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The Problem of the Legal Consequences of Reservations Incompatible with the Object and Purpose of the Treaty*

ปัญหาว่าด้วยผลทางกฎหมายของข้อสงวนที่ไม่สอดคล้องกับวัตถุประสงค์และเป้าหมายของสนธิสัญญา

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Abstract

This article aims to address the problem of the legal consequences of reservations incompatible with the object and purpose of the treaty according to Article 19(c) of the Vienna Convention on the Law of Treaties 1969 (VCLT). As there are no provisions in the VCLT that indicate the legal consequences of reservations incompatible with the object and purpose of the treaty, this raises the issues of the vagueness and uncertainty of the legal consequences of the incompatibility between a reservation and the object and purpose of the treaty.

The legal consequences of reservations incompatible with the object and purpose of a treaty must be addressed in two dimensions. The first dimension is the

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determination of the legal consequence of a reservation which is incompatible with the object and purpose of a treaty. The second dimension is the consequences of the state consent to be bound by a treaty given by a reserving state with which a problematic reservation is attached. Whilst the legal consequence of a reservation itself is less problematic, as it has been well-settled that the reservation prohibited by Article 19(c) is invalid and produces no legal effects, the legal consequence of the consent to be bound by a treaty of a reserving state is still an unsolved riddle. Academically, three proposals — the surgical approach, the backlash approach, and the severability approach — are put forward to serve as a proper threshold for determining the legal consequences of the consent of a reserving state which has made a reservation that is incompatible with the object and purpose of a treaty.

By examining the three approaches, this article argues that none of the three by itself can serve as a proper criterion to determine the legal consequence of incompatibility between a reservation and the object and purpose of the treaty on the consent of a reserving state. However, it is proposed by this article that the hybrid model based on the essentiality of a reservation to the consent of a reserving state which compromises between the backlash approach and the severability approach can serve as the solution to this issue. In order to deal with legal uncertainty caused by the essentiality criterion of the hybrid model, it is proposed by this article that the clause on the rebuttable presumption of severability should be incorporated into a treaty which will be helpful in cases where states fail to express to make a clear intention to be bound or not by a treaty in case of a reservation is considered invalid. Nevertheless, the suggestion of the ILC in its Guide to Practice on Reservations to Treaties that a reserving state is allowed to express its intention not to be bound by the treaty in case of invalidity of its reservation after the formulation of the reservation is rejected by this article due to a problem of legal uncertainty it may potentially cause.

Keywords: Treaties, Reservations, Reservations Incompatible with the Object and Purpose of the Treaty

บทคัดย่อ

บทความฉบับนี้มุ่งหมายที่จะศึกษาปัญหาว่าด้วยผลทางกฎหมายของข้อสงวนที่ไม่สอดคล้องกับวัตถุประสงค์และเป้าหมายของสนธิสัญญาอันถูกกำหนดให้รัฐไม่สามารถกระทำได้ตามข้อ 19(c) ของอนุสัญญากรุงเวียนนาว่าด้วยกฎหมายสนธิสัญญา ค.ศ. 1969 (VCLT) ซึ่งมีปัญหาความไม่ชัดเจนและความไม่แน่นอนของผลทางกฎหมายอันมีสาเหตุมาจากที่ VCLT นั้นหาได้กำหนดผลแห่งกฎหมายในกรณีดังกล่าวไว้แต่อย่างใดไม่

โดยในการศึกษาปัญหาในเรื่องนี้นั้น จะต้องพิจารณาในสองแง่มุมคือ ผลทางกฎหมายของข้อสงวนที่ไม่สอดคล้องกับวัตถุประสงค์และเป้าหมายของสนธิสัญญา และผลทางกฎหมายของความยินยอมของรัฐที่เข้าผูกพันตามสนธิสัญญาซึ่งได้มีการตั้งข้อสงวนประกอบการให้ความยินยอมมาด้วย แม้ว่าในส่วนของผลทางกฎหมายของข้อสงวนนั้น มีความชัดเจนว่าข้อสงวนดังกล่าวนั้นย่อมเสียไปและไม่มีผลทางกฎหมาย แต่ยังคงมีประเด็นปัญหาในกรณีของผลทางกฎหมายของความยินยอมของรัฐที่ได้ตั้งข้อสงวนที่เสียไปนั้น ในทางวิชาการนั้นมีข้อเสนอ 3 ประการในการกำหนดผลทางกฎหมายของความยินยอมของรัฐที่ได้ตั้งข้อสงวนอันไม่สอดคล้องกับวัตถุประสงค์และเป้าหมายของสนธิสัญญา อันได้แก่ แนวทางในลักษณะการผ่าตัด (Surgical Approach) แนวทางในลักษณะสะท้อนกลับ (Backlash Approach) และแนวทางในลักษณะของสิ่งที่สามารถแยกส่วนออกจากกันได้ (Severability Approach)

จากการศึกษานั้นพบว่าข้อเสนอทั้งสามไม่สามารถถูกนำมาใช้กำหนดผลของความไม่สอดคล้องของข้อสงวนต่อวัตถุประสงค์และเป้าหมายของสนธิสัญญาที่มีต่อความยินยอมของรัฐผู้ตั้งข้อสงวนได้อย่างเหมาะสม แต่อย่างไรก็ตามผู้เขียนพบว่าแนวทางในลักษณะผสมผสาน (hybrid model) บนฐานของความจำเป็นของการตั้งข้อสงวนต่อการตัดสินใจเข้าผูกพันตามสนธิสัญญาซึ่งอยู่บนพื้นฐานของทั้งแนวทางในลักษณะสะท้อนกลับและแนวทางในลักษณะของสิ่งที่สามารถแยกส่วนออกจากกันได้เป็นแนวทางที่เหมาะสมในการกำหนดผลทางกฎหมายของความยินยอมเข้าผูกพันตามสนธิสัญญาในกรณีปัญหา และเนื่องด้วยเกณฑ์ความจำเป็นอาจจะสร้างความไม่แน่นอนทางกฎหมาย ผู้เขียนจึงมีข้อเสนอว่าในการจัดทำสนธิสัญญานั้นควรจะมีการกำหนดข้อสันนิษฐานในลักษณะไม่เด็ดขาดต่อการแยกส่วนได้ของข้อสงวนและความยินยอมของรัฐซึ่งสันนิษฐานในลักษณะไม่เด็ดขาดว่ารัฐมีเจตนาที่ยังคงผูกพันตนตามสนธิสัญญาในกรณีที่ข้อสงวนถูกพิจารณาว่าเสียไปและไม่มีผลทางกฎหมาย แต่อย่างไรนั้นบทความนี้ปฏิเสธข้อเสนอของคณะกรรมาธิการกฎหมายระหว่างประเทศในเอกสาร Guide to Practice on Reservations to Treaties ที่เสนอว่า ในภายหลังจากที่กระบวนการตั้งข้อสงวนได้ดำเนินไปจนเสร็จสิ้นแล้วนั้น รัฐผู้ตั้งข้อสงวนสามารถแจ้งเจตจำนงในการที่ยังจะดำรงสถานะเป็นรัฐภาคีของสนธิสัญญาแม้ในกรณีที่ข้อสงวนนั้นจะเสียไปและไม่มีผลทางกฎหมายและให้ถือตามเจตจำนงดังกล่าว เนื่องด้วยจะนำไปสู่ปัญหาของความไม่แน่นอนในทางกฎหมาย

คำสำคัญ: สนธิสัญญา ข้อสงวน ข้อสงวนที่ไม่สอดคล้องกับวัตถุประสงค์และเป้าหมายของสนธิสัญญา

1. The Problem and Its Significance

Reservations serve as a unique legal mechanism in the international legal system to provide flexibility for potential treaty state parties to exclude or modify the legal effects of certain provisions of a treaty in their application to those states,[1] thus helping to expand the membership of relevant treaties. However, an inappropriately high level of flexibility could put the integration and effectiveness of relevant treaties in danger. Therefore, the 1969 Vienna Convention on the Law of Treaties (Hereinafter "VCLT") sets the rules on the limitations on the content of reservations that states may make.

Among those limitations in VCLT, Article 19(c)[2] of VCLT does not allow states to make a reservation which is incompatible with the object and purpose of a treaty. Nevertheless, this article does not specify the legal consequences of reservations that are incompatible with the object and purpose of a treaty, resulting in ambiguity and legal uncertainties regarding the outcome of incompatibility of a reservation with the object and purpose of a treaty. The effect of incompatibility with the object and purpose of a treaty has two dimensions — one is the consequence of incompatible reservation itself and the other is the consequence of the consent of a reserving state with which a reservation is accompanied. Despite some debates on the nature of the test of the compatibility with the object and purpose of the treaty, the legal consequences of a reservation are less problematic, as it is well-settled that the reservation prohibited by Article 19(c) is invalid and produces no legal effects due to the nature of the test of compatibility as an objective test of permissibility rather than the subjective test of acceptability and opposability. Contrariwise, the consequence of the consent to be bound by a treaty of a reserving state is still an unsolved question.

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[1] Article 2(d) of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides: "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

[2] Article 19 of VCLT provides: 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, which do not include the reservation in question, may be made; or

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Academically, three proposals are put forward to determine the legal consequences of the consent of a reserving state in case of the incompatibility between its reservation and the object and purpose of a treaty, namely — the surgical approach, the backlash approach, and the severability approach.[3]

The ascertainment of legal consequences of incompatibility between a reservation and the object and purpose of a treaty is of vital importance, not only in the context of the law of treaty but also in the light of international law as a whole, as it lies at the heart of the key to determining the right balance between, on the one hand, expansion of the scope of applicability of a treaty and, on the other hand, protection of the object and purpose of a treaty, without which the integrity of a treaty is virtually impossible to be achieved or maintained. A poor balance between these two factors can deprive any treaty of its ability to realize its aims and the level and range of impact it aims to have.

Accordingly, the fundamental goal of this article is to shed light on the lack of clarity regarding the legal consequences of the incompatibility of reservations with the object and purpose of a treaty by considering three alternatives based on the surgical approach, the backlash approach, and the severability approach to identify the most suitable one to construe the legal outcome of the incompatibility of reservations with the object and purpose of a treaty. In cases where none of three approaches serves as the proper alternative, this article will examine whether a hybrid model alternative based on the essentiality of a reservation to a state's consent of a reserving state offers the proper solution to this problem.

2. Compatibility with the Object and Purpose of a Treaty as a Limitation of a Reservation to a Treaty

In this section, this article will specifically discuss Article 19(c) of VCLT which entails the rule of the compatibility with the object and purpose of the treaty as a limitation of a reservation to a treaty. To determine the proper legal consequence of the incompatibility between a reservation and the object and purpose of the treaty, it

[3] See the discussions of three possible consequences in Roslyn Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent' (2004) 5 Melbourne Journal of International Law 155, 158–162; Iain Cameron and Frank Horn, 'Reservations to the European Convention on Human Rights: The Belilos Case' (1990) 33 German Yearbook of International Law 69, 115. However, please note that Cameron and Horn name the severability approach as the "integrity principle".

is important to understand the underlying rationale behind Article 19(c) and the contour and contents of this Article 19(c). Thus, the following topics will be discussed in this section: 1. Underlying Rationale behind Article 19(c), 2. Determination of the Incompatibility with the Object and Purpose of the Treaty, 3. Nature of the Test of Compatibility with the Object and Purpose of a Treaty and 4. Problem of the Legal Consequences of Incompatibility with the Object and Purpose of a Treaty as a Limitation of a Reservation to a Treaty.

2.1 Underlying Rationale behind Article 19(c) of VCLT

Unlike the limitations set by Article 19(a) and (b) of VCLT, the application of which relies on the contents of the treaty, Article 19(c) of VCLT sets the conditions of compatibility with the object and purpose of a treaty as an automatic limitation of the freedom to make a reservation to a treaty. Accordingly, even in a case where the treaty in question contains no provisions on the limitation of reservations, as Reuter puts, "the only prohibition of the freedom to formulate a reservation is that reservations cannot be incompatible with the object and purpose of the treaty".[4]

As pointed out by Pellet, a compatibility test serves as "the pivot between the need to preserve the nature of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States".[5] Article 19(c) operates as a tool to alleviate the problem of the relativism of the VCLT's flexible system as a side effect in an attempt to avoid the rigidity of the traditional unanimity approach.[6] Although generally a reservation rule is based on the principle of the consent of states, states do not enjoy unlimited inherent rights to formulate whatever reservations they desire to make; otherwise "if the balance could be upset, through the loophole of reservations, the whole system established under the treaty might fall to the ground".[7] Thus, the test of compatibility serves as one of the safeguards for

[4] Paul Reuter, *Introduction to The Law of Treaties* (Jose Mica and Peter Haggenmacher trs, Routledge 2011) 82.

[5] Alain Pellet, Special Rapporteur, 'Tenth Report on Reservations to Treaties', (2005) UN Doc A/CN.4/558/Add.1 para 55.

[6] ibid para 54.

[7] Mr. Tsuruoka (the delegate of Japan), Twenty-First Meeting, 'United Nations Conference on the Law of Treaties, First Session, Vienna, Official Records Summary Records of The Plenary Meetings and of the Meetings of the Committee of the Whole' (26 March–24 May 1968) A/CONF.39/11 (hereinafter as "United Nations Conference on the Law of Treaties (1st Session)") 110.

the integrity of the systems of a treaty by prohibiting reservations incompatible with the object and purpose of a treaty. This point is well illustrated by Lijnzaad as follows:[8]

> ... parties not only consent to the text of a treaty but also, and foremost, to the common intention expressed in that text. Expressing consent to be bound by a treaty, while at the same time denying the *raison d'être* of the treaty by formulating a reservation incompatible with the object and purpose of the treaty is, at the very least, contradictory. Article 19.c is both a logical necessity as well as a realistic requirement, the formalities of the law on reservations may not be used to serve other purposes than the ones they were designed for. Reservations incompatible with the object and purpose of the treaty are clearly beyond the instrumental scope of the law, and may therefore not be formulated. This is why article 19.c may be seen to underline the instrumental character of the law of treaties.

Whilst during the United Nations Conference on the Law of Treaties, it did not stir a high level of debate at the level of principles for the incorporation of the test of compatibility with the object and purpose of the treaty into the VCLT.[9] However, the difficulties that may arise out of the application of the test based on the contents proposed by the ICL was indicated by many states. For example, the Indian delegate raised the following enquiries: "What was an incompatible reservation and who would determine incompatibility? What would happen if a dispute arose?"[10] The focus of the criticism by states is on the lack of a mechanism to establish the objectivity of the test.[11] Accordingly, despite the necessity of prohibiting reservations incompatible with the object and purpose of a treaty to maintain the balance between the expansion of membership and integrity of a treaty, Article 19(c) allegedly contains shortcomings in terms of its contents, which results in confusion in the process of application which will be discussed in the following sections.

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[8] Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff Publishers 2012) 59.

[9] Some states even expressly approved the principle, e.g. the delegate of Ghana (Twenty-Second Meeting) and the delegate of Japan (Twenty-First Meeting), 'United Nations Conference on the Law of Treaties (1st Session)' (n 7).

[10] Mr. Jagota (delegate of India), Twenty-Fourth Meeting, 'United Nations Conference on the Law of Treaties (1st Session)' (n 7) 128.

[11] Mr. Sinclair, UK delegate (Twentieth Meeting), and please see also, e.g. the opinion of the delegate of Ceylon (Twenty-Fourth Meeting), the delegate of Japan (Twenty-First Meeting), 'United Nations Conference on the Law of Treaties (1st Session)' (n 7).

2.2 Determination of the Incompatibility of a Reservation with the Object and Purpose of a Treaty

In order to identify the incompatibility between a reservation and the object and purpose of the treaty, one must be able to identify the object and purpose of the treaty. However, identification of the object and purpose of a treaty is not an easy task at all. For example, Buffard and Zemanek describe the object and purpose of a treaty as "indeed something of an enigma".[12]

On exploring the VCLT, eight provisions,[13] including Articles 19 and 20 which govern reservations, contain the term "object and purpose of the treaty". Whilst, in its 2011 Guide to Practice on Reservations to Treaties, International Law Commission (hereinafter "ILC") opines that the term "object and purpose of the treaty" in those provisions has the same meaning,[14] ILC argues that "none of them defines the concept of the object and purpose of the treaty or provides any particular "clues" for this purpose".[15] Nonetheless, the ILC suggests that "at most", it can be deduced that, to identify the object and purpose, one has to take "a fairly general approach" to exact the essence or overall task of a treaty, rather than a dissecting method that minutely analyzes each provision of a treaty one by one.[16] This serves as a basis of the contents of Guideline 3.1.5 on "Incompatibility of a reservation with the object and purpose of the treaty" in the ILC 2011 Guide to Practice on Reservations to Treaties which provides:[17] "[a] reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty".

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[12] Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 Austrian Review of International and European Law 311, 342; See also Liesbeth Lijnzaad (n 8) 82–83.

[13] The eight provisions are Article 18, Paragraph C of Article 19, Paragraph 2 of Article 20, Paragraph 1 of Article 31, Paragraph 4 of Article 33, Paragraph 1(b)(ii) of Article 41, Paragraph 1(b)(ii) of Article 58 and Paragraph 3(b) of Article 60.

[14] ILC, Commentary on Guideline 3.1.5 Incompatibility of a reservation with the object and purpose of the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (2011) A/66/10/Add.1 para 3.

[15] ibid para 2.

[16] ibid.

[17] ILC, Guideline 3.1.5. of the Guide to Practice on Reservations to Treaties, Report of the International Law Commission on the work of its sixty-third session (26 April–3 June and 4 July–12 August 2011) A/66/10.

A further explanation of Guideline 3.1.5, from the ILC, is that "it is the '*raison d'être*' of the treaty, its '*noyau fondamental*' [fundamental core] that is to be preserved in order to avoid undermining the 'effectiveness' of the treaty as a whole", and this of course has the implication of dividing obligations into core obligations and non-core obligations.[18] As for the term "essential element", the ILC explains that the reason why the adjective "necessary" is chosen rather than the stronger option "indispensable" is to avoid establishing too high a threshold.[19] The "essential element" does not need to be a specific provision as it may be a norm, a right or an obligation, as long as it is essential to the general tenor of the treaty and its exclusion or modification would result in the treaty's *raison d'être* being compromised.[20] However, the ILC admits that Guideline 3.1.5 functions as an indicator of a direction but does not articulate "a clear criterion that can be directly applied in all cases".[21] Accordingly, based on the general direction indicated by 3.1.5 of the ILC guidelines, in order to identify the object and purpose of the treaty, one needs to identify the essential elements of a treaty that are necessary to its general tenor or *raison d'être*. However, this leads us to another question of the methodology on how to identify the essence which is necessary for the general tenor or *raison d'être* of a treaty.

Among the many proposals on the methodology, Buffard and Zemanek's two-stage procedure is regarded by the ILC as the "most successful method".[22] According to Buffard and Zemanek's two-stage procedure, the first step is that a prima facie assumption regarding the object and purpose of a treaty is to be articulated by scrutinizing "the title, preamble and, if available, programmatic articles of the treaty". Consequently, in a second step, such a prima facie assumption must then be proved "against the text of the treaty and all other available material and, if necessary, adjusted in the light of that test".[23] However, although such a two-stage method appears to be logical and natural, when Buffard and Zemanek applied their method to five selected treaties or groups of treaties in their Article named "The 'Object and

[18] ILC, Commentary on Guideline 3.1.5 Incompatibility of a reservation with the object and purpose of the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) para 12.

[19] ibid para 14(c).

[20] ibid para 14(a).

[21] ibid para 15.

[22] ibid at footnote 1610.

[23] Isabelle Buffard and Karl Zemanek (n 12) 333.

Purpose' of a Treaty: An Enigma?", they themselves admitted that they failed to objectively determine the object and purpose of four of them.[24]

In order to shed some light on the methodology, the ILC has attempted to explore the relevant cases in the ICJ's jurisprudence to identify where the ICJ examines to seek the object and purpose of a treaty and has made the following list:[25]

- from its title;
- from its preamble;
- from an article placed at the beginning of the treaty that "must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied";
- from an article of the treaty that demonstrates "the major concern of each contracting party" when it concluded the treaty;
- from the preparatory work on the treaty; and
- from its overall tenor.

Nonetheless, as remarked upon by the ILC itself, it is problematic to take the list as a "method properly speaking" as there are "disparate elements" which are taken into account, "sometimes separately, sometimes together".[26]

Based on the possible variants of situations as well as their likelihood to change over time, the articulation of "a single set of methods" for identification of the object and purpose of a treaty seems to be impossible and it has to be admitted that some level of subjectivity is unavoidable.[27] However, indeed, this is "not uncommon in law in general and international law in particular" since it is basically an

[24] The five selected treaties or group of treaties are, first, the Charter of the United Nations, second, the Vienna Convention on Diplomatic Relations, third, the Vienna Convention on the Law of Treaties, fourth general human rights conventions and, fifth, the Convention on the Elimination of All Forms of Discrimination against Women and the other human rights conventions dealing with specific rights; the method proposed is successful only in the case of CEDAW. ibid 334–342.

[25] Please see Para 3 and the relevant case law supporting for each item in the list in footnotes 1629-1634, respectively in Commentary on Guideline 3.1.5.1 Determination of the object and purpose of the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14).

[26] ILC, Commentary on Guideline 3.1.5.1 Determination of the object and purpose of the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) para 4.

[27] ibid para 2.

issue of interpretation.[28] Accordingly, in Guideline 3.1.5.1[29], the key to the ILC's answer to tackle the subjectivity of the object and purpose is the general rule of interpretation contained in Article 31 of VCLT[30] and supplementary means of interpretation in light of Article 32.[31] Nevertheless, Guidelines 3.1.5.4–3.1.5.7 of the ILC Guide to Practice on Reservations to Treaties offer guidance on the assessment of the incompatibility of a reservation with the object and purpose of a treaty in four specific scenarios, namely, a reservation to provisions concerning rights from which no derogation is permissible under any circumstances, a reservation relating to internal law, a reservation to a treaty containing numerous interdependent rights and obligations, and a reservation to treaty provisions concerning dispute settlement or monitoring the implementation of a treaty.[32]

2.3 Nature of the Test of Compatibility with the Object and Purpose of a Treaty

It is vital to address the nature of the test of compatibility with the object and purpose of a treaty—whether the test is a subjective question of acceptability/ opposability[33] or an objective question of permissibility.[34] To elaborate further, if the test of compatibility is a subjective criterion of acceptability/opposability[35], the admissibility of a reservation depends on each state's acceptance or objection based

[28] ibid para 4.

[29] ILC, Guideline 3.1.5.1, 'the Guide to Practice on Reservations to Treaties' (n 17).

[30] VCLT article 31.

[31] VCLT article 32.

[32] See ILC, Guidelines 3.1.5.4–3.1.5.7, 'the Guide to Practice on Reservations to Treaties (n 17)'; See also ILC, Commentaries on Guidelines 3.1.5.4–3.1.5.7, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14).

[33] Academics opt to call the subjective test of compatibility differently. For example, Koh, Barrata, and MacCall-Smith opt to use the term "opposability". See Jean Kyongun Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision' (1982-1983) 23 Harvard International Law Journal 71; Roberta Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?' (2000) 11 European Journal of International Law 413; Kasey L McCall-Smith, 'Severing Reservations' (2014) 63 International & Comparative Law Quarterly 599. However, Coccia and Lijnzaard chooses the term "acceptability". See Massimo Coccia, 'Reservations to Multilateral Treaties on Human Rights' (1985) 15 California Western International Law Journal 1; Liesbeth Lijnzaad (n 8).

[34] See extended discussions in Liesbeth Lijnzaad (n 8) 41–42; and in Massimo Coccia (n 33) 23–26.

[35] According to Koh, "[o]pposability is ... defined as the degree to which the rights and obligations of the reserving state are dependent upon the actions of the reacting states". Jean Kyongun Koh (n 33) 71.

on its own assessment of compatibility with the object and purpose of a treaty and the acceptance has an effect only on the relation between an accepting state and a reserving state. However, if the test of compatibility is taken as an objective criterion of permissibility, a reservation incompatible with the object and purpose of a treaty is impermissible and such a reservation is invalid and produces no legal effects. Hence, the invalidity will objectively terminate the existence and effect of such a reservation.[36]

Before the emergence of VCLT, in the *1951 Reservations to the Genocide Convention* Advisory Opinion which could be perceived as the origin of the test of compatibility with the object and purpose of a treaty, the ICJ articulated the compatibility test as a question of acceptability as the Court argued that the state party was entitled to individually assess the validity of a reservation from its own point of view in light of the test of compatibility with the object and purpose of the convention.[37] However, it must be noted that Article 19(c) of VCLT has been interpreted differently from what was articulated in the *1951 Reservations to the Genocide Convention* Advisory Opinion.

In the current context, based on Article 19(c) of VCLT, the wording of the text offers no clue to answer this question. Accordingly, there exist divided opinions regarding the nature of the test. On the one hand, certain scholars see the test of compatibility as a subjective test, arguing that the only real test for the admissibility of a reservation is acceptance by other states.[38] For example, Ruda proposes that Article 19(c) functions "as a mere doctrinal assertion which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that".[39] On the other hand, there exists an academic opinion that the compatibility test is an issue of permissibility. Take, for example, Bowett, who argues that if a reservation is incompatible with the object and purpose of a treaty, it is impermissible and therefore illegal or invalid.[40] Coccia even proposes that "clearly" states have an

[36] According to McCall-Smith, "[t]he permissibility doctrine argues that a reservation which is incompatible the object and purpose test is invalid and without legal effect, and is therefore a nullity, regardless of whether other States object". Kasey L. McCall-Smith (n 33) 607.

[37] *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 26-29.

[38] P.-H. Imbert, *Les Réserves Aux Traités Multilatéraux* (1979), 137-140 cited in Massimo Coccia (n 33); JM Ruda, 'Reservations to Treaties', *Collected Courses of The Hague Academy of International Law, 1975-III*, vol 146 (1977) 95, 182–190.

[39] Ruda (n 38) 190.

[40] DW Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976) 48 British Year Book of International Law 67, 77.

international obligation to restrain from formulating a reservation that is incompatible with the object and purpose of a treaty.[41]

The ILC Guideline 4.5.1[42] confirmed that the compatibility test is a question of permissibility that determines the validity of a reservation by providing that a reservation that does not meet the conditions of formal validity and permissibility, including compatibility with the object and purpose of a treaty, is null and void, and therefore has no legal effect at all. Further, it also emphasizes in Guideline 4.5.2(1)[43] that the nullity or invalidity of a reservation is not determined by the objection of or acceptance from a state party or an international organization. The ILC's reason is that allowing a state party or a contracting organization to assess the compatibility of a reservation would deprive Article 19 of the Vienna Conventions "of any real impact as it permits States to validate a reservation not in conformity with the conditions for permissibility".[44] Some scholars also suggest that interpreting Article 19(c) as an objective test of permissibility can systemically explain the function of Article 19(c), which is distinct and additional to that of Article 20.[45] Article 19, including Article 19(c), governs the validity of a reservation based on the permissibility conditions and Article 20 sets the rules on the acceptances and objections that can be made to a valid reservation.

2.4 Legal Consequences of the Incompatibility of a Reservation with the Object and Purpose of a Treaty

The problem of the legal consequences of the incompatibility of a reservation with the object and purpose of a treaty is the subject of study this article aims to address. However, first of all, it is very important to understand that the legal consequences of reservations prohibited under Article 19, including the compatibility

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[41] Massimo Coccia (n 33) 25.

[42] ILC, Guideline 4.5.1, 'the Guide to Practice on Reservations to Treaties' (n 17).

[43] ILC, Guideline 4.5.2(1), 'the Guide to Practice on Reservations to Treaties' (n 17).

[44] ILC, Commentary on Guideline 3.1.5. Nullity of an invalid reservation, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) para 6.

[45] Christian Walter, 'Article 19. Formulation of Reservations' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 302; Catherine Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1994) 64 British Yearbook of International Law 245, 260–261.

test in light of Article 19(c), must be addressed in two dimensions.[46] The first dimension is the determination of the legal consequences of a reservation incompatible with the object and purpose of a treaty. The second dimension is the consequences of the state consent given by a reserving state via an instrument of consent accompanied by a problematic reservation. Whilst the legal consequences of a reservation are well-settled, the effect on the consent of a reserving state is still an unsolved riddle.

2.4.1 Legal Consequences of Reservation Incompatible with the Object and Purpose of the Treaty

As discussed in the section on the nature of the test of compatibility with the object and purpose of a treaty, the test of compatibility with the object and purpose of a treaty is an objective test of permissibility. Pursuant to the ILC Guideline 3.5.1, a reservation which is incompatible with the object and purpose of a treaty is null and void, and therefore devoid of any legal effect. The Human Rights committee opines in its General Comment No. 24 that "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party".[47] The Committee in *Rawle Kennedy v. Trinidad and Tobago* Communication does not recognize the legal effect of a reservation which is in conflict with certain basic principles of the International Covenant on Civil and Political Rights (hereinafter "ICCPR") and its Protocols.[48] Likewise, in *Loizidou v. Turkey*, the European Court of Human Rights (hereinafter "ECtHR") decided, based on the character of the Convention and the ordinary meaning of Articles 25 and 46 in their context and in light of their object and purpose and the practice of state parties, that the restrictions *ratione loci* attached to Turkey's Article 25 and Article 46 declarations, which are treated as disguised reservations, are invalid.[49] In the same

[46] See Walter's "two-step approach" of the assessment of the legal consequences of reservations prohibited under Article 19 in Christian Walter (n 45) 301.

[47] Human Rights Committee, 'ICCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (1994) CCPR/C/21/Rev.1/Add.6 para 18.

[48] Human Rights Committee, 'Communication No 845/1999' (Kennedy v. Trinidad and Tobago) (1999) CCPR/C/67/D/845/1999 para 6.7. See also ILC, Commentary on Guideline 4.5.1 Nullity of an invalid reservation, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) para 25.

[49] *Loizidou v. Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995) Series A No 310, para 89.

vein, the Inter-American Court of Human Rights (hereinafter "IACtHR") in *Hilaire v. Trinidad and Tobago* held that a reservation incompatible with the object and purpose of a treaty due to its limiting effect on the mandatory jurisdiction of the Court has no legal effect.[50]

After a reservation is determined to be nullified or void, then, of course, the logical follow-up question to think about is when the nullity or voidness of the incompatible reservation begins. Albeit specifically focusing on human rights treaties, Cameron and Horn argue that for the sake of clarity, nullity should operate *ex nunc*, in other words, from the moment of a decision declaring nullity.[51] However, Walter disagrees since the suggestion by Cameron and Horn is only workable in some scenarios, in which there exists an organ empowered to deliver authoritative decisions on the validity of reservations. Thus, he proposes that a preferable alternative is to nullify *ex initio*.[52] The author agrees with Walter to the point that the nullity of a reservation should operate *ex initio* since if nullity *ex nunc* was applied, it would create a big loophole of law in cases where there exist no entities readily empowered to authoritatively determine the validity of a reservation, since a state party can formulate a reservation incompatible with the object and purpose of a treaty and other state parties can accept an invalid reservation and be bound by that invalid reservation until, for some reasons, relevant parties are willing to submit a question of validity to an international adjudicating body.

2.4.2 The Problem of the Legal Consequences of the Consent of Reserving States

As discussed in the preceding, it is well-settled that the reservation incompatible with the object and purpose of the treaty becomes void and produces no legal effects; however, the remaining question is that what happens to the consent given by the reserving state accompanied by such an incompatible reservation. In the case of *Belilos v. Switzerland* in which the validity of Switzerland's reservation in the guise of a declarative interpretation to Article 6 of the European Convention of Human Rights was also challenged *inter alia* in light of the compatibility of the

[50] *Hilaire v. Trinidad and Tobago (Preliminary Objections)*, Inter-American Court of Human Rights (1 September 2001), para 98.

[51] Iain Cameron and Frank Horn (n 3) 119.

[52] Christian Walter (n 45) 303.

reservation with the object and purpose, although the Court invalidated the reservation in question based on the ground of violation of Article 64 of the European Convention of Human Rights rather than the incompatibility with the object and purpose of the treaty,[53] in the public hearing, the Swiss Government listed three different consequences that an invalid reservation could create.[54]

1. A reserving state which makes a reservation incompatible with the object and purpose is not a party to a treaty as the invalidity of the incompatible reservation lashes back at an instrument of consent, resulting in the invalidity of the instrument of consent. Cameron and Horn name this approach "the backlash principle".[55]

2. Despite the invalidity of the reservation, a reserving state becomes a party to the treaty; however, the invalidity of a reservation renders the provision(s) to which the incompatible reservation relates inapplicable to a reserving state; however, the invalidity of the reservation does not affect other provisions. This approach is called "the surgical principle" by Cameron and Horn.[56]

3. An incompatible reservation is invalid but the invalidity of the reservation does neither affect an instrument of consent nor modify rights and obligations under the provisions of the treaty to which a reservation relates. According to Cameron and Horn, "[t]he invalidity of the reservation means that it is without legal effect, as if it had never been attached to the instrument of consent".[57] In other words, an invalid reservation is severable from the instrument of consent. Whilst Cameron and Horn term this alternative "the integrity principle",[58] other academics opt to term this approach the "severability approach".[59] The term "severability

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[53] *Belilos v. Switzerland* (ECtHR, 29 April 1988) Series A vol 132, para 60.

[54] Note of the Public Hearings held on 26 October 1987 (morning) 45 cited in Iain Cameron and Frank Horn (n 3) 115.

[55] Iain Cameron and Frank Horn (n 3) 115.

[56] ibid.

[57] ibid.

[58] ibid.

[59] E.g. Goodman, McCall-Smith, Moloney and Baratta. See Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 The American Journal of International Law 531; Kasey L. McCall-Smith (n 33); Roslyn Moloney (n 3); Roberta Baratta (n 33). Due to the practice adoption of severability approach by the ECtHR, the approach is also named as the Strasbourg approach. See Bruno Simma, 'Reservations to Human Rights Treaties—Some Recent Developments' in Gerhard Hafner (ed), *Liber Amicorum:Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (Springer) 670.

approach" is adopted by this article as it reflects more of the character of the approach than does the term "integrity".

Thus, in the next section, this article will provide an in-depth analytical account for each of the three approaches as well as a hybrid approach to figure out the most suitable alternative for the legal consequences of the consent of a reserving state due to the invalidity of a reservation incompatible with the object and purpose of a treaty.

3. Three Approaches for the Articulation of the Legal Consequences of a Reservation Incompatible with the Object and Purpose of the Treaty on the Consent of a Reserving State

In this section, this article will provide in-depth analyses of each of three possible approaches for the articulation of the legal consequences of a reservation incompatible with the object and purpose of the treaty on the consent of a reserving state, as well as a hybrid model which is based on elements deriving from more than one of the three approaches.

3.1 Surgical Approach

Based on the surgical approach, the incompatibility of a reservation with the object and purpose of a treaty invalidates the reservation itself and the invalidity of the reservation has a further consequence that the provisions, the effect of which an incompatible reservation purports to exclude or modify, will not apply to the reserving state. This approach is termed the "surgical principle" since the infected parts, which are the incompatible reservation and the relevant provisions, are cut off, leaving only the undisputed parts applying to the reserving state.[60] This surgical approach produces the same effect as a reservation that meets an objection by other state parties according to Article 20 of VCLT.[61]

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[60] Rolf Kühner, 'Vorbehalte und Auslegende Erklirungen Zur Europiischen Menschenrechtskonvention', (1982) 43 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 58, 89 cited in Iain Cameron and Frank Horn (n 3) 115.

[61] See VCLT Articles 20-21.

One can easily see the problem of surgical approach when applying to invalid reservations which are incompatible with the object and purpose of a treaty as it is fraught with difficulties to figure out any well-founded ground to allow a reserving state which makes an invalid reservation to avoid the effect of the provisions to which the invalid reservation is related.[62] Further, as Macdonald suggests, a reserving state bears the onus to ensure that its reservation is "correct"[63]; i.e., a reserving state should enjoy the benefits of its reservation only when its reservation is in conformity with the rules set in the VCLT and those set out in the relevant treaty. Specifically focusing on an invalid reservation which is incompatible with the object and purpose of a treaty, the surgical approach could jeopardize the purpose of Article 19(c) of VCLT which is to protect fundamental norms, rights or obligations that are essential to the general tenor of a treaty from being modified via a reservation as the application of the surgical approach results in a reserving state being unbound by the provisions containing essential elements of a treaty. Moreover, as Article 19(c) serves as one of the vital mechanisms that protect the integrity of treaties, the surgical approach could not only put the effectiveness of Article 19(c) of VCLT into peril but also negatively affect the mechanism of the law of treaties protecting the integrity of treaties in general.

In sum, the author opines that although the surgical approach has some roots in the law of reservation regarding the effect of an objection, one significant drawback, as explained before, is that in scenarios where an invalid reservation purports to exclude the effect of specific provision(s) of a treaty, the surgical approach, which would cut off that specific provision from applying to a reserving state, would effectuate the same consequence as what is intended by the invalid reservation. This allows a reserving state to earn a benefit it wishes to have, albeit the invalidity of a reservation. Added to this, as the invalidity in this case is grounded on the incompatibility of a reservation with the essence of the relevant treaty, articulating the legal consequence of the invalidity could result in a devasting effect on the integration of the treaty as a state could circumvent core obligations of a treaty whilst being recognized as a state party to it by abusively making a reservation that they already know to be in conflict with the object and purpose of such a treaty.

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[62] R StJ MacDonald, 'Reservations under the European Convention on Human Rights' (1988) 21 Revue Belge de Droit International 428, 449.

[63] ibid.

3.2 Backlash Approach

The backlash approach construes the legal consequence of the incompatibility of a reservation with the object and purpose of the treaty as invalidity of both the incompatible reservation and the consent of a reserving state. As Cameron and Horn put it, based on the backlash approach, "the invalidity of the reservation lashes back at the instrument of consent and invalidates it".[64] Hence, as the backlash effect invalidates the consent of a reserving state, a reserving state remains an outsider to the treaty.[65] The backlash approach has its supporting ground in the principle of state consent by virtue of which states shall not be bound by a provision they have never give their consent to be bound by.[66] The role of the principle of consent in determining the consequences of invalid reservations is well-illustrated by Baratta, who explains:[67]

> Arguably, a treaty provision is compelling for parties which ratified it if, and only if, their expressions of consent have the same content. This implies that there is no room for agreement between the contracting states and the reserving state on the provision of the treaty affected by the reservation. A mutual agreement on the contents of the text, essential in the declaration of intent of states adhering to the treaty so that its clauses produce rules of conduct, is then missing with regard to a reserved provision.

Accordingly, it would be in conflict with the principle of state consent, which is regarded as a fundamental principle of international law to invalidate a reservation to a treaty but hold the reserving state as a party of the treaty without recognizing its reservation.[68]

Whilst supporting the severability approach for other cases where a reservation is invalid due to impermissibility reservations, Bowett argues that the backlash approach should apply "when the impermissibility arises from the fundamental inconsistency of the reservation with the object and purpose of the treaty" and it

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[64] Iain Cameron and Frank Horn (n 3) 115.

[65] ibid.

[66] See e.g. Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 Harvard Law Review 399, 436–437; Roslyn Moloney (n 3) 159; Catherine Redgwell (n 45) 267.

[67] Roberta Baratta (n 33) 419.

[68] Jack Goldsmith and Daryl Levinson (n 66) 437.

results in the nullity of the whole instrument of consent.[69] In his Dissenting Opinion in *Case of Certain Norwegian Loans (France v. Norway) (Preliminary Objections)*, even though Judge Lauterpacht opined that France's reservation attached with its acceptance of the jurisdiction of the International Court of Justice is invalid, he objected to the idea of severing an invalid reservation from the rest of the instrument and argued that the entire acceptance is invalid.[70] However, it must be noted that Lauterpacht did not argue that severing an invalid reservation from an instrument of consent is legally impossible as he proposes that the severability of an invalid reservation can be achieved in a case where a reservation does not constitute an essential part of the instrument of consent.[71] In the *Interhandel Case*, Judge Lauterpacht again denied the severability of an invalid reservation from an acceptance to the ICJ's jurisdiction and argued that the acceptance to the ICJ's jurisdiction becomes invalid. However, similar to the *Norwegian Loans* case, he bases his opinion on the essentiality of the reservation to the declaration to overrule the severability.[72]

Arguably, a strong point of the backlash approach is its adherence to the principle of state consent. Nonetheless, a weak point of the backlash principle is that the backlash effect, which invalidates the consent of a reserving state, discourages the expansion of membership of a treaty. This defect is more significant when it involves treaties whose purpose is to protect the fundamental interests of the international community, such as human rights treaties.

According to Moloney, achieving universality or the expansion of membership as widely as possible is among the goals for multilateral human rights treaties.[73] Arguing that the backlash approach "significantly interferes with this goal of universality" of multilateral human rights treaties, Moloney uses the United States' reservation to the ICCPR to illustrate this problem.[74] Among its many reservations to the ICCPR, the US make a reservation to exclude the application of Article 6, Paragraph 5 of the ICCPR[75]

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[69] DW Bowett (n 40) 84.

[70] Separate Opinion of Judge Sir Hersch Lauterpacht, *Case of Certain Norwegian Loans (France v. Norway)* [1957] ICJ Rep 1957, 59.

[71] ibid 58.

[72] Dissenting Opinion of Judge Sir Hersch Lauterpacht, *Interhandel Case (Switzerland V. United States of America) (Preliminary Objections)* [1959] ICJ Rep I959 6, 117.

[73] Roslyn Moloney (n 3) 159.

[74] ibid 159–160.

[75] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 6 para 5.

over its domestic practice regarding capital punishment.[76] The Human Rights Committee reached a decision that such a reservation is incompatible with the object and purpose of the Covenant.[77] Moloney argues that if the backlash approach applies and the invalidity of the incompatible reservation lashes back the consent of the US to be bound by the Covenant, thus excluding the US from the membership of the ICCPR, this may have a serious negative impact on the effectiveness of and respect for the ICCPR since the world's most powerful state is not a party to the Covenant.[78] However, even given that such an effect put forward by Moloney may be true, there exist no legal reasonings why, normatively, the principle of consent shall not apply to certain treaties, such as human rights treaties. Indeed, despite their importance, just the fact that the treaties involved are human right treaties may not serve as a ground to treat such treaties as an exception to the principle of state consent.[79]

Although the backlash approach is arguably compatible with the principle of state consent, the author opines that the application of the backlash approach for determining the legal consequences of the invalidity of an invalid reservation could lead to the problem of legal uncertainty in practice as the backlash effect on the instrument of consent will nullify *ab initio* the legal status as a state party to a treaty of a reserving state, frustrating the rights and obligations of other state parties towards a reserving state. Given the high level of vagueness of the test of compatibility with the object and purpose of the treaty, this problem is more severe in the case of a reservation incompatible with the object and purpose of a treaty than other scenarios of invalid reservation in Article 19 of VCLT. To illustrate this point further, since authoritative determination of the compatibility of a reservation with the object and purpose of a treaty can be achieved by an organ empowered to do so, if the invalidity of the reservation incompatible with the object and purpose of a treaty has a legal effect that can lash back the validity of the instrument of consent to be bound by a treaty of a reserving state, this means that the status of a reserving state cannot be

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[76] Multilateral Treaties Deposited with the Secretary-General, Chapter IV Human Rights, 4. International Covenant on Civil and Political Rights <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec> accessed 19 November 2020.

[77] UN Human Rights Committee, 'Report of the Human Rights Committee Volume I' (2005), General Assembly Official Records, Fiftieth Session Supplement No. 40 (A/50/40) 48.

[78] Roslyn Moloney (n 3) 160.

[79] E.g. Baratta opines that "[t]he principle of consent applies to human rights treaties even though they are characterized as having a 'normative' nature" Roberta Baratta (n 33) 419.

affirmed until the competent organ, be it an international adjudicating or a treaty body, has confirmed that all of the reservations made by a reserving state are compatible with the object and purpose of the relevant treaty.

3.3 Severability Approach

Based on the severability approach, invalid reservations are severable from the instrument of consent of a state. Terming this approach the "integrity principle", Cameron and Horn explain that according to this alternative, "the invalidity of the reservation means that it is without legal effect, as if it had never been attached to the instrument of consent".[80] Severing an invalid reservation from the instrument of consent of a state results in a reserving state still being a party to a treaty without being able to take the benefits of an invalid reservation.[81]

The severability approach has been adopted by certain international courts and Human Rights Committee in determining the legal consequences of an invalid reservation, including those due to the incompatibility of a reservation with the object and purpose of a treaty. Accordingly, it would be beneficial to study the legal reasoning behind those decisions.

In the case of *Belilos v. Switzerland*, the ECtHR adopted the severability approach, severing Switzerland's invalid reservation disguised as an interpretative declaration from the instrument of its consent. In this case, Mrs. Marlène Belilos was fined 200 Swiss francs (CHF) by the municipal Police Board, which was subsequently reduced to 120 Swiss francs (CHF), for allegedly participating in an illegal demonstration.[82] Belilos submitted to the ECtHR that she was the victim of a violation of Article 6, Paragraph 1 of the Convention on the ground that her dispute was not judicially decided.[83] To rebut this claim, the Government of Switzerland relied *inter alia* on the interpretative declaration made when the instrument of ratification was deposited, the content of which is as follows:[84]

> The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 (art. 6-1) of the Convention, in the determination of civil

[80] Iain Cameron and Frank Horn (n 3) 115.

[81] Roslyn Moloney (n 3) 160.

[82] *Belilos v. Switzerland* (n 53) paras 10 and 12.

[83] ibid para 36.

[84] ibid para 38.

> rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.

Accordingly, the ECtHR ruled that this interpretative declaration has the nature of a reservation,[85] and thus, the Court had to determine the validity of this interpretative declaration as a reservation. Although Belilos challenged the issue of the incompatibility of the reservation with the object and purpose of the European Convention of Human Rights[86] whilst the Government of Switzerland defends the compatibility of the reservation with the object and purpose of the Convention,[87] the Court determined the validity of Switzerland's reservation, not on the ground of the compatibility test but on the ground of Article 64 of European Convention of Human Rights,[88] which sets out two requirements for the formulation of a reservation to the European Convention of Human Rights — first, reservations of a general character shall not be permitted under this article, and secondly, a reservation must contain a brief statement of the law concerned. The Court held that the declaration in question does not satisfy two of the requirements of Article 64 of the Convention and thus, it is invalid. However, the Court also ruled that "it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration",[89] reflecting the severability approach. Similarly, in the case of *Weber v. Switzerland*, the ECtHR ruled that the reservation in question was invalid due to its violation of the requirement of Paragraph 2 of Article 64 of ECHR[90] but the invalidity of the reservation did not affect the consent of Switzerland to be bound by the Convention and its status as a state party to the Convention, as the Court ruled that Switzerland breached its obligation under Article 6, Paragraph 1 and Paragraph 2.[91] The ECtHR's adherence to the severability approach was affirmed again in *Loizidou v. Turkey.* However, in this case, the Court's reason for invalidating Turkey's reservation disguised as a declaration was based on the incompatibility of the reservation with

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[85] ibid paras 40–48.

[86] ibid para 52.

[87] ibid para 53.

[88] European Convention on Human Rights (ECHR) article 64.

[89] *Belilos v. Switzerland* (n 53) para 60.

[90] *Weber v. Switzerland* App no 11034/84 (ECtHR, 22 May 1990) paras 36–38.

[91] ibid paras 39–52.

the object and purpose of the Convention, ruling that "in the light of their object and purpose and the practice of Contracting Parties, the Court concludes that the restrictions *ratione loci* attached to Turkey's Article 25 and Article 46 (art. 25, art. 46) declarations are invalid".[92] With respect to the issue of severance, the Court expressly ruled that the invalid reservation can be severed from the instrument of acceptance, explaining:[93]

> The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.

The IACtHR also adopted the severability approach in the case of a reservation incompatible with the object and purpose of a treaty, e.g. *Hilaire v. Trinidad and Tobago (Preliminary Objection).* Intriguingly, in this case, Trinidad and Tobago argued against the application of the severability approach, maintaining that if the Court declared that its reservation in light of Article 62 of the American Convention on Human Rights was incompatible with the object and purpose of the American Convention, this would result in Trinidad and Tobago's declaration accepting the Court's compulsory jurisdiction being null and void *ab initio*.[94] Nevertheless, the Inter-American Commission on Human Rights submitted to the Court that the reservation should be severed from the acceptance of the Court's jurisdiction.[95] The Court agreed with the Commission as the Court invalidated only the part of Trinidad and Tobago's reservation that was incompatible with the object and purpose of the treaty and severed from its instrument of acceptance of the optional clause for the mandatory jurisdiction of the Court.[96] The IACtHR reached the same verdict regarding the invalidity of Trinidad and Tobago's reservation to the compulsory jurisdiction clause of the

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[92] *Loizidou v. Turkey (Preliminary Objections)* (n 49) para 89.

[93] ibid para 97.

[94] *Hilaire v. Trinidad and Tobago (Preliminary Objections)* (n 50) para 49.

[95] ibid para 67.

[96] ibid paras 88 and 98.

Court in *Benjamin et al. v. Trinidad and Tobago (Preliminary Objections)*[97] and *Constantine et al. v. Trinidad and Tobago (Preliminary Objections)*.[98] The severability approach is also supported by the Human Rights Committee which explains in its General Comment No. 24 that generally, invalid reservations will be severable in the fashion that the Covenant is applicable for the reserving party but without benefits of the reservation.[99]

Obviously, the strong point of the severability approach is its facilitating effect on the expansion of membership of a treaty, in contrast to the backlash approach. This strong point has been emphasized in the context of human right regimes in which universal application holds the key to success. For example, Moloney suggests that keeping a reserving state as a party to a human rights treaty despite its invalid reservation would enhance the protection of human rights.[100]

Despite the benefits of the severability approach for expansion of the participation of states in treaties, especially those protecting fundamental values, making a state bound by a treaty whilst disregarding the conditions contained in a reservation, despite its invalidity, contradicts the principle of state consent.[101] Thus, there are also objections by states to the application of the severability approach. For example, in its response to General Comment No. 24, the US contended that severability should not apply to their instrument of ratification as "the reservations contained in the United States instrument of ratification are integral parts of its consent to be bound by the Covenant and are not severable" and argued that the rule relevant to a reservation must be based on the principle of state consent, which is a fundamental principle of the law of treaties.[102] Also, focusing on the principle of

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[97] *Benjamin et al. v. Trinidad and Tobago (Preliminary Objections)*, Inter-American Court of Human Rights (1 September 2001).

[98] *Constantine et al. v. Trinidad and Tobago (Preliminary Objections)*, Inter-American Court of Human Rights (1 September 2001).

[99] Human Rights Committee, 'ICCPR General Comment No. 24' (n 47) para 18.

[100] Roslyn Moloney (n 3) 160.

[101] Kasey L. McCall-Smith (n 33) 615.

[102] The Observation of United States of America, 'Observations of States parties under article 40, paragraph 5 of the Covenant' (1995), Report of Human Rights Committee Volume I, Official Records, Fiftieth Session, Supplement No. 40 A/50/40, Annex VI 129. <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=A%2f50%2f40%5bVOL.I%5d(SUPP)&Lang=en> accessed 31 May 2021 (please note that there are different versions of this document and the page numbers differ in each version).

consent, the United Kingdom and France rejected the severability approach taken by the Human Right Committee.[103] However, the severability approach is also supported by the practice of certain states. The practice of Nordic States of incorporating a super-maximum effect clause in their objection to a reservation reflects the severability approach. Take for example the objection by Sweden to the reservation in the guise of an interpretative declaration to the Convention on the Rights of Persons with Disabilities formulated by Thailand upon ratification, which contains a super-maximum effect clause, partially stating: "[t]his objection shall not preclude the entry into force of the Convention between Thailand and Sweden. The Convention enters into force in its entirety between Thailand and Sweden, without Thailand benefiting from its reservation."[104] Apart from the Nordic Countries, a super-maximum effect clause was employed by Austria, the Czech Republic and the Netherlands in their objections to the reservations of El Salvador and Thailand to the Convention on the Rights of Persons with Disabilities of 2006.[105]

Thus, although the severability approach has desirable effects in expanding the membership of treaties, its conflict with the principle of state consent cannot be ignored or taken as an insignificant defect as the principle of state consent serves as a fundamental principle of international law.

4. Hybrid Approach and Rebuttable Presumption for Severability: A Way Out?

Discussing the three approaches, the surgical approach can be regarded as the weakest among the three alternatives as its effect creates a loophole that a state can abuse to avoid the core obligations of the relevant treaty whilst enjoying the benefits of being a state party to such a treaty. This boils down to the competition between

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[103] The Observation of United Kingdom, ibid 134; The Observation of France, 'Observations of States Parties under Article 40, Paragraph 5 of the Covenant' (1995), Report of the Human Rights Committee Volume I, General Assembly Official Records, Fifty-first Session, Supplement No. 40 UN Doc A/51/40, Annex VI, 106. <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=A%2f51%2f40%5bVOL.I%5d(SUPP)&Lang=en> accessed 31 May 2021 (please note that there are different versions of this document and the page numbers differ in each version).

[104] Multilateral Treaties Deposited with the Secretary-General, Chapter IV Human Right, 15. Convention on the Rights of Persons with Disabilities <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en> accessed 26 November 2020.

[105] ibid.

the backlash approach and the severability approach. On the one hand, arguably the backlash approach harmoniously aligns with the principle of state consent; however, not only does it lack a facilitating effect for the expansion of membership of treaties, but it also poses a risk to legal certainty in light of the legal status of a reserving state as a state party to a relevant treaty. On the other hand, although the severability approach clearly has a positive effect on expanding the membership of states to treaties, which is a very important factor when it comes to treaties aiming to protect fundamental values of the international community, it is clearly incompatible with the well-established principle of state consent. Based on both alternatives' strong and weak points, patently, it is not a very easy task to choose between the two approaches. However, a way out of this dilemma might lie in the hybrid model mixing elements of the two approaches that can fix the defects of the two approaches whilst keeping their strong points.

Carefully examining the academic proposals both by those who support the backlash approach and those favouring the severability approach, certain scholars propose that the approach they support will only be applicable in certain cases under certain conditions, expressing or hinting that the other approach will apply in remaining cases. Lauterpacht is among the first and solid examples of scholars who suggest the hybrid approach. In his Separate Opinion in the *Norwegian Loans case,*[106] although he disagrees with the Court decision to sever the reservation, Lauterpacht does not argue that severing invalid reservation from the instrument of consent is legally impossible as he proposes that the severability of invalid reservation has its ground on the general principle of law. Lauterpacht explains:[107]

> That general principle of law is that it is legitimate-and perhaps obligatory-to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument. *Utile nom debet per inutile üitiari*.

Nevertheless, based on the relevant facts and circumstances of this particular case, Judge Lauterpacht argues that the "particular formulation of the reservation" constitutes an essential condition of France's acceptance to the ICJ's jurisdiction and

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[106] Separate Opinion of Judge Sir Hersch Lauterpacht, *Case of Certain Norwegian Loans* (n 70) 56–57.

[107] ibid.

thus must be regarded non-severable part. Thus, according to Lauterpacht, "[i]t is not a collateral condition which can be separated, ignored and left on one side while all others are given effect."[108] In his Dissenting Opinion in the *Interhandel Case,*[109] again, based on the essentiality of the reservation to a state's consent, he disagrees with the Court decision to sever invalid reservations from its acceptance to the Court's jurisdiction.[110] Accordingly, one way to find a compromise between the backlash approach and the severability approach is a hybrid proposal whereby the former applies when an invalid reservation is essential to a state's consent to be bound by a treaty whilst the latter will apply when an invalid reservation is non-essential to a state's consent. Goodman offers an elaborated account of a hybrid model based on the essentiality of a reservation to the consent of a reserving state.[111] Fundamentally, he argues that his hybrid approach of "intent-based inquiry" can serve as a better tool to reflect and protect state consent compared to those models which completely reject the severing mechanism.[112] He explains that situations where a reserving state has a preference for severability over non-severability are not uncommon and not difficult to comprehend. Such situations happen when a state formulates a reservation when ratifying or acceding to a treaty; however, on balance, a reserving state would give consent to be bound by the treaty without the condition contained in a reservation since a reserving state gains substantial benefits from becoming a state party.[113] Accordingly, Goodman proposes an "intent-based inquiry" model in determining whether or not an invalid reservation constitutes an essential condition of a state's consent to be bound by a treaty.[114] He applies cost-benefit analyses to establish the criteria to distinguish essential reservations, which are termed "critical reservations", and inessential reservations, which are termed "accessory reservations". Based on cost-benefit analyses, critical reservations serve as conditions a reserving state deems essential to its ratification, notwithstanding the benefits of becoming a party to the relevant treaty. Contrariwise, accessory reservations are conditions a reserving state deems to be ideal, but such conditions are dispensable for a reserving state in order to obtain the benefits of becoming a

[108] ibid 58.

[109] Dissenting Opinion of Judge Sir Hersch Lauterpacht, *Interhandel Case* (n 72) 95.

[110] ibid 117.

[111] Ryan Goodman (n 59) 531.

[112] ibid 532–533.

[113] ibid 538.

[114] ibid 532.

party to a treaty.[115] Of course, although Goodman's distinction between critical reservations and accessory reservations sheds light on the understanding of the essentiality of a reservation to consent to be bound by the treaty of a reserving state to some extent, it is still fraught with vagueness, e.g. how to verify whether or not a reserving state is willing to sever an invalid reservation because of the overwhelming benefits of becoming a state party. In this respect, Goodman also puts forward "a presumption of severance".[116] According to the presumption for severance, it is to be assumed that an invalid reservation is not an essential condition of a state's consent to be bound by a treaty unless evidence to the contrary is provided.[117] This potentially raises the question of why presumption in favour of the severability approach should be adopted, rather than one in favour of the backlash approach. Goodman argues that the key factor behind his preference for the presumption for severance, not otherwise, is the consideration of "error cost", explaining that a presumption favouring non-severance is more likely to result in more harmful outcomes than the severance presumption. Goodman compares the corrective actions in two error scenarios. The first scenario is that if an adjudicating body erroneously decided not to sever an invalid reservation, a reserving state would have to re-ratify a treaty. In the reverse scenario, if an adjudicating body erroneously severed an invalid reservation, a reserving state would need to correct the situation by withdrawing from a treaty. Goodman opines that the corrective action is much more difficult in the former case compared to the latter. For example, the struggle to build the necessary coalition for the process of ratification could slow down corrective attempts. Further, in a case where the transaction costs of ratification are high enough, this could prevent corrective actions from being achieved.[118]

In its Commentary on Guideline 4.5.3, admitting the "irreconcilable positions" to the legal consequence of the consent of state in cases of an invalid reservation, the ILC proposes a hybrid approach, to use the ILC terms, "the principle of a middle solution" based on the rebuttable presumption.[119] Paragraph 1 of its Guideline 4.5.3[120] suggests that in cases of invalid reservation, whether a reserving state is a state party

[115] ibid 536.

[116] ibid 555–559.

[117] ibid 556.

[118] ibid 556–557.

[119] ILC, Commentary on Guideline 4.5.3 Status of the author of an invalid reservation in relation to the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) para 1.

[120] ILC, Guideline 4.5.3 (1), 'the Guide to Practice on Reservations to Treaties' (n 17).

or not depends on the intention expressed by the reserving State on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty. Referring to Lauterpacht's essentiality criterion in his dissenting opinion in the *Interhandel Case*, the ILC indicates that "the will of the author of the reservation and its intention to be bound by the treaty, with or without benefit of its reservation" is important issue[121] and therefore, considering an intention of reserving state as the "deciding factor", Paragraph 1 bases the legal status of a reserving state as a state party to a relevant state party on the intention of a reserving state.[122] However, there exist the cases where the determination of the intention of the reserving state is impossible or the cases where a reserving state refrains from making its true intention known to the other state parties. Accordingly, the ILC sees the necessity of a presumption as the "safety net".[123] Thus, the ILC also needs to decide which way presumption should be articulated.[124] The ILC also adopts the presumption in favour of severability which is termed a "positive presumption" by the ILC, rather than one in favour of non-severability, which is termed by the ILC as "negative presumption". This caused divided opinions among states[125]—between those supporting the ILC's proposal[126] and those opposing it[127]. The inconsistence with the principle of state consent has been raised by certain opposing states as a

[121] ILC, Commentary on Guideline 4.5.3 Status of the author of an invalid reservation in relation to the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) para 23.

[122] ibid para 31.

[123] ibid para 49.

[124] ibid para 34.

[125] ibid para 21.

[126] See, for example, the opinions of Denmark (on behalf of the Nordic countries) and Mexico, '19th meeting' (25 October 2010) A/C.6/65/SR.19, sixty-fifth session of the Sixth Committee, Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, paras 66 and 80 respectively; The opinions of Czech Republic and Belgium, '20th meeting' (26 October 2010) A/C.6/65/SR.20, Records of the General Assembly, Sixty-fifth Session, Sixth Committee, 20th meeting paras 4 and 30 respectively; The positions of South Africa and Greece, 21st Meeting (27 October 2010) A/C.6/65/SR.21, Records of the General Assembly, Sixty-fifth Session, Sixth Committee, paras 10 and 39 respectively.

[127] See, for example, the opinions of Germany, 19th meeting' (25 October 2010) A/C.6/65/SR.19, sixty-fifth session of the Sixth Committee, Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, paras 92-94; The opinions of Italy, Portugal, Egypt, United Kingdom, Thailand and United States of America '20th meeting' (26 October 2010) A/C.6/65/SR.20, Records of the General Assembly, Sixty-fifth Session, Sixth Committee, paras 10, 14, 22, 54, 57, 59 and 63 respectively; The position of Singapore, 21st Meeting (27 October 2010) A/C.6/65/SR.21, Records of the General Assembly, Sixty-fifth Session, Sixth Committee, paras 21-22.

ground to reject the ILC's proposal. For example, the delegate of Thailand pointed out that:[128]

> It would be more reasonable to presume the opposite: that a State would rather not regard itself as bound towards a contracting State that considered the reservation to be invalid. That view better reflected the accepted principle that a State's consent to create legal obligations should be clear and should not be lightly presumed.

Likewise, the United States argued that presumption favouring severability conflicts with the principle of state consent since it will impose on states "an obligation expressly not undertaken by a country even if based on an invalid reservation".[129] Nevertheless, the ILC gives the following reasons to support this choice. First, the presumption in favour of severability respects the will of other contracting states while fully respecting that of a reserving state; however, the ILC states with the condition that this is based on an understanding that the latter can express at any time its intention not to be bound by the treaty without the benefit of the reservation, as expressly suggested in Paragraph 3 of Guideline 4.5.3.[130] Second, the ILC suggests that when a state makes a reservation, a state, "by definition", wishes to become a party to the treaty in question, expressing its consent to be bound by the treaty but conveying its intention to enter the privileged circle of parties and committing itself to implementation of the treaty.[131] Third, the ILC explains that it is "certainly wiser" to make a presumption that the author of the reservation is a party to a treaty in order to resolve the problems associated with the nullity of its reservation.[132] Fourth, it is argued by the ILC that it can help resolve the uncertainty between the time of the formulation of the reservation and the authoritative determination of the invalidity of the reservation, which can be several years.[133] Although favouring the presumption for the severability, the ILC opines that the

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[128] Mr. Kittichaisaree (the delegate of Thailand), '20th meeting' (26 October 2010) A/C.6/65/SR.20, Records of the General Assembly, Sixty-fifth Session, Sixth Committee, para 57.

[129] Mr. Johnson (The delegate of United States of America), '20th meeting' (26 October 2010) A/C.6/65/SR.20, Records of the General Assembly, Sixty-fifth Session, Sixth Committee, para 59.

[130] ILC, Commentary on Guideline 4.5.3 Status of the author of an invalid reservation in relation to the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) 36.

[131] ibid para 37.

[132] ibid para 39.

[133] ibid para 38.

irrebuttable presumption is too strict and opts for an idea of rebuttable one.[134] Further, in Paragraph 3 of Guideline 4.5.3[135], the ILC suggests the authorization for a reserving state to express at any time its intention not to be bound by the treaty without the benefit of the reservation, whilst Paragraph 4[136] provides an exception to Paragraph 3 in a case where a treaty body opines that a reservation is invalid and a reserving state should express its intention not to be bound by the treaty without the benefit of the reservation within a period of twelve months from the date at which the treaty monitoring body made its assessment. The ILC explains that allowing a reserving state to express its intention not to be bound by the treaty without the benefit of the reservation at any time aims on "softening the strength of the presumption".[137] The ILC also expounds that since only a reserving state can know the role of the reservation in making its consent to be bound by the treaty, "it is vital to establish whether the author of the reservation would knowingly have ratified the treaty without the reservation or whether, on the contrary, it would have refrained from doing so".[138]

As a result, the ILC Guide to Practice on Reservations to Treaties adopts the hybrid model with the rebuttable presumption for severability as well as additional rules in Guideline 4.5.3. of the ILC. The Guideline 4.5.3 provides:[139]

> 1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.
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> 2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.

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[134] ibid para 31.

[135] ILC, Paragraph 3 of Guideline 4.5.3, 'the Guide to Practice on Reservations to Treaties' (n 17).

[136] ILC, Paragraph 4 of Guideline 4.5.3, 'the Guide to Practice on Reservations to Treaties' (n 17).

[137] ILC, Commentary on Guideline 4.5.3 Status of the author of an invalid reservation in relation to the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) para 42.

[138] ibid para 43.

[139] ILC, Guideline 4.5.3, 'the Guide to Practice on Reservations to Treaties' (n 17).

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

Nevertheless, the ILC clearly admits that the content of the provisions of Guideline 4.5.3 is largely part of the progressive development of international law[140] and cautions that it should not be taken as approval of the practice generally called objections with "super-maximum" effect.[141]

In the next part, this article will analytically discuss the suitability of the hybrid approach based on the essentiality of reservation and illustrated in the particular context of an invalid reservation incompatible with the object and purpose of a treaty, which will be divided into three issues — 1. on the hybrid approach based on the essentiality condition, 2. on the rebuttable presumption in favour of severability and 3. on the additional rules in Paragraphs 3 and of Guideline 4.5.3.

With respect to the hybrid approach, the author shares the same view as Lauterpacht and Goodman in opting for the hybrid approach based on the essentiality criterion, rather than completely opting for either the backlash approach or the severability approach for determining the legal consequences of invalid reservations in general. However, this article aims to provide an additional discussion on the suitability of the hybrid approach based on the essentiality criterion in specific cases of the invalid reservations which are incompatible with the object and purpose of a treaty. The hybrid approach is based on the essentiality criterion which applies the severability approach to sever non-essential invalid reservations from the instrument of consent of a reserving state and applies the backlash approach to invalidate both the invalid essential reservations and the whole instrument of consent, thus accommodating both respect for the consent of a state and the desire for expansion of membership of a treaty without jeopardizing its integrity. The essentiality criterion offers a solution to the conflict between the severability approach and the principle

[140] ibid paras 49 and 55.

[141] ibid para 49.

of state consent as a reserving state is regarded as a party only when an invalid reservation does not form an essential condition to the decision to give consent to be bound by a treaty. Accordingly, keeping a reserving state as a state party whilst invalidating a reservation incompatible with the object and purpose of a treaty is not against the will of a reserving state. Moreover, unlike other limitations in Article 19 of VCLT, which are the explicit prohibition of certain types of reservations and the prohibition of reservations not included in the limited list of reservations allowed by a treaty, the prohibition of reservations incompatible with the object and purpose of a treaty contains a higher level of vagueness in its application. Accordingly, a reserving state should logically embrace the possibility that a reservation can be invalidated. Further, based on the assumption that states make a decision to join a treaty in good faith, states should not have the perception that they are aggravated by being held as a state party without attaining the benefits or privileges that imperil the essence of the treaty as a whole and prevent a treaty in question from achieving its object and purpose. The hybrid approach, based on the essentiality of a reservation, can also have a desirable effect on expanding the membership of a treaty in case of invalid non-essential reservations. In the cases of both essential and non-essential reservations, reservations which are incompatible with the object and purpose of a treaty would be invalidated and the content of such incompatible reservations would not cause negative effects on the integrity and effectiveness of the relevant treaty. However, as already observed, the test of essentiality will add more vagueness and uncertainty to the problem of the legal consequences of a reservation incompatible with the object and purpose, which is already fraught with unclarity. Therefore, states should clearly indicate its intention on whether or not it is willing to be bound by a treaty in cases where its reservation is deemed to be invalid or not. Further, in cases where states do not clearly express their intention to be bound or not by a treaty if their reservation becomes invalid, the presumption in favour of severability, which is going to be discussed next, can offer help to some extent.

Pertaining to the rebuttable presumption of severability, the author agrees with Goodman and ILC in articulating presumption favouring severability rather than non-severability. Of course, the costs and benefits analysis of the corrective actions put forward by Goodman has a strong persuasive force behind the model. However, normatively, especially in the specific case of a reservation incompatible with the object and purpose of a treaty, the importance of the beneficial effect of the

presumption in favour of severability in alleviating legal uncertainties should be emphasized. Likewise, the ILC in its guidelines is of the view that "[t]his presumption can help resolve the uncertainty between the formulation of the reservation and the establishment of its nullity".[142]

The author argues that the advantage of creating legal certainties of the presumption in favour of severability serves as a very strong rationale to support the presumption for severability. This is because in applying the hybrid model based on the essentiality, the problem of legal uncertainty, which is already caused by the test of compatibility with the object and purpose of the treaty, will be aggravated by the legal uncertainty caused by the test of essentiality. The presumption in favour of severability will be helpful in creating legal certainty not only for the legal status of a reserving state as a state party to the relevant treaty but also for other state parties, as it can assure them that at least generally their rights and obligations vis-à-vis a reserving state, apart from those relating to an invalid reservation, will not be terminated due to invalidity of the consent of a reserving state. Given that nullity as a result of invalidity will operate *ab initio*, the presumption favouring severability is clearly very much needed to deal with the issue of legal uncertainty. Pertaining to the rebuttable character of the presumption for severability, it is argued here that the presumption for severability should be rebuttable since this alternative respects the consent of a state on which the hybrid approach is fundamentally based. Although it can cause the problem of legal uncertainty for other state parties, it is a reserving state that bears the burden of proof to prove otherwise in case it fails to express its intention not to be bound by a relevant treaty in case of invalid reservation when making a reservation. However, although the rebuttable presumption in favour of severability is based on strong arguments in terms of legal certainty and in light of cost-benefit analysis, it has not yet become part of the current general international rule and the ILC guidelines have no legal binding effect in itself. Thus, the presumption of severability can serve as a tool to alleviate the legal uncertainty arising from the test of compatibility between a reservation and the object and purpose of a treaty and the test of essentiality of a reservation to the consent of a reserving state when they are incorporated as a rule of reservation of relevant treaties.

[142] ibid para 39.

In light of the additional rules on the presumption for severability suggested by the ILC in Paragraphs 3 and 4 of Guideline 4.5.3,[143] Paragraph 3 recommends authorization for a reserving state to express at any time its intention not to be bound by the treaty without the benefit of the reservation, whilst Paragraph 4 provides an exception to the Paragraph 3 in a case where a treaty monitoring body opines that a reservation is invalid and a reserving state should express its intention not to be bound by the treaty without the benefit of the reservation within a period of twelve months from the date at which the treaty monitoring body made its assessment. It is argued by this article that allowing a reserving state to express its intention not to be bound by a treaty in a case of the invalidity of a reservation at any time, with the exception in a case where a treaty monitoring body had already decided that a reservation in question is invalid, is problematic in terms of legal uncertainty as this would in practice allow a reserving state to abusively modify the character of the relevant reservation — whether it is essential to a reserving state's consent or not. Thus, this would negatively affect legal uncertainty, especially for other state parties, since their rights and obligations towards a reserving state may be modified by a reservation state unilaterally. The ILC itself in the commentary admits this weakness that the proposed rule in Paragraph 3 can create "great practical difficulties in terms of reverting to the situation that existed at the time the State or international organization had expressed its consent to be bound."[144] Accordingly, the author argues against the proposed rule that allows a reserving state to express its intention not to be bound by the treaty without the benefit of the reservation that can legally alter the character of a reservation after the reservation has been formulated. However, a reserving state can, of course, prove such an intention before the court. This article argues that the relevant rule should be articulated in that way that the intention not to be bound by a treaty in a case of invalid reservations is to be expressed when a reservation is formulated; however, this does not bar a reserving state from proving otherwise in case a reserving state does not express such an intention when making a reservation.

[143] ILC, Paragraphs 3 and 4 of Guideline 4.5.3, 'the Guide to Practice on Reservations to Treaties' (n 17).

[144] ILC, Commentary on Guideline 4.5.3 Status of the author of an invalid reservation in relation to the treaty, 'Commentaries on the Guide to Practice on Reservations to Treaties' (n 14) para 54.

5. Conclusion

In summary, the author proposes that the hybrid approach, based on the essentiality of a reservation to the consent of a reserving state, offers a solution to the problem of the legal consequences of the invalidity of a reservation incompatible with the object and purpose of a treaty. Further, the presumption of severability is to be adopted primarily based on its benefits in creating legal certainties together with its advantages in light of cost-benefit analyses. However, whilst it can be construed that the hybrid approach, based on the essentiality of a reservation to the consent of a reserving state has its ground on general international law, to be more specific, the principle of state consent, the rebuttable presumption of severability is neither by itself general international law nor can it be grounded on any general international law. Thus, the mechanism of the rebuttable presumption of severability must be incorporated into a relevant treaty for the court can lawfully apply the mechanism to solve the problem. Nonetheless, this article argues against the suggestion of the ILC allowing a reserving state to express its intention not to be bound by a treaty in a case of the invalidity of a reservation at any time, with the exception in the case where a treaty monitoring body had already decided that a reservation in question is invalid since it would cause a problem of legal uncertainties, which is actually the problem that the presumption aims to deal with.