

**Analytical Note concerning the issue of reservations in draft Convention on
international through railway traffic
(Article 72 of draft Convention)**

At the XXVII meeting of the Temporary Working Group, TWG (6-9 March 2012, OSJD Committee), the Group's members from Lithuania and Estonia proposed a new wording of Article 72 "Reservations" of draft convention on international through railway traffic, stipulating the possibility to make a reservation regarding the non-application of essential provisions of the Convention (to which Annexes to it are relating) at any time, including the time upon the entry of the Convention into force for the State making the reservation.

The existing wording of Article 72 of draft Convention does not specifically stipulate the reservation making "at any time". In this case, Article 19 of the Vienna Convention (1969) on the law of treaties may be applied (hereinafter, Vienna Convention). The Article stipulates that a State may formulate a reservation when signing, ratifying, adopting or approving it or acceding to it. Thus, the current edition of draft Convention in combination with the Vienna Convention allows declaring a reservation by the Party only prior to expiry of the confirmation time that the Convention is binding to it.

At the same time, the current international agreements do not contain provisions that may obstruct the establishment of other rules regarding reservations in draft Convention. Paragraph 2, Article 30 of the Vienna Convention specifies the priority to be taken by succeeding international agreements over those concluded earlier, i.e. even in case of availability of such obstructions, the Convention will be in effect as a later agreement.

In general, it can be noted that the establishment of the possibility to formulate reservations in an international agreement after the expression of will by a State to be bound by such an agreement is atypical. However, examples of such an approach are available in a number of conventions.

In particular, Article 287 of the United Nations Convention on the Law of the Sea of 1982 stipulates that when signing, ratifying or acceding to the Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes described in the Article. The same provision is specified in Article 298 of the same convention.

Article 46 of the Convention on the Contract for the International Carriage of Goods by Road stipulates that any country may, at the time of depositing its instrument of ratification or accession or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall extend to all or any of the territories for the international relations of which it is responsible.

Paragraph 1, Article 42 of Convention concerning International Carriage by Rail (COTIF) 1980 (in edition of Protocol 1999) stipulates that any Member State may declare, at any time, that it will not apply in their entirety certain provisions of the Convention

The assessment of the States' practices on declaring reservations was carried out by the UN International Law Commission. The Guide to Practice on Reservations to Treaties prepared by the Commission in 2011 stipulates, in its paragraph 1.1, that "reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organisation.

The Guide notes that the cases can often be cited when a State endeavors to formulate a reservation at the moment that is different from those contained in the definition of Vienna Conventions, and such a possibility has not been eliminated completely from practice, moreover, the principle under which a reservation may not be formulated after the expression of consent to be bound by the agreement is not absolute. It signifies inasmuch as the contracting states concluding agreements prohibit the formulation of new reservations in one form or another and does not limit more strictly the list of moments when a reservation may be made (page 204).

Moreover, the juridical conclusion of the UN Secretariat, dated 19 June 1984 indicates that "contracting parties may unanimously adopt one or another reservation, if the agreement does not contain respective concrete provisions, and even contrary to such provisions", or if an agreement contains clear provisions as to when reservations may be made (pages 208-209).

At the same time, paragraph 2.3 of the Guide stipulates that a State or an international organisation may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

Based on the Commission's position, the Parties to the Convention may agree on formulating a reservation after expressing consent to be bound by the document. Therefore, neither of the editions of Article 72 "Reservations" of draft Convention under consideration (with a possibility to make reservations at any time or only when signing/acceding to the Convention) contravenes the existing international legal practice.

The issue of modification of Article 72 "Reservations" of draft Convention was considered by a number of the TWG meetings in 2012-2014 as well as sessions of the OSJD governing bodies.

The wording proposed to the TWG members by Lithuania and Estonia was supported by TWG members from Bulgaria, Georgia, Moldova, Latvia, Poland, Slovakia, Ukraine and Czech Republic. TWG members from Belarus, Kazakhstan, China, Russia and Chairman of OSJD Committee spoke in favour of the edition available in draft Convention.

TWG member from Uzbekistan has not voiced his position on this issue so far. Due to the fact that opinions are divided, the TWG decided to submit the given matter in two options for consideration by the International Conference on adoption of the text of Convention.

ARTICLE 72
Reservations

1. A statement by any Contracting Party, including an expository statement, as well as an interpretative declaration or statement made when signing, ratifying, accepting, approving or acceding to this Convention, and purporting to exclude or modify the legal effect of certain provisions of this Convention, shall be referred to as a reservation.
2. A reservation may be made only if clearly provided for by this Convention.

Edition proposed by TWG members from Lithuania and Estonia
Article 72
Statements and reservations

1. Any Contracting Party may at any time make a statement to the effect that it will not apply in full certain Annexes to this Convention. Moreover, reservations and statements regarding the non-application of certain provisions of the Convention itself or of Annexes to it shall be permitted only if such reservations and statements are expressly provided for in the provisions themselves.
2. Reservations and statements shall be sent to the Depositary. They shall take effect from the entry into force of this Convention for the State concerned. Any statement submitted after this Convention enters into force shall take effect from 31 December of the year following the year in which the statement was submitted. The Depositary shall inform the Contracting Parties accordingly.