RESERVATIONS: DISCUSSION OF RECENT DEVELOPMENTS IN THE PRACTICE OF THE SECRETARY-GENERAL OF THE UNITED NATIONS AS DEPOSITARY OF MULTILATERAL TREATIES

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Treaties underpin much of modern international relations. Reservations play an important role with regard to multilateral treaties. In many instances, the ability to formulate reservations makes it possible for a state to decide to become party to a treaty while reserving its position with regard to a provision of the treaty with which it has difficulties. This possibility might enable a state to overcome certain constraints, in particular, domestic legal and political considerations, which may inhibit its ability to become a party to a multilateral treaty. Although, in this sense, reservations contribute to encouraging wider participation in many multilateral treaties, it is legitimate to ask whether such wider participation alone assists in advancing the essential goals of such treaties. This question becomes particularly pertinent as many contemporary treaties are negotiated with meticulous care in order to accommodate the often differing interests of individual states and groups of states. Various concessions are made and compromises are reached during these negotiating processes in order to achieve the broadest possible agreement. In these circumstances, the use of reservations by some countries could contribute to further diluting the scope of the treaties concerned. It is the experience of the Secretary-General of the United Nations (Secretary-General) that certain multilateral treaties have tended to attract more reservations than others.

The Secretary-General, as the largest depositary of multilateral treaties, has played a significant role in contributing to the development of the law and practice relating to reservations since 1945. This Article will essentially focus

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on the developments in his practice since 1969 with regard to reservations.\textsuperscript{3} It will not deal with all aspects of the practice of the Secretary-General as depositary of multilateral treaties.\textsuperscript{4}

II. BACKGROUND

The Vienna Convention on the Law of Treaties (VCLT) substantially codified the law relating to the functions of depositaries.\textsuperscript{5} Consequently, the VCLT has provided the legal framework for the Secretary-General of the United Nations in his role as the depositary of multilateral treaties.\textsuperscript{6} Most aspects of the law relating to reservations and declarations to treaties are also codified in the VCLT.\textsuperscript{7}

\textsuperscript{3} For the sake of consistency and convenience to readers and researchers, the approach adopted in this Article roughly approximates the organization of the United Nations' Treaty Handbook. See generally Treaty Section, U.N. Office of Legal Affairs, Treaty Handbook, U.N. Sales No. E.02/V.2 (2001), http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm [hereinafter Treaty Handbook]. Unless otherwise stated, the principles discussed in this Article apply generally to reservations to multilateral treaties deposited with the Secretary-General. However, note that the Secretary-General takes a special approach with regard to reservations to the Convention on Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261.


\textsuperscript{5} Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (stating "the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set for the Charter," while "[a]ffirming that the rules of customary international law will continue to govern questions not regulated by [the VCLT]."")

\textsuperscript{6} See, e.g., id. pt. VII (Depositaries, Notifications, Corrections and Registration), 1155 U.N.T.S. at 350-52.

\textsuperscript{7} See id. pt. II, § 2 (Reservations), 1155 U.N.T.S. at 336-38. The rules relating to reservations, which initially developed through customary international law, continue to be fostered through state practice and the practice of the depositaries. See, e.g., Vienna Convention on Succession of States in Respect of Treaties, opened for signature Aug. 23, 1978, art. 20, 1946 U.N.T.S. 3, 13-14 (providing procedures with respect to reservations for newly independent states succeeding to multilateral treaties); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, § 2 (Reservations), 25 I.L.M. 543, 556-59 (applying the VCLT's reservation provisions to the context of treaties between states and international organizations or between international organizations).
With over 500 multilateral treaties in his custody, the Secretary-General is, by far, the largest depositary in the world, and the treaties in his charge cover almost every aspect of international interaction. They range across the spectrum of human activity, covering sustainable development, the oceans, human rights, humanitarian affairs, terrorism, international criminal matters, refugees and stateless persons, disarmament, commodities, narcotics, organized crime, transport, communications, as well as outer space. The number of treaties deposited with the Secretary-General continues to grow at an average of twelve new multilateral treaties every year, while some treaties may be terminated or superseded.

Generally, the Secretary-General’s tendency is to adopt a cautious and conservative approach in the discharge of his responsibilities as depositary. However, he has had to adjust his practice to accommodate the complexities of the various multilateral treaties deposited with him, their special characteristics, as well as the evolving needs of the international community, which has grown considerably over the years. Consequently, certain developments in his role as depositary have occurred in ways seemingly inconsistent with the provisions of the VCLT. The practice of the Secretary-General has also had an influence on other depositaries who have, on a number of matters, tended to be guided by the precedents that he sets. Accordingly, his practice has been an important factor in the development of the law and practice relating to reservations. The Secretary-General’s practice as depositary is recorded in the *Summary of Practice of the Secretary-General as Depositary of Multilate-

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8 *TREATY HANDBOOK, supra* note 3, *Foreword.*


10 Other than in exceptional circumstances, the Secretary-General only accepts in deposit treaties which:
- have been adopted by the General Assembly;
- have been concluded by a conference convened by a UN organ;
- have been drawn up within the framework of a regional commission;
- are open multilateral treaties of a universal nature.

See *SUMMARY OF PRACTICE, supra* note 4, ¶ 28.


12 See *SUMMARY OF PRACTICE, supra* note 4, ¶ 13.

13 For example, the International Maritime Organisation follows the practice of the Secretary-General with regard to terminology where there is a disagreement on the appropriate terminology to identify countries.
Early in the development of the Secretary-General’s role as depositary of multilateral treaties, reservations were the subject of an advisory opinion of the International Court of Justice (ICJ) which highlighted the importance of the Secretary-General’s practice. In 1950, in order to obtain guidance on the question of the effect of reservations on the entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the General Assembly of the United Nations (General Assembly) requested, by resolution, an advisory opinion from the ICJ. The resulting advisory opinion gave rise to a General Assembly resolution which required the Secretary-General to conform his practice (in the case of the Genocide Convention and conventions concluded after the adoption of Resolution 598(VI)) to the following: accept deposit instruments containing reservations or objections; refrain from making a determination on the legal effect of such instruments; and communicate such instruments to all states concerned, leaving each state to draw the appropriate legal consequences. In a second resolution in 1959, the General Assembly required the Secretary-General to follow this practice with regard to all conventions concluded under the auspices of the United Nations which did not contain provisions to the contrary. Since then, the practice of the Secretary-General has reflected the


15 In 1950, the Secretary-General encountered a difficulty: whether the Convention on the Prevention and Punishment of the Crime of Genocide, which contains no provisions relating to reservations, would enter into force, since a large number of the instruments of ratification contained reservations to various provisions of the Convention. See SUMMARY OF PRACTICE, supra note 4, ¶ 173; see also id. ¶ 168-172 (describing the Secretary-General’s practice as depositary with respect treaties silent as to reservation prior to 1952).


20 G.A. Res. 1452(XIV), U.N. GAOR, 14th Sess., 847th plen. mtg. at 56, U.N. Doc. A/4354 (1959); SUMMARY OF PRACTICE, supra note 4, ¶ 177. For a brief discussion, see also AUST,
The International Law Commission (ILC) has also addressed the issue of reservations to treaties. Legal luminaries such as James Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, and Sir Humphrey Waldock have all reported to the ILC on reservations. The ILC's proposals provided the substantial basis for the provisions on reservations incorporated in the VCLT, the Vienna Convention on Succession of States in Respect of Treaties, and the Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations.

The ILC has continued to examine the subject of reservations. At its 45th session in 1993, the ILC adopted a recommendation to include the topic "The law and practice relating to reservations to treaties" on its agenda, subject to the approval of the General Assembly. The General Assembly approved this recommendation at its 48th session in 1993, but required that the final form of the work of the ILC be decided "after a preliminary study is presented to the General Assembly." Professor Alain Pellet was appointed as the Special Rapporteur for this study at the 46th session of the ILC in 1994. Significantly, the ILC formed the conclusion that there should be no change to the relevant provisions of the VCLT and the two related conventions, and that the results of the work of the Commission should take the form of guidelines with commentaries. The Special Rapporteur has presented nine reports so far. Reflecting current uncertainties in the international community with regard to the law and practice relating to reservations and declarations to
treaties, states have expressed a diversity of views on some of the proposals. The ILC has been progressively adopting draft guidelines on the basis of the Special Rapporteur’s reports.30

The work of the ILC is of special significance to the practice of the Secretary-General. He tends to keep developments in the ILC under close scrutiny due to the impact that they may have on his own practice. The views expressed by the international community in response to the proposals made by the Special Rapporteur have also been noted carefully by the Secretary-General. The Special Rapporteur, for his part, has consulted states and international organizations on their practices relating to reservations, and has been provided a detailed briefing by the Treaty Section of the United Nations Office of Legal Affairs on the practice of the Secretary-General.31

A. What Is a Reservation?

The Secretary-General’s practice with regard to determining what constitutes a reservation is consistent with the provisions of the VCLT.32 A state may formulate a formal statement upon signature, ratification, acceptance, approval, confirmation of, or accession to a treaty33 with implications for the legal rights and obligations under the treaty.34 Depending on the objective of the state concerned, such a statement may be entitled a “reservation,” “declaration,” “understanding,” “interpretative declaration,” or “interpretative statement.”35 “However phrased or named, any such statement purporting to exclude or modify the legal effect of a treaty provision with

32 See supra notes 5-10 and accompanying text.
33 TREATY HANDBOOK, supra note 3, § 3.5.1.
34 A successor state, “the State which has replaced another State on the occurrence of a succession of States,” Vienna Convention on Succession of States in Respect of Treaties, supra note 7, art. 2(1)(d), 1946 U.N.T.S. at 6, depositing an instrument of succession is treated as a state undertaking a treaty action such as ratification, acceptance, approval, or accession. See generally id., art. 1, 1946 U.N.T.S. at 5; SUMMARY OF PRACTICE, supra note 4, ¶¶ 289-291. Accordingly, a successor state will be entitled to withdraw an existing reservation or lodge a new instrument of reservation. Vienna Convention on Succession of States in Respect of Treaties, supra note 7, art. 20, 1946 U.N.T.S. at 13.
35 TREATY HANDBOOK, supra note 3, § 3.5.1.
regard to the declarant is, in fact, a reservation." The Secretary-General, as the depositary, receives in deposit a large number of statements which are categorized as "reservations," all of which are analyzed, faithfully recorded, and circulated to the international community.

In most cases, the intention of a state which formulates such a statement on signature, ratification, acceptance, approval, or accession is clear. Such statements are unequivocally intended to be reservations and raise little or no difficulty for the depositary or for the other parties to the relevant treaties. However, in certain cases the real purpose of a statement being formulated on signature, ratification, acceptance, approval, or accession becomes contentious and these cases give rise to legal issues. Some of these statements have resulted in considerable discussion and have contributed to the development of the practice of the Secretary-General.

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Reservation means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of a treaty in their application to that State or to that international organization.

Id. at 176 n.177.

37 See SUMMARY OF PRACTICE, supra note 4, ¶ 311 (listing the types of depositary notification the Secretary-General provides for interested parties); TREATY HANDBOOK, supra note 3, § 3.5.5 (describing the Secretary-General’s practice as depositary with respect to depositary notifications of reservations in three cases: (1) where a treaty expressly prohibits reservations, (2) where a treaty expressly authorizes reservations, and (3) where a treaty is silent on reservations). Although in the past a depositary notifications of the Secretary-General could have taken months to reach state capitals, now with the assistance of modern technology depositary notifications are sent out the day on which they are processed by e-mail and are also posted on the United Nations Treaty Collection (UNTC) website, http://untreaty.un.org/English/CTC/CTC.asp. Depositary notifications continue to be distributed in paper format also.

38 See, e.g., SUMMARY OF PRACTICE, supra note 4, § 189.

39 For example, a state seeking to become party to a treaty may formulate a statement that is tantamount to a reservation due to domestic political considerations, although it is not entitled a reservation.
B. Who Can Formulate a Reservation?

The Secretary-General follows a strict practice with regard to persons competent to formulate reservations on behalf of their states. He recognizes this competency only in the same authorities recognized under the VCLT as being capable of undertaking treaty actions on behalf of their states (or persons acting for the time being for one of these authorities or possessing full powers issued for the purpose). The Secretary-General has taken the view that a reservation, being a modification or exclusion of the treaty obligations being undertaken by a state, should be expressed by the same authority which undertakes the treaty action on behalf of the state. Accordingly, he would not accept in deposit an instrument purporting to be a reservation submitted under the signature of a permanent representative of a state to the United Nations unless he or she is in possession of full powers authorizing the formulation of the reservation in question.

The Secretary-General permits a permanent representative to the United Nations of a state to undertake treaty actions on behalf of his or her government without specific full powers for the purpose, if he or she is in possession of appropriate general full powers. For example, the permanent representatives of China and the United Kingdom carry general full powers that allow them to undertake certain treaty actions on behalf of their governments without specific full powers in each case and, consequently, are also authorized to formulate reservations.

Naturally, the Secretary-General’s approach has been influenced by the large number of multilateral treaties deposited with him, the numerous states which may be eligible to undertake treaty actions with regard to these treaties, the need to safeguard those states’ interests, and the political sensitivities surrounding his decisions. He is also aware of the necessity to protect his own

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41 See VCLT, supra note 5, art. 7, 1155 U.N.T.S. at 334. The Council of Europe and the Organization of American States permit reservations to be formulated in letters from permanent representatives to these organizations. See Alain Pellet, Sixth Report on Reservations to Treaties, ¶ 64, U.N. Doc. A/CN.4/518/Add.1 (2001). The Special Rapporteur also appears to favor such a flexible approach. Id. ¶¶ 67-71.

42 See SUMMARY OF PRACTICE, supra note 4, ¶ 102. “However, full powers may also be “general”, [sic] i.e. [sic] full powers that do not specify the treaty to be signed, but rather authorize the representative to sign all treaties of a certain kind, most often all the treaties adopted by an organization.” Id.

43 See generally id.
integrity. Accordingly, he has opted for a cautious approach which seeks to ensure consistency between his practice and the requirements of the VCLT. Accordingly, he requires the signature of an instrument containing a reservation by one of the recognized authorities or a person acting for the time being in one of these positions (or a person carrying appropriate full powers).\textsuperscript{44}

The Special Rapporteur, in his report, has favored an approach which would permit the practice of each depositary to determine who could formulate a reservation on behalf of his or her government with regard to treaties deposited with that depositary.\textsuperscript{45} This approach may lend indirect weight to the practice of the Secretary-General.\textsuperscript{46}

C. Form of Reservations

A reservation must be formulated in writing.\textsuperscript{47} As Dr. Frank Horn has observed,

In the era of differentiated treaty making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depository, so that all interested states become aware of them. A reservation not notified cannot be acted upon. Other states would not be able to expressly accept or object to such reservations.\textsuperscript{48}

\textsuperscript{44} Treaty Handbook, supra note 3, § 3.5.4.
\textsuperscript{46} In accordance with recognized customary international treaty law, as codified by the Vienna Convention on the Law of Treaties, only heads of State, heads of Government and Ministers for Foreign Affairs (referred to hereinafter as "qualified authorities") are, by virtue of their functions, and without having to produce full powers, considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty, including their signature with or without reservations. . . .
\textsuperscript{47} Summary of Practice, supra note 4, ¶ 101.
\textsuperscript{48} Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties 44 (1988).
The Special Rapporteur, in his *Sixth Report on Reservations to Treaties*, confirms that a reservation must be formulated in writing.\(^49\)

The Legal Counsel of the United Nations wrote in 1976:

> A reservation must be formulated in writing, and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally. . . \(^50\)

A reservation is normally included in the instrument of ratification, acceptance, approval, or accession, or is annexed to the instrument.\(^51\) If annexed to the instrument of ratification, acceptance, approval, or accession, in the practice of the Secretary-General, the reservation must be separately signed by the head of state, head of government, minister for foreign affairs, a person acting in the capacity of one of the above authorities, or a person possessing full powers for that purpose.\(^52\) Similarly, a modification to an existing reservation must be formulated under the same conditions as a reservation.\(^53\)

### III. TIME FOR FORMULATING RESERVATIONS

Article 19 of the VCLT specifies that

[a] state may, when signing, ratifying, accepting, approving, or acceding to a treaty, [make] 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 [the above two categories], the reservation is incompatible with the object and purpose of the treaty.\(^54\)

\(^49\) Pellet, *supra* note 41, at 7.


\(^51\) *TREATY HANDBOOK, supra* note 3, § 3.5.4.

\(^52\) *Id.*

\(^53\) See *id.* § 3.5.8.

Thus, Article 19 of the VCLT requires that a reservation be made at the time of signature or when an instrument of ratification, acceptance, approval, or accession is deposited.55

This approach ensures a degree of certainty in treaty relations as the information on a reservation would be recorded and circulated to parties along with the relevant treaty action. A reservation made upon simple signature (i.e., signature subject to ratification, acceptance, approval, or accession) is merely declaratory and must be formally confirmed in writing when the state expresses its consent to be bound.56

Despite the requirements of Article 19 of the VCLT,57 the practice of the Secretary-General has evolved to accommodate reservations formulated after the relevant treaty actions had been undertaken.58 Accordingly, the Secretary-General now permits a state to qualify its treaty obligations in the light of changed circumstances and to formulate a reservation after the act of ratification, accession, approval, or acceptance, but subject to certain limitations.59 Where the Secretary-General, as depositary, receives a written statement containing a reservation after the deposit of the instrument of ratification, acceptance, approval, or accession, he circulates the reservation to all the states parties unless the treaty prohibits reservations or permits only certain specified reservations.60 These are referred to as late reservations. However, the Secretary-General will accept such a reservation in deposit only if no state party objects to it.61 This approach is based on the premise that any act which results in the modification of a treaty obligation already undertaken by a state party is valid only with the unanimous consent of all the other parties to that treaty.62

55 A reservation can be made on succession to a treaty also. Vienna Convention on Succession of States in Respect of Treaties, supra note 7, art. 20(2), 1946 U.N.T.S. at 13.
56 VCLT, supra note 5, art. 23(2), 1155 U.N.T.S. at 338; SUMMARY OF PRACTICE, supra note 4, ¶ 209.
57 VCLT, supra note 5, art. 19, 1155 U.N.T.S. at 336-37.
58 TREATY HANDBOOK, supra note 3, § 3.5.3; see also SUMMARY OF PRACTICE, supra note 4, ¶¶ 204-206.
59 See id.
60 Initially this was not the Secretary-General's approach. He had taken the view that a government which did not make a reservation at the time of expressing its consent to be bound, was not entitled to make one later. 1976 U.N. Jurid. Y.B., supra note 40, at 221.
61 SUMMARY OF PRACTICE, supra note 4, ¶ 205; TREATY HANDBOOK, supra note 3, § 3.5.3.
Initially, the Secretary-General permitted state parties only ninety days within which to lodge objections to a late reservation. Recently, however, a number of states raised concerns about the inadequacy of the ninety-day period to complete their internal consultations and finalize their national positions with regard to late reservations, especially in view of the need to take account of complicated issues of law and policy. The difficulties arising from this short time limit were further accentuated where it was necessary for a group of states, twenty-five in the case of the European Union as it stands today, to coordinate their positions. The possibility of a state party seeking to use the ninety-day period to deposit a reservation unnoticed by the other states parties also became a pertinent concern. Had such a reservation been properly formulated at the time of signature or the deposit of the instrument of ratification, acceptance, approval, or accession, it is likely that the twelve-month period stipulated under Article 20(5) of the VCLT for objections to be lodged would have provided other state parties a longer time period to consider it and, if necessary, to formulate objections.

The Secretary-General also recognizes the possibility of an existing reservation being substituted with a new reservation or being modified at a subsequent date so as to create new exemptions from, or modifications to, the legal effects of the provisions of a treaty. A modification of this kind has the nature of a new reservation. The Secretary-General, as depositary, circulates such substitutions or modifications. Also, in such cases the Secretary-General allows the same time limit for objections to be lodged as he would permit in the case of late reservations.

The complexities associated with the practice of permitting only ninety days for objections to be lodged to late reservations or to modifications to existing reservations were illustrated by the modification formulated on January 29, 1999, by the government of Maldives to its reservation made upon accession to the Convention for the Elimination of all Forms of Discrimination Against Women.

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54 With the enlargement of the United Nations and the creation of more coherent regional and economic groupings, this could increasingly become a significant issue.
55 Members of the European Union coordinate their positions on legal issues through regular meetings.
56 TREATY HANDBOOK, supra note 3, § 3.5.3.
57 TREATY HANDBOOK, supra note 3, Annex 2.
58 The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may
The Secretary-General, following the existing depositary practice, advised the international community that he would receive the proposed modification\(^{69}\) in deposit in the absence of any objection from a contracting state either to the deposit itself or to the procedure envisaged. He also gave a period of ninety days from the date of the notification for objections to be lodged.\(^{70}\) No objection was received to the modification within the ninety days specified.\(^{71}\) Accordingly, the modification was accepted in deposit on June 23, 1999.\(^{72}\)

In actual fact, it was known that a number of states had intended to object formally to the modified reservation by Maldives, but were unable to lodge their objections within the specified time. Since the objections were received by the depositary after the stipulated time limit, they were characterized as "communications" instead of "objections" which would have caused the modification to fail. Germany was one of the states to lodged a late objection consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded.

Furthermore, the Republic of Maldives does not see itself bound by any provisions of the Convention which obliges to change its Constitution and laws in any manner.


\(^{69}\) The modified reservation of the Republic of Maldives read:

1. The Government of the Republic of Maldives expresses its reservation to article 7 (a) of the Convention, to the extent that the provision contained in the said paragraph conflicts with the provision of article 34 of the Constitution of the Republic of Maldives.

2. The Government of the Republic of Maldives reserves its right to apply article 16 of the Convention concerning the equality of men and women in all matters relating to marriage and family relations without prejudice to the provisions of the Islamic Sharia, which govern all marital and family relations of the 100 percent Muslim population of the Maldives.


\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id.
to Maldives' modified reservation. Germany's objection was lodged on August 16, 1999. It is also interesting that Germany, despite being aware of the Secretary-General's practice with regard to late or modified reservations, sought to reaffirm, in its objection, its position under the VCLT by stating, "reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty." Those states which had failed to meet the ninety-day deadline then allowed by the Secretary-General for objections to be lodged to late reservations or modifications to existing reservations were not pleased with the outcome. In

73 Id.
74 Id. The objection by Germany, which was characterized as a communication, reads as follows:

The modification does not constitute a withdrawal or a partial withdrawal of the original reservations to the Convention by the Republic of the Maldives. Instead the modification constitutes a new reservation to article 7(a) (right of women to vote in all elections and public referenda and be eligible for elections to all publicly elected bodies), and article 16 (elimination of discrimination against women in all matters relating to marriage and family relations) of the Convention extending and reinforcing the original reservations.

The Government of the Federal Republic of Germany notes that reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification.

The Government of the Federal Republic of Germany objects to the modification of the reservations.

Id.

75 Id. Germany had previously taken a much softer approach to late reservations:

The Government of the Federal Republic of Germany has taken note of the communication of the French Government on the Convention of 19 March 1931 providing a Uniform Law for Cheques, which was received by the Secretary-General of the United Nations on 7 February 1979 and distributed with circular note C.N.29.1979.Treaties-1 of 10 February 1979 of the Acting Director of the General Legal Division and which informed about the modification of France's membership of the Convention effected by the said communication, and raises no objections thereto.

this particular case, the problem was aggravated by the delayed transmission of the depositary notification containing the modified reservation,\textsuperscript{76} which made it difficult for the states concerned to consult each other on the appropriate response. The objecting states, which were mainly from the European Community, thus made representations to the Legal Counsel of the United Nations on the inadequacy of the time period for objections to be lodged to modifications of existing reservations or to late reservations.\textsuperscript{77}

The need to rush to lodge objections within ninety days has also resulted in unclear consequences. For example, the instrument lodged with the depositary on February 6, 1998, by the government of Malaysia, stating Malaysia’s intention to modify its reservation to the Convention on the Elimination of All Forms of Discrimination Against Women upon accession,\textsuperscript{78} may have caused consequences which are still to be determined.

Malaysia’s proposed modification read as follows:

With respect to article 5(a) of the Convention, the Government of Malaysia declares that the provision is subject to the Syariah law on the division of inherited property.

With respect to article 7(b) of the Convention, the Government of Malaysia declares that the application of said article 7(b) shall not affect appointment to certain public offices like the Mufti Syariah Court Judges, and the Imam which is in accordance with the provisions of the Islamic Shariah law.

\ldots

With respect to article 16.1(a) and paragraph 2, the Government of Malaysia declares that under the Syariah law and the laws of Malaysia the age limit for marriage for women is sixteen and men is eighteen.\textsuperscript{79}

\begin{footnotesize}
\textsuperscript{76} At the time, due to organizational factors and technical limitations, depositary notifications in paper form took weeks (sometimes months) to be distributed.

\textsuperscript{77} The European Community’s concerns were a major factor in the decision to extend the period from ninety days to twelve months.


\textsuperscript{79} Id.
\end{footnotesize}
The Secretary-General, following the normal practice, proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the contracting states, either to the deposit itself or to the procedure envisaged, within a period of ninety days from the date of its notification, April 21, 1998.80

The Secretary-General received a blanket objection from the government of France within the specified time period relating to the modification proposed by Malaysia.81 Accordingly the modification, including the aspects which may have resulted in limiting the scope of the existing reservation, could not be received in deposit.82

On April 4, 2000, in a letter addressed to the Permanent Representatives to the United Nations, the Legal Counsel advised that the time limit for objecting to late reservations and modified reservations had been reviewed.83 He acknowledged the Secretary-General's understanding of the inadequacy of the ninety-day period.84 Accordingly, the Legal Counsel advised that the time limit would be extended to twelve months from the date of the depositary notification.85 This change in the practice of the Secretary-General, in addition to providing states with more time to consider and formulated any objections to late or modified reservations, also brings it into line with the time limit available under Article 20(5) of the VCLT.86 Since depositary notifications are also circulated by e-mail now, and the e-mails are transmitted immediately on the finalization of depositary notifications, states do, in actual fact, receive twelve months within which to formulate their objections.

The receipt of an objection to a late reservation or a modification to an existing reservation within the specified time is critical. Where a late reservation or a modification to an existing reservation has been circulated and

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80 Id.
81 The objection lodged by France on July 20, 1998, reads as follows:
   France considers that the reservation made by Malaysia, as expressed in the partial withdrawal and modifications made by Malaysia on 6 February 1998, is incompatible with the object and purpose of the Convention. France therefore objects to the [reservation].
   This objection shall not otherwise affect the entry into force of the Convention between France and Malaysia.

Id.
82 Id.
83 TREATY HANDBOOK, supra note 3, Annex 2.
84 Id.
85 Id.
86 See VCLT, supra note 5, art. 20(5), 1155 U.N.T.S. at 337.
no objection has been received within the specified time limit, the Secretary-
General accepts the reservation in deposit. The acceptance of late reservations
by the Secretary-General could be said to introduce an element of uncertainty
into treaty relations, but it could also be argued that this practice accommodates
the inherent right of states to modify their treaty relations with the consent of the
other states parties to a treaty.

A different situation has arisen where some states have denounced treaties
to which they are party in order to accede afresh with reservations. This
approach has been adopted by a few countries to exclude or modify their
existing treaty obligations. The actions of these countries has not been
received favorably by the international community in general. For example,
the use of the Human Rights Committee to delay or thwart the process of
justice for Guyanese nationals under the penalty of death posed a major law
and order problem for the government of Guyana. The position of the
government of Guyana was further aggravated by domestic political pressure.
In response, Guyana denounced its accession to the Optional Protocol to the
International Covenant on Civil and Political Rights on January 5, 1999,
effective April 5, 1999; Guyana re-acceded on April 5, 1999, with a
reservation which reads:

Guyana re-accedes to the Optional Protocol to the International
Covenant on Civil and Political Rights with a Reservation to
article 6 thereof with the result that the Human Rights Committee
shall not be competent to receive and consider communications
from any persons who is under sentence of death for the offences
of murder and treason in respect of any matter relating to his
prosecution, detention, trial, conviction, sentence or execution of
the death sentence and any matter connected therewith.

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87 TREATY SECTION, U.N. OFFICE OF LEGAL AFFAIRS, Optional Protocol to the Interna-
tional Covenant on Civil and Political Rights, in MULTILATERAL TREATIES DEPOSITED WITH THE
partI/chapterIV/treaty7.asp#Notes (last updated Apr. 19, 2005).
88 TREATY SECTION, U.N. OFFICE OF LEGAL AFFAIRS, Optional Protocol to the Interna-
tional Covenant on Civil and Political Rights, in MULTILATERAL TREATIES DEPOSITED WITH THE
partI/chapterIV/treaty7.asp (last updated Apr. 19, 2005).
Guyana's re-accession with a reservation attracted a number of objections. Although Guyana appears to have stayed close to the letter of the law to deal with a difficult domestic policy problem, objecting states have questioned the propriety of the procedure employed by Guyana.

Similarly, the government of Trinidad and Tobago acceded to the Optional Protocol to the International Covenant on Civil and Political Rights on November 14, 1980. Confronted by a similar problem to Guyana's, on May 26, 1998, the government of Trinidad and Tobago informed the Secretary-General of its decision to denounce the Optional Protocol effective August 26, 1998. On August 26, 1998, the government of Trinidad and Tobago re-accessed to the Optional Protocol with a reservation to Article 1. However,

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89 See 1 TREATY SECTION, U.N. OFFICE OF LEGAL AFFAIRS, supra note 87. Sweden's objection, lodged on April 27, 2000, reads as follows:

The Government of Sweden has examined the reservation to article 1 made by the Government of Guyana at the time of its re-accession to the Optional Protocol. The Government of Sweden notes that the Government of Guyana accepts the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, and that it stresses that its reservation in no way detracts from its obligations and engagements under the Covenant.

... Nevertheless, the Government of Sweden has serious doubts as to the propriety of the procedure followed by the Government of Guyana. While article 12, paragraph 1 of the Protocol provides that any State Party may denounce the Protocol "at any time," the denunciation may in no case be used by a State Party for the sole purpose of formulating reservations to that instrument after having re-accessed to it. Such a practice would constitute a misuse of the procedure and would be manifestly contrary to the principle of good faith. It further contravenes the rule of pacta sunt servanda. As such, it undermines the basis of international treaty law and the protection of human rights. The Government of Sweden therefore wishes to declare its grave concern over this method of proceeding.

Furthermore, the reservation seeks to limit the international obligations of Guyana towards individuals under sentence of death. The Government of Sweden is of the view that the right to life is fundamental and that the death penalty cannot be accepted. It is therefore of utmost importance that states that persist in this practice refrain from further weakening the position of that group of individuals.

90 See id.
91 Id. n.3.
92 Id.
93 1 TREATY SECTION, U.N. OFFICE OF LEGAL AFFAIRS, supra note 88.

Trinidad and Tobago re-accessed to the Optional Protocol to the International
since the Human Rights Committee sought to ignore the reservation which Trinidad and Tobago had lodged,\textsuperscript{94} the government of Trinidad and Tobago notified the Secretary-General on March 27, 2000, that it had decided to denounce the Optional Protocol for the second time with effect from June 27, 2000.\textsuperscript{95}

The reservation lodged by Trinidad and Tobago on re-accession has also been the subject of objections from a number of governments which raised serious doubts about the propriety of the procedure followed and the impact of such subsequent reservations on treaty-based human rights regimes. These governments have considered the denunciation of the Optional Protocol succeeded by re-accession with a reservation to undermine the basis of international treaty law as well as the international protection of human rights.\textsuperscript{96}

IV. INFORMING PARTIES OF RESERVATIONS

A. Where a Treaty Prohibits Reservations

Many treaties specifically prohibit reservations. For example, no reservation or exception may be made to the Agreement Relating to the Implementation of Part XI of the Convention on the Law of the Sea, except where expressly permitted elsewhere in the agreement.\textsuperscript{97} Similarly, Article 120 of the Rome Statute of the International Criminal Court prohibits

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\textsuperscript{95} This raises the question of the role of human rights bodies in determining the validity of reservations lodged by parties to a human rights treaty.

\textsuperscript{96} \textit{I Treaty Section}, U.N. Office of Legal Affairs, \textit{supra} note 87, n.3 (providing Italy’s objections to the actions of Trinidad and Tobago).

reservations.\textsuperscript{98} In cases where a treaty expressly prohibits reservations and a state on expressing its consent to be bound by the treaty formulates a statement, however phrased, which is unambiguously a reservation, the Secretary-General as depositary makes a preliminary assessment as to whether that statement constitutes a reservation.\textsuperscript{99} The essential criterion employed is whether the statement in question results in the modification or exclusion of the legal rights and obligations being undertaken under the treaty by the state in question. If it is determined that the statement has no bearing on the state’s legal rights and obligations, the Secretary-General circulates the statement to the other states concerned.\textsuperscript{100} However, if the statement is in fact a reservation,\textsuperscript{101} the Secretary-General will refuse to accept that state’s signature, ratification, acceptance, approval, or accession in conjunction with the offending statement.\textsuperscript{102} In these circumstances, the Secretary-General will also draw the attention of the state concerned to the issue while withholding circulation of the unauthorised reservation.\textsuperscript{103} “Where a \textit{prima facie} determination by the Secretary-General is not possible, and doubts remain, the Secretary-General may request a clarification from the declarant on the real nature of the statement.”\textsuperscript{104} If the declarant formally confirms that the statement is not intended to be a reservation but only a declaration, the Secretary-General will formally receive the instrument in deposit and notify all states concerned accordingly.\textsuperscript{105} Such a clarification, whether embodied in the statement in question or submitted separately, may have the effect of estopping the state concerned from relying on the statement to exclude or limit its rights and obligations under the treaty.

Situations of this nature have arisen with regard to a number of treaty actions undertaken by states in recent times. It is suggested that the Secretary-
General's approach with regard to treaties that prohibit reservations may be justified on the basis that the depositary is required to be guided by the provisions of the treaty deposited with him. Accordingly, he is at liberty not to accept in deposit a statement that is prohibited by the treaty, i.e., a reservation. There have been rare occasions when the depositary, guided by the provisions of a treaty, has refused to accept an offending reservation in deposit. It is not uncommon for informal discussions to take place between the depositary and the state concerned with a view to modifying the language of a statement which creates doubts as to its nature. When this has occurred (on occasion, such discussions have been prolonged and difficult), it has been the experience of the Secretary-General that the problematic statement is withdrawn or appropriately modified by the state concerned.

The role of the Secretary-General as depositary in relation to problematic statements is illustrated by the instrument of ratification of the Rome Statute of the International Criminal Court submitted by Australia in 2002 to which a declaration was attached. Australia clarified its position by making it clear that its statement was only intended to be a declaration. The first paragraph of Australia's declaration emphasizes that it is not a reservation. It is suggested that a confirmation of intent of this nature will estop the state making it from relying on it as a reservation.

106 Aust, supra note 1, at 128.
107 Since these situations are the subject of informal discussions only, the Secretary-General does not normally keep records of them.
108 The Government of Australia, having considered the Statute, now hereby ratifies the same, for and on behalf of Australia, with the following declaration, the terms of which have full effect in Australian law, and which is not a reservation:

Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes.

The Secretary-General, as depositary, is not required to request such a clarification automatically with regard to a doubtful statement. Where a "declaration" formulated by a state continues to cause doubt about its meaning and where the clarification provided by the state concerned does not assist in making the situation clearer, the Secretary-General will circulate such "declaration" and leave it to the states concerned to formulate their own positions. "[I]t is for the States concerned to raise any objections they may have to statements they consider to be unauthorized reservations."

B. Where a Treaty Authorizes Reservations

Some treaties specifically authorize certain types of reservations. Where a state formulates a reservation to a treaty that is expressly authorized by it, "the Secretary-General, as depositary, informs the States concerned [of such reservation] by depositary notification." Unless a translation or an in-depth analysis is required, such a reservation is processed and transmitted by e-mail to the states concerned on the date of deposit. A depositary notification in paper format will follow, and such notification is also placed on the Internet. "A reservation of this nature does not require any subsequent acceptance by the states concerned, unless the treaty so provides . . . ."

C. Where a Treaty Is Silent on Reservations

Where a treaty is silent on reservations and a state formulates a reservation, the Secretary-General, as depositary, informs the states concerned of the reservation by depositary notification. This has given rise to contentious issues, including whether the statement in question is compatible with the
object and purpose of the treaty. Guided by the advisory opinion of the ICJ relating to reservations to the Genocide Convention, and the General Assembly resolutions that followed, the approach of the Secretary-General is to accept such statements in deposit and let the state parties draw their own legal conclusions. Generally, human rights treaties do not contain provisions relating to reservations and it is with regard to these treaties that this issue of whether a reservation lodged is compatible with the object and purpose of a treaty has arisen most frequently. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women have attracted a large number of reservations as well as a similar number of objections to reservations.

117 For example, see the U.N. Human Rights Committee’s Addendum to the General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the Internal Covenant on Civil and Political Rights, General Comment No. 24(52), General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant: “The absence of a prohibition on reservations does not mean that any reservation is permitted.” U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1282d mtg. at 2, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter General Comment No. 24(52)].

118 See supra text accompanying notes 15–21. For additional discussion, see ROSENNE, supra note 2, at 374; see also AUST, supra note 1, at 129.


120 TREATY HANDBOOK, supra note 3, § 3.5.5.


V. WHO DETERMINES THE ACCEPTABILITY OF A RESERVATION?

The question has often arisen as to who possesses the authority to determine whether a reservation formulated by a state or an international organization is compatible with the object and purpose of a treaty. As discussed above, where a treaty prohibits reservations and a statement which is unambiguously a reservation is submitted to the Secretary-General, his practice as depositary is to refuse to accept such a statement in deposit. However, where a treaty is silent on reservations and a statement which is tantamount to a reservation is submitted to the Secretary-General, he circulates such a statement, even though it might be contrary to the object and purpose of the treaty, and leaves it to the states concerned to determine their own legal positions.

The Secretary-General takes the view that the function of determining whether a statement made by a government upon signature, ratification, acceptance, approval, or accession meets the technical criteria for acceptance in deposit as a reservation falls within his depositary responsibilities, particularly where the treaty concerned contains specific and applicable provisions. It is suggested that this approach is compatible with rules of customary international law as codified in the VCLT and the long-standing practice of the Secretary-General.

Where the treaty itself is silent on reservations, the Secretary-General does not undertake the additional responsibility of determining whether a proposed reservation is compatible with its object and purpose. The Secretary-General's position must be viewed against the background of the ongoing debate on the role of the committees established under the various human rights treaties in determining the acceptability of reservations formulated for these treaties. It has been argued that the general reservations regime in international law is largely based on the idea of reciprocity between state parties—a concept which is difficult to transpose to various fields, including human rights. Treaty provisions in the human rights field establish rules of conduct for all states; thus treaties concluded in the field of human rights do not "lend themselves to

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122 See discussion infra Part IV.A.
123 SUMMARY OF PRACTICE, supra note 4, ¶ 178.
124 Id. ¶¶ 165, 194-196.
125 These treaty bodies have called on states to withdraw reservations and, in several cases, have plainly declared that certain reservations are incompatible with the object and purpose of the treaty in question. Ryan Goodman, Human Rights Treaties, Invalid Reservations and State Consent, 96 AM. J. INT’L L. 531 (2002).
the formulation of reservations," as allowing states to object to certain treaty provisions would contradict the treaty's raison d'etre. The Committee on the Rights of the Child regularly challenges reservations lodged in deposit by state parties which are considered to be contrary to the object and purpose of the convention. Frequently, the Committee demands that state parties withdraw their reservations "in the spirit of the World Conference on Human Rights" even when it does not suggest that the reservations actually violate the object and purpose of the Convention on the Rights of the Child.

The Human Rights Committee, established under Article 28 of the International Covenant on Civil and Political Rights, has taken a similar view in asserting the right to determine the legality of reservations and even their scope. The Committee has stated that "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party." Furthermore the Committee has asserted that "such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."

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126 INTERNATIONAL LAW COMMISSION, INTERNATIONAL LAW COMMISSION REPORT, 1996, ¶ 118 (1996), http://www.un.org/law/ilc/reports/1996/contents.htm (providing a summary of Professor Alain Pellet comments made while presenting to the ILC his second report to the Committee on the topic of "The law and practice relating to reservations to treaties"). In its General Comment No. 24(52), the Human Rights Committee considered that

[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because . . . it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions.

General Comment No. 24(52), supra note 117, at 7.


130 General Comment 24(52), supra note 117, at 7.

131 Id. But see Alain Pellet, Seventh Report on Reservations to Treaties, addendum 2, at 17, U.N. Doc. A/CN.4/526/Add.2 (2002) (containing a draft guideline formulated by the Special Rapporteur: "The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.")
The United States, France, and the United Kingdom have not agreed with the Human Rights Committee on this point. For example, the United States "could not accept the Human Rights Committee's views in its General Comment No. 24(52), since it did not believe that the classic rules on reservations were inadequate for human rights treaties." The United States' position was that the Committee's assertion regarding the severability of reservations "had no basis in international law." Further, the U.S. legal advisor expressed doubt as to how many legal advisors would recommend that their governments ratify a treaty if the governments were aware that their reservations would be ignored and that they would still be bound by the terms of the treaty.

It is recalled that the decision of the committee established under the Optional Protocol to the International Covenant on Civil and Political Rights to disregard the reservation deposited by Trinidad and Tobago on its re-accession to the Optional Protocol, resulted in Trinidad and Tobago denouncing the Optional Protocol.

There appear to be two distinct issues to be considered. One relates to the acceptance in deposit by the depositary of a statement which is a reservation where the treaty is silent on reservations, and which may also be contrary to its object and purpose. In this case, it is clearly the responsibility of the depositary to determine whether it should be accepted in deposit consistent with the law and his practice. The Secretary-General will accept such a statement in deposit if it meets the technical requirements relating to reservations and will circulate it to the other state parties. The other issue is determining whether such a statement is capable of affecting the legal relations established under the treaty. Clearly on this issue there is a divergence of views, with some states asserting that it is for states alone to determine such legal effect.

The Special Rapporteur has flagged a related issue, particularly in view of the lack of resources which restrict the ability of smaller states to become aware of the nature of a reservation circulated by the depositary. Many questionable statements may escape their attention simply because of their lack

133 Id.
134 Id. at 13.
135 Decision of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights, supra note 94.
of resources to analyze all of these statements adequately. Professor Alain Pellet has suggested that the reservations regime under the VCLT was intended to apply universally, including human rights treaties. However, as his *Second Report* states, "the establishment, by most of these treaties, of monitoring bodies influences the modalities of determination of the permissibility of reservations." In these circumstances, the view has been expressed that there is a role for the depositary to draw the attention of the international community to statements of a questionable nature. A range of divergent views have been expressed by delegates to the Sixth Committee on this issue.

It is suggested that there is a way to reconcile these seemingly disparate positions. Undoubtedly, it is the depositary who should determine which statements are to be received in deposit and circulated consistent with the law and his practice. The relevant human rights bodies could perform the role of examining and expressing a view on whether such a statement is compatible with the object and purpose of the treaty in question. Given the twelve-month

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In New Zealand’s view, the dialogue between the reserving party and the depositary is likely to be a useful process for all concerned, and would be carried out on both sides with sensitivity. We envisage that this process would in most cases resolve the issue. We would also note that the depositary already has a similar function in relation to the due and proper form of a reservation, on which it is able to make a judgement under Article 2.1.7. In addition, many foreign ministries (particularly small foreign ministries) would not have the resources to check each reservation they receive notification of for impermissibility. The high volume of treaty notifications that a State receives means that in practice these are not likely to be checked at senior levels, but if the depositary were to circulate a note which referred to the discussion it had with the reserving State about “manifest impermissibility,” it would draw the attention of the parties to that particular notification and the possible need to take a view on the reservation involved.


138 Some states have suggested that the depositary should refuse to communicate a reservation that was manifestly impermissible. See Report of the International Law Commission on the Work of Its Fifty-Fourth Session, supra note 137, at 113.
period specified in Article 20(5) of the VCLT,\textsuperscript{139} and in the case of late reservations, this task will need to be performed expeditiously. Finally, or in parallel, it will be for the state parties to determine whether they would object to such a statement being accepted in deposit.

VI. TIME FOR FORMULATING OBJECTIONS TO RESERVATIONS

Where a treaty is silent on reservations and a reservation is formulated and subsequently circulated, the states concerned have twelve months to object to the reservation, beginning on the date of the depositary notification or the date on which it expressed its consent to be bound by the treaty, whichever is later.\textsuperscript{140}

However, as discussed above,\textsuperscript{141} some states have tended to submit objections even after the twelve-month period has elapsed. In the past this may have resulted from the late receipt of the relevant depositary notification or might even have been the result of a conscious decision by the state concerned in order to avoid producing any legal consequence from its objection. Where a state submits an objection to the Secretary-General after the end of the twelve-month period, the Secretary-General circulates such objection simply as a "communication."\textsuperscript{142}

The legal effect of a reservation that has attracted a late objection which has been circulated by the depositary as a "communication" still awaits judicial analysis. Article 20(5) of the VCLT specifies a clear time limit for objections to be lodged.\textsuperscript{143} It may be suggested that where a time limit has been specified for objections to reservations by treaty or by customary international law (or in the case of late reservations, in the depositary notification advising the parties of the proposed reservation), non-compliance with such time limit is tantamount to implicit acceptance of the reservation by a non-objecting state.

\textsuperscript{139} VCLT, \textit{supra} note 5, art. 20(5), 1155 U.N.T.S. at 337.
\textsuperscript{140} TREATY HANDBOOK, \textit{supra} note 3, § 3.5.6; VCLT, \textit{supra} note 5, art. 20(b), 1155 U.N.T.S. at 337.
\textsuperscript{141} \textit{See supra} Part III.
\textsuperscript{142} SUMMARY OF PRACTICE, \textit{supra} note 4, § 213; TREATY HANDBOOK, \textit{supra} note 3, § 3.5.6. Late objections, not having a legal effect, are not registered by the depositary pursuant to Article 102 of the Charter of the United Nations and they are not published in the United Nations Treaty Series. The circulation of such late objections may assist in highlighting the concerns of the objecting state with regard to the reservation in question.
\textsuperscript{143} VCLT, \textit{supra} note 5, art. 20(5), 1155 U.N.T.S. at 337. Aust suggests that the time limit specified in Article 20(5) is not part of customary international law. AUST, \textit{supra} note 1, at 127.
Furthermore, a clear objective of VCLT Article 20(5) is to ensure certainty in treaty relations. Late objections do not contribute to achieving this objective. In the circumstances, it is suggested that late objections should not have a legal consequence but only a moral or political effect. The practice of the Secretary-General with regard to the continued circulation of late objections may also reflect the circumstances of a time when depositary notifications containing reservations (and late reservations) generally took a long time to be finalized and sent to capitals.

The Secretary-General, in his capacity as depositary, has taken the view that it is for the parties concerned to determine the legal consequences, if any, of a late objection.144

A. Late Objections to Late Reservations or Modifications to Reservations

Where no objection to a late reservation or a modification to an existing reservation has been received within the period of twelve months specified, the Secretary-General accepts the reservation or modification in deposit. In these cases the receipt of an objection in time is critical.145

B. Effect of an Objection on Entry into Force of a Treaty

An objection to a reservation "does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State."146 "Normally, to avoid uncertainty, an objecting State specifies whether its objection to the reservation precludes the entry into force of the treaty between itself and the reserving State."147 The Secretary-General, as depositary, circulates such objections.148 See, for example, the objection by Denmark on August 16, 2001, to a

144 The acceptance of late objections and their circulation by the Secretary-General may reflect the fact that in the past reservations were not always circulated in time for other states to respond to them within the stipulated time. See generally SUMMARY OF PRACTICE, supra note 4, 213.
145 See discussion infra Part III. The Secretary-General circulates late objections to late reservations or to modifications to existing reservations as "communications." The reasons for this practice have given rise to questions. See generally Report of the International Law Commission on the Work of Its Fifty-Second Session, supra note 28, at 213.
146 VCLT, supra note 5, art. 20(4)(b), 1155 U.N.T.S. at 337.
147 TREATY HANDBOOK, supra note 3, § 3.5.6.
148 Id.; see SUMMARY OF PRACTICE, supra note 4, 214.
reservation made by Saudi Arabia upon its accession to the Convention on the Elimination of All Forms of Discrimination Against Women:

The Government of Denmark has examined the reservations made by the Government of Saudi Arabia upon ratification on the Convention on the Elimination of All Forms of Discrimination Against Women as to any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law.

The Government of Denmark finds that the general reservation with reference to the provisions of Islamic law are of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservations as being incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.

The Government of Denmark therefore objects to the aforementioned reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on Elimination of All Forms of Discrimination against Women.

These objections shall not preclude the entry into force of the Convention in its entirety between Saudi Arabia and Denmark.

The Government of Denmark recommends the Government of Saudi Arabia to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination against Women.\footnote{149}

"If a State does not object to a reservation made by another State, the first State is deemed to have tacitly accepted the reservation,"\footnote{150} and the treaty applies as modified by the reservation as between those states.\footnote{151}

\footnote{149}{1 \TREATY SECTION, U.N. OFFICE OF LEGAL AFFAIRS, supra note 69; see also \TREATY HANDBOOK, supra note 3, § 3.5.6.}
\footnote{150}{Id.}
\footnote{151}{See VCLT, supra note 5, art. 21(1), 1155 U.N.T.S. at 337. \But see General Comment 24(52), supra note 117, at 17: "And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations." \Id. This idea may not necessarily be endorsed by many states.}
C. Withdrawal of Reservations

"A State may, unless the treaty provides otherwise, withdraw its reservation or objection to a reservation completely or partially at any time."\textsuperscript{152} Also, "[i]n such a case, the consent of the states concerned is not necessary for the validity of the withdrawal."\textsuperscript{153} In the practice of the Secretary-General, the withdrawal must be formulated in writing and signed by the head of state, head of government minister for foreign affairs, a person acting for the time-being for one of the above authorities, or a person having full powers for that purpose issued by one of the above authorities.\textsuperscript{154} "The Secretary-General as depositary, circulates a notification of withdrawal to all states concerned..."\textsuperscript{155}

Article 22(3)(a) of the VCLT provides that "[t]he withdrawal of a reservation becomes operative in relation to another contracting state only when notice of it has been received by that state."\textsuperscript{156} Similarly, "[t]he withdrawal of an objection to a reservation becomes operative when the notice of it has been received by the State which formulated the reservation."\textsuperscript{157} Since depositary notifications are circulated by the Secretary-General by e-mail and are posted on the Internet immediately after being processed, it could be assumed that such notifications are received by the interested states without delay. They continue to be circulated in paper format.

VII. TERRITORIAL EXCLUSIONS

A unilateral statement made upon signature, ratification, acceptance, approval, confirmation of, or accession to a treaty which purports to exclude the application of a treaty provision to any part of the territory of the declarant state would normally be considered a reservation.\textsuperscript{158} Under the VCLT, a state

\textsuperscript{152} TREATY HANDBOOK, supra note 3, § 3.5.7. Reservations are withdrawn more frequently today than in the past. See Pellet, supra note 131, at 2.

\textsuperscript{153} TREATY HANDBOOK, supra note 3, § 3.5.7; see VCLT, supra note 5, arts. 22-23, 1155 U.N.T.S. at 338.

\textsuperscript{154} TREATY HANDBOOK, supra note 3, § 3.5.7; see 1974 U.N. Jurid. Y.B. 190-191, U.N. Doc. A/5687; SUMMARY OF PRACTICE, supra note 4, ¶ 216. The Council of Europe appears to follow a different practice. See Pellet, supra note 131, at 23.

\textsuperscript{155} TREATY HANDBOOK, supra note 3, § 3.5.7.

\textsuperscript{156} VCLT, supra note 5, art. 22(3)(a), 1155 U.N.T.S. 338.

\textsuperscript{157} Id. art. 22(3)(b), 1155 U.N.T.S. at 338.

is deemed to become party to a treaty on behalf of all its territories unless a different intention appears from the treaty or is otherwise established. However, in the practice of the Secretary-General, some statements made at the relevant time, which seek to exclude certain parts of a state’s territory from the application of the treaty and which are not specifically authorized by the treaty concerned, are not considered to be reservations.

The states which tend to exclude the application of a treaty to parts of their territories in this manner, mainly from their non-metropolitan territories, are the United Kingdom, The Netherlands, Denmark, and New Zealand. The approach of these states is often explained on the basis of a domestic legal need to consult these non-metropolitan territories or to take specific measures through the legislatures of the territories prior to making a treaty applicable to them. Sometimes, it is not always possible to complete such consultations or obtain the necessary legislative approvals in time for the state concerned to undertake the relevant treaty action, particularly where there is international pressure to become party to the treaty as soon as possible. These states have relied on the view, which the Secretary-General acknowledges, that the act of not extending the application of a treaty to such non-metropolitan territories is compatible with the terms of Article 29 of the VCLT in that a treaty is

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159 Article 29 of the VCLT states, “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” VCLT, supra note 5, art. 29, 1155 U.N.T.S. at 339. Some treaties provide in their own provisions for parts of the territory of a party to be excluded from their application. Similarly, the federal clause that used to be employed in treaties dealing with commercial and trade matters permitted subunits of a state to be excluded from the application of a treaty. See SUMMARY OF PRACTICE, supra note 4, ¶ 272.

160 They are simply recorded as territorial exclusions. See generally SUMMARY OF PRACTICE, supra note 4, ¶ 273-285.

161 For example, the ratification of the Rome Statute of the International Criminal Court by New Zealand contained the following statement:

[C]onsistent with the constitutional status of Tokelau and taking into account its commitment to the development of self-government through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory.


162 See AUST, supra note 1, at 166-67.
binding on the entirety of the territory of a state unless a different intention appears from the treaty or "is otherwise established." The Secretary-General recognizes that in view of the continued practice of these states and the acquiescence of other states in this practice, these statements of territorial application should not be considered to be reservations. They are treated as cases where a different intention had been established consistent with Article 29 of the VCLT. In many instances, the states concerned have extended the application of the treaty to the affected territories at a subsequent date once the necessary domestic formalities have been completed and the depositary acknowledges such extensions. The statements which exclude the territories from the application of the treaty and any subsequent statements which extend such application to them are both circulated to concerned states by the Secretary-General without comment.

The Special Rapporteur in his Third Report suggests that this practice should belong to the category of reservations.

VIII. CONCLUSION

It is evident from the above discussion that over the years, the practice of the Secretary-General as depositary of multilateral treaties has given rise to important developments in the law and practice relating to reservations and

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163 VCLT, supra note 5, art. 29, 1155 U.N.T.S. at 339.
164 AUST, supra note 1, at 167.
165 "Today, as in the past, many territories are small (some very small), but most have internal self-government. Given their circumstances, they do not necessarily want, or need, every multilateral treaty to apply to them." Id. at 168.
166 See id. at 167.
declarations. Many such developments have been a response to the evolving needs of an international community that has expanded considerably since the establishment of the United Nations and the complexities of the wide range of multilateral treaties deposited with him. In many instances these developments have been explicitly endorsed by the international community or, at least, have received its acquiescence such as in the case of late reservations. In this respect, the quiet and non-obtrusive role played by the Secretary-General over the previous sixty years in his capacity as depositary in contributing to the development of the law and practice in this area has been very important.

However, as the above discussion further illustrates, some of these developments, especially in the area of determining the compatibility of reservations with the object and purpose of a treaty where the treaty is silent on reservations, continue to give rise to debate in the international community. This debate becomes all the more pertinent in view of the limitations confronting many of the smaller states which lack the resources to critically analyze all the reservations and declarations circulated by the depositary. Many states continue to regard any infringement by a non-state entity of their sovereign right to determine the scope of treaty relations as unacceptable.

As the law and practice in this area evolves, many factors, such as the continuing importance attached to national sovereignty by states, the rapidly changing needs of the international community, the critical new issues being highlighted by modern multilateral treaties, the increasing emphasis being placed on the rights of non-state actors such as individuals under international law, and the need for legal certainty, will all continue to influence further developments. In these circumstances, the work being done by the ILC to clarify some of these issues by encouraging further discussion and to find common ground will serve an invaluable purpose.

\footnote{169 See Austin, supra note 1, at 100.}