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INTERNATIONAL HEALTH REGULATIONS  
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## Review and approval of proposed amendments to the International Health Regulations

### Reservations to the International Health Regulations

#### Report by the Secretariat

1. The Intergovernmental Working Group on Revision of the International Health Regulations, at the last plenary meeting of its first session, on 12 November 2004, requested the Secretariat to prepare a document to clarify the question of reservations to the International Health Regulations. The request was made in the light of the debate in subgroup C on Article 62 of the draft revised Regulations.<sup>1</sup> Statements were made, inter alia, to the effect that Article 62, by giving the Health Assembly the authority to accept reservations, was not in conformity with Article 22 of the WHO Constitution. It was also noted that reservations were sovereign decisions, which could not be challenged or reviewed by the Health Assembly. The amendments submitted with respect to Article 62 were issued in document A/IHR/IGWG/PL/Conf.Paper No.2.
2. The present report aims at clarifying the legal parameters governing the formulation of reservations to regulations adopted under Article 21 of the Constitution; the reasons why the Secretariat drafted Article 62 as set out in document A/IHR/IGWG/3; and the differences between regulations and international treaties with regard to reservations.
3. It may be useful to recall at the outset that reservations are defined, in Article 2, paragraph 1 (d), of the 1969 Vienna Convention on the Law of Treaties as “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”. A reservation is thus different from a proposed amendment as well as from a declaration or a comment, by which a State purports to specify or clarify the meaning or scope attributed by it to certain provisions of a legal instrument.

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<sup>1</sup> Document A/IHR/IGWG/3.

## **ARTICLE 22 OF THE WHO CONSTITUTION**

4. The relevant constitutional provision is that contained in Article 22 of the Constitution:

Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.

Article 22 has obviously to be read in conjunction with Article 21, which gives the Health Assembly authority to adopt binding regulations in five specific areas, including “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease”.

5. While Article 22 as a whole was one of the items most debated during the drafting of the Constitution, discussions mostly related to the principles of tacit approval of regulations and of “opting out”, which were perceived by some delegations as an infringement of State sovereignty. The available records do not contain a clear explanation of the rationale for the proposal that the formulation of reservations would prevent a regulation from entering into force for the reserving State. The records also reveal little discussion on that point, which apparently was not controversial. In the light of the historical context in 1946, it can be assumed that there were two main reasons for the regime on reservations with regard to the regulations envisaged in paragraph (a) of Article 21. First, the regulations were going to replace the largely ineffective international sanitary conventions, which were hampered *inter alia* by a lack of consistency and uniformity in their implementation; strong limitations on the right of States to formulate reservations would have guaranteed uniformity in a technical area of crucial public health importance. Secondly, the traditional practice on reservations to multilateral treaties, which was generally applied until the 1950s and was considered to reflect customary international law, required the unanimous acceptance of the reservation by all other treaty parties as a condition for the reserving State being considered to be a party to the treaty.

6. The essential point enunciated in Article 22 in this respect is that “regulations ... shall come into force for all Members after due notice has been given of their adoption ... except for such Members as may notify the Director-General of ... reservations ...”. Article 22 thus focuses on one specific issue: which States are bound by the regulations when they first enter into force after the expiry of the relevant period of time. Article 22, however, provides no specific guidance as to the further consequences of formulating a reservation. In particular, it does not explicitly rule out the possibility that a mechanism can be devised to permit reserving States to become bound by the regulations in certain conditions. Moreover, there is evidently a qualitative difference between rejection of the regulations, which covers the instrument in its entirety, and reservations which purport only to exclude or modify the legal effects of certain provisions of the regulations in their application to the reserving State. It would thus be reasonable to conclude that Article 22 sets a clear standard for the initial entry into force of regulations for various categories of States, but leaves further consequences unaddressed.

7. As for the body competent to address such further consequences, in the view of the Secretariat that body could only be the Health Assembly. First, the Health Assembly has the constitutional authority to adopt regulations, and therefore also the authority to determine the conditions for their entry into force, within the limits defined by Article 22. Secondly, it should also be observed that the Health Assembly has a general authority to interpret the Constitution. This is explicitly provided in Article 75 of the Constitution with specific regard to questions or disputes “concerning the interpretation or application” of the Constitution. The following section clarifies the practice of the Health Assembly in this regard.

## RESERVATIONS TO THE 1951 AND 1969 REGULATIONS

8. The first World Health Assembly (resolution WHA1.36) adopted Regulations No.1 (the so-called “Nomenclature Regulations”), which in its Article 20 basically reproduced the language of Article 22 of the Constitution as to the effect of rejections or reservations. The same language was retained by the Twentieth World Health Assembly in its revision of the Regulations (resolution WHA20.19).

9. On 25 May 1951 the fourth World Health Assembly (resolution WHA4.75) adopted the International Sanitary Regulations. Article 107 of those Regulations introduces the model which was then repeated verbatim in Article 88 of the current Regulations and which formed the basis for Article 62 of the draft revision.

10. As in the case of Article 22 of the Constitution, the *travaux préparatoires* shed little light on the reasoning behind Article 107. However, at the request of the Health Assembly, the Director-General prepared an explanatory memorandum on the technical and legal aspects of the 1951 Regulations.<sup>1</sup> The memorandum contained the following considerations with regard to reservations:

- (a) in view of the technical nature of the International Sanitary Regulations and the fact that they replaced no fewer than 13 earlier sanitary conventions, it was felt that it would be desirable for the Health Assembly to exercise a degree of control over reservations.
- (b) the difficulties of securing acceptance of the reservations by all Member States individually would be avoided through the establishment of a centralized mechanism.
- (c) the Health Assembly had indicated its intention not withhold acceptance of reservations except on the most serious grounds. Rather, the exercise of its authority under Article 107 was seen as being of a consultative nature, consisting in its engaging in a dialogue with a State unable to accept all the obligations of the Regulations with a view to assisting it in resolving its difficulties.

11. The available records show that 25 States formulated reservations with respect to the International Sanitary Regulations, 10 States with regard to the 1969 Regulations and 16 with regard to the 1973 revision of the Regulations. It should also be stressed that the Health Assembly developed a fairly consistent practice in dealing with reservations under the 1951 Regulations, and also under subsequent revisions. In particular, the Assembly devised mechanisms for examining the substance of the reservations and adapted its consideration and decisions so as to assist the reserving States in overcoming or minimizing the problems that had prompted the formulation of the reservations. As a result, several reservations were eventually withdrawn or formulated with a narrower scope than had initially been proposed.

12. A reasonable analysis of the approach adopted in the 1951 and 1969 Regulations is that the Health Assembly exercised its constitutional authority to interpret Article 22 of the Constitution. It aimed, in particular, at reconciling the limits set by that Article for the entry into force of the Regulations for States formulating reservations with the aspiration to achieve a universally applicable uniform system for the prevention of the international spread of disease. It apparently did so by interpreting the limits imposed by Article 22 in the light of the consideration that reservations are

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<sup>1</sup> Official Records of the World Health Organization, No.37, pp. 329-333.

different from rejections and that only reservations substantially detracting from the character and purpose of the Regulations, as determined by the Health Assembly, should ultimately preclude the entry into force of the Regulations for a State. The fact that such determination was entrusted to an intergovernmental body may reflect, on the one hand, the above-mentioned traditional rule on the acceptance of reservations to treaties, and, on the other, the peculiar nature of the Regulations as international legal instruments closely linked to WHO and its governance system, as well as the paramount interest in striving to achieve uniform national implementation of the Regulations. It also appears to reflect the general interest of Member States at that time in a centralized system which would allow an objective determination of whether a particular reservation undermined the integrity of the Regulations.

## **RESERVATIONS TO MULTILATERAL TREATIES**

13. As far as reservations to multilateral treaties are concerned, international law and practice have undergone substantial development since the adoption of the WHO Constitution. As noted in paragraph 5 above, the recognized traditional rule was the requirement for unanimous acceptance of the reservation by the other parties to a treaty as a condition for considering the reserving State to be a party to the treaty. As a result of the rapid increase in the number of multilateral treaties, of the procedure for their negotiation and adoption, and of the need to balance the quest for universal treaty participation with the protection of the rights of States with views divergent from those of the majority of contracting parties, that rule was felt to be inadequate and too restrictive. United Nations efforts to develop new legal parameters culminated in Articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties.

14. A detailed explanation of the regime introduced by the Vienna Convention is beyond the scope of the present report. For the purposes of the issue under consideration, it should be noted that Article 19 states the general principle that a State may formulate a reservation, unless: (a) the reservation is prohibited by the treaty; (b) the treaty allows only specified reservations, which do not include the reservation in question; or (c) the reservation is otherwise incompatible with the object and purpose of the treaty. Under Articles 20 and 21, a reservation does not preclude the entry into force of the treaty as between the reserving State and other States that expressly or tacitly accept the reservation, or else object to it but do not explicitly exclude such entry into force. In the latter case, the provisions to which the reservation relates do not apply as between the two States.

15. The main problem left unresolved by the Vienna Convention are the legal effects of reservations impermissible under Article 19, in particular the question who has the authority to determine whether a reservation is incompatible with the object and purpose of the treaty, and whether its acceptance by other parties overrides the impermissibility and constitutes the reserving State as a party to the treaty. The problem is particularly acute since modern multilateral treaties, with very few exceptions, do not establish bodies competent to adjudicate in such matters with binding effects, so that in practice much depends on the appreciations and reactions of the other parties to the treaty. This may lead to situations in which treaty relations are fragmented, since some parties refuse to establish them vis-à-vis States that formulated reservations considered incompatible with the object and purpose of the treaty whereas other parties did not raise such objections. As a result, the Vienna Convention has had only a limited influence on subsequent treaty practice; the trend has in any case been towards a liberal approach to impermissible reservations so that even reservations considered by several parties to be incompatible with the object and purpose of the treaty did not in practice prevent the reserving State from being considered to be a party to that treaty.

16. The foregoing summary seeks to clarify why the general regime on reservations to multilateral treaties based on the Vienna Convention would not in the view of the Secretariat be in keeping with the provisions of Article 22 of the Constitution. The practical effect of the Vienna Convention is that the formulation of a reservation does not normally preclude the entry into force of a treaty for a reserving State, except with regard to parties that object to the reservation and indicate that they do not consider the treaty to be in force as between them and the reserving State. In the case of the International Health Regulations, on the contrary, the rule established by Article 22 of the Constitution is that the Regulations do not enter into force for a State formulating a reservation at the same time as they do for other States. In the absence of some centralized mechanism to determine which reservations do not ultimately preclude the entry into force of the Regulations for a reserving State, the latter would become a party vis-à-vis the States that do not object to its reservation. This could also undermine the establishment of an internationally uniform regime for the control of the international spread of disease.

17. In this connection, it may be of interest to note that a few multilateral conventions have introduced collective mechanisms either to authorize a State to make an otherwise impermissible reservation or to determine whether a reservation is incompatible with the object and purpose of the treaty. Such mechanisms are not dissimilar in their intention from the aforementioned articles of the 1951 and 1969 Regulations. For example, under Article 50 of the 1961 Single Convention on Narcotic Drugs and Article 32 of the 1971 Convention on Psychotropic Substances, a State that wants to become a party but wishes to enter a reservation not permitted under those conventions has to seek authorization from the other Parties. Such a reservation is deemed to be permitted unless it is objected to by one third of the existing Parties. Under Article 20 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, a reservation is considered incompatible with the object and purpose of the Convention if at least two thirds of the States Parties object to it.

## CONCLUDING OBSERVATIONS

18. On the basis of the foregoing analysis, the Secretariat submits to the Working Group for consideration a few concluding observations that may assist in further debates on the topic at hand:

- Article 22 of the Constitution states that regulations do not enter into force for States notifying the Director-General of their rejection or reservation within the relevant period, at the same time as they enter into force for States accepting them;
- The regime contained in the Vienna Convention is not prima facie compatible with Article 22 of the Constitution insofar as in practice it normally allows in practice States formulating reservations to constitute themselves as parties to a treaty and leaves further consequences to bilateral interactions between parties;
- Article 22 leaves unaddressed the question whether a regulation may enter into force under certain conditions for States that have formulated reservations, aside from the obvious case of withdrawal of those reservations;
- The authority to devise a mechanism to enable reserving States to become parties to regulations within the context of Article 22 of the Constitution lies with the Health Assembly, as the governing body competent to adopt regulations and to interpret the Constitution.

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