

January 1980

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### Recommended Citation

Linda L. Hazou, Determining the Extent of Admissibility of Reservations: Some Considerations with Regard to the Third United Nations Conference on the Law of the Sea, 9 Denv. J. Int'l L. & Pol'y 69 (1980).

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## Determining the Extent of Admissibility of Reservations: Some Considerations with Regard to the Third United Nations Conference on the Law of the Sea

### Keywords

Law of the Sea, United Nations, Treaties

# Determining the Extent of Admissibility of Reservations: Some Considerations with Regard to the Third United Nations Conference on the Law of the Sea

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## INTRODUCTION

Particular problems are posed with regard to the admissibility of reservations to the proposed United Nations Law of the Sea Convention. These are due to its comprehensive nature, as evidenced by the fact that it will contain over 300 articles and several annexes, dealing with issues as diverse as delimitation of ocean space, scientific research, environmental control, commercial activities, and settlement of disputes. It will be a multifaceted treaty which will contain legislative elements, representing the progressive development of international law and codification of customary norms, as well as elements of constituent instruments which embody both organizational and regulatory provisions.<sup>1</sup> The complexity of this convention will render the determination of admissibility of reservations troublesome. It must be decided whether reservations will be allowed at all, and if so, to what extent.

A reservation has been defined 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."<sup>2</sup> The nature of a reservation is that it is a declaration, made unilaterally, outside of the treaty and not within it.<sup>3</sup> However, a statement which is explanatory or is merely a declaration of intent is not a reservation unless it denotes a variation in the legal effect of the treaty vis-à-vis the reserv-

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1. Mendelson, *The Constitutions of International Organizations*, [1971] *BRR. Y.B. INT'L L.* 146 (1973).

2. Vienna Convention on the Law of Treaties, art. 2(d), done May 23, 1969, U.N. Doc. A/Conf.39/27 (1969).

3. Ruda, *Reservations to Treaties*, III *RECUEIL DES COURS* 105 (1976).

ing state.<sup>4</sup> Consent, being the basis of treaty power,<sup>5</sup> is also the basis underlying the validity of the reservation.<sup>6</sup> Consent to the reservation may be given by the states parties tacitly, impliedly, or expressly, either at the time of the formulation of the reservation, thereafter, or in advance where the reservation is formulated in accordance with a specific reservations clause of the treaty in question.<sup>7</sup> When a reservation has been consented to by a state party, it has the effect of operating reciprocally as between the reserving state and the accepting state, "so that it modifies the treaty for both of them in their mutual relations to the extent of the reserved provisions."<sup>8</sup> However, it does not have the effect of modifying the treaty for the accepting state vis-à-vis other, nonreserving states, since they have not accepted it as a term of the treaty *inter se*.<sup>9</sup> So in fact, a multiplicity of levels of participation in the convention is possible in that there may be a multiplicity of degrees of its acceptance.

Implicit in the question of acceptability of reservations is that of their admissibility, for acceptance involves a prior determination that a reservation must be admissible. However, reservations may not be appropriately admissible to all provisions of a treaty. A distinction may be drawn between "reciprocal" and "normative" provisions.<sup>10</sup> It is contended that reservations may only be appropriate vis-à-vis reciprocal provisions, "the essence and operation of which involves the grant by each of the parties to each of the others of a number of reciprocal rights, benefits, or privileges which the parties accord to, and receive from, one another *inter se*."<sup>11</sup> Reservations to such provisions could operate between two states without affecting the rights of third states.<sup>12</sup> Normative provisions, on the other hand, are those which "operate for each party *per se*, and not between the parties *inter se*—coupled with the further peculiarity that they involve mainly the assumption of duties and obligations."<sup>13</sup> A

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4. *Id.* at 162.

5. *Id.* at 102.

6. *Id.* at 183.

7. *Id.*

8. *Draft Articles on the Law of Treaties with Commentaries*, [1966] Y.B. INT'L L. COMM'N (vol. II), adopted by the International Law Commission (ILC) at its 18th session. Commentary to art. 19, ¶ 1, reprinted in *U.N. Conference on the Law of Treaties*, U.N. Doc. A/Conf.39/11/Add.2 (1968) [hereinafter cited as *Draft Articles on the Law of Treaties*].

9. *Id.*

10. Mendelson, *supra* note 1, at 145.

11. *Id.*

12. *Id.* at 146.

13. *Id.* at 145.

nonreserving state could not alter its behavior toward a reserving state in regard to the operation of a reservation to a normative provision without violating its obligations towards other nonreserving states.<sup>14</sup> It would seem, then, that one of the aspects which would have to be taken into consideration in determining the admissibility of reservations to the Law of the Sea Convention is the categorization of provisions as to whether they are reciprocal or normative.

However, there are other characteristics of the treaty which will further complicate the determination of admissibility, the most important of which is the fact that the treaty will be what has been called a "package deal."<sup>15</sup> That is, the substance of the treaty will be the result of a process of arduous negotiation and compromise over a period of more than ten years in which more than 150 states will have participated. As a consequence of this process, the content of many provisions will be wholly dependent on the content of many other, not necessarily related, provisions. Some areas of the Convention which immediately come to mind in this respect are aspects of Part VI on the Continental Shelf, Part XI on the International Seabed Area, some provisions of Part XIII on Marine Scientific Research, and areas of Part V on the Exclusive Economic Zone, among others. A reservation to one such provision may tend to weaken, if not render meaningless, the whole package. A further element which will make the determination of admissibility complex is the fact that certain sections of the treaty which relate to the Authority and the Law of the Sea Tribunal comprise constituent instruments of international organizations, as traditionally no reservations are allowed to instruments of this nature. The process of selecting those provisions to which reservations will be allowed, if at all, therefore becomes very difficult.

Given the crucial role that reservations play in the formation and interpretation of international law, the General Assembly at its sixth session, made the following recommendations:

[T]hat organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them; . . . .<sup>16</sup>

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14. *Id.* at 146.

15. *See, e.g., Third U.N. Conference on the Law of the Sea* 66, 69 (vol. VIII) (1977) [hereinafter cited as *Third LOS Conference*]; and U.N. Doc. A/Conf.62/91 at 1 (1974).

16. G.A. Res. 598, 6 U.N. GAOR, Supp. (No. 20) (Jan. 12, 1952).

In compliance with these recommendations, the Third United Nations Conference on the Law of the Sea has considered this issue, though no conclusions have yet been reached, and has before it conference document A/Conf.62/L.13 which presents four alternative approaches.<sup>17</sup> These approaches are listed in article 7 as formulae A through D, and encompass (1) the prohibition of all reservations, (2) the specific enumeration of permissible reservations, (3) the prohibition of some reservations, and (4) the noninclusion of a reservations clause at all. The issues presented by each of these schemes, as well as their appropriateness for inclusion in the proposed Law of the Sea Convention will be discussed within the framework of the following questions:

- I. Is a reservation clause desirable?
- II. If there is a reservations clause, in what manner should admissibility be regulated?
- III. Should reservations be allowed at all?

#### I. IS A RESERVATIONS CLAUSE DESIRABLE?

The first question which must be considered is whether or not a

17. U.N. Doc. A/Conf.62/L.13 App. I, art. 7 (1976) in *Third LOS Conference at 126* (vol. VI).

#### RESERVATIONS

##### *Formula A: No reservations permitted*

"Reservations may not be made with respect to any of the provisions of the present Convention."

##### *Formula B: Certain reservations permitted*

"Any State may, at the time of signature, ratification or accession, make reservations in respect of the following provisions of the present Convention: . . ."

##### *Formula C: Certain reservations not permitted*

"At the time of signature, ratification or accession, any State may make reservations to any article of the present Convention other than articles . . ."

##### *Specification of a procedure for acceptance or rejection of reservations*

"A reservation incompatible with the object and purpose of the present Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by the present Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States parties to the present Convention object to it."

##### *Withdrawal of reservations*

"Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received."

##### *Formula D: No clause on reservations*

reservations clause should be included at all. It must be noted in this respect, that the absence of a clause would not signify that there would be complete freedom to declare any and all reservations. Rather, the rules of customary international law would apply to limit the extent to which reservations could be declared.

There are two objective rules of customary law which may limit the freedom to propose reservations, but which apply only in certain circumstances. The first is that no reservations are allowed to constituent instruments.<sup>18</sup> It must be noted that it may not always be easy to determine whether an instrument is in fact constitutional in nature.<sup>19</sup> This may be particularly true in the case of the Law of the Sea.<sup>20</sup> The second objective rule is that no reservations are allowed to peremptory norms of international law, or rules of *jus cogens*. A peremptory norm, or *jus cogens*, has been defined as a "norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . ." <sup>21</sup> As reservation involves derogation, it is clear that no reservations could be permitted to a peremptory norm of international law.

While the Law of the Sea Convention does contain some provisions which fall within these two categories, that is, *jus cogens* and constituent instrument, most of its provisions do not. The principle most often cited which would govern the admissibility of reservations to such other provisions is the test of compatibility with the object and purpose of the treaty in question. This test was first set out by the International Court of Justice in the advisory opinion relating to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>22</sup> The issue there had been the posture of reserving states vis-à-vis nonreserving states, given the fact that the Convention itself contained no clause regarding reservations. The Court stated that the reserving state could be considered a party to the Convention if the reservation were compatible with its "object and purpose."<sup>23</sup> It was specified that the criteria used to determine compatibility must be based on the individual characteristics of the Convention concerned.<sup>24</sup> The Court suggested that the intention of the

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18. Mendelson, *supra* note 1, at 169.

19. Ruda, *supra* note 3, at 187.

20. See pp. 77-78 *infra*.

21. Vienna Convention, art. 53, note 2 *supra*.

22. Opinion of May 28, 1951, [1951] I.C.J. 15.

23. *Id.* at 29.

24. *Id.* at 22ff, especially at 24 which reads in part, "[t]he object and purpose of the Convention . . . limit both the freedom of making reservations and that of ob-

contracting parties as to the scope of the treaty may be a determinative factor.<sup>25</sup>

The International Law Commission, in its draft articles on the Law of Treaties, adopted the rationale of the compatibility test as one "suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objection to them."<sup>26</sup> It was noted, however, that there was difficulty in applying the principles of that test, "especially where there is no tribunal or other organ invested with standing competence to interpret the treaty."<sup>27</sup> In practice, then, the application of the rule of compatibility is ultimately left to the individual state.<sup>28</sup> As such, it is a completely subjective decision, which is finally expressed by means of the state's acceptance of or objection to the reservation. However, although the individual decision is presumably based on the object and purpose of the treaty, this may not necessarily be the case. The state's decision may in fact be based on whatever motives it deems fit.<sup>29</sup> Therefore, while the acceptance of the reservation should be governed by the need to preserve the integrity of the treaty, integrity being that juridical value gleaned from the object and purpose of the treaty which is the essence of the balance of reciprocal rights and obligations achieved during the negotiations,<sup>30</sup> this is not always the principal consideration. Given a convention such as that on the Law of the Sea, where the balance is particularly fragile, even one acceptance of a reservation which could be construed as contravening the integrity of the treaty could have disastrous consequences. This is complicated further by the fact that due to the intricacy and diversity of the Law of the Sea treaty, it may be difficult to determine the precise nature of its multiple objects and purposes.

It is evident, therefore, that where there is no clause governing the admissibility of reservations to the treaty, the treaty itself becomes exceptionally difficult to administer. There would be possible an infinite multiplicity of degrees of its acceptance based on the complete decentralization of authority to determine its legal effects. The effect in the case of the Law of the Sea treaty could be to render it completely meaningless. It would be ill-advised, therefore, to fail

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jecting to them." See also Commentary to arts. 16 and 17, *Draft Articles on the Law of Treaties*, *supra* note 8, at ¶ 4(d).

25. [1951] I.C.J. at 24.

26. *Draft Articles on the Law of Treaties*, *supra* note 8, at ¶ 10.

27. *Id.*

28. Ruda, *supra* note 3, at 186.

29. *Id.* at 190.

30. *Id.* at 186.

to include a specific clause governing reservations to the Law of the Sea treaty.

## II. IF THERE IS A RESERVATIONS CLAUSE, IN WHAT MANNER SHOULD ADMISSIBILITY BE REGULATED?

One of the principal drawbacks to the noninclusion of a specific reservations clause is the completely subjective nature of the compatibility test as customarily practiced. It was pointed out during the negotiations of the Vienna Convention that "[r]eservations introduced an element of relativity and subjectivity into treaty relations and [their admissibility] must therefore be made subject to objective criteria, so as to limit the absolute freedom of States in the interests of international co-operation."<sup>31</sup>

The most effective method of controlling the admissibility of reservations is to include in the treaty a provision which specifies which reservations will be permitted and/or which will not. Such a provision could either set out the provisions to which reservations will specifically be allowed, or it could enumerate those to which reservations will be prohibited. Among alternatives to be considered by the Third United Nations Conference on the Law of the Sea presented in document A/Conf.62/L.13<sup>32</sup> is one of each of these clauses. Formula B of article 7 sets forth a clause which would involve the enumeration of provisions to which reservations will be deemed to be compatible with the objects and purposes of the treaty. The inclusion of such a clause in the Law of the Sea treaty would involve a prior determination by the Conference that certain reservations will be deemed compatible with the objects and purposes of the treaty. Where a reservation has been declared to one of the provisions enumerated in the clause, it would not require acceptance by any other state in order to be valid.<sup>33</sup> The effect would be that it is deemed to be automatically accepted by all state parties.

Such a listing as under formula B could be exclusive, that is, reservations would be admissible only to the articles cited therein, or it might be possible to include a nonexclusive listing whereby other reservations would be allowed if compatible. This would involve a policy decision on the part of the Conference which would be effected by means of the language used in the clause. If the listing is to be nonexclusive, and a reservation were to be declared in respect

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31. Statement by Mr. Cuenca (Spain), 21st meeting of the Committee of the Whole (Apr. 10, 1968), *U.N. Conference on the Law of Treaties* 109, U.N. Doc. A/Conf.39/11 (1968).

32. Note 17 *supra*.

33. Vienna Convention, art. 20(1), note 2 *supra*.

of a provision not specifically cited in the listing, its compatibility with the objects and purposes of the treaty would have to be determined by some means.

Formula C of article 7,<sup>34</sup> on the other hand, is a clause which would enumerate those provisions of the treaty to which no reservations would be admissible. The inclusion of such a clause would involve a prior determination by the Conference that certain reservations will be deemed absolutely incompatible and, therefore, will not be permissible. The implication of the use of such a clause would be that reservations to provisions other than those cited therein may be acceptable.<sup>35</sup> It must be noted that this does not signify that such other reservations will automatically be acceptable, but rather, that the rules of customary international law governing admissibility will control. The application of these rules, though simplified somewhat by the predetermination of incompatibility in some cases, would nonetheless be intricate, and would involve those drawbacks of decentralization, multiplicity of degrees of acceptance of the convention, and subjectivity, discussed above. However, where there is a specific clause governing admissibility, it may be possible to curb the subjectivity of the compatibility test somewhat by delineating a procedure whereby that test could be more objectively applied.

One approach to promote objectivity would involve the use of the majority rule to determine compatibility. This would involve setting a time limit within which a state could declare its objection to a reservation. By failing to lodge an objection within the time limit, a state would be deemed to consider the reservation compatible.<sup>36</sup> Then, upon the expiration of the time period, the number of objecting states would be tallied, and if that number were to rise above some predetermined figure, the reservation would be declared to be incompatible and would be invalid.<sup>37</sup> The duration of the time limit would be arbitrarily set but a "more extensive period [may be] preferable, in order that all doubt, in a field involving a rule that has a residual character, may be avoided."<sup>38</sup> The figure used to determine compatibility could be an absolute number or a percentage of states parties. In this connection, formula C<sup>39</sup> suggests the use of a two-

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34. Note 17 *supra*.

35. *Id.* at 128 n.24.

36. This alternative was considered by the ILC when preparing its draft convention on the law of treaties. *Draft Articles on the Law of Treaties*, *supra* note 8, at ¶ 23.

37. *Id.* at ¶ 11.

38. Ruda, *supra* note 3, at 185.

39. Note 17 *supra*, *Specification of a procedure for acceptance or rejection of a reservations clause*.

thirds majority of the states parties for such a determination.

Another alternative for objectively determining compatibility would be to provide for the submission of the reservation in each case to an impartial body, which would be entrusted with the task of its interpretation. Although this is not an expedient method, it is the customary procedure in the case of constituent instruments. The Vienna Convention, article 20, paragraph 3,<sup>40</sup> requires the acceptance of a reservation by the competent organ of the body being established. The rationale for such a requirement, according to the International Law Commission, is that

[i]n the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and . . . it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.<sup>41</sup>

This is, in effect, an extension of the majority rule, since in most cases the competent organ will make decisions by means of a majority vote.<sup>42</sup>

One problem which arises with regard to the Law of the Sea treaty is the question of which organ is the competent one.<sup>43</sup> With respect to the Authority, would it be the Assembly, the Council, or some other organ which would be competent? It is clear that with regard to a reservation to the provisions which establish the Law of the Sea Tribunal, it would be the Tribunal itself which would be empowered to make the determination of admissibility. However, since the Tribunal would have competence to interpret the whole treaty, perhaps it should also have competence to determine the compatibility of reservations to parts of the treaty other than those which established it. But, the Law of the Sea Tribunal would not be an organ of the Authority, and therefore, it could not be the competent organ of the institution being established vis-à-vis the Authority. Furthermore, by the terms of the treaty itself, a state is not required to accept the jurisdiction of the Tribunal unless it has made a specific declaration to that effect.<sup>44</sup> In any event, it may be difficult

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40. Vienna Convention, note 2 *supra*.

41. *Draft Articles on the Law of Treaties*, *supra* note 8, at ¶ 20.

42. Ruda, *supra* note 3, at 187.

43. Mendelson, *supra* note 1, at 153-54.

44. *Third U.N. Conference on the Law of the Sea: Informal Composite Negotiating Text/Revision 1*, art. 287, U.N. Doc. A/Conf.62/WP.10/Rev.1 (1977) [hereinafter cited as ICNT/Rev. 1].

to identify those provisions of the Law of the Sea treaty which are constitutional in nature. In some cases there may be ambiguity, since constitutional provisions may be located in various parts of the body of the treaty itself, or in several of the annexes.

Another disadvantage of the system of acceptance by the organ is that it only becomes possible to consult the competent organ of an organization, whichever one it may be, after such organization becomes operational.<sup>45</sup> If the reservation is formulated before the competent organ is established, it would seem apparent that it could have no legal effect until such time as the organ becomes established and has occasion to pronounce on the question of compatibility.<sup>46</sup> However, if the reservation is rejected by the organ at that time, thereby precluding the acceptance of the reservation by any state, a question may arise as to whether the reserving state could be considered a party to the convention. This may be a pivotal concern where there is otherwise an issue of entry into force of the convention.<sup>46.1</sup>

Formula C, the *Specification of a procedure for acceptance or rejection of reservations* clause, provides that no reservation will be allowed "the effect of which would inhibit the operation of any of the bodies established by the present Convention."<sup>47</sup> It must be noted that this may be a more restrictive test than a compatibility test as customarily applied.

It is evident, then, that overall, the use of either formula B or formula C will be far from simple in terms of application. What will be involved is a detailed analysis of the objects and purposes of the convention. Then, the Conference will need to undertake a scrupulous examination of each article of the treaty, to determine whether or not a reservation thereto will contravene those objects and purposes, or whether the provision is constitutional in nature. In addition, the formulation of a residual procedure to be applied in the case of reservations to provisions not specifically enumerated in the clause, as well as in the case of the constituent elements of the treaty,

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45. *Supra* note 17, at 128 n.26. Footnote 26 also notes that in the case of the Law of the Sea, it may be possible to consult the Preparatory Commission or some organ of the United Nations. *See also Draft Articles on the Law of Treaties, supra* note 8, at ¶ 10.

46. Ruda, *supra* note 3, at 188.

46.1. In this case the competent organ may in fact be considering the question of its own existence, for where there are too few nonreserving states to allow for entry into force of the convention, the determination that declared reservations are compatible would be mandatory in order to enable entry into force and the coming into existence of the organ itself.

47. Note 17 *supra*.

will be necessary.

### III. SHOULD RESERVATIONS BE ALLOWED AT ALL?

By far the most expedient method of dealing with the question of the admissibility of reservations is to include a clause, such as that which is set out in formula A of document A/Conf.62/L.13<sup>48</sup> which expressly prohibits their formulation.

Three considerations should be borne in mind in determining the desirability of allowing reservations to a multilateral treaty. These are:

- (i) Flexibility, due to the necessity to meet all needs which may arise in practice;
- (ii) Simplicity, due to the fact that there must be clear and firm standards to guide practice; and
- (iii) Respect for the will of states and their sovereign equality.<sup>49</sup>

Several arguments may be made in support of the disallowance of any reservations to a multilateral treaty. Among these are that the integrity of the treaty may be destroyed,<sup>50</sup> that the principle of certainty of law would be undermined by the allowance of reservations, and that confusion would ensue.<sup>51</sup> These factors may weigh more heavily where the desire for uniformity of law plays a strong role.<sup>52</sup> For example, the International Court of Justice noted in the *Genocide*<sup>53</sup> opinion that the Genocide Convention was intended to codify basic principles of morality for a purely humanitarian and civilizing purpose.<sup>54</sup> It is undeniable that that Convention was intended to be universal in scope,<sup>55</sup> thereby establishing uniform rules on the subject. Furthermore, the Court noted that the principles underlying the Convention are themselves principles of customary international law recognized by states as binding upon them, even without any Conventional obligation.<sup>56</sup> Both the universal character

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48. *Id.*

49. Statement of Mr. Virally (France), 22nd Meeting of the Committee of the Whole (Apr. 11, 1968), *supra* note 31, at 116.

50. A. McNAIR, *THE LAW OF TREATIES* 18 (1961). See also the Report of Mr. J. L. Brierly, Special Rapporteur, *Reservations to Multilateral Conventions* ¶ 11 U.N. Doc. A/CN.4/41 (1951), reprinted in [1951] Y.B. INT'L L. COMM'N (vol. II).

51. See, e.g., the statement of Mr. Jhirad (India), 8th Plenary meeting (Apr. 22, 1958) *1958 Conference on the Law of the Sea*, U.N. Doc. A/Conf.13/41 at 11 (1958), and the statement of Mr. Gros (France), 9th Plenary meeting (Apr. 22, 1958) *id.* at 17.

52. [1951] Y.B. INT'L L. COMM'N, *supra* note 50, at ¶ 11.

53. [1951] I.C.J. 15.

54. *Id.* at 23.

55. *Id.*

56. *Id.*

of those principles and the cooperation required to effectuate them necessitates that any reservation which derogates from them be considered incompatible.<sup>57</sup> It was indicated that these considerations may outweigh any freedom of a state to declare a reservation by virtue of its sovereignty.<sup>58</sup> By analogy, then, it would seem that reservations to those aspects of the Law of the Sea treaty which represent *jus cogens* or customary norms of international law would not be proper.

As to those aspects of the treaty which represent the progressive development of international law, Briery pointed out in his report to the International Law Commission, that "one of the ways in which international law is developed is by a consistent rule of general application being laid down in multilateral . . . conventions."<sup>59</sup> Reservations by states to such provisions may "hinder the development of international law by preventing the growth of a consistent rule of general application."<sup>60</sup> Therefore, if reservations were to be allowed to provisions of this character, the purpose of the treaty to promote progressive development of the law of the sea would be defeated.

The International Court of Justice has suggested that a determinative factor regarding the admissibility of reservations may be the degree to which the allowability of reservations was contemplated during the negotiation stages of the convention in question.<sup>61</sup> In the *Genocide* opinion, it was held that certain reservations had been foreseen, and therefore, that reservations were allowable.<sup>62</sup> An essential element taken into the Court's consideration was the use of majority rule as the voting procedure by which the Genocide Convention was adopted.<sup>63</sup> However, it may be argued that with regard to the Law of the Sea Convention, clearly no reservations were contemplated due to the use of consensus as the method of taking decisions. Furthermore, such use of consensus by a conference in which over 150 states have participated should result in the emergence of a treaty which will be broadly acceptable to a large number of states, thus facilitating the universality of its acceptance.<sup>63.1</sup>

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57. *Id.* at 24.

58. *Id.*

59. [1951] Y.B. INT'L L. COMM'N, *supra* note 50, at ¶ 6.

60. *Id.* at ¶ 7.

61. [1951] I.C.J. at 22.

62. *Id.*

63. *Id.*

63.1. With respect to the adoption of the Convention as a whole, however, it may be noted that the attainment of consensus may be facilitated by the allowance of reservations.

Opponents of the no-reservations approach argue that such a prohibition produces rigidity of law, and that flexibility is enhanced by the allowance of reservations.<sup>64</sup> However, flexibility may be enhanced by a means other than the use of reservations. For example, the Third United Nations Conference on the Law of the Sea has considered the inclusion of a system of revision and amendment of the Convention,<sup>65</sup> although no conclusions have yet been reached on that question. When a satisfactory system of revision and amendment is agreed upon, the use of reservations to effect flexibility may not be necessary. Furthermore, the treaty itself provides a limited degree of flexibility. This is especially true in regard to the system of settlement of disputes, where not only is a choice of several mechanisms offered,<sup>66</sup> but where there is also an option to preclude the application of the provided mechanisms altogether in certain cases.<sup>67</sup> In addition, flexibility is built into the treaty by means of a Review Conference<sup>68</sup> which will be empowered to consider the effectiveness of the system for exploitation and exploration and, in particular, to determine whether the aims of the international regime have been achieved.

With respect to those elements of the treaty which are constitutional in nature, it has already been noted that in customary practice no reservations are permitted. However, objective methods of determining the compatibility of reservations to constituent instruments have been discussed, particularly in the context of the Vienna Convention system which provides for acceptance of a reservation by the competent organ of the institution being established.<sup>69</sup> A disadvantage of this system was pointed out during the negotiations in Vienna by Mr. Cuenca (Spain), who said that:

[N]o reservations [should] be permitted to a treaty which [is] the constituent instrument of an international organization, in order to protect that type of treaty at the beginning of its existence. . . . If the reserving States were themselves in a ma-

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64. See, *Draft Articles on the Law of Treaties*, *supra* note 8, at ¶ 14; and Genocide opinion, [1951] I.C.J. at 26.

65. See U.N. Doc. A/Conf.62/91 (1979) at 121-26. These items were considered at the 2d, 7th, and Resumed 8th sessions of the Conference in the context of its discussions of final clauses.

66. ICNT/Rev. 1, art. 287, note 44 *supra*.

67. *Id.* art. 298, which allows a state to make a declaration that the system need not apply to disputes involving maritime boundary delimitations or military activities, or in respect of which the Security Council of the United Nations is seized.

68. ICNT/Rev. 1, art. 155, note 44 *supra*.

69. Vienna Convention, art. 20(3), note 2 *supra*.

70. *Supra* note 31, at 109.

majority among those who had ratified the constituent instrument, they would be able to decide in the competent organ in favour of the acceptance of their own reservations. The result would be to bring about an amendment of the constituent instrument by the indirect means of reservations.<sup>70</sup>

This argument would favor the inclusion of a no-reservations clause. The most poignant argument against the admissibility of reservations to the Law of the Sea treaty is its character as a "package deal." This characteristic has been discussed previously, as has been the consequent fragility of the integrity of the treaty, which is a reflection of the many delicate compromises at which the Conference has arrived. The Law of the Sea treaty is unique as a "package deal" with respect to its vast scope, the magnitude of its provisions, and the large number of negotiating states. It is uncontested that one of the goals of the Third United Nations Conference is to establish a comprehensive unified regime for the regulation of ocean space.

In customary international law, reservations to a restrictive multilateral treaty are impermissible.<sup>71</sup> A restrictive treaty is one in respect of which it is apparent that the application in its entirety, as between the parties, is an essential condition of the consent of each to be bound.<sup>72</sup> The concept of the "package deal" may be analogized to that of a restrictive treaty, whereby the acceptance of "the package" as a whole by all states is an essential condition to the acceptance of the whole by each state. This is really the essence of the concept of "the package." Although restrictive treaties generally have only a small number of parties,<sup>73</sup> the International Law Commission notes that "the decisive part is [the] intention that the treaty should be applied in its entirety between all the parties,"<sup>74</sup> and this intention may be present regardless of the number of parties. Furthermore, in either case it would be clear that reservations are not foreseen. It may, therefore, be undesirable to allow reservations to "the package" of the Law of the Sea treaty, as this may disrupt the compromises which have taken so long to achieve and may foil the intentions of the parties in arriving at these compromises.

#### CONCLUSION

The comprehensive nature of the proposed Law of the Sea

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71. Vienna Convention, art. 20(2), note 2 *supra*.

72. *Id.*

73. *Id.*

74. *Draft Articles on the Law of Treaties, supra* note 8, at ¶ 19.

treaty as a legislative and constituent instrument has been discussed, as has its unique nature as a "package deal." In establishing the Third United Nations Conference on the Law of the Sea, the General Assembly noted that the closely interrelated problems of ocean space need to be considered as a whole, and that political and economic realities have accentuated the need for progressive development of the law of the sea in a framework of close international cooperation.<sup>75</sup> In striving to attain these goals, it would seem that a system which is uniform in its application and simple to administer would be ideal. Such a system could be achieved by the strict prohibition of reservations. Otherwise multiplicity would be introduced and the application of the Convention may become piecemeal and complex. Where there is a cry for universality and flexibility of application, it may be said that these are provided by the terms of the treaty itself.

The pros and cons of the other alternatives presented in conference document A/Conf.62/L.13<sup>76</sup> have also been discussed. These may be workable to varying degrees and may provide greater flexibility, but each risks the undermining or disrupting of the delicate balance of compromises which make up the treaty. Where such is perceived to be the case, it is doubtful whether the goal of universality will be promoted at all. Furthermore, these alternatives may themselves involve an extended process of negotiation before agreement is reached. The noninclusion of a clause, on the other hand, may be an expedient method of dealing with the problem, but this would present the greatest risk of destroying the integrity of the treaty.

In the final analysis, then, when the Third United Nations Conference on the Law of the Sea next considers these issues, it may be that the ideal approach of excluding all reservations would prove to be the most popular choice, bearing in mind the objects and purposes of the proposed Law of the Sea Convention.

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75. G.A. Res. 2750 C, 25 U.N. GAOR, Supp. (No. 28) 26 (1970).

76. Note 17 *supra*.

