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The Problem of the Progressive Development of the Reservations Institution to the International Treaties in Contemporary International Law

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Abstract. The problem of the progressive development of the reservations institutions to the international; treaties in contemporary international law. The author notes that the regime of reservations and other unilateral statements of participants are not settled enough in details. This is due to the fact that the practice of using the reservations by different states is highly controversial. The article touched the issues such as the complexity of interpretation of certain articles of the Vienna Convention on the Law of Treaties, the permissibility of reservations in bilateral agreements and reservations in some integration structures.

Key words: reservations, international treaty, Vienna Convention on the Law of Treaties, permissibility of reservations in bilateral agreements

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One of the most important trends in the development of the law of international treaties and treaty practice of States has become the use of reservations. In this case, the number of reservations claimed by the participants is constantly growing, and international and legal issues arising in connection with these needs to be resolved.

Reservations Institution in the law of international treaties is a relatively new phenomenon of the international law and owes its development to the actual development of the law of international treaties. Despite the relatively short history of its existence, it has undergone significant changes that can be attributed to the change of approaches in the legal regulation.

The Vienna Conventions on the law of international treaties has codified rather complicated frameworks of the Reservations Institution. The so-called "Vienna regime of reservations" is flexible and based on the sovereign right of States to declare reservations. However, it would be however wrong to assume that the regime of reservations and other unilateral statements of participants is regulated rather in details. In particular, after the adoption of the Vienna conventions the significant doubts left regarding the legal regime of reservations. This is confirmed by the fuzzy variable practice of states and international organizations.

Therefore, the issue on reservations to international treaties is one of the complex and controversial issues of international law.[1] The complexity of the question is confirmed by the fact that the UN International Law Commission dealing with the issues of codification and progressive development of the provisions on reservations to international treaties still hase not offered a generally accepted solution to this problem. Since the adoption of resolution 48/31 by the General Assembly on December 9, 1993 the work on this topic has begun and continues in the UN International Law Commission and in the Human Rights Commission. To date, the Special Rapporteur of the ILC made six reports on the topic "Reservations to treaties". In addition, there is active work on the regional level. In the framework of the Ad hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe the Group of experts on reservations to international treaties (DI-E-RIT) works, the meetings and discussions with the representatives of the Ministry of Foreign Affairs of the European States are held.[2]

However, not all problems in the application of reservations are resolved, that causes a number of difficulties in practice. The problem mainly lies in the ambiguous understanding of the provisions of the Vienna conventions and the lack of regulation of certain aspects of the legal regime of reservations.

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[1] Kolesnik V.V. Reservations to international treaties: Extended abstract of dissertation for Ph.D. thesis in Legal Science. Specialty 12.00.10 – International Law; European Law /V.V. Kolesnik; Dissertation advisor I. I. Lukashuk; Institute of state and law of the Russian Academy of Sciences. -M.,2001. -21 p.-Bibliography: p. 21.

[2] ibidem, p. 21.

The problems lie primarily either in the ambiguity of the provisions of the Vienna conventions, or in the absence of regulation of certain aspects of the legal regime of reservations. The following points are unclear: the legal effects of acceptance of a reservation, the content of the criterion of compatibility of a reservation with the object and purpose of the treaty; the nature of an impermissible reservation and its consequences. Among the issues that remained outside the Vienna regime there are: the variations of reservations from interpretative declarations and the legal consequences of the latest; the possibility of applying rules relating to reservations to treaties on human rights.[3]

Thus, the Article 19 of the Vienna Convention on the Law of Treaties establishes the presumption of validity (legality) of any reservation, except when:

a) the reservation is prohibited by the treaty;

b) the treaty provides for that only certain reservations can be done, that do not include this reservation;

c) the reservation is incompatible with the object and purpose of the treaty.

In this case regarding the last paragraph concerning the criterion of compatibility of a reservation with the object and purpose of the treaty there are many contentious issues, the main of which– who and how should determine this compatibility.[4] In accordance with the provisions of the Vienna Convention that must be individually done by the state, based on a subjective approach that cannot lead to a different interpretation of the same legal establishments. One state may consider that a reservation made by it complies with the object and purpose of the treaty and therefore is legitimate, while the rest state can be disagree, and consider such a reservation unacceptable.

According to the Vienna Convention (articles 19 and 20), in order the reservation of one state becomes binding on another member state of the treaty **two conditions** should be met:

the reservation should be valid (legal) – the so-called requirement of admissibility is as a necessary but insufficient condition;

the reservation should be accepted by this second state - the requirement of opposability.

It is obviously, that the significant insufficiency of the Vienna convention is the **absence of the objective procedure on the establishment of the reservation acceptability** under the article 19, notably: definition of the criterion of compatibility with the object and purpose of the treaty. One of the ways for solving this problem, according to our opinion, is the inclusion of the related mechanisms of such definition into multilateral treaties.

In this regard it is the development of particular regulations on reservations in the Law of Treaties and further work in the sphere of reservations to the international treaties.

The issue on reservations to bilateral treaties causes many disputes and disagreements. The disagreements mainly involve the clarification whether the fact called by some states and authors as "reservations" to bilateral treaties is actually the reservation.

The study of the Vienna conventions and preparatory work for them does not allow making clear conclusions regarding the possibility to formulate reservations to bilateral treaties. The word "bilateral" in the provisions on reservations is never used.

At the beginning of the work of the International Law Commission on the topic "Law of treaties" there was raised the question on reservations to bilateral treaties. The views of the members of the Commission regarding the fact of which contracts are subject to review and are they only multilateral treaties has been divided. In 1956, George Fitzmaurice in the first report highlighted the peculiarities of the regime of reservations to treaties with the limited participation, having directly included bilateral treaties in this category. In 1962 H. Waldock in his report did not exclude the case of reservations to bilateral treaties. He considered it separately, though, only made the remark that reservations to bilateral treaties did not cause a problem.

Article 19 like other articles of the Convention do not specify which contracts allows reservations: only multilateral or bilateral as well. At the Vienna conference this question was raised at the discussion of the title of section 2 of part II of the Convention "Reservations to multilateral treaties", as it was presented by the International Law Commission. During the discussion in the Drafting Committee it was agreed to delete the words "to multilateral treaties" and to leave only the word "reservations". As it was stated by the Chairman of the Committee Professor M. Yasin (Iraq), this was done because the definition of reservations contained in article 2 of the Convention, does not mention multilateral treaties. This does not mean that the Committee considers reservations to bilateral treaties permissible.

On this question there were different points of view in the Committee and in order not to prejudge such a complex theoretical issue, it was decided to omit the mention of multilateral treaties. Professor M. Yasin emphasized that "every amendment proposed to the bilateral agreement, means a new proposal and cannot be considered a reservation." The Chairman of the Conference, the Professor R. Ago (Italy) said that regardless of this the procedural articles on reservations, considered by the Conference "are not applicable to bilateral treaties". In this sense the section on reservations was adopted by the Conference. In fact, the reservations to bilateral treaties are pointless.

In signing a bilateral treaty but prior to its entry into force state or an international organization may formulate a unilateral declaration, the purpose of which - to achieve the modification of provisions of the treaty from the other contracting party, thus stipulating its consent to its bindingness. This statement is not a reservation within the meaning of the Vienna conventions, and therefore it is not subject to the legal regime governing the reservations to international treaties. This

[3] Kolesnik, V.V. (Vera Vladislavovna). Reservations to international treaties: Extended abstract of dissertation for Ph.D. thesis in Legal Science. Specialty 12.00.10 – International Law; European Law /V.V. Kolesnik; Dissertation advisor I. I. Lukashuk; Institute of state and law of the Russian Academy of Sciences. -M.,2001. -21 p.-Bibliography: p. 21.

[4] ibidem

statement constitutes the proposal to negotiate the treaty again.

Despite the frequent contacts with reservations to multilateral treaties, the reservations to bilateral treaties are different from them mainly in the consequences to which they lead. If a reservation to a multilateral treaty leaves its position intact, affecting only their legal effect, a reservation to a bilateral treaty is aimed at changing these provisions. In case of consent to a reservation to a multilateral treaty, the legal effect of the affected provisions is modified in relation to the state or international organization which has formulated it; acceptance of a reservation to a bilateral contract by the other party leads to the fact that the contents of the treaty itself is changed. New contractual obligations are created. Thus, it is possible to agree that a reservation to a bilateral treaty is a proposed amendment to the treaty or a proposal for the resumption of negotiations.

As a result of the harmonization of positions on controversial issues, the Vienna Convention contributed to the further codification and progressive development of legal regulation of reservations. It should be noted that many of its provisions have acquired the character of customary norms and act as such for those states that are not the members of this Convention.

The significant disadvantages of the Vienna Convention include primarily the uncertainty, vagueness and ambiguity of many of its provisions, causing differences in their interpretation and application. The following questions arise to which it is not yet possible to give a definite answer.

1. What is the exact meaning of the expression "compatibility with the object and purpose of the treaty".

2. Who and how should set the compatibility of the reservation with this criterion.

3. What are the consequences of statements of the illegal reservation.

A number of issues have not been reflected in the Vienna convention at all. A number of such omissions include:

1) the legal regime of reservations to bilateral treaties;

2) distinction between reservations and interpretative declarations;

3) problems with the statement of reservations at the succession of states in respect of treaties, not settled by the Convention of 1978;

4) specific modes of reservations regarding certain treaties (on human rights).

Above-mentioned difficulties and insufficiencies in the regulation of reservations by the Vienna Convention, as well as the inconsistency of state practice define the direction of further study and development of the reservations institutions in contemporary international law. The need of the world community in a more detailed regulation of reservations to international treaties meeting modern conditions is obvious. In this respect the activities of the International Law Commission and other organs of international organizations engaged in the codification and progressive development of international law attract the attention.

Issues of formation and development of the provisions on reservations to international treaties are conceptually new direction in the research of international law in the Republic of Uzbekistan. In this regard, existing studies are notable for fragmentation, narrow focus and lack of consistency.

The lack of doctrinal elaboration of the provisions on reservations should be considered in the science of international law. In modern domestic legal science the special studies in this field are practically entirely absent, which is associated with the novelty of emerging problems for the law enforcement practice of the Republic of Uzbekistan. The theory of reservations to international treaties is a promising trend in domestic international legal science, and therefore it does not have the relevant research and theoretical development. However, it is necessary to admit that reservations are the subject of law in the international treaties, which was extensively studied in our Republic by the D.J.S. I. M. Umarakhunov[5]. In his doctoral thesis I. M. Umarakhunov devoted a separate paragraph to the issues of reservations[6], but it cannot serve the sufficient basis for the recognition of the fact that this direction in our republic has been developed enough.

Subject to the foregoing, a clear need for a comprehensive and analytical understanding of theoretical and applied questions of declaration of reservations, international and national legal regime for their regulation is obvious in the light of modern trends of development of interstate relations and international law, as well as in the study of practices of the Republic of Uzbekistan in the field of reservations and the assessment of its compliance with the national interests of our republic and new requirements of international legal regulation.

Examination of the problem of reservations to international treaties in the foreign policy practices of the Republic of Uzbekistan is of important practical significance. Knowing theoretical bases of the provisions on reservations to international treaties and its regulation is necessary in the conclusion and implementation of the various international treaties, agreements and conventions. The study of treaty practice of the Republic of Uzbekistan shall contribute to the development of a correct international legal position for the national interests of our republic in the expression of reservations and statement of objections against them.

In this regard, it is particularly important to note the fact that the Republic of Uzbekistan, entering into interstate relations, comes from its national interests. This brings to mind the words of our President I. A. Karimov that "the main goal, the essence and content of our foreign policy are the interests of Uzbekistan and once again the interests of Uzbekistan"[7]. On the basis of the general

[5] Umarakhunov I.M. Republic of Uzbekistan and international treaty law. – T.: National Uzbek cyclopaedia, 1998; Umarakhunov I.M. International contractual legal practice of the Republic of Uzbekistan. – T.: Academy, 2003.

[6] Umarakhunov I.M. International contractual legal practice of the Republic of Uzbekistan: theory and practice: Extended abstract of dissertation. … D.J.S. – T.: Academy of state and public construction at the President of the Republic of Uzbekistan, 2003.

[7] Report of the President of the Republic of Uzbekistan Islam Karimov on joint meeting of Legislative House and Senate of Oliy Majlis: “Our main goal is the

methodological establishments of the President I. A. Karimov, we note that one of the main directions of participation of Uzbekistan in international treaty relations is the promotion of the national interests of our republic on the basis of developed and announced international legal positions of Uzbekistan.

Thus, the problem of reservations to international treaties really deserves the close attention. The interest in reservations is explained by the complexity and inconsistency of this institution. The specific of the reservations is that they are not the legal phenomenon in pure form, the political issues and positions of states on various issues are of great significance for their formulation and adoption.

Hence the need for further study of the reservations institution, of its codification and progressive development is obvious that will lead to the increase of efficiency of legal regulation of the process of conclusion and validity of international treaties in contemporary international law.[8]

Author Profile

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democratization and renovation of society, reformation and modernization of country" // Public word. – T., 2005. – January 29.

[8] ibidem