



Council of the European Union
General Secretariat

Brussels, 24 July 2024

WK 10337/2024 REV 1

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INFORMATION

From:	Presidency
To:	Working Party on Integration, Migration and Expulsion (IMEX Expulsion) Working Party on Public International Law
Subject:	Proposed reaction of the EU to the 'Interpretative Declaration' of the Republic of Belarus of 31 July 2023 regarding Article 20 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime - Working document from the Commission services - REVISED VERSION

Dear COJUR Delegates,

Please find attached the revised version of the Note Verbale following a comment from France.

Any objections to the proposed comment may be sent to the COJUR Presidency (cojur.hupres@mfa.gov.hu) with COJUR Secretariat in copy (cojur@consilium.europa.eu) by **13:00 today**. The reason of the short deadline is that the issue is scheduled to be on the agenda of IMEX WP today at 15:00.

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Thank you for your kind understanding.

Kind regards,

The Presidency Team

Note verbale from the European Union addressed to the Secretariat General of the United Nations in response to Interpretative Declaration (C.N.225.2023.TREATIESXVIII. 12.b (Depositary Notification)) of 31 July 2023 formulated by the Republic of Belarus

The Delegation of the European Union to the United Nations in New York presents its compliments to the Secretary-General of the United Nations and, with reference to the Interpretative Declaration (C.N.225.2023.TREATIESXVIII. 12.b (Depositary Notification)) of 31 July 2023 formulated by the Republic of Belarus (the ‘Declaration’) regarding Article 20 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 (the “Protocol”), has the honour to communicate the following:

Having examined the Declaration, the European Union considers that it amounts to a reservation. The purpose and content of the Declaration is to exclude the application of Article 20 of the Protocol to State Parties that have withdrawn their reservation pursuant to Article 20(4) thereof to all disputes that arose “*before, on, or immediately after the withdrawal of such a reservation*”.

The Declaration, being a reservation, cannot be accepted as it was formulated late. In accordance with Article 20(3) of the Protocol, States are only allowed to make reservations concerning Article 20(2) of the Protocol when signing the Protocol by a State or when depositing its instrument of ratification or accession thereto. This rule of international treaty law is also stipulated in Article 19 of the Vienna Convention on the Law of Treaties. Since the Declaration was made after the signing of the Protocol by the Republic of Belarus and after the deposit of its instrument of ratification of the Protocol, it must be concluded that the Declaration constitutes a belated reservation.

Moreover, the Declaration is to be considered as impermissible reservation as it is not permitted by the Protocol. In accordance with Article 20(3) of the Protocol, only reservations to Article 20(2) thereof are permitted. Therefore, the Declaration, being a reservation to Article 20(4) of the Protocol, cannot be accepted as it intends to modify the date at which the withdrawal of a reservation to Article 20(2) of the Protocol becomes effective.

~~Finally, the Declaration, being a reservation to Article 20(4) of the Protocol, also runs against the object and purpose of the Protocol. The Declaration aims at preventing the reestablishment of the method of dispute settlement provided in Article 20(2) of the Protocol after a State Party has withdrawn its reservation in this regard, and thereby aims at preventing the application of this provision to itself. In this regard, the European Union would like to recall that the Republic of Belarus accepted Article 20(2) of the Protocol without reservations.~~

The European Union also opposes the purported interpretation of Article 20 of the Protocol provided by the Republic of Belarus in the Declaration. That interpretation would allow the Republic of Belarus and other States to formulate objections to withdrawals of reservations by reserving States. Furthermore, given the instrumentalisation of migration movements at the Eastern borders of the European Union performed by the Republic of Belarus, the Declaration has to be considered as an attempt to prevent disputes between the European Union Member States and the Republic of Belarus to reach the stage of the International Court of Justice. Therefore, the Declaration cannot be accepted as an act in good faith. In addition, the European Union would like to state that the interpretation of Article 20 of the Protocol as provided by Belarus runs against customary international law and the Vienna Convention on the Law of the Treaties. In accordance with Article 22(1) of the Vienna Convention on the Law of the Treaties,

Commented [GG1]: Comment from FR:

This paragraph on the incompatibility of the reservation with the object and purpose of the Convention is indeed problematic since Article 20 of the Protocol itself states that reservations to the jurisdiction of the ICJ may be formulated. In our view, what is problematic in this case is the late formulation of the reservation, not its incompatibility with the object and purpose of the Convention.

unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. The general rule stemming from the Vienna Convention on the Law of the Treaties (Article 22(3)(a) of the Vienna Convention on the Law of the Treaties) is that unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State.

The Delegation of the European Union to the United Nations in New York avails itself of this opportunity to renew to the Secretary General of the United Nations the assurances of its highest consideration.

Annex I
Working document from the Commission services

Proposed reaction of the EU to the ‘Interpretative Declaration’ of the Republic of Belarus of 31 July 2023

1. Context

The Union is a party to United Nations Convention against Transnational Organized Crime (the ‘UNTOC’) and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (the ‘Protocol’)¹. All EU Member States are also parties to the UNTOC and to the Protocol. The Secretary General of the UN is the depositary of the UNTOC and the Protocol.

Article 20 of the Protocol in material part stipulates the following (underscore added):

“2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.”

The Republic of Belarus became a party to the Protocol on the 25 June 2003 and it has not made use of the possibility, provided for in Article 20(3) of the Protocol, to formulate a reservation on the applicability of Article 20(2) thereof. Therefore, for Belarus, any dispute concerning the “interpretation or application” of the Protocol is governed by Article 20 of the Protocol.

Pursuant to Article 20(3) of the Protocol the Republic of Lithuania formulated a reservation to Article 20(2) thereof when it ratified the Protocol on 12 May 2003. On 12 May 2023, Lithuania exercised its right under Article 20(4) to withdraw its reservation.²

¹ Council Decision 2004/579/EC of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime; Council Decision 2006/617/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community.

² On 12 May 2023, the Government of Lithuania informed the Secretary-General of its decision to withdraw the following reservation made upon ratification:

"And whereas, it is provided in paragraph 3 of Article 20 of the Protocol, the Republic of Lithuania would like to declare that it does not consider itself bound by paragraph 2 of Article 20, which provides that any State Party

On 31 July 2023, the Republic of Belarus made an “Interpretative Declaration” (C.N.225.2023.TREATIESXVIII.12.b (Depositary Notification)) regarding Article 20 of the Protocol. The text of the ‘Interpretative Declaration’ is as follows:

“The Republic of Belarus proceeds from the assumption that the provisions of paragraphs 2 – 4 of Article 20 of the Protocol shall be interpreted in good faith as not binding for the States Parties to the Protocol with the obligations to settle disputes in the International Court of Justice with that State Party to the Protocol which withdraws its reservation on non-recognition of its jurisdiction, in situations when disputes concerning the interpretation or application of the Protocol have arisen from and/or become the subject of peaceful settlement, inter alia through negotiations and/or arbitration, before, on, or immediately after the withdrawal of such a reservation.”

Lithuania has objected to that ‘Interpretative Declaration’ by way of Communications dated 7 September 2023 (C.N.374.2023.TREATIES-XVIII.12.b (Depositary Notification)) and 28 November 2023 (C.N.498.2023.TREATIES-XVIII.12.b (Depositary Notification)).

2. Analysis of the Belarus Interpretative Declaration

In accordance with Article 2(1)(d) of the Vienna Convention on the Law of the Treaties (the ‘VCLT’) “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. The VCLT does not regulate interpretative declarations, which are defined in the Guide to practice on reservations to treaties³ as follows: *“‘Interpretative declaration’ means a unilateral statement, however phrased, or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.”*

To determine whether the ‘Interpretative Declaration’ of Belarus is in essence a reservation, it is necessary to examine the legal effect that Belarus purports to produce. The ‘Interpretative Declaration’ needs to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, in light of the Protocol to which it refers. Due regard will be given to the intention of Belarus at the time the statement was formulated.⁴

A) Text of the ‘Interpretative Declaration’

The text of the ‘Interpretative Declaration’ purports the existence of a rule whereby if a State Party withdraws its reservation as regards the applicability of Article 20(2) of the Protocol, then the other State Parties are not subject to dispute settlement procedure governed by that provision *“in situations when disputes concerning the interpretation or application of the Protocol have arisen from and/or become the subject of peaceful settlement (...) before, on, or immediately after the withdrawal of such a reservation.”*

In substance, the ‘Interpretative Declaration’ amounts to defining the date at which the withdrawal of a reservation to Article 20(2) of the Protocol becomes effective.

may refer any dispute concerning the interpretation or application of the said Protocol to the International Court of Justice.”

³ Guide to Practice on Reservations to Treaties, adopted by the International Law Commission, 2011.

⁴ Guide to Practice on Reservations to Treaties, *op. cit.*, Point 1.3.1. This is further elaborated in point 4.2.6: *“A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.”*

The effective date of the withdrawal

In accordance with Article 22(1) VCLT, unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. The general rule stemming from the VCLT (Article 22(3)(a) VCLT) is that, unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State. *In casu*, Lithuania has given notice of the withdrawal of its reservation through notifications to the depositary and the communication of these withdrawals to the other State Parties of the Protocol.⁵

In this regard, Belarus declares that it is not bound by Article 20(2) of the Protocol in relation to disputes that have arisen “*before, on, or immediately after the withdrawal of such a reservation.*” Whilst Belarus is not bound by Article 20(2) of the Protocol before the date at which the withdrawal of the Lithuanian reservation has become effective, it is bound by that provision after that date, regardless of the point in time at which a dispute has arisen. Therefore, through its ‘Interpretative Declaration’, Belarus purports to amend the legal effects of Article 20(4) of the Protocol with regard to disputes that have arisen “*before, on, or immediately after the withdrawal of such a reservation.*”

The effects of the withdrawal

As a general rule, the effect of withdrawal of a reservation is the “restoration” of the effects of the provision of the treaty in relation to which the reservation was made. In the present case, as of the date at which the withdrawal of the Lithuanian reservation has become effective, Article 20(2) of the Protocol is fully applicable to any dispute concerning the “interpretation or application” of the Protocol between Lithuania and Belarus. Belarus cannot validly alter this legal consequence by means of a unilateral ‘Interpretative Declaration’.

B) The object and purpose of the Protocol

As stated in Article 2 of the Protocol, the purpose of the Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among Parties to that end, while protecting the rights of smuggled migrants. In this regard, the Parties declare in the preamble that “*effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels.*” The cooperation between State Parties includes provisions on dispute settlement, which should provide for legal certainty as regards the rights and obligations of each State Party. The Protocol provides for a possibility to make a reservation to Article 20(2) of the Protocol, which can be withdrawn at any time without requiring the consent of any other State Party.

In this regard, the ‘Interpretative Declaration’ aims at changing the situation of the reserving State Party that is entitled to withdraw its reservation in relation to other State Parties that did not make any reservations at the time of signature, ratification, acceptance or approval of or accession to the Protocol.

C) Circumstances of the Interpretative Declaration

It is recalled that there is a dispute between Lithuania and Belarus regarding the question of smuggling of migrants. In this regard, the ‘Interpretative Declaration’ constitutes an attempt of

⁵ Communications dated 7 September 2023 (C.N.374.2023.TREATIES-XVIII.12.b (Depositary Notification)) and 28 November 2023 (C.N.498.2023.TREATIES-XVIII.12.b (Depositary Notification)).

Belarus to limit the possibility for that dispute to be brought before the International Court of Justice in accordance with Article 20(2) second sentence of the Protocol.

D) Conclusion on the nature of the Interpretative Declaration

The 'Interpretative Declaration' amounts to a reservation within the meaning of the VCLT and the Protocol.

3. Permissibility and time of reservations under the Protocol

Under the Protocol, reservations can be formulated only at the time of signature, ratification, acceptance or approval of or accession to the Protocol. Since the Declaration amounts to a reservation, it has been formulated late.

What is more, in accordance with Article 19 VCLT, States may formulate reservations 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.

The Declaration is impermissible as it is not a reservation that is permitted by the Protocol. In fact, in accordance with Article 20(3) of the Protocol, only reservations to Article 20(2) thereof are permitted. Therefore, the Declaration, being a reservation to Article 20(4) of the Protocol, cannot be accepted as it intends to modify the date at which the withdrawal of a reservation to Article 20(2) of the Protocol becomes effective.

In any event, the Declaration is incompatible with the object and purpose of the Protocol. As a general rule, a reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty. However, such a reservation might be contrary to the object and purpose of the Protocol if it has the effect of excluding the reserving State from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of a treaty is to put such a mechanism into effect. It is also contrary to the object and purpose of a treaty when the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*.⁶

In casu, Belarus' Interpretative Declaration would aim at preventing the reestablishment of the method of dispute settlement. While this was possible at the time of signature, ratification, acceptance or approval of or accession to this Protocol, it would be contrary to the object and purpose of the Protocol to exclude certain dispute settlement methods at will, through unilateral decisions. The power to reestablish dispute settlement methods after signature, ratification, acceptance or approval is limited only to those states that made a reservation pursuant to Article 20(3) of the Protocol (i.e. Lithuania). Moreover, Belarus intends to limit the scope of application of Article 20(2) of the Protocol that it had accepted without reservations.

4. Conclusion

The 'Interpretative Declaration' should be considered to be a reservation as it purports to modify the legal effect of Article 20(4) of the Protocol. This reservation is not only belated but also impermissible. It is therefore suggested that the Union makes the objection to that reservation as set out in the Annex.

⁶ Guide to Practise on Reservations to Treaties, *op. cit.*, Point 3.1.5.7