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Tenth plenary meeting

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should therefore be deleted, as the Netherlands representative had suggested, and the words " the full powers " should be replaced by the words " full powers ".

81. Sir Humphrey WALDOCK (Expert Consultant) pointed out that the question of full powers was covered more fully in article 6. Article 10, paragraph 1 (*c*) related to the case of an agreement in simplified form where a State's practice might be to follow a simple procedure, and where it might be stated during the negotiations that a signature was to be binding. Such cases were extremely common, and he did not think that the provision should give rise to difficulties.

82. The PRESIDENT invited the Conference to vote on the words " or was expressed during the negotiation " in article 10, paragraph 1 (*c*).

The words in question were retained by 54 votes to 26, with 19 abstentions.

83. Mr. EUSTATHIADES (Greece) said that his proposal to replace the words " the full powers " by the words " full powers " would only have applied if the concluding words of paragraph 1 (*c*) had been deleted. In view of the result of the vote on those words, he withdrew his proposal.

84. The PRESIDENT put paragraph 2 (*a*) to the vote separately, as requested by the Swiss representative.

Article 10, paragraph 2 (a), *was retained by 74 votes to 15, with 12 abstentions.*

Article 10 was adopted without change by 95 votes to 1, with 5 abstentions.

85. Mr. HAYTA (Turkey) said that he had abstained in the vote on article 10 in view of the comments made by the Turkish representative at the 17th meeting of the Committee of the Whole on the question of consent to be bound by a treaty.

The meeting rose at 1.15 p.m.

TENTH PLENARY MEETING

Tuesday, 29 April 1969, at 3.15 p.m.

President: Mr. AGO (Italy)

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)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

1. The PRESIDENT invited the Conference to continue its consideration of the articles approved by the Committee of the Whole.

Article 10 bis [1]

Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(*a*) The instruments provide that their exchange shall have that effect; or

(*b*) It is otherwise established that those States were agreed that the exchange of instruments should have that effect.

2. Mr. DENIS (Belgium) said that his delegation's amendment to article 10 *bis* (A/CONF.39/L.14) had a connexion with its amendment to article 9 *bis* (A/CONF.39/L.13) which he had withdrawn at the previous meeting. Upon reflexion, however, he now felt that both amendments should be considered by the Drafting Committee, since they would improve the wording of the two articles without restricting in any way their provisions of substance. The terms " letters " and " notes " covered the memoranda, aides-mémoires and notes verbales to which the Polish representative had referred. Surprise had been expressed that ratification, accession, exchanges of letters and so forth should be placed on the same footing, and it had been asked whether, in the case of exchanges of letters, it was not the signatures, rather than the exchange, which constituted the means of expressing consent. Part of the reply to that question was of course the fact that notes exchanged were as often as not unsigned and that their reciprocal delivery was in such cases the means of expressing consent.

3. The PRESIDENT said that, if there were no objection, he would consider that the Conference agreed to refer the Belgian amendments to article 9 *bis* and 10 *bis* (A/CONF.39/L.13 and L.14) to the Drafting Committee, for that Committee to take them into account in the drafting of those articles, without changing the substance.[2]

It was so agreed.

Article 10 bis *was adopted by 91 votes to none.*

Article 11 [3]

Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(*a*) The treaty provides for such consent to be expressed by means of ratification;

(*b*) It is otherwise established that the negotiating States were agreed that ratification should be required;

(*c*) The representative of the State has signed the treaty subject to ratification; or

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[1] For the discussion of article 10 *bis* in the Committee of the Whole, see 17th, 18th and 59th meetings. An amendment was submitted to the plenary Conference by Belgium (A/CONF.39/L.14).

[2] The Drafting Committee came to the conclusion that it could not accept the amendments. See 29th plenary meeting.

[3] For the discussion of article 11 in the Committee of the Whole, see 18th and 61st meetings.

(*d*) The intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 11 was adopted by 94 votes to none.

Article 12 [4]

Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(*a*) The treaty provides that such consent may be expressed by that State by means of accession;

(*b*) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(*c*) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

4. Mr. MUUKA (Zambia) said that his delegation had endeavoured, through informal negotiations, to find a wording which would broaden the provisions of sub-paragraph (*b*) so as to facilitate accession to multilateral treaties by the largest possible number of States. Since those negotiations had not led to any promising results and it had become clear that any proposal by his delegation would only meet the same fate as the proposal for an article 5 *bis,* it had decided not to put forward any proposal for the present.

5. Mr. USENKO (Union of Soviet Socialist Republics) said that his delegation would oppose article 12 as it now stood.

6. A progressive approach to the question of accession to treaties demanded that participation in multilateral treaties, particularly general multilateral treaties, should be open to the largest possible number of States, in accordance with the principle of universality and in furtherance of the general aims of co-operation between States with different political, economic and social systems.

7. The present text of article 12 was a reflection of the reactionary trend which hindered the development of co-operation between States, encouraged the creation of closed groups of States, and endeavoured to discriminate against socialist countries and developing countries. The statement in sub-paragraph (*b*) that the agreement of the negotiating States was required in order that a State could become a party to the treaty by means of accession was an attempt to give legal expression to the reactionary trend to which he had referred, in that it would have the effect of limiting international co-operation and of promoting discrimination against socialist countries and developing countries. His delegation would therefore vote against article 12. If article 12 were rejected, that would not leave a gap in the convention, since a compromise formula could doubtless be found which would prove acceptable to all.

8. Mr. DE CASTRO (Spain) said that his delegation maintained its position with regard to article 5 *bis* and would therefore vote in favour of article 12. It would again urge the Conference, as it had already done at the 89th meeting of the Committee of the Whole, to adopt a declaration or resolution on the principle of universality.

9. Mr. HARASZTI (Hungary) said that article 12, in so far as it stated that it was possible to become a party to a treaty by accession, expressed a unanimously accepted principle of international law and reflected State practice. Nevertheless, there were certain treaties which ought to be open to accession by all States. During the discussion on the proposed article 5 *bis,* his delegation had given its reasons for sponsoring that proposal, and those reasons applied equally to the right of States to accede to treaties. Consequently, unless that right of accession were recognized in article 12, his delegation would not be able to vote in favour of the article.

Article 12 was adopted by 73 votes to 14, with 8 abstentions.

Article 13 [5]

Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(*a*) Their exchange between the contracting States;

(*b*) Their deposit with the depositary; or

(*c*) Their notification to the contracting States or to the depositary, if so agreed.

10. Mr. DENIS (Belgium) said he would like to have some clarification of the meaning to be attached to the concluding words of the article, " if so agreed ". It was difficult to see what those words covered bearing in mind the opening proviso " Unless the treaty otherwise provides ", which implied that the article contained a residuary rule. Moreover, it was not clear whether the words " if so agreed " referred to the notification or to the time at which the consent of a State would be considered to have been established, or to both.

11. Sir Humphrey WALDOCK (Expert Consultant) said that the three cases set out in sub-paragraphs (*a*), (*b*) and (*c*) constituted three alternatives. The first two referred to the more usual methods of establishing consent. The third dealt with the rather more special notification procedure, and the purpose of its concluding words " if so agreed ", was to indicate that sub-paragraph (*c*) would not apply unless it were so decided. However, the words were not absolutely necessary and, if any ambiguity resulted from their inclusion, he thought they could be dispensed with. Those words

[4] For the discussion of article 12 in the Committee of the Whole, see 18th and 105th meetings.

[5] For the discussion of article 13 in the Committee of the Whole, see 18th and 61st meetings.

had however been included in the text of article 13 from the outset by the International Law Commission itself.

12. Mr. YASSEEN (Iraq) said that, personally, he was inclined to share the view of the Expert Consultant that the words " if so agreed " could safely be dropped.

13. Sir Francis VALLAT (United Kingdom) said that he was in favour of retaining the words " if so agreed ", which clearly referred only to the provisions of sub-paragraph (*c*). The provisions of sub-paragraphs (*a*) and (*b*) would apply in any circumstances, but those of sub-paragraph (*c*) would apply only if so agreed between the States concerned, and it was appropriate to make the position clear in that respect.

14. Mr. ESCUDERO (Ecuador) suggested the insertion in the Spanish version of the conjunction " *o* " at the end of sub-paragraph (*a*), as had already been done at the end of sub-paragraph (*b*). That would make it absolutely clear that the three sub-paragraphs envisaged three separate and distinct cases.

15. Sir Humphrey WALDOCK (Expert Consultant) said that, in the English version, the conjunction " or " at the end of sub-paragraph (*b*) made it perfectly clear that there were three alternatives; there was no need to insert the word " or " at the end of sub-paragraph (*a*). The suggestion relating to the Spanish text should be referred to the Drafting Committee; but he would point out, that there were many other articles in which the same form of drafting had been used.

16. Mr. EUSTATHIADES (Greece) said he strongly urged that the wording of article 13 should be retained unchanged. There was no need to insert the conjunction " or " at the end of sub-paragraph (*a*); the text as it stood made it clear that it dealt with three alternatives. The first two, in sub-paragraphs (*a*) and (*b*), referred to the normal rule, which was reflected in the title of the article; that title, however, did not cover the exceptional case mentioned in sub-paragraph (*c*).

17. It would be possible to improve the wording of article 13 by breaking it up into two paragraphs. The first would deal with the normal cases set forth in sub-paragraphs (*a*) and (*b*); the second would deal with the exception in sub-paragraph (*c*) and could be worded to read: " If so agreed, the notification to the contracting States, or to the depositary, of the instruments of ratification, approval or accession shall establish the consent of a State to be bound by a treaty." He was not making any formal proposal, however, as he did not wish to burden the Drafting Committee with a new task. He was prepared to accept the text as it stood, with the retention of the concluding words " if so agreed ", which were necessary.

18. Mr. DENIS (Belgium) said that he had not proposed the deletion of the words " if so agreed ", but had merely asked for clarification of their meaning and effect. He had the impression that article 13 had been intended to serve the dual purpose of setting out the procedures whereby instruments were communicated and at the same time determining the moment at which consent was established. The drafting could perhaps be improved by dissociating the two ideas. The present text, with the qualification " if so agreed " for sub-paragraph (*c*), described the position in so far as the choice of procedure was concerned. As for the moment at which consent was established, the rule surely was that, unless the treaty otherwise provided, it was, according to the case, (*a*) the moment when the instruments were exchanged between the contracting States, (*b*) the moment when they were deposited with the depositary, or (*c*) the moment when they were notified.

19. Sir Humphrey WALDOCK (Expert Consultant) said that if the words " if so agreed " did create the misunderstanding which the Belgian representative had in mind, they should, in his opinion, be deleted. They would seem to have been included because sub-paragraph (*c*) referred to rather special methods which were becoming very common in current practice.

20. The PRESIDENT said that the matter was one which could be dealt with by the Drafting Committee. He invited the Conference to vote on article 13.

Article 13 was adopted by 99 votes to none, with 1 abstention.[6]

Statement by the Chairman of the Drafting Committee on articles 14-18

21. Mr. YASSEEN, Chairman of the Drafting Committee, said that, in order to bring it into line with the titles of articles 9 *bis*, 10, 10 *bis*, 11 and 12, the Drafting Committee had amended the title of article 14 to read " Consent to be bound by " instead of " Consent relating to ". At the beginning of paragraph 1, it had deleted the words " to the provisions " after " without prejudice ", since those words were not to be found in the similar expressions in articles 23 *bis* and 62; in the Spanish version the words " *de lo dispuesto en* " had been added. In the English text, the Drafting Committee had replaced the expression " made plain " in paragraph 2 by " made clear " in order to bring it into line with the usual terminology of the convention.

22. In the title of article 15, the Drafting Committee had deleted the words " of a State " after the word " obligation ", in order to simplify the wording, since it was obvious that it referred to an obligation of a State.

23. In the title of Section 2, the Drafting Committee had adopted an amendment by Hungary (A/CONF.39/C.1/L.137) to delete the words " to multilateral treaties " after the word " reservations ", since the adjective " multilateral " did not modify the noun " treaty " in the definition of a reservation given in article 2, paragraph 1 (*d*); that did not, of course, prejudice the question of reservations to bilateral treaties.

24. The Drafting Committee had also made a few minor drafting changes in articles 16, 17 and 18, of

[6] No change was made by the Drafting Committee.

which he need mention only two. First, in order to make the text of article 16 a little clearer, it had reworded sub-paragraph (*b*) to read " the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or ". The second was to article 18. The text approved by the Committee of the Whole for paragraph 2 of that article referred to the formulation of a reservation " on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval ". However, neither article 16 nor article 2, paragraph 1 (*d*) referred to the formulation of a reservation without adopting the text of a treaty; the Committee had therefore deleted the words " on the occasion of the adoption of the text " in article 18, paragraph 2.

Article 14 [7]

Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 16 to 20, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 14 was adopted by 99 votes to none.

Article 15 [8]

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(*a*) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(*b*) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

25. Mr. WYZNER (Poland) said that article 15 referred to two situations where a State was obliged to refrain from acts which would defeat the object and purpose of the treaty. In its present wording, sub-paragraph (*a*) was somewhat restrictive, since signature, it would seem, was not the only way in which a State could express its intention to be bound by a treaty. Such an intention could also be expressd by an exchange of notes or other instruments, as had been pointed out by several Latin American representatives. If the principle of good faith in the observance of treaties was to be fully implemented, some reference to that possibility should be included in sub-paragraph (*a*). His delegation had therefore submitted an amendment (A/CONF.39/L.16) for the insertion, after the words " it has signed the treaty ", of the words " or has exchanged instruments constituting the treaty ".

26. The PRESIDENT put the Polish amendment to the vote.

The Polish amendment (A/CONF.39/L.16) was adopted by 65 votes to none, with 36 abstentions.

Article 15, as thus amended, was adopted by 102 votes to none.

27. Mr. BILOA TANG (Cameroon) said he would like to have some clarification from the Expert Consultant of the meaning of the words " not unduly delayed " in sub-paragraph (*b*). After how long a time would entry into force be considered to have been " unduly delayed "?

28. Sir Humphrey WALDOCK (Expert Consultant) said that that was a question which could only be answered in the light of the circumstances of each case.

Article 16 [9]

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under paragraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

29. Mr. OTSUKA (Japan) said that his delegation, in conjunction with the delegations of the Philippines and of the Republic of Korea, had submitted an amendment (A/CONF.39/C.1/L.133/Rev.1) to the Committee of the Whole at the first session in the hope of improving the proposed rules on reservations by providing for machinery to test the compatibility of a proposed reservation to a treaty with the object and purpose of that treaty. Its amendment had, however, failed to obtain the support of the majority in the Committee of the Whole. His delegation now feared that the new rules embodied in article 16 and article 17 might lead to undesirable situations which would have the effect of permitting virtually any reservation that any party wished to make.

30. In view of those considerations, his delegation would have to abstain from voting on articles 16 and 17. Should those articles be adopted by the Conference, his delegation sincerely hoped that the future parties to the convention would develop a sound practice in the application of those articles, in order to ensure the maximum measure of integrity for future multilateral treaties.

31. Mr. WERSHOF (Canada) said that his delegation

[7] For the discussion of article 14 in the Committee of the Whole, see 18th and 61st meetings.

[8] For the discussion of article 15 in the Committee of the Whole, see 19th, 20th and 61st meetings.

An amendment was submitted to the plenary Conference by Poland (A/CONF.39/L.16).

[9] For the discussion of article 16 in the Committee of the Whole, see 21st, 22nd, 23rd, 24th, 25th and 70th meetings.

wished to make a statement of its understanding of the effect of articles 16 and 17.

32. At the 25th meeting of the Committee of the Whole on 16 April 1968 [10], the Expert Consultant, replying to questions put by the Canadian representative at the previous meeting in connexion with articles 16 and 17, had 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. 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.[10]

33. His delegation was prepared to vote for articles 16 and 17 on the understanding that the passage he had just quoted was a correct interpretation of the international law on the formulation of reservations and the acceptance of and objection to reservations.

34. Mr. BRAZIL (Australia) recalled that his delegation's attitude towards the complex problem of reservations had been stated at the 22nd and 24th meetings of the Committee of the Whole. It was still not convinced that the present articles 16 and 17 were a satisfactory solution to that problem; it would prefer the inclusion of a clause providing for some machinery of control, such as had been proposed by the Japanese delegation. His delegation would therefore have to abstain from voting on articles 16 and 17.

35. Mr. BILOA TANG (Cameroon) said that his delegation attached great importance to the right of every State to formulate reservations to a treaty, provided they were not incompatible with its object and purpose. It was therefore prepared to vote for articles 16 and 17.

Article 16 was adopted by 92 votes to 4, with 7 abstentions.

Article 17 [11]

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs of this article and unless the treaty otherwise provides:

(*a*) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(*b*) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(*c*) An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

36. Mr. KOVALEV (Union of Soviet Socialist Republics) said that the position of his delegation was that every State had a sovereign right to formulate reservations to a treaty and that it was unnecessary for such reservations to be accepted by other States. That view was fully in accordance with the trends of contemporary international law and with the principle of the widest possible participation of States in multilateral treaties. He noted that the attitude of the majority of delegations, expressed in two votes, differed from that of his own, and he did not therefore think it appropriate to reopen the debate on the whole problem of reservations. But his Government reserved the right to defend its point of view when drawing up future multilateral treaties.

37. To his delegation it seemed both wrong and dangerous to admit such a clause as paragraph 4 (*b*), which provided that " an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State ". Paragraph 4 (*b*) could have the effect of terminating the majority of existing treaties to which reservations and objections had been made. The principle stated in it was confirmed neither by accepted international practice nor by the frequently quoted advisory opinion of the International Court of Justice of 28 May 1951.[12]

38. In the interests of good sense and the stability of treaty relations, he would therefore appeal to the Conference to reverse the decision it had taken at the first session. He would not repeat the arguments

[10] See 25th meeting of the Committee of the Whole, paras. 2 and 3.

[11] For the discussion of article 17 in the Committee of the Whole, see 21st, 22nd, 23rd, 24th, 25th, 72nd and 85th meetings.

An explanatory memorandum (A/CONF.39/L.3) on the question of reservations to multilateral treaties, proposing an amendment to article 17, paragraph 4 (*b*), was submitted to the plenary Conference by the Union of Soviet Socialist Republics.

[12] See *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports, 1951*, p. 15.

advanced by his delegation at that session, but they were set out at length in the Soviet delegation's explanatory memorandum on the question of reservations to multilateral treaties (A/CONF.39/L.3), at the end of which would be found his delegation's amendment to article 17, paragraph 4 (*b*), to replace the word " precludes " by the words " does not preclude " and to insert the word " definitely " before the word " expressed ".

39. Mr. WYZNER (Poland) said that while his delegation generally supported the articles on reservations approved by the Committee of the Whole, it had serious doubts as to the propriety of the rule laid down in paragraph 4 (*b*) of article 17. That rule had been subjected to a most interesting analysis in the explanatory memorandum by the USSR delegation on the question of reservations to multilateral treaties (A/CONF.39/L.3). The presumption that a State objecting to a reservation to, say, one out of one hundred possible articles of a treaty, did not wish that treaty to enter into force between itself and the reserving State, was both unjustified and, from a juridical point of view, illogical. The natural presumption was in favour of the binding force of the remaining ninety-nine articles to which no reservation had been formulated.

40. Furthermore, the rule establishing a presumption in favour of the non-existence of treaty relations between the reserving and the objecting State found no support in the contemporary practice of States. Out of some forty-seven instruments printed in the United Nations *Treaty Series* containing objections to reservations, only three contained declarations to the effect that the objecting State did not consider the whole treaty as being in force between itself and the reserving State. Twenty-seven of those instruments expressed objections to reservations made in connexion with the 1958 Geneva Conventions on the Law of the Sea [13], and six instruments to reservations made in connexion with the 1961 Vienna Convention on Diplomatic Relations.[14] Almost all the objections related to reservations made by more than one State.

41. If paragraph 4 (*b*) of article 17 were applied in all those cases, the conclusion would have to be drawn that the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations were not in force between a significant number of States parties to the treaties. That made it clear that such a provision was not in keeping with the interest of sound treaty relations in general.

42. The Polish delegation was unable to support paragraph 4 (*b*) of article 17, in its present form and would vote in favour of the USSR amendment.

43. Mr. SUAREZ (Mexico) said that in the Committee of the Whole his delegation had declared itself satisfied with paragraph 4 (*b*) of article 17 and had voted for it. Upon further reflexion, however, it now considered that the text approved by the Committee of the Whole was inadequate and it would accordingly vote for the USSR amendment.

44. The Mexican delegation's present position was based on its view that the two principles governing the question of reservations and objections to reservations should be reconciled. The first principle was the freedom of sovereign States to enter into contracts, which meant that a contract was binding on a State only to the extent that the State concerned wished to be bound by it. The second principle was that of the integrity of multilateral treaties, the corollary of which was the prohibition of all reservations. That principle had been abandoned, in its absolute form, in order to allow the majority of States to accede, even partially, to as many multilateral treaties as possible. Obviously no State should be allowed to formulate a reservation which was incompatible with the object and purpose of a particular treaty. Only when a State's objection to a reservation was based on that specific ground would the treaty as a whole cease to be in force between the objecting State and the reserving State. Otherwise, the effect of an objection should fall only on those elements of the treaty to which a reservation had been formulated.

45. Viewed in that context, paragraph 4 (*b*) was unduly severe. The effect of even a minor reservation would be that the treaty would not come into force between the reserving and the objecting State. The best solution would be to ensure that the treaty remained binding on the States concerned except for the provisions to which a reservation had been formulated. A State often objected to a reservation not because of the legal effects which its objection would produce, but for other reasons. Recognition of that fact was implied in article 19, paragraph 3, which dealt with cases where a State expressly declared that it wished to continue to be bound by a treaty.

46. A State objecting to a reservation could, of course, declare that it was no longer bound by the treaty as between itself and the reserving State. Any such statement of intention should not be capricious or arbitrary and should only be made if the reservation destroyed the basic structure of the treaty. That assumption had been recognized by the International Law Commission in paragraph 1 of article 17, where it was stated that a reservation expressly authorized by a treaty did not require any subsequent acceptance by the other contracting States. The provision simply meant that, where a reservation was authorized, the reserving State was merely availing itself of a right which could not be restricted or denied by an objection.

47. An objection to a legitimate reservation should not be allowed to deprive a treaty of its effects when its application could be beneficial to both the reserving and objecting State. That had happened in the past and it was in order to avoid it happening in the future that the Mexican delegation had now decided to support the USSR amendment.

48. Mr. NETTEL (Austria) requested a separate vote

[13] See *Multilateral Treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No. E68.V.3), pp. 322, 323, 327, 328 and 333.

[14] *Ibid.*, pp. 45-47.

on the words " the limited number of the negotiating States and " in paragraph 2. He said he was in favour of their deletion, since there was nothing to indicate what constituted a limited number of States within the meaning of the article.

49. Mr. BOLINTINEANU (Romania) said that his delegation maintained its view that paragraph 4 (*b*) required rewording along the lines proposed in the USSR amendment. An objection by a contracting State to a reservation should only affect those provisions with respect to which the reservation had been formulated, unless a contrary intention had been definitely expressed by the objecting State. The solution proposed in the present text of paragraph 4 (*b*) was inconsistent with the usual practice of States, which was not to prevent the entry into force of the remainder of a treaty simply because an objection had been lodged in connexion with a reservation. An objection to a reservation should be interpreted in accordance with the principle *ut magis valeat*.

50. One argument adduced in support of paragraph 4 (*b*) was that the present text would be more appropriate where an objecting State inadvertently failed to state its contrary intention and thus prevented a treaty from coming into force, although that had not been its intention. That argument was not convincing. The possibility of such a thing happening would be avoided by providing that a contrary intention must be definitely expressed. Adoption of the Soviet Union amendment would safeguard the purpose of reservations, which was to ensure that as many States as possible participated in multilateral treaties.

51. Mr. VALENCIA-RODRIGUEZ (Ecuador) said that his delegation supported the Soviet Union amendment to paragraph 4 (*b*) for the following reasons. First, it preserved a proper respect for the principle of the sovereign equality of both the reserving and the objecting State by recognizing not only the right to formulate a reservation to a treaty but also the right to object to a reservation. Secondly, it allowed the objecting State to decide whether or not the treaty as a whole should come into force between itself and the reserving State. At the same time it presumed that in principle the treaty should come into force, since there was no reason to presume that a reservation to a particular provision affected the integrity of the treaty. Thirdly, it was a rule consistent with the progressive development of international law since it would allow more States to become parties to general multilateral treaties of interest to the international community. It thus reaffirmed the principle of universality.

52. When the question had been discussed in the Committee of the Whole at the first session, no fundamental objections had been raised to the principle of the reversal of the presumption. It had been argued that such a reversal would impose an excessive obligation upon States, and that an objecting State might inadvertently enter into relations with the reserving State through the treaty to which the reservation had been formulated, when in fact the objecting State wished to avoid such relations. But it was for the State to which a reservation had been communicated to determine its position and to decide whether it wished to object to the reservation and, if so, whether the treaty as a whole, except for the provisions to which the reservation had been formulated, should remain in force between itself and the reserving State. The formulation of reservations incompatible with the object and purpose of a treaty was prohibited under article 16 (*c*). It would therefore be better to start from the presumption that those parts of a treaty to which reservations could not be formulated were in force between the objecting and the reserving State.

53. In the light of those views, the Ecuadorian delegation would vote in favour of the Soviet Union amendment.

54. Mr. WERSHOF (Canada) said that his delegation could not agree with the arguments adduced in support of the USSR amendment. The present text of paragraph 4 (*b*) had been proposed by the International Law Commission and approved by the Committee of the Whole at the first session. Amendments similar to the USSR amendment had been rejected after a lengthy debate.

55. The combined effect of articles 16 and 17 as approved by the Committee of the Whole was already quite wide and sufficiently flexible. The Canadian delegation would therefore vote for article 17 in its present form. When a contracting State objected to a reservation, it was reasonable that its objection should preclude the entry into force of a treaty as between itself and the reserving State.

56. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that article 17 restricted the principle of universality and limited the participation in multilateral treaties of a large number of States. The concept on which it was based might perhaps have been justified at a time when the international community had been about a quarter of its present size. With the creation of the United Nations, which now numbered over one hundred States, the interests of all must be taken into account. A State which formulated a reservation to a treaty should not be precluded from participation in the treaty as a whole if it accepted the main provisions of the treaty. That view had been supported by the International Court of Justice in the advisory opinion it had delivered in 1951 and by the United Nations General Assembly in its resolution 598 (VI).

57. The principle most consistent with present practice was that the effect of a reservation did not automatically invalidate a treaty between the objecting and the reserving State. The Conference should not now endorse the concept expressed in paragraph 4 (*b*) of article 17, which had become obsolete and was fraught with discriminatory elements.

58. His delegation would therefore vote against paragraph 4 (*b*) and in favour of the Soviet Union amendment.

59. Mr. CARMONA (Venezuela) said that his delegation supported the USSR amendment to para-

graph 4 (*b*). Venezuela had made a reservation to article 6 of the 1958 Convention on the Continental Shelf and the Netherlands had objected to that reservation,[15] which related only to the question of the division of the continental shelf by the median line. In February 1969 the International Court of Justice [16] had decided that such a reservation was not incompatible with the basic principles of the Convention. If the present wording of sub-paragraph 4 (*b*) were maintained, the result in the case he had referred to would have been that the Convention on the Continental Shelf would not be in force between Venezuela and the Netherlands, although it contained matters of concern to both countries, and it was in the interests of the international community as a whole that it should be applied. In his view, it should be left to the free will of the objecting State to decide whether or not it wished the treaty as a whole to remain in force between the two States concerned.

60. With respect to paragraph 2 of article 17, it would be remembered that, at the 84th meeting of the Committee of the Whole, France had withdrawn a number of amendments on the same lines, and it would hardly be logical to reject the principle concerned as a general rule for the convention, while retaining it in an article concerning reservations where it would be more harmful.

61. It appeared that the International Law Commission had been concerned over the right of veto which sometimes applied to a treaty concluded between a small number of States. In such treaties as those governing the European Common Market or the Latin American Common Market, the consent of all the States concerned was necessary for the economic union envisaged to be realized. Such treaties reserved the right of any of the States not to accept a given decision, and opposition to a decision would make its acceptance impossible. But if that principle were accepted as it stood, it would amount to reintroducing the old principle of requiring unanimity in the conclusion of treaties, which had fortunately been abandoned in recent years. It would therefore not be sufficient to delete the words " the limited number of the negotiating States and ", as proposed by the Austrian representative, because that would still leave the door open to a veto. The whole of paragraph 2 should be deleted, and he therefore asked that a separate vote be taken on that paragraph, in order to make clear the decision of the Conference on that point.

62. Mr. RUEGGER (Switzerland) said he was not surprised that so many difficulties had arisen over the thorny problem of reservations. With regret he must confess that his delegation was as puzzled now as it had been at the first session about paragraph 3 of article 17, regarding which he would refer to his delegation's statement at the 21st meeting of the Committee of the Whole. Switzerland still considered that it would be better, instead of attempting to resolve that particular problem in the convention, to delete paragraph 3.

63. The discussion at the present meeting and at the previous one had emphasized the need for legal machinery to resolve the problems that might arise, since it was obvious that difficulties would occur that could not be solved in advance.

64. Mr. HUBERT (France), referring to the proposal by the Austrian representative to delete from paragraph 2 the reference to " the limited number of the negotiating States ", said that in the Committee of the Whole, France had withdrawn its amendments concerning restricted multilateral treaties in order to facilitate the work of the Conference. Its withdrawal of those amendments did not mean that the French delegation had changed its views, and in the light of that withdrawal, it much regretted the proposal to delete the provisions drafted by the International Law Commission. The objection that the article lacked precision was not convincing, since many other articles lacked precision, but had nevertheless been accepted because they were regarded as necessary. The whole of paragraph 2 should be retained in the convention as it stood.

65. The French delegation appreciated the force of the arguments put forward by the Soviet Union representative concerning paragraph 4 (*b*), and would vote for the Soviet Union amendment.

66. Mr. RATTRAY (Jamaica) said that article 17 could not apply until the criteria regarding reservations in article 16 had been met. Furthermore, if a reservation was permitted, article 18 provided that it must be communicated to the other contracting parties, and that if any State objected to such a reservation, it must communicate its objection to the other contracting parties. Consequently, there was every opportunity for any contracting party to become aware of the content of a reservation, and to state its position regarding such reservation. The question was whether, when a State objected to a reservation, it should take the additional step of indicating whether or not it considered itself to be bound by the treaty as a whole in relation to the State making the reservation. His delegation was prepared to accept either the Soviet Union's formula or that proposed by the International Law Commission. Article 18 provided an appropriate opportunity for a State to explain an objection and to say whether, in the light of the nature of the reservation concerned, it considered itself bound by the treaty in relation to the reserving State. Consequently he would not vote against the Soviet Union proposal, but at the same time he was prepared to accept the International Law Commission's draft.

67. Mr. NĚMEČEK (Czechoslovakia) said that his delegation maintained the view it had expressed at the first session that all States should strive to ensure that contractual relations should be as extensive as possible. It would not further that aim to have a provision in the convention which automatically precluded the existence of treaty relations between two States if one of them objected to a reservation made by

[15] *Ibid.*, p. 333.

[16] See *North Sea Continental Shelf, Judgment, I.C.J. Reports, 1969*, p. 3.

the other. It was desirable to avoid misunderstandings that might have serious legal consequences, and his delegation would therefore support the USSR amendment.

68. Mrs. ADAMSEN (Denmark) said she regretted that her delegation could not agree with the Austrian proposal to delete the reference in paragraph 2 to a limited number of negotiating States. On the contrary, in her delegation's view, the very fact that a limited number of States concluded a treaty was sufficient reason to apply a veto rule, regardless of the object and purpose of the treaty.

69. Denmark was a party to many treaties concluded by a small number of States, and was likely to conclude many more such treaties in the future. Consequently, it was important for her Government that the future convention on the law of treaties should include a rule that a reservation to such treaties required acceptance by all parties. Denmark would therefore vote for paragraph 2 of article 17 as submitted to the Conference.

70. Mr. SHUKRI (Syria) said that at the first session his delegation had proposed an amendment to paragraph 4 (*b*) (A/CONF.39/C.1/L.94), providing that an objection by another contracting State to a reservation would not *ipso facto* preclude the entry into force of the treaty as a whole, but only the application of the provision to which the reservation referred, unless the other party expressed a desire to cancel the treaty *in toto*. Like the Soviet Union and Poland, Syria considered that that formula was more consistent with international practice. Since any State lodging a reservation must do so within the limits laid down in article 16, there did not appear to be any sound legal argument against restricting the effects of such reservations. Not to limit the effect might lead to abuses, since it would enable a contracting party arbitrarily to preclude the entry into force of the whole treaty merely on account of a reservation to a minor provision. The Conference should reflect on the confusion that could result with regard to existing treaties to which reservations had been attached, and which nevertheless still remained in force between the reserving and objecting States.

71. For those reasons Syria supported in principle the Soviet Union amendment as an improvement to paragraph 4 (*b*). It would vote for that amendment, and if it was not adopted would abstain from voting on article 17 as a whole.

72. Sir Humphrey WALDOCK (Expert Consultant), referring to paragraph 2, said that there was an element of compromise in the drafting of the articles on reservations as a whole. When the International Law Commission had begun its work on those articles, many States had had strong misgivings concerning the whole notion of a flexible system of reservations. In drafting those articles, the Commission had had to take into account the various points of view on the question as a whole in order to arrive at a text that had some prospect of general acceptance. The Commission had regarded one point as essential in order to arrive at a compromise, and that was the rule in paragraph 2 which limited the flexible system for some types of treaty.

73. Paragraph 4 (*b*) also formed part of the general structure of the articles on reservations directed towards arriving at a text that would have the best chance of winning general agreement. The International Law Commission had taken the view that, if the rule had been expressed conversely, so as to put the onus on the objecting State to say that the treaty was to come into force, that might be some encouragement to the free making of reservations; and also that perhaps the logical intention to attribute to a State was an intention not to have treaty relations with the reserving State. That had certainly been the classical position in the past and it was thought perhaps that that was the intention that should be attributed to the objection. Furthermore, an objection might be made with the aim of trying to persuade the reserving State to withdraw its reservation, but the pressure to withdraw it would be only slight if the treaty was to come into force in any case. Those were the kind of considerations that seemed to justify the formulation of a rule of that kind.

74. However, as some representatives had pointed out, the problem was merely that of formulating a rule one way or the other. The essential aim was to have a stated rule as a guide to the conduct of States, and from the point of view of substance it was doubtful if there was any very great consideration in favour of stating the rule in one way rather than the other, provided it was perfectly clear. The Commission had discussed various possible ways of formulating the rule; it had not considered that any great question of substance was at issue. The aim had been to find what was the normal intention to attribute to a State. It would appear that the views of members of the Commission and of delegations had been evolving over the past seven or eight years. What was required now was to determine the general sense of the Conference regarding the rule it would prefer to include in the convention.

75. Sir Francis VALLAT (United Kingdom) said that he wished to explain his delegation's vote on article 17. The United Kingdom had voted for article 16 because it supported the principle that a reservation should not be formulated if it was incompatible with the object and purpose of a treaty. His delegation did not feel that article 17 followed the application of that principle to its logical conclusion. The article opened the door too wide and was too flexible, and consequently the United Kingdom would abstain from voting on article 17 as a whole. That was because his delegation did not wish to raise objections if the Conference as a whole liked article 17 as it stood.

76. The same applied to the Soviet Union amendment; if the Conference preferred that text, the United Kingdom would raise no objections, and would accordingly abstain from voting on the amendment.

77. The PRESIDENT said that he would invite the Conference to vote first on the Austrian amendment for the deletion of the phrase " the limited number of negotiating States and " in paragraph 2.

The Austrian amendment was rejected by 75 votes to 6, with 18 abstentions.

78. Mr. TAYLHARDAT (Venezuela) said that in view of the result of that vote his delegation withdrew its request for a separate vote on paragraph 2.

79. The PRESIDENT invited the Conference to vote on the USSR amendment to paragraph 4 (*b*).

The USSR amendment (A/CONF.39/L.3) was adopted by 49 votes to 21, with 30 abstentions.

80. Mr. ROMERO LOZA (Bolivia) said that he had voted for the Soviet amendment because Bolivia considered that an objection to a secondary clause of a treaty should not preclude the entry into force of the treaty as a whole between the reserving and objecting States. He wished to make it clear, however, that, although such a reservation would not affect the entry into force of the treaty as between the two parties concerned, it would still apply with respect to the article concerned.

81. Mr. USENKO (Union of Soviet Socialist Republics) said that he agreed with the representative of Switzerland that paragraph 3 should be deleted; it was already covered by the provisions of article 4. He therefore asked for a separate vote on paragraph 3.

82. The PRESIDENT invited the Conference to vote on paragraph 3.

Paragraph 3 was adopted by 61 votes to 20, with 18 abstentions.

Article 17 as a whole, as amended, was adopted by 83 votes to none, with 17 abstentions.

The meeting rose at 6.35 p.m.

ELEVENTH PLENARY MEETING

Wednesday, 30 April 1969, at 3.15 p.m.

President: Mr. AGO (Italy)

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)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

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

1. The PRESIDENT invited any representatives who wished to do so to explain their votes on article 17 at the previous meeting.

2. Mr. STEVENSON (United States of America) said his delegation wished to make clear what it understood to be the meaning of the term " object and purpose " as used in articles 15, 16 and 17 and in various subsequent articles. At the first session, his delegation had co-sponsored an amendment (A/CONF.39/C.1/L.126 and Add.1) to replace the words " object and purpose " in article 16, sub-paragraph (*c*) by the words " character or purpose ", because it had been uncertain whether the traditional reference to the object and purpose of the treaty was intended to cover the concept of the nature and character of a treaty. The amendment had been referred to the Drafting Committee, which had not considered it proper to change the expression " the object and purpose of the treaty ", which had been used by the International Court of Justice and was to be found in many legal texts.

3. His delegation noted that the International Court of Justice, in its advisory opinion on the Genocide Convention, had used the term " object and purpose " in summarizing its conclusions on the admissibility of reservations, thus setting up the criterion of compatibility with the object and purpose of the treaty. In reaching its conclusions, however, the Court had emphasized that the kind of reservation that might be made was governed by the " special characteristics " of the Convention; the Court had stated that " The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties ".[1] In the light of that opinion, the United States understood the expression " object and purpose of the treaty " in its broad sense as comprehending the origins and character of the treaty and the institutional structure within which the purpose of the treaty was to be achieved.

4. Mr. BADEN-SEMPER (Trinidad and Tobago) said that his delegation had voted in favour of article 17, although the wording and content of some of its provisions, such as paragraphs 3 and 4 (*c*), left much to be desired. In particular, his delegation wished to state categorically that it did not regard paragraph 5 as *lex lata*. The provision clearly represented a progressive development of international law, but it was not a wholly satisfactory one. His delegation had no doubt concerning the existence of the principle of acquiescence in international law and would have been quite prepared to accept that principle instead of paragraph 5; on the other hand, there was no rule or principle in customary law under which a reservation would be regarded as accepted by a State merely by reason of its silence or of the passage of time. Indeed, in the Committee of the Whole his delegation had consistently refrained from supporting amendments advocating acquiescence through the mere passage of time, and it therefore had considerable doubts as to the desirability or workability of paragraph 5.

Article 18 [2]

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing

[1] *I.C.J. Reports, 1951*, p. 23.

[2] For the discussion of article 18 in the Committee of the Whole, see 23rd and 70th meetings.