Problems with the Implementation of the Third United Nations Law of the Sea Convention: The Question of Reservations and Declarations

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Introduction

Reservations and declarations are essential aspects of treaty law. A declaration is a statement issued by a State when ratifying, signing or acceding to a treaty. As a general rule, a State can make a declaration in so far as the declaration does not purport to alter the legal relationship between the parties as established under the treaty. Where the declaration alters the relationship, it becomes a reservation.[1] Thus every reservation is indeed a declaration but not every declaration is a reservation. Given the relationship between reservations and declarations, the distinction between the two is sometimes blurred and often poses problems in the implementation of treaties.[2] This is illustrated by the 1982 United Nations Convention on the Law of the Sea (LOSC). Article 309 prohibits the making of reservations "unless expressly permitted by the articles of [the] Convention". Since none of the articles permit reservations, it follows that no party to the LOSC may lawfully make a reservation. This prohibition was considered appropriate by the framers of the LOSC because it was thought that reservations were inconsistent with the consensus approach adopted by the Third Law of the Sea Conference. In any case, the regime established by the LOSC was seen as a package to be accepted or rejected by each party and not to be subject to the possible fragmentation effect of reservations. But at that time the LOSC was the product of political compromise and a new spirit of international cooperation and understanding. Thus despite the prohibitions in Article 309, the framers of the LOSC deemed it necessary at the same time to provide some measure of flexibility in order to prevent any future erosion of the Convention. To this end Article 310 of the LOSC provides:

Article 309 does not preclude a State, when signing, ratifying or acceding to

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1 Article 2.1(d), Vienna Convention on the Law of Treaties. See also the discussion accompanying notes 20 to 25 below.

2 McNair A, *The Law of Treaties* (1961), p 158. A useful test that could help distinguish reservations from declarations is that of whether a given statement purports to exclude or modify the actual terms of the treaty or the legal effect of certain provisions in their application to the declaring State. Where a statement does not fit into this test, it is a declaration and not a reservation. See *Delimitation of the Continental Shelf (UK v France)* arbitration, (1977) 54 ILR 6 at 50. See also Detter I, *Essays on the Law of Treaties* (1967), pp 52-54. But even then this test is by no means objective and it could still pose problems: see Bishop, "Reservations to Treaties", (1961) 103 HR 245 at 317-325; Elias TO, *The Modern Law of Treaties* (1974).

> 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.

The political reasoning behind Article 310 is quite clear, but its legal significance is not.[3] For one thing, to the extent that Article 310 does not allow declarations that "purport to exclude or to modify the legal effect of the provisions of [the] Convention", it only reinforces or restates Article 309. On the other hand the effect of Article 310 is as good as irrelevant since the parties reserve the right under international law to make such declarations in any case.[4] Be that as it may, Article 310 has attracted responses from several States. As of July 1987, forty States had made statements as declarations in pursuance of Article 310. A disturbing feature of some of these statements is that they seem to modify the legal effect of some of the provisions of the LOSC as they apply to the declaring States and are arguably inconsistent with Article 309. The exact legal effect and significance of these statements within the regime of the Convention is not clear. What is however clear is that in the implementation of the Convention the statements are likely to pose problems. Indeed the statements have already attracted objections from a number of States.[5] Within the framework of treaty law, these statements and their corresponding objections raise questions about the applicability of the Convention between some of the State parties and the future of the Convention generally.

In this article, we intend to examine the legal validity of the statements in the light of the provisions of Articles 309 and 310 and to establish the extent to which they affect the relationship between the parties to the Convention. The work is divided into three sections. The first section examines briefly the

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3 There is the view that "article 310 was accepted in the context of a device which would allow statements to be made by national officials for public consumption back home but which, under its terms, would legally maintain the requirement that the national legislation of states parties be consistent with the provisions of the Convention". (Juda, "The EEZ: National Claims and the UNCLOS Convention". (1986) 16 ODIL at 14). But Pohl of El Salvador, former Chairperson of Committee II at UNCLOS III, suggests that Article 310 was adopted with a view to making the Convention compatible with the national laws and regulations of the States parties. More significantly, he argues that ambiguity in Article 310 "provides sufficient latitude that even though...declarations of compatibility may not be called reservations they will in fact function as such and are authorized to do so" (Pohl, "The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea" in Vicuna FO (ed), *The Exclusive Economic Zone: A Latin American Perspective* (1984), p 31 at 56). For a critique of this argument see Juda, above, at 15.

4 This is well evidenced by State practice. See for instance the statements made by several States following the signing of the Kellog-Briand treaty in 1928, discussed in Hackworth, 5 *Digest of International Law* 144; Whiteman, 14 *Digest of International Law* 186.

5 The objecting States include Australia, Byelorussia, Bulgaria, Czechoslovakia, the Ukraine and the USSR: (1987) 26 ILM 77–78, 1116–22.

international law on declarations and reservations. The second part discusses the content of the various statements made so far by the contracting parties. Against a background of these two sections, the third section examines the legal implications of the statements.

Declarations and Reservations in International Law

i. Declarations

International law has no precise definition of "declaration". The term is therefore best defined by explanation. In signing, ratifying or acceding to treaties, it is common place for States to make statements concerning the treaty which are purely explanatory in character. The statement may for instance relate to motives of the State in signing the treaty, or it may simply be of domestic import with no relevance to the treaty's operation between the parties. Such statements have no real significance as such and could be classified as *mere declarations*.

A State may on the other hand make a declaration as to its understanding of the subject matter of the interpretation of a specific provision in a treaty. This form of declaration is usually described as an *understanding* or an *interpretative declaration*.[6] Where the statement is truly interpretative and simply goes to clarify an otherwise obscure issue, without purporting to modify the terms of the treaty, the statement remains a declaration without more and has only relative significance. While the declaration does not form part of the treaty[7] and may not be conclusive on any given issue under the treaty, it may nonetheless have considerable probative value where it contains recognition by a party of the extent of its obligations or its acceptance of a given issue.[8]

To the extent that a declaration does not modify or alter the legal effect of a treaty, it is usually not regarded as part of a treaty and does not require acceptance by other parties. However the depository of a treaty would normally circulate the text of such a declaration to other signatories for their information.[9] In treaty practice, a problem which frequently arises is that what

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6 On the subject of interpretative declarations see generally McRae, "The Legal Effect of Interpretative Declarations", (1978) 49 BYBIL 155.

7 See the majority decision in *Power Authority of the State of New York v The Federal Power Commission* 247 F (2d) 538 (1957). For comments on the case see Kenkin, "The Treaty Makers and the Law Makers: The Niagra Reservation", (1956) 56 Col LR 1151; and also McRae, above note 6 at 166-8.

8 The *South West Africa* case ICJ Rep 1950, p 128 at 134–136.

9 See GA Res 598 (VI) 1952 and 1452 B (XIV) for the practice of the UN Secretary General. For a survey of the practice of States acting as depositories see the Yearbook of the ILC. The depository's role here arises directly from its functions under Article 77 of the Vienna Convention on the Law of Treaties. It is however doubtful whether the depository can reject a purported ratification or accession on the grounds that an accompanying statement amounts to an impermissible reservation. This is because in its commentary on the functions of the depository, the ILC was quite clear that "it is no part of the functions (of the depository) to adjudicate on the validity of an instrument or reservation". (Yearbook of the

the declaring State may regard as mere declarations may well be construed or interpreted as reservations. Where there are doubts as to the implications of a purported declaration with regard to a treaty or where the declaration tends to modify the treaty, the other signatories are entitled to object to it in accordance with the terms of the treaty. The depository may also seek a clarification from the declaring State and circulate such clarification among the other signatories before accepting the ratification or accession. In such cases if the declaring State confirms or indicates that its statement is indeed a modification of the treaty or its legal effect as it applies to it, then the statement would be treated as a reservation and will become subject to the treaty's provisions on the subject of reservations. If the treaty does not permit reservations the depository State could reject the ratification or accession. Where on the other hand the declaring State confirms that its statement is not meant to be a modification of the terms of the treaty or its legal effect, then the statement, whatever its content, must be treated as a mere declaration without more. The declaring State would then be estopped from using the content of the statement as a basis to modify its obligations under the treaty at a future date. This is well illustrated in the events surrounding India's ratification of the Convention establishing the Intergovernmental Maritime Consultative Organisation (IMCO),[10] which was concluded under the auspices of the United Nations. The Indian instrument of acceptance included a statement that said that India approved the Convention subject to the following "conditions":

> ...The Government of India further expressly states that its acceptance of the...Convention neither has nor shall have the effect of altering or modifying in any way the law on the subject in force in the territories of the Republic of India.[11]

Upon receipt of the instrument the United Nations Secretary General notified IMCO that since the "condition" was "in the nature of a reservation" the issue of India's ratification should be put before the Assembly.[12] Indeed, India's ratification coincided with the opening of the first session of IMCO's Assembly, which subsequently resolved to circulate the Indian "condition" to all member States. Pending the outcome of the Members' responses, India was allowed to participate in IMCO without a vote.[13]

The primary issue for the members was whether the Indian "condition" was "in the nature of a reservation" as indicated by the Secretary General. A number of States replied that they had no comments or any objections, for that matter,

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International Law Commission (1966), Vol 2, p 269). It appears however that the class of treaties which explicitly prohibits all reservations is excluded from this. In this class of treaties, the depository's function could include a *prima facie* determination as "whether the statement would result in expanding or diminishing the scope of the treaty, in which case should be regarded as a reservation". (Statement by the UN Secretary General in *UN Juridical Yearbook* (1975), p 206). See also comments in this regard by Rosenne, "More on the Depository of International Treaties", (1970) 64 AJIL 838 at 851-2.

10 (1959) 289 UNTS.

11 UN Doc A/4235, Annex I.

12 Ibid, p 4.

13 IMCO/AI/SR6; Resolution 5(I) 12 January, 1959.

to the Indian statement. The United States on the other hand argued that to the extent that the "condition" was not inconsistent with the purposes of IMCO, the condition did not legally constitute a reservation.[14] But France and the Federal Republic of Germany regarded the "condition" as a reservation.[15]

India objected to the action of the Secretary General to the General Assembly of the United Nations at its Fourteenth Session.[16] But at the Sixth Committee debate on the issue India declared that its condition was not a reservation as such but a mere "declaration of policy".[17] In the end the General Assembly adopted a resolution noting that the Indian condition was one of policy and did not constitute a reservation.[18] More significantly the IMCO Council also took note of India's declaration at the Sixth Committee and added that in the light of the fact that the "condition" was only a declaration of policy, it was not a reservation and had no legal effect with regard to the interpretation of the Convention.[19] India was accordingly to be treated as a member with full voting rights. It seems correct to suggest that today India's obligations under the IMCO Convention are not affected by the "Declaration of Policy" that accompanied its ratification.

ii. Reservations

The development and the nature of reservations in modern treaty law has been exhaustively dealt with elsewhere.[20] For the purposes of this work a discussion of the main features of the law on reservations is nonetheless necessary as an appropriate background to the status of the reservations under the Law of the Sea Convention.

Article 2.1(d) of the Vienna Convention on the Law of Treaties defines a reservation as:

> a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State...

In some respects, a reservation is thus the international law equivalent of a counter offer in municipal law contract. Before 1951 there was the view that a reservation being a counter offer was not valid unless accepted unanimously by

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14 UN Doc A/4235, Annex III.

15 Ibid, Annex II. For the West German position see Annex IV.

16 UN Doc A/4188.

17 GAOR 14th Session, Sixth Committee, 614th Meeting, paragraph 28.

18 GA Res 1452A (XIV) 7th Dec 1959.

19 Resolution CI (III) 1 March 1960.

20 See generally Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Points", (1957) 23 BYIL 203 at 272-293; Fitzmaurice, "Reservations to Multilateral Conventions" (1953) 2 ICLQ 1; Holloway K, *Modern Trends in Treaty Law* (1967), pp 473-542; Elias, note 2 above, pp 27-36; Schachter *et al, Toward Wider Acceptance of UN Treaties* (1971), pp 147-156; McNair, note 2 above; 158-177; Bowett, "Reservations to Non-Restricted Multilateral Treaties", (1976–77) 48 BYBIL 67; Bishop, note 2 above; Gamble, "Reservations to Multilateral Treaties: A Macroscopic view of State Practice", (1980) 74 AJIL 372.

the other parties to the treaty.[21] But since the *Reservations* case[22] and more particularly since the adoption of the Vienna Convention on the Law of Treaties, the law relating to reservations has become well settled. Under Article 19 of the Convention, "a State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) the reservation is incompatible with the object and purpose of the treaty". In other words under the Convention a reservation is impermissible once it is classified under any of the three foregoing paragraphs.

It is thus important to note that where a treaty itself deals with the issue of reservations, the question of what is a permissible reservation must be resolved in accordance with the provisions of the treaty. In treaty law, it is not uncommon for a treaty to specify clauses reservations to which are impermissible[23] or to prohibit reservations altogether.[24] In any of these cases, any reservations made must be subject to the relevant provisions of the treaty. It thus follows that a State is precluded from making any reservations if there is an express provision in the treaty prohibiting reservations. On the other hand the point needs to be made that, even where a treaty expressly permits reservations, any reservations made must be compatible with the object and purpose of the treaty. In other words, as was noted in the *Reservations* case, the object and purpose of a treaty limit the freedom of making reservations; it is the compatibility of a reservation with the object and purpose of a treaty which determines the extent to which a State can make reservations.[25] This view is clearly embodied in Article 19(c) of the Vienna Convention, which provides that, where a treaty is silent on the issue of reservations, a State can formulate any reservation unless it is incompatible with the object and purpose of the treaty.

What is and what is not compatible with the object and purpose, and what, for that matter, constitutes a permissible or impermissible reservation in each case can be a matter for debate. However it could be said that where a treaty is precise and specific terms expressly allow a reservation, the reservation would obviously satisfy the compatibility criterion. In any other cases, the compatibility of a reservation can only be determined by examining the actual content of the reservation in relation to the terms of the treaty itself. In such cases, the intention of the parties as manifested in the treaty and the circumstances surrounding its negotiation could be relevant factors to be taken into account.

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21 This was the basis of the so called integrity or unanimity rule on reservations. See generally Hoyt E, *The Unanimity Rule in the Revision of Treaties* (1959): Melkin, "Reservations to Multilateral Conventions", (1926) 7 BYBIL 141 at 159; Detter, note 2 above, pp 62–70; Owen, "Reservations to Multilateral Treaties", (1929) 38 Yale LJ 1086.

22 ICJ Rep 1951, p 15.

23 Examples of such treaties include the 1951 Refugee Convention (Art 42) and the 1958 Continental Shelf Convention (Art 12).

24 A typical example is of course the 1982 Law of the Sea Convention.

25 ICJ Rep 1951, p 15 at 24.

In practice, the determination as to whether a reservation satisfies the compatibility test is initially a matter for each signatory. However to the extent that the questions of compatibility and permissibility are governed by each treaty itself, they are without doubt legal questions and are thus justiciable within the dispute settlement provisions of the treaty.

The Implications of Impermissible Reservations

Granted that a reservation could be impermissible under the terms of a treaty, the question arises as to the implications of making such a reservation and the effect of the impermissibility on the relationship of the signatories generally. In specific terms, two questions arise: (a) can signatories to a treaty opt to accept impermissible reservations; and (b) does the treaty as a whole remain in force as between the reserving State and other signatories?

i. *The acceptability of impermissible reservations*

Where a treaty expressly prohibits reservations, any purported reservation made is, in a way, a breach of the treaty. Three things could be said about such a reservation in relation to its acceptability by other signatories. First, it could be said that since the reservation is a breach, it is invalid and therefore outside the scope of the treaty. Consequently, the question of acceptability does not arise. In any case a signatory to a treaty cannot claim to accept terms which are outside the scope of the treaty. Second, an extension of this view is the "double breach" argument: if a reservation is impermissible because it is prohibited, then any such reservation made is in fact a breach of the treaty; a purported acceptance of the reservation in itself also becomes a breach because it clearly defeats the purpose of the reservations clause in the treaty.[26] Since breaches of a treaty do not necessarily alter the legal relationship between the parties, the treaty will remain applicable in its original terms notwithstanding the reservations and the purported acceptance. There is a third and perhaps more preferable approach to the issue. Agreement as such between the parties is the very lifeline of any given treaty. Thus, notwithstanding the original terms of a treaty, the parties may by express agreement, or by subsequent practice (impliedly agree to), vary such terms. The resulting modifications to the treaty are of course valid once there is evidence of the appropriate underlying *consensus ad idem*.[27] The parties' obligations under the treaty can thus be revised informally, so to speak. Indeed, in disputes over the interpretation of a treaty, recourse to the subsequent conduct and practice of the parties in relation to the treaty is not only permissible, but may also be desirable, as affording the best and most reliable evidence as to interpretation.[28] Article 31.3 of the Vienna Convention on the Law of Treaties supports this view with the provision that in interpreting a treaty "there shall be taken into account, together with the context:

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26 Bowett, note 20 above pp 82-83.
27 *South West Africa* case, ICJ Rep 1950, p 128 at 167.
28 McNair, note 2 above, pp 424–426.

(a) any subsequent agreement of the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation..."

It is therefore the case that, even where a treaty expressly prohibits reservations, the parties may by their subsequent conduct or practice modify the reservations clause and accept reservations which may otherwise be impermissible.[29] To conclude, it may simply be stated that, contrary to some existing opinion,[30] an impermissible reservation can in fact be accepted if the parties so choose.

Once the reservation is accepted, the relationship between the declaring State(s) and the rest of the membership of the treaty will be governed by treaty rules on reservations as reflected in the Vienna Convention on the Law of Treaties, Article 21. But this conclusion relates only to the conduct of the entire membership as such of the treaty. It does not concern the question as to whether in a given treaty a fraction of the parties can admit an otherwise impermissible reservation while the rest of the membership object to it.

In treaty law, it is permissible for two or more parties to a multilateral treaty to conclude an agreement to modify the treaty as between themselves.[31] Thus the issue is whether on this basis two or more States can modify the terms of a treaty inter se by admitting an otherwise impermissible reservation. Even though international law permits States to conclude modifications of a treaty inter se, this is only effective if:

(i) rights and obligations of the other parties are not in any way affected, that is to say, there is neither curtailment of their rights nor imposition upon them of any additional burdens;

(ii) the modification does not constitute a derogation from the duty to execute the treaty in accordance with its object and purpose; an inter se agreement would be incompatible with the object and purpose of the treaty if it alters vital provisions of a convention like a disarmament treaty; and

(iii) the proposed modification is not prohibited by the treaty.[32]

Since a reservation that is impermissible either on the grounds of incompatibility or of an outright prohibition in the treaty itself does not meet these conditions, it follows that no two or more States can permit or accept an impermissible reservation on the basis of an inter se agreement.

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29 This conclusion is supported to some degree by the holding in the *Reservation* case that "if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention *it can in fact* consider that that reserving State is not a party..." (ICJ Rep 1951, p 15 at 29, emphasis added). The phrase "in fact" would seem to suggest that the objecting State can take note of the reservation but still consider the reserving State a party. But see the critical comments of Bowett on this conclusion, note 20 above at 83.

30 Bowett, loc cit.

31 Articles 40(4) and 41 Vienna Convention on the Law of Treaties.

32 Elias, note 2 above, p 96.

ii. The issue of acquiescence

Where a party to a treaty makes an impermissible reservation, are other signatories necessarily required to object to it or can they choose to ignore it? In international law, there seems to be no requirement that a party to a treaty must necessarily object to an impermissible reservation.[33] Indeed it may well be argued that once it is or can be established that a reservation is impermissible it is a nullity and therefore requires no objection from other signatories. The difficulty with this view however is that the failure to object to an impermissible reservation and attendant conduct of the reserving State in applying the provisions of the treaty could constitute acquiescence.[34]

Acquiescence consists of the failure of a party to object to an infringement of its rights or a breach of an obligation.[35] Acquiescence thus constitutes a form of tacit consent and may even be used as a basis to modify relations settled by agreement if a party does not challenge subsequent deviating claims. In the *Case Concerning the Interpretation of the Air Transport Services Agreement Between the United States of America and France*,[36] the tribunal noted that instances where acquiescence may have such modifying effect on treaty relations include where:

> the interested party has not in fact raised an objection that it may have had the possibility of raising, or it has abandoned, or not renewed at a time when the opportunity occurred, the objection that it raised at the outset; or while objecting in principle, it has in fact consented to the continuance of the action in respect of which it has expressed the objection; or again, it has given implied consent, resulting from the consent expressed in connection with a situation related to the subject matter of the dispute.[37]

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33 But see Article 20.5 Vienna Convention on the Law of Treaties: "a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later". This would seem to relate only to reservations made under treaties which do not prohibit reservations. See however Elias, note 2 above, p 36: "[i]t is necessary to note that...an express acceptance of a reservation as well as an objection to a reservation must be formulated in writing and communicated to the Contracting States and other States which are entitled to become parties to the treaty".

34 Hackworth for instance admits that "[t]here is authority for the proposition that failure to object to a reservation should be regarded as acceptance". He however goes on to note: "the better view . . . would appear to be that the mere failure to object to a reservation, in the absence of some act by the party which has already deposited its ratification indicating that it regards the treaty as operative between it and the party making the reservation, does not constitute acceptance of the reservation. As to signatories whose ratifications are deposited subsequent to the receipt by them of notice of the deposit of a ratification with reservations, acceptance of the reservations would seem to be implied from failure to object..." (5 *Digest of International Law* 130).

35 See generally MacGibbon, "The Scope of Acquiescence in International Law". (1954) 31 BYBIL 143.

36 (1963) 16 UNRIAA 5.

37 At 63–64; See also the *Fisheries* case, ICJ Rep 1951, p 116 at 139. Vienna

It is also the case that where the interested party chooses to object to a breach, a mere formal protest may not be sufficient. As Greig puts it, the party must demonstrate that "it means business".[38] This is because a mere formal protest in situations where concrete actions could have been taken can in the end constitute acquiescence. The issue as to whether a given protest is merely formal or has the form of a concrete action is a question of fact and will depend on the circumstances of each case.

From the foregoing analysis, the general position in international law would seem to be that where a party makes a reservation, an interested party who considers it impermissible under the treaty must take appropriate steps to protest against the conduct and or claims of the reserving State. The silence of an interested party who is notified of a reservation could be interpreted as an acceptance of the conduct of the reserving State and the abandonment of conflicting claims.

iii. The Effect of Impermissible Reservations on the Relationship between the Parties

Where a party makes an impermissible reservation which is opposed accordingly by other parties to the treaty, what is the effect of such a reservation? Is the reservation simply a nullity with no effect on the original terms of the treaty as accepted by the party; or does the reservation nullify the party's acceptance of the treaty? On the one hand, there is the view that, "if that reservation is an essential condition of the acceptance [of the treaty] in the sense that without it the declaring state would have been wholly unwilling to undertake the principal obligation" then the acceptance would be a nullity.[39] In support of this view it has further been argued that it is possible to distinguish the category of reservations "which nullify the acceptance of the principal obligation ... [from] those reservations which, though they are not permissible, do not raise the issue of fundamental incompatibility and, therefore, may be severed".[40] It is thus suggested that if it can be objectively, and preferably judicially, determined that the State's paramount intention was to accept the treaty, as evidenced by the ratification or accession, then an impermissible reservation which is not fundamentally opposed to the object and purpose of the treaty can be struck out and disregarded as a nullity. Conversely, if the State's acceptance of the treaty is clearly dependent upon an impermissible condition of which the terms are such that the two are not severable and the reservation is in fundamental contradiction with the object and purpose of the treaty, then the effect of that impermissible and invalid reservation is to invalidate the act of

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Convention on the Law of Treaties, Article 20.5.

38 Greig D W, *International Law,* 2nd ed (1976), p 163.

39 Judge Lauterpacht in the *Interhandel* case, ICJ Rep 1959, p 6 at 117. But see the views expressed by Judges Klaestad and Armand-Ugon at 76-8 and 93-4 respectively that an invalid reservation is severable and may not necessarily affect the acceptance.

40 Bowett, note 20 above at 77.

ratification or accession, nullifying the State's participation in the treaty.[41] The Advisory Opinion in the *Reservations* case[42] seems to support this suggestion. In response to the first question posed to it, the Court held that:

> ...a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.[43]

The foregoing views seem to suggest that once a reserving State makes a reservation which is impermissible on the grounds of incompatibility, the State's acceptance of the treaty becomes a nullity; it cannot be regarded as being a party to the treaty. These views are not consistent with modern treaty law. For one thing, since treaties do not normally specify criteria or provide a collegiate system for determining incompatibility and impermissibility for that matter, each State party is left to determine for itself which reservations are permissible and which are not. Indeed what one objecting State may determine to be an impermissible reservation may well seem permissible in the eyes of other parties to the same treaty. One can therefore hardly not accept the general statement that a State whose reservation is found by one or more parties to be incompatible with the object and purpose of the treaty cannot be regarded as being a party. This conclusion is of course without prejudice to the more specific relationship between the reserving State and an objecting State.

The narrow issue of the relationship between a reserving and an objecting State was addressed specifically in the *Reservations* case when the Court held that "if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention".[44] In other words, an objecting State could set aside the application of a treaty between itself and the reserving State on the grounds of incompatibility. The Vienna Convention on the Law of Treaties adopts a similar approach but in more exact terms. It states that, unless a treaty otherwise provides, "an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State".[45]

Under the Vienna Convention on the Law of Treaties, then, and indeed in modern treaty law, a reservation does not nullify the acceptance of the reserving State and its membership of a treaty automatically, no matter how incompatible it may be with the object and purpose of the treaty. Unless the treaty makes specific provisions on the issue, it is up to the objecting State to indicate expressly whether the treaty will enter into force as between it and the reserving State. The reaction of the objecting State will of course depend on whether it considers the reservation to be compatible or not with the object and purpose of the treaty.

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41 Ibid.
42 ICJ Rep 1951, p 3.
43 At 29.
44 Ibid.
45 Article 20.4(b).

Where an interested State objects to a reservation but nonetheless determines that the reservation, although impermissible, is not necessarily incompatible with the treaty, it may allow the treaty to enter into force between it and the reserving State. In such a case, however, "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation".[46] It thus follows that unless a treaty so provides, an impermissible reservation is never a nullity but has definite legal implications: if it is impermissible because of incompatibility, the objecting State has the option of disallowing the entry into force of the treaty between it and the reserving State. Second, if the objecting State does not oppose the entry into force of the treaty, then the operation of the treaty will be limited to the provisions unaffected by the reservations. State practice supports these conclusions. For instance, following reservations made by a number of States to the Geneva Convention on the Territorial Sea and Contiguous Zone, in spite of prohibitions in the treaty, some States, including the United Kingdom, indicated their objections. In correspondence with the United Nations Secretary General, the United Kingdom objected to the rights of the States to make the reservations under the Convention and went on to say that:

> [e]ven in the absence of a right to make reservations to a Convention, it is of course always possible for a party or intending party to propose a reservation, but in that case the reservation only has validity if it is accepted by the other parties or at any rate is not objected to. If any party objects to the reservation, the latter can have no validity, at any rate against the party making the objection.[47]

The last sentence in the statement leaves open the conclusion that the reserving States are not necessarily excluded from the treaty vis-a-vis the United Kingdom but that the Convention's application would only be limited to the provisions unaffected by the reservations. The United Kingdom's response to reservations to Article 37.2 of the Vienna Convention on Diplomatic Relations supports this conclusion on its practice. In this case, the United Kingdom made it known that it "did not regard as valid", reservations made by a number of States to Article 37.2.[48] But this position notwithstanding, it still regarded the Convention (excepting Article 37.2) as binding between it and the reserving States. It seems reasonable to infer that the United Kingdom would have considered that in these cases the reservations were not necessarily incompatible with the object and purpose of the Conventions. This is in sharp contrast to the United Kingdom's response to reservations to the Vienna Convention on the Law of Treaties by Syria; it objected to the reservations and expressly noted that "it does not accept the entry into force of the Convention as between the United Kingdom and Syria".[49]

The practice of the United States is similar. Following reservations to the Geneva Convention on the Territorial Sea and the Contiguous Zone by a

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46 Article 21.3.

47 *Multilateral Treaties in Respect of which the Secretary General Performs Dispository Functions*, ST/LEG/SER D/9, p 474.

48 Ibid, p 60.

49 Ibid, p 503.

number of States, the United States government sent a note to the United Nations Secretary General noting that it considers all the Geneva Conventions as being in force between it and the other States that have ratified or acceded thereto "including States that have [made] reservations unacceptable to the United States".[50] More significantly the correspondence also noted:

> With respect to the States which ratified or acceded with reservations unacceptable to the United States, the Conventions are considered by the United States to be in force between it and each of those States except that provisions to which such reservations are addressed shall apply only to the extent that they are not affected by those reservations.[51]

Declarations under Article 310 of the Law of the Sea Convention

As at July 1987, forty countries had made declarations under Article 310 of the LOSC.[52] These declarations may be grouped into five categories, namely: (i) declarations seeking to record the State's interpretation of certain provisions of the LOSC;[53] (ii) those defining the relationship between certain provisions of the LOSC and the domestic laws or other international obligations of the State making the declaration;[54] (iii) those defining the relations between the State making the declaration and other parties to the LOSC;[55] (iv) those relating to the legal status of the Convention as a whole;[56] and (v) those expressing dissatisfaction with certain aspects of the LOSC.[57]

In our view, declarations in categories (iii)–(v) are generally valid under Article 310 of the LOSC. There are two tests of validity provided by Article 310 of the LOSC. First, the declaration must be formulated with a view, *inter alia,* to the harmonization of the laws and regulations of the State making it with the provisions of the LOSC. Second, and more importantly, such a declaration or statement must not purport to exclude or modify the legal effect of the provisions of the LOSC in their application to the State making the declaration. All the declarations made in categories (iii)–(v) satisfy these tests.

Some of the declarations in categories (i)–(ii) are arguably invalid because they have reservatory effect. Such declarations are discussed below to illustrate this point. In category (i), we single out for discussion declarations covering: (a) innocent passage of foreign warships through the territorial sea; (b) the status of the exclusive economic zone (EEZ); (c) the status of archipelagic waters. In

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50 Ibid, p 474.

51 Ibid.

52 (1987) 26 ILM 1108 at 1123–9.

53 See for instance paragraph v of the statement by Cape Verde (on the exclusive economic zone): *The Law of the Sea ('The Status of the Law of the United Nations Convention on the Law of the Sea* (hereinafter cited as the *Status*) (1985), p 12.

54 Examples include the statements by Angola, Guinea, Mali and the Philippines, *The Status*, pp 6, 12, 21 and 22 respectively.

55 Such statements include those made by Algeria, Iraq, Qatar, South Africa and the Yemen Arab Republic. (ibid, pp 6, 19, 23, 24 and 29 respectively).

56 Eg statements by the EEC and Luxembourg (ibid pp 20 and 30 respectively).

57 The statements by Belgium, Bolivia and Luxembourg are examples (ibid, pp 7, 10 and 30 respectively).

category (ii) we shall discuss the declarations by two States: Angola and Guinea.

i. Declarations seeking to record the State's interpretation of certain provisions of the LOSC

(a) *Statements made on Innocent Passage through Territorial Waters*

The Convention provides for the right of innocent passage through territorial waters.[58] The right operates as a qualification on the jurisdiction of the coastal State in its territorial waters. The Convention's provisions are quite specific; under the heading "Rules Applicable to All Ships", Article 17 states "[s]ubject to this Convention, ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea". To safeguard the interests of the coastal State, the latter is allowed under Article 21 of the Convention to make laws and regulations to govern innocent passage in its territorial sea in respect of

(a) the safety of navigation and the regulation of maritime traffic;
(b) the protection of navigational aids and facilities and other facilities or installations;
(c) the protection of cables and pipelines;
(d) the conservation of the living resources of the sea;
(e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
(g) marine scientific research and hydrographic surveys;
(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

From the heading of the section, it is clear that the general innocent passage provisions in the Convention apply to *all* ships, i.e. merchant ships, warships nuclear-powered or otherwise and other government-owned or operated non-commercial vessels.

In general, the right of innocent passage for merchant ships and government operated non-commercial vessels does not pose any problems but the right in relation to warships and nuclear-powered ships does. About eleven States have so far made declarations relating to innocent passage in pursuance of Article 310; most of the statements concern the innocent passage of warships or nuclear-powered vessels. For instance, on signature, the Yemen Arab Republic declared that it:

adheres to the concept of general international law concerning free passage

58 On the subject of innocent passage see generally, O'Connell DP, *The International Law of the Sea,* Vol. 1 (1982), Chapter 7; "The Juridical Nature of the Territorial Sea", (1971) 45 BYIL 303; Churchill RR and Lowe AV, *The Law of the Sea* (1983), pp 63-78; Jessup P, *The Law of Territorial Waters and Maritime Jurisdiction* (1927); Pharand, "Innocent Passage in the Arctic" (1968) 6 Can Yb IL 3.

as applying exclusively to merchant ships and aircraft; nuclear-powered craft, as well as warships and warplanes in general, must obtain the prior agreement of the Yemen Arab Republic before passage through its territorial waters, in accordance with the established norm of general international law relating to national sovereignty.[59]

Iran issued a similar statement which it justified on the basis of customary international law and the Convention itself. The statement read:

In the light of customary international law, the provisions of article 21, read in association with article 19 (on the Meaning of Innocent Passage) and article 25 (on the Rights of Protection of the coastal States) recognize (though implicitly) the rights of the coastal States to take measures to safeguard their security interests, including the adoption of laws and regulations regarding, *inter alia*, the requirements of prior authorization for warships willing to exercise the right of innocent passage through the territorial sea.[60]

Similar statements have been made by Egypt[61] and Yugoslavia.[62]

As we shall demonstrate presently, these statements are interpretative declarations which tend to modify the application of the Convention's provisions on innocent passage vis-a-vis the declaring States. They are to this extent undoubtedly reservations. But, for our immediate purposes, it could perhaps be suggested that the position of the declaring States is a reflection of the uncertain and confusing international situation in respect of innocent passage, particularly in the pre-UNCLOS III years, the essence of the suggestion being that uncertainty continues even today and could therefore indicate the position taken by the declaring States.[63] To understand their position and to support our contention that their statements are inconsistent with Article 310, it is appropriate to review briefly the law on innocent passage in the pre-UNCLOS III days.

1. Innocent Passage in the Pre-Conventional Period

Because of the world's reliance on the oceans for most of its trade and communication, States have always had strong interests in the maintenance of the freedom of the seas. But the pursuit of these interests has had to be balanced against the legitimate security and other related interests of coastal States within waters proximate to their shores. This is particularly because ships find it more desirable and economical to sail closer to shores and usually within territorial waters where sailing is more likely to be smoother because of much better weather. The balance of the interests resulted in the notion of "innocent

59 *The Status*, p 29.
60 Ibid, p 18.
61 (1987) 35 ILM 1110.
62 Ibid, p 1116.
63 Valencia, "Law of the Sea in Transition: Navigational Nightmare for the Maritime Powers?", (1987) 18 JoMLC 541 at 545-547; Frank, "The USSR Position on the Innocent Passages of Warships Through Foreign Territorial Waters", (1987) 18 JoMLC 33 at 39.

passage" or *passage inoffensive* which allows for transit rights through the designated territorial waters of a foreign State.[64]

There is support for the general view that, historically and in international law, merchant ships wishing to make innocent passage have a right to do so without the prior authorization of the coastal State.[65] But the innocent passage of warships has always been controversial. While their seems to be no dispute as to their right of innocent passage, there was some disagreement as to whether the consent or authorization of the coastal State is a precondition for such a transit for warships.[66] A survey of some of the relevant authorities illustrates the extent of the disagreement:[67] "Warships may not pass without consent into this zone [i.e. the territorial sea] because they threaten. Merchant-ships may pass because they do not threaten"; so declared the United States Agent Elihu Root in the hearings of the *North Atlantic Fisheries* arbitration.[68] On the one hand it has been suggested that as an agent of the United States, Mr. Root's words "are indeed to be classified as state practice".[69] On the other hand there is the more preferable view that at the time, his statement "was scarcely more than an expression of opinion since there was so little State practice to support a doctrinaire stand one way or the other, beyond the unquestionable fact that warships regularly made transits by the shortest routes".[70]

Before the Hague Codification Conference of 1930, earlier attempts to codify the law on innocent passage for warships reflected the inconsistencies in State practice of the period. The Harvard Research in International Law (Territorial Waters) rejected the right of innocent passage for warships.[71] But

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64 For a comprehensive survey of the history of innocent passage see O'Connell, note 58 above, particularly pp 260-266, Churchill and Lowe, note 58 above, pp 63-71.

65 Colombos, *International Law of the Sea,* 6th ed (1967), pp 132-133; Hall, *A Treatise on International Law,* 8th ed (1924), pp 197–198.

66 For authorities with the view that warships require prior authorization for transit see Jessup, note 58 above, p 120 for the view that "warships enjoy no absolute right to pass through a state's waters any more than its army may cross the land territory"; Harvard Law School Research in International Law (Territorial Waters), (1929) 23 AJIL (Supp) 295; Colombos, note 65, p 133; Baldoni, Les Navires de Guerre dans les Eaux Territoriales Etrangères, (1938) 3 HR 189 at 225. See also Brownlie I, *Principles of Public International Law*, 3rd ed (1979), p 296: "It is clear that a significant number, and perhaps a majority, of States require prior authorization for the passage of warships, and, as a consequence, dogmatic assertions of a right of passage have an aspect of advocacy"; Hall, note 65, p 198. But for a different opinion see Oppenheim, *International Law,* Vol 1, 8th ed (1955), p 495; also Ghosh, "The Legal Regime of Innocent Passage through the Territorial Sea", (1980) 20 Ind JIL 216 at 223. Judicial tribunals have tended to avoid a determination of the issue because it has not come up directly for determination as such. See, for example, the *Polish War Vessels* case (1931), PCIJ Ser A/B, No 43, pp 141–142; *Corfu Channel* case, ICJ Rep 1949, p 4 at 30.

67 O'Connell, note 58 (1982), p 276 at 107 and 108.

68 *Proceedings in the North Atlantic Fisheries* arbitration, Vol 11 (1912), p 2007.

69 Frank, note 63 above, 50 to 59.

70 O'Connell note 58 above, at 277.

71 Note 66 above.

three years earlier the American Institute of International Law had made the innocent passage of warships dependent on consent, which could be presumed in peace time.[72] Some other drafts prepared in the period deal with innocent passage only in relation to merchant shipping, whereas the draft Convention prepared by Alvarez for the International Law Association's Committee on the Regulation of Means of Maritime Communication in Times of Peace provided for innocent passage of warships in the same manner as merchant ships.[73]

At the Hague Codification Conference in 1930, the issue of innocent passage for warships received substantial attention. In his report to the Committee of Experts, Schucking, the Chairman of the Sub Committee, included in his draft Article 7, a right of innocent passage for "all vessels, without distinction".[74] Even though a majority of States appears to have favoured his position, there was considerable opposition which in the end led the Conference to adopt a rather ambiguous provision on innocent passage in its Final Act. Article 12 of the Final Act read: "As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification".

The Hague Conference obviously failed to settle the issue and left the impression that if there was to be a right of common use for warships in the territorial sea then it had to be a precarious right. The uncertainty of the law on the subject was well exhibited in the *Corfu Channel* case,[75] in which the Parties debated the issue of whether a right existed in law to send warships through the territorial waters of another State not included in a strait without prior authorization. The majority of the Court declined to consider the merits of the debate on the grounds that in the circumstances it was not necessary to do so.[76]

The matter was however addressed by Judge Alvarez in his Separate Opinion in the case. While noting that innocent passage is not a matter of "simple tolerance but a *right* possessed by merchant ships belonging to other States", he also indicated that "[t]he matter is not the same in the case of warships". Such vessels, he noted, "only enjoy an unrestricted right of passage when they are engaged in an international mission assigned to them by the United Nations".[77] A similar view was expressed by Judge Krylov, relying on the statement of French writer Gidel that: "*Le passage des bâtiments de guerre étrangers dans la mer territoriale, n'est pas un droit mais une tolérance*".[78]

Given the unsettled state of affairs on the issue, the right of innocent passage for warships in territorial waters came to be of considerable interest in the years leading up to UNCLOS I. In 1951 the International Law Commission included the Law of the Sea in its agenda and accorded it high priority. In the Commission's debate on the specific subject of innocent passage for warships, opinion among the members was very divided. In the end, the Commission

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72 Project No 12 (Jurisdiction) (1926) 20 AJIL (Supp) Article 9.
73 Report of the 33rd Conference (1924), 267 (Article 8 of draft).
74 League of Nations Official Doc C196, M70, 1927, V172.
75 ICJ Rep 1949, p 4.
76 At 32.
77 At 46–47.
78 At 74.

settled on a position that rejected unauthorized innocent passage for warships. Thus, in its report to the General Assembly in 1956, the Commission submitted a draft the relevant section of which read:

Sub-section D. Warships

Passage

Article 24

The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18.[79]

Non-observance of the regulations

Article 25

If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea.

At the conference itself the issue of innocent passage for warships was heatedly debated mostly along political lines with East and West taking opposite sides.[80] When the time came to vote on the issue, Articles 24 and 25 were voted on separately despite the obvious fact that Article 25 was a residual clause of Article 24. Article 24 was dropped for having failed to secure the required two thirds majority. But the residue, Article 25, was left untouched having secured the required majority; it thus appeared as Article 23 of the 1958 Convention.

The effect of this was that even though the Convention devoted a section comprising Articles 14–23 to the subject of innocent passage, only one Article made any direct reference to warships. Section III of the Convention dealing with innocent passage was divided into four sub-sections. Sub-section A comprised: "Rules Applicable to all Ships". Article 14 in this sub-section provided: "Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea". Sub-section B dealt with rules applicable to Merchant Ships; sub-section C dealt with government ships other than warships, while sub-section D covered warships.[81]

The question then arises: did the Geneva Convention allow innocent passage of warships without prior authorization? Despite some opinions to the

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79 Articles 17 and 18 of the draft related to the duties of the coastal State and the rights of protection of the coastal State respectively.

80 See generally UNCLOS I, Official Records, Vol. III (First Committee).

81 For comments on the subject of innocent passage and the Geneva Convention see Jessup, "The UN Conference on the Law of the Sea", (1959) 59 Col LR 234; Slonim, "The Right of Innocent Passage and the 1958 Conference on the Law of the Sea", (1966) 5 Col JTL 96; Tunkin, "The Geneva Conference on the Law of the Sea", (1958) 7 International Affairs (Moscow) 47; Gross, "The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba", (1959) 53 AJIL 564.

contrary,[82] it could be argued that the Convention allowed such innocent passage. This is because sub-section A contained general rules applicable to *all ships*; it is in that section that we find Article 14 which provides for innocent passage for "ships of all States". Since the rules in the section applied to all ships, it follows that the word "ships" in Article 14 included warships. Thus by implication the Convention could be interpreted as permitting innocent passage for warships without prior authorization. This interpretation is strengthened by the fact that at the conference itself, the draft article which required prior authorization for innocent passage had been defeated.[83]

Despite the provisions of the Convention on the issue, some States still opposed the innocent passage of warships without prior notification. On ratification, the Soviet Union for instance made a declaration in which it noted that a State reserved the right to establish procedures for the authorization of the passage of foreign warships.[84] No fewer than fifteen States were later to enact legislation purporting to require prior notification of the transit of warships in their territorial waters.[85] On the other hand the United Kingdom took the view, well expressed by the then Minister of State, that "[t]he 1958 Convention...provides that ships of all States including warships shall enjoy the right of innocent passage through the territorial sea [and that] Her Majesty's Government take the view that there is no basis in international law for requesting prior authorization or notification to the coastal State of the intended passage of warships through the territorial sea..."[86]

Even though the general international situation after 1958 up to UNCLOS III seemed to support the transit of warships without prior notification, it is fair to say that the law on the issue was not well settled given the attitude of the opposing States and the failure of UNCLOS I itself to clarify the situation. It was thus left to UNCLOS III to put the matter to rest.[87]

2. *The Third UN Law of the Sea Conference*

At UNCLOS III, there was consensus among the major naval powers from both the Eastern Bloc and the Western Bloc that there was to be no distinction

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82 Tunkin, note 81 above, at 47. The substance of Tunkin's argument is that Article 24 of the Geneva Convention could be interpreted to include "a requirement that prior permission be obtained or prior notification of passage be given". Tunkin's view represented the view of the Soviet Bloc at the time. Other States outside the Soviet Bloc however supported this interpretation. They included Malaysia, Indonesia and the Philippines. See O'Connell note 58 above, 290 at note 205).

83 Jessup, note 81 above, at 248; Pharand, note 58 above, at 11; But see Brownlie, note 66 above pp 206-207. O'Connell on the other hand takes the view that the Geneva Conference "relegated the question of innocent passage to customary law": note 58 above, at 291.

84 *Status of Multilateral Conventions*, UN Doc ST/LEG/SERD.

85 (1978) 49 BYIL 395-396.

86 Ibid, p 395.

87 UNCLOS III was of course preceded by UNCLOS II (1960). But the 1960 Conference left the issue untouched. The conference is therefore of little significance to the discussion.

between merchant ships and warships for the purposes of innocent passage.[88] Even though this was well reflected in Article 29(2) of the Informal Single Negotiating Text of 1975, the revised text in 1976 omitted direct references to warships and adopted a wording similar to the provisions of the 1958 Convention.

There were however a few additions to the provision in the 1982 Convention. For instance Article 30, which was an exact copy of Article 23 of the 1958 Convention, had the word "immediately" added onto it. But more significantly in an attempt to ease the concern of Third World States who feared that unauthorized transit of warships in their territorial seas may threaten their security, the major naval powers supported what may well be described as the "do's" and "don'ts" of vessels in transit in the territorial sea. Article 19 of the 1982 Convention dealing with the meaning of innocent passage thus provided:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of wilful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.

Despite the apparent dissatisfaction of a handful or Third World States,[89] there was no doubt at the conclusion of the Convention that, in so far as innocent passage was concerned, warships and merchant ships were to be treated equally with no prior authorization for transit. Thus, in October 1982,

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88 UNCLOS III, Official Records Vol 111, pp 183-203.

89 The Countries include Bangladesh, Maldives, Somalia, Sri Lanka, Sudan, Yemen Arab Republic and Yugoslavia. See O'Connell, note 58 above, at 293.

the President of UNCLOS III, Ambassador Koh of Singapore, was able to say:

> I think the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State.[90]

That "the Convention is quite clear on [the] point" may be based on the interpretation of the general provisions on innocent passage in Section 3 of the Convention.[91] As noted earlier, Sub-section A of this section deals with rules applicable to all ships. Article 17 in this sub-section states clearly that "ships of all States...enjoy innocent passage". There is no mention of the requirement of prior notification. The correct interpretation of the word "ships" in Article 17 must include warships for two reasons. First, 'ships' is a generic term; thus in the absence of any qualifications its interpretation is consistent with the title of the sub-section. Second, Article 19 of the same sub-section specifies the meaning of and what may not constitute innocent passage for "all ships" in transit in the territorial sea. The activities specified in paragraph 2(a), (b), (c) and (f), are all of the type that are associated principally with warships. Thus the combined effect of Articles 17 and 19 is that warships, like merchant ships, have the right of innocent passage without prior notification.

Statements such as those of the Yemen Arab Republic[92] and Egypt[93] are based on a wrong interpretation of the provisions on innocent passage. As the Italian response to these declarations correctly notes: "[n]one of the provisions of the Convention, which correspond on this matter to customary international law, can be regarded as entitling the coastal State to make innocent passage of particular categories of foreign ships dependent on prior consent or notification".[94] Any statement requiring prior notification for innocent passage therefore amounts to a purported modification of the provisions of the Convention and thus a reservation, which is inconsistent with Article 310.

(b) Statements relating to the Exclusive Economic Zone

Another regime in respect of which States have made statements which could well amount to reservations under the Convention is the Exclusive Economic Zone (EEZ). The status of the EEZ today is codified in the Convention. But its origins predate the Convention itself.[95] Well before the Third Law of the Sea Conference at least ten Latin American States had long extended their maritime

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90 Cited in Oxman, "The Regime of Warships under the United Nations Convention on the Law of the Sea", (1984) 24 Virg JIL 809 at 854 note 159.

91 But see Frank, note 63 above at 39 for the view that "[t]he 1982 Convention itself did not put the matter to rest".

92 See note 59 above.

93 See note 61 above.

94 *The Status*, p 20.

95 For commentaries on the origins of the EEZ concept see, O'Connell, note 58 above, Chapter 15; Rembe, *Africa and the International Law of the Sea* (1980), pp 116-127; Sharma, "Exclusive Economic Zone in Policy Perspective" in Anand RP (ed), *Law of the Sea; Caracas and Beyond* (1980), pp 204-208; Nawaz, "On the Advert of the Exclusive Economic Zone: Implications for a New Law of the Sea" in ibid, pp 180, 181–189.

zones or jurisdiction to 200 miles from their coastlines.[96] Even though there was some scientific basis for the choice of 200 miles as the limit,[97] most or the Latin American States claimed the 200 mile zone simply by imitation or due to the dictates of economic realities given their dependence on fisheries.

The earlier claims were ambiguous as to their nature. As O'Connell notes, the objective of the claims "was solely to recover the fishery resources of the Humboldt Current, they were not designed to interfere with navigation or the other incidents of the freedom of the seas".[98] The claims were thus more in the nature of fisheries zones, "but since the history of international law imposed serious inhibitions upon the exercise of authority in the sea outside the area of sovereignty, the claims had to be couched in the terms that often made them indistinguishable from territorial waters claims".[99] Indeed some later claims by States in the region were undoubtedly claims to territorial waters but without interference with shipping or overflights beyond the 12 mile limit.

The failure of the 1958 Geneva Conference to settle the issue of the limits of the territorial sea was followed by the progressive extension of the 200 mile

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96 The practice among the States appears to have started in June 1947 with a Chilean declaration extending the country's sovereignty over its continental shelf and the adjacent seas up to a distance of 200 miles (UN Leg Ser ST/LEG/SER B/6, 4). In August the same year Peru also claimed a similar zone calling it the "epicontinental seas". These declarations were later formalized on a more general basis. In the Santiago Declaration of August 1952 (ie the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific), Chile, Ecuador and Peru proclaimed that "as a principle of their international maritime policy...each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country extending not less than 200 nautical miles". In 1954 the parties convened a second conference and concluded an agreement that they "shall consult with one another for the purpose of upholding, in law, the principle of their sovereignty over the maritime zone to a distance of not less than 200 nautical miles" and that they would not enter into any agreements "which imply a diminution of the Sovereignty over the said zone". (Law, Churchill and Nordquist, *New Directions in the Law of the Sea: Documents* (1973), Vol 1, pp 231-234). Later, in 1970, the Latin American States adopted by a vote of 14 to 3 the Declaration of the Latin American States on the Law of the Sea. *For*: Argentina, Brazil, Chile, Columbia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Uruguay; *Against*: Bolivia, Paraguay and Venezeula; *Abstained*: Trinidad and Tobago. (Ibid, p 237).

Barbados and Jamaica were absent when the vote was taken. Costa Rica was represented by an observer.

97 See for instance the justification used by the signatories of the Santiago Declaration: "Owing to the geological and biological factors affecting the existence, conservation and development of the marine fauna and flora of the waters adjacent to the coasts of the declarant countries, the former extent of the territorial sea and contiguous zone is insufficient to permit of the conservation, development and use of those resources, to which the coastal countries are entitled" (Article 3(I)). See also O'Connell, note 58 above, p 555; Nelson, "The Patrimonial Sea", (1973) 22 ICLQ 668.

98 O'Connell, note 58 above, p 557.

99 Ibid.

limit to the Atlantic coast of South America. By 1970 the practice among the Latin American States had become widespread enough to provide the basis for a formal demand for the recognition of a 200 mile territorial sea limit in international law as was articulated in the Declaration of the Latin American States on the Law of the Sea.[100] Even though the Latin American States were later to drop the demand for a 200 mile territorial sea limit for a 200 mile "patrimonial sea" zone which emphasized only jurisdiction over natural resources, the idea of exclusive jurisdiction, with its promising economic implications, had already taken hold among the developing States of Africa and Asia. In early 1971, at the meeting of the Asian African Legal Consultative Committee, Kenya proposed the notion of an "exclusive economic zone" extending up to 200 miles from the coast for the coastal States.[101] In 1972 a group of African States meeting in Yaounde adopted a recommendation based on the exclusive economic zone concept without confirming the limit of 200 miles.[102] In the same year a Kenyan proposal on the concept to the Enlarged Seabed Committee was accepted;[103] the EEZ appears to have gained a formal status from this period.

Thus by the time of the Caracas conference there was already in existence considerable support for some form of exclusive jurisdiction over the maritime zones adjacent to coastal States. For the immediate purposes of this study, however, what is significant about the pre-UNCLOS III situation is that, despite the claims and demands for the 200 mile exclusive zone limit at the time, there was confusion as to the status of.such a zone and the exact parameters of the coastal States' rights therein.[104] Even though the confusion has been cleared to a large extent in the Law of the Sea Convention, the statements made by some States supposedly in pursuance of Article 310 indicate a misunderstanding of the current status of the EEZ and are reminiscent of the confusion that characterized the pre-UNCLOS III period.

1. The EEZ under the Convention

Article 55 of the Convention defines the EEZ as "an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in [Part V] under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of [the] Convention''.[105] The breadth of the zone is not to extend "beyond 200

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100 Note 96 above.

101 Asian-African Legal Consultative Committee, *Report of the 12th Session*, Colombo (1971). See also the *Report of the 13th Session,* New Delhi (1973).

102 UN Doc A/AC 138/79 (1972).

103 UN Doc A/AC 138/sc II/L10.

104 Oxman, "An Analysis of the EEZ as Formulated in the Informal Composite Negotiating Text", in Clingan TA (ed), *Law of the Sea: State Practice in Zones of Special Jurisdiction* (1982), p 57 at 62.

105 For comments on the EEZ in the Convention, see generally Charney, "The Exclusive Economic Zone and Public International Law", (1985) 15 ODIL 233; Conforti Beneditto, "The Exclusive Economic Zone: Some Transnational Law Problems", (1980-81) 5 *Ital.* Yb IL 14; Fleischer, "The Exclusive Economic Zone

nautical miles from the baselines from which the breadth of the territorial sea is measured''.[106] The rights, jurisdiction and duties of the coastal State are set out in Article 56 as follows:

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

Article 58 on the other hand sets out the rights and duties of other States in the EEZ as follows:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not

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under the Convention Regime and in State Practice", Law of Sea Institute Proceedings, Vol 17. Juda, "The Exclusive Economic Zone: Compatibility of National Claims and UNCLOS", (1986) 16 ODIL 1; Oxman BH, *Custom, Consensus and Confrontation, The US and the Law of the Sea* (1985).

106 UNCLOS III Article 57.

incompatible with this Part.

Articles 60–73 set out the rights and duties of all states in the EEZ in more specific terms.

2. Statements by States on the EEZ in pursuance of Article 310

Statements made by States on the EEZ which appear to be inconsistent with Article 310 are mostly interpretative declarations relating to the non-peaceful uses of the zone by other States. On signature of the Convention, Brazil for instance noted that:

> [it] understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone military exercises or manoeuvres, in particular those that imply the use of weapons or explosives, without the consent of the coastal State.[107]

Similarly, on signature, Cape Verde declared that in the EEZ "the enjoyment of the freedoms of international communication, in conformity with its definition and other relevant provisions of the Convention, excludes any non-peaceful use without the consent of the coastal State, such as exercises with weapons or other activities which may affect the rights or interests of the said State".[108] Uruguay made a similar statement on signature.[109]

The problem posed by these declarations is their requirement of the consent of the coastal State as a mandatory prerequisite for the conduct of military exercises in the EEZ. The Convention is silent on the questions of such exercises in the Zone. What is however clear is that under the Convention the coastal State does not have sovereignty as such over the 200 nautical mile zone but rather sovereign rights for four specific primary purposes: exploration, exploitation, conservation and the management of the natural resources of the area.[110] In addition to these purposes, the Convention also provides for other related rights such as those on the construction of artificial islands and other similar installations for scientific research and the production of water energy.[111] It is thus the case that the coastal State has exclusive and or preferential rights in the EEZ only in so far as the economic and conservation uses of the EEZ are concerned. Outside such uses and the specific provisions of Article 60, the EEZ retains the characteristics of the high seas.[112]

The question then is: can a coastal State legitimately require its prior authorization for any non-economic uses of the EEZ where the uses in question are not covered under Article 60? More specifically, do other States need the

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107 Para IV of the statement, *The Status*, p 10.

108 Para V of the statement, Ibid, p 12.

109 Para D of the statement, Ibid, p 28.

110 Article 56. In this regard see the comments of O'Connell, (1982), note 58 above, pp 562-563. But see Clingan "An overview of the Second Committee Negotiations on the Law of the Sea", (1984) Oregon LR 53 at 56.

111 UNCLOS III, Articles 56 and 60.

112 Thus to define the appropriate parameters of the EEZ one needs a careful reading of Articles 56, 58 and 87. But see the statement by Uruguay, note 109 above.

prior consent of the coastal State for any non-economic uses of the EEZ? On the one hand, it could be suggested that since the non-peaceful uses of the EEZ (eg military exercises) are not dealt with in the Convention they could be treated as residual issues and thus subject to residual rights reserved for the coastal State. Thus, as of right, the coastal State can legitimately demand its prior consent for any non-peaceful uses of the EEZ not covered by the treaty. The premise of this argument rests on the debatable assumption which has already been made by some States that, in the EEZ, the coastal State retains residual rights.[113] The assumption is wrong. As its history indicates, the EEZ has evolved as an encroachment on the traditional regime of the high seas. The encroachment entails the endowment of specific economic and related rights to the coastal State. It therefore follows that where a specific right has not been reserved for the coastal State, it does not become a residual right for the coastal State; the right remains in the traditional domain of the high seas unaffected by the new development. In other words, in so far as non-economic uses are concerned, the EEZ retains the residual characteristics of the high seas.[114] The non-economic rights therein are thus residual rights reserved for all States. The Convention deals with the subject of residual rights in some respects. Article 59 provides that:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

The impression one gets from this provision is that the Convention chose to deal with disputes of residual rights on the basis and merits of specific user rather than on the conceptual status of the zone. This would thus lead to the conclusion that one cannot make any *a priori* statements as to who retains residual rights in the zone. But one should treat the provisions of Article 59 with caution. Its intended capacity or role to deal with the issues of residual rights particularly on the subject of the non-economic activities (eg military manoeuvres in the EEZ) is rather limited. For one thing, the text of Article 59 close to its final form appears to have been agreed on some two years before

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113 See for instance paragraph IV of the statement by Cape Verde and that of Uruguay paragraph C. Notes 108 and 109 above, respectively.

114 Article 86 of the Convention defines the High Seas regime as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State or in the archipelagic waters of an archipelagic State". This definition would seem to exclude the high seas regime from the EEZ altogether but it needs to be noted that despite its label, the EEZ is defined in functional terms with specific rights allocated to the coastal State. Beyond or outside these rights, the zone has the characteristics of the high seas. This is the basis of its description as an area *sui generis*, because it is neither part of the high seas as such nor part of the territory of the coastal State. But the coastal State is given sovereign rights in it while other States enjoy rights associated with the high seas.

agreement was reached on the context and wording of the provisions of Articles 56, 58, 86 and the inclusion of Article 55.[115] It is hardly the case that the Parties agreed on how to resolve residual issues in relation to these articles well before the content of the articles themselves were agreed on. As a survey of the debates at the Conference would indicate, the maritime powers saw the resolution of such problems not in terms of Article 59 but more in terms of Articles 56 and 58. It has thus been suggested:

> [S]hould the need arise, the principal intrinsic guide to the proper application of article 59 is the general thrust of articles 56 and 58 themselves. The question posed would be whether the activity involved is more akin to the type of activity dealt with in article 56 or in article 58. In this connection, one observes that article 56 generally deals with localized activities of actual or potential economic significance, while article 58 generally deals with communications and military activities.[116]

There is nothing to indicate that in the debates on the subject the maritime powers agreed to abandon their rights in the zone in respect of naval activities that did not threaten the security of the coastal State and were not prohibited as such in the Convention.

An argument which could be put in favour of the coastal States is that their declarations are consistent with the Convention's provisions on the EEZ even if they have no residual rights because the non-economic uses of the zone such as naval manoeuvres could impede the quiet and effective enjoyment of the EEZ by the coastal States. Such uses therefore necessarily require prior consent from the coastal State. Paradoxically, the apparent strength of this argument is a basis for its weakness. It implies that if the non-economic uses of the zone would not impede the effective enjoyment of the EEZ, they do not warrant the prior consent of the coastal State. Any interpretation that insists on such a consent for every type of non-economic use of the zone is therefore not consistent with the Part V provisions of the Convention.[117]

The foregoing argument involves the concession or the presupposition that if the non-economic use of the EEZ could disturb the effective enjoyment of the zone, it requires the consent of the coastal State. But the presupposition is wrong. Neither the treaty nor general international law prohibits non-economic uses in the EEZ beyond the 12 nautical mile limit. The enjoyment of rights not prohibited in international law could of course do damage to the legitimate interests of coastal States in the EEZ in some cases but the current international law situation on the injurious consequences arising out of acts not prohibited by law is not clear.[118] However this much is clear: such acts are not prohibited and

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115 Compare the provisions as they appear in the SNT, UNCLOS III Official Records, 159 UN Doc A/CONF 62/WP 8 (1975) and ICNT VIII UNCLOS III Official Records 1 UN Doc A/CONF 62/WP 10 (1977).

116 Oxman, note 90 above at 848.

117 Ibid, at 838, for the view that "[i]t is essentially a futile exercise to engage in speculation as to whether naval maneuvers and exercises within the economic zone are permissible. In principle, they are".

118 See generally Magraw, "Transboundary Harm. The International Law Commission's Study of International Liability", (1986) 80 AJIL 305.

neither do they require the prior consent of States whose interests could suffer potential damage.

The evolution of the EEZ and its eventual incorporation in the Convention was the product of a compromise between the freedom of the high seas and a recognition of the moral rights of the coastal State to exploit and conserve the fisheries resources in its adjacent waters. The zone was not meant to be an extension of territorial waters.[119] By their interpretative declarations, the coastal States are literally seeking to extend their territorial seas to the 200 mile limit and thereby extending their rights as provided under the Convention. Such declarations therefore amount to reservations and are inconsistent with Article 310.

ii. Declarations on the Status of Archipelagic Waters

(a) Status of Archipelagic Waters[120]

Until the LOSC, it had been impossible for States to reach agreement on a special regime for the archipelagic waters. Archipelagic States had long sought some means of delimiting their territorial seas in a way which would reflect what they perceived to be the intrinsically special character of the waters in and around the islands comprising archipelagos, rather than relying upon separate territorial seas for each island.

Following the *Anglo-Norwegian Fisheries* case,[121] it became established that coastal archipelagic States could draw straight baselines to define their territorial sea. However, this case applied very much to islands having a close physical relationship to a mainland, rather than a mid-ocean archipelago, ie a State consisting entirely of islands. Another significant feature of the case was that the waters within the baselines would be internal waters. While mid-ocean archipelagic States, principally the Philippines and Indonesia, have claimed such a status for the waters within their own baselines, this has been contested by many countries with major maritime interests, including the United States of America, the United Kingdom, France, Japan and Australia.

The particular problems of so-called mid-ocean archipelagos have been addressed in the LOSC, which provides a special regime for archipelagic States in Part IV (Articles 46–54). For the first time, archipelagic waters are treated as a separate category, quite distinct from the territorial sea. Under the pre-LOSC regime, coastal archipelagic States could draw straight baselines when delimiting their territorial sea, so that waters within those baselines were actually internal waters.[122] This possibility was not open to the mid-ocean

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119 Oxman, note 104 above, at 77 for the view that: "First [the EEZ] is not the territorial sea or part of the territorial sea...Second, it is not an area of general coastal State jurisdiction".

120 See, generally, O'Connell, note 58 above, Chapter 6; Churchill and Lowe, note 58 above.

121 ICJ Rep 1951, p 116.

122 O'Connell, note 58 above, pp 247-250.

archipelagos because the straight baseline option was only available where there was a mainland coast to which the islands were related.[123] In the case of mid-ocean archipelagos, each island was deemed to have its own territorial sea of at least three miles, so that the waters between islands were either territorial seas or high seas.

The significance of Part IV of the Convention lies not only in the acknowledgement of the legal distinctiveness of archipelagic States, but also, practically, in the purpose of being an archipelagic State. Those States which fit the conditions set out in Article 47 have the right to draw straight archipelagic baselines from which the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf are to be measured.[124] The value of being an archipelagic State, for the purposes of the Convention, is that the waters contained within these baselines will not be territorial seas. Rather, they will be archipelagic waters, having a legal status of their own. Archipelagic States have sovereignty over such waters. Article 49 provides that such States have sovereignty over "the waters enclosed by the archipelagic baselines drawn in accordance with Article 47...". But their sovereignty is by no means unlimited. In addition to any restrictions imposed generally by international law, sovereignty, enjoyed in accordance with the Convention, must be exercised only over an area defined by the terms of the Convention, and subject to Part IV of the Convention comprising Articles 46–54.[125] In specific terms, Article 52 provides for the right of innocent passage through archipelagic waters. In addition to this, the jurisdiction of the archipelagic State is regulated by Article 53—"Right of archipelagic sea lanes passage"—which sets out in 12 paragraphs the rights and duties or the archipelagic State. The essence of Article 53 is that, despite the sovereignty of the archipelagic State, this tenure is limited by the rights of passage of other States by sea and air. It is not a right to allow or deny such passage but only to regulate it. While the State may regulate passage through and over archipelagic waters, it cannot, by failure to make provision for such passage, thereby prevent it. This is clear from Article 53.12 which provides:

> If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

This provision thus emphasises the inherent right of passage through these waters.

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123 The problematic nature of this distinction between mid-ocean and coastal archipelagos has been noted frequently. For instance, Iceland could be a mid-ocean archipelago consisting, as it does, of one main island and many smaller islands, or it could be a coastal archipelago with the off-shore islands connected to its "mainland" coast.

124 Article 48.

125 The effect and general implication of this part has been described as something entirely new in the law of the sea without any direct precedent either in the practice of concerned States or in the traditional notions of internal waters and the territorial sea, as known to international law. Symonides, *Nowe Prawo Morza* (The New Law of the Sea), (1986), p 149; Churchill and Lowe, note 58 above, p 95.

The question which arises in the context of reservations to the LOSC is: to what extent have States, in making declarations under Article 310 with regard to archipelagic waters, entered reservations to the Convention?

(b) The Declaration by the Philippines

Among those States which have entered declarations in accordance with Article 310, perhaps the one which has raised the most vehement opposition is that of the Philippines. That State's declaration includes the following statement:

> 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.[126]

The relevant provision of the Philippines' Constitution provides:

> The national territory comprises the Philippines archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historic right or legal title, including the territorial sea, the air space, the subsoil, the sea-bed, the insular shelves, and the other submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.[127]

It is clear that the Philippines claims as part of its internal waters areas which would be classed as archipelagic waters under the LOSC, yet the two notions are quite distinct. States have sovereignty over their internal waters and other archipalegic waters. But whereas the latter are subject to the right of innocent passage, internal waters are not. Indeed States' sovereignty over archipelagic waters is a peculiar form of sovereignty, qualified as it is by the provisions of Part IV.

This qualification is crucial to an assessment of the legal effect of the Philippines' declaration. The sovereignty which that State enjoys over its archipelagic waters under the terms of the LOSC is subject to the right of innocent passage, as specified in Article 52, and the right of archipelagic sea lanes passage provided for in Article 53. These differences alone are sufficient to distinguish archipelagic waters from internal waters. The Philippines' Constitution makes no provision for the right of innocent passage through that State's internal waters; nor is there any right of archipelagic sea lanes passage.

The LOSC regime on archipelagic waters leaves no room for doubt that sovereignty over these waters coexists with other rights, in particular those of

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126 (1987) 26 ILM 1113-1114. The Philippines signed the Convention on 10 December 1982 and ratified it on 8 May 1984.

127 Article 1 of the Constitution of the Philippines, 1973. In Fernando EM, *The Constitution of the Philippines,* (1974) Appendix A. This Constitution, which was in force when the Philippines signed and ratified the LOSC, has been replaced by the "Aquino" Constitution, which was adopted by the Constitutional Convention of 15 October 1986 and ratified by a vote of over 76% in a nationwide plebiscite on 3 February 1987.

innocent passage and archipelagic sea lanes passage. The consequence of the Philippines declaration, were it to be given effect, would be to remove both the right of innocent passage and that of archipelagic sea lanes passage by making the relevant area a zone of internal waters. For virtually all purposes, the area could be closed to foreign shipping. This defeats the purpose of that part of the Convention, which was intended to acknowledge the specific needs of both the archipelagic States and the maritime States which navigated these waters.

As Bulgaria indicated in its Note Verbale of 3 May 1985 to the Philippines, "such a concept of the legal status of archipelagic waters is in contravention of Part IV" of the LOSC. It has the purported effect of excluding the application of part of the Convention with regard to the Philippines.[128] It is therefore in the nature or a reservation, which, under Article 309, is not permissible. A similar objection made by Australia in August 1988[129] produced the following response from the Philippines:

> The Philippine 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.
>
> 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 said Convention'.[130]

The response, though phrased in very general terms, is significant. It indicates an implicit admission that the declaration that was made on signature and affirmed on ratification was indeed inconsistent with Article 309. But more importantly, it also indicates the readiness of the Philippines to rectify any inconsistencies by harmonizing its domestic legislation with the provisions of the Convention.

iii. Declarations defining the relationship between certain provisions of the LOSC and the domestic laws or other international obligations of the State making the declarations.

Declarations have been made under Article 310 of the LOSC which purport to characterise provisions of the Convention with regard to the municipal law of the declaring State.[131] This raises significant questions concerning the effect of the Convention, both for the State making the declaration and for other Parties.

The law with regard to the relationship of the two jurisdictions is well established: the fundamental principle is that, in the international arena,

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128 (1987) 26 ILM 1117.

129 Australian Dept. of Foreign Affairs, issued in New York, August, 1988.

130 UN Doc CN 254, 1988 Treaties – 2 (Depositary Notification).

131 The Philippines declaration falls into this category. See also statements by The Republic of Guinea and Angola discussed below.

international law prevails over domestic law. This was stressed recently by the International Court of Justice when it delivered its unanimous Advisory Opinion on the *United Nations Headquarters Agreement*.[132] It is also the case that, where there exists a conflict between municipal and international law, "...a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".[133] Furthermore, a State may not generally invoke provisions of its internal law to justify its failure to conform to its international obligations.[134]

On signature of the Convention, a number of States made declarations purporting to define the relationship between their domestic laws and the LOSC. An examination of some of the declarations indicates a potential basis of conflict between the domestic laws of the declaring States and the LOSC provisions. For example the Guinean declaration read in part:

> The Government of the Republic of Guinea reserves the right to interpret any article of the Convention in the context and taking due account of the sovereignty of Guinea and of its territorial integrity as it applies to the land, space and sea.[135]

Similarly, the Angolan statement read:

> The Government of the People's Republic of Angola reserves the right to interpret any and all articles of the Convention in the context of and with due regard to Angolan sovereignty and territorial integrity as it applies to land, space and sea...[136]

Neither of these statements, in itself, seems to modify the terms of the LOSC. Indeed, the Angolan declaration concludes with the assertion that signature by that State of the treaty "is without prejudice to the position taken by the Government of Angola or to be taken by it on the Convention at the time of ratification". Nevertheless, the statements seem to be intended to keep open the rights of the declaring States with regard to future interpretations of the Convention. Given that either State could decide to interpret provisions of the treaty in a manner which would limit the scope of the LOSC in some way, there is the potential, within these statements, for reservations to be entered in future. This raises the question of whether the statements do themselves amount to reservations.

It has to be said that the statements do not, *prima facie*, alter the effect of the Convention vis-a-vis the States concerned. However, to the extent that these States claim the right to interpret "all articles of the Convention" in the context of their respective sovereignties and territorial integrities, they leave room for the view that their claims may provide a basis for reservations. This is because

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132 Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April ICJ Rep 1988, p 12 at 34–35.

133 *Exchange of Greek and Turkish Populations* case, (1925) PCIJ Ser B, No 10, p 6 at 20.

134 *Free Zones* case (1932) PCIJ Ser A/B, No 46, p 167.

135 *The Status*, p 17.

136 Ibid, p 6.

a possible implication of the statements is that the LOSC will be interpreted in a particular way even at the expense of the Convention itself if the declaring State so chooses. Perhaps one can sum up the anomalous category of these declarations with the observation that since they do not by themselves modify the provisions of the Convention, they are not reservations. However to the extent that they indicate the right of the declaring States to make laws or adopt interpretations that may modify the application of the Convention to them, the statements have the character of *inchoate reservations*.

The implications of reservations under the Law of the Sea Convention.

i. Possible validity of reservations

Where a State (such as the Philippines) makes a reservation under the Convention, what are the implications? The Convention provides the two-stage process of signature and ratification.[137] When the Convention becomes operative, it will bind only States which have ratified or acceded to it. However, under Article 310, any State may make "declarations or statements, however phrased or named", "when signing, ratifying or acceding to [the] Convention".[138] If a State makes a reservatory statement at the time of signing the Convention, the reservation would have no legal relevance because signature implies neither membership nor acceptance to be bound by the Convention.[139] But the point could perhaps be made that in treaty law, a State which has signed the Convention is under an obligation to refrain from doing anything which defeats the purposes of the Convention.[140] However, there is no authority that supports the proposition that this rule of treaty law precludes a State from making a reservation pending its ratification of the treaty. The situation is of course different where the State having made the reservation upon signature subsequently ratifies the Convention while still maintaining its reservation.

Where a State maintains its reservation on ratification of the Convention, can the State remain a party? As noted earlier,[141] the making of an impermissible reservation does not *ipso facto* nullify a State's membership or acceptance of a treaty. So it is the case that when a State makes a reservation to the LOSC, that State remains a party notwithstanding the obvious prohibition in Article 309. This is still the case even where a party or some other parties to the Convention determine(s) that the reservations made are inconsistent with the object and purpose of the Convention. This is because in the absence of any specific

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137 Articles 305 and 306 respectively.

138 In the case of the Philippines, for example, its declaration was initially made upon signature of Convention and then confirmed later at the time of ratification.

139 In this regard see the Court's reply to Question III in the *Reservations* case, ICJ Rep 1951, p 15 at 30: until the reserving State ratifies the Convention, its reservation "merely serves as a notice" to the parties and prospective parties of the eventual attitude of the signatory or reserving State. See also the implication of Article 23.2 of the Vienna Convention on the Law of Treaties.

140 The Vienna Convention on the Law of Treaties, Article 18.

141 See text accompanying notes 39-44 above.

system for determining what may or may not amount to a reservation and what may or may not be compatible with the object and purpose of the Convention, each State party is left to its own assessment of the statement made under the Convention. What one State may regard as a reservation may not be considered as such by another State. In view of this, one cannot say that a reserving State ceases to be a member of the Convention once another contracting State or a group of contracting States determines that its conduct is inconsistent with Article 309.

In any case it seems undesirable to exclude a declaring State from the Convention generally on the basis of an impermissible reservation. The LOSC constitutes the most comprehensive set of rules on the sea in modern international law. Given the nature of international relations relating to the sea, the success or failure of the Convention will depend in part on the extent of universality it enjoys among States. Indeed the consensus approach used in the negotiation process was in itself aimed at ensuring this vital element of universality. To promote the Convention's universality it would seem necessary to accept the continued validity of the membership of reserving States because by entering into the Convention subject to their reservations, the reserving States at least submit themselves to the regime of the Convention in some degree. Furthermore, even though the motives behind the inclusion of Article 309 in the Convention are understandable, with hindsight it appears quite unrealistic, given the multilateral nature of the LOSC. As the International Law Commission noted in its report on the Draft Convention on the Law of Treaties,

> ...when today the number of the negotiating States may not be far short of one hundred States with very diverse cultural, economic and political conditions, it seems legitimate to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties. It may not unreasonably be sought that the failure of negotiating States to take the necessary steps to become parties to multilateral treaties at all is a greater obstacle to the development of international law through the medium of treaties than the possibility that the integrity of such treaties may be unduly weakened by the feared admission of reserving States as parties to them. There may also perhaps be some justification for the view that, in the present era of change and of challenge to traditional concepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community.[142]

This does not mean that the essential interests of individual States are not safeguarded when they participate in a multilateral treaty such as the LOSC. The interests of individual States are protected through two well established rules: first, a State which objects to a reservation is entitled to regard the Convention as not applicable between it and the reserving State on the grounds of the incompatibility test;[143] second, a State which assents to such a reservation

142 ILC Yb (1962), Vol II, p 179.

143 *Reservations* case, ICJ Rep 1951, p 15 at 29. Vienna Convention on the Law of

is nonetheless entitled to consider the clauses of the Convention affected by the reservation as being inapplicable between it and the reserving State.[144] The essence of these rules is that they focus on the narrow issue of the relationship between the reserving State and the objecting State. Thus the broader issue of the continued membership of the reserving State to the Convention does not prejudge or prejudice the more specific questions of the relationship between individual States and the legally permissible options available to the objecting State.

ii. Permissible options of objecting States

There are a number of options open to a State objecting to a reservation made under the LOSC. The objecting State may (1) declare the Convention inapplicable between it and the reserving State; (2) declare that the clauses affected by the reservation are not applicable between it and the reserving State but that the rest of the treaty is; (3) accept the reservation; (4) be silent about the reservation; or (5) protest against the validity of the reservation. In adopting any of these options, the State's response will be determined by a number of factors prominent among which will be the extent to which the State's maritime or naval interests are affected. Each option entails specific implications that require examination.

Option 1: Declaring the Convention to be inapplicable between the objecting and the reserving States.

Where a State determines that a reservation is incompatible with the object and purpose of the Convention, that State may decide that the Convention shall not enter into force between it and the reserving State. It is, however, doubtful whether this is a desirable option. For one thing, the determination that the Convention shall not enter into force between the objecting and the reserving States does not necessarily affect the status of the reservation. In the absence of the Convention as between the two States, the Law of the Sea will be governed by rules of customary international law or any conventions to which they may be parties. Where the pre-UNCLOS III rules on a subject are not clear or not existent, the unilateral declaration by the reserving State may well play a significant role in determining the positions of the parties. This may be the case particularly if some parties to the Convention accept the declaring State's statement as valid or simply refrain from objecting to the statement. The exclusion of the treaty between the two States would thus not offer any advantages as such to the objecting State. Indeed it may be a disadvantage. This is because the exclusion of the declaring State from the Convention vis-a-vis the objecting State puts the former beyond the ambit of the Convention. The practical effect of this would be that both States will miss out on the mutual benefits of the application of those parts of the treaty unaffected by the reservations.

Another aspect of this option that makes it unattractive is that even though it

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Treaties, Article 20.4 (b).

144 Vienna Convention on the Law of Treaties, Article 21.3.

may exclude the application of the Convention between the two States, it has no effect on the membership of the declaring State to the Convention on a general basis. In other words, whatever the relationship between the objecting State and the declaring State may be, the latter would remain an effective party to the Convention. Even where some other members of the Convention take similar steps to exclude their participation with the reserving State, it will still remain a member of the Convention. The reserving State's membership will of course be on a relative basis. However the problem of relativity will not affect its participation in the Convention.

Thus, apart from not affording the objecting State any significant advantages, this option does not penalize the declaring State in any significant way or alter the State's participation in the Convention generally. The principal utility of this option is that its adoption would amount to an unequivocal statement of protest and objection to the conduct of the reserving State. It will however be more useful where a substantial number of States parties to the Convention adopt it. In such a case, the effect would be to ostracize the reserving State. On the other hand an isolated act of one State by excluding the Convention's application between it and the reserving State will be of little relative significance.

Option 2: Declaring that the clauses affected by the reservation between the objecting State and the reserving State are inapplicable

Following the reservation, the objecting State can permit the entry into force of the Convention between it and the reserving State but exclude the applicability of the clauses affected by the reservation. In other words the objecting State may accept the applicability of the Convention on a limited basis by severing those clauses the reserving State wishes to modify. The advantage with this option is that it does not exclude the reserving State totally from the ambit of the Convention. It thus allows the objecting State to enjoy the mutual benefit of participating with the reserving State without necessarily compromising its objection to the reservation.

As noted earlier, the response of the objecting State would be determined by whether its maritime or naval interests are affected by the reservation or whether its objection is simply based on principle. Where the objection is based on principle the practical effect of excluding the applicability of the clauses affected by the reservation is virtually nil. On the other hand where the interests of the objecting State are affected by the reservation, this option offers no better remedy than option 1. This is because in specific regard to the reservations, the practical results of both options are the same: ie the Convention will not apply between the parties. They will thus be left to deal with each other on the basis of customary international law of pre-UNCLOS III rules on the issues affected by the reservation.

Perhaps the greater disadvantage with this option is that once the objecting State permits the applicability of the Convention between it and the reserving State even on a limited scale, it could imply a degree of recognition of the right of the reserving State to make the reservations notwithstanding the prohibitions under Article 309 and the inconsistency with Article 310. The objecting State

may perhaps avoid this by entering a disclaimer on the entry into force of the Convention, that the limited applicability of the Convention does not imply the recognition of the validity of the reservations or the legitimacy of the right of the reserving State to make such reservations.

On the whole however, this option is only minimally better than option 1. It does not offer any substantive remedies for a State whose interests may be affected by the reservations. The advantages of the limited applicability of the Convention between it and the reserving State may not be enough to offset the disadvantages of the interests affected by the reservations.

Option 3: Acceptance of the reservation

A State party to the Convention may choose to accept the reservation made by another State notwithstanding the provisions of Article 309 and 310. As noted earlier, this may well be a "double breach" of the Convention's provisions and arguably not permissible in treaty law.[145] This is because the acceptance of the reservation would amount to a modification of the Convention between the parties (the reserving and accepting States) and indeed a de facto amendment inter se. International law permits two or more parties to a multilateral convention to modify or amend its provisions inter se so long as the rights of other parties are not affected or the inter se agreement is not incompatible with the object and purpose of the treaty or the proposed modification is not prohibited.[146] The point here is that a State could accept the reservation and justify its conduct on the basis that all these conditions have been met.

In treaty law, reservations operate reciprocally. The reserving State can thus neither expect to benefit from the provisions against which it has made reservations nor invoke them against another party. The practical effect of this option is thus not very different from those of options 1 and 2 because once a State accepts the reservation, it may then exclude the applicability of the affected provisions between it and the reserving State. So as between the two States, the applicable law of the sea will be the pre-UNCLOS III rules or customary laws.

This option may be attractive to a State that wishes to make a reservation similar to that of the reserving State. It will also be attractive to a State that perceives its interests as better served by the exclusion of the reserving State from benefiting from the clauses affected by the reservation.

To the extent that this option permits breaches of the Convention by accepting reservations, it is not desirable. The conduct of a State in adopting this course would hardly be responsible because it will contribute to undermining the effective operation of the Convention.

Option 4: Ignoring the reservation

We noted earlier that in international law, a State is under no obligation as

145 Vienna Convention on the Law of Treaties, Article 21.3.
146 See note 32 above.

such to respond to a declaration or a reservation.[147] In the specific case of the LOSC, a State party may thus choose to ignore or not to respond to any purported reservations made thereunder for a number of reasons. First, it may determine that the "reservation" is not a reservation in fact but a mere declaration; second, it may decide that even if it is a reservation in fact, it does not affect its interests; third it may also decide that even if it affects its interests, the reservation is void in any case because it is impermissible under Article 309 and inconsistent with Article 310. Even where the State decides to accept the reservation, it may still choose not to respond to it because there is no requirement in law for it to indicate its acceptance of reservations.[148] Finally, it is possible that a State may not respond to the reservation simply because it does not fully understand or appreciate the exact import of the reservation.

Judging by the general lack of response from States to the reservations made so far under the Convention, it seems a lot of States have adopted this option or are yet to indicate their responses.[149] Since the very absence of response implies the non-disclosure of a State's motives for adopting this option, the option is fraught with ambiguities and therefore hardly useful. Indeed it seems useful only to those States whose interests may not have been affected by the reservations and therefore do not wish to object to them or to those States which accept the reservations despite the prohibition in the Convention. In the case of a State which determines that a given statement is a mere declaration, but that it would object if it were a reservation in fact, it seems prudent for the State to respond accordingly to clarify its interpretation of the declaring State's statement because over time its misunderstanding or mistaken interpretation of the statement could estop it from reappraising its position.

A State that finds a reservation to the Convention unacceptable but chooses not to respond immediately to it is not of course precluded from responding at a later stage. However, it seems prudent for a State in this case to respond within a reasonable time so that its silence may not be construed as acquiescence. This is not to say that silence in every case constitutes acquiescence. The point here is that in the case of responses to reservations, an accepting State may also choose to be silent. Thus where accepting States and objecting States adopt this option, one may easily construe the silence as acceptance. It therefore seems vital for an objecting State to adopt an active response option once a given reservation is brought to its attention. Where a party to the Convention determines that there has been a breach the onus rests on the party to indicate

147 See text accompanying note 33 above. See also Fitzmaurice, note 20 above, at 270-277.

148 But see Article 23.1 of the Vienna Convention on the Law of Treaties; "A reservation, an *express acceptance* of a reservation...must be formulated in writing and communicated to the contracting States..." (emphasis added). On the other hand the acceptance could be implicit and would be presumed accordingly where the State indicates no objection or simply fails to respond (Article 20.5) of the Vienna Convention on the Law of Treaties).

149 So far objecting parties include Australia, Bulgaria, Byelorussia, Czechoslovakia, the Ukraine and the USSR: (1987) 26 ILM 1116–22. All the objections have been aimed at the Philippines' reservation.

the extent of the breach and its objections. The failure to address this burden when the breach occurs will neither disclose the State's objection nor the extent of the breach and may thus leave room for the conclusion that the State does not object in fact or that it has acquiesced on the issue.[150]

Option 5: A protest against the validity of the reservation .

An objecting State can choose to file a protest against the validity of any reservations made under the Convention without adopting options 1 or 2.[151] In other words, the State can simply choose to indicate its objection to a reservation's validity without indicating that it will exclude the applicability of the Convention or the affected clauses between it and the reserving State. For example, in August 1988, Australia sent a note to the United Nations' Secretary General, in response to the Philippines' declaration. The substantive part of the note read:

> Australia considers that this declaration made by the Republic 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 or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State"...
>
> Australia cannot, therefore, 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.[152]

With this protest, Australia joined the ranks of the Soviet Union, Byelorussia and Bulgaria, all of which have made similar objections.

The attraction about this option is that it serves to notify the parties to the Convention, including the reserving States, about the objecting State's position on the reservation. More significantly it can also be followed or combined with either option 1 or 2 at a later stage if the objecting State so wishes. Thus, even though it may be adopted by itself, this option is also preliminary in nature because it allows the objecting State to assess which further options if necessary may be adopted to protect its interest when the Convention enters into force.

So far none of the States which have adopted this option have followed it up with any other option and neither have they indicated that they will do so at a

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150 In this regard the opinion expressed by Fitzmaurice (note 20 above, at 290–291) is quite instructive: "There can be little doubt that, in the present state of international practice, and provided the reservation has been brought to the official attention of each of the other States concerned...acceptance must be deemed to result from non-objection, from tacit assent conveyed *sub silentio*. It has not been sufficiently appreciated how very greatly the process of making and validating unilateral reservations has been facilitated by the admission of this process".

151 By their nature options 1 and 2 are protests or objections in themselves.

152 Note 129 above.

future date. Indeed, given the disadvantages of options 1 and 2, these States are unlikely to adopt them in addition to this option. All the States which have adopted this option indicated in their protest notes that they consider the reservations to be null and void. It seems doubtful whether the parties can unilaterally declare the reservations to be null and void or whether their determination necessarily renders the declarations invalid; nonetheless their determination that the reservations are null and void is central to their protest and very significant. It indicates their intention to ignore the purported reservations and to consider the reserving States as bound by the Convention in its original terms. Given the declared positions of the reserving States, the option as adopted by the objecting States has an obvious potential for disputes; but therein lies the strength and the most significant advantage of this option. A purported reservation by one State and corresponding objection by another under the Convention constitute a disagreement on an issue of law relating to the interpretation of the Convention itself and the content of the reservation. To this extent they constitute the basis for a justiciable dispute subject to the dispute-settling arrangements under the Convention. This option thus has the advantage of bringing the issue of reservations under the Convention to settlement. It avoids the unilateral active response options in options 1 and 2 which undermine the potential for wider application of the Convention and provides room for an objective determination of whether a given statement is a reservation and whether such reservations are valid under the Convention.

The interests of the objecting State under the Convention are well secured and protected through this option because an objective determination by a tribunal that a statement is a mere declaration would mean that the Convention's provisions have not been modified as perceived by the objector. On the other hand, a determination that the statement is a reservation in fact may be followed by a declaration that is null and void and that the reserving State is bound by the Convention in its original terms.

Conclusion

Despite the much applauded consensus approach adopted in the long and arduous negotiations at the Third United Nations Law of the Sea Conference in an effort to establish a universal and uniform regime for the use of the oceans and their resources, the universal applicability of the resulting Convention is now considerably in doubt. Indeed given the reluctance of States to ratify the Convention, one may say, at the risk of sounding very pessimistic, that perhaps the Convention will never come into operation. If it ever comes into operation, the complexity of its application may well threaten the universality and uniformity its framers had hoped for. The question of reservations is only one aspect of this complexity. To date, the number of States that have made reservations is relatively small, but the figure is likely to grow with the increase in the number of ratifications, thus compounding the complexity of the problem.

Reservations are without doubt impermissible under the Convention. While any reservations made would not necessarily nullify the membership of the reserving States to the Convention, each reservation will attract appropriate responses from objecting States who see the future of the Convention and their

own interests threatened. In responding to the reservations, States have a wide range of options to consider. In the choice of options, it is hoped that States would be guided by the superior objective of ensuring that the Convention will establish a truly universal and uniform regime for the use of the oceans and the seas. It is thus hoped that States would avoid any options that will exclude the applicability of the Convention or parts of it between them and reserving States. In conformity with the mutual understanding and the co-operation which served as the basis for negotiating the Convention, the interests of States would be better served by options that ensure that any misunderstandings or disputes relating to the Convention are settled in accordance with the Convention's provisions without resorting to unilateral acts of limiting the Convention's applicability.

In its note to the Secretary General protesting against the Philippines' statement, the Soviet Union indicated that:[153]

> Taking into account the statement of the Philippines and the statements made by a number of other countries upon signing the Convention, together with the statements that might possibly be made subsequently upon ratification of and accession to the Convention, the Permanent Mission of the USSR considers that it would be appropriate for the Secretary-General of the United Nations to conduct, in accordance with article 319, paragraph 2(a), a study of a general nature on the problem of ensuring universal application of the provisions of the Convention,...

Given the problems reservations are likely to pose for the implementation of the Convention, it is urgent for the United Nations' Secretary General to consider the Soviet proposal seriously.

153 (1987) 26 ILM 1122.