DECLARATIONS, STATEMENTS AND 'DISGUISED RESERVATIONS' WITH RESPECT TO THE CONVENTION ON THE LAW OF THE SEA

L. D. M. NELSON*

I. INTRODUCTION

THE question of reservations was one of the 'controversial issues' facing the Third United Nations Conference on the Law of the Sea in drawing up the final clauses of the Convention. On the one hand it was argued that the integrity of the Convention must be safeguarded and that the 'package deal' must be protected from possible disintegration by the making of reservations.[1] On the other hand the view was held that 'allowance for the possibility of reservations is aimed at accommodating the views of the delegations who have maintained that they cannot become parties to the Convention unless the Convention permits them to exercise a right to enter reservations, in accordance with customary international law and as envisaged under the Vienna Convention on the Law of Treaties.'[2] In short the need to preserve the integrity of the Convention was pitted against the need to secure universal participation in the Convention.

The Conference was faced with four choices: the first would have prohibited reservations altogether; the second would have permitted reservations to certain provisions; the third would have prohibited reservations to specified provisions; the fourth would not have provided a clause on reservations at all.[3]

In the event the Conference elected, not without difficulty, to adopt the no-reservation formula which now appears in the Convention as article 309 and which reads as follows:

> No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.[4]

* Judge, Vice-President of the International Tribunal for the Law of the Sea, Visiting Professor of International Law at the London School of Economics.

1. FC/6, 7 Aug 1979, R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, vol. XII (1987), 356. As Sir Robert Jennings has succinctly put it: 'A package deal subject to reservations is no longer a package or a deal.' R. Y. Jennings, 'Law-Making and the Package Deal', *Mélanges offerts à Paul Reuter* (Paris: Pedone, 1981), 347–55 at 352.

2. FC/6, 7 Aug 1979, see n. 1.

3. Draft alternative texts of the preamble and final clauses prepared by the Secretary-General, UN Doc.A/CONF.62/L.13 (1976), *Third United Nations Conference on the Law of the Sea, Official Records* (referred to hereinafter as *Off. Rec*), vol. VI, 126.

4. No reservations are expressly permitted by other articles of the Convention, and exceptions are only permitted under article 298. Multilateral treaties which contain this formula are, among others, the 1993 International Cocoa Agreement, the 1994 International Coffee Agreement, Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), Protocol on Environmental Protection to the Antarctic Treaty (1991), Convention on

https://doi.org/10.1093/iclq/50.4.767 Published online by Cambridge University Press

But even then a footnote was appended to this article when it first appeared which stated:

> This article is based on the assumption that the Convention will be adopted by consensus. In addition, it is recognized that the article can be regarded only as *provisional* pending the conclusion of discussions on outstanding substantive issues such as that relating to the delimitation of maritime zones as between adjacent and opposite States and to settlement of disputes thereon, where the final solution might include provision for reservations.[5]

The reason for this footnote could be found in the President's preliminary report on the work of the informal plenary meeting of the Conference on final clauses. He noted that 'some of the delegations that found difficulty, as a matter of principle, in renouncing the right to enter reservations were prepared to acquiesce in the text of the article provided the foot-note was retained'.[6]

This footnote of course does not appear in the Convention itself. Rosenne and Sohn have observed that 'having regard to that footnote, the fact that the Convention was not adopted by consensus means that the understanding on the basis of which article 309 was accepted—with some degrees of reluctance—was not maintained' and concluded that 'it is now open to question, in light of the legislative history of article 309 (and 310), whether in this Convention the word (reservation) retains precisely the same significance that it has in the Vienna Convention.'[7]

It will be remembered that almost at the end of the Conference the Turkish amendment which had as its object the deletion of article 309 was put to the vote and rejected by 100 votes to 18, with 26 abstentions.[8] As a consequence the status of article 309 was changed; it ceased *ipso facto* to be provisional. The result of the vote on article 309 was significant. It not only changed the status of the article itself rendering the footnote irrelevant but also indicated that that article had the decisive support of the Conference. Therefore, in this writer's opinion, it is not necessary to give the term 'reservation' any other meaning that that which is ascribed to it in the 1969 Vienna Convention on the Law of Treaties.[9]

Biological Diversity (1992), Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994), the Marrakesh Agreement Establishing the World Trade Organisation (1994) and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995).

5. Emphasis added. Draft Convention on the Law of the Sea (Informal Text) UN Doc.A/CONF.62/WP.10/Rev.3 (1980).

6. UN Doc.A/CONF.62/L.60, *Off. Rec.* (1980), vol. XIV, 132.

7. See *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, Martinus Nijhoff, 1989), vol. V, 222, referred to hereinafter as *Virginia Commentary*.

8. At its 176th Meeting, 26 April 1982, *Off. Rec*. (1982), vol. XVI, 133–4.

9. Article 2, para. 1(d), of the 1969 Vienna Convention on the Law of Treaties reads as follows: ' "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

States are allowed to make certain declarations and statements. Article 310 contains the rule with respect to the making of such declarations and statements:

> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

This provision, the language of which is for the most part taken from the Vienna Convention on the Law of Treaties (article 2(d)) seeks to make a distinction between a reservation which is prohibited under the Convention and a declaration or a mere declaration which is allowed—a distinction which, as is so well known, is at times difficult to draw.[10]

As far as can be discerned from the *travaux préparatoires*, the phrase 'with a view, *inter alia*, to the harmonisation of its laws and regulations with the provisions. . .' was introduced into the text to accommodate States such as Ecuador which, during the Conference, made proposals in order to enable them to continue to apply national legislation enacted prior to the adoption of the Convention with respect to zones extending beyond 12 nautical miles 'to the extent that it does not affect the rights and obligations of all States in accordance with the present Convention'. In other words the application of such national laws should not be in violation of the Convention.[11]

exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.' See also article 2, para. 1(d), of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations and articles 2, para. 1(j), of the 1978 Vienna Convention on Succession of States in Respect of Treaties. A composite text of the definitions contained in the Vienna Conventions of 1969, 1978 and 1986 is contained in the draft guideline 1.1 provisionally adopted by the International Law Commission. ' "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organisation 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 organisation 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.' Report of the International Law Commission on the work of its fifty-first session, Official Records of the General Assembly, Fifty-fourth session, Supplement No. 10 (A/54/10) 1999, 205, para. 470 (referred to hereinafter as 1999 ILC Report (A/54.10)).

10. In its commentary on article 2, para. 2(d), the International Law Commission noted that the need for that definition 'arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted', (1966) YBILC vol. II, 189–90.

11. UN Doc.C.2/Informal Meeting/29 May 1978, R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, vol. V (1984), 38. The Philippines had also submitted the following proposal with respect to the territorial sea: 'Any State which, prior to the approval of the Convention, shall have already established a territorial sea with a breadth more than the maximum provided in this article shall not be subject to the limit provided therein', Ibid. 145 and *Virginia Commentary* (1989) vol. V, 227.

II. DISTINCTION BETWEEN DECLARATIONS AND RESERVATIONS

As already indicated the Convention seeks to make a distinction between declarations which are permitted by the treaty and reservations which are prohibited by it. States are free to make declarations which 'do not purport to exclude or modify the legal effect of the provisions of this Convention in their application to that State'.

As of July 2001 forty-nine States out of a total of 135 have made declarations upon ratification or accession. The European Community has also made a declaration upon the deposit of its formal instrument of confirmation.

Fitzmaurice has given some guidelines for drawing the distinction between declarations and reservations. He has observed that 'Governments often append to their signatures, ratifications or acceptances of a treaty, statements or declarations of a purely explanatory character, e.g. regarding the position or motives of the government in becoming a party; or which are of a political character, or of domestic import.' Such declarations or statements are not reservations because 'they leave unaffected the obligations of the treaty for the party concerned'.[12] Bolivia's declaration upon signature is a case in point:

1. The Convention on the Law of the Sea is a perfectible instrument and, according to its own provisions, is subject to revision. As a party to it, Bolivia will, when the time comes, put forward proposals and revisions which are in keeping with its national interests.
2. Bolivia is confident that the Convention will ensure, in the near future, the joint development of the resources of the sea-bed, with equal opportunities and rights for all nations, especially developing countries.[13]

The statement made by Germany on its accession to the Convention falls under this category: 'For the Federal Republic of Germany the link between

12. G. Fitzmaurice, 'The Law and Procedures of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points (1957) 33 BYIL 203–93 at 273. In his report, as Special Rapporteur on the law of treaties, he noted 'but it (a reservation) does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty", UN Doc.A/CN.4/101, (1956) YBILC, vol. II, 110. In his first report on the law of treaties Waldock also stated that 'an explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation', UN Doc.A/CN.4/144, (1962) YBILC, vol. II, 31–2. The International Law Commission has characterised these declarations as general statements of policy. 'A unilateral statement formulated by a State or by an international organisation whereby that State or that organisation expresses its view on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to practice', Draft guideline 1.4.4 (1.2.5), 1999 ILC Report (A/54/10), 208–9. These declarations are dealt with here since they serve to illustrate a type of declaration or statement which clearly complies with the requirements of article 310 of the Convention on the Law of the Sea.

13. *Multinational Treaties deposited with the Secretary-General* (ST/LEG/SER.E/17), 759. This declaration, it should be noted, was not repeated upon Bolivia's ratification of the Convention.

Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea as foreseen in article 2(1) of that Agreement is fundamental.'[14]

Chile's sixth declaration upon ratification of the Convention with respect to the protection of the environment from deep seabed mining activities can also be classified as a statement of policy. It reads:

> With reference to the part XI of the Convention and its supplementary Agreement, it is Chile's understanding that, in respect of the prevention of pollution in exploration and exploitation activities, the Authority must apply the general criterion that underwater mining shall be subject to standards which are at least as stringent as comparable standards on land.[15]

III. INTERPRETATIVE DECLARATIONS AND RESERVATIONS

To cite Fitzmaurice again

> governments not infrequently made declarations in which they do not say they will not carry out, or will only partly carry out, a certain provision—but make statements of intention, or say how they understand or propose to interpret or apply the provision, either generally or in certain events. Whether this will amount strictly to an actual reservation or not, will depend on whether, by way of special interpretation, the party concerned is really purporting, so far as its own obligations are concerned, to alter the substantive content or application of the provision affected; or whether the statement is truly interpretational, and merely clarifies some obscurity, or makes explicit something that in the clause is only implicit.[16]

Within the context of the Convention on the Law of the Sea examples of declarations which may be considered interpretative declarations and which seem merely to interpret or apply certain provisions of the Convention are the

14. Ibid. 766.
15. Ibid. 761.
16. (1957) 33 BYIL 273. Alain Pellet, the Special Rapporteur on reservations to treaties, in his Third Report, adopted the following distinction: 'interpretative declarations are distinguished from reservations principally by the objective which the State or international organisation sets when making them: by formulating a reservation, the authors seek to exclude or modify the legal effect of some of the provisions of a treaty (or the treaty in its entirety) as they apply to them; by making an interpretative declaration, they seek to clarify the meaning and the scope they attribute to the treaty or to certain of its provisions', Third Report on Reservations to Treaties, UN Doc.A/CN.4/491/Add.4 (1988), 38–9. In this regard the International Law Commission has provisionally adopted the following draft guideline. ' "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organisation whereby that State or that organisation purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions', Draft guideline 1.2, 1999 ILC Report (A/54/10), 207. This definition focuses on what an interpretative declaration is rather than what it is not. It is an approach which excludes the negative element. It may be noted that article 310 of the Convention on the Law of the Sea retains the negative element and, in the view of this writer, is not without practical value. It may also be noted that article 310 covers only declarations made 'when signing, ratifying or acceding to this Convention'. This temporal element is omitted in the draft guideline. Ibid. n. 323 at 238.

declarations of Finland, Sweden and Chile all directed towards the interpretation or application of article 35(c) of the Convention. This article reads in part as follows:

> Nothing in this Part affects:
> (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

—which as a result excludes such straits from the regime of transit passage.

Finland made the following declaration upon signature and confirmed upon ratification which stated that:

> It is the understanding of the Government of Finland that the exception from the transit passage regime in straits provided for in article 35(c) of the Convention is applicable to the strait between Finland (the Aland Islands) and Sweden. Since in that strait the passage is regulated in part by a long-standing international convention in force, the present legal régime in that strait will remain unchanged after the entry into force of the Convention.[17]

Sweden made a similar declaration upon signature which was also confirmed upon ratification:

> It is the understanding of the Government of Sweden that the exception from the transit passage régime in straits, provided for in Article 35(c) of the Convention is applicable to the strait between Sweden and Denmark (Oresund) as well as to the strait between Sweden and Finland (the Aland Islands). Since in both those straits the passage is regulated in whole or in part by long-standing international conventions in force, the present legal régime in the two straits will remain unchanged.[18]

In the same vein Chile's declaration upon ratification can be mentioned. It stated that:

> With regard to part III of the Convention, it should be noted that in accordance with article 35(c), the provisions of this part do not affect the legal regime of the Strait of Magellan, since passage through that strait is 'regulated by long-standing international conventions in force specifically relating to such straits' such as the 1881 Boundary Treaty, a regime which is reaffirmed in the Treaty of Peace and Friendship of 1984.[19]

Spain's declaration with respect to its interpretation of the scope of the application of Annex III, article 9, of the Convention may also be cited: 'The provisions of Article 9 of Annex III shall not prevent States Parties whose industrial potential does not enable them to participate directly as contractors

17. *Multilateral Treaties deposited with the Secretary-General* (ST/LEG/SER.E/17), 765.

18. Ibid. 776. It may here be remarked that the United States, a non-party to the Convention on the Law of the Sea, has never recognised that the strait between Sweden and Finland (the Aland Islands) as falling within article 35 (*c*) of the Convention on the Law of the Sea. J. A. Roach and R. W. Smith, *United States Responses to Excessive Maritime Claims* (The Hague: Martinus Nijhoff, 2nd edn. 1997), 298. The United States has not, however, as far as this writer is aware, lodged a formal protest on this matter.

19. *Multilateral Treaties deposited with the Secretary-General* (ST/LEG/SER.E/17), 761.

in the exploitation of the resources of the zone from participating in the joint ventures referred to in paragraph 2 of that article'.[20]

Such declarations referred to as mere interpretative declarations only seek to apply a specific provision of the Convention without modifying in any way the juridical status of the relevant provision. It serves notice of the position to be taken by the declaring State. Such interpretative declarations can always be contested by other States and they can always be examined by Tribunals.

> Une telle déclaration n'est qu'une prise de position, dont il faudra tenir compte, mais qui ne s'impose ni à l'autre Etat, ni au Tribunal: le premier pourra toujours la contester, le second pourra toujours procéder a un réexamen de la question.[21]

In order to obtain general acceptance it was inevitable that the Convention would contain ambiguities and gaps[22]—a feature which is certainly not unique to the Convention on the Law of the Sea.[23] Some declarations seek to clarify these ambiguities and fill the gaps in the text and are in this sense interpretative.[24] Take for instance the declaration of Spain made on ratification with respect to article 39, paragraph 3(*a*), of the convention.[25] It states that Spain

20. Ibid. 776. Annex III, article 9, para. 2 reads in part as follows: 'It (the Enterprise) may also enter into joint ventures for the conduct of such activities with any entities which are eligible to carry out activities in the Area pursuant to article 153, paragraph 2(b). When considering such joint ventures, the Enterprise shall offer to States Parties which are developing States and their nationals the opportunity of effective participation.'

21. P.-H. Imbert, 'La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République Française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord' (1978) 24 Annuaire français de droit international, 29–58 at 35.

22. The Convention 'was largely the product of political compromises between conflicting interests where clarity had at times to be sacrificed for the sake of obtaining consensus—a process which necessarily resulted, on not a few occasions, in ambiguous provisions'. See this writer's article—'The Drafting Committee of the Third United Nations Conference on the Law of the Sea: the implications of multilingual texts' (1986) 57 BYIL, 169–99 at 187. See also William J. Aceves, 'Ambiguities in Plurilingual Treaties: A case study of article 22 of the 1982 Law of the Sea Convention' (1996) 27 Ocean Development and International Law, 187–233 at 203–14.

23. As Yasseen so justly remarked: 'Le désir, combien justifié, de faire réussir une conférence, d'assurer la majorité requise, aboutit parfois à l'adoption des formules vagues ou ambigüs. Il ne faut surtout pas écarter la possibilité qu'à dessein les parties évitent une certaine précision afin de se ménager à l'avenir une échappatoire commode, pour se dérober à une obligation gênante'. M. K. Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités', *Recueil des Cours* (1976–III), vol. 151, 85. Lauterpacht has observed that: 'the parties, being unable to reach agreement, are at times obliged to use vague or ambiguous expressions, leaving the task of resolving the differences to a subsequent agreement or to judicial or arbitral tribunal', H. Lauterpacht, 'De l'interprétation des traites' (1950) Annuaire de l'Institut de Droit International, vol. 43, I, 426. See also D. Kappeler, *Les Réserves dans les Traités Internationaux* (Bâle: Verlag für Recht and Gesellschaft, 1958), 85.

24. Waldock stated that one of the purposes of interpretative declarations 'was to clarify the meaning of doubtful clauses or of clauses which were controversial for particular States'. United Nations Conference on the Law of Treaties, First Session (1986), Meetings of the Committee of the Whole, Sixth Meeting, 34, para. 29. To the same effect see the following observations: 'Souvent, ces instruments internationaux sont libellés en termes obscures, ambigus ou flous et c'est précisément pour cela que les États se sentent alors obligés de formuler des déclarations sur leur interprétation'. Rosario Sapienza, 'Les Déclarations interprétatives unilatérales et l'interprétation des traités' (1999) 103 RGDIP, 603–29 at 607.

25. *Multilateral Treaties deposited with the Secretary-General* (ST/LEG/SER.E/17), 776.

https://doi.org/10.1093/iclq/50.4.767 Published online by Cambridge University Press

understands that: 'In article 39, paragraph 3(*a*), the word "normally" means "unless by *force majeure* or by distress".'[26] The United States, a non-party to the Convention, has objected to Spain's attempt to limit the meaning of the term 'normally' to the exceptional cases of *force majeure* or distress.[27] It may be noted that a formal amendment simply to delete the word 'normally' was rejected by the Conference.[28]

The crucial question regarding the so-called residual rights in the exclusive economic zone—that is those uses of the seas which are not mentioned or covered by the relevant provisions of the Convention—is also raised in the declarations of certain States.

For example Uruguay made the following declaration upon signature and confirmed upon ratification:

> (*c*) Regulation of the uses and activities not provided for expressly in the Convention (residual rights and obligations) relating to the rights of sovereignty and to the jurisdiction of the coastal State in its exclusive economic zone falls within the competence of that State, provided that such regulation does not prevent enjoyment of the freedom of international communication which is recognized to other States.[29]

On the other hand Italy has stated in its declaration made upon signature and confirmed upon ratification that 'according to the Convention, the Coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the Coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorise them.'[30]

On the specific question of military manoeuvres in the exclusive economic zone of coastal States, Brazil, on ratifying the Convention on the Law of the Sea, made the following statement:

> The Brazilian Government understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone military

Article 39, paragraph 3(a) reads in part: 'Aircraft in transit passage shall: (*a*) observe the Rules of the Air established by the International Civil Aviation Organisation as they apply to civil aircraft; State aircraft will *normally* comply with such safety measures and will at all times operate with due regard for the safety of navigation' (emphasis added).

26. It has been stated that this declaration only gives a precise content (un contenido preciso) to the word 'normally': Javier Quel López, *Las reservas a los tratados internacionales—un examen de la práctica española* (Bilbao: Servicio Editorial Universidad del pais Vasco, 1991), 311.

27. The United States has contended that 'although a state aircraft would not be obliged to comply with such rules in cases of *force majeure* or distress these are not the only circumstances in which a state aircraft would not be obliged to comply with such rules', Roach and Smith, op. cit. 303 above n. 18.

28. *Off. Rec.* (1982), vol. XVI, 132 and see letter dated 26 April 1982 from the representative of Spain to the President of the Conference, ibid. A/CONF.62/L.136, 243–4.

29. *Multilateral Treaties deposited with the Secretary-General* (ST/LEG/SER.E/17), 778. To the same effect see the declarations of Cape Verde, ibid. 760.

30. Ibid. 768. See too the declaration of Germany, ibid. 766.

> exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State.[31]

These declarations seem, in this writer's opinion, to concern the interpretation of the text—raising *inter alia* the following questions. Are *all* the rights of the coastal State set out in article 56—rights, jurisdiction and duties of the coastal State in the exclusive economic zone? What are the precise uses of the sea covered by article 58—rights and duties of other States in the exclusive economic zone? And finally what is the true import of article 59—basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone?[32] These questions by their nature constitute matters for interpretation.

Interpretative declarations may play a role in the interpretation of the relevant provisions of the treaty. As McRae has correctly pointed out, 'A State making an interpretative declaration . . . is taking the opportunity in advance to influence any subsequent interpretations of the treaty, the extent of that influence in part being affected by the reaction of other States to the declaration'.[33] Unilateral interpretative declarations can be considered 'offers' of interpretation but lacking any inherent binding character.[34]

The question remains as to 'the method' to be utilised to determine whether a unilateral statement is a reservation or an interpretative declaration. The International Law Commission has dealt with this question in its draft guideline 1.3.1 which reads as follows:

31. Ibid. 759. To the same effect see declarations of Cape Verde, ibid. 760; Malaysia, ibid. 769; Pakistan, ibid. 772; India, ibid. 767; Uruguay, ibid. 778; Bangladesh (31 July 2001). It might be noted that in 1995 Italy reiterated its declaration made upon signature and confirmed upon ratification 'with respect to the declaration made by India upon ratification, as well as for the similar ones made previously by Brazil, Cape Verde and Uruguay' as well as to all past and future declarations of that kind. Ibid. 781. See below, 786.

32. On this matter see, among others, Francisco Orrego Vicuña, 'La Zone Économique Exclusive: Régime et Nature Juridique dans le Droit International', *Recueil des Cours* (1986–IV), vol. 199, 41–4; Bernard Oxman, 'An Analysis of the Exclusive Economic Zone as Formulated in the Informal Composite Negotiating Text', in Thomas A. Clingan (ed.), *Law of the Sea: State Practice in Zones of Special Jurisdiction* (Law of the Sea Institute, University of Hawaii, 1982), 67–78; International Law Association, Report of the Committee on the Exclusive Economic Zone, Report of the Sixty-First Conference (Paris) (1984), 192–3; Tullio Treves, 'Codification du Droit International et Pratique des États dans le Droit de la Mer' *Recueil des Cours* (1990–IV), vol. 223, 213–17. Jorge Castañeda, 'Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea', in *Essays in International Law in honour of Judge Manfred Lachs* (The Hague, Martinus Nijhoff, 1984) 605–621.

33. D. M. McRae, 'The Legal Effect of Interpretative Declarations' (1978) 49 BYIL 155–73 at 170. In this respect Waldock's observations may be recalled: 'Statements of interpretation were not dealt with by the Commission in the present action for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties.' See his Fourth Report on the Law of Treaties, UN Doc.A/CN.4/177 (1965) YBILD, vol. II. 49.

34. Pellet's Third Report on Reservations to Treaties, UN Doc.A/CN.4/491/Add.4 (1998), 23, para. 313. Sapienza has made the following observations on the functions of interpretative declarations: 'Elles sont des actes juridiques unilatéraux qui visent, grâce a l'interprétation qu'elles proposent, à sauvegarder une position juridique à empêcher la crystallisation d'une praticuq, ou bien au contraire, à l'aider', Sapienza, op. cit. above n. 24, 618 and see also his *Dichiarazioni interpretative unilateralie e trattati internazionali* (Milan, Dott. A. Giuffrè Editore, 1996), 236. These functions seem to go somewhat beyond mere 'offers' of interpretation.

> To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in the light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.[35]

The rationale for this guideline was based on the dictum of the International Court of Justice with respect to declaration and reservations made under the Optional Clause (article 36, paragraph 2, of the Court's Statute). The Court stated that:

> The régime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties

and observed

> that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction.[36]

The Commission did acknowledge that declarations under the Optional Clause were different in their nature from reservations and declarations made with respect to treaties and that the rules of interpretation contained in the Vienna Convention constituted useful guidelines. However the Commission warned that 'while the rules provide useful indications, they cannot be purely and simply transposed to reservations and interpretative declarations because of their special nature. The rules applicable to treaty instruments cannot be applied to unilateral instruments without some care'.[37]

As far as the Convention on the Law of the Sea is concerned, reservations and declarations are, in most cases, inextricably linked to the provisions of the Convention itself. Their interpretation forms an integral part of the process of interpreting the Convention on the Law of the Sea which itself is indubitably subject to the general rules of interpretation embodied in the Vienna Convention. That is why in the writer's view this warning of the Commission raises some difficulties.

IV. SIMPLE INTERPRETATIVE DECLARATIONS AND CONDITIONAL INTERPRETATIVE DECLARATIONS

As is generally agreed, it is at times extremely difficult to make any distinction between an interpretation declaration and a reservation as there is in truth no objective test. 'An interpretative declaration might be regarded by one State

35. 1999 ILC Report (A/54/10), 253–4.
36. *Fisheries Jurisdiction Case (Spain v Canada)*, ICJ Reports, 1998, 453, para. 46.
37. 1999 ILC Report (A/54/10), 255.

https://doi.org/10.1093/iclq/50.4.767 Published online by Cambridge University Press

as rendering the true meaning of a treaty and by another as distorting that meaning'[38]—hence modifying or excluding the legal effect of the relevant provision in its application.

Here it may be useful to make mention of the classic distinction drawn by McRae between a mere interpretative declaration where the declaring State seeks only to offer an interpretation of the treaty which may subsequently be found to be incorrect and what he has termed 'a qualified interpretative declaration' when the declarant State makes its acceptance of the provision in question conditional upon acquiescence in that interpretation.[39] A qualified interpretative declaration, in his view, 'must be assimilated to a reservation, for by asserting that its interpretation overrides any contrary interpretation the declarant has purported to exclude or to modify the terms of treaty'. McRae observes that this may be evident from the words used but may also be ascertained subjectively from the answer of the declarant to specific enquiry about its intention.

This distinction between what is at present termed 'simple interpretative declarations' and 'conditional interpretative declarations' is now generally acknowledged and is in fact embodied in the draft guidelines adopted by the International Law Commission.

> A unilateral statement formulated 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 notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.[40]

38. See Ustor, Official Records of United Nations Conference on the Law of Treaties, First Session (1968), 25th Meeting, 137, para. 53. The Hungarian delegate was then arguing in favour of assimilating interpretative declarations to reservations.

39. McRae op. cit. above n. 33, 172. For some criticisms of this criterion see F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (Amsterdam, North-Holland, 1988) 239 and I. Sinclair, *The Vienna Convention on the Law of Treaties* (Melland Schill Monographs in International Law, 2nd edn. 1984), 53. In the words of the ILC Commentary: 'Unlike reservations, simple interpretative declarations place no conditions on the expression by a State or international organisation of its consent to be bound; they simply attempt to anticipate any dispute that may arise concerning the interpretation of the treaty. The declarant "sets a date", in a sense; it gives notice that, should a dispute arise, its interpretation will be such, but it does not make that point a condition for its participation in the treaty. Conversely, conditional declarations are closer to reservations in that they seek to produce a legal effect on the provisions of the treaty, which the State or international organisation accepts only on condition that the provisions are interpreted in a specific way', 1999 ILC Report (A/54/10), 245, para. 10.

40. Draft guideline 1.2.1, ibid. 240. This also finds support in the jurisprudence. For example in the Decision of 30 June 1977 it was stated: 'The Court thinks it sufficient to say that, although the third reservation doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation regime provided for in Article 6', *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, RIAA, vol. XVIII, 40, para. 55.

https://doi.org/10.1093/iclq/50.4.767 Published online by Cambridge University Press

The Commission, however, was not of the opinion that a conditional interpretative declaration should necessarily be assimilated to a reservation: 'even when it is conditional, an interpretative declaration does not constitute a reservation in that it does not try "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to the State or organisation formulating it, but to impose a specific interpretation on those provisions.'[41] The Commentary of the International Law Commission on this guideline does, however, point out that even if it cannot be entirely 'assimilated' to a reservation, a conditional interpretative declaration does come quite close.[42]

Not surprisingly, it is difficult to discern from the drafting of the declarations and statements made by States with respect to the Convention on the Law of the Sea whether the State concerned *intended* to make a mere interpretative declaration or a conditional interpretative declaration—that is to say whether or not the declaration in question constituted the condition for the State becoming a party to the Convention on the Law of the Sea.[43] Of course the decisive question in the end is whether the declaration in question has the effect of excluding or modifying the legal effect of certain provisions of the Convention in their application to the declarant State concerned.

It has been suggested that where a treaty prohibits the formulation of reservations as is the case with article 309 of the Convention on the Law of the Sea, a presumption is created whereby declarations must be considered to constitute interpretative declarations. 'This would comply with the presumption that a State would intend to perform an act permitted, rather than one prohibited, by a treaty and protect that State from the possibility that the permissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached.'[44]

This presumption is obviously rebuttable. There is little doubt that several declarations made ostensibly under article 310 do not conform to the rules contained in the Convention. They have in fact the legal effect of excluding or

41. 1999 ILC Report (A/54/10) 246, para. 11.

42. Ibid. 247, para. 13. See also D. W. Greig, 'Reservations: Equity as a Balancing Factor?' (1995) 16 The Australian Year Book of International Law, 21–172 at 31.

43. The 'understanding' recorded upon signature by the Islamic Republic of Iran in connection with the Convention on the Law of the Sea has been labelled a conditional interpretative declaration. It reads in part as follows: 'The main objective (of the Government of the Islamic Republic of Iran) for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations. . .'. See Third Report on Reservations to Treaties, A/CN.4/491/Add.4 (1998), 24, para. 319.

44. Greig, op. cit. above n. 42, pp. 24–25. See draft guideline 1.3.3 which reads as follows: 'When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organisation shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author'. The Commission, in its commentary, has observed that 'his presumption of permissibility is consonant with the well-established general principle of law that bad faith is not presumed', 1999 ILC Report (A/54/10), 266–7. *Lac Lanoux case (France/Spain)* (1957) RIAA, vol. XII, 305. See also *Tacna-Arica* Arbitration (1925) RIAA, vol. II, 929–30.

modifying certain provisions of the treaty in the application to the declarant State and as a consequence are virtually reservations in disguise.[45]

V. OBJECTIONS

Several declarations or statements made by States Parties have drawn protests from other States Parties as being not in conformity with articles 309 and 310. According to the 1997 Secretary-General's report 'the declarations generating the most objections, . . . involve the right of innocent passage through the territorial sea, transit passage through straits used for international navigation, archipelagic sea lanes passage and freedom of navigation and other internationally recognised uses of the seas, in the exclusive economic zone, as well as those uses which intend to subordinate the interpretation or application of the Convention to national law.'[46] These items are in fact quite similar to those mentioned in the declarations made by the United Kingdom upon accession to the Convention.[47]

45. The special rapporteur himself admitted that it cannot be denied that some unilateral declarations are presented as 'interpretative' with a view to getting around the prohibition or limitation on reservations stipulated in the treaty to which they apply, Third Report on Reservations to Treaties, A/CN.4/491/Add.4 (1998), 8. Likewise, Denmark observed in its reply to the Commission's questionnaire on reservations that: 'There even seems to be a tendency among States to cast their reservations in terms of interpretative statements either because the treaty does not allow for reservations proper or because it looks "nicer" with an interpretative declaration than a real reservation', 1999 ILC Report, A/54/10, 224, n. 285. The Secretary-General has noted that 'at least 14 out of 46 declarations made upon ratification or accession (7 out of 28 declarations made after the entry into force of the Convention) seem not to be in conformity with the provisions of article 310 or to be supported by any other provision of the Convention nor by any rule of general international law', Report of the Secretary-General on Oceans and the Law of the Sea: Law of the Sea, UN Doc.A/53/456 (1998), 7, para. 18. See also Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 2000), 104–5.

46. UN Doc.A/52/487 (1997), 9, para. 15.

47. 'The United Kingdom considers that declarations and statements not in conformity with articles 309 and 310 include, *inter alia*, the following:

'Those which relate to baselines not drawn in conformity with the Convention;

'Those which purport to require any form of notification or permission before warships or other ships exercise the right of innocent passage or freedom of navigation or which otherwise purport to limit navigational rights in ways not permitted by the Convention;

'Those which are incompatible with the provisions of the Convention relating to straits used for international navigation, including the right of transit passage;

'Those which are incompatible with the provisions of the Convention relating to archipelagic states of waters, including archipelagic baselines and archipelagic sea lanes passage;

'Those which are not in conformity with the provisions of the Convention relating to the exclusive economic zone or the continental shelf, including those which claim coastal state jurisdiction over all installations and structures in the exclusive economic zone or on the continental shelf, and those which purport to require consent for exercise or manoeuvres (including weapons exercises) in those areas;

'Those which purport to subordinate the interpretation or application of the Convention to national laws and regulations, including constitutional provisions', *Multilateral Treaties deposited with the Secretary-General* (ST/LEG/SER.E/17), 777–8. These are certainly not 'of a fairly minor nature'. Gamble suggested in 1980 after an examination of various types of reservations to multilateral treaties, that 'reservations may not be too serious a problem; most are of a fairly minor nature', J. K. Gamble, 'Reservations to Multilateral Treaties: a macroscopic view of State practice' (1980) 74 AJIL, 372–94 at 391.

VI. THE DECLARATION OF THE PHILIPPINES[48]

The Philippines, on ratifying the Convention on the Law of the Sea in 1984, confirmed the following declaration which was made upon signature. This instrument contained, *inter alia*, the following:

> 5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippine Constitution;
> 7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.[49]

Australia, Belarus, Bulgaria, Czechoslovakia, the Russian Federation (the Union of Soviet Socialist Republics) and the Ukraine lodged objections to the declaration of the Philippines. Australia, for instance, considered that the declaration of the Philippines

> is not consistent with article 309 of the Law of the Sea Convention, which prohibits the making of reservations, nor with article 310 which permits declarations to be made 'provided that such declarations and statements do not purport to exclude or modify the legal effects of the provisions of this Convention in their application to that State'.
>
> The declaration of the Republic of the Philippines asserts that the Convention shall not affect the sovereign rights of the Philippines arising from its Constitution, its domestic legislation and any treaties to which the Philippines is a party. This indicates, in effect, that the Philippines does not consider that it is obliged to harmonize its law with the provisions of the Convention. By making such an assertion, the Philippines is seeking to modify the legal effect of the Convention's provisions.

With reference to the status of archipelagic waters Australia pointed out:

> that the Convention distinguishes the two concepts and that different obligations and rights are applicable to archipelagic waters from those which apply to internal waters. In particular, the Convention provides for the exercise by foreign ships of the rights of innocent passage and of archipelagic sea lanes passage in archipelagic waters.[50]

It is of some significance that on 26 October 1988 the Philippines made a declaration stating that:

> The Philippines declaration was made in conformity with article 310 of the United Nations Convention on the Law of the Sea. The declaration consists of interpretative statements concerning certain provisions of the Convention.

48. This matter is also dealt with in Sapienza, op. cit. above n. 24, 614–17.
49. *Multilateral Treaties deposited with the Secretary-General* (ST/LEG/SER.E/17), 773.
50. Ibid. 779–80.

https://doi.org/10.1093/iclq/50.4.767 Published online by Cambridge University Press

> The Philippine Government intends to harmonize its domestic legislation with the provisions of the Convention.
>
> The necessary steps are being undertaken to enact legislation dealing with archipelagic sea lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention.
>
> The Philippine Government, therefore, wishes to assure the Australian Government and the States Parties to the Convention that the Philippines will abide by the provisions of the said Convention.[51]

However, it has been asserted that as of December 1993, the Philippines has not reformed its legislation.[52] Of course this unilateral declaration of the Philippines with respect to its earlier declaration of 1984 must be treated at least as a public recognition by the Philippines of its own legal obligations under the Convention and in that sense it is not without legal significance.[53]

VI. LEGAL EFFECTS OF SO-CALLED 'DISGUISED RESERVATIONS'

As far as the Convention on the Law of the Sea is concerned, what are the legal effects of 'disguised reservations'—that is to say 'impermissible reservations' in the guise of interpretative declarations? There seem to be three options: (i) the impermissible reservation nullifies the entire acceptance of the treaty and the reserving State cannot be considered a party to the treaty;[54] (ii) the impermissible reservation can be severed from the State's consent to be bound by the treaty and thus, the reserving State was bound by the whole treaty; and (iii) both the reservation and the affected provision are excised and the rest of the treaty applies.[55]

There is general agreement that the third option should be rejected because it will give an impermissible reservation the same consequences as a valid reservation. Though Greig contends that 'nevertheless, it is a possibility which cannot be totally ignored as it is sometimes advanced as a practical solution in circumstances where it is claimed that the alternatives are unsatisfactory'.[56]

State practice to date with respect to 'impermissible reservations' in the framework of the Convention on the Law of the Sea seems to support the view

51. Ibid. 787.

52. Roach and Smith, op. cit. above n. 18, 222. As far as is known, the situation remains unchanged.

53. See *International Status of South-West Africa*, ICJ Reports 1950, 135–6. Cf. *Nuclear Tests (Australia v France)*, Judgment of 20 Dec 1974, ICJ Reports 1974, 267 et seq.

54. O'Connell considers this solution to be the correct one. 'It follows from the consensual theory of treaty-making that States are bound only by what they agree to', D. P. O'Connell, *International Law*, vol. I (London, Stevens & Sons, 2nd edn. 1970), 237.

55. See *Belilos* Case, Public Hearing (Afternoon, 26 Oct 1987), Eur Ct H R Cour/Misc (87) 238, pp. 45–48. Iain Cameron and Frank Horn, 'Reservations to the European Convention on Human Rights: The Belilos Case', (1990) 33 German Yearbook of International Law, 69–129 at 115–116. Greig, op. cit. above n. 42, 52. See K. Zemanek, 'General Course of International Law', *Recueil des Cours* (1975–III), vol. 146, 97–218. On which see also C. Redgwell, 'Universality or integrity? Some reflections on reservations to general multilateral treaties' (1993) 64 BYIL, 245–82 at 274–8.

56. Greig, op. cit. above n. 42, 52.

that such reservations are null and void and that the reserving State remains a party to the Convention and is bound by the entire Convention—thus following the so-called integrity principle.[57]

In this respect the declaration made by the Russian Federation upon ratification of the Convention is of some interest. It read as follows:

> The Russian Federation, bearing in mind articles 309 and 310 of the Convention, declares that it objects to any declarations and statements made in the past or which may be made in future when signing, ratifying or acceding to the Convention, or made for any other reason in connection with the Convention, that are not in keeping with the provisions of article 310 of the Convention. The Russian Federation believes that such declarations and statements, however phrased or named, cannot exclude or modify the legal effect of the provisions of the Convention in their application to the party to the Convention that made such declarations or statements, and *for this reason they shall not be taken into account by the Russian Federation in its relation with that party to the Convention.*[58]

Similarly, in objecting to the declaration of the Philippines already referred to, Australia declared that it 'cannot, . . . accept that the statement of the Philippines has *any legal effect or will have any effect when the Convention comes into force and considers that the provisions of the Convention should be observed without being made subject to the restrictions asserted in the declaration of the Republic of the Philippines*'.[59] The same point was made by

57. Commenting on the Belilos Case, Edwards observed: 'The Court probably made the right decision. Consider the magnitude of the political and legal problems that would have been created for the European human rights system if the Court had held that Switzerland was not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Consider the meaninglessness of the exercise had the Court, after determining that the reservation was invalid, given it the same effect as if it were valid. Perhaps this case shows that the severability issue, even when considered by a court, is more an issue for political judgment (in the best sense of the term) than for legal analysis', Richard W. Edwards, Jr. 'Reservations to Treaties' (1989) 10 Michigan Journal of International Law, 362–405 at 378. These observations certainly bring out the international public policy element which lies behind the integrity principle. This writer is of the opinion that partly for the same reason this principle should be applied to impermissible reservations made under articles 309 and 310 of the Convention on the Law of the Sea. Bowett has also remarked on the relevance of public policy in dealing with this matter and consequently suggested that 'whenever possible the impermissible reservation, though itself a nullity, should not nullify the entire acceptance of the treaty', D. W. Bowett, 'Reservations to non-restricted multilateral treaties' (1976–7) 48 BYIL, 67–92 at 76, n. 2.

58. Emphasis added. Ibid. 780. *Multilateral Treaties deposited with the Secretary-General* (ST.LEG/SER.E/17), 774.

59. Emphasis added. Ibid. 780. The European Union has also taken the same position. In the debates which took place in 2000 on the law of the sea in the General Assembly, France speaking on behalf of the European Union, stated that: '(A) number of States have made statements that affect the legal scope of the provisions of the Convention. *Article 309 of the Convention states that no reservations or exceptions may be made to the Convention. The European Union thus stresses that such statements are without legal force*. Similarly, the espousal or introduction in the national law of States parties or in international agreements of provisions that run counter to the Convention is unacceptable to us', A/55/PV.42, 26 Oct. 2000, 9. The observations of certain members of the International Law Commission in the 1995 debates on Pellet's First Report on the law and practice relating to reservations are also relevant. Note for instance those of Tomuschat who stated: 'There was, however, no reason not to be clear in the case of prohibited reservations. If a State that ratified the United Nations Convention on the Law of the Sea declared that the

https://doi.org/10.1093/iclq/50.4.767 Published online by Cambridge University Press

all the other States (Belarus, Bulgaria, Czechoslovakia, Russian Federation and Ukraine) which objected to the declaration of the Philippines.

As was to be expected, none of the States which objected to the Philippines declaration has suggested that the invalidity of such impermissible reservations 'taint' the entire acceptance of the Convention so that the declarant State cannot be considered a party to the Convention.

Does 'the flexible system' embodied in the Vienna Convention on the Law of Treaties apply to declarations considered impermissible by the terms of articles 309 and 310? 'Can the other contracting parties or international organisations accept an impermissible reservation?'[60] In other words, with respect to the Convention on the Law of the Sea is there a place for the application of the opposability test whereby the validity of a 'disguised reservation' would depend on acceptance of the reservation by another contracting State?[61]

It would be recalled that at the Vienna Conference on the Law of Treaties Waldock, the Expert Consultant, gave a simple and clear response to a similar question.[62] He stated 'that a contracting State could not purport, under article 17 (now article 20), to accept a reservation prohibited under article 16 (now article 19), paragraph (a) or paragraph (b), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance'.[63]

Convention had no effect on its rights under its Constitution or internal law, that declaration must be considered invalid, and a judge did not need to examine whether it was a reservation. By accepting a treaty that prohibited reservations, a State accepted the treaty in its entirety, regardless of what it stated elsewhere', (1995) YBILC, vol. I. 155. Yamada also observed that 'With regard to multilateral treaty prohibiting the formulation of a reservation, a disguised reservation must of course be considered as invalid', ibid. 191. See too Robinson, ibid. 159.

60. A general question raised by Pellet in his First Report on the Law and Practice Relating to Reservations to Treaties UN Doc.A/CN.4/470 (1995), 57, para. 124.

61. The following statement by Ruda contains the core of the opposability test: 'In the last analysis, under this system, the validity of a reservation depends solely on the acceptance of the reservation by another contracting State. It is of course to be presumed that a State has no interest in accepting a reservation which conflicts with the object and purpose of the treaty, but such considerations may of course be displaced, for example, in favour of political motivations; there is nothing to prevent a State accepting a reservation, even if such reservation is intrinsically contrary to the object and purpose of the treaty, if it sees fit to do so', J. M. Ruda, 'Reservations to Treaties', *Recueil des Cours* (1975–III), vol. 146, 97–218 at 190. This makes opposability 'the predominant criterion' (J. K. Koh, 'Reservations to Multilateral Treaties: how international legal doctrine reflects world vision' (1982) 23 Harvard International Law Journal 98). It may be observed that Ruda is here focusing his attention on reservations incompatible with the object and purpose of the treaty (article 19, para. c.). The question posed here is whether the opposability test has any relevance where reservations are expressly prohibited as in the case of the Convention on the Law of the Sea. See generally Bowett, op. cit. above n. 57, 28; Redgwell op. cit. above n. 55 263–269.

62. Official Records United Nations Conference on the Law of Treaties, First Session (1968), Meetings of the Committee of the Whole, Twenty-Fifth Meeting, 133. The question put to the Expert Consultant by the Canadian delegate was as follows: 'if a reservation was prohibited under article 16, sub-paragraph (a) or (b), had it been the intention of the International Law Commission to prevent a contracting State from accepting the reservation under article 17, paragraph 4(a)?', ibid. Twenty-Fourth Meeting, 132.

63. As Bowett makes clear: 'If the reservation is impermissible because it is expressly prohibited it would appear difficult to justify an acceptance of such a reservation by another Party. For

https://doi.org/10.1093/iclq/50.4.767 Published online by Cambridge University Press

As Gaja justly observes 'on principle, when a treaty prohibits reservations, only an amending agreement would make a reservation admissible. More than acquiescence would therefore be required on the part of the other Contracting States in order to overcome the prohibition written in the treaty. There is no evidence in practice in favour of the existence of a rule of general international law that would allow reservations that are prohibited in a treaty on the basis of mere acquiescence.'[64] In this writer's opinion this proposition applies particularly to the Convention on the Law of the Sea which contains such a clear-cut prohibition against the making of reservations. If the flexible system contained in the Vienna Convention were to be applied to the so-called 'disguised reservations' the whole meaning and purpose of articles 309 and 310 would be destroyed.

VII. GENERAL ASSEMBLY RESOLUTIONS

Developments in the UN General Assembly are of some relevance here. The General Assembly responding to concerns expressed by a number of States has in a series of resolutions[65] called upon States to withdraw the so-called 'disguised reservations'. In the latest resolution on this matter the General Assembly called upon States to 'harmonise as a matter of priority their national legislation with the provisions of the Convention, to ensure the consistent application of those provisions and to ensure also that any declarations or statements that they have made or make when signing, ratifying or acceding to the Convention are in conformity therewith and otherwise to withdraw any of their declarations or statements that are not in conformity.'[66] The Secretary-General noted that so far, despite those appeals, none of the States whose declarations were objected to and are considered not to be in conformity with UNCLOS have withdrawn their declarations or statement.[67]

Thus the international community as represented in the General Assembly has accepted (1) the fact that there are declarations which are not in conformity with the Convention—the so-called disguised reservations and (2) that such declarations must be withdrawn.[68] In that sense the will of the members

the effect would be to defeat the clear purpose of the agreed reservations article. The inconsistency is plain and the conduct of the "accepting" State, being contrary to the agreed reservations article, is essentially a breach of the treaty', Bowett, op. cit. above n. 57, 82–3.

64. Georgio Gaja, 'Unruly Treaty Reservations', in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Robert Ago*, I (Milan, Giuffrè, 1987) 307–30 at 320.

65. A/RES/52/26 of 26 Nov 1997; A/RES/53/32 of 24 Nov 1998; A/RES/54/31 of 24 Nov 1999; and A/RES/55/7 of 20 Oct 2000.

66. A/55/L.10 of 20 Oct 2000 operative para. 3.

67. Report of the Secretary-General on Oceans and the Law of the Sea: Law of the Sea, UN Doc.A/54/429 (1999), 7, para. 15.

68. States have been known to withdraw their reservations, for instance, in the case of declarations made to the International Covenant on Civil and Political Rights (1966) and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). See *Multilateral Treaties deposited with the Secretary-General* (ST.LEG/SER.E/17).

of the international community is still *ad idem* with the terms of the Convention.

VIII. THE ROLE OF DISPUTE SETTLEMENT

It has always been held that third party adjudication could play a role in determining when a reservation is permissible. Bowett, for instance, has remarked that 'the question of permissibility, since it is governed by the treaty itself, is eminently a legal question and entirely suitable for judicial determination and, so far as the treaty itself or some other general treaty requiring legal settlement of disputes requires the Parties to submit this type of legal question to adjudication, this would be the appropriate means of resolving the question'.[69]

There is no reason in principle why disputes concerning declarations or statements made under article 310 of the Convention on the Law of the Sea may not be submitted to the tribunals referred to in article 287 of the Convention. These disputes fall within the scope of the system of dispute settlement contained in the Convention.[70] Such disputes may either relate directly to the validity of a declaration under article 310 or may arise in the context of disputes with respect to the interpretation or application of substantive provisions of the 1982 Convention on the Law of the Sea.

The Convention on the Law of the Sea provides its own dispute settlement procedures with respect to the interpretation or application of the provisions of the Convention. The dispute settlement system contained in the Convention gives courts and tribunals standing competence to resolve a wide range of disputes concerning the interpretation or application of the Convention.[71] In accordance with article 286 any dispute concerning the interpretation and application of the Convention shall be submitted at the request of any party to the dispute to a court or tribunal having jurisdiction under article 287 of the Convention. This is subject to the limitations and exceptions set out in articles 297 and 298.[72]

In addition the Convention *ex abundante cautela* specifically gives courts or tribunals compulsory jurisdiction over disputes, *inter alia*, relating to the

69. Bowett, op. cit. above n. 57, 81.

70. As has been correctly remarked: 'Disputes over the interpretation or application of article 310 would come within the scope of Part XV, especially if the depositary is unable to resolve them through the means at his disposal, which are stated in article 77, para. 2 of the Vienna Convention of 1969', *Virginia Commentary*, vol. V, 227.

71. The lack of such institutions had been noted by the International Law Commission with respect to the adoption of the principle of 'compatibility with the object and purpose of the treaty'. 'The difficulty lies', it observed, 'in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty', Commentary on the 1962 Draft Articles on the Law of Treaties (1962) YBILC, vol. II, 178–9.

72. Unilateral action is sufficient to vest a court or tribunal having jurisdiction under article 287 and of course that court or tribunal may render a decision whether or not the other party participates in the process, *Virginia Commentary*, vol. V, 39.

freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines or in regard to the internationally lawful uses of the sea specified in article 58.[73] Certain disputes concerning fisheries and marine scientific research in the exclusive economic zone are automatically excluded from compulsory dispute settlement.[74]

It must however be borne in mind that under article 298 certain categories of disputes which are especially relevant to this enquiry may be excluded from the compulsory dispute settlement procedures. States may exclude from mandatory procedures disputes, *inter alia*, concerning military activities[75] which would include military manoeuvres in the exclusive economic zone and perhaps the deployment of listening and other security-related devices on the continental shelf of coastal States.[76]

There nevertheless remains a large number of disputes which would come under the compulsory jurisdiction of courts and tribunals under the Convention. Thus disputes arising from declarations concerning the right of innocent passage, transit passage, archipelagic sealanes passage, the freedom of navigation and so on all may fall under the compulsory dispute settlement of the Convention. This unique dispute settlement system allows courts and tribunals to play a part in preserving the integrity of the Convention and securing its harmonious implementation.[77]

73. See article 297, para. 1(a).

74. See article 297, paras. 2 and 3.

75. Article 298, para. 1(b). The following States have made declarations under this provision: Argentina, Cape Verde, Chile, France, Portugal, The Russian Federation, Tunisia and Ukraine. If the USA accedes to the Convention on the Law of the Sea it would most probably make a declaration under article 298. See United States: President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI to the US Senate with Commentary, 7 Oct 1994 (1995) 34 ILM, 1442.

76. This has to do with article 60, paragraph 1 especially subparagraph (c) and raises the question of the extent of coastal States' control of and jurisdiction over artificial islands and installations in the exclusive economic zone and on the continental shelf.

77. A question may arise whether such consequences will be excluded by the operation of article 33, para. 2, of the Statute of the International Tribunal for the Law of the Sea which states that 'the decision shall have no binding force except between the parties in respect of that particular dispute' (which is based on article 59 of the Statute of the International Court of Justice). Waldock seemed to be of the opinion that such will be the case. He stated that such a judicial decision—that is a decision concerning the validity of a reservation or declaration—'would bind only the State concerned and that only with respect to the case decided', (United Nations Conference on the Law of Treaties, First Session (1968), Meetings of the Committee of the Whole, Sixth Meeting, p. 126, para. 10). It is hard to imagine that a judicial decision with respect to declarations and statements under article 310 will not at least be of considerable value in the interpretation or application of the Convention on the Law of the Sea. Neither article 33 of the Statute of the Tribunal nor article 59 of the Statute of the Court was meant 'to exclude persuasive precedents'. As Judge Jennings has remarked: 'Every State a member of the Court is under a general obligation to respect the judgment of the Court' (*Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1984, Diss.Op., 158. This observation applies with equal force to the judgments of the Tribunal for the Law of the Sea.