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Incompatibility of Multilateral Treaty Reservations with International Environmental Law

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1 Introduction

The Vienna Convention on the Law of Treaties, Article 2(d), defines a reservation as "a unilateral statement ... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, where, it purports to exclude or modify the legal effect of certain provisions of the treaty...". A State's ability to enter into reservations to international treaties has evolved since the 19th Century to become an integral part of treat formulation. However, a State's right to submit a reservation is constrained by the relevant articles in the Vienna Convention that prohibit the deposition of reservations that run contrary to the 'object and purpose' of the treaty.

In this paper, I will look at how the idea of reservations has developed from a guiding principle, through its codification in the Vienna Convention on the Law of Treaties (VCLT), to its place in customary international law. Subsequently, I will analyse three selected international environmental treaties to see if the reservation provisions and those consequently deposited contradict the object and purpose of their respective convention, with due regard given to Article 19 of the VCLT. Finally, I propose a number of reservation mechanisms that could be used or adapted in order to minimise the negative impact that any reservation to an international environment treaty may have to its effective functioning.

2 Theory of Reservations to Multilateral Treaties

2.1 Emergence of Reservations

Reservations first became an aspect of multilateral treaties at the end of the 18th and beginning of the 19th Centuries.[1] The first occasion was by Sweden, in formulation of the Final Act of the Vienna Congress in 1815,[2] with a marked increase in State utilisation of reservations during the codification of the 1899 and 1907 Hague Convention on the Laws of War.[3] In the post-World War II era, there has been a dramatic increase, for a number of reasons,[4] in the quantity of reservations that have been deposited by contracting parties to multilateral treaties.

Mainly though decolonisation in the post-war age, but along with the collective participation of United Nation Member States, there has been a growing number of States participating in the formulation and fulfilment of treaties. This has led to a gradual egress of the unanimity rule of final treaty text adoption,[5] to a more wieldy two-thirds or clear majority approach[6] before the concluding draft of a multilateral treaty is implemented. Obviously, as the number of participating States increase, the resulting chance of realising an overall textual consensus would conversely decline.[7] As a result of increased participation, the number of submitted reservations to any given multilateral treaty increased.[8] It could be expected that the negation of unanimity in the adoption of a text would serve to stimulate the out-voted nations into producing reservations. However,

[1] Horn, F. "Reservations and Interpretative Declarations to Multilateral Treaties" 1998, North Holland. p. 7

[2] id.

[3] id. See also: Roberts, A., & Guelff, R., "Documents on the Laws of War", 3rd. Ed. Oxford

[4] The large-scale decolonisation process that took place after the Second World War has dramatically increased the number of State actors in the process of multilateral treaty formulation. Coupled with the United Nations treaty-orientated approach to international law, the number of States party to international environmental treaties, and correspondingly the number of treaty reservations, has increased.

[5] supra., note 1, at p. 9. When the number of States involved in the formulation of multilateral treaties was low, the final text of a multilateral treaty was adopted through a unanimous consensus. Such an approach could be seen to encourage the adoption of a text that took the lowest common denominator approach.

[6] supra., note 1, at p. 9-11

[7] id.

[8] id.

the fact that a State has been ruled against by a majority vote does not necessarily lead to the formation of a reservation. Conversly, unanimity does not negate the need for deposition; the Genocide Convention[9], which was unanimously adopted,[10] contains a large number of interpretative declarations[11] and reservations.

The established preference of multilateral treaties over customary international law[12] has exposed states to a degree of flexiblity in their international legal obligations[13] Reser- vations are of heightened importance to minority states in treaty deliberations[14] and also in such cases where the domestic legislative body of a treaty signatory may be unwilling or momentarily powerless to adjust their domestic legislation to complement their treaty-bound commitments.

International legal norms may be induced into generation by a number of stimuli, one of which is conflict.[15] It was disputes over the formulation of reservations that led to rules of procedure regarding their application and admissibility.[16] The United Kingdom initiated the divergence by declaring its opposition to a reservation deposited by Austria to the 1925 Opium Convention,[17]

[9] The Convention on the Prevention and Punishment of the Crime of Genocide - U.N. Doc. A/47/49. Entered into force on 12 January 1951

[10] Fitzmaurice, M., "The Practical Working of the Law of Treaties", in Evans, M., "International Law", Oxford, 2003, p. 191

[11] An interpretative declaration is a statement made by a party to a particular treaty with regard to the State's understanding as to the interpretation of a particular provision or its comprehension on a related matter. Such declarations are unable to exclude or modify the legal effect of particular treaty provisions. In this paper, I shall deal solely with reservations as they have the legal characteristics possible to modify a State's position with regard to a environmental treaties. As of 9 October 2001, there are 133 parties to the Genocide Convention, 31 of which have entered a reservation or declaration and 20 states have also submitted objections to those reservations that have been lodged. Source: United Nations Treaty Collection.

[12] Thirlway, H., "The Sources of International Law", in Evans, M., "International Law", Oxford, 2003, p. 134-136

[13] Unlike customary international law, States can chose which legal obligations they wish to be bound by through entering into mulitlateral and bilateral treaties with other States. Only persistent objecters can chose not to be bound by a particular customary international rule, but the process is far more labourious than entering reservations, or chosing not to be party to a treaty.

[14] Horn, F. "Reservations and Interpretative Declarations to Multilateral Treaties", 1988, North-Holland

[15] id.

[16] id.

[17] id.

and solicited the League of Nations to clarify the principles of reservations.[18] This subsequently led to a League of Nations resolution[19] in which the unanimity rule was confirmed, which required that all parties to a multilateral treaty declare their acceptance of the reservation in order for it to become effective.

2.2 Traditional Rule of Unanimity

As was determined in the League of Nations resolution,[20] the traditional rule of reservation admissibility has been that a reservation must be consented to by all contracting parties.[21] This was believed to bind all parties through uniformity of treaty commitments and instil treaty integrity.[22]

However, the idea of ensuring consistency and reliability within treaty-based obligations, by negating the need for reservations, rests on the principle that the final treaty text that has been adopted encompasses a balanced system of rights and obligations. The subjective element as to what equates to a 'balanced system' could easily vary between contracting parties.

The unanimity doctrine began to falter when a number of states attempted to attach reservations along with their instruments of ratification to the Genocide Convention[23] , which was opposed by a number of States, as the Convention contained no provisions regulating reservations. The General Assembly requested an Advisory Opinion from the International Court of Justice (ICJ)[24] , which subsequently created more uncertainly rather than clarity[25] , as the ICJ's ruling leaned toward a more flexible and liberal stance rather than upholding the unanimity rule:[26]

> That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the convention but not by others, can be regarded as being a party to the Convention

[18] id.
[19] id. Document C.266(2) 1927. V., LoN OJ, July 1927, pp. 800-801
[20] id.
[21] League of Nations. OJ, Special Supplement (1931) 93, at 139
[22] Jennings, R., "Oppenheim's International Law", 9th Ed., 1992, p. 1244
[23] Convention on the Prevention and Punishment of the Crime of Genocide. UNTS, No.1021, vol.78 (1951) 277
[24] General Assembly Resolution 478. Fifth session (1950)
[25] M.Bedjaoui, International Law: Achievements and Prospects (1991), para. 141-142
[26] ICJ Reports (1951) para. 29-30

> if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being party to the Convention.[27]

The International Law Commission was also drafted to address the question of reservations and further complicated the issue by disregarding the findings of the ICJ and upholding the unanimity principle.[28]

However, in the 1960's, under the direction of a new Special Rapporteur, the ILC consequently moved in favour of the ICJ's previous opinion on a more flexible reservation regime, as "the number of potential participants in multilateral treaties" (primarily due to decolonisation) "seemed to make the unanimity principle less appropriate and less practical."[29] The nexus of opinions, between the ICJ and ILC, has lead to the liberalisation in the practise of reservations to multilateral treaties.

2.3 Vienna Convention on the Law of Treaties

The eventual correlation of reservation doctrines between the ICJ and the ILC allowed the codification of the Vienna Convention on the Law of Treaties (VCLT)[30] to continue.[31] Articles 19 and 20 of the VCLT focus on the issue of reservations to multilateral treaties. As we shall see, the ascension of key provisions of the VCLT to customary international law[32] has allowed the scrutinization of the reservation traditions of environmental treaties,[33] particularly the International Convention on the Regulation of Whaling (ICRW),[34] which entered into force before the codification of the VCLT principles on the functioning of reservations.

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[27] ICJ Reports (1951), at 29-30

[28] ILC Report, A/1858 (1951) para.12-34

[29] Yearbook of the International Law Commission, Vol.II (1966) 204

[30] Vienna Convention on the Law of Treaties. Entered into force: 27 January 1980

[31] Gillespie, A., "Iceland's Reservation at the International Whaling Commission", EJIL 14 (2003) 986

[32] First Report on the Law and Practice Relating to Treaties. A/CN.4/470. 30 May 1995, para.157

[33] This is important as Article 4 of the VCLT states that 'the Convention applies only to treaties which are conducted by States after the entry into force of the present Convention with regard to such States' i.e. treaties that have been concluded after 27 January 1980. However, this rule is applied 'without prejudice' to any rules to which treaties would be subject to independently. Therefore, the customary provisions of the VCLT continue to apply to treaties that entered into force before the Vienna Convention.

[34] International Convention for the Regulation of Whaling, 161 UNTS 193. Entered into force: 2 December 1946

2.3.1 Article 19

Formulation of Reservations:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty

(b) the treaty provides that only specified reservations ... may be made

(c) in cases not falling under sub-paragraphs (a) or (b) the reservation is incompatible with the object and purpose of the treaty

The first provision in Art. 19 is quite straightforward: no reservations can be submitted by any contracting party to a treaty, insofar as the treaty stipulates that reservations are forbidden. Contemporary multilateral treaties in international environmental law tend to incorporate the prohibition of reservations:[35] the 1985 Ozone Layer Convention,[36] 1992 Climate Change Convention[37] and the 1992 Biological Diversity Convention.[38] The focus of this essay will be for those international environmental conventions that fall under the remit of paragraphs (b) and (c).[39] Such examples would encompass the ICRW, the Convention on Nuclear Safety and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[40] The reservations that such conventions may bring about will be evaluated to determine if they do contravene Art.19(c), with guidance taken from the ICJ's Genocide Opinion.[41] The ICJ ruled that the object and purpose of a treaty must be looked at on an individual basis with emphasise given to the "character ... purpose, [and] provisions"[42] of the treaty.

[35] Birnie, B. & Boyle, A., "International Law and the Environment", 2nd, Oxford, p. 15

[36] Vienna Convention on the Protection of the Ozone Layer, UNTS 1513. Entered into force: 22 September 1988

[37] United Nations Framework Convention on Climate Change, UNTS 1771. Entered into force: 21 March 1994

[38] Convention on Biological Diversity. Entered into force: 29 December 1993

[39] supra., note 30, Art.19

[40] Convention on International Trade in Endangered Species of Wild Fauna and Flora, UNTS 1052. Entered into force: 1 July 1975

[41] supra., note 23

[42] supra., note 23, para. 22 & 26

2.3.2 Article 20

Acceptance of and Objection to Reservations:

1. A reservation expressly authorised by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organisation.

4. In cases no falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

The reciprocal aspects of reservation deposition, acceptance and objection, is codified under Article 20 of the VCLT. These principles will mainly help to identify the legal issues that may arise if particular reservations are deemed incompatible with the object and purpose of the treaty.[43] The first two paragraphs of Article 20 deal with situations in which it is necessary to have acceptance by other parties to the treaty. If a reservation is accepted by another State, possibly through acquiescence, then the treaty is in force between the two States with exception to the reserved provision. However, an objection to the reservation by another party prohibits the entry into force

[43] Article 20 deals with the legal relationship that ensues between a reserving State and an accepting / objecting State.

of the treaty between those States unless the objecting State expresses a desire for the treaty to be in force. The main issue that could be raised would be the severability of consent with reservations: if a reservation to an international environmental treaty is deemed invalid, does this automatically revoke the contracting party's consent to be bound by the treaty in question?

2.3.3 Basis in Customary International Law

Toward the end of the 20th Century, when the question of reservations was re-examined by the ILC,[44] it was proposed that the provisions of the VCLT governing the admissibility of reservation now formed part of customary international law.[45] It is difficult to isolate the provisions of the VCLT that are a codification of customary international law and those that have progressively developed into binding custom. The rules of interpretation[46] and those of termination and suspension of treaties have been identified as reflecting customary international law.[47] It is believed that the rules governing reservations were already incorporated into the body of customary international law whilst the VCLT was being drafted.[48]

This suggestion is of paramount importance when looking at the admissibility of reservations to multilateral environmental treaties that were concluded before the entry into force of the VCLT in 1969. This allows us to use the principles set forth in Articles 19 and 20 of the VCLT, which would normally be deemed irrelevant due to the non-retroactive application of the VCLT,[49] when looking at the deposition of reservations such as those put forward by Iceland[50] to the International Whaling Commission (IWC) regarding its accession to the ICRW.

[44] ILC Report (1997), Ch.5, Reservations to Treaties
[45] supra., note 31,
[46] Kasikili/Sedudu Island (Botswana/Namibia), Judgement, ICJ Reports 1999, p. 1045, para. 18
[47] Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgement, ICJ Reports 1997, p. 7, para. 46
[48] supra., note 10, p. 176
[49] supra., note 30, Article 4.
[50] supra., note 31, p. 997

3 Incompatiblity with the Treaty Object and Purpose

One of the initial aspects of deciding the admissibility of a reservation is to ascertain which bodies or subjects are competent to determine the validity of any disputed reservations. If a monitoring body exists to resolve questions of interpretation and application of its respective environmental treaty, then it could be assumed that these powers extend the admissibility of reservations. However, there does not appear to be a great deal of homology with regard to the settlement of disputes arising in international environmental treaties. Methods range from submitting the dispute to arbitration, at the Permanent Court of Arbitration in The Hague[51], to resolving any difference of opinion at a meeting on the Contracting Parties[52]; from yielding to the jurisdiction of the ICJ[53], to the convention's governing body using the principle of "Kompetenz-Kompetenz"[54] to determine reservation validity without any direct contracting party influence.[55]

Nevertheless, practise shows an inclination to allow contracting parties to lodge objections to irregular reservations and the existence of any monitoring body does not negate the entitlement of unilateral action or declerations by states.[56] Each of the treaties analysed in this paper contain individual dispute provisions that reflect, along with their method of reservations, the vogue treaty styles present at the time of their respective plenipotentiaries. They were chosen due to their high participation and importance in international environmental law. More notable conventions, like the Biodiversity Convention, lack reservations that could be analysed.

[51] Convention on the International Trade of Wild Species of Flora and Fauna, Article XVIII, para. 2

[52] Convention on Nuclear Safety, Article 29

[53] Convention on the Protection of the Environment through Criminal Law, Article 19, para. 2

[54] This principle is a major part of the jurisdiction of any tribunal. It basically provides jurisdiction to determine the extent of one's own jurisdiction. Such authority does not necessarily have to be provided in the constitutive text of such bodies. The most recent example of the reinforcement of this principle is in Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, 2 October 1995, at paragraph 18. See also, Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March).

[55] supra., note 31, p. 980, 993-996

[56] Baratta, B., "Should Invalid Reservations to Human Rights Treaties be Disregarded?", EJIL 2000 11 (413) p. 415

3.1 Convention on Endangered Species

3.1.1 Structure of Reservation Clauses

Within the Convention on Endangered Species,[57] there are two routes by which contracting parties can enter into reservations. Upon amendment to species controlled under Appendices I and II of CITES, a contracting party may submit a reservation to the amendment within ninety days of its adoption. In addition, a reservation may also be submitted at any time with regard to a species controlled under Appendix III.[58] Although general reservations are not permitted[59], a State may, upon ratification, accession or acceptance to the treaty, enter into reservations with regard to any species in Appendices[60] I to III[61].

Upon the submission of a permissible reservation, which does not have to be justified by the submitting party, the State shall be treated as a non-party to the Convention with regard to the trade in the species against which it has lodged its reservation.[62] Therefore, this allows reserving States to by-pass their treaty commitments in two ways:[63] firstly, dealings between a reserving State and a non-member would not fall under the control of CITES. Secondly, trade between contracting parties that have entered identical reservations (multiple reservations), results in the same legal obligations as if it were trade between two non-parties.

Also of significant importance is a contracting party's ability to escape responsibility totally upon the upgrading or downgrading of species between Appendices I and II.[64] Within ninety days of a species' transfer to a different appendix, any contracting party may enter into a reservation

[57] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Entered into force: 1 July 1975

[58] ibid., Article. XXIII para. 1

[59] id.

[60] This follows general practise in international law, as codified in the Vienne Convention on the Law of Treaties, Article 2 para. 1(d)

[61] supra., note 57 at para. 2(a) and (b)

[62] supra., note 57 at para. 3; Article. XV para. 3

[63] Stewart, G., "Enforcement Problems in the Endangered Species Convention: Reservations Regarding the Reservation Clauses", 14 Cornell Int'l L.J 429 (1981) p. 438

[64] id., pp. 435-436

that would exclude that particular species from the State's commitments under CITES. As well as excluding the species from controls under its new appendix, it also dissolves any previous commitments that existed under the former appendix.[65] So upon a species' upgrade to Appendix I from Appendix II, in order to provide in more protection, the resulting effect may be of decreased protection if contracting parties enter into multiple reservations.[66]

At the 7th Conference of Parties (COP) meeting in Lausanne in 1989, parties consented to reassign the African elephant from Appendix II to Appendix I, in the hope of preventing its decline in the wake of evidence of elephant slaughters[67]. However, the major traders in ivory trade, notably the consumer' states and those African states which controlled the elephants' habitats, entered reservations upon the African elephants upgrade to Appendix I.[68] These reservations were perfectly legal under Article XXIII of CITES, but would they be inadmissible under the terms of the VCLT?

Any reservation submitted by a contracting party to CITES could be deemed inadmissible if it was found to contravene the object and purpose of the Convention. Even though Article XXIII specifically provide the opportunity for States to submit reservations, the customary status of VCLT dictates that such reservations cannot run contrary to the principles laid down in Art. 19 of the Vienna Convention, regardless of how the reservation is formulated. I will use the compatibility test set out by the ICJ in the Genocide Case to identify the object and purpose of CITES, by analysing the purpose, provisions and character of the treaty text.

[65] id.

[66] id.

[67] Ong, D., "The Convention on International Trade in Endangered Species (CITES, 1973): Implications of Recent Developments in International and EC Environmental Law", J. Env. Law. 1998 (10) at 297

[68] China, Hong Kong, Malawi, Namibia, South Africa, Zambia and Zimbabwe all entered reservations upon the African elephant being moved to Appendix I, with the Asian states being primarily the consumers, and the African states being the producers.

3.1.2 Compatibility Test

The most obvious textual area to begin the analysis would be with the preamblular provisions:

> recognising that wild fauna and flora ... are irreplaceable ... [and] must be protected[69]
>
> recognising that international co-operation is essential ... against over-exploitation through international trade[70]

The first paragraph of the preamble highlights a strong commitment for parties to protect wild fauna and flora, which is reinforced in paragraph four, which emphasizes the importance of co-operation between states to ensure the sustainable development of endangered flora and fauna. The purpose of the treaty could be clearly argued to be to ensure that the trade in wild flora and fauna do not threaten their survival.

However, the character of the convention appears harder to define. CITES is not an authentic international environmental treaty; it is a hybrid of a trade agreement. The fundamental principles outlined in Article II of the treaty appear to focus essentially on the trade aspects of the agreement. However, that is not to exclude them from an analysis of the treaty's character. The trading obligations, which encompass the species in Appendices I, II and III, could be indicative of the treaties character as they are the fundamental processes by which the treaty functions successfully.

Therefore, if the object and purpose of CITES could be defined as trade regulator to ensure the sustainable development of endangered species, then those reservations against protected species, particularly to those severely endangered species in Appendix I, may be declared inadmissible. The necessity for wide-spread participation has hindered any contest as to the validity of reservations in CITES.

[69] CITES preamble, para. 1 (emphasis added)
[70] CITES preamble, para. 4 (emphasis added)

3.2 Convention on Nuclear Safety

The impetus behind the establishment on multilateral environment conventions regarding nuclear safety[71] is most likely the Chernobyl disaster of 1983,[72] so it is ironic that the Ukraine should have the daring to attach a reservation to their instrument of ratification for the Convention on Nuclear Safety (CNS),[73] regarding the remnants of the disaster:[74]

> 2. The provision of Article 3 of the Convention shall not apply to the "Shelter" [75]

Therefore, the remains of the destroyed reactor at Chernobyl shall not be subject to Ukraine's legal obligations under Article 3 of the CNS:

> This Convention shall apply to the safety of nuclear installations[76].

To sum up, the Ukraine believes that the regulation of the Shelter, the remains of the nuclear installation from the worst nuclear accident in history, should not be subject to any of the principles set forth in the Convention[77]. However, the objectives of the CNS are clearly defined in Article 1(i) and (ii) and encompass the achievement and maintenance of "high level of nuclear safety

[71] As well as the Convention on Nuclear Safety, there is the Convention on the Physical Protection of Nuclear Material, Convention on Early Notification of a Nuclear Accident, Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Joint Convention on the Safety of Spent Fuel Management and on the Safety

of Radioactive Waste Management.

[72] The disaster in 1983 destroyed the 1,000MWe reactor at Chernobyl Nuclear Plant's Unit 4, leaving behind 190 tons of highly radioactive fuel. An area of 5 million acres had to permanently evacuated and 160,000 people relocated.

[73] Convention on Nuclear Safety. Entered into force: 24 October 1996

[74] See "Declarations/reservations made upon expressing consent to be bound and objections thereto" with regard to the Convention on Nuclear Safety. (http://www.iaea.org/Publications/Documents/Conventions/nukes-afety_reserv.pdf)

[75] The ensuing radioactive waste left behind after the disaster had to be contained before radiation further damaged the environment, not only in Ukraine but most of Western Europe. A 20-storey concrete and steel shelter was erected over the destroyed reactor, and was subsequently filled with sand, clay, lead and boron in an attempt to absorb some of the radiation and prevent catastrophic contamination.

[76] Convention on Nuclear Safety, Article 3

[77] By placing a reservation on Art. 3 regarding the Shelther, the Ukraine has effectively altered the legal effect that the entire convention will have with regard to the Shelter.

worldwide"[78] through "effective defences in nuclear installations".[79] Therefore, the purpose of the Convention could be defined as the promotion of global nuclear safety with specific regard to the undertakings within land-based nuclear power plants[80].

I believe that the most qualified statement of character comes once again from the preamble:

> recognising that this convention entails a commitment to the application of fundamental safety principles for nuclear installations ...[81]

Within this preamblular paragraph, there is an obvious binding obligation for contracting parties to fulfil the core safety requirements in nuclear installations under its jurisdiction.

The Ukraine's decision to exclude the Shelter from the provisions of the Nuclear Safety Convention could be argued to run contrary the object and purpose of the convention and therefore could be deemed inadmissible. The Shelter still falls clearly under the definition of a "nuclear installation" as defined by the Convention[82] and therefore should be treated as such.

[78] supra., note 73, Art. 1, para (i)

[79] supra., note 73, Art. 1, para (ii)

[80] With respect to the definition of "nuclear installations" under Article 2(i) of CNS

[81] supra., note 73, preamble, para. viii (emphasis added)

[82] Art. 2(i)

3.3 Convention on the Regulation of Whaling

In the late 1990's, Iceland suggested their re-adherence to the International Convention on the Regulation of Whaling (ICRW)[83] , after their departure in 1992,[84] conditional upon the acceptance of their reservation to Article 10(e) of the Schedule[85] attached to the ICRW[86]. Although the ICRW was concluded almost 25 years[87] before the Vienna Convention on the Law of Treaties, the present status of Art. 19 of the VCLT in international custom[88] has allowed these provisions to be utilised in the analysis of the compatibility of Iceland's reservation with the Convention on Whaling.

As there are no provisions in the ICRW regarding reservations, then it can be easily recognised that any reservations do not contravene Art. 19(a) and (b) of the Vienna Convention. Therefore, the onus falls upon paragraph (c) to dictate whether Iceland's reservation is admissible with regard to the object and purpose of the ICRW.

It would be prudent at this point to look at the exact subject of the Icelandic reservation, paragraph 10(e) of the Schedule:

> Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whales stocks and whether to consider modification of this provision and the establishment of other catch limits.[89]

This 'moratorium' was justified, as the International Whaling Commission (IWC) was at odds over the effectiveness of its management regime.[90] There was uncertainly over exact stock numbers

[83] supra., note 34
[84] supra., note 31, p. 979
[85] supra., note 31, p. 977
[86] id. Iceland was originally unsuccessful on two occasions when it attempted to rejoin the ICRW by attaching a reservation to its instrument of accession.
[87] supra., note 35
[88] supra., note 34
[89] supra., note 31, p. 990
[90] supra., note 31, p. 991

of species covered by the ICRW, along with the establishment of catch quotas, both of which were compounded by the global identification for the establishment of a moratorium.[91]

Once again with the compatibility test, the purpose and provisions of the ICRW can be identified from the preambular paragraphs. Through the interpretation of paragraph 3, it highlights that whaling should be suitably regulated; while paragraph 7 suggests that the 'whaling industry' should be developed in an orderly fashion. By developing a reservation to paragraph 10(e), Iceland would be attempting to engage in whaling that was not suitably regulated and would run contrary to the IWC's attempts to develop the whaling industry with a methodical and standardised approach.[92] One of the most identifiable aspects is the character of the ICRW; it would be possible to argue that the moratorium is the mainstay of the ICRW's.[93] Thus, by attempting to assert a reservation against paragraph 10(e), Iceland was challenging the very nature of the Whaling Convention.

Iceland's success at submitting, what I believe to be an inadmissible reservation, was met with dissent by a number of IWC member States.[94] Two approaches ensued: a number of countries that made their objections to the reservation known to the Depository still permitted the convention to come into force between Iceland and their country,[95] with the remaining opposing States refusing to accept Iceland's status as a member of the IWC.[96]

[91] id.
[92] id.
[93] supra., note 31, p. 992
[94] supra., note 31, p. 997
[95] id.
[96] id.

3.4 Legal Consequences of Invalid Reservations

If a reservation is subsequently deemed to be inadmissible, three options can be identified with regard to the reserving State's relationship with the treaty:

1. The State remains bound to the treaty, with exception to the provision against which the invalid reservation was submitted;
2. The reservation is severed from the instrument of consent, and the State is bound to the treaty as a whole;
3. The invalidity of the reservation annuls the instrument of consent and the State is no longer a party to the treaty.

The foundation of treaty formulation and obligation, consent to be bound, is indissolubly bound to a State's right to reservation deposition[97] , if the treaty so provides. Thus, if a treaty is deemed invalid, be it by a court of arbitration or by a Conference of Parties, then such a ruling will directly impact the legal status of the reserving State's consent to be legally bound by the convention. Two cases at the European Court of Human Rights (ECHR), Belilos (1988)[98] and Weber (1990),[99] have advocated that the treaty, beyond the limitations of the inadmissible reservations, should bind states that make invalid reservations. This 'Strasbourg approach' dictates that such irregular reservations are severable from consent and, as such, the reserving State is forced to comply with the treaty as a whole, bar any admissible reservations. Both the United Kingdom[100] and France[101] have made it clear that they are opposed to the concept of detaching invalid reservations from State consent.

[97] supra., note 56, p. 417

[98] Belilos Case, 132 Eur. Ct. H.R. (ser. A)(1988), reprinted in 10 Eur. Hum. Rts. Rep. 466 (1988)(treaty reservations).

[99] Weber ECHR (1990) Series A, Vol. 177

[100] supra., note 56, p. 416. 'Observations by the United States of America on General Comment No. 24 (52)'in 16 Human Rights Law Journal (1995) at 426.

[101] supra., note 56, p. 416.

A similar methodology was adopted by the UN ICCPR[102] Human Rights Committee[103]:

> 'the normal consequence of an unacceptable reservation is not that the covenant will not be in effect at all for a reserving party. Rather, 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'.[104]

Such an approach to inadmissible reservations undeniably impacts on the core principle of consent. A personal interpretation of the Vienna Convention perceives that states, which have made invalid reservations to the treaty, to be third parties with respect to the treaty and thus cannot be bound without consent. In addition, any State, which has lodged an objection to the reservation, cannot subsequently be party to a decision that enforces consent upon an unwilling State, as the treaty is not in force between the objecting and reserving states. The preamble of the VCLT interprets a third State as 'a State not a party to the treaty', which has the same legal effect as the relationship between objecting and invalidly reserving states. Subsequently, Article 34 of the VCLT prohibits the extension of the legally binding obligations and provisions of a treaty without third-State consent.

The International Law Commission has taken a cautious stance on the topic:[105]

> "in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty."

The ILC puts the onus upon the reserving State to re-evaluate the necessity of its inadmissible reservation with the view of retracting it.

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[102] United Nations International Covenant on Civil and Political Rights

[103] supra., note 56, p. 414

[104] id.

[105] First Report on the Law and Practice Relating to Reservations to Treaties. Preliminary Report, 30 May 1995, UN GA A/CN.4/470

4 Proposals to Control the Impact of Reservations

4.1 Limiting Mechanism

One of the most obvious methods of limiting the impact of over-zealous reserving states would be to limit the number of reservations that a contracting party may enter into.[106] Such an application would fall loosely under the auspices of Art.19(b) of the VCLT, if such a formulation was adopted as part of the treaty text, and not at subsequent Conference of Parties.

Putting a quantitative limit of reservations would force contracting parties to deposit reservations only with respect to aspects of the treaty that they would find most contrary to their major aims and objectives. For example, by using the limitinag mechanism, contracting parties to CITES would only make reservations to those species that hold the greatest economic value to their respective economies.[107] However, one of the main concerns is that if the limiting number is too low, it may discourage States from becoming party to the treaty.[108] I am sceptical to this line of thought as the most contemporary multilateral environmental treaties contain provisions prohibiting the use of reservations,[109] with the Convention on Biological Diversity being one such treaty but has one of the highest number of ratifications for any international environmental convention.

One author, Stewart, has set a limit of five reservations per contracting party,[110] based on previous quantitative studies into reservation deposition. However, if the number is too high, then the same problems as those found under an unlimited system are basically re-presented. One of the main drawbacks of this system of limiting reservations is of multiple reservations: if a number of contracting parties enter into the same reservation, this could potentially disable an integral aspect of an international environmental convention.

[106] supra., note 63, p. 447
[107] id.
[108] id.
[109] supra., note 33
[110] supra., note 63, p. 447

4.2 Time-Barring Mechanism

A second touted proposal would be to limit the reservation's duration,[111] as this is believed to have the potential to create incentives for reserving states to progressively develop in order to meet their legal obligations under the respective convention as a whole. In addition, industries and other areas of the economy would be give ample time in order to adapt with the intention of fulfilling subsequent treaty commitments,[112] once the reservation has become time-barred.

Although I am not a staunch proponent of the idea that the prohibition of reservations inhibits State participation in multilateral environmental treaties, I believe that quantitative and temporal restrictions juxtaposed in a single treaty could serve as a disincentive for participation. Contracting parties would use limited reservations to their maximum economic potential, but by also time-constraining such economically important reservations could be counter-productive.

The duration of the reservations' validity would have to be representative of the conventions subject matter in international environmental law. For example, the Convention on Endangered Species has a system of post-ratification reservations, where a contracting party can submit a reservation with respect to an amendment to the Appendices, the resulting duration should be relatively short. However, there would have to be a system in place to ensure that States do not resubmit an identical reservation, should the previous reservation become time-barred. Multilateral treaties that only permit the submission of reservations at the time of ratification (EXAMPLES), acceptance or accession, may find it more beneficial to offer a longer grace period before the dissolution of reservations, as re-presented reservations would be automatically prohibited. Additionally, in my opinion, it may also be prudent to uses a flexible duration method in order to accommodate the spectrum of economic and environmental needs and circumstances between developed and developing countries.

[111] supra., note 63, p. 447
[112] id.

4.3 Adaptive Reservations

I would like to propose a new model for the advancement of flexible reservation methods: a model of adaptive reservations.[113] The main element behind such reservations would be the ability for their application to be provisionally terminated on the development of a trigger stimulus. It would be useful to return to CITES at this point, which has a complex system of reservation deposition, to provide practical illustration.

If, for example, Japan's reservation to sperm whales was deposited under a system of adaptive reservations, then the operation of the reservation would be dependant on the total stock number of the species in question. If the stock number were to fall before a predefined threshold level, then the reservation would be temporarily suspended and Japan's legal commitments would revert back to those under the Convention, which would be the trade restrictions under Article I of CITES. The reservation would subsequently be 'reactivated' upon the species' stock levels returning to a sustainable level, thus releasing Japan (or other reserving party) from its legal commitments under the species' corresponding appendix, as allocated by the Conference of Parties.

I think the benefits of this model are two-fold. Such a system of reservations would induce participation as it is an adaptation of the unlimited reservation structure rather than following one of quantitative and temporal restrictions. As participation is of paramount importance in international environmental conventions, as with the majority of multilateral treaties, adaptive reservations would ensure the inducement of States to participate. Additionally, the use of an adaptive method would promote the sustainable development of species that were of respective importance to the economies of the contracting parties. Returning to the Japanese example of whaling reservations, the Japanese Government would find it in their best interests to ensure that the stock level of sperm whales did not drop below the threshold level that would suspend the reservation, thus ensuring the sustainable development of the sperm whale.

The application of such a system would be easily extendable to other environmental conventions, such as the Convention on the Conservation of Migratory Species. This is due to the unique

[113] I have not identified any literature that contains an identical or similar proposal.

structure of post-ratification reservations found in CITES and the Migratory Species Convention, but also due to their reliance on quantitative data that is vital to the progressive functioning of their respective treaty systems and in order to monitor contracting party compliance.

However, adaptive reservations may only be able to serve those environmental treaties that encompass a quantitative aspect such as emission regulation or trade in natural resources. Regulating emissions through adaptive reservations may not be as attractive as the benefits gained in the CITES example. Although it may be possible to modify adaptive reservations to include other subject areas of international environmental law, I believe it would best serve the nexus between international trade and the environment.

5 Conclusions

Although international environmental conventions are beginning to show a trend in prohibiting reservations, there are still a number of important environmental treaties that allow States to submit reservations to key provisions. The Vienna Convention on the Law of Treaties permits such reservations on the proviso that such reservations do not contradict the object and purpose of the treaty. Using the compatibility test laid out by the ICJ, it could be surmised that the extensive application of reservations in CITES could run contrary to the treaty's object and purpose. Likewise, the example reservations taken from the Nuclear Safety Convention and the Whaling Convention could be clearly argued to be inadmissible as they challenge the reservation principles laid out in the Vienna Convention.

Even those reservations that are deemed admissible may have a negative impact in the workings of the treaty. As such, a number of proposals have been made in order to lessen the impact that reservations may have on the successful functioning of an environmental treaty. These include limiting the number of reservations; constricting the duration of reservations; and an adaptive approach in which the reservation can be temporarily suspended on the occurrence of a trigger stimulus. However, as yet there is no apparent move toward varying the methods by which reservations can be submitted.