In the field of International Trade Law While the United Nations Convention on Contracts for the International Sale of Goods, 1994[20] the United Nations Convention on International Bill of Exchange and International Promissory Notes, 1988,[21] the United Nations Convention on the Carriage of Goods by Sea, 1978,[22] and the United Nations Convention on International Multimodal Transport of Goods, 1980,[23] admit of no reservations.

Owing to the Special Character of the Conventions of the International Labour Organization (hereinafter called the ILO), it is recognized that Labour Conventions are incapaable of being ratified subject to reservations. These conventions may in certain circumstances be conditionally ratified. Moreover, a State while ratifying an ILO Convention may couple its ratification with explanations of any limitations upon the manner in which it intends to execute the convention.

A declaration by a signatory as to how the treaty will be applied, which does not alter the obligations of that treaty vis-a-vis other signatories is not a reservation properly so called. Thus in 1959 the Assembly of the Inter-Govemmental Maritime Consultative Organization (IMCO) agreed that India's acceptance of the Convention establishing the Organization, subject to her right to adopt measures aimed solely at developing her maritime industries was not a reservation but a declaration of policy.

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[20]. The text of Article 98 of that Convention reads: No reservations are permitted except those expressly authorized in this Convention.

[21]. The text of Article 88 of that Convention stipulates. No reservations are permitted except those expressly authorized in this Convention.

[22]. The text of Article 29 of that Convention provides. No reservations may be made to this Convention.

[23]. The text of Article 35 of that instrument reads: No reservation may be made to this Convention.

Recent Work of the International Law Commission on Reservation to Treaties

The General Assembly had by its resolution 47\33 *inter alia* requested the ILC to consider planning of its activities and programme for the term of office of its members bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles. The Commission acting in pursuance of that request had at its forty-fifth session proposed *inter alia* to incorporate in its agenda the topic "The Law and Practice relating to Reservations to Treaties". Thereafter the General Assembly at its forty-eighth session had by its resolution 48\31 endorsed the decision of the Commission to include in its agenda the above, understanding that the final form to be given to the work on this topic shall be decided after a preliminary study is presented to the General Assembly. Pursuant to the aforementioned endorsement the Commission at its forty-sixth session, among other things, appointed Mr. Alain Pellet (France) Special Rapporteur for the topic "The Law and Practice relating to Reservations to Treaties."

FORTY SEVENTH SESSION OF THE ILC

At its forty seventh session the Commission considered the First Report of the Special Rapporteur, Mr. Alain Pellet[24]. The report comprised an introduction and three Chapters the first of which dealt with the Commission's previous work on reservations and the outcome. Chapter II contained a brief inventory of the problem of the topic and the third chapter discussed the possible scope and form of the Commission's future work on this topic.

The introduction to the Report emphasized that it had no doctrinal pretensions, and made an endeavour to enumerate the main problems raised by the topic, without in any way prejudging the Conimission's possible response regarding their substance. The Special Rapporteur outlined that in view of the wish of the General Assembly to have a preliminary study to determine, the final form to be given to the work on the topic , the report sought to furnish an overview of the earlier work of the ILC and proposed solutions that would

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[24]. See A/CN.4/470 and Corr. 1. and 2.

not jeopardize earlier advances and yet allow for the progressive development and codification of the law on reservation to treaties.

Inventory of the Problem of the Topic

Chapter II of the report entitled 'Brief Inventory of the Problem of the Topic' was divided into two sections viz. (i) 'the ambiguities of the provisions relating to reservations in the Vienna Convention on the Law of Treaties'; and (ii) the 'gaps in the provisions relating to reservations in the Vienna Convention on the Law of Treaties'. The Special Rapporteur began with the premise that the three Vienna Conventions have allowed major uncertainties to persist with regard to the legal regime applicable to reservations and emphasized that such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations, especially when they are confronted with difficult concrete problems when acting as depositaries.

Permissibility of Reservations

On the issue of permissibility of reservations the Special Rapporteur posed the question whether the permissibility or impermissibility of a reservation can be decided objectively and in the abstract or does it depend in the end on a subjective determination by the contracting State. By way of an example the Rapporteur posed the question whether a reservation which obviously clashes with the object and purpose of the treaty or even a reservation prohibited by the treaty but accepted by all the other parties to the treaty can be described as an impermissible reservation. Obviously such a reservation is impermissible and the question of opposability arises only at a later stage and only in respect of permissible reservation. There is thus a presumption in favour of the permissibility of reservations and this is consistent with the text of article 19 of the Vienna Convention. However this presumption in favour of permissibility of reservations is not invulnerable and fails if the prohibition is prohibited explicitly or implicitly by the treaty or if it is incompatible with the object and purpose of the treaty. It remained to be seen, how to determine whether these conditions are met on the one hand, and what the effects may be of a reservation which would be impermissible according to those criteria on the other.

Doctrinal Differences \ Conflicting View Points \ Permissibilists vs. Opposabilists

In Chapter II of his report the Special Rapporteur had listed a long list of questions which in his opinion, posed problems and had sought suggestions on the order in hierarchical importance in which they might be placed. Many of these problems have their roots in the opposing schools of permissibility and opposability to reservations to treaties. The proponents of the permissibility school consider that a reservation contrary to the object and purpose of the treaty was void, *ipso facts* and *ab-initio* regardless of the reactions of the contracting States. On the other hand, the adherents of the opposability school held the view that the sole test as to the validity of a reservation consisted of the objections of the other States.' The Special Rapporteur had argued that if the "permissibilists" were right the nullity of a reservation incompatible with the object and purpose of the treaty could be invoked before an international tribunal or even before a municipal court even if the State causing the nullity of the reservation had not objected to it (the reservation). If, on the other hand, the "opposabilists" were right a State could not avail itself of a reservation contrary to the object and purpose of the treaty even if the other States had accepted it.

Identification of Issues

The Special Rapporteur raised "a number of thorny questions" related to: (i) the effect of an impermissible reservation; (ii) the question of objections to reservations; (iii) interpretative declarations; (iv) the effect of reservations on the entry into force of the Convention; (v)the fate of objections to reservations in the event of State succession; (vi) the specific objects of certain treaties or provisions; and (vii) the rival techniques of reservation.

(i) Impermissible Reservations

Apropos the effect of an impermissible reservation the question was posed whether it (an impermissible reservation) entailed the nullity of the expression of consent of the reserving State to be bound (by the treaty), or only nullity concerning the reservation itself. (It was pointed out in this regard

that the case law of international human rights protection agencies revealed that the answers to these issues had considerable effect.)

(ii) Objection to Reservations to Treaties

On the matter of objection to reservations the question is whether in formulating a reservation a State should be guided by the principle of its (the reservation's) compatibility with the object and purpose of the treaty or could the State exercise its own discretion. On this question also the debate between opposability and permissibility was obvious. The Rapporteur asked that consideration be given to the effects of an objection to a reservation if, as Article 21 paragraph 3 of the 1969 and 1986 of the Vienna Conventions permitted, the State objecting to the reservation had not opposed the entry into force of the treaty or between the reserving State and itself.

(iii) Interpretative Declarations

The Special Rapporteur drew attention to the distinction between reservations and interpretative declarations which States resort to with increasing frequency and on which the Conventions are silent. He pointed out that an "interpretative declaration" must be taken as a genuine reservation if it is consistent with the definition accorded to the latter term in the Conventions. On the other hand, several otherjudicial decisions however testify to the fact that it is extremely difficult to make a distinction between "qualified interpretative declarations" and mere interpretative declarations". What is more the legal effects of the latter remained unclear.

(iv) Effects of Reservations and Objections on the Entry Into Force of a Treaty

Discussing the effect of reservations and objections on the entry into force of a treaty the Special Rapporteur observed that this "important and widely debated question has caused serious difficulties for depositaries and has not been answered in the relevant Conventions". It was pointed out that the practice followed by the Secretary General in his capacity as depositary had been the subject of rather harsh criticism. Attention was invited to the

opinion of the Inter-American Court of Human Rights that a treaty entered into force in respect of a State on the date of deposit of the instrument of ratification or accession whether or not the State had formulated a reservation. It was recalled that while this position was accepted in some circles, others doubted whether it was compatible with the provisions of Articles 20 paragraphs 4 and 5 of the Vienna Convention.

(v) Do Successor States 'Inherit' Reservations to Treaties? Reservation Provisions of the Vienna Convention of 1978.

The Vienna Convention of 1978 was silent on the fate of reservations in the event of State succession and called for consideration to be given to the question whether the successor State inherited the objections formulated by the predecessor State and whether it could express its own new objections.

(vi) Issues and Problems arising from the specific object and nature Of certain treaty

On the problems connected with the specifc object of certain treaties provisions it was observed that because of their *general* nature codification Conventions neglect the particular problems driving from the specific object and nature of certain treaties. This was particulary true of constituent instruments of international organizations, human rights conventions and codification treaties themselves. In the existing regime of reservations and objections to reservations in these specific areas may need consideration. If the system provided for under the 1969 Convention was deemed unsatisfactory the ways and means of its modification would also need to be examined. Certain other areas, such as environment and disarmament, needed to be recognized as calling for special treatment.

Rival Techniques Formulating Reservations to Treaties

Would it be deemed appropriate at some stage to consider rival techniques of reservations whereby States parties to the same treaty could codify their respective objections by means of additional Protocols, bilateral

arrangements or optional declarations concerning the application of a particular provision.

Scope and form of the Commission's future Work on the Subject

Chapter III of the report of the Special Rapporteur dealt with the scope and form of the Commission's work and constituted the essence of what needed to be considered and discussed on the matter of scope of the future work the Commission was not on *terra incognito*.Much had been written on the subject and three, Conventions had been adopted - and they had proved their worth. The debate in the Sixth Committee on the inclusion of the topic in the Commission's agenda had emphasized *inter alia* that a second look at the three Vienna Conventions of 1969, 1978 and 1986, should be taken before calling into question the past work of the Commission and to which States were attached. What has hither to been achieved must be preserved, regardless of possible ambiguities. The rules on reservations set forth in the Vienna Conventions on Treaties operated fairly well and the potential abuses had not occurred and even if States did not always respect the rules they regarded them as a useful guide. The rules in question had now acquired customary force. The Commission, it was hoped, would not begin questioning what had been achieved and would, instead, seek to determine such new rules as may be complementary to the 1969, 1978 and 1986 rules without throwing out the old ones which were certainly not obsolete.

Were the Commission to adopt norms incompatible with articles 19 to 23 of the 1969 and 1986 Vienna Conventions on Law of Treties or even article 20 of the 1978 Vienna Convention on State Succession, States which had ratified, or would in the future ratify those Conventions would be placed in an extremely delicate position. Some of them would, perhaps, have accepted the existing rules and would be bound by them, while others would be bound by the new rules that would be incompatible with the rules already adopted. Yet others could even be bound by both. If recourse were had to a legal fiction it would be possible, of course, "to circumvent the situation exemplified, almost caricatured", by the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, 1982. In the case of reservations to treaties there was no need for such an upheaval in the

law. In sum, it was proposed that the Provisions of the existing articles of the Vienna Conventions be treated as sacrosanct unless during the course of work on the topic they proved to be wholly impracticable. Where possible and desirable ambiguities should be removed and an attempt made to fill any gaps, if only to avoid anarchic developments.

Apropos the form that should be given to the Commission's work, in the opinion of the Special Rapporteur, the possibilities open to the Commission included: (i) the treaty approach; (ii) the drawing up of a guide on the practice of States and international organizations; and (iii) proposing model clauses.

(i) The treaty approach

The treaty approach could take two different forms including drafting a Convention on reservations that would reproduce the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions subject only to clarifications and completion where necessary. The second possibility was to adopt one or three protocols that would supplement, but not conflict with the existing 1969, 1978 and 1986 Conventions. The mere fact of repeating the existing rules would in either case, preclude any likelihood of incompatibility and would not prevent the Commission from submitting draft articles together with commentaries.

(ii) Drawing up of a guide on the practice of States and International organizations

The second option listed was the drawing up of a guide on the practice of States and international organizations on the matter of reservations to treaties. Such a guide could take the form of an article by article commentary to provisions on reservations in the three Vienna Conventions prepared in the light of developments since 1969 and destined to preserve what had been achieved, along with the requisite clarifications and additions.

(iii) Formulation of Model Clauses

The third approach open to the Commission was to propose model

clauses into which negotiators could delve and draw inspiration from depending upon the purpose of a particular treaty. This approach, if adopted, would make for flexibility and be of great use to States. Model Clauses offered two advantages. First, by furnishing a variety of clauses of-derogation it would counterbalance the general trend towards precision by providing for more flexibility. Second, there were at the present time fairly strong tensions which were reflected in the challenging of existing rules in certain areas. This was particularly true of human rights and there was no certainly that the problems which arose concerning the Human Rights Conventions could be resolved simply by interpreting the existing rules. Model clauses for human rights treaties would, therefore, in the opinion of the Special Rapporteur, provide a viable solution for the future.

It would however be difficult to draw up an exhaustive list of all the clauses relating to reservations incorporated in the existing multilateral conventions. A catalogue of such clauses, it was suggested could be made on the basis of a sufficiently representative sample of the various areas covered by Conventions such as those on human rights, disarmament, international trade etc. The drafting of model clauses could thus be a useful complement to the Commission's basic task.

Having emphasized that there are several ways of achieving the basic objective consolidated draft articles, a guide to practice of States and international organizations model clauses or a combination of these approaches, the Special Rapporteur had concluded by observing that "it is up to the Commissign in close consultation with the Sixth Committee, to determine which are the most appropriate"[25]

[25] It may be stated that the Special Rapporteur had sought urgent assistance and orientation from the Commission on the following 4 questions: (1).Did the Commission agree to change the title of the topic to 'Reservations to Treaties'; (2).Did it agree not to challenge the rules contained in article 2 paragraph 1 (d) and articles 19 and 23 of the Vienna Conventions of 1969 and 1986 and article 20 of the Vienna Convention of 1978 and to consider them as presently formulated and to clarify and complete them only as necessary ? (3)Should the result of the Commission's work take the form of a draft convention, a draft protocol(s), a guide to practice, a systematic commentary, or something else?, and (4) Was the Commission in favour of drafting model clauses that could be proposed to States for incorporation in future multilateral conventions in keeping with the field in which those conventions would be concluded?

Forty Eighth Session of the Commission

At its 48th session the Commission had before it the Second Report of the Special Rapporteur, Mr. Alain Pellet[26].The Report presented an overview of the study of the question of reservation to treaties and formulated an overview of the study in three sections. In the first section entitled "the First Report on Reservation to Treaties and Outcome" the Special Rapporteur summarized 'the conclusions' that he had drawn from the debate both in course of the consideration of that report in the Commission during its 48th Session as well as the debate on the item in the Sixth Committee at its fiftieth session. He recalled that the General Assembly had *inter alia*, noted the beginning of the work on the topic and invited the Commission to "continue its work along the lines indicated in the reports'[27] and had invited "States and international organizations, particularly those which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur, on the topic concerning reservation to treaties"[28]

The second section of the Report addressed to the 'Future work of the Commission on the topic of Reservation to Treaties'was divided into three parts viz. (i) Area covered by the study; (ii) Form of study; and (iii) General outline of the study.

[26] See *A\CN.4\477* In addition to the Second Report, the Special Rapporteur had also prepared"non exhaustive bibliography" on the question of reservation to treaties" . *see A\CN\478*

[27] See General Assembly Resolution 50\45 of 24 January 1996 '?perative paragraph 4.

[28]Twelve States viz. Canada, Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovenia, Spain, Switzerland,the United Kingdom and the United States of America had sent their r.eplies to the questionnaire prepared by the Special Rapporteur, and sent to States Members of the United Nations ,or of Special Agencies or parties to the Statute of the International Court of Justice.A similar questionnaire was then proposed to be sent to international organizations which are depositaries of multilateral treaties.

(i) Area of Study

As regards the Area covered by the Study the Special Rapporteur identified five topics which required a careful study. The issues identified included : (a) the question of the definition of reservation ; (b) the legal regime governing interpretative reservations ; (c) the effect of reservations which clash with the purpose and object of the treaty; (d) objections to reservations; and (e) the rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties. The Special Meeting could give consideration to these issues.

(ii) Form of the Study

Addressing the issue of the form of the study, the Special Rapporteur recalled that the ILC at its 47th Session had decided in principle to draw up a "Guide to practice in respect of reservations" and taken the view that there were insufficient grounds for amending the relevant provisions of the existing international instruments. The Commission had also decided that the guide to practice in respect of reservations would, if necessary, be accompanied by model clauses.

The Special Rapporteur, Mr. Alain Pellet, in his Second Report addressed the following issues, viz. (a) Preserving what has been achieved; (b) Draft articles accompanied by commentaries and (c) Model Clauses; and (d) Final form of the Guide to practice.

(a) Preserving what has been achieved

The Special Rapporteur pointed out that the starting point i.e. the preservation of what has been achieved by the Vienna Conventions of 1969, 1976 and 1986 was a constraint in that the Commission must ensure that the draft articles eventually adopted, by it, conform, to in every respect, to the provisions with regard to which it should simply clarify any ambiguities and fill in any gaps. He therefore deemed it advisable to quote the actual text of the existing provisions at the beginning of each chapter of draft guide to practice in respect of reservations.

Be that as it may, the Commission at its 49th Session *inter alia* reiterated that articles 19-23 of the Conventions on Treaties of 1969 and 1986 govern the regime of reservations to treaties.

(b) Draft articles accompanied by commentaries

The articles shall be followed by a statement of additional or clarificatory regulations which would comprise the actual body of the Commission's work on the subject and would be presented "in the form of draft articles whose provisions would be accompanied by commentaries".

(c) Model Clauses

The Special Rapporteur proposed that the draft articles be followed by model clauses phrased in such a way as to "minimize disputes in the future". Emphasizing that the function of these model clauses needed to be clearly understood, the Special Rapporteur, pointed out that the "guide to practice" which the Commission intends to draw up would consist of general rules designed to be applied to all treaties, regardless of their scope, in cases where the treaty provisions are silent. Like the actual rules of the Vienna Convention and the customary norms which they enshrine, the rules relating to reservations would be purely remedial where the parties concerned have no stated position. These rules cannot be considered binding and the States Parties will always be free to disregard them. The negotiators need only to incorporate the specific clauses relating to the reservations into the treaty.

The sole aim and functions of the model clauses would be to encourage States to incorporate in certain specific treaties clauses concerning reservations which derogate from the general law and are better adopted to the special nature of the treaties or the circumstances in which they are considered. This approach would have the advantage of adapting the legal regime concerning reservations to the special requirements of these treaties or circumstances and thus preserve its flexibility without calling in question the unity of the law applicable to reservation to treaties.