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Reservations to Treaties: An Objection to a Reservation is Definitely not an Acceptance

Alain Pellet and Daniel Müller

Professor Gaja, a leading member of the International Law Commission (ILC) since 1999, has taken a prominent part in the elaboration of the Guide to Practice on reservations to treaties,[1] a topic on which he has written extensively.[2] His views, expressed both in the plenary sessions of the Commission and in the Drafting Committee, have greatly influenced the drafting of the guidelines which compose the Guide, which should be finalized in 2011.

'[T]he question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties.'[3] But, amongst the very many difficult questions it raises, probably the most vexing issue is that of the respective effects of an acceptance of a reservation, on the one hand, and of an objection to a reservation on the other.

The 1969 and 1986 Vienna Conventions on the Law of Treaties[4] are so ambiguous and, in some respects, so sibylline, that it is sometimes alleged that

[1] As the Special Rapporteur on reservations to treaties stated in 1995, the ILC 'should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of states and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses' (*YILC* (1995), vol. II(1), at 108, para. 487 (*b*)).

[2] 'Reservations to Treaties and the Newly Independent States', 1 *Ital. Yb. of Int'l L* (1975) 52–68; 'Unruly Treaty Reservations', in *Le droit international à l'heure de sa codification: Études en honneur de Roberto Ago* (Milano: Giuffrè, 1987) 307–30; 'Le riserve tardive ai trattati: un fenomeno a molti inviso (ma non sempre visto bene)', 86 *Riv. di Diritto Internaz.* (2003) 463–6; 'Il regime della Convenzione di Vienna concernente le riserve inammissibili', in *Studi in onore di Vincenzo Starace* (Napoli: Editoriale Scientifica, 2008) 349–61.

[3] P. Reuter, 'Tenth Report on the Question of Treaties Concluded between States and International Organizations or Between Two or More International Organizations', *YILC* (1981), vol. II(1), at 56, para. 53.

[4] Except where otherwise specified, in the remainder of this paper the expression 'Vienna Convention' will encompass both the Vienna Convention of 23 May 1969 on the Law of

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an acceptance of a reservation and an objection to it have the same effect[5]—at least when the objecting state does not 'definitely express' the intention that its objection preclude the entry into force of the treaty between itself and the reserving state.[6] Indeed, apart from this situation (commonly known as 'objection with maximum effect'), envisaged in Article 20(4)(b), the Vienna Convention is extremely discreet with respect to the 'normal'[7] consequence of an objection, which is only addressed in Article 21(3). According to this rather obscure[8] provision: 'When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.'

However, absent a definition in the Vienna Convention of the words 'acceptance' and 'objection', according to Article 31(1) they must be interpreted in accordance with their ordinary meaning; and this clearly implies that they have opposite meanings and invite the conclusion that they generate different effects. The drafting of Articles 20 ('Acceptance and objection to reservations') and 21 ('Legal effects of reservations and of objections to reservations') calls for distinguishing the effects an acceptance or an objection may have on the entry into force of the treaty, on the one hand (1)—and on the relations between the parties if and when the treaty enters into force between them, regardless of whether the reservation is permissible—on the other hand (2). The first aspect is not exempt from difficulties, but the second one is immensely complex.

1. Acceptance, Objection, and the Entry into Force of the Treaty

Under the traditional unanimity régime, the impact of acceptances and objections on the entry into force of the treaty was clear-cut: failing unanimous acceptance of the reservation by the other parties, the treaty could not enter into force for the reserving state; in other words, any objection prevented a unanimous acceptance and therefore precluded the latter from becoming a party.[9] It was

Treaties and the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between Organisations, and we will use the word 'state(s)' as including international organisations.

[5] J. Klabbers, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties', 69 *Nordic JIL* (2000) 179–93, at 179.

[6] Article 20(4)(*b*) of the Vienna Convention.

[7] Or 'minimum' effect—in contrast to the exceptional situation of an objection with maximum effect.

[8] The US representative at the 1968–69 Vienna Conference noted that one can be 'rather puzzled' about the meaning of that provision (United Nations Conference on the Law of Treaties, *Official Records*, vol. II, at 181, para. 9).

[9] This is also the reason why the first Special Rapporteur of the ILC on the subject of the law of treaties did not consider specifically the issue of 'objections'. See D. Müller, 'Article 21 (1969)', in O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le droit des traités, Commentaire*

therefore crystal clear that an objection constituted the very opposite of an acceptance. Moreover, the acceptance of the reservation was deemed to result from the absence of an objection.[10] It is thus apparent that the opposition and complementarity between acceptance and objection is not a new element introduced by the 'flexible' approach launched at the universal level by the ICJ in 1951,[11] before being advocated by Sir Humphrey Waldock, endorsed by the ILC after much procrastination, and finally enshrined in the 1969 Vienna Convention.[12]

In the framework of the elaboration of the Guide to practice on reservations to treaties, the ILC Special Rapporteur took up the same idea. In view of the fact that 'it follows from article 20, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties that in most cases, acceptance of a reservation results from the absence of an objection',[13] he proposed to define the term 'acceptance' as follows in draft Guideline 2.8: 'The acceptance of a reservation arises from the absence of objections to the reservation formulated by a State or international organization on the part of [a][14] contracting State or contracting international organization.'[15]

The opposition between acceptances and objections is particularly clear with respect to the entry into force of the treaty vis-à-vis the reserving state (Section 1.1). However, it is also relevant for the entry into force of the treaty with regard to all its contracting parties (Section 1.2).

1.1. Acceptance of the reservation and constitution of the reserving state as a party

One cannot consider Article 21 of the Vienna Conventions without taking into account that an acceptance of a reservation—whether it be given in advance,[16] unanimously,[17] or by the competent organ of an international organization[18]—makes the author of this reservation a contracting state.

article par article (Bruxelles: Bruylant, 2006) at 887, paras 5–6 (to be published in English, Oxford University Press, 2011).

[10] On this point, see D. Müller, ibid., at 814–15, paras 31–32.

[11] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *ICJ Reports* (1951) 15.

[12] For a summary of this sinuous history, see A. Pellet, 'Article 19 (1969)', in O. Corten and P. Klein (eds), *supra* note 9, at 652–73, paras 16–67.

[13] A. Pellet, 'Eighth Report on Reservations to Treaties' (2003), A/CN.4/535/Add.1, para. 69.

[14] The English translation of the Special Rapporteur's Report (originally in French) erroneously translated the word '*un*' as 'the'.

[15] A. Pellet, 'Twelfth Report on Reservations to Treaties' (2007), A/CN.4/584, para. 195. The ILC has included the idea in a broader definition which includes express and tacit reservations in a single guideline (provisionally numbered 2.8.0—see *GAOR, Sixty-fourth Session, Supplement No. 10* (A/64/10) at 212).

[16] In the treaty itself—Vienna Convention, Article 20(1).

[17] In case it appears that 'the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty'—Article 20(2).

[18] Article 20(3).

Guideline 4.2.1 states the obvious: 'As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3 [relating to the "establishment" of a reservation], its author becomes a contracting State or contracting organization to the treaty.'[19]

On the contrary, an objection does not have this effect, or at least, the objection cannot produce it alone. Traditionally, in keeping with the unanimity principle, the immediate and radical effect of an objection was that the reserving state could not claim to be a state party to the treaty;[20] this is what is nowadays commonly called the 'maximum' effect of an objection.[21] That outcome was unavoidable under the system of unanimity, in which even a single objection neutralized the otherwise unanimous consent of the other contracting states, which could therefore produce no effect; no derogation was possible. Sir Humphrey Waldock's reference to the 'revolution' introduced by the 'flexible' system did not lead him to propose a complete rejection of the unanimity principle whereby 'the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States'—this was a reflection of the traditional rule—'but shall not preclude its entry into force as between the reserving State and any other State which does not object to the reservation'[22]—and this was the introduction of an element of flexibility.

However, in 1951, the ICJ considered that '… each State objecting to [a reservation] will or will not … consider the reserving State to be a party to the Convention'.[23] In order to align the draft with the solution proposed in the Advisory Opinion, and in response to the criticisms and misgivings expressed by many members of the ILC,[24] the radical (but traditional) solution proposed by Sir Humphrey in respect of the relations between the reserving and the objecting states was abandoned in favour of a simple presumption of 'maximum effect', leaving 'minimum effect' available as an option. Thus, draft Article 20(2)(b), as adopted by the ILC on first reading, provided:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the

[19] *GAOR*, *Sixty-fifth Session, Supplement No. 10* (A/65/10) at 63.

[20] P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris: Pedone, 1979) at 155 and 260. See also D. Müller, *supra* note 10, at 911, para. 48.

[21] A. Pellet, 'Eighth Report on Reservations to Treaties' (2003), A/CN.4/535/Add.1, para. 95.

[22] Draft Article 19, para. 4(*c*), presented by Sir Humphrey in 1962 in his first Report on the law of treaties (A/CN.4/144, *YILC* (1962), vol. II, at 62). This solution is, moreover, frequently offered as the only one that makes sense. See, for example, P. Reuter, *Introduction au droit des traités* (Paris: PUF, 2nd edn, 1985) at 75, para. 132.

[23] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *ICJ Reports* (1951) at 26.

[24] See, for example, Tunkin (*YILC* (1962), vol. I, at 156, para. 26 and 654th meeting, 30 May 1962, at 161, para. 11), Rosenne (ibid., at 156–7, para. 30), Jiménez de Aréchaga (ibid., at 158, para. 48), de Luna (ibid., at 160, para. 66), Yasseen (ibid., at 161, para. 6). The Special Rapporteur was also in favour of introducing the presumption (ibid., at 162, paras 17 and 20).

objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.[25]

This formulation of the presumption had the advantage of underlining what was then the main function of an objection: even if its author could no longer prevent the reserving state from becoming a contracting state to the treaty, it would nevertheless exclude any treaty relationship between itself and the reserving state.[26] However:

1. the permissibility of the objection was limited to cases when the objecting state considered that the reservation was incompatible with the object and purpose of the treaty;
2. the presumption was not conclusive, since it entered into play only in the absence of a contrary view expressed by the objecting state; and
3. the provision as drafted left open the question of whether a 'minimum effect' objection produces the same effect as an acceptance, making the reserving state a contracting party. However, subparagraph (c) of paragraph 4 of the ILC draft Article suggested otherwise, and the Commentary of the ILC confirmed that only the expression of at least one acceptance 'determines the moment at which a reserving State may be considered as a State which has ratified, accepted or otherwise become bound by the treaty'.[27]

The controversial reversal of the presumption in favour of 'minimum' instead of 'maximum' effect objections seemed motivated by the desire 'to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States',[28] just as if a 'minimum effect' objection would *ipso facto* create treaty relations between the reserving and the objecting state. The Explanatory Memorandum on the Question of Reservations to Multilateral Treaties submitted by the USSR to the second session of the Vienna Conference very openly criticized the ILC proposal which, according to the Memorandum, was 'based on the erroneous idea that a reservation made to an international treaty by one of the parties to that treaty requires "acceptance" by the other parties to the treaty'.[29] However, the amendment as it was finally adopted does not even come close to the idea that a 'minimum effect' objection is tantamount to an acceptance. Quite to the contrary, Article 20(4) (b),

[25] *YILC* (1962), vol. II, at 175 and at 181, para. 23.

[26] The Commentary of draft Article 17 prepared by the ILC explained in this regard: 'Although an objection to a reservation normally indicates a refusal to enter into treaty relations on the basis of the reservation, objections are sometimes made to reservations for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States' (*YILC* (1966), vol. II, at 207, para. 17).

[27] *YILC* (1966), vol. II, at 207, para. 17.

[28] See the summary of the Czechoslovak and Romanian observations in Sir Humphrey Waldock's Fourth Report on the Law of Treaties, *YILC* (1965), vol. II, at 48.

[29] United Nations Conference on the Law of Treaties, *Official Records*, vol. III, at 265.

as finally amended in conformity with the Soviet proposal, makes it clear that, rather than creating a treaty relationship between the objecting state and the reserving state, 'an objection by another contracting State to a reservation *does not preclude* the entry into force of the treaty as between the objecting and reserving States . . .'.

1.2. Objection to the reservation and entry into force of the treaty

In the now 'normal' case, an objection (with 'minimum effect') still has no immediate effect on the entry into force of the treaty in relations between the two states, and, *a fortiori*, it cannot make the author of the reservation a contracting state, as is the case for an acceptance of the reservation.[30] This is probably one of the most fundamental differences between acceptances and objections. As Article 20(4)(c) of the Convention unmistakably makes clear, the (permissible)[31] reservation needs to be accepted by at least one other contracting state in order for the author of the reservation to be part of the circle of contracting states. Failing such a critical acceptance—in whatever way it might have been expressed—an objection with a 'minimum effect' produces no specific consequence and certainly does not establish a treaty relationship between the reserving state and the objecting state. Concretely, a treaty which is subject to the general régime of consent as established in Article 20(4) of the Vienna Convention enters into force for the reserving state only if the reservation has been accepted by at least one other contracting party. It is only if the reservation is thus established that treaty relations may exist between the reserving state and the author of a simple objection.[32] As long as there has been no acceptance of the reservation there can be no treaty relationship whatsoever for its author; its consent to be bound by the treaty will not produce any effect.

It is nevertheless true, as Professor Gaja explained as early as 1987,[33] that the practice followed in particular by the United Nations Secretary-General in his capacity of depositary of international treaties does not seem to be consistent with the rule contained in Article 20(4)(c). As explained in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Secretary-General

[30] See *supra* pp. 39–40.

[31] As for the effects of acceptances and objections in the case of impermissible reservations, see *infra* pp. 54–9.

[32] This treaty relationship is nevertheless subject to the provision of Article 21(3) of the Vienna Convention: 'the provisions to which the reservation relates do not apply between the reserving State and the objecting State to the extent of the reservation'. See also *infra* pp. 46–54.

[33] 'Unruly Treaty Reservations', *supra* note 2, at 323–4. See also P.-H. Imbert, 'À l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités, réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire', 26 *AFDI* (1980) 524–41; R. Riquelme Cortado, *Las reservas a los tratados, Lagunas y ambigüedades del Régimen de Viena* (Murcia: Universidad de Murcia, 2004) at 245–50; or D. Müller, *supra* note 10, at 821–2, para. 48.

agrees that any instrument expressing consent to be bound by a treaty which is accompanied by a reservation may be deposited; however, he refuses to adopt a position on the issue of the permissibility or the effects of the reservation, and therefore he 'indicates the date on which, in accordance with the treaty provisions, the instrument would normally produce its effect, leaving it to each party to draw the legal consequences of the reservations that it deems fit'.[34] The Secretary-General does not wait for the expression of at least one acceptance (as is provided for under Article 20(4)(c)), but treats an instrument of ratification or accession containing a reservation in the same way as any other notification of ratification or accession:

> Since he is not to pass judgement, the Secretary-General is not therefore in a position to ascertain the effects, if any, of the instrument containing reservations thereto, *inter alia*, whether the treaty enters into force as between the reserving State and any other State, *a fortiori* between a reserving State and an objecting State if there have been objections. As a consequence, if the final clauses of the treaty in question stipulate that the treaty shall enter into force after the deposit of a certain number of instruments of ratification, approval, acceptance or accession, the Secretary-General as depositary will, subject to the considerations in the following paragraph, include in the number of instruments required for entry into force all those that have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections.[35]

Just to give a recent example, Pakistan has thus acceded to the International Convention for the Suppression of the Financing of Terrorism through a notification dated 17 June 2009. This instrument was accompanied by reservations to Articles 11, 14, and 24 of the Convention. Despite these reservations, the Secretary-General noted in his depositary notification of 19 June 2009 that:

> The Convention will enter into force for Pakistan on 17 July 2009 in accordance with its article 26 (2) which reads as follows: 'For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.'[36]

Pakistan's instrument is therefore considered by the depositary as taking immediate effect, notwithstanding the twelve-month delay envisaged in Article 20(5) of the Vienna Convention. For the depositary, Pakistan is one of the contracting states, and is indeed a party to the International Convention for the Suppression

[34] United Nations, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (New York: United Nations, 1999) (ST/LEG/7/Rev.1) para. 187.

[35] Ibid., para. 184.

[36] *Status of Multilateral Treaties Deposited with the Secretary-General*, Chapter XVIII, 11 (available at <http://treaties.un.org>). This practice is constant. See, eg, the examples given in R. Riquelme Cortado, *supra* note 33, at 546–7.

of the Financing of Terrorism, independently of whether its reservations have been accepted by at least one other contracting party.

This position has been justified by the Secretary-General by the fact that:

> . . . [f]inally, for a State's instrument not to be counted, it might conceivably be required that all other contracting States, without exception, would have not only objected to the participation of the reserving State, but that those objecting States would all have definitely expressed their intention that their objection would preclude the entry into force of the treaty as between them and the objecting State.[37]

The Secretary-General thus contests neither the validity nor the correctness of the rule expressed in Article 20(4)(c); he simply ignores the delay for reversing the presumption of acceptance expressed in Article 20(5). Indeed, he does not express the view, as the USSR did,[38] that no acceptance is necessary but that, in any event, it is hardly conceivable that there would not always be at least one state which makes no objection and which therefore will be considered to have accepted the reservation (under Article 20(5)). Waiting for the necessary period for the presumption to trigger its effects would, in the opinion of the Secretary-General, unduly 'delay the announcement of the entry into force of the treaty as well as its registration under Article 102 of the Charter of the United Nations'.[39]

The mere existence of this practice[40] gave rise to a harsh discussion during the re-consideration of the question by the ILC in 2010. Some members of the Commission considered that the rule enunciated in Article 20(4)(c) has no value any more, and that it has been modified by this 'subsequent' practice. However, when considering and evaluating this practice, it should be kept in mind that the depositary of an international treaty does not, as such, have the authority to determine the date of entry into force of the treaty. In relation to the Secretary-General's practice, at the relevant time, with regard to the Genocide Convention (which concerned the very same issue), the ICJ pointed out that 'the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom'. Moreover, the ILC did not overlook the issue during the elaboration of the Draft Articles on the Law of Treaties. In its Commentary of draft Article 72(1)(f), it noted:

> Paragraph 1(f) notes the duty of the depositary to inform the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, etc. required for the entry into force of the treaty have been received or deposited. The question whether the required number has been reached may sometimes pose a problem, as when questionable reservations have been made. In this connexion, as in others, although

[37] *Summary of Practice of the Secretary-General*, *supra* note 34, para. 186.
[38] See *supra* pp. 41–2.
[39] *Summary of Practice of the Secretary-General*, *supra* note 34, para. 186.
[40] Also followed by other depositaries (see 'Depositary Practice in Relation to Reservations', Report of the Secretary-General, A/5687, *YILC* (1965), vol. II, at 74).

the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other States concerned. However normal it may be for States to accept the depositary's appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged by another State and that then it would be the duty of the depositary to consult all the other interested States as provided in paragraph 2 of the present article.[41]

In 2010, the ILC finally took into account the existence of the discrepancy between the rule provided for in the Vienna Convention and the dominant depositary practice. While reconfirming the rule enunciated in Article 20(4)(c) of the Convention,[42] the Commission also stated that: '[t]he author of the reservation may however be included at an earlier date [ie before the reservation has been accepted and established] in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed in a particular case'.[43]

Even if the drafting seems to suggest otherwise, this guideline cannot dispense with the reservation to be accepted, which reduces the difference between acceptances and objections practically to the vanishing point.[44] It only allows the states parties to presume that the reservation has been accepted at an earlier date (eg the date of the act of ratification or accession of the treaty) as the date at which the reservation would normally have been established under the Vienna Convention (the date of an express acceptance, or twelve months after the formulation of the reservation).

In its celebrated Advisory Opinion of 1951, the ICJ very logically considered that:

- 'it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation';[45]

[41] *YILC* (1966), vol. II, at 270, para. 6 of the Commentary.

[42] Paragraph 1 of Guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty) reads: '1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established' (*GAOR, Sixty-fifth Session, Supplement No. 10* (A/65/10) at 63).

[43] Guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty), para. 2, ibid.

[44] This is all the more so since the Secretary-General (wrongly) seems to equate an objection with minimum effect with an acceptance ('Finally, for a State's instrument not to be counted, it might conceivably be required that all other contracting States, without exception, would have not only objected to the participation of the reserving State, *but that those objecting States would all have definitely expressed their intention that their objection would preclude the entry into force of the treaty as between them and the objecting State*'—see *supra* p. 44).

[45] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *ICJ Reports* (1951) at 24.

- 'As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention';[46] but
- only in that case, the ICJ had linked the automatic preclusion of the entry into force of the treaty between the two states; it admitted that 'it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation'.[47]

By delinking the 'maximum effect' of an objection from the criterion of the compatibility with the object and purpose of the treaty, the Vienna Convention has put this impeccable reasoning in jeopardy: the presumption laid down in Article 20(4)(b) results in the (widely used) possibility that a state may in fact agree to be bound with another state by a treaty that it considered to be devoid of object and purpose by means of the reservation. Absurd as it might be, this situation threatens but does not eliminate the distinction between an acceptance and an objection in the relations between the states in question.

2. Acceptance, Objection, and the Relations between the Reserving and the Objecting States

Acceptances and objections do not only have different legal effects regarding the entry into force of the treaty. If and when the treaty has entered into force, they also have different legal effects with regard to the content of the treaty relations between the reserving and the objecting states. However, the Vienna Convention provides only an *obscure clarté* as to the effect of an acceptance of or an objection to a permissible reservation (Section 2.1); it is mute as to the effects (if any) of an acceptance of, or an objection to, an impermissible reservation (Section 2.2).

2.1. Acceptance of, and objection to, a permissible reservation

Article 21(1) makes clear that the acceptance of a permissible reservation has a fundamental role to play in the relations between the reserving and the objecting states since it 'establishes' the reservation, to use the word in the *chapeau* of Article

[46] Ibid., at 26. [47] Ibid.

21(1) of the Vienna Convention[48] whereas, by contrast, an objection prevents a reservation from producing effects. However, Article 20 and—in spite of its title ('Legal effects of reservations and of objections to reservations')—Article 21 leave many questions unanswered with regard to the consequences of an objection to a permissible reservation. Indeed, this is one of the core issues.

However, deficient as they may be, these provisions confirm the dialectical relation existing between the two possible reactions to reservations: an acceptance is the opposite of an objection, and vice versa. Article 20(5), according to which a state is presumed to have accepted a reservation if it has not objected to it, clearly illustrates this basic idea. As the representative of the French Republic put it during the Vienna Conference: '[A]cceptance and objection [are] the obverse and reverse sides of the same idea. A State which [accepts] a reservation thereby [surrenders] the right to object to it; a State which [raises] an objection thereby [expresses] its refusal to accept a reservation.'[49]

In contrast to an acceptance, which conditions the establishment of a reservation and cannot but modify the treaty as and to the extent provided for by the reservation, an objection to a reservation can have various consequences on the treaty relationship between the reserving state and the objecting state. The choice of these different legal effects, which are, at least partially, envisaged by the Vienna Convention, is left to a certain extent to the objecting state alone.[50]

As provided for in Article 20(4)(b) of the Vienna Convention, an objecting state can choose, at its own discretion and without any condition, whether to establish a treaty relationship between itself and the reserving state. This choice is not open to the accepting state: its acceptance *ipso facto* makes the author of the reservation a contracting state.

In addition, as Professor Gaja has noted,[51] objecting states have a certain degree of freedom[52] to determine the extent of the treaty relations they want to have with

[48] According to the definition given in Guideline 4.1 of the Guide to Practice (Establishment of a reservation with regard to another state or organization): 'A reservation formulated by a State or an international organization is established with regard to a contracting State or contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.'

[49] United Nations Conference on the Law of Treaties, *Official Records*, vol. I, at 116, para. 14.

[50] At least when the reservation is permissible; the situation is appreciably different with regard to an objection made to an impermissible reservation. See *infra* Section 2.2.

[51] 'Unruly Treaty Reservations', *supra* note 2, at 325–6.

[52] There are limits to that freedom. In particular, it is not open to the objecting state to impose on the reserving state an obligation to respect the treaty without the benefit of its reservation. These objections purport to produce what has been called a 'super-maximum effect' (see B. Simma, 'Reservations to Human Rights Treaties—Some Recent Developments', in *Liber amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (The Hague: Kluwer, 1998, at 667–8; or A. Pellet, 'Eighth Report on Reservations to Treaties' (2003), A/CN.4/535/Add.1, para. 96). It is quite clear that such an effect of an objection (including objections with intermediate effect) is not only not envisaged by the Vienna Conventions, but is also clearly incompatible with the principle of mutual consent. Accordingly, a super-maximum effect is excluded in the case of a valid reservation: the author of an objection cannot force the author of the reservation to be bound by more than what it is prepared to consent to. Guideline 4.3.7 of the Guide to Practice

the reserving state in that they can choose a (narrow) road between the maximum and the minimum effects of their objection. Such objections, intended to have an 'intermediary effect', were made in relation to the 1969 Vienna Convention itself, and they consisted in accepting the entry into force of the Convention with the exclusion not only of the provisions to which the reservation related[53] but also to other provisions linked to those excluded by the reservation.[54] This 'new generation'[55] of objections purports to produce effects exceeding those provided for under Article 21(3) without, however, reaching the clear-cut effect of a 'maximum effect' reservation, ie the non-entry into force of the treaty between the two states.

The ILC has decided to take note of this—limited—practice of objections with 'intermediary effect' in its Guide to practice.[56] Nevertheless, they are not entirely unproblematic. First, the question arises whether the objecting state can modulate the legal relationship to be established with the reserving state at its full discretion. The limited practice described above seems to suggest that only treaty provisions which have a specific link with the provisions affected by the reservation can be excluded. The United Kingdom, in its objection of 5 June 1987 in respect of the Soviet reservation to Article 66 of the Vienna Convention, stated 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

(Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation) adopted in 2010 unmistakably recognizes that: '[t]he author of a reservation which is permissible and which has been formulated in accordance with the required form and procedures cannot be compelled to comply with the provisions of the treaty without the benefit of its reservation'. (*GAOR, Sixty-fifth Session, Supplement No.10* (A/65/10) at 66).

[53] Usually Article 66 of the Vienna Convention (see the reservations formulated by Algeria (*Multilateral treaties deposited with the Secretary-General*, available at <http://treaties.un.org/>, Chapter 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.).

[54] The other articles of the Vienna Convention relating to *jus cogens* (Articles 53 and 64)—see the objections of Canada, Egypt, Japan, the Netherlands, New Zealand, Sweden, the United Kingdom, and the United States (ibid).

[55] '*Nueva generación*' (our translation), Riquelme Cortado, *supra* note 33, at 293. R. Baratta expressed the idea that 'the practice has generated new legal models of objections, dictated probably by the necessity of responding to needs which had not emerged and had not been considered at the time of the "codification"' (our translation—'*la prassi abbia generato nuovi modelli giuridici di obiezioni, dettati verosimilmente della necessità di rispondere a bisogni non emersi e comunque non considerati al momento della "codificazione"*') (*Gli effetti delle riserve ai trattati* (Milano: Giuffré, 1999) at 387).

[56] See Commentary to Guideline 2.6.1 (Definition of objections to reservations), in *GAOR, Sixtieth Session, Supplement No. 10* (A/60/10) at 199, para. 23). See also 'Eighth Report on Reservations to Treaties' (2003), A/CN.4/535/Add.1, para 95.

inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference.[57]

But even in the case where objections intended to have an 'intermediary effect' remain in these strict limits and aim at excluding only provisions which have a particular link with the provision to which the reservation relates, it can be questioned whether this effect can result only from the objection or whether the reserving state needs to consent. It has been suggested that 'these extended objections are, in fact, reservations (limited *ratione personae*)';[58] this finds some support in the fact that certain states have chosen to formulate reservations so as to achieve the same result.[59] Professor Gaja also wrote:

> 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.[60]

After some discussion, the ILC finally considered that at least some kind of acquiescence is necessary in order for an 'intermediary effect' objection to produce its full effects.[61]

However, even with these limitations, these objections 'of the third type' confirm that it is possible for an objecting state to modulate the treaty relationship which it is ready to undertake in its relations with the reserving state, a choice which is not open to a state accepting a reservation. And clearly these objections are not tantamount to acceptance. This is also true concerning the objection with 'minimum effect', as envisaged in Article 21(3) of the Vienna Convention.

It is true that, when the 1968–69 Vienna Conference adopted the USSR amendment to Article 20(4)(b), reversing the presumption of the legal effect

[57] *Multilateral Treaties Deposited with the Secretary-General*, available at <http://treaties.un.org/>, Chapter XXIII, 1.

[58] See, *inter alia,* J. Sztucki, 'Some Questions Arising from Reservations to the Vienna Convention on the Law of Treaties'. 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., at 291).

[59] See, in particular, the late reservation formulated by Belgium, *Multilateral Treaties Deposited with the Secretary-General*, available at <http://treaties.un.org>, Chapter XXIII, 1.

[60] 'Unruly Treaty Reservations', *supra* note 2, at 326. See also R. Baratta, *supra* note 55, at 385. *Contra* D. Müller, *supra* note 9, at 923–5, paras 64–66.

[61] Guideline 4.3.6 (Effect of an objection on provisions other than those to which the reservation relates) adopted by the ILC, in 2010, seems to transform an 'intermediary effect' objection into a 'counter-reservation' which, again, is submitted to the consent of the reserving state. Paragraph 2 reads: 'The reserving State or organization may, within a period of twelve months following the notification of such an objection, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection' (*GAOR, Sixty-fifth Session, Supplement No.10* (A/65/10) at 65–6).

of an objection on the entry into force of the treaty,[62] the Drafting Committee changed not only the introductory words of Article 21(3) but also the final part. Article 21(3), as proposed by the Drafting Committee and provisionally adopted by the Conference,[63] read: 'When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, *the reservation has the effects provided for in paragraphs 1 and 2*.'[64]

This provision left no doubt about the legal effect of an objection with regard to those produced by an accepted reservation: they were identical. Indeed, the issue had already given rise to some debate within the ILC: Yasseen, who also chaired the Drafting Committee during the Conference, had drawn the attention of his colleagues to the fact that, '[i]n the text before the Commission . . . objection to a reservation and acceptance thereof seemed to produce the same effect, and objection was therefore made tantamount to acceptance'.[65] The view expressed by Castrén,[66] who considered that the case of a reservation in respect of which a simple objection had been raised was already covered by draft Article 21(1)(b), was not shared by the other members of the ILC. Most members[67] considered it necessary, if not 'indispensable',[68] to have a distinct provision 'in order to forestall ambiguous situations'.[69]

A joint amendment introduced by India, Japan, the Netherlands, and the USSR only a few days before the end of the Conference,[70] in order to replace the end of the provision by the text initially proposed in the ILC draft, brought things back to order. As the Dutch representative rightly explained:

> What has been overlooked, however, was another category of reservations, where the reserving State declared that an article of a treaty was acceptable provided it was interpreted in a particular way; in such a case, a State which objected to that interpretation could not hold the opinion that the legal effects of its objection should be the same as they would be if it accepted the special interpretation.[71]

The amendment was finally adopted by the Conference.[72] Yasseen, chairman of the Drafting Committee, indicated that '[i]t was necessary to distinguish between cases where a State objected to a reservation but agreed that the treaty should

[62] See *supra* pp. 41–2.

[63] United Nations Conference on the Law of Treaties, *supra* note 8, at 36, para. 10 (94 votes to none).

[64] Ibid., at 36 (emphasis added).

[65] *YILC* (1965), vol. I, at 271, para. 5. See also ibid., at 174, para. 40 (Tsuruoka).

[66] Ibid., at 172, para. 15.

[67] Ruda (ibid., para. 13); Ago (ibid., at 271–2, paras 7 and 11); Tunkin (ibid., at 271, para 8), and Briggs (ibid., at 272, para. 14).

[68] See the statement made by Ago (ibid., at 271, para. 7).

[69] Ibid.

[70] A/CONF.39/L.49, United Nations Conference on the Law of Treaties, *supra* note 29 at 273.

[71] United Nations Conference on the Law of Treaties, *supra* note 8, at 179–80, para. 55. The Dutch representative had in mind the case of an objection by which its author did not purport to exclude the application of a treaty provision, but only to modify its application. See also the intervention made by the Soviet representative (ibid., at 180, para. 60).

[72] Ibid., at 181, para. 12.

nevertheless come into force, and cases in which the reservation was accepted'.[73] As Horn puts it, '[t]he view that the institution of objections is in the end void of any special effect is discomforting as it was intended by the framers of the Vienna Convention to be the means by which the parties to a treaty safeguarded themselves against unwelcome reservations'.[74]

This late restoration of the text grants to objections their real object in endowing them with legal effects different from those of an established (ie accepted) reservation. This is particularly clear when considering the case of a reservation whereby its author purports to modify the legal effect of one or several provisions of the treaty, as pointed out by the Dutch representative at the Conference: whereas, once established, such a reservation fully effective and modifies the legal effect of the provision(s) concerned in the bilateral relationship between the reserving state and the accepting state, is Article 21(3) excludes the application of these provisions 'to the extent of the reservation' in the case an objection has been made. The legal effect of an established reservation—which, by definition, has been accepted[75]—and those of an objection to a reservation are thus diametrically opposed. This solution has been confirmed by the decision of the Arbitral Tribunal in the *Anglo-French Continental Shelf* case, which makes clear that an objection does not necessarily exclude the application of the entire provision concerned between the objecting and reserving states, as had been argued by France.[76] Consequently, the objection excludes or modifies the application of the relevant provision only to the extent of the reservation.

In the case of France and the United Kingdom, that meant accepting that Article 6 of the Geneva Convention on the Continental Shelf remained applicable as between the parties, apart from the matters covered by the French reservation. This is what must be understood by the expression 'to the extent of the reservation'. The effect sought by Article 21(3) is to preserve the agreement between the parties to the extent possible by reducing the application of the treaty to the provisions on which there is agreement and excluding the others, or, as J.K. Koh explains: 'Here the Vienna Convention seems to be overtly seeking to preserve as much of the treaty as possible even when parties disagree about a reservation. … The Vienna Convention tries to salvage as much as is uncontroversial about the relations between reserving and opposing states.'[77]

But this cannot mean that, under the Vienna régime of reservations, acceptances and objections are identical and that the Vienna Convention 'threatens to

[73] Ibid., para. 2.

[74] F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: T.M.C. Asser Institute, 1988) at 173–4.

[75] See *supra* note 48.

[76] *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 18 *RIAA* (1977), 42, para. 61.

[77] J.K. Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision', 23 *Harv. Int'l LJ* (1982) at 102.

obliterate the difference between an accepted and an opposed reservation, and renders objection to the reservation a fruitless endeavor'.[78]

However, it is true that there is one circumstance in which the concrete effect of Articles 21(1) and 21(3) happens to be identical. This is the case when a reservation does not purport to modify the legal effect of a provision of the treaty, but purely and simply to exclude the provision under the treaty régime. In such a case, and only in such a case, an objection produces the same effects as an acceptance: the exclusion of the legal effect, or of the application, of the provision to which the reservation relates 'to the extent of the reservation'. An acceptance and a simple objection therefore result in the same treaty relations between the author of the reservation and the author of the acceptance or of the objection with minimum effect. On this point authors agree, including Professor Gaja, who wrote: 'Whenever a reservation, as is normally the case, intends to restrict, either totally or in part, the content of an obligation under a treaty, it is difficult to see any difference between the effects of a reservation to which an objection has been made and those of a reservation which has been accepted.'[79]

Guidelines 4.3.5 (Effects of an objection on treaty relations), paragraph 2, and 4.2.4 (Effect of an established reservation on treaty relations), paragraph 2, of the Guide to Practice[80] reflect this hypothesis where an objection and an acceptance produce concretely the same outcome in the relations between the two states concerned. Paragraph 2 of Guideline 4.3.5 provides that:

> . . . [t]o the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

Paragraph 2 of Guideline 4.2.4 specifies:

> To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

[78] Ibid.

[79] 'Unruly Treaty Reservations', *supra* note 2, at 327. See also B. Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination against Women', 85 *AJIL* (1991) at 308; M. Coccia, 'Reservations to Multilateral Treaties on Human Rights', 15 *California Western International Law Journal* (1985) at 36; P.-H. Imbert, *supra* note 20, at 157; J.-M. Ruda, 'Reservations to Treaties', 146 *Recueil des Cours* (1975-III) at 199; Sir I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 2nd edn, 1984) at 76; F. Horn, *supra* note 74, at 173; J. Klabbers, *supra* note 5, at 186–7. See also the explanations of the representative of the Netherlands in respect of the four-state amendment, United Nations Conference on the Law of Treaties, *supra* note 8, at 179, para. 55.

[80] *GAOR, Sixty-fifth Session, Supplement No.10* (A/65/10) at 64–5.

Concretely, even if the intention is different, the content of the legal relationship between the reserving state and an accepting state is the same as the relation between an objecting state and the reserving state.

However, the similarity in the effects of an acceptance and a minimum-effect objection does not mean that the two reactions are identical and that the author of the reservation 'would get what it desired'.[81] The reserving state cannot 'get it' if its reservation only calls for objections with minimum effect; it also needs at least one acceptance. Moreover, while an acceptance is tantamount to an agreement, or at least implies the absence of opposition to a reservation, an objection cannot be considered mere 'wishful thinking';[82] it expresses disagreement and purports to protect the rights of its author as much as a unilateral declaration (ie unilateral protest) does.[83]

Furthermore, this similarity is only observed in the very specific case of excluding reservations, and not when the reserving state purports to modify the legal effects of a treaty provision. In that case, the difference between an objection and an acceptance is very clear. Whereas the establishment of such a reservation modifies the legal obligations between the author of the reservation and the contracting parties with regard to which the reservation is established, Article 21(3) excludes the application of all the provisions that potentially would be modified by the reservation, to the extent of the reservation. If a state makes a reservation purporting to replace one treaty obligation with another, Article 21(3) requires that the obligation potentially replaced by the reservation be excised from the treaty relations between the author of the reservation and the author of the objection with minimum effect. Neither the initial obligation nor the modified obligation proposed by the reservation apply: the former because the author of the reservation has not agreed to it and the latter because the author of the objection has not agreed to it.

The difference between the legal relationships established by a modifying reservation is made apparent by a comparison between Guidelines 4.2.4 (Effect of an established reservation on treaty relations), paragraph 3,[84] and 4.3.5 (Effects of an objection on treaty relations), paragraph 3 of the Guide to Practice.[85] The

[81] J. Klabbers, *supra* note 5, at 179.

[82] '*Un vœu pieux*' (our translation)—P.-H. Imbert, *supra* note 20, at 157 quoting J. Dehaussy, *Jurisclasseur de Droit international*, fasc. 11, mise à jour 8, 1975, n° 97ter.

[83] K. Zemanek, 'Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties', in J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague-Boston: Martinus Nijhoff, 1984) at 332.

[84] 'To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation' (*GAOR, Sixty-fifth Session, Supplement No. 10* (A/65/10) at 64).

[85] 'To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their

content between the two relationships is clearly different: on the one hand, the accepted reservation modifies the treaty relationship as provided for under the reservation; on the other hand, the treaty relationship is amputated by the provisions which the reservation purports to modify. In this case, not only is the specificity of an objection with regard to the acceptance appreciable, but, more importantly, the reserving state does not get what it desires: clearly, it gets less.

2.2. Acceptance of, and objection to, an impermissible reservation

The Vienna Convention does not address the issue of the legal effects of impermissible reservations,[86] and this is one of its most serious lacunae which had to be filled by the ILC in the framework of the preparation of the Guide to Practice. To this effect, the Special Rapporteur proposed in its tenth Report to include the following guideline:

> 3.3.2 Nullity of invalid reservations
> A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 [which is reproducing Article 19 of the Vienna Conventions] is null and void.

This nullity entails, as explained in the Special Rapporteur's fifteenth Report, that the impermissible[87] reservation produces no legal effect at all.[88]

Consequently, acceptances and objections do not play any role in determining the legal effect to be attached to an impermissible reservation, contrary to what is provided for by the Vienna Convention concerning permissible reservations. The absence of any reference to impermissible reservations in the Convention suggests that the acceptance/objection mechanism, which is provided for in Article 20, cannot be transposed to impermissible reservations. This may seem surprising if one keeps in mind that objections are, in practice, usually motivated by the fact that the objecting state considers the reservation to be incompatible with the object and purpose of the treaty. But the terms of Article 19 of the Vienna Convention are unambiguous: in the three cases mentioned in that provision, a reservation cannot be formulated.

However, even if the Vienna Convention does not make any allusion to the effect of an acceptance or of an objection to an impermissible reservation, they

treaty relations, by the provisions of the treaty as intended to be modified by the reservation' (ibid., at 65).

[86] A. Pellet, 'Fifteenth Report on the Law of Treaties' (2010), A/CN.4/624/Add.1, para. 398.

[87] And, more widely, any non-valid reservation. The ILC retained the term 'permissibility' (in French '*validité substantielle*') 'to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions' (*GAOR*, *Sixty-first Session*, *Supplement No. 10* (A/61/10) at 327, para. 7 of the General Commentary to section 3 of the Guide to Practice). The term 'validity' denotes the fulfilment of permissibility requirements *and* of the formal requirements concerning the formulation of a reservation (Article 23 of the Vienna Convention).

[88] A. Pellet, 'Fifteenth Report on the Law of Treaties' (2010), A/CN.4/624/Add.1, paras 416–427.

are not automatically devoid of any effect. Interestingly, even in this case, a clear distinction between acceptance and objection appears.

Accepting a non-valid reservation may appear to be a paradox. One may wonder what might be the intention of a state when accepting an impermissible reservation which, in any event, cannot be established within the meaning of Article 21(1) of the Vienna Convention. At the Vienna Conference, Sir Humphrey Waldock noted without any ambiguity: '[A] contracting State could not purport, under article [20], to accept a reservation prohibited under article [19], paragraph (*a*) or paragraph (*b*), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.'[89]

This is also true concerning paragraph (c). There is no reason to distinguish between these three provisions because

> . . . nothing, either in the text of Article 19 or in the *travaux préparatoires*, gives grounds for thinking that a distinction should be made between the different cases: *ubi lex non distinguit, nec nos distinguere debemus.* In all three cases, as clearly emerges from the *chapeau* of article 19, a state is prevented from formulating a reservation and, once it is accepted that a reservation prohibited by the treaty is null and void by virtue of subparagraphs (a) and (b) of article 19, there is no reason to draw different conclusions from subparagraph (c).[90]

It is thus impossible to accept an impermissible reservation, whatever the reason for this impermissibility may be, and any such acceptance would be deprived of legal effect. The ILC confirmed this point of view, in 2010, by adopting Guideline 3.4.1 (Permissibility of the acceptance of a reservation): 'The express acceptance of an impermissible reservation is itself impermissible.'

However, even if a single isolated acceptance expressed by a state to an impermissible reservation cannot 'validate' the reservation[91]—validity (or permissibility)[92] being an objective criterion—the situation may differ in the case where all contracting states accept a reservation which, objectively, is impermissible. As masters of the treaty, and in accordance with the consent principle underlying the law of treaties,[93] 'the Parties always have a right to amend the

[89] United Nations Conference on the Law of Treaties, *supra* note 49, at 133, para. 2.

[90] *GAOR*, *Sixty-fourth Session*, *Supplement No. 10* (A/64/10) at 305, para. 4 of the Commentary of Guideline 3.3 (Consequences of the non-permissibility of a reservation).

[91] In its tenth report, the Special Rapporteur proposed draft Guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation) which highlighted this absence of effect: 'Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.' ('Tenth Report on Reservations to Treaties' (2005), A/CN.4/558/Add.2, para. 202). See also the 'Fifteenth Report on Reservations to Treaties' (2010), A/CN.4/624/Add.1, paras 477–483.

[92] See *supra* note 87.

[93] In this connection, the ICJ specified in its Advisory Opinion of 1951 on *Reservations to the Genocide Convention* that 'it is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto' (*supra* note 11, at 21). The authors of the joint Dissenting Opinion accompanying the Advisory Opinion express this idea even more strongly: 'The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance

treaty by general agreement *inter se* in accordance with Article 39 of the Vienna Conventions and . . . nothing prevents them from adopting a unanimous agreement to that end on the subject of reservations'.[94] This idea finds some support in practice[95] and, in its tenth Report, the Special Rapporteur proposed a draft Guideline 3.3.4 which takes account of this possible effect of collective acceptance of an invalid reservation:

> A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose may be formulated by a State or an international organization if none of the other contracting parties objects to it after having been expressly consulted by the depositary.
>
> During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, to the nature of legal problems raised by the reservation.[96]

In such a case, an acceptance becomes an instrument to express its author's agreement with the proposed reservation—independently of the question of whether it is valid or not; and it re-introduces, by the keyhole, the very traditional system of unanimity under which only the consent of other states could 'establish' a reservation.

Similarly, like acceptances, objections to impermissible reservations have no concrete legal effect as such. It is true that Article 21(3) of the Vienna Convention does not limit the application of the rules contained therein to permissible reservations only, as is the case for Article 21(1) in relation to acceptances. However, Article 21(3) cannot operate if the reserving state has not become a party to the

of the proposal of the reservation or at the same time or later.' (ibid., at 32) See also PCIJ, *S.S. Wimbledon (United Kingdom, France, Italy, Japan/Germany, Poland intervening)*, Judgment of 17 August 1923, 1923, Series A, No. 1, at 25; ICJ, *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, *ICJ Reports* (1950) at 139; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, *supra* note 76, at 41–2, paras 60–61. See also P. Reuter, *supra* note 22, at 20–1; Ch. Tomuschat, 'Admissibility and Legal Effects of Reservations to Multilateral Treaties', 27 *ZaöRV* (1967) at 466.

[94] A. Pellet, 'Tenth Report on Reservations to Treaties' (2005), A/CN.4/558/Add.2, para. 205 (footnotes omitted). This position is supported by D.W. Greig, 'Reservations: Equity as a Balancing Factor?', 16 *Australian YIL* (1995) at 56–7, and L. Sucharipa-Behrmann, 'The Legal Effects of Reservations to Multilateral Treaties', 1 *ARIEL* (1996), at 78. However, D.W. Bowett, who shares this point of view, notes that this possibility is not part of the law of reservations ('Reservations to Non-Restricted Multilateral Treaties', 48 *BYIL* (1976–77) at 84; see also C. Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', 64 *BYIL* (1993) at 269).

[95] Although it is not, strictly speaking, a unanimous acceptance of the parties to the treaties, the example of the neutrality reservation made by Switzerland upon its accession to the Covenant of the League of Nations remains a prominent example where, despite the prohibition of reservations by the treaty (the Covenant in that case), the author of the reservation was accepted as a member of the League, that is, in the circle of state parties to the Covenant; see M.H. Mendelson, 'Reservations to the Constitutions of International Organizations', 45 *BYIL* (1971) at 140–1.

[96] A. Pellet, 'Tenth Report on Reservations to Treaties' (2005), A/CN.4/558/Add.2, para. 207.

treaty, ie if its reservation has not been accepted by at least one other party; only in that case would it be necessary to determine the concrete legal relationship between the reserving state and the objecting state but, as has been shown, the acceptance of a non-valid reservation is not legally possible.[97] More importantly, an impermissible reservation is simply not open to the consent of other states parties; its effect (or absence of any effect) is based exclusively on the nullity of the reservation, and this is the end of the matter.

Nevertheless, objecting to non-valid reservation is not necessarily a futile gesture. Although an objection to a reservation does not produce any specific legal effect of its own and cannot determine as such the validity of the reservation, it constitutes a significant element of appreciation for all interested parties, ie the author of the reservation, the states and contracting organizations, and any court or competent body, in order to determine the validity of a reservation.

In this respect, it can be noted that, in its 1951 Advisory Opinion, the ICJ considered that: 'each State which is a party to the Convention is entitled to appraise the validity of the reservation and it exercises this right individually and from its own standpoint'.[98]

However, this approach, which rests on a distinction between the validity of a reservation and consent thereto, would hardly be compatible with the contemporary Vienna régime. Thus, in its orders on the request for the indication of provisional measures in the *Use of force* cases between former Yugoslavia, on the one hand, and the United States of America and Spain on the other hand, the Court only noted that: 'the Genocide Convention does not prohibit reservations; [that] Yugoslavia did not object to the United States reservation to Article IX; and [that] the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties'.[99]

The Court did not resort to any test of validity of the reservation; the mere fact that no objection was made to it seemed to imply that it was valid.

However, as Professor Gaja has noted in his latest article on reservations,[100] the Court subsequently changed its mind. In its judgment on jurisdiction and admissibility in the *Armed Activities on the Territory of the Congo* case between

[97] See *supra* p. 55.

[98] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 11, at 26. See also Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)*, Advisory Opinion, 24 September 1982, Series A No. 2, para. 38 ('The States Parties have a legitimate interest, of course, in barring reservations incompatible with the object and purpose of the Convention. They are free to assert that interest through the adjudicatory and advisory machinery established by the Convention').

[99] ICJ, *Legality of Use of Force (Yugoslavia v United States of America)*, Provisional Measures, Order of 2 June 1999, *ICJ Reports* (1999) at 924, para. 24; and ICJ, *Legality of Use of Force (Yugoslavia v Spain)*, Provisional Measures, Discontinuance, Order of 2 June 1999, *ICJ Reports* (1999) at 772, para. 32.

[100] 'Il regime della Convenzione di Vienna concernente le riserve inammissibili', *supra* note 2, at 354.

the Democratic Republic of the Congo and Rwanda, the Court determined objectively the validity of Rwanda's reservation to the Genocide Convention and, as noted in a Joint Separate Opinion, 'added its own assessment as to the compatibility of [that] reservation with the object and purpose of the Genocide Convention':[101]

> Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.[102]

However, the absence of any objection was not entirely disregarded. The Court indeed 'strengthened its own conclusion with an *ad hominem* argument',[103] adding: 'as a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it'.[104]

The Strasbourg Court has also given an important place to objections in order to confirm its proper assessment of the validity of Turkey's reservation in the *Loizidou* case.[105] The Human Rights Committee explained in its General Comment No. 24:

> The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified [...]. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.[106]

The Swedish representative at the Sixth Committee also confirmed that:

> ... [t]heoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its

[101] ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, *ICJ Reports* (2006) at 70, para. 20.

[102] ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, *ICJ Reports* (2006) at 32, para. 67.

[103] '*Rafforzare la propria conclusione con un argomento* ad hominem' (our translation) G. Gaja, 'Il regime della Convenzione di Vienna concernente le riserve inammissibili', *supra* note 2, at 354.

[104] ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, *supra* note 102, at 33, para. 68.

[105] ECHR, *Loizidou v Turkey*, Preliminary Objections, Judgment of 23 March 1995, Series A, No. 310, para. 95.

[106] *GAOR, Fiftieth Session, Supplement No. 40* (A/50/40) at 123–4, para 17.

own and did not even have to be seen as an objection per se; [...] However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such 'objections' still served an important purpose.[107]

An objection thus serves not only the consent function expressly envisaged under the Vienna Convention régime; it is also an instrument that permits other states to express their point of view on the validity of a reservation. Whereas an objection to an impermissible reservation is deprived of its first function—because there is no possibility to consent—it retains the second one.

In the specific case of impermissible reservations, an objection and an acceptance are both as such devoid of any legal effect. In this respect, they are comparable. However, they are entirely different in their significance, for the author of the reservation on the one hand, and for states that have reacted to the reservation on the other.

There can be no doubt that the rather improvised reversion of the presumption triggered by the formulation of an objection to a reservation is a source of ambiguity and might have created the impression of an assimilation between the effects of an acceptance of the reservation and an objection with 'minimum effect'. However, in spite of some troubling similarities in specific circumstances, a closer look at the effects and implications of an acceptance of a reservation and of an objection to a reservation shows that there are still some important differences. Indeed, these differences are quite easy to overlook, especially if one considers Articles 21(1) and 21(3) of the Vienna Convention in isolation. Nevertheless, there can be no doubt that these differences do exist, a most fortunate conclusion which confirms, definitively, that an objection is not an acceptance, and that law is not always incompatible with common sense.

[107] A/C.6/60/SR.14, para. 22.