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## The Reservation to Treaty

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**Abstract:** In this paper we aimed at analyzing the reservation to the treaty, a theme involving issues related to one of the most important areas of public international law, namely the Law of Treaties. The reservation to the treaty is regarded as one of the most controversial issues in the international law, which has generated intense discussions and debates and it has been analyzed both by the doctrine and by the international states and organizations. We aim at interpreting and explaining the content of the articles of the 1969 Vienna Convention on the Law of Treaties on the reservation to the Treaty in order to establish the meaning and scope thereof, and at identifying the relationship between the reservation to the treaty and the states' sovereignty. We do not believe that our analysis is exhaustive regarding the reservation to the Treaty, but we have highlighted the importance of this institution relative to the conduct of relations between states respecting the principles of international law.

**Keywords:** multilateral treaties; states; treaty law; Vienna Convention 1969

### 1. Introduction

The Treaty represents today the main tool that confirms the cooperation of States within international relations, "the major route" (Anghel, 2000, p. 72) of occurrence and development of law, it makes all the other branches to be influenced, as the Law of Treaties "*is intended to regulate absolutely all relations that take place between entities that have international capacity.*" (Ploșteanu et al., 2005, p. 32)

Schwartzenberger believed that the treaty allowed the parties to solve final, actual and potential disputes, which allowed the parties to amend or supplement the customary international rules on the path of principles and standards that may lead to the transformation of international society into one that can be organized at the level of social integration. (Schwartzberger, 1967, pp. 151-152)

Article 2, paragraph 1 of the 1969 Vienna Convention<sup>4</sup> on the Law of Treaties defines international treaty as "*an agreement concluded between States in written form and governed by international law, whether recorded in a single instrument document or twice in more related instruments, whichever their particular denomination.*"

The International treaty is concluded under the essential purpose of producing legal effects, namely to create, modify or extinguish the rights and obligations towards international law involved subjects, as a result of the consent they gave to the conclusion of the Treaty. Consensual nature of the Treaty requires the existence of mutual consent of all states for the birth of conventional relationships, as an indispensable condition for its validity. In terms of number of states participating in the treaty, we

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<sup>4</sup> Vienna Convention on the Law of Treaties was opened for signature in 1969 and entered into force on January 27, 1980

distinguish bilateral and multilateral treaties. In the case of multilateral treaty, the highest the number of participating states, the more difficult is to achieve the unanimous consent of the states. As a resolution to this situation, in the practice of states, it has emerged and developed the institution of the reservation to the Treaty, considered an “important innovation in the Law of Treaties” (Ploșteanu et al., 2005, p. 193) which is designed to “allow the participation of a larger number of countries in multilateral treaties of general interest, promoting the international cooperation of states, even in situations when they disagree on the developed detailed solutions.” (Anghel, 2000, p. 587)

## 2. Definition

In the Romanian doctrine the reservation was defined as “a unilateral declaration - part of the legal act by which a State, which is intended to become a party to a multilateral treaty, falls among the Contracting Parties - Declaration recorded outside the treaty text, having as purpose to reduce, as far as the state in question is concerned, the scope of obligations being developed in principle from that treaty,” (Glaser, 1971, p. 31) “a declaration of will by which the state makes when signing or ratifying a treaty, or on the occasion of accession, thus creating with other parties, in certain aspects, other relations than those that would have been established in the absence of the reservations.” (Geamănu, 1965, p. 510)

In the specialized foreign literature the reservation to the treaty was seen as a surgical procedure by which certain provisions of the Treaty are being removed, (Droz, 1969, p. 383) a unilateral way of limiting the effects of the treaty, made by the Contracting States before its entering into force, a statement made by a State party to a treaty on which it intends to exclude a provision thereof, to alter or to ascribe a determined meaning, a provision derogation from the general rules. (Rousseau, 1944, pp. 290-291)

The purpose of formulating such statements is to reduce, for the State in question, the extent of the obligations under that treaty, (Glaser, 1971, p. 13 and the next) and the formulation of a reservation expressing the will of a state of “excluding, in its part, certain provisions of the Treaty, not accepting certain obligations under that treaty, clarifying the meaning that it intends to give to the provisions of that Treaty”. (Anghel, 2000, p. 602)

The reservation to a treaty represents, according to the 1969 Convention, Article 2 paragraph 1 letter d) a unilateral statement, whatever its content or its name, made by a State when signing or approving a treaty or accede to it, by which it expresses the intention to exclude or modify the legal effect of certain provisions of the Treaty on their application to that State.

Similarly, Law no. 590/2003 on Treaties<sup>1</sup> defines the reservation in article 1 (j) as being the unilateral declaration, whatever the content or its name, when signing, ratifying, approving, acceding or accepting a multilateral treaty, by which it expresses the intention to exclude or modify the legal effects of certain provisions of the treaty for the Romanian part, unless the treaty prohibits such reservations and they also are according to the international law; in order to produce legal effects, the reservations must be ratified or approved.

## 3. Effects Legal, Substantial and Formal Requirements

Reservations process has been the subject to “severe criticism” (Dinh, Dailler, & Pellet, 1999, p. 178); the criticisms regarded the fact that the reservations change, undermine the integrity and balance of the treaty, they fragment the regime. Even if these objections are not without truth, they are not able to tip the balance against reservations, because under the appliance of such special mechanism, it facilitates the acceptance of the Treaty by a larger number of states.

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The reservation to the treaty is made by the reservation state to exclude, as far as the state is concerned, certain provisions of a treaty, or to specify the sense that it intends to assign to certain provisions of the Treaty, or to refuse certain obligations established by that treaty, essentially to restrict the extent of its obligations under the Treaty.

For example, when joining the Convention on the recognition and enforcement of foreign arbitral sentences, adopted at New York on June 10, 1958, Romania has made the following reservations:<sup>1</sup>

- it will apply the Convention at the recognition and enforcement of judgments passed on the territory of another Contracting State.
- as for judgments passed on a territory of a non-contracting state, the Romanian People's Republic will apply the Convention only on the basis of reciprocity established by the agreement between the parties.

When depositing the instrument of ratification by the Romania of the European Convention on Nationality (adopted in Strasbourg on 6 November 1997 and entered into force on March 1<sup>st</sup>, 2000), the Law no. 396 of June 14, 2002,<sup>2</sup> Romania has made the following reservations:

1. On the application of article 6, paragraph 4, letter. e), f) and g) of the Convention: “*Romania reserves the right to grant citizenship to persons born on its territory of parents with foreign nationality and to persons residing, legally and ordinarily in its territory, including stateless persons and recognized refugees, upon request, under the conditions specified in the internal law.*”
2. On the application of article 8, paragraph 1 of the Convention: “*Romania reserves the right to allow the renunciation of its nationality, if the requesting person meets the conditions of internal law.*”
3. On the application of article 17, paragraph 1 of the Convention: “*Romanian citizens residing in Romania, who have another nationality in Romania, enjoy the same rights and same obligations as any other Romanian citizen under the Romanian Constitution.*”

This way of defining the scope of international obligations that a State wishes to take is only possible for multilateral treaties, as in the case of bilateral treaties, the agreement requires both parties to agree upon all discussed issues.

The legal status of the reservation to the Treaty has been codified in article 19-23 of the 1969 Vienna Convention. According to these regulations, the reservation to the Treaty must fulfill certain substantial and formal *requirements*.

The article 19 (a) of the Vienna Convention on the Law of Treaties provides that the reservation formulation may be possible in different phases: the moment when a Member State is signing, ratifying, accepting or approving a treaty or acceding to it. If the reservation at the moment of signing intervenes when the participants to the negotiation are in the stage of concluding the treaty, the situation is complicated for the reservation at ratification, when the negotiations' stage is completed, and it becomes extremely sensitive in terms of the reservation to ascension, as it regards a treaty which is final born between the initial contractors.

The same article 19 states that the reservation should not be prohibited by the treaty, the treaty should not provide that there may be accepted only certain reservations, among which it is not specified the reservation in question, or that the reservation is incompatible with the object and purpose of the treaty. Article 120 of the Rome Statute of the International Criminal Court in 1998 which states, for example, that: “*The current Statute does not allow any reservation*”.

The interpretation of situations listed in article 19 we notice that if at point a) it is emphasized the unity of the legal regime applicable to reservations, at point b) it represents “*the other side of the coin*” (Pellet, 2005, p. 10 and the next) and it requires the fulfillment of the following conditions:

<sup>1</sup> Decree no. 186 of 24 July 1961 Published in Official Monitor, no. 19 of 24 July 1961.

<sup>2</sup> Published in the Official Monitor, Part I, no. 490 of July 9, 2002.

- the treaty should allow the formulation of the reservations;
- the authorized reservations must be determined;
- it should be noted that only certain reservations may be made.

In this respect, the Geneva Convention of 1958, for example, enrolls in article 12, paragraph 1 the following provision:

*„At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.”*

The European Human Rights Convention governs the formulation scope of reservations in article 57:

*„1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.*

*2. Any reservation made under this Article shall contain a brief statement of the law concerned.”*

The reservations to the Treaty must be expressed in written form and communicated to the Contracting States and other countries entitled to be parties to the treaty. In this sense, article 23 of the Vienna Convention of 1969 provides in paragraph 1 that:

*“The reservation, an express acceptance of a reservation and the objection to a reservation must be expressed in written form and communicated to the contracting parties and other countries that have the capacity to become parties to the Treaty.”*

The other parties to the Treaty have the right to raise objections or to accept the communicated reservations, and the acceptance of the reservations can be made expressly or implied. Article 20 of the Vienna Convention of 1969 states that a reservation expressly authorized by a treaty *does no longer require any subsequent acceptance* by the other contracting States, unless the treaty provides it; but when from the small number of States that participated in the negotiations, and the object and purpose of the treaty it results that the appliance of the treaty in its whole between all parties is an essential requirement of the consent of each of them to be bound by the treaty, the reservation must be *accepted by all parties*.

The Convention also establishes that a reservation is considered to have been accepted by a State if it has not been raised any objection to the reservation until the expiration of twelve months from the date on which it was notified or after the expressed consent of being bound by the treaty, if it is a subsequent date.

Unless the treaty otherwise provides, a reservation may be withdrawn. Regarding the moment when a reservation may be withdrawn, article 22 of the 1969 Vienna Convention states that *“a reservation may be withdrawn at any time without requiring the consent of the State which has accepted the reservation”* and article 23 requires that the withdrawal of reservations to be made in writing. Romania became a party to the 1949 Geneva Conventions on international humanitarian law by Decree no. 183/1954.<sup>1</sup> When ratifying the four conventions, Romania has made reservations on:

- article 10 of the Convention on improving the fate of the wounded, sick and shipwrecked from the armed forces at sea, adopted in Geneva on August 12, 1949;
- article 10 of the Convention for improving the fate of the wounded and sick in armed forces in the field, adopted at Geneva on 12 August 1949;
- article 10, 12 & 85 of the relative Convention on the treatment of prisoners of war, adopted at Geneva on 12 August 1949;
- article 11 & 45 of the Convention on the protection of civilian people in time of war, adopted at Geneva on 12 August 1949.

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<sup>1</sup> Published in Official Monitor no. 25 of 21 May 1954.

Thus, in article 12, for example, it was formulated the following reservation: “Romania will not consider as valid the release of power holders, who transferred to other powers the prisoners of war, of the responsibility for implementing the Convention to these prisoners of war, while they are under the protection of the power that has agreed to receive them” and article 85: “Romania does not consider itself bound by the obligation under article 85, to extend the appliance of the Convention of prisoners of war, condemned, under the law of the entitled power in accordance with the principles of the Nuremberg trial, for war crimes committed against humanity, given that the persons convicted of these crimes must be subject to the regime established in the country in question, for those serving their sentence. “

After 1989, when the political reasons that laid on the very foundation of these reservations have disappeared, Romania withdrew its reservations to the four conventions by Law no. 277 of May 15, 2002.<sup>1</sup>

#### 4. Conclusion

The current moment of development of international relations reflects the problems of great complexity which are to be solved by the states through treaties. The content of these issues determines the achievement of the unanimous agreement of the States concerned in their regulation difficult to fulfill. The institution of the reservation contributes in encouraging the member participation in multilateral treaties, by applying to the fundamental principles of international law on state sovereignty, equality in rights of all states and the noninterference in internal affairs of a State, even if it reduces the scope of the treaty on countries that have made reservations. It is referable this solution, the opposite case leading to the unthinkable violation of states free consent on the assumed obligations. Our great diplomat, Nicolae Titulescu, in a speech in 1936 excluded the situation in a speech in 1936: “We will never give up at the sovereign right of never accepting a decision that concerns us, to which we have not consented.”

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<sup>1</sup> Published in the Official Monitor, Part I, no 368 of 31 May 2002.