UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/CN.4/L.562/Add.1
10 August 1998
ENGLISH
ORIGINAL: FRENCH

INTERNATIONAL LAW COMMISSION
Fiftieth session
Geneva, 20 April-12 June 1998
New York, 27 July-14 August 1998

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert DUGARD

CHAPTER IX

RESERVATIONS TO TREATIES

Addendum

CONTENTS

	Paragraphs	Page
1. Introduction by the Special Rapporteur of his third report (continued)	1 - 18	2
(c) Definition of interpretative declarations	4 - 18	3
2. Summary of the debate	19 - 31	6

1. Introduction by the Special Rapporteur of his third report (continued)

1. In introducing the part of his report covering the distinction between reservations and interpretative declarations (A/CN.4/491/Add.4), the Special Rapporteur made three general statements:

(a) First, the three Vienna Conventions were silent on the question of interpretative declarations,[1] whereas the Commission had studied the matter in 1956 and 1962 while developing its draft articles on the law of treaties. While the silence on the part of the Vienna Conventions had drawbacks, such as a lack of guidelines and pointers, it did have the advantage that, unlike the case of reservations, there was no conventional wisdom about interpretative declarations. The Commission could therefore innovate on the basis of its members' convictions and the needs of contemporary international society;

(b) Second, there was abundant practice[2] proving that States used interpretative declarations as widely as they did reservations. The practice was of very long standing, going back to the Final Act of the Congress of Vienna in 1815, and had developed in parallel with the traditional multilateral format;

(c) Third, defining interpretative declarations was made more difficult by two complicating factors, (i) unclear terminology and (ii) States' foreign policies and legal strategies. In the former case, the question arose of whether it did not smack too much of Cartesian rationalism to analyse unilateral declarations that affected the treaties about which they were made by setting up an opposition, in binary mode, between "reservations" and "interpretative declarations". Indeed, even though some languages seemed to have adopted the binary mode, others, English for example, seemed to have a much more diverse approach. Nevertheless, none of the States - including the English-speaking ones - or the international organizations that had replied to the questionnaires had taken issue with classifying unilateral declarations into two categories.

2. The terminology was no less unclear as a result, however, and it did happen that States either did not qualify their declarations at all or used various tortuous or ambiguous forms of words.[3]

3. Ambiguous wording was indeed an example of the unclear terminology difficulty: even if such forms of words were used inadvertently sometimes, they were very often used deliberately either to get round a prohibition on reservations or, as one State said in its response to the questionnaire, to avoid creating the bad impression that making a reservation might.

---

[1] Some States, such as Japan, found this regrettable.

[2] See A/CN.4/491/Add.4, paras. 236-239.

[3] See A/CN.4/491/Add.4, paras. 261-266.

(c) Definition of interpretative declarations

4. The Special Rapporteur pointed out that interpretative declarations had been given a "negative" definition - as not being reservations - during the travaux préparatoires for the 1969 Vienna Convention and indicated that he had arrived at a positive definition by empirical means (draft guideline 1.2). The definition contained elements that were common both to reservations and to interpretative declarations: they were both unilateral declarations, however phrased or named.

(i) Joint formulation of interpretative declarations

5. Joint formulation was one of the points in common between reservations and interpretative declarations, but practice for the latter was well established[4] (draft guideline 1.2.1).

(ii) Phrasing and name - interpretative declarations where reservations are prohibited

6. The Special Rapporteur mentioned the repudiation of nominalism in the definition both of reservations and of interpretative declarations ("however phrased or named"), and wondered whether States should not be taken at their word by holding to whatever name they gave their unilateral declarations [as Japan recommended in 1969 and in accordance with a suggestion from a member of the Commission in 1997]. However, he recognized that such an approach would be very far removed from practice and would be equivalent to the Commission's making law, which was not its function. He had therefore adopted a more realistic approach by taking as his basis the judicial decisions of the Human Rights Committee, the Commission on Human Rights and the European Court of Human Rights, and he proposed taking the view that even if the title of an interpretative declaration did not prove what its legal nature was, it did create a presumption - not an irrefragable one, however - particularly when the author [of such a declaration] entitled some declarations "reservations" and others "interpretative declarations" (draft guideline 1.2.2).

7. Similarly, when reservations were prohibited under a treaty, it would seem that there were grounds for presuming, again not irrefragably, that the author of an interpretative declaration with the same object had acted in good faith and had made what was indeed an interpretative declaration (draft guideline 1.2.3).

(iii) Conditional interpretative declarations

8. A conditional interpretative declaration occurred when the State or international organization making the declaration subordinated its consent to be

[4] See A/CN.4/491/Add.4, para. 275.

bound by a treaty to its own interpretation, in the same way that the author of a reservation made the reservation the condition for being so bound.[5]

9. Such a declaration was much closer to a reservation than a simple interpretative declaration, and the temporal element was therefore essential, which it was not for simple interpretative declarations. Also, if any uncertainty existed about the exact scope of interpretative declarations or about their nature, conditional or otherwise, the general rule of interpretation set out in article 31 of the Vienna Convention, supplemented if necessary by the additional means provided for under article 32 of the same Convention, must be used (draft guideline 1.2.4).

(iv) Declarations of general policy and informative declarations

10. Declarations of general policy had the same object as the treaty, but their aim was not to interpret the treaty but to set out the author's policy towards the object of the treaty (draft guideline 1.2.5).

11. In an informative declaration, a State indicated how it intended to discharge its obligations at the internal level, with no impact on the rights and obligations of the other States (draft guideline 1.2.6).

12. Neither of the above was a reservation or an interpretative declaration.

(v) Distinction between reservations and interpretative declarations

13. Interpretative declarations differed from reservations in two ways: (a) the temporal element, in other words the moment when the declaration could be made, and (b) the teleological factor, the author’s purpose in making that declaration. The latter was the crucial factor: while a reservation sought to exclude or modify the legal effect of the treaty’s provisions in their application to the author, an interpretative declaration sought only to interpret the treaty or some of its provisions, i.e., to clarify its meaning or scope, as had been affirmed on many occasions in the decisions of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). The interpretation thus accepted the provisions to which it referred as well as their legal effect. The Special Rapporteur pointed out that the latter was quite clear in the definition of an interpretative declaration (1.2) but that if the Commission so desired, it could be restated even more explicitly in guidelines clearly defining the criteria for both reservations and interpretative declarations (draft guidelines 1.3.0 and 1.3.0 bis). Although there were advantages and disadvantages in both explaining and not explaining the criteria, States must be made aware of that point in the Guide to Practice.

[5] The Special Rapporteur gives as an example the declaration by France on signing Additional Protocol II of the Treaty of Tlatelolco.

14. The Special Rapporteur was of the opinion that the temporal element, unlike in the definition of reservations,[6] should not be included in the general definition of interpretative declarations (with the exception of conditional interpretative declarations). Although reservations were made upon concluding the treaty, interpretative declarations dealt with the interpretation of the treaty, which was itself an aspect of its implementation, a point on which the Special Rapporteur agreed with his predecessor, Sir Humphrey Waldock, who held that interpretative declarations could be made at any time - during negotiations, when signing or ratifying, or later during ensuing practice.

(vi) Method of distinguishing between reservations and interpretative declarations

15. The Special Rapporteur indicated that the method could in fact follow the model set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, containing the general rule of interpretation of treaties. By following not only the practice of States but, especially, the judicial decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the arbitral tribunal set up to hear the Mer d'Iroise case, unilateral declarations must be interpreted in good faith in accordance with the meaning to be given to the terms in their context, pending verification of the result obtained by this method through recourse to supplementary interpretative measures, in particular the travaux préparatoires (draft guideline 1.3.1).

(vii) Scope of the definitions

16. Referring to questions raised concerning the permissibility of reservations during the Commission's discussion of the definition of a reservation, the Special Rapporteur pointed out that a definition was not a binding provision and that all the definitions contained in the first part of the Guide to Practice were without prejudice to their legal scope or, especially, their permissibility. A reservation (or an interpretative declaration) could be permissible or impermissible but nevertheless remained a reservation or interpretative declaration. The very fact that a unilateral declaration was defined as either a reservation or an interpretative declaration conditioned its permissibility (draft guideline 1.4).

17. The Commission decided to refer draft guidelines 1.1, 1.1.1 to 1.1.8, 1.2 and 1.4 to the Drafting Committee.

18. At the ... meeting of the Commission, the Chairman of the Drafting Committee introduced the draft guidelines adopted by that Committee, the texts of which, along with comments and references, with the exception of draft guidelines 1.1.7 and 1.2, could be found in section C below.

---

[6] The Special Rapporteur even felt that the inclusion of the temporal element in the definition of reservations was unwise and due rather to reasons of legal policy related to the stability of treaty relations and the unity of treaties.

2. Summary of the debate

19. With regard to draft guideline 1.1.7, several members, while recognizing the practicality of a clarification of the nature of statements of non-recognition, wondered if they were really reservations. They pointed out that it was the application of the treaty as a whole, and not specific provisions of it, that was excluded between the party making the statement and the non-recognized party, which did not follow the Vienna definition to the letter. Furthermore, it had been observed that any reservation assumed a treaty-based or contractual relationship between the reserving party and the other parties to the treaty, while in the case of statements of non-recognition, it was in fact the contractual capacity of a party that had been denied. Consequently, such statements belonged more in the area of recognition or interpretative declarations than in treaty law, particularly as it pertained to reservations. They were simply made at the moment when the State expressed its consent to be bound by the treaty. It was also noted that the discussion had left the realm of treaty law and had entered a highly political area, where a distinction must be made between non-recognition of States, of Governments and also of international organizations. Since the practice of that type of statement was sufficiently widespread, participation by a larger number of States in treaties should not be discouraged by a "preventive" qualification.

20. According to another point of view, the draft guideline went far beyond the Vienna regime and could give the impression that the Commission intended to include the greatest possible number of situations under the regime on reservations. In that regard, the view had been expressed that if such statements could be made at any time at all, they were even farther removed from the "classic" characteristics of reservations. Moreover, such statements could prove to have varied effects depending on the type of treaty (for example restricted treaties) to which they were made. It was also stated that classifying them as reservations and attempting to apply that regime to them could sometimes lead to absurd results, for example in a case where reservations were prohibited by the treaty or when mutual recognition among all the parties was lacking.

21. In the view of some members, the question should be asked in the opposite way: could a reservation exclude the application of the treaty in its totality between two parties? If so, it was a question of knowing if that was necessarily related to an act of non-recognition. The possibility was raised of linking such statements to "offers" or agreements inter se. It was also suggested that the phenomenon should be discussed further or studied at the same time as interpretative declarations.

22. Other members stated that it was a question of unilateral declarations, sui generis, "statements of exclusion", or statements producing effects similar to reservations which still should have a place in the Guide to Practice (perhaps in an annex) because they expressed an indisputable reality. The view was also expressed that they constituted statements of refusal of the capacity of the non-recognized entity to enter into treaty relations, falling rather within the province of the conclusion of treaties, and that the draft guideline should say specifically that such statements did not constitute reservations.

23. On the other hand, to some members, those statements constituted true reservations, in that they were aimed at modifying the legal effect of the treaty, which was the function of a reservation. Nevertheless, the general regime of reservations was not entirely applicable: the treaty as a whole was excluded, and the moment of formulation of the statements could vary. In that regard, the members recalled that although recognition was a political matter, it had legal effects.

24. Summarizing the debate, the Special Rapporteur noted that five main issues had been raised:

(a) The first was a philosophical problem: even if it was a "political" matter, as several members seemed to believe, he thought that it should be discussed in an effort to determine its legal consequences;

(b) Besides their being currently named "reservations", which was an indication in that direction, he did not see why reservations could not be made rationae personae as well as rationae materiae or rationae loci. Moreover, if a State could exclude the application of a treaty as a whole between two parties by means of an objection, he wondered why it could not also do so by means of a reservation. It seemed to him too formalistic to adhere strictly to the wording "certain provisions" as contained in the Vienna definition;

(c) However, he recognized that even by calling such statements reservations, some characteristics of the regime of reservations (objections and others) could not be applied to them;

(d) The problem of the exact moment when such statements could be made remained unresolved; in order to protect the stability of treaty relations, the Commission would do well to specify that they might be made at the time when the non-recognized entity became party to the treaty, and not at any time whatsoever;

(e) As the sui generis "qualifications" were unsatisfactory, in his view, he would be inclined to think that, if such statements were not actually reservations, they could be thought of as statements similar to declarations of general policy or statements made in relation to the treaty which did not produce legal effects on its application, although he would reserve judgement on that point.

25. With regard to the introduction of the part of the report concerning interpretative declarations (A/CN.4/491/Add.4), several members said they agreed with the Special Rapporteur’s view that the greatest confusion of terminology could be found in the area of interpretative declarations, and, they thought that draft guidelines 1.2 and 1.2.2 clarified the matter and helped to avoid vague and ambiguous situations. From one point of view, besides the problem of terminology, the definition played an essential role in the determination of the permissibility of a unilateral declaration. However, support had been expressed for the Special Rapporteur’s view that interpretative declarations must first be defined before problems of permissibility could be tackled. It had also been pointed out that the Vienna regime was not entirely silent concerning interpretative declarations, general rules of interpretation and content

applicable to them. Nevertheless, the distinction between interpretative declarations and reservations was sometimes very difficult to make. It had also been noted that the general rules of interpretation contained in the Vienna Convention were intended to clarify the meaning of an agreement of intentions between two or more parties, and the Commission should think about whether it would be possible to transpose them to interpretative declarations, i.e., to unilateral statements.

26. Other members wondered if it was necessary to study interpretative declarations in detail and had subsequently decided that it was, stressing that there must be a clear definition of the criteria for distinguishing them from reservations. (All the Special Rapporteur's proposals, with the possible exception of that contained in draft guideline 1.2.1, on the joint formulation of an interpretative declaration, were in fact aimed at such a definition of criteria.) The view was expressed, however, that conditional interpretative declarations constituted genuine reservations and should be treated as such, especially with regard to their conformity with the object and purpose of the treaty.

27. With regard to conditional interpretative declarations, the question was asked as to whether, if another contracting party had raised an objection, such declarations would be an obstacle to the entry into force of a treaty between the author of the conditional declaration and the objecting State.

28. As to the definition of interpretative declarations (draft guideline 1.2), several members felt that it met the need to clear up misunderstandings surrounding the notion of interpretative declarations. It was also noted that the definition could be matched with its negative "counterpart", namely, that interpretative declarations purported neither to modify nor to exclude the legal effect of certain provisions of the treaty.

29. Other members said that a limit must be placed on the far too subjective power of interpretation (introduced especially by the expression "attributed by the declarant"), saying that the interpretation should conform to the letter and spirit of the corresponding provision of the treaty.

30. From another point of view, interpretative declarations often dealt with the conditions of implementation of the treaty (as in the 1982 Convention on the Law of the Sea), and that element could also be included in the definition.

31. Summarizing the debate, the Special Rapporteur noted that, in essence, a definition did not have normative content as such, but that it was an essential prerequisite for determining the permissibility of unilateral declarations and the application of the legal regime relating to both. The main problem was obviously to determine whether the legal regime was transposable to that of interpretative declarations, and to what extent. But it was too soon to undertake that debate. For his part, he felt that although in many cases the regime of conditional interpretative declarations could be brought into line with that of reservations, it did not seem possible to completely assimilate the two notions.
