RESERVATIONS TO MULTILATERAL TREATIES*

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With the Treaty of Versailles not yet ten years old, we may hesitate at the implications of the axiom that consent is the essential element in treaties. But whatever the compulsion which drives states into the conference hall, it seems that, once there, they must be judged by their own terminology as the "High Contracting Parties." Yet mutual consent, in the legal sense, is no simple irreducible element, clearly present or not present in any given draft; it is rather a shifting elusive compound which the signatories must seek to crystallize in the written form, and which diplomats and arbitrators may later resolve in very different shape, from words which have changed not their letters but their connotation.¹ Thus the business of treaty-drafting and interpretation becomes a business of endless approximation: the clothing of the intangible in the tangible, of the inarticulate in speech.

It is believed that the practice of introducing reservations into treaties had its beginning as part of this business of approximation.² Faced with the difficulty of compromising and

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¹ It is for this reason that it is of the highest importance to maintain the rule of international law that the cardinal principle of treaty interpretation is to ascertain the meaning which the contracting parties intended to convey. To this end any pertinent data should be utilized and there should be no confinement within the narrow limits of artificial "rules of construction." The science of international law should not make more difficult the problem of expressing the agreed meaning by rendering unavailable for later use the explanations which have been made contemporaneously. "It must however be borne in mind that the final purpose of seeking the intention of the contracting States is to ascertain the sense in which terms are used. . . ."

² HYDE, *INTERNATIONAL LAW* (1922) §§ 530, 531. And the same writer further: "As the sense which contracting states have attached to the terms of their agreement is controlling in the estimation of those to whom are entrusted the duty of interpreting treaties, as all circumstances probative of that fact are admissible for the purpose of its establishment, the formation of rules of interpretation can hardly serve a useful purpose. . . ." Hyde, *Concerning the Interpretation of Treaties* (1909) 3 AM. J. INT. LAW 46. See also TSUNE-CHI YÜ, *THE INTERPRETATION OF TREATIES* (1927) 52-58; Wright, *The Interpretation of Multilateral Treaties* (1929) 23 AM. J. INT. LAW 94; Malkin, *Reservations to Multilateral Conventions* (1926) BRITISH YEAR-BOOK OF INTERNATIONAL LAW 141-162.

² Report presented by Senor Gutierrez to the Havana Conference 1928. "La antigua doctrina establece que los Tratados debían ser ratificados en conjunto o rechazados totalmente, pero en la práctica se ha visto que muchas

reconciling different points of view, negotiators have sought to enter any verbal port to escape the storm of conflicting thoughts and interests. Where agreement on the general principle had been secured, it was felt that particular deviations might well be tolerated lest the substance be lost. The argument was attractive but dangerous. It has introduced in place of the principle of unanimous consent to a single text what Hoijer calls "*un élément de trouble et d'incertitude.*"³

In the first place, so far from any safeguard existing that the reservations will be confined to the "constitutional or traditional technicalities" envisaged by Señor Gutierrez,⁴ there is an ever present danger that they may so far impinge upon the general proposals underlying the treaty as to rob that document of all reality. This seems actually to have been the case with the London Sugar Convention of 1882,⁵ which Austria-Hungary, Brazil, Belgium, France, and Sweden each signed under the proviso that the obligations were to mature contingently upon unreserved ratification by all the other powers. It followed that the treaty never came into effect, and a new treaty on the same lines was not concluded until 1902.⁶ This was the earliest case, at least of modern times, where reservations were introduced into a multilateral convention, and it constitutes an omen of the future development of the policy and a monument to what has been called "*la manie de faire des traités.*"⁷ This first unhappy example suggests that the practice of admitting reservations has done nothing to discourage man's natural passion for treaty-making, since signatories may claim the moral advantage of a treaty while obviating all burdensome obligations by a timely reservation. But where nobody is prepared to make concessions,

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veces tecnicismos constitucionales o principios tradicionales impedían aceptar determinadas estipulaciones que no eran de trascendencia para el pacto, y la costumbre estableció el uso de reservas en la ratificación, sobre cuestiones específicas y concretas. . . ." 20 DIARIO 285.

³ HOIJER, *LES TRAITÉS INTERNATIONAUX* (1928) 46.

⁴ *Supra* note 2.

⁵ 18 DE CLERCQ, *RECUEIL DES TRAITÉS DE LA FRANCE* 90-99: "The point in respect to this Convention was that the Convention must either include all the contracting states or would not be worth signing. The proviso was therefore an essential part of the treaty, and was included in the form of a reservation for drafting purposes. It therefore differs from such reservations as those to the Multilateral Convention for the Renunciation of War, since it was understood by the parties that the Treaty should not go into effect unless all the other Powers signed."

Notice the Opium Convention of 1912, which in art. 24 provides that the convention shall only come into effect after it has been approved by all the powers and the various decisions of supplementary conventions resolving to put the treaty into effect, even if all the powers do not sign it.

⁶ 22 DE CLERCQ, *op. cit. supra* note 5, at 82.

⁷ DE MIRIMONDE, *LES TRAITÉS IMPARFAITS* (1920) 151.

it is idle to talk of agreement. It is not the least of the disadvantages of reservations that they serve to hide this unfortunate fact.

The second difficulty which follows from the practice of introducing reservations is that signatories may be under a real uncertainty as to the extent of their obligations as a result of reservations made by other parties. This matter has been receiving attention of late from various international conferences,⁸ and from the consensus of juristic opinion it seems possible to collect some guiding principles.

It may, perhaps, be contended that the question is referable to the prime fact of consent. This proposition seems to be supported by the present trend of opinion. It seems that the reservation stands on the same footing as the treaty to which it is appended, and, like the treaty, it must stand or fall as consent is or is not present. It is further believed that the customary practice as to the forms such reservations should take is, in reality, simply a safeguard that this necessary element be not overlooked.

Today the matter merits immediate attention from the "reservations"⁹ which certain powers, particularly France,¹⁰ Czecho-

⁸ Projects on the question of reservations to multilateral conventions were adopted by the American Institute of International Law in 1924 and in 1925, and were submitted to the governing board of the Pan-American union in the latter year. A project was submitted to the Havana Conference of 1928 by the International Commission of Jurists, and was substantially adopted by the conference.

In addition, the Council of the League of Nations, at the instance of the British government, submitted the question to a specially constituted Committee of Experts in March 1926. The report containing the recommendations of this committee was submitted to the Council of the League in June 1927, and was then adopted. This report is quoted *infra*, p. 1111.

⁹ The popular use of this term to cover the various declarations etc. made by the signatories to the pact exceeds its strict significance as a term of art. Some attempt is made *infra* at page 1102 to delimit more exactly the nature of a reservation, as distinguished from other qualifying provisions, but it is the view of the writer that little light is thrown on the question under discussion by differences of nomenclature. "Whether the announced conditions upon which Great Britain and France were willing to sign this Pact are called 'interpretations,' 'reservations,' 'qualifications,' or what not, they express as clearly as language can express a purpose, intention, and understanding, that these countries have signed the treaty on the sole condition that their obligations under the treaty are to be interpreted and understood in the light of the declarations thus officially made and communicated." Borchard, *The Multilateral Treaty for the Renunciation of War* (1929) 23 Am. J. Int. Law 116.

¹⁰ M. Briand's note to Ambassador Herrick of July 14, 1928 reserves to France the right to make war in case of self-defence, obligations under the Covenant of the League of Nations, the Locarno Treaty, or "treaties of neutrality" and the release of obligations towards a treaty-breaking state. THE GENERAL PACT FOR THE RENUNCIATION OF WAR (Government Printing Office 1928) 43.

Slovakia,¹¹ and Great Britain¹² have expressed in correspondence upon signing the Multilateral Pact for the Renunciation of War.¹³ Russia, upon the occasion of her adhesion,¹⁴ expressly declared that she considered these "reservations" to have no binding effect upon one not a party to the correspondence. Turkey, when notifying the United States of her intention to adhere, said that she considered herself ". . . bound by the text of the proposed act exclusive of all the documents which have not been submitted as an integral part of the pact itself to the collective signatures of the participating states."¹⁵ Persia¹⁶ and Egypt¹⁷ proposed to adhere under "reservations" criticizing impliedly the substantial policy of the British "reservation."

Two questions seem to arise. One raises broadly the effect of collateral documents upon the construction of a treaty.¹⁸ The

¹¹ M. Benés in his note to Minister Einstein, on July 20, 1928, made reservations in the cases contemplated by France, and, in addition "the obligations contained in existing treaties which the Czecho-Slovak Republic has hitherto made." *Ibid.* 51.

¹² Sir Austen Chamberlain in his note to Ambassador Houghton, May 19, 1928, repeats the French reservations, with the exception of the "neutrality treaties," and continues: "There are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference in these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government, in Great Britain, accept the treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests, any disregard of which by a foreign power they have declared they would consider as an unfriendly act. His Majesty's Government believe therefore, that in defining their position they are expressing the intention and meaning of the United States' Government." *Ibid.* 26.

¹³ *Ibid.* 1; the text of the pact and of the correspondence is also given in Shotwell, *The Paris Pact* (1928) INTERNATIONAL CONCILIATION PAMPHLETS, No. 243. See also, SHOTWELL, WAR AS AN INSTRUMENT OF NATIONAL POLICY AND ITS RENUNCIATION IN THE PACT OF PARIS (1928); MILLER, THE PEACE PACT OF PARIS (1928).

¹⁴ In a note to the French ambassador at Moscow, dated August 31, 1928. The text is quoted *infra* at 1105-1106; and may be found in Shotwell, *The Paris Pact*, *supra* note 13, at 91.

¹⁵ This is stated not to exclude the American explanatory note of June 23, 1928. *Ibid.* 496. The Turkish note is dated October 31, 1928.

¹⁶ By a note dated October 4, 1928.

¹⁷ By a note dated September 4, 1928. The adhesion of Egypt is not to be construed as "implying any admission of any reserve whatever made in connection with the pact." This passage is given in the issue of the Egyptian Gazette dated September 5, 1928.

An abstract of the Turkish, Persian and Egyptian notes may be found in *The Anti-War Pact* (1928) 4 FOREIGN POLICY ASSOCIATION INFORMATION SERVICE, No. 18.

¹⁸ This aspect of the problem has received admirable treatment from Professor Quincy Wright, *op. cit. supra* note 1.

other deals more narrowly with the form in which reservations should be made and with the resulting obligations of other signatories. It is this second question which will receive present attention.

BILATERAL TREATIES

The practice of the last fifty years seems to have established the principle that a reservation may be introduced at any point in the making of a treaty. But where there are only two parties to any given treaty, it follows that the reservation must be formulated at the moment either of signature or of ratification. The first case really presents no difficulty. The reservation, however unilateral it may be in form, must necessarily have received the assent of the other signatory and is submitted as an integral part of the treaty at the exchange of ratifications.

It is with the case of reservations made by one party upon ratification that the first hint of difficulty appears. This difficulty consists in ensuring that the consent present at signature is extended to embrace all modifications present upon ratification. It seems reasonably clear that in the case of the United States and of other countries having a similar constitutional process,¹⁹ reservations often make their appearance not so much because the signatory parties themselves claim a *locus penitentiae*, but rather because the act of ratification calls into play other points of view, such as that of the Senate of the United States, which found no direct expression in the negotiation and signature.²⁰

An early example of a reservation made upon ratification occurs in the Treaty of Peace and Amity negotiated between France and the United States in 1800.²¹ The Senate on February 3, 1801 advised and consented to the treaty—

“Provided that the second article be expunged, and that the following article be added or inserted:—‘It is agreed that the present convention shall be in force for the term

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¹⁹ France, whose constitution requires the interposition of the Chambres for certain treaties only, has her special problems. These are considered in MICHON, *LES TRAITÉS INTERNATIONAUX DEVANT LES CHAMBRES* (1901); CLUNET, *DU DÉFAUT DE VALIDITÉ DE PLUSIEURS TRAITÉS DIPLOMATIQUES* (1880) 20 *et seq.*

²⁰ Report of Senor Orestes-Ferrara, Rapporteur from the Committee on Treaties to the Havana Conference 1928: “. . . En la ratificación concurren Poderes que no intervinieron en la concertación. Por lo tanto, antes de ser ratificado, el Estado puede no aceptar el Tratado concertado o introducir reservas. Ambas cosas constituyen un derecho legítimo que no infringe ningún principio de derecho internacional. . . .” 18 *DIARIO* 232.

²¹ 1 MALLOY, *TREATIES BETWEEN THE UNITED STATES AND FOREIGN POWERS* 496.

of eight years from the exchange of the present ratifications'.²²

The reservation of the Senate was accepted by the First Consul, Napoleon Bonaparte—

“With the addition importing that the convention shall be in force for the space of eight years and with the retrenchment of the second article,—*Provided* that by this retrenchment the two States renounce the respective pretensions which are the object of the said articles.”

Ratifications were exchanged at Paris on June 31st of the same year; the treaty was thereafter submitted to the Senate of the United States, which on December 10, 1801 declared the treaty to be fully ratified and returned it to the President for promulgation.

The course of these negotiations has been described at some length, because it is significant that the parties seem to have treated the reservation of the Senate as a counter-offer,²³ requiring French acceptance to complete it. And although the treaty had been formally ratified in February 1801, it appeared before the Senate again in December of the same year, with the addition of the French declaration, and this time the activity of the Senate was confined to a “declaration” that ratification was complete. By these means it was ensured that mutual consent might extend to every provision in the final agreement.²⁴ This early precedent has not gone unsupported. Estimates of the number of bilateral treaties since 1800 to which the Senate has introduced reservations vary from sixty-six to eighty-seven.²⁵

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²² Article II ran: “The ministers plenipotentiary of the two parties not being able to agree at present respecting the Treaty of Alliance of the sixth of February 1778, the Treaty of Amity and Commerce of the same date, and the Convention of the fourteenth November 1788, nor upon the indemnities mutually due or claimed, the parties will negotiate further on these subjects at a convenient time, and until they have agreed upon these points the said treaties and convention shall have no operation, and the relations of the two countries shall be regulated as follows. . . .”

²³ This is the theory of reservations adopted in 2 HYDE, *op. cit. supra* note 1, at § 519.

²⁴ When the extreme anxiety of the young republic to obtain diplomatic countenance from Europe by means of these treaties is borne in mind, the interposition of the Senate obtains an added significance, showing a determination that no political considerations should be allowed to hamper that part in treaty-making assured to that body by the Constitution. The function of the Senate is considered in BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* (1902); also, CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* (2d ed. 1916).

²⁵ The former figure given by Washburn, *Treaty Amendments and Reservations* (1920) 5 CORN. L. Q. 247. MILLER, *RESERVATIONS TO TREATIES* (1919) considers a selective group of treaties only. It may be said that there is a very general disagreement among the authorities. Eighty-seven

It has been the custom of the Senate of late years, when inserting reservations into bilateral treaties, to ensure that the other signatory shall be committed by express consent to the proposed reservations. This is no longer done by continued exchange and re-exchange of the entire treaty, as in the Franco-American Treaty of 1800 referred to above; instead, the Senate commonly requires that there shall be an exchange of notes to ascertain whether the proposed reservations will be acceptable to the other signatory. One might cite as an example the North Atlantic Fisheries Arbitration Convention of 1909 between Great Britain and the United States,²⁶ where the Senate advised ratification, "subject to its understanding" that question five of the *compromis* was not to extend to the Bay of Fundy, nor to prejudice either party's rights therein. This "understanding" was communicated to the British ambassador by Secretary of State Bacon, who expressed the hope that the former would

"... in like manner formally confirm the assent of His Majesty's Government to this understanding . . . and that you will be prepared at an early date to exchange the notes confirming the Special Agreement as provided for therein."

Again, the Senate's ratification of the treaty of 1916²⁷ with Denmark by which the Danish West Indies were purchased by the United States appeared in the following form:

"... The Senate . . . advises and consents on condition that the attitude of the United States in this matter, as set forth in the above proviso, be made the subject of an exchange of notes between the Governments of the two High Contracting Parties; and so as to make it plain that this condition is understood and accepted by the two Governments. . ."

The ratification of the Military Service Convention between the United States and Great Britain of 1918²⁸ provided that the interpretation of Article 1 should be fixed by an exchange of notes.

It may be mentioned that this practice on the part of the United States has occasionally been used to introduce modifica-

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bilateral treaties to which reservations were attached by the American Senate, and which were thereafter ratified, are noted in the appendix to (1928) 4 FOREIGN POLICY ASSOCIATION INFORMATION SERVICE, No. 16. This appendix is stated to be based upon lists prepared by Dr. W. Stull Holt, from the "Executive Journals" (up to 1901 only); by Dr. C. C. Tansill, in (1924) 18 AM. J. INT. LAW; by Senator Henry Cabot Lodge in Scribner's Magazine for January 1902. The compilers of the appendix deprecate any claim that their list is complete, as some treaties entered into since 1901 are subject to an injunction of secrecy.

²⁶ 1 MALLOY, *op. cit. supra* note 21, at 835.

²⁷ 3 *ibid.* 2558-2563.

²⁸ *Ibid.* 2650-2653.

tions desired by the other party after its ratification has been completed. This happened in the case of a treaty between the United States and New Granada in 1857,²⁹ in which the Senate introduced amendments "Agreeably to the modifications approved by the Granadan Confederacy. . ."

The latest example of language worthy of note is Secretary Kellogg's note to Ambassador Von Maltzan, communicating the Senate's reservation to the Treaty of Commerce between the United States and Germany³⁰ of March 19, 1925:

" . . . I shall be glad if when bringing the foregoing to the attention of your government, you will inform it that it is the hope of this government that your government will find acceptable the reservations and understandings which the Senate has made a condition of its advice and consent to the ratification of the treaty. You may regard this note as sufficient acceptance by the United States of these reservations and understandings. An acknowledgment of this note on the occasion of the exchange of ratifications accepting, by direction and on behalf of your government, the said reservations and understandings will be considered as completing the required exchange of notes and acceptance by both governments of the reservations and understandings. . . ." ³¹

In accordance with the American suggestion, Ambassador Von Maltzan on May 21, 1925 signified by note the decision of the German government to accept the reservations introduced by the Senate resolution, "notwithstanding serious fundamental objections."³² It is probable that the practice outlined above secures mutual consent to the final draft with the minimum of formality.³³

From these examples it seems reasonably clear that neither party has doubted the right of the other to introduce reserva-

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²⁹ *Ibid.* 210.

³⁰ U. S. TREATY SERIES (1925) No. 725.

³¹ *Ibid.* 32.

³² *Ibid.* 33.

³³ An attempt to extend the practice to multilateral treaties has not however met with success. By his note of March 2, 1926 to the Secretariat of the League of Nations, Secretary Kellogg communicated the Senate's resolution of adherence to the World Court protocol under reservations, and requested that the acceptance of the reservations by the signatories of the protocol might be made by an exchange of notes. (1926) 7 LEAGUE OF NATIONS OFFICIAL JOURNAL 628-629. Sir Austen Chamberlain, speaking at the 39th Session of the Council of the League of Nations on March 17, 1926, said: "It is not usual that rights established by an instrument which has been ratified should be varied by a mere exchange of notes."

The United States remained firm. In his reply, dated April 9, 1926, to the invitation to the United States to attend the Geneva session of the Council of the League to consider the Senate's resolution, Secretary Kellogg said: "These reservations are plain and unequivocal and, according to their

tions at the time of ratification: the only restriction upon this liberty is that the other signatory shall consent to such reservations.

MULTILATERAL TREATIES

It may be well in passing to inquire what is the nature of the relation created by a multilateral treaty, for upon this question depends the effect of the reservations upon the obligations of other signatories. Can we say that there is but one many-sided obligation created as a result of the agreements?³⁴ In this case, a qualification in the consent of any signatory, whether made by reservations or other means, if acquiesced in by the other signatories, would modify the relations *inter se* of all parties to the treaty; on the other hand, if this consent were absent, there would be no meeting of the minds, and therefore no obligation under the proposed treaty at all.

General practice seems to show that neither the premise nor the conclusion can be adopted. It is accepted that the introduction of a reservation by state *A* upon ratification of a treaty cannot by any means affect the relations existing between states *B* and *C*, who are prior signatories.³⁵ The operation of *A*'s reservation will affect only the relations of *B* and *C* with itself.

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terms, they must be accepted by the exchange of notes between the United States and each one of the forty-eight States signatory to the Statute of the Permanent Court of International Justice before the United States can become a party and sign the Protocol. The resolution specifically provided this mode of procedure." Text in (1926) 20 AM. J. INT. LAW 554. Owing to the rejection by the signatories to the protocol of the Senate's reservations, the matter was dropped.

³⁴ The analogy of private law is not of great assistance, as it is difficult to collect a general principle from the rules framed to meet particular circumstances. Those who incline to the "single obligation" theory may find some support in the Roman concept of correalty. SOHM, INSTITUTES (1901) § 74: "A correal obligation is a plurality of obligations, where there is, economically speaking, only one obligation. And the correal obligation of Roman Law is one not only economically, but also legally, in virtue of the fact that legally speaking, the plurality of the obligations constitutes one common obligation of the several parties concerned . . . Hence the Romans described a correal obligation as *una obligatio (communis obligatio)* and the parties to a correal obligation as persons who *unius loco habentur (eiusdem obligationis participes, eiusdem obligationis socii)*." Buckland, however, takes the view that the significance of the concept is adjective only and that this metaphysical "*communis obligatio*" implies only peculiar methods of discharge. BUCKLAND, TEXT-BOOK OF ROMAN LAW (1921) 450.

³⁵ This relation is an existing fact at the moment of the formulation of the reservation by the later state. An alteration in such relation with the consent of *B* and *C* constitutes in reality a case of the novation of an earlier agreement by the adoption of a new one.

This proposition is supported by Article VI of the Convention on Treaties adopted by the Havana Conference of 1928:³⁶

"... In international treaties celebrated between different states, a reservation made by one of them in the act of ratification affects only the application of the clause in question in relations of the other contracting parties with the state making the reservation. . . ."

The delegates of the United States commented upon this clause:³⁷

"This is an express acceptance of the theory and practice of the United States. . . ."

On the whole it seems that there are less difficulties inherent in the theory which sees in the multilateral treaty an aggregate of bilateral obligations, although it must be recognised that the phraseology or purpose of a particular multilateral treaty may compel a different conclusion. Such a theory provides a better rationale for the axiom that the relations of state *A* with states *B* and *C* under the reservation depend upon the consent of states *B* and *C*, who may refuse to accede to the reservation in question and thus preclude state *A* from all participation in the treaty.³⁸

But as soon as the necessity for the consent of other signatories is openly accepted, the problem of reservations shifts,

³⁶ The English text seems unfortunately ambiguous. The Spanish text is as follows: "En los tratados internacionales celebrados entre diversos estados, la reserva hecha por unos de ellos en el acto de la ratificación, solo afecta a la aplicación de la cláusula respectiva en las relaciones de los demás estados contratantes con el estado que hace la reserva. . . ." Complete texts may be found in REPORT OF THE DELEGATES FROM THE UNITED STATES TO THE SIXTH INTERNATIONAL CONFERENCE OF AMERICAN STATES (Government Printing Office 1928); also in (1928) 22 AM. J. INT. LAW (Supp.) 138-142.

³⁷ *Ibid.*

³⁸ Senator Lodge, in a conference held by President Wilson with the Senate Committee on Foreign Relations, said: "Mr. President . . . I take it there is no question whatever under International Law and practice, that an amendment to the text of a treaty must be submitted to every signatory and must receive either their assent or dissent. . . ." The Senator then went on to suggest a difference between such an "amendment" and a reservation. Full text may be found in SEN. DOC. No. 106, 66th Cong. 1st Sess. at 509. Sir Austen Chamberlain, in the course of the debate in the Council of the League of Nations on the report from the Committee of Experts to whom the question of the admissibility of reservations to multilateral conventions had been submitted, said: "They were all agreed . . . that a reservation must be accepted by the parties to the convention, and, unless it were so accepted, an adherence accompanied by the reservation had not the effect of an adherence. . . ." (1927) 7 LEAGUE OF NATIONS OFFICIAL JOURNAL 770. This proposition received general endorsement in Article VI of the Convention on Treaties adopted by the Havana Conference, 1928. *Supra* note 36.

becoming formal in nature, and envisaging only the means by which the fact of consent is to be established. These means will be found to vary according to the chronological moment in the formulation of the treaty when the reservation is put forward. Where the reservation is made upon signature, no special formality seems to be necessary.

Between the London Sugar Convention of 1882³⁹ and the Brussels Convention upon Maritime Collisions and Salvage of 1910,⁴⁰ there were at least twenty-two multilateral treaties to which reservations were attached upon signature.⁴¹ Since that

³⁹ DE CLERCQ, *loc. cit. supra* note 5.

⁴⁰ DE MARTENS, NOUVEAU RECUEIL GENERAL DES TRAITES (3d Series) vol. 7, p. 711.

⁴¹ The full list is as follows:

Date	Title	Reference	Reservations by:
1882	London Sugar Convention	18 DE CLERCQ, <i>op. cit. supra</i> note 39, at 90-99	Austria-Hungary, Brazil, Belgium, Denmark, France
1885	Convention for Egyptian loan	14 <i>ibid.</i> 488	Russia
1885	Convention for protection of artistic property	17 <i>ibid.</i> 264	Belgium
1891	Madrid Industrial Convention	2 MALLOY, <i>op. cit. supra</i> note 21, at 1943	United States
1892	Sanitary Convention for Suez Canal	19 DE MARTENS (2d series) <i>op. cit. supra</i> note 40, at 260.	Germany, Holland
1893	Dresden Sanitary Convention	<i>Ibid.</i> 3	Great Britain
1899	Convention I of Hague Peace Conference	2 MALLOY, <i>op. cit. supra</i> note 21, at 2016	Rumania, Serbia, Turkey, United States
1899	Convention III	<i>Ibid.</i> 2035	Germany, Great Britain, Turkey, United States
1906	Geneva Red Cross Convention	<i>Ibid.</i> 2183	China, Great Britain, Japan, Korea
1906	Brussels Medical Convention	<i>Ibid.</i> 2209	Austria-Hungary, Germany, Great Britain, Portugal, Sweden, United States
1906	Berne Industrial Convention	23 DE CLERCQ, <i>op. cit. supra</i> note 39, at 806	Denmark
1907	Convention I of Hague Peace Conference	2 MALLOY, <i>op. cit. supra</i> note 21, at 2220	Brazil, Chile, Greece, Japan, Rumania, Switzerland, Turkey, United States
1907	Convention II	<i>Ibid.</i> 2248	Argentina, Peru, Salvador, Uruguay

date, it has become more common to formulate reservations upon ratification, and reservations upon signature have been made, so far as the writer is aware, upon five occasions only:

- (1920) Berne Convention for Protection of Industrial Property.⁴²
- (1923) Protocol upon Arbitration Clauses.⁴³
- (1924) Convention for the Suppression of Obscene Publications.⁴⁴
- (1926) Sanitary Convention.⁴⁵
- (1929) Pan-American Arbitration Convention.⁴⁶

In all these cases, equally with the case of bilateral treaties, a ratification automatically embraces the reservations made at the time of signature;⁴⁷ so little difficulty is found in collecting the fact of consent from the fact of ratification.

1907	Convention IV	<i>Ibid.</i> 2269	Austria-Hungary, Germany, Japan, Montenegro, Russia, Turkey
1907	Convention V	<i>Ibid.</i> 2290	Argentina, France
1907	Convention VI	SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS (1915) 230	Germany, Russia
1907	Convention VII	<i>Ibid.</i>	Turkey
1907	Convention VIII	2 MALLOY, <i>op. cit. supra</i> note 21, at 2304	Dominica, France, Germany, Great Britain, Siam, Turkey
1907	Convention IX	<i>Ibid.</i> 2314	Chile, France, Germany, Great Britain, Japan
1907	Convention X	<i>Ibid.</i> 2326	China, Great Britain, Persia, Turkey
1907	Convention XIII	<i>Ibid.</i> 2352	Dominica, Germany, Great Britain, Japan, Persia, Siam, Turkey
1910	White Slave Traffic Convention	7 DE MARTENS, <i>op. cit. supra</i> note 40, at 252	Brazil, Germany
1910	Brussels Convention upon maritime collisions	<i>Ibid.</i> 711	Denmark, Germany, Great Britain, Holland, Italy, Portugal, United States

⁴² 12 DE MARTENS, *op. cit. supra* note 40, at 596.

⁴³ 27 LEAGUE OF NATIONS TREATY SERIES (1924) 158.

⁴⁴ *Ibid.* 215.

⁴⁵ U. S. TREATY SERIES (U. S. 1928) No. 762.

⁴⁶ The reservations may be found in (1929) 23 AM. J. INT. LAW (Supp.) 85-88.

⁴⁷ It seems that the reservation may be attached at signature in almost any form. At the London Sugar Conference of 1882 (see *supra* note 5) the Belgian representative asked to have the Belgian reservation formulated in the protocol of signature. The chairman, M. le Baron de Worms, declared this precaution to be unnecessary. "La mention des réserves de la

Great Britain's reservations to the Geneva Convention of 1906⁴⁸ were the occasion for the expression of a curious view in the *Deutsches Reichs Gesetzblatt* of 1907,⁴⁹ where it was argued that the subsequent ratification of the Convention by Great Britain nullified the reservations she had formulated upon signature. If this view were to be generally adopted, it would seem to follow that all signatories would postpone all reservations until the date of ratification, whence there would be more confusion. The suggestion seems to lack support both in theory and in practice. It has been severely criticized by M. de Mirimonde.⁵⁰

The earliest case in modern times of a reservation to a multilateral treaty made at the moment of ratification seems to be that of the Anti-Slavery Agreement of Brussels of 1890,⁵¹ in which France reserved the operation of certain clauses with the consent of the other signatory powers.⁵² Since 1890 there have been at least fifteen such treaties, of which nine were signed after 1910.⁵³ It will be seen that the practice is of recent growth.

Belgique dans le procès-verbal de la précédente séance a absolument la même valeur qui si elle était faite dans le protocol. . . ." DE CLERCQ, *op. cit. supra* note 5, at 91. Procès-Verbal of the 26th Session of the Conference.

⁴⁸ 2 DE MARTENS, *op. cit. supra* note 40, at 323.

⁴⁹ Issue number 25; 2 DE MARTENS, *op. cit. supra* note 40, at 323.

⁵⁰ DE MIRIMONDE, *op. cit. supra* note 7, at 42.

⁵¹ 2 MALLOY, *op. cit. supra* note 21, at 1964; also 18 DE CLERCQ, X, *op. cit. supra* note 5, at 496-549.

⁵² The protocol of the deposit of ratifications contains the following note: "Les représentants des Puissances donnent acte à M. le Ministre de France du dépôt des ratifications du Président de la République Française, ainsi que de l'exception portant sur les articles 21, 22 et 23 et sur les articles 42 à 61." *Ibid.* 543.

⁵³ The full list is as follows:

Date	Title	Reference	Reservations by:
1890—	Brussels Anti-Slavery Agreement	2 MALLOY, <i>op. cit. supra</i> note 21, at 1964	France, United States
1903	Sanitary Convention	<i>Ibid.</i> 2066	Great Britain, Persia, United States
1907	Convention II of 2d Hague Peace Conference	<i>Ibid.</i> 2248	Nicaragua, United States
1906	Algeciras Convention	<i>Ibid.</i> 2157	United States
1907	Convention XIII of 2d Hague Peace Conference	<i>Ibid.</i> 2352	China, United States
1910	Copyright Convention	8 DE MARTENS, <i>op. cit. supra</i> note 40, at 760	France, Japan, Norway

The difficulties to which it gives rise are of a practical nature, flowing from the custom by which ratifications are frequently not exchanged simultaneously at a special meeting of the plenipotentiaries, but are deposited with one of the signatories at varying dates.⁵⁴

Before going further, it may be well to say that the problem of ensuring the presence of consent seems to center round the fact of chronology, as it is this question of the time when the final consent is given which causes modern difficulties. For the present purposes, then, it seems to matter very little whether the reservation is formulated upon the ratification of a signatory or upon the accession of a non-signatory.⁵⁵ The essential fact

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1911	Washington convention for protection of industrial property	3 MALLOY, <i>op. cit. supra</i> note 21, at 2953	Great Britain
1912	Radio-Telegraph Convention	<i>Ibid.</i> 3048	United States
1912	Sanitary Convention	<i>Ibid.</i> 2972	United States
1921	Convention for suppression of traffic in women and children	35 LEAGUE OF NATIONS TREATY SERIES 300	Iraq, Japan
1921	Four-Power Treaty on Pacific Relations	3 MALLOY, <i>op. cit. supra</i> note 21, at 3093	United States
1922	Supplementary Agreement	<i>Ibid.</i> 3098	United States
1923	Trademark Convention	TREATY SERIES (U. S.) No. 751	United States
1925	Opium Convention	51 LEAGUE OF NATIONS TREATY SERIES, 338	Austria
1926	Sanitary Convention	TREATY SERIES (U. S.) No. 762	Spain, United States

⁵⁴ The older practice was followed in the "Four-Power Treaty" of Washington on Near-Pacific Relations, 1921. 3 MALLOY, *op. cit. supra* note 21, at 3093. The following reservation made by the United States at the time of the deposit of ratifications was recorded in the proces-verbal: "The United States understands that under the statement in the preamble or under the terms of this treaty there is no commitment to armed force, no alliance, no obligation to join in any defence." This example is quoted to show the ease with which under the older procedure consent might be imputed from the fact that all parties had the proposed reservation brought to their attention, at the time.

⁵⁵ An example of an accession under reservation which does not seem to have provoked comment is that of Iraq to the White Slave Traffic Convention of 1910. See 35 LEAGUE OF NATIONS TREATY SERIES (1925) 334. Iraq reserved the right to fix a lower age-limit than that contemplated in the treaty. The Secretary-General on May 6, 1927 called attention in a

is that it should appear at some point after one party has put the final symbol of his approval upon the treaty.

The question is presented something like this: suppose state *K* ratifies with a reservation—how does this affect state *Z* which has not yet ratified, or state *A* which has already ratified? If a concrete example be preferred, reference may be made to the various reservations made to Convention II of the Hague Peace Conference of 1907.⁵⁶

Considering first the case of the hypothetical state *Z*, there seems to be little difficulty. The United States ratified Convention II with a reservation on November 27, 1909.⁵⁷ France ratified unconditionally on October 7, 1910. Since it is plain that France might, if she had so chosen, have objected to the reservation and so refused to deal with the United States as a party to the treaty, it seems that by ratifying with notice and without protest the reservation is embraced in the ratification.

Nicaragua declared her adhesion to this same convention on December 16, 1909, with a reservation.⁵⁸ Could an earlier signa-

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note to the growing practice of acceding to general conventions with reservations. He put the number of such accessions, as for April 1927, at twenty-one. On February 18, 1927 the Swiss Federal Government in a communication to the Secretary-General announcing the accession of Bolivia, with a reservation, to the Opium Convention of 1925, raised the question: "It would, however, be of interest to us to be exactly informed as to the practical consequences of the step taken by the Bolivian Government. We do not in fact know any precedent for a State's acceding, subject to ratification, to a general convention and we do not perfectly understand the legal effect which should be attributed to an accession given in this manner." In view of the twenty-one accessions subject to reservations noted by the Secretary-General, there is interest in the following opinion attributed to the State Department by the New York Times of October 10, 1928, on the occasion of Hungary's notification of her intention to adhere to the Multilateral Pact for the Renunciation of War: "While comment was withheld at the State Department, it was pointed out that no conditions are possible in a document of adhesion; either a government adheres or it does not."

⁵⁶ SCOTT, *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907* (1915).

⁵⁷ The reservation of the United States ran as follows: "The United States approves this Convention with the understanding that recourse to the Permanent Court for the settlement of differences referred in the said Convention can be had only by agreement thereto through general or specific treaties of arbitration heretofore or hereafter concluded between the parties in dispute."

⁵⁸ Nicaragua's reservation ran as follows: "With regard to debts arising from ordinary contracts between the citizen or subject of a nation and a foreign government, recourse shall be had to arbitration only in the specific case of a denial of justice by the courts of the country where the contract was made, the remedies before which courts must first have been exhausted."

tory, such as the United States or Great Britain, who ratified unconditionally on November 27, 1909, have opposed this adhesion? It seems that they might have done so had they so chosen. The reservation does not, of course, increase the extent of their obligations under the treaty, but it may well leave them with a more limited field of rights against the later signatory than they had anticipated at the moment of their ratifications. They may argue, in fact, that the treaty with the addition of the reservation is no longer the treaty which they ratified, and this even though the addition may be unilateral in scope. On these grounds it seems that Great Britain or the United States—types of the hypothetical state A—might have been justified in insisting that the objectionable proviso be deleted, or, failing this, in refusing to recognize Nicaragua as a party to the treaty.⁵⁹

From this one may proceed to inquire whether anything short of an affirmative protest will be effective, and whether in the absence of such a protest, consent will be implied from silence and construed against the earlier signatory. The question thus shifts once more from the substantive to the adjective ground. The Havana Conference of 1928, in Article VI of the Convention on Treaties,⁶⁰ uses language which appears to be inconclusive:

“ . . . In case the ratifying State makes reservations to the treaty, it shall become effective when the other contracting party informed of the reservations either expressly accepts them, or having failed to reject them formally should perform actions implying its acceptance.”

Practice shows that in very many cases signatories, once they have deposited their own ratifications, are not accustomed to take an actively affirmative or protesting part in the ratifica-

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“Public loans secured by bond issues and constituting the national debt shall in no case give rise to military aggression or the material occupation of the soil of American nations.”

⁵⁹ This possibility is implicit in the report of Senor Gutierrez to the Havana Conference. “Si éstas (reservas) son aceptadas por los demás contratantes, no hay ningún inconveniente. . . . Si las reservas en la ratificación no son aceptadas, la ratificación se tiene por no hecha y el Tratado no se perfecciona en cuanto a ese país. . . .” 20 DIARIO 285. It is also endorsed by the Committee of Experts appointed by the League of Nations in March 1926 to study the question of the admissibility of reservations to general conventions.” In order that any reservation whatever may validly be made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of negotiations. If not, the reservation, like the signature to which it is attached, is null and void. . . .” LEAGUE OF NATIONS DOCUMENTS (1927) C. 357. M. 130. V.

⁶⁰ See *supra* note 35.

tions of others. On the whole, it seems to be the sense of the Article VI that a passive attitude implies acceptance; the first alternative does indeed speak of an "express" acceptance, but it seems that in the absence of an open disavowal of the treaty, almost anything might be construed as "actions implying its acceptance." So, likewise, the report of the Committee of the League of Nations, while emphatic upon the substantive fact of consent, is silent as to the procedure by which this consent is to be ascertained.⁶¹

It may have been a sense of the possible inconveniences of this rule which led President Wilson in 1919 to express a contrary view in conversation with the Senate Committee on Foreign Relations.⁶² At this same interview, Senator Lodge clearly believed express consent to be unnecessary:

"I had supposed it had been the general diplomatic practice with regard to reservations—which apply only to the reserving Power and not to all the signatories, of course—that with regard to reservations it had been the general practice that silence was regarded as acceptance and acquiescence. . . ."

On the whole one may perhaps be justified in concluding that it is the view of Senator Lodge which was endorsed by the Havana Conference.

Some authorities have offered a middle way, suggesting that there may be a difference in the degree of consent required to make effective a reservation, properly so-called, and an interpretative declaration.⁶³ The distinction would proceed on the theory that a reservation imported some alteration in the effect of the text of a treaty, corresponding to the "textual amendment" contemplated by Senator Lodge,⁶⁴ whereas a declaration was not intended to modify the operation of the treaty, but merely to state explicitly the signatory's understanding of its terms. There may have been some such thought in the mind of Secretary Hughes, when he wrote the following letter to Senator Hale, dated July 24, 1919:

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⁶¹ See *supra* note 58.

⁶² For reference, see *supra* note 37. Senator Williams: "Mr. President, suppose that for example we adopted a reservation . . . and that Germany did nothing about it at all, and afterwards contended that so far as she was concerned, it was new matter to which she was never a party; could her position be justifiably disputed?" The President: "No."

⁶³ The authority of Professor C. C. Hyde was claimed for this view at the Paris meeting, 1924, of the American Institute of International Law, quotation being made from his work. 2 HYDE, INTERNATIONAL LAW (1922) § 519.

⁶⁴ See *supra* note 37.

"... If a reservation as a part of the ratification makes a material addition to or substantial change in the proposed treaty, other parties will not be bound unless they assent. . . . But where there is simply a statement of the interpretation placed by the ratifying State upon ambiguous clauses in the treaty, whether or not the statement is called a reservation, the case is really not one of amendment, and acquiescence of the other parties to the treaty may be readily inferred unless express objection is made after notice has been received of the ratification with the interpretative statement forming a part of it. . . ."

Examples of such declarations would presumably be the declaration annexed by the United States to the Algeciras Convention of 1906,⁶⁵ to the Brussels Anti-Slavery Agreement of 1890,⁶⁶ to the Radio-Telegraphic Convention of 1912,⁶⁷ and to the Washington Treaty of 1922.⁶⁸

The suggested distinction was recently appealed to in the debate in the Senate upon the Multilateral Treaty.⁶⁹ Senator Robinson remarked that he considered the report from the Committee on Foreign Relations to constitute something "in the nature of a reservation, but not such a reservation as would necessarily need to be submitted to the other signatories." It seems here that confused nomenclature is obscuring principles clear in themselves, for without the consent of the other signatories, the declaration of one party can never amount to more than a unilateral expression of opinion. This was stated rather conservatively by Professor P. M. Brown in a letter to Senator Bingham: "An interpretative resolution . . . would have only an attenuated legal significance unless expressly conveyed to

⁶⁵ 2 MALLOY, *op. cit. supra* note 21, at 2157. The resolution of the Senate ran: ". . . without purpose to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope."

⁶⁶ *Ibid.* 1964. "That the United States of America having neither possessions nor protectorates in Africa, hereby disclaims any intention, in ratifying this treaty, to indicate any interest whatsoever in the possession of protectorates established or claimed on that continent by the other Powers, or any approval of the wisdom, expediency or lawfulness thereof, and does not join in any expressions in the said General Act which might be construed as such a declaration or acknowledgment."

⁶⁷ 3 *ibid.* 3048. "The delegation of the United States declares that its government is under the necessity of abstaining from all action in regard to rates, because the transmission of radiograms as well of ordinary telegrams in the United States is carried on, wholly or in part by commercial or private companies."

⁶⁸ *Ibid.* 3094. "The United States understands that under the statement in the preamble or under the terms of this treaty there is no commitment to armed force, no alliance, no obligation to join in any defense." See *supra* note 53.

⁶⁹ 70 CONG. REC. 1713-1715 (1929), from which the following material, including the correspondence, is taken.

other signatories. . ." and, we may add, unless accepted by them at least by implication.

In the course of this same debate, Senator Bingham read a letter from Professor Borchard which crystallizes the distinction between a "reservation" which is intended to modify the final relationship, and which must therefore receive the consent "at least by silent acquiescence" of all parties to that relationship, and an "interpretative resolution" which may be unilateral but can have no wider operation than to dispel, within the field of morality, a possible future charge of bad faith. The letter runs:

" . . . A reservation is the most formal method in which the Senate could express an exception to or interpretation of the treaty. It becomes in effect a counter-offer, must necessarily be communicated to the foreign government before or at the time of ratification, and usually, though not always, requires express assent from the other party signatory. . . ."

An interpretative resolution, on the other hand,

" . . . would not, unless specifically so stated by the Senate, necessarily be communicated to foreign governments by the Secretary of State, and would, therefore, unless so communicated, be merely a unilateral expression by the Senate of its understandings of the obligations the United States was undertaking.

"In that event the resolution would have no legal effect, I believe, as a limitation of the obligations of the United States."

Great weight was given to this correspondence in the Senate. The suggested argument that there can be a reservation made independently of the consent of other signatories is scarcely tenable. Once the necessity for such consent is conceded, it seems that the distinction suggested above by Secretary Hughes goes only to the formalities by which the existence of this consent is to be proved. So that if the conclusion suggested earlier be accepted, that silence will generally be construed as consent, and, in fact, that there are no indispensable formalities, the proposed distinction loses its formal importance. And, as a matter of fact, the distinction was abandoned as a basis for classification in the project submitted to the governing board of the Pan-American Union by the American Institute of International Law in 1925.⁷⁰ Similarly, the question was raised neither at the sessions held at Rio de Janeiro in 1927 of the International Commission of Jurists, nor at the Pan-American Conference at Havana, in 1928.

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⁷⁰ CODIFICATION OF AMERICAN INTERNATIONAL LAW (Government Printing Office 1925) 77.

At this point it may be permissible to hazard the proposition that, as things stand at present, reservations may be made by both signatories of and parties acceding to a treaty up to and including the time of ratification. Such reservations become ineffective only upon a positive expression of dissent from an earlier party to the treaty. Probably the most familiar example of such a dissent is presented by the rejection by the conference of states signatory of the protocol of signature of the statute of the Permanent Court of International Justice of the Senate's resolution of adherence to the World Court Protocol subject to reservations.⁷¹ Dissent to such reservations on the part of a later signatory would in no way affect the validity of the reservation, as that is already in existence through the consent of earlier signatories. Such dissent might, however, operate to exclude the later signatory from all part in the treaty. This is the situation as it exists between the hypothetical states *K* and *Z*,⁷² and it seems to be paralleled in the actual position of Russia as regards the Multilateral Treaty for the Renunciation of War.⁷³

At this point it becomes pertinent to inquire what is the position of Russia with regard to the other signatories. She was invited to accede to the pact by the French government,⁷⁴ and signified her willingness to do so on August 31, 1928, in a long note⁷⁵ in which she not only criticized the "reservations" but declared them not to be binding upon her in the following language:

"... The Soviet Government also cannot agree with any other reservations which can serve as a justification for war, particularly with reservations which are made in the said correspondence in order to keep effective the compact and resolutions entailed by affiliation with the League of Nations and the Locarno Agreements. . . .

"Among the reservations made in the diplomatic correspondence between the original participants of the compact, especial attention of the Soviet Government is drawn by the reservation of the British Government in paragraph 10 of its note of May 10th, this year. By virtue of this reservation the British Government reserves a freedom of action towards a series of regions which it does not even enumer-

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⁷¹ (1927) 21 AM. J. INT. LAW (Spec. Supp.) 1-11.

⁷² See page 1100.

⁷³ The "reservations" of the original signatories have been criticized also by Egypt, Persia and Turkey—see *supra* at 1089. It seems reasonable to suppose that these reservations, so far as their legal effect goes, stand or fall together. The position of Russia, therefore, may be argued as a kind of test case.

⁷⁴ The adhesion of other nations was invited by the United States. These exceptional measures were taken in the case of Russia to get over the difficulty that her government has not been recognized by the United States.

⁷⁵ Shotwell, *op. cit. supra* note 14, at 91.

ate. . . . However, inasmuch as the note of the British Government has not been communicated to the Soviet Government as a part of the compact or its supplements,⁷⁶ it therefore cannot be considered obligatory for the Soviet Government. Similarly, other reservations contained in the diplomatic correspondence between the original participants may be passed over."⁷⁷

The Russian state was not an original signatory of the pact. She could not by any declaration of her own on August 31st affect the relations existing between the fifteen original signatories, as these could be collected from the note of the United States to the signatory powers on June 23, 1928,⁷⁸ embodying the substance of Secretary Kellogg's speech before the American Society of International Law on April 28, 1928,⁷⁹ and from the notes in which the signatory powers express their concurrence in this interpretation. Her animadversions on the British reservation relate to a closed matter.

The Russian position seems to have been stated by her on two different grounds at different times. In the first place, there is the language of the note of August 31, 1928, quoted above. Here the Soviet government recognises the existence of reservations by which the signatory powers intend to limit the scope of their obligation not to resort to war. This being conceded, Russia then claims that such reservations cannot affect her as they were not communicated to her as an integral part of the treaty. It will be noticed that the point raised here is once more formal in character. Once again it is necessary to inquire what form is necessary to clothe the fact of consent with obligatory force. There is no question as to the validity of the reservations *per se*:

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⁷⁶ The concluding paragraph of Secretary Kellogg's note of August 27, 1928, inviting general accessions to the treaty reads: "I shall shortly transmit for your Excellency's convenient reference a printed pamphlet containing the text in translation of M. Briand's original proposal to my government of July 20th, 1927, and the complete record of the subsequent diplomatic correspondence on the subject of a multilateral treaty for the renunciation of war. . . ." THE GENERAL PACT FOR THE RENUNCIATION OF WAR, *supra* note 10, at 56.

⁷⁷ The rule suggested in the last two sentences has also received particular support from Turkey, who states her adhesion not to imply adhesion to "documents which have not been submitted as an integral part of the pact to the collective signature of the participating States. . . ." Shotwell, *op. cit. supra* note 14, at 4A.

⁷⁸ THE GENERAL PACT FOR THE RENUNCIATION OF WAR, *supra* note 10, at 36.

⁷⁹ PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1928). In the hearings before the Senate Committee on Foreign Relations over the pact on December 7, 1928, in reply to a question from Senator Swanson, Secretary Kellogg stated that this speech might be taken to embrace the official interpretation of the pact. U. S. Daily, Dec. 29, 1928.

it is only their binding force upon Russia that is denied. And this for a lack of formality in her notification.

The suggestion has already been made that in the matter of reservations all formalities are to be regarded solely as safeguards of the existence of the fact of consent. Russia admits her factual knowledge of the reservations and adheres with such knowledge. As this point is established, it seems that the formalities of her notification thereupon become unimportant.

Moreover, Russia's contention that the specific reservations in question "cannot be considered obligatory" in no way affects the weight of the reservations as among the original signatories. Thus the effect of her protest seems to amount to this: she gives the treaty a wider scope for herself, and, in the circumstances contemplated in the reservation she reserves the right *not* to go to war. And yet it is surely plain that she does not intend to bind herself without imposing any corresponding restriction on the other signatories. This thought is stated in a press release from M. Tchitcherin on August 5, 1928, before the French invitation to accede had been received: ⁸⁰

"... Notre gouvernement constate que le pacte, insuffisant par soi-même, perd encore de sa valeur par les réserves de la France et de l'Angleterre, qui accordent à chaque participant le droit de l'interpréter dans l'esprit de sa propre politique nationaliste ou impérialiste. . . ." ⁸¹

This may be said to be a foreshadowing of the more recent argument ⁸² of some defenders of the treaty before the United

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⁸⁰ The invitation to accede was extended to the Soviet Government on August 27, 1928.

⁸¹ The text is taken from LEYSEN, *LE PACTE KELLOGG* (1928) 76. A suggestion has been made that the following consequence might be drawn from the British Monroe Doctrine and the Russian statement: Britain invades Afghanistan. This attack on Afghanistan is no breach of the pact if the movement is in self-defence, provided one assumes that the signatory powers accept the British reservation. Russia has not expressly accepted it, so it would be a breach as to Russia and Russia therefore is free from her obligations to Britain under the pact. She could therefore move troops into Afghanistan, and attack the British without becoming a pact-breaker as to the United States; in the following war, neither Russia nor Britain would be pact-breakers as to the United States since Russia was freed by the British action, and the British action was protected by her reservation. But we are reminded of Professor Shotwell's view that the "real reservation to the pact" lies in the autonomy granted to each signatory to formulate its own definition of "self-defence." Shotwell, *op. cit. supra* note 14, at 217. It may therefore be that the British action would be covered by the general British reservation as to "self-defence" to which Russia did not object.

⁸² Secretary Kellogg, speaking at the hearing on the pact before the Senate Committee on Foreign Relations: "As to the reservations . . . there is absolutely nothing in the notes of the various governments which would

States Senate that all these "reservations" are just interpretative declarations,⁸³ defining more narrowly that concept of "self-defence" which is the reverse side of the provision outlawing only those wars, easy to conceive of in debate, but seldom met with in practice, which stand out nakedly as "wars of national policy."⁸⁴

Thus, according to the second position assumed by Russia, she disputes the interpretation placed upon the concept of self-defence by the signatory powers, and here serves notice upon them that should at any time a war break out in the circumstances contemplated in the reservations, to which a signatory is a party, Russia will accuse such signatory of breaking the pact.⁸⁵ But it may be asked whether the effect of the correspondence accompanying the pact was not to give to each signatory by general agreement the right to define for itself the scope to be allowed to the exception of self-defence. The objection that such autonomy pushed to its conclusion robs the pact of meaning⁸⁶ has been tacitly admitted by some of its sponsors in the Senate, who have turned their weakness to strength by urging that in that case ratification can do no harm.

It seems to be upon this theory that the "interpretative report" from the Committee on Foreign Relations was filed with the Senate,⁸⁷ including the following "definitions of the Senate's understanding of the pact":

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change this treaty, if the treaty had been laid on the table and signed as it is without discussion. It is true that during this discussion through these notes with the various governments, many questions were raised as to the meaning of the treaty." U. S. Daily, Dec. 29, 1928.

⁸³ This point of view also finds expression in the article by Wright, *op. cit. supra* note 1, at 94-107.

⁸⁴ Senator Glass in a debate on the pact on the floor of the Senate: "The treaty renounces what no nation on earth has ever proclaimed for a hundred years. Not even Napoleon conceded that war was an instrument of his national policy." 70 CONG. REC. 1781 (1929).

⁸⁵ The question may possibly be raised whether, under the conclusion tentatively suggested *supra* at 1105, silence on the part of the powers does not involve their acquiescence in the Russian view. The question is now approached, however, from the angle of interpretation, and it seems difficult to suppose that acquiescence could be presumed from mere silence to an interpretation differing materially from the several powers' express definitions in writing as set out in the correspondence.

⁸⁶ This difficulty is emphasised by Borchard, *op. cit. supra* note 9, at 117. "In view of the fact that the treaty apparently leaves such country contemplating or exercising measures of force the judge of what is 'self-defence,' who could assert that any signatory, going to war under circumstances which it claims are 'self-defence,' is violating the Pact? Has any modern nation ever gone to war (and without any suggestion of bad faith) for any other motive? How then could this Pact ever be legally violated?"

⁸⁷ There seems to have been divergence of opinion in certain quarters as to the exact legal effect of the filing of the report. On one hand, a cable

"The Committee reports the above treaty with the understanding that the right of self-defence is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself and is the sole judge of what constitutes the right of self-defence and the necessity and extent of the same.

"The United States regards the Monroe Doctrine as a part of its national security and defence. Under the right of self-defence allowed by the treaty must necessarily be included the right to maintain the Monroe Doctrine, which is a part of our system of national defence. . . .

"The Committee further understands that the treaty does not provide sanctions, express or implied. Should any signatory of the treaty or any nation adhering to the treaty violate the terms of the same, there is no obligation or commitment, express or implied, upon the part of any of the other signers of the treaty to engage in punitive or coercive measures as against the nation violating the treaty. . . .

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to The World, published in the issue of January 17, 1929, suggests that in certain quarters of Great Britain the report is regarded as an outright reservation. "The view is generally maintained that the American action squares with the declaration of Sir Austen Chamberlain that Great Britain may reserve the right to take action in certain regions of the world where the maintenance of her interests is essential for national safety. No difference is seen between the British and American attitudes on the Pact." On the other hand, a cable from Paris published in the same issue suggests that the attitude of the Quai d'Orsay ("The ministry of Foreign Affairs, however, let it be known that it considers the adoption as an unqualified acceptance of the terms") corresponds more exactly to that of the State Department. Secretary Kellogg stated in a Department press release that the report is in no sense a reservation or limitation upon the treaty. It seems that this latter attitude reflects the final intention of the Senate, which required the filing of the report, but refrained from communicating its provisions through official channels to other governments. The effect of this action, in so far as this may be collected from the authorities cited *supra* in note 68 is to deprive the report of operative effect within the strict field of international law. Senator Reed admitted this: "The only way in which we could absolutely place a legal obligation in this treaty in the sense that a contract is modified would be to attach a reservation, and send that reservation to all of the nations that had signed the treaty or may hereafter sign it." Senator Borah contended strenuously that the significance of the report was to be moral only. "Then the proposal was made that the report which was to have been made be taken up and adopted by the Senate—acted upon by the Senate. I felt at once that that would result in what would practically be a reservation, and even if it was not technically so, the foreign governments would all regard it as a reservation. . . . It was proposed later that the report be filed, that it be read in the open Senate, and that an oral motion be made transmitting it to the foreign governments. . . . I felt sure that taking the report and drawing it away from the ordinary functions of a report and transmitting a report of the Senate to foreign powers would have the same effect in their minds precisely as a reservation would have. . . . I have never been willing at any time to do anything that could be construed into a change of the treaty or constitute a reservation. . . ." 70 CONG. REC. 1717 (1929).

"This treaty in no respect changes or qualifies our present position or relation to any pact or treaty existing between other nations or governments."⁸⁸

When the general acquiescence of the signatories in the note of the United States dated June 23, 1928 is borne in mind, it seems that Russia in her contention that the words of the treaty mean something different from the interpretations there agreed upon or formulated later in accordance with this note is playing the part of *Athanasius contra mundum*. Private suspicions may be entertained by some that Athanasius has the best of the moral argument, but this cannot affect the question.

In other words, it seems that Russia may make her accusation in the future, but *Securus Judicat Orbis Terrarum*. The transition from accusation to conviction must be made before a tribunal which is at least very unlikely, as things stand at present, to consent to deprive itself of the evidence of the accompanying correspondence, with which Russia was concededly familiar, to ascertain the extent of the obligations contemplated by the parties to the treaty.⁸⁹

FURTHER PROPOSALS

The general agreement⁹⁰ among the signatories of the Kellogg Pact to a liberal interpretation of the concept of self-defence does not in any way preclude a general dissatisfaction with the present rules as to the admissibility of reservations to multilateral treaties. The question received the attention of the Eighth Assembly of the League of Nations in the summer of 1927.

The question was opened in concrete form by the British government in a note⁹¹ to the Council, dated March 17, 1926, protesting against the reservations made by Austria upon her signature of the open protocol to the Convention of the Opium Conference of 1925, in which it was said:

"... In the opinion of His Majesty's Government reservations to a convention made, as in the present case, without

⁸⁸ *Ibid.* 1783.

⁸⁹ The importance of the correspondence in any judicial construction of the treaty was emphasised in the hearings before the Senate Committee on Foreign Relations on December 7, 1928: Senator Reed: "I would like to know . . . whether we are to take into consideration in construing it, certain statements that have been made during the progress of the negotiations?"

Senator Robinson: "If ambiguities appear in the language of the contract, I understand you may resort to the negotiations to determine the meaning. . . ."

Senator Reed: "But in construing it and giving it its meaning, you think that they should look into these previous communications?"

Secretary Kellogg: "Yes." U. S. Daily, Dec. 29, 1928.

⁹⁰ Marred however by the dissent of Russia, Egypt, Persia and Turkey.

⁹¹ (1926) 7 LEAGUE OF NATIONS OFFICIAL JOURNAL 612.

the knowledge or assent of the other signatories, involve an important question of principle. . . ."⁵²

A Committee of Experts was constituted the same month to consider the question,⁵³ and they reported to the Council of the League in June 1927 as follows:

" . . . Ultimately the stage has been reached of leaving certain treaties open unconditionally for varying periods for signature by Powers that did not even participate in the elaboration of the treaty. Such was the case of the Opium Convention of February 19th, 1925.

"A signature appended in these circumstances constitutes nothing more than 'accession': the Power signing in this way simply associates itself with the Powers concluding the treaty. It therefore accepts the latter under the same conditions as the contracting parties. What they accepted, it accepts. It cannot make any modification or addition for such addition or modification would not be covered by the reciprocal agreement which constitutes the treaty concluded by the contracting Powers.

"It no doubt frequently happens that, in the course of negotiation of a treaty, agreement is reached between the contracting parties regarding a reservation which is put forward by one of them and accepted by the others. In such a case the former party may naturally, when appending its signature to the act concluded, mention and maintain its reservation. The other contracting parties, when they also append their signatures, signify thereby that they have accepted the reservation and consent thereto.

"But when the treaty declares, as we have seen above, that it permits the signature by Powers which have not taken part in its negotiation, such signatures can only relate to what has been agreed upon between the contracting Powers. In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation like the signature to which it is attached, is null and void. . . ."⁵⁴

Two practical measures were suggested for dealing with the problems of reservations made in practice by later adherents to international conventions. In the first place, the Director of the International Labor Office submitted a memorandum⁵⁵ to the Council on June 15, 1927 in which he proposed the heroic measure of forbidding all reservations whatsoever to International Labor Conventions. That there is nothing impossible in this

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⁵² 51 LEAGUE OF NATIONS TREATY SERIES (1925) 338.

⁵³ LEAGUE OF NATIONS DOCUMENTS (1927) 8th Assembly, A. 13, p. 6.

⁵⁴ LEAGUE OF NATIONS DOCUMENTS (1927) c. 357, M. 130, V.

⁵⁵ (1927) 8 LEAGUE OF NATIONS OFFICIAL JOURNAL 882.

suggestion is indicated by the presence of such a prohibition in Article 65 of the Declaration of London, 1908.⁹⁶ But the memorandum is particularly interesting because it undertakes to consider reservations both from that point of view which sees in them an attempt to modify the text of the treaty, and from that which sees in them simply a desire to "interpret" it:

"In theory, reservations would only be admissible if they were accepted by all the bodies concerned in the adoption of the convention, *i.e.*, by the International Labour Conference. This hypothesis itself, however, cannot be realized. If the acceptance of the reservations is simply equivalent to an interpretation of the convention, the Conference is not competent to give it, since, under the treaties, the interpretation of the Labour Conventions is expressly reserved for the Permanent Court of International Justice. If, on the other hand, the acceptance of the reservations substantially modifies the significance of the texts originally adopted, then it constitutes a revision for which the Conference is competent; but in that case the effect of the revision would be to create a new convention, and it would in consequence annul all previous ratifications, since the Conference's decisions are not binding on the States Members of the International Labour Organisation.

"Obviously, therefore, the legal arguments force us to deny the admissibility of reservations on the occasion of the ratification of international labour conventions. . . ."

The particular legal considerations to which the memorandum draws attention are not equally pressing in conventions other than those of the International Labor Organisation, and in these cases M. Zalewski had a suggestion to make. He recommended the general adoption of the procedure followed in the Customs Convention of 1923,⁹⁷ where a protocol was attached containing all the possible reservations which the signatories were prepared to sanction in advance for later signatories. Other reservations not to be found in the protocol were prohibited.⁹⁸

A resolution⁹⁹ of the Council taken on June 27, 1927 adopted the report of the Committee of Experts and took special notice of the suggestion of M. Zalewski.

"The Council:

Takes note of the report and directs it to be circulated to the members of the League;

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⁹⁶ Article 65 ran: "The provisions of the present Declaration must be treated as a whole, and cannot be separated." But the United States signed under reservation of art. 1, c. 5.

⁹⁷ Possibly suggested by the procedure of the International Copyright Convention of 1910; Article 27 of this convention recognizes the right of signatories, if they prefer, to elect at time of ratification to be bound by the anterior convention. 4 DE MARTENS, *op. cit. supra* note 41, at 590.

⁹⁸ LEAGUE OF NATIONS DOCUMENTS (1927) C. 357. M. 130, V.

⁹⁹ (1927) 8 LEAGUE OF NATIONS OFFICIAL JOURNAL 800.

Requests the Secretary-General to be guided by the principles of the Report regarding the necessity for acceptance by all Contracting States when dealing in future with reservations made after the close of a Conference at which a Convention is concluded, subject, of course, to any special decisions made by the Conference itself;

Calls the attention of Conferences on technical subjects to the fact that, in cases where the text of a convention contains, in the opinion of the signatories, certain articles to which reservations can be made without prejudice to the other articles, a method similar to that adopted by the Customs Conference may certainly be recommended. . . ."

Article 39 of the General Act for the Pacific Settlement of Disputes adopted by the Assembly of the League of Nations at their 1928 session embodies the suggestion of M. Zalewski.¹⁰⁰

What, then, is the position at the present time? There seems to be little dispute that the reservation, like the treaty to which it is attached, derives its validity from the mutual consent of all parties. Debate begins when the question is raised as to the evidence from which such consent can be adduced. Thus it may be illuminating to consider the question as one formal in nature, lying more properly within the sphere of the acceptance of treaties rather than of their interpretation.

In the case of reservations made before ratification by any party, little difficulty is found. The ratifying state necessarily consents to all reservations of which it has notice along with the body of the treaty. But where ratification on the part of one or more signatories has already taken place at the time the reservation is formulated, the consent of these signatories should be sought afresh. The custom, however, which permits one to imply the consent of such signatories from a mere failure on their part to protest has probably established a rule, and it might reflect present practice more accurately if one were to say that the reservations are effective in the absence of express dissent on the part of any signatory. But however tacit the consent, consent there must be. And hence it follows that there must be communication also of the proposed reservations. It seems to be here rather than in the thorny field of their content that a distinction may be made between a "reservation," and an "interpretative declaration" such as the report from the Senate Committee on Foreign Relations on the Multilateral Treaty for the Renunciation of War. This distinction denies international legal validity to the "interpretative declaration."

There would seem in principle to be no obstacle to the formulation of any reservations by a state acceding to a completed treaty, *provided* the consent of the other signatories was ob-

¹⁰⁰ (1928) LEAGUE OF NATIONS OFFICIAL JOURNAL (spec. supp.) No. 63, p. 25.

tained. The formal difficulty attending the proof of the double question of communication of and consent to these reservations, however, led to the recommendation of M. Zalewski, adopted by the Council of the League of Nations,¹⁰¹ that the only reservations permitted to acceding states should be those contemplated by the original signatories at the time of ratification.

In the case of the reservations to the Multilateral Treaty which have been most severely criticized, such as the British reservation, since they were made by original signatories, the condemnation in the report of the League of Nations Committee has little force. A more cogent objection is the formal one raised by Russia that in default of the incorporation of these various "reservations" in the text of the treaty, their communication was defective and their binding force upon acceding states correspondingly impaired. But the point of view has already been suggested that the essential fact is the actual knowledge, and hence consent, of the acceding state; where this is known to exist, formal questions have lost their importance.

But if the Russian objection be treated as a reservation against reservations, it seems to fall within the scope of the condemnation of the report of the League of Nations Committee. The original signatories seem to have agreed to treat it as a rhetorical ornament to Russia's adhesion; perhaps that is all it is. But it serves to draw attention to a point upon which agreement would be as desirable as it is at present absent. The solution of actual and potential sources of dispute may be at least as useful as are abstract agreements to "outlaw war."

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¹⁰¹ See *supra* notes 99 and 100. The question of reservations is included in the general topic of "Treaties" which the League of Nations Committee of Experts consider to be ripe for codification. In April 1927 this Committee adopted a proposal to refer the subject to a small Committee of Experts for further study. LEAGUE OF NATIONS DOCUMENTS (1927) V. Legal. V. 3; also (1928) 22 AM. J. INT. LAW (Spec. Supp.) 21-25.