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and 3 of the Spanish amendment related to depositary functions and should be considered together with the provisions on that subject. He supported the Hungarian amendment.

41. Mr. VEROSTA (Austria) said that the opening words of paragraph 2, " If formulated on the occasion of the adoption of the text or upon signing the treaty ", conflicted with the provisions of article 16 and should therefore be deleted.

42. The CHAIRMAN suggested that, subject to the decision on articles 16 and 17, article 18 might be referred to the Drafting Committee.

It was so agreed.[4]

Organization of the work of the Conference

43. Mr. TABIBI (Afghanistan) said that, despite the Chairman's efforts to induce the Committee to work faster, the bulk of the draft still remained to be discussed and at the present rate of progress there was little chance of getting through it by 24 May. Something drastic would therefore have to be done, and consideration might be given to the possibility either of establishing another committee of the whole to consider certain parts of the draft, or of setting up a working group to sound delegations on their views and try to reconcile differences of opinion. It would be remembered that, at the first Conference on the Law of the Sea, held at Geneva, no fewer than five committees had been set up.

44. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he agreed that the Conference must work faster and he fully supported the idea of establishing a second committee of the whole; when the General Assembly, at its twenty-first session, had discussed the Conference's method of work, his delegation had advocated two committees of the whole. As an alternative, a working group might perhaps be set up to consider part V of the draft. In the meantime all delegations should do their best to submit amendments as early as possible.

45. Mr. DADZIE (Ghana) said he agreed with what had been said by the representative of Afghanistan and favoured the creation of a small group to consult delegations informally and prepare recommendations for consideration by the Committee of the Whole.

46. Mr. SINCLAIR (United Kingdom) said that his delegation had also favoured two committees of the whole but had been overruled in the General Assembly. Delegations which had made their arrangements on the basis of there being only one committee might now find it difficult to service two committees. The idea of a working group on part V might well be acceptable, but, before it could be established, it must have the benefit of a preliminary general discussion in the Committee of the Whole.

47. Mr. KEARNEY (United States of America) said that, while he was prepared to support the suggestion for establishing a second committee of the whole, he was not certain that the physical facilities were available.

48. He did not favour the Soviet Union representative's suggestion for establishing a special group on part V, as it could not do useful work without first hearing the views of the Committee of the Whole on a very complex set of articles. Moreover such a procedure would hardly be democratic.

49. Mr. DE BRESSON (France) said he did not think it would be possible to establish a second committee of the whole, as that would be contrary to rule 47 of the rules of procedure. In any case it would create difficulties for some delegations, and perhaps there would not even be a room available in which a second committee could meet. Working groups could only function usefully if a prior discussion had been held in the Committee of the Whole at which each delegation had had the opportunity of expressing its views.

50. Mr. WATTLES (Secretary of the Committee) said that the possibilities of holding extra meetings were set out in the Secretary-General's memorandum on methods of work and procedures of the first session of the Conference (A/CONF.39/3), which had been approved at the third plenary meeting on the recommendation of the General Committee. The Austrian authorities and the Secretariat had taken into account the General Assembly's decision to establish one Committee of the Whole, and there was not a large enough room available for a second, since the other would be occupied as from next week by the United Nations Industrial Development Organization. After 22 April it might be possible to hold extra meetings of the Committee of the Whole and working groups as an additional team of interpreters would then be available, but no summary records could be kept of meetings of working groups, whose discussions would consequently have to be informal. He presumed that delegations would wish the discussion on each article to be held in the Committee of the Whole first, before the article was referred to a working group.

51. Mr. TABIBI (Afghanistan) said that there was nothing to prevent the Conference from amending its rules of procedure. Clearly the Secretariat must consider what would happen if the Conference failed to deal with all the draft articles by the end of its session.

52. Mr. SUPHAMONGKHON (Thailand) said that perhaps the whole question of the organization of work might be referred to the General Committee.

The meeting rose at 5.35 p.m.

TWENTY-FOURTH MEETING

Tuesday, 16 April 1968, at 10.55 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 16 (Formulation of reservations) and *Article 17* (Acceptance of and objection to reservations) *(resumed from the 23rd meeting)* [1]

1. Sir Humphrey WALDOCK (Expert Consultant) said that the scheme of articles 16 and 17 was based on the

[4] For resumption of the discussion on article 18, see 70th meeting.

[1] For a list of the amendments submitted to articles 16 and 17, see 21st meeting, footnote 1.

consensual character of treaties. A reservation was, *ex hypothesi*, something other than that which had been agreed by the negotiating States. It had therefore seemed to the International Law Commission that there were two main questions: first, under what conditions could a State wishing to become a party to a treaty claim to formulate a reservation? Secondly, what form and degree of acceptance by the other negotiating States were required for the reserving State's participation in the treaty?

2. In answering those questions, the Commission had had to take account of three different approaches to the problem: some States, putting the stress on sovereignty, favoured the maximum freedom both to formulate reservations and for the reserving State to become a party to the treaty; others, stressing the principle of the integrity of the convention, appeared to favour limitation of the freedom to formulate reservations and a strict approach to the degree of acceptance; others, again, while not advancing any doctrine of an inherent right to make reservations, favoured a flexible system of acceptance or rejection of reservations by the other negotiating States individually.

3. It was, therefore, not only for logical reasons, but also because of the divergent views of States that the Commission had dealt with reservations in two separate articles. In doing so, it had sought to establish a balance between the interests of the reserving State and those of the other negotiating States, and it was perhaps because that balance had been achieved that the divergent views had not manifested themselves too sharply during the present debate.

4. He therefore believed that the amalgamation of articles 16 and 17 in a single article might upset the balance aimed at, by blurring the principles involved in those two articles.

5. The deletion of article 16, sub-paragraph (*a*), would have the same unfortunate result, since it would eliminate the reference to the right of States to insist on the integrity of a particular convention.

6. The deletion of article 16, sub-paragraph (*b*), had been called for because, it was argued, the presumption proposed by the Commission, that a treaty which allowed certain reservations implied that it prohibited others, did not necessarily represent the intentions of the parties in all cases. The formula proposed by the Polish delegation, namely, to limit the sub-paragraph to cases in which the treaty authorized only specified reservations, was a possible solution. The outright deletion of the sub-paragraph would leave a gap in the system, unless the reservations prohibited under the Polish proposal were accepted as falling indirectly under the prohibition contained in sub-paragraph (*a*). That was certainly so in fact, but the Committee of the Whole might prefer to state the rule in black and white.

7. Turning to the relationship between article 16, sub-paragraph (*c*), and article 17, and to the proposal to delete sub-paragraph (*c*), he said that the International Law Commission had certainly intended to state an objective criterion for the compatibility of a reservation with the object and purpose of a treaty; and the debate seemed to have shown that the principle of that criterion now met with very general acceptance. The question which then arose was that of the method of application: by collegiate decision or by decision of each of the other contracting States individually.

8. The Commission had adopted the principle of a collegiate decision, in differing forms, for two categories of treaty: those for which the integrity of the treaty was an essential condition of the consent of each party and those which were constituent instruments of international organizations. For all other treaties, the question would be settled by individual decision between two contracting States, as it was under the flexible bilateral system applied in the Organization of American States.

9. Suggestions had been made, notably by the delegations of Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2) for the adoption of some system of collegiate objection on the ground in article 16, sub-paragraph (*c*), and having effect *erga omnes*. His view was that proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations.

10. It was true that, although the International Law Commission had intended to state an objective criterion, the method of application proposed in the draft articles was subjective, in that it depended on the judgement of States. But that situation was characteristic of many spheres of international law in the absence of a judicial decision, which in any case would bind only the State concerned and that only with respect to the case decided.

11. The Committee should bear in mind that under the system adopted by the International Law Commission, no State was obliged to accept the entry into force of a treaty as between itself and a reserving State whose reservation it regarded as incompatible with the object of the treaty; that States were free to adopt different rules in advance by inserting express provisions in the treaty; and that the flexible system would apply only to treaties for which the principle of the integrity of the treaty was, *ex hypothesi*, less significant.

12. The reversal of the presumption established by article 17, sub-paragraph 4(*b*), would also upset the balance of the two articles under consideration by favouring greater freedom in the matter of reservations. Furthermore, as he had already pointed out, States did not readily object to reservations. If they did raise an objection, however, it was probably preferable, and consistent with the intention of an objecting State in most cases, to reserve their position with regard to the entry into force of the treaty between themselves and the reserving State.

13. It had been proposed that the word " formulate " in article 16 should be replaced by the word " make ". The International Law Commission had rejected the word " make " because it might imply that the State concerned had the right to participate in the treaty on the basis of the reservation. The Commission had preferred the word " formulate " as being more non-committal having regard to the balance it sought.

14. Lastly, the words " or impliedly " in article 17, paragraph 1, seemed to have been retained in the draft

articles as a relic from earlier and more detailed drafts which dealt with implied prohibition and implied authorization of reservations.

15. Mr. SMALL (New Zealand) said he thought that despite the reassuring remarks of the Expert Consultant, the scheme of articles 16 and 17 afforded a considerable amount of freedom in the matter of reservations. The divergent views expressed in the debate raised a question, not of directly conflicting values, but of degree: they related solely to the extent to which it was possible to ensure the maximum freedom in the matter of reservations and thus encourage wider participation in treaties, but without impairing the contractual obligations themselves. The Peruvian delegation had drawn attention in its amendment (A/CONF.39/C.1/L.132) to the dangers of the highly general and indeterminate reservation which seemed the archetype of the reservations that a very liberal system might well tend to produce to a greater and greater extent.

16. From a small country's point of view, the lack of provisions on the settlement of disputes in many multilateral treaties and the fact that only a few countries recognized the jurisdiction of the International Court of Justice in regard to the interpretation of treaties, combined with a subjective system of judging reservations, resulted in a situation far removed from the rule of law which was the remedy of small countries.

17. He feared that the abuse of reservations might ultimately have repercussions on States' conduct in executing even those provisions of the treaty which had not been the subject of reservations. Over a period, the worth of the treaty relationship itself could be subverted.

18. The New Zealand delegation was therefore in favour of setting up machinery for the acceptance of reservations and supported, in particular, the proposals of Sweden, Australia, the United Kingdom and Japan. As much time as could be spared during the Conference should be devoted to studying the proposals which had been put forward or any other possible arrangements.

19. Mr. GON (Central African Republic) said he found the International Law Commission's text satisfactory. He supported the proposal to delete the words " or impliedly " in article 17, paragraph 1, however, because the distinction between reservations authorized impliedly and reservations incompatible with the object of the treaty would give rise to difficulties.

20. Reminding the Committee of the resolution (A/CONF.39/C.1/2) which, at the 11th meeting, it had recommended the Conference to adopt, he said that the whole question of international organizations should be dealt with elsewhere and he therefore supported the deletion of article 17, paragraph 3. If that paragraph was retained, however, it should at least be supplemented as proposed in the Austrian amendment (A/CONF.39/C.1/L.3); otherwise, it was not clear how a reservation could be accepted by the competent organ of an organization which in principle did not yet exist.

21. Lastly, he was in favour of reversing the presumption in article 17, paragraph 4(*b*), for once the principle stated in article 16, sub-paragraph (*c*) had been accepted, namely, that a reservation must not be incompatible with the object and purpose of the treaty, the States concerned had agreed on the essential point.

22. Mr. EL DESSOUKI (United Arab Republic) said that the text of the International Law Commission's draft articles on reservations was balanced, effective and consistent with the needs of a developing international community. The importance of the principle of the integrity of treaties should not be exaggerated. If the negotiating States feared that reservations to certain provisions would really endanger the integrity of the treaty, they would probably prohibit reservations to those provisions by an express clause in the treaty.

23. In his delegation's view, the rules stated in articles 16 and 17 applied to reservations as defined in article 2(*d*) of the convention, and consequently did not relate to declarations which neither excluded nor varied the legal effect of certain provisions of a treaty.

24. Commenting on the amendments to articles 16 and 17, he said that those submitted by Czechoslovakia (A/CONF.39/C.1/L.84 and L.85), Poland (A/CONF.39/C.1/L.136) and Malaysia (A/CONF.39/C.1/L.163) were purely drafting amendments. The amendments submitted by the USSR (A/CONF.39/C.1/L.115), Ceylon (A/CONF.39/C.1/L.139 and L.140) and Spain (A/CONF.39/C.1/L.147 and L.148) were intended only to simplify the text. Those two groups of amendments raised no difficulties.

25. The other amendments involved changes of substance on which the delegation of the United Arab Republic had not yet formed a definite opinion. It hoped that the authors of those amendments would meet and try to reconcile their views. In any event, the Committee should guard against taking any hasty decision.

26. Sir Lalita RAJAPAKSE (Ceylon) said he would withdraw his amendments (A/CONF.39/C.1/L.139 and L.140), which had obviously not met with the approval of the majority of the Committee, and associate himself with those who urged that some appropriate means be found for objectively determining the compatibility of a reservation with the object and purpose of a treaty.

27. Mr. JAGOTA (India) said that the question of reservations dealt with in articles 16 and 17 had long been controversial, particularly since 1948, and had been considered in turn by the General Assembly, the International Court of Justice and the International Law Commission. The principal question relating to multilateral treaties was whether emphasis should be placed on maintaining the integrity of the treaty, which had often been concluded after long negotiations, or whether States must be given freedom to accept a treaty with certain reservations. In the first case, the danger was that States might never become parties to the treaty and hence that it might never come into force. In the second case there might be uncertainty as to who was a party to the treaty and what were the reciprocal obligations of the contracting States. It was generally recognized that States must be free to formulate reservations, but that freedom must be subject to such safeguards which would ensure that the reservations did not frustrate the object or purpose of the treaty. The number of multilateral treaties concluded had increased considerably, and in view of the practice which had gradually evolved, unanimity could not be the basis for adopting the text of a treaty. It would therefore be unrealistic to emphasize unanimity for the acceptance of reservations,

on the theory that the text of a treaty was authentic and final and represented the considered views of all the negotiating States.

28. The Indian delegation was satisfied with the compromise text arrived at by the International Law Commission. Article 16 specified the three categories of prohibited reservations, corresponding to the three possibilities open to the negotiating States when a treaty was concluded. At that time the States could either prohibit reservations wholly or partly, permit reservations to certain specified articles, or remain silent on the subject. Article 17 dealt with the modalities of permissible reservations, which were divided into two categories. Those in the first category (paragraphs 1, 2 and 3) were subject to régimes of their own. To be valid, such reservations must not fall within the category of reservations prohibited under article 16. The second category of reservations was dealt with in paragraph 4, which applied only to reservations that were not prohibited, and no special régime was established for them. Sub-paragraphs (*a*) and (*b*) showed the extent of flexibility in the formulation and acceptance of reservations. Sub-paragraph (*c*) specified when the act expressing the consent of a State to be bound by a treaty containing a reservation became effective. That clause was necessary because of the flexibility of the system established in sub-paragraphs (*a*) and (*b*).

29. His delegation accepted the principle and the scheme embodied in articles 16 and 17, but the wording of the articles gave rise to certain difficulties concerning matters of substance.

30. The distinction between the prohibited and the permitted reservations was not clear, though the two articles in question clearly showed that that distinction existed. Whereas the reservations permitted under the terms of article 16(*c*) must be compatible with the object and purpose of the treaty, the criterion of compatibility did not apply either to article 16(*b*) or to reservations impliedly authorized under article 16(*a*). For the latter reservations, acceptance by the other contracting States was not required under article 17, paragraph 1. Such reservations seemed to be those referred to in article 16(*b*) and those which did not fall under article 16(*a*). On the other hand, the compatible reservations authorized under article 16(*c*) might be subject to acceptance or objection under the terms of article 17, paragraph 4. The basis of that discrimination was not clear. With regard to authorized reservations, it might be argued that the negotiating States had already accepted the compatibility of the reservations with the object and purpose of the treaty, which was not the case if the treaty was silent on reservations. But what was the situation with regard to impliedly authorized reservations? Two questions then arose: should the criterion of compatibility apply only to article 16(*c*) or to all reservations, and should the distinction between impliedly authorized reservations and compatible reservations be dropped, making article 17, paragraph 1, apply only to expressly authorized reservations, so that impliedly authorized reservations came within the scope of article 17, paragraph 4?

31. The second observation the Indian delegation wished to make related to the criterion of compatibility under article 16(*c*). What was an incompatible reservation and who would determine incompatibility? What would happen if a dispute arose? The question would be particularly complicated owing to the provision in article 17, paragraph 4(*c*) to the effect that ratification or consent by the reserving State was effective as soon as one other contracting State had accepted the reservation. A dispute about the compatibility of a reservation might arise between a State objecting to it and a State accepting it. The question of compatibility had been taken up in the Advisory Opinion delivered by the International Court of Justice in 1951. The Court had not been very sure about how the question could be settled, but it had clearly set out the limitations of the applicability of the criterion of compatibility.

32. The difficulties arising from that position had not been solved in articles 16 and 17 of the draft. One possible solution might be that suggested by the representative of Japan, namely, that if an objection on the ground of incompatibility was raised by a contracting State and a majority of the contracting States supported that objection within three months of the communication of the reservation, the consent of the reserving State to be bound by the treaty would be without legal effect. The occasions on which a reservation could be made and the effect of an objection on the ground of incompatibility must, however, be clearly set out. A reservation might be made at the time of signature, and it could then be communicated to the States which had signed the treaty. Objections raised by a signatory State would be merely provisional. If the reservation was made at the time of ratification, it could be communicated to all the States concerned and should have no effect if one-third—rather than one-half—of such number of States as would bring the treaty into force raised objections to the reservation on the ground of its incompatibility. If a reservation was made after the treaty had entered into force, it could be communicated to all the States parties and should have no effect if one-third of the States parties to the treaty at the time of the deposit of the reservation had raised objections on the ground of incompatibility within three months from the date on which they had been notified of the reservation. Those rules should be included in article 16(*c*), so as to make it clear that they were not linked to article 17, paragraph 4(*c*). Thus an objection made to a reservation on the ground of incompatibility would fall under article 16(*c*), so that the consent of the reserving State would be without legal effect and that State would not be able to become a party to the treaty unless it withdrew its reservation or made it compatible with the object and purpose of the treaty. On the other hand, article 17, paragraph 4(*c*), which required acceptance by only one State, would only apply when the reservation had not been objected to on the ground of incompatibility.

33. It seemed that article 17, paragraph 2, could be deleted, since the negotiating States could take an appropriate decision, either prohibiting the formulation of reservations, or authorizing reservations to certain specified clauses, or providing that even the specified reservations must be accepted by all the contracting States. Those States would be able to take that decision in accordance with article 16(*a*), article 16(*b*), and article 17, paragraph 1.

34. Article 17, paragraph 2, raised another fundamental question. It applied to a treaty involving a limited

number of negotiating States. In that case the reservation must be accepted by all the parties. It might be asked what was meant by a " limited number ". Who was to determine whether the object and purpose of the treaty required that a reservation be accepted by all the parties? As it stood, article 17, paragraph 2, would raise problems having regard to article 16(*c*) and the basis for its distinction from article 17, paragraph 4 would not be readily apparent.

35. His delegation was not convinced that article 17, paragraph 3, need be retained.

36. To sum up, if the distinction between prohibited reservations and permitted reservations were made perfectly clear, if the distinction between impliedly authorized reservations and compatible reservations were dropped, if determination of incompatibility of reservations and sanctions against their abuse were provided for, and if article 17, paragraphs 2 and 3 were deleted, articles 16 and 17 would be simpler and would achieve the intended purpose.

37. It was against that background that the Indian delegation would take its position with regard to the proposed amendments. The USSR amendment (A/CONF.39/C.1/L.115) combined articles 16 and 17. Paragraph 1, which stated the circumstances in which a State could make reservations, did not mention the prohibited or impliedly prohibited reservations referred to in article 16, sub-paragraphs (*a*) and (*c*). It might perhaps be necessary to mention those prohibitions, for instance by adding at the end of paragraph 1 of the amendment the words " except when reservations are prohibited expressly or impliedly by the provisions of the treaty ". As to paragraph 2 of the USSR amendment, the Indian delegation preferred the wording of article 17, paragraph 4(*b*) as it stood. Paragraph 3 of the amendment was acceptable to the Indian delegation. Paragraph 4, which was similar to article 17, paragraph 2, could be deleted. The amendment did not state when the consent of a reserving State became effective and it did not deal with the question of incompatibility. Provisions on those points should be added.

38. The amendment submitted by the delegations of Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add. 1 and 2) was acceptable to the Indian delegation and could be redrafted in the light of its comments.

39. The Swiss amendment (A/CONF.39/C.1/L.97) was also acceptable, as were the amendments to article 17, paragraphs 1 and 3 proposed by France and Tunisia (A/CONF.39/C.1/L.113). The Indian delegation accepted the United States amendment to article 17, paragraph 4 (A/CONF.39/C.1/L.127).

40. Mr. KRISHNADASAN (Zambia) said that his delegation was uneasy about article 16, sub-paragraph (*c*). If a treaty contained no provisions concerning reservations, there were two possibilities: the intention of the parties was either that a State maintaining reservations should not become a party to the treaty or that reservations should be valid only for the parties which did not object to them. The incompatibility criterion stated in sub-paragraph (*c*) seemed to divide the provisions of a multilateral treaty into two classes: those which were and those which were not part of the object and purpose of a treaty. Normally, however, all the provisions were part of the object and purpose of a treaty, otherwise they would not have been included in it. But even if such a distinction were possible, the criterion would be subjective, because it would be States themselves which would make the distinction, and that would be contrary to a basic aspect of the law of treaties, namely, the identity of the parties. Furthermore, it was difficult to define precisely what was meant by " the object and purpose of the treaty ".

41. In paragraph (17) of its commentary to articles 16 and 17, the International Law Commission had pointed out that article 16, sub-paragraph (*c*) had to be read in close conjunction with the provisions of article 17 regarding acceptance of an objection to reservations. Moreover, article 17, paragraph 4(*c*) was important for determining when a State could be regarded as being bound by a treaty. It was that sub-paragraph, however, which was causing his delegation concern, for it was sufficient for a single contracting State to have accepted a reservation for the reserving State to be considered a party to a multilateral treaty. Even if the " compatibility theory " were accepted, the question arose how it could be satisfactorily applied. The Zambian delegation supported the suggestion made by some speakers that a system be adopted whereby a reserving State would not become a party to a treaty unless its reservation were accepted by a certain proportion of the other contracting States. In his opinion, an element of objectivity should be introduced into article 16, sub-paragraph (*c*) in order to safeguard the integrity of multilateral treaties.

42. Mr. RUDA (Argentina) said that reservations to multilateral treaties raised the problem of reconciling two important trends: the growth of international relations and respect for the sovereign equality of States. A formula preserving the balance between those two trends had to be found. The theory of the unanimous acceptance of reservations was no longer acceptable in modern times; everything pointed to the need to adopt a flexible system. It was better that a State should consent to part of a treaty rather than lose all interest in it. The Inter-American system had adopted a rule which had proved most effective, as it promoted relations between States with very diverse interests. The International Law Commission's draft articles were based on the Inter-American experience and the Argentine delegation accordingly approved of them.

43. Paragraph 1 of the USSR amendment (A/CONF.39/C.1/L.115) altered the original text inasmuch as the criterion applied was no longer the existence or absence of a prohibition of reservations, but the character of the reservation, which was likely to create difficulties. The same applied to the amendment submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.125). As to paragraph 2 of the USSR amendment, the Argentine delegation preferred the International Law Commission's text. According to the Soviet Union text, the treaty would remain in force between the objecting State and the reserving State unless a contrary intention was expressed by the objecting State; that would be going too far in applying the principle of flexibility and might create unduly complex relations between States. That comment also applied to the amendments in documents A/CONF.

39/C.1/L.85 and L.94. On the other hand, the Argentine delegation had no objection to paragraphs 3 and 4 of the USSR amendment.

44. The proposal by the United States and Colombia (A/CONF.39/C.1/L.126 and Add.1) to substitute the words " character or " for " object and " would impair the clarity of article 16.

45. The Argentine delegation supported the Polish amendment (A/CONF.39/C.1/L.136) as it made article 16, sub-paragraph (*b*) easier to understand. Paragraph 1 of the amendment in document A/CONF.39/C.1/L.133 and Add.1 and 2 reproduced the idea of the Soviet Union amendment, but added nothing to the clarity of the original text. As to paragraph 2 of that amendment, he saw no need to give a majority of States the power to determine whether a reservation was compatible with the object and purpose of a treaty. That procedure would not be in conformity with the principle of the sovereign equality of States.

46. The deletion of the words " or impliedly " proposed in the amendment to article 17, paragraph 1, by France and Tunisia (A/CONF.39/C.1/L.113) would make the text clearer. On the other hand, the Argentine delegation could not accept the amendment to paragraph 2 by those two delegations, which contained the words " restricted multilateral treaty ". The words " limited number of the negotiating States " should be retained. Article 17, paragraph 3, should also be retained; the text proposed by the International Law Commission seemed satisfactory, but consideration might be given to the Austrian amendment (A/CONF.39/C.1/L.3), which made the meaning clearer, and to the Spanish amendment (A/CONF.39/C.1/L.148).

47. The Argentine delegation unreservedly approved of paragraph 4, which was based on the Pan-American rule. It was not in favour of the amendments to that paragraph submitted by Switzerland (A/CONF.39/C.1/L.97) and the United States (A/CONF.39/C.1/L.127), but it supported the United States amendment to paragraph 5, inserting the words " unless the treaty otherwise provides ".

48. Mr. BEVANS (United States of America) said he approved of the amendment submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.125) and hoped it would receive consideration if the proposal by the United States and Colombia (A/CONF.39/C.1/L.126 and Add.1) to delete article 16, sub-paragraph (*b*), was adopted. That deletion was justified, since it was impossible, at the negotiating stage, to foresee all the reservations which might subsequently be found necessary. Consequently, the United States delegation also supported the amendment submitted by the Federal Republic of Germany (A/CONF.39/C.1/L.128), which likewise deleted article 16, sub-paragraph (*b*).

49. The amendment submitted by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add. 1 and 2) contained a far more effective formulation of the incompatibility rule than that adopted by the International Law Commission, but the word " character " should be included in the rule. The proposed mechanism could, however, raise a number of difficulties. For example, if only four States had consented to be bound by a treaty, and a fifth State ratified the treaty with a reservation, the acceptance of the reservation by three of the contracting parties would make the reservation admissible. The reservation would thus be accepted even if a hundred contracting parties which subsequently ratified the treaty were to regard the reservation as incompatible with its object and purpose. If a solution could be found for that problem and for others which would become apparent when the system was studied, the United States delegation would give sympathetic consideration to a proposal for a collegiate system.

50. His delegation could support the Polish amendment (A/CONF.39/C.1/L.136) if its meaning was in fact that suggested by the representative of Argentina, and if it was reworded to make that meaning clear. He was opposed to sub-paragraph (*b*) of article 16, because if negotiators intended to prohibit all reservations except those they specified, they should state that intention expressly.

51. The relationship between articles 16 and 17 was not clear either from the text proposed by the delegation of Ceylon (A/CONF.39/C.1/L.139)—now withdrawn—or from the International Law Commission's draft.

52. The beginning of paragraph 1 of the Spanish amendment to article 16 (A/CONF.39/C.1/L.147) clearly formulated the various concepts contained in the original draft; being a drafting amendment, it should be referred to the Drafting Committee. The wording of paragraph 1(*a*) of the Spanish amendment seemed much more precise than that of the corresponding sub-paragraph of the International Law Commission's text; the words " prohibited by the treaty itself " showed that the treaty must contain a specific provision prohibiting the reservation. Paragraph 1(*b*) of the Spanish amendment seemed to be the counterpart to article 17, paragraph 3. The United States delegation fully approved of the inclusion of the word " nature " in the amendment, since the structure within which the object and purpose of a treaty were to be achieved was a vital element often overlooked in the consideration of reservations.

53. He could not support the Malaysian amendment to article 16, sub-paragraph (*b*) (A/CONF.39/C.1/L.163), which seemed to embody the same limiting concept as the corresponding sub-paragraph of article 16 of the draft. The United States delegation approved of the amendments submitted by France and Tunisia (A/CONF.39/C.1/L.113), Switzerland (A/CONF.39/C.1/L.97) and Thailand (A/CONF.39/C.1/L.150) deleting the words " or impliedly " in article 17, paragraph 1. It was opposed, however, to the proposal by France and Tunisia to introduce the words " restricted multilateral treaty " in article 17, paragraph 2, and to the Czechoslovak proposal (A/CONF.39/C.1/L.84) to include a reference to a " general multilateral treaty " in article 17.

54. The United States delegation could agree to the deletion of article 17, paragraph 3, as proposed by Switzerland and by France and Tunisia, provided that paragraph 2 of that article was expanded as proposed by the United States and that a new paragraph 3 on the following lines was inserted:

" 3. When a treaty is a constituent instrument of an international organization, it shall be deemed to

be of such a character that, pending its entry into force and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides."

55. Such a new provision might prove necessary to protect the interests of signatory States. States negotiating the constituent instrument of an international organization should be recognized as competent to agree to reservations by unanimous consent, without awaiting the establishment of the organization. It was because of the restrictive character of the wording of article 17, paragraph 3, that the United States delegation was opposed to the amendments submitted by Austria (A/CONF.39/C.1/L.3) and China (A/CONF.39/C.1/L.162).

56. The United States delegation could support the Swiss amendment (A/CONF.39/C.1/L.97) to article 17, paragraph 4, if the substance of its own proposal regarding paragraph 2 was adopted. Sub-paragraph (*b*) of the new paragraph 2 of article 17 proposed by Ceylon was too rigid and might have precluded a State from having treaty relations with another State to whose reservation it had objected.

57. The new wording proposed by Spain in document A/CONF.39/C.1/L.148 was an outstanding example of clear drafting, but it omitted the substance of article 17, paragraph 2, which was of great importance. His delegation supported the amendment to article 17, paragraph 4, submitted by Thailand (A/CONF.39/C.1/L.150) but suggested adding the words " and the provisions of article 16 ". It also supported the amendment by Thailand to article 17, paragraph 5.

58. He was opposed to the amendments submitted by Czechoslovakia (A/CONF.39/C.1/L.85), Syria (A/CONF.39/C.1/L.94) and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115), which would reverse the rule stated in article 17, paragraph 4(*b*), since those amendments might place small States at a disadvantage. The United States delegation found the present wording of paragraph 4(*b*) satisfactory.

59. He would be glad to support any proposal combining articles 16 and 17 in a single article if he found the wording of the new article satisfactory. The amendment submitted by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115) combined the two articles, but the new version seemed far less precise than the International Law Commission's wording. The proposed article did not contain sufficient substantive concepts and was also too rigid to meet the needs of States in regard to multilateral treaties. It might prevent negotiators from reaching agreement on provisions concerning reservations which had long been formulated to meet special needs. That would be contrary to General Assembly resolution 598 (VI) adopted as a result of the Advisory Opinion of the International Court of Justice concerning the Genocide Convention. The Soviet Union amendment made the mistake of trying to apply to all treaties the criteria laid down by the Court with respect to the Genocide Convention only. In paragraph (3) of its commentary on articles 16 and 17, the International Law Commission had stated that in replying to the General Assembly's questions " the Court emphasized that they were strictly limited to the Genocide Convention ". The solution to the reservations problem must be found in the " special characteristics " of a treaty; in his view, that idea should be embodied in article 16, sub-paragraph (*c*), and in article 17, paragraph 2.

60. In conclusion, the United States delegation considered that the incompatibility rule should be supplemented and expanded so as to meet the practical needs of treaty-making and to become a more useful guide for the various types of treaty. The Spanish amendment (A/CONF.39/C.1/L.147) was a positive step in that direction.

61. Mr. TSURUOKA (Japan) said that his delegation had revised the wording of its amendment to take account of the comments of various representatives. The new proposal (A/CONF.39/C.1/L.133/Rev.1) did not change the substance of the original amendment.

62. The International Law Commission had, above all, succeeded in bringing out the principle of compatibility with the object and purpose of a treaty as the cardinal principle to be applied to the question of admissibility of a reservation. The Japanese delegation fully agreed with that approach, but did not think it had been carried to its logical conclusion. It had therefore proposed the application of an objective and workable test to the question of the compatibility of reservations with the object and purpose of a treaty. Many difficulties might arise if that question was left to each contracting party to decide subjectively. Under the régime proposed in the International Law Commission's draft, States could become parties to a treaty with as many reservations as they wished, so long as at least one other contracting State accepted the reservations, and much of the significance of the treaty might be lost. Thus it was vitally important to secure an objective test of compatibility.

63. His delegation regarded the collegiate system as the best means of securing an objective judgement on the compatibility of a reservation. The object and purpose of a treaty were really determined by the intention of its authors, or of the parties to it, as the case might be; hence the question could be better judged by the States concerned than by an independent body. Nevertheless, it would be inadvisable to allow each of the States concerned to form a separate judgement, since that would be tantamount to leaving it to States to decide the matter subjectively. A multilateral treaty could not always be dissolved into a collection of bilateral treaties. It would create rules applicable to the parties as a whole.

64. After studying various views expressed in the Committee, the Japanese delegation had come to the conclusion that the period prescribed in the joint amendment had better be lengthened to twelve months. Further extensions would not be appropriate, as that would leave the legal status of a reserving State unstable for too long a period. As to the right to take part in an objective judgement of the compatibility, his delegation still considered that that right should not be granted to States which were merely entitled to become parties to the treaty. To make that judgement, they should also have committed themselves formally to becoming parties.

65. Mr. SMEJKAL (Czechoslovakia) said that despite the efforts made by negotiators to reach compromises, multilateral treaties might not be accepted by certain States, for the most varied reasons.

66. Contemporary developments militated in favour of reservations rather than against them. Although reservations restricted the effects of treaties, they helped to strengthen international relations by enabling States to ratify treaties they would have been unable to ratify without a reservation. Moreover, by virtue of the principle of sovereignty, States had the right to make reservations and to object to them. Some reservations were inadmissible, because they were incompatible with the object which the contracting parties had set themselves. But objections to reservations which were perfectly compatible with the object of a treaty were also inadmissible. In that connexion, his delegation would remind the Committee of the opinion delivered by the International Court of Justice in 1951 in favour of the reservations formulated by Czechoslovakia to the Genocide Convention. The criterion applied in deciding whether reservations were incompatible with the object and purpose of a treaty was frequently subjective, but it was subjective for both the reserving State and the State making the objection. The Czechoslovak delegation believed that in that matter the parties to the treaty were the best judges and that they themselves should determine the legal consequences of article 17 in the light of their own positions. There was no need for arbitration machinery, which might raise a number of difficulties.

67. He hoped that no delegation wished to revert to the out-of-date theory of unanimity. The system of legal consequences of reservations and objections to reservations formulated by the International Law Commission in article 17, paragraph 4, should be the only basis for discussion. The development of law in recent years had shown the need to improve the system proposed by the Commission. That was the aim of the amendments submitted by Czechoslovakia (A/CONF.39/C.1/L.85), Syria (A/CONF.39/C.1/L.94) and the USSR (A/CONF.39/C.1/L.115).

68. He regarded the existing wording of articles 16 and 17 as perfectly satisfactory provided that his delegation's amendment was accepted.

69. He could not support the Peruvian amendment (A/CONF.39/C.1/L.132), which would limit the sovereign right of States to formulate reservations, or the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133/Rev.1), which introduced a system based on the majority rule.

70. The amendment submitted by Ceylon (A/CONF.39/C.1/L.139) would have limited the possibility of formulating reservations, and the Czechoslovak delegation would not have been able to support it. It was not, however, opposed to the amendments which would delete article 16, sub-paragraph (*b*).

71. He could accept the Austrian amendment (A/CONF.39/C.1/L.3) if paragraph 3 of article 17 was retained. His delegation could also support the amendments submitted by Switzerland (A/CONF.39/C.1/L.97) and Poland (A/CONF.39/C.1/L.136), and certain parts of the United States amendment (A/CONF.39/C.1/L.127) which related to drafting.

72. Mr. HARRY (Australia) said that his delegation's amendment (A/CONF.39/C.1/L.166) could be regarded as additional to the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133/Rev.1). The latter, however, provided for machinery to decide only a preliminary question, namely, whether a reservation was inherently incompatible with the character and purpose of a treaty. Under the terms of that amendment, even if a reservation was found to be compatible, States could raise an objection to it under article 17, paragraph 4. The Australian proposal was designed to provide an automatic mechanism by which it could be established that a reservation, even though inherently incompatible with the treaty, was regarded as acceptable by a substantial proportion of the negotiating States and by other States if they had become contracting parties.

73. The Australian proposal would relax the unanimity rule for those general multilateral treaties where participation by a large number of States was desirable. A majority of two-thirds—the same majority as could have expressly approved a reservation had it been proposed during the negotiation of the treaty—should be able to approve it after the authentication of the text.

74. It should be noted that the two-thirds majority could consist entirely or largely of States which gave "passive" approval. It could also consist of or include States which had objected to the reservation, provided that those States had decided that the treaty should nonetheless enter into force for the reserving State. That system would also overcome the difficulty referred to by the representatives of the United States and Japan, since it would not include all the States entitled to become parties, but only those which were negotiating States and those which had expressed their consent to be bound by the treaty. In short, the "college" would consist of those States which could have expressly approved the reservation during the negotiations, plus those States which had agreed to be bound by the treaty.

75. In the event of acceptance by two-thirds of the "college", a reservation would be regarded as having been accepted by all the negotiating States and by those other States which had expressed their consent to be bound. In other words, the situation would be the same as it would have been if the reservation had been expressly authorized in the treaty or if, under the old system, all the parties had accepted it.

76. That machinery would make it possible to simplify article 19 and to maintain the certainty and integrity of treaties.

77. Mr. WERSHOF (Canada) said he wished to ask the Expert Consultant three questions. First, if a reservation was prohibited under article 16, sub-paragraph (*a*) or (*b*), had it been the intention of the International Law Commission to prevent a contracting State from accepting the reservation under article 17, paragraph 4(*a*)? He thought the answer would be in the affirmative. Second, if a reservation was not authorized within the meaning of article 17, paragraph 1, but was not prohibited or incompatible under article 16, would it be open to a contracting State to object to the reservation on other grounds under article 17, paragraph 4(*b*)? He assumed that question would also be answered in the affirmative. Third, in the view of the Expert Consultant, was paragraph C of the United States amendment (A/CONF.39/

C.1/L.127) consistent with the intention of the International Law Commission regarding incompatible reservations?

The meeting rose at 1.10 p.m.

TWENTY-FIFTH MEETING

Tuesday, 16 April 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 16 (Formulation of reservations) and *Article 17* (Acceptance of and objection to reservations) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of articles 16 and 17 of the International Law Commission's draft.[1]

2. Sir Humphrey WALDOCK (Expert Consultant), replying to the questions put by the Canadian representative at the previous meeting, said his answer to the first question was that a contracting State could not purport, under article 17, to accept a reservation prohibited under article 16, paragraph (*a*) or paragraph (*b*), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.

3. The second question was, where a reservation had not been expressly authorized, and at the same time was not one prohibited under article 16, paragraph (*c*), could a contracting State lodge an objection other than that of incompatibility with the object and purpose of the treaty? The answer was surely Yes. Each contracting State remained completely free to decide for itself, in accordance with its own interests, whether or not it would accept the reservation.

4. The third question was, would the addition of the words " and unless the reservation is prohibited by virtue of article 16 " to the opening words of article 17, paragraph 4, as proposed in the United States amendment (A/CONF.39/C.1/L.127), be consistent with the Commission's intention? The answer was again Yes, since it would in effect restate the rule already laid down in article 16. It would not however carry the solution of the reservation problem any further and would still leave unsettled the question of who would decide whether a reservation was or was not incompatible with the object and purpose of the treaty.

5. Mr. VIRALLY (France), introducing the French amendment to articles 16 and 17 (A/CONF.39/C.1/L.169 and Corr.1), which would combine the two into one article, said that its main purpose was to simplify and clarify the text. His delegation approved of the system of reservations devised by the International Law Commission, but thought it was too complicated and involved; it needed to be made more easily applicable.

[1] For a list of the amendments submitted to articles 16 and 17, see 21st meeting, footnote 1.

6. The question of the legal effects of reservations was not dealt with in the amendment, since that was a matter which properly belonged to article 19; the amendment was accordingly confined to the formulation and acceptance of or objection to reservations. Account had been taken in paragraph 3 of certain amendments concerning reservations to bilateral or restricted multilateral treaties, but without giving any definition of the latter since that should be placed in article 2. In fact his delegation had submitted an amendment to that effect (A/CONF.39/C.1/L.24). It would have no objection to using the phrase " plurilateral treaty " if the phrase " restricted multilateral treaty " were found unacceptable.

7. Mr. CUENDET (Switzerland) said that his delegation had submitted an amendment (A/CONF.39/C.1/L.97) which, in its opinion, went to the heart of the problem; he would confine his remarks to its two crucial aspects. The first was the question of the right to make a reservation, as formulated in the USSR amendment (A/CONF.39/C.1/L.115). In his view, the express formulation of that right introduced no change whatsoever into the working of the system proposed by the International Law Commission; it was merely a question of drafting. The Expert Consultant had explained the nature of the compromise worked out by the Commission and the importance of reconciling the difference between the upholders of the unilateral right to make reservations and the proponents of the consensual concept, whereby the validity of a reservation would depend on agreement between the contracting States. His delegation accepted the neutral formula as worked out by the Commission, first, because it represented a compromise between the two schools of thought, and secondly and principally, because it offered legal security and enabled the parties to know exactly where they stood.

8. It was from that standpoint that his delegation had examined the amendments relating to the second aspect, that of the procedure for the acceptance of reservations. There were two theses: one defended by the Swedish delegation, that reservations incompatible with the object and purpose of a treaty could not be accepted by the other States, and the other, which was the position of his own delegation, that such incompatibility could not be determined in practice except by a subjective procedure, in other words, that each State must itself apply its own criterion of incompatibility. It was not an entirely satisfactory solution, but in the absence of any form of collegiate machinery, it was the only one which enabled the legal consequences of a reservation to be established with perfect certainty.

9. The Japanese delegation, with those of the Philippines and the Republic of Korea, had proposed (A/CONF.39/C.1/L.133/Rev.1) a system for providing an objective definition of compatibility, and his delegation could accept some machinery of that type. The difficulty of that system, however, was that the reservation was to be accepted only by the States which were parties to the convention at the time when the reservation was made. States which became parties later would have to accept those decisions, even if they were much more numerous. The system proposed by Australia (A/CONF.39/C.1/L.166) presented a similar drawback, that of entrusting the examination of reservations to States which might possibly never become parties to the convention. His