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Summary record of the 105th meeting

Topic:
Law of Treaties

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185. The CHAIRMAN confirmed that the text applied to States which were not members of the United Nations.

186. Mr. KERNO (Assistant Secretary-General) pointed out that in the case of the Convention on Genocide, among others, discussion had taken place in an organ, namely, the General Assembly, and that the States concerned were not negotiating States but members of the United Nations. Nevertheless, the result of their work was the text of the convention. Therefore, in practice, the clause relating to reservations would be incorporated in the convention during such a procedural discussion in an organ of the United Nations, and provision must be made for such an eventuality, even if some other formula were adopted.

187. Mr. LIANG (Secretary to the Commission) referred to the terms of Article 62, paragraph 3, of the Charter, which stated that the Economic and Social Council "may prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence". He therefore suggested that the word "prepare" be used.

188. The CHAIRMAN accepted that suggestion.

189. In reply to a question by Mr. YEPES, the CHAIRMAN said that the present text was not limited to States Members of the United Nations.

190. Mr. HUDSON hoped that the text would apply to the States which had met at Geneva to negotiate the 1948 Convention. He suggested the wording: "during the negotiation or preparation of multilateral conventions it is advisable to consider the suitability . . .".

191. The CHAIRMAN then proposed the deletion of the word "all" and the use of the phrase "during the preparation of conventions, States consider . . .".

PARAGRAPH 19 (*paragraph 34 of the "Report"*)

*Sub-paragraph (3)*¹³

192. The CHAIRMAN explained that discussion of sub-paragraphs (1) and (2) had been adjourned until a text was prepared.

193. Mr. YEPES said that he would submit an amendment to sub-paragraphs (1) and (2) when the discussion on the latter was resumed. He could not accept them in their existing form.

194. Mr. HUDSON, referring to sub-paragraph (3), said that account must be taken of reciprocity between the reserving State and the other States.

195. The CHAIRMAN thought that the point was covered by the words "limits the effect of the convention".

The meeting rose at 1 p.m.

105th MEETING

Monday, 18 June 1951, at 3 p.m.

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Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Law of treaties: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (b) of the agenda) (A/CN.4/L.18) (*continued*)

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (*continued*) (A/CN.4/L.18)¹

1. The CHAIRMAN said that he was by no means satisfied with the two draft texts he had had distributed, and which he had drawn up on the basis of the proposal submitted by Mr. François at the previous meeting and approved in substance by the Commission.²

NEW PARAGRAPH 18 (*paragraphs 29 and 30 of the "Report"*) (*resumed from the 104th meeting*)

2. The CHAIRMAN said that the first was intended to replace the last part of paragraph 17 of his draft report, from the words "The Commission is aware . . .",³ and to form a new paragraph 18. It read as follows:

"18. The Commission believes that, in substance, the tender of a reservation constitutes a proposal of a new agreement, the terms of which are not the same as those of the agreement negotiated by the plenipotentiaries, and that for this proposal to take effect it must be accepted by all the contracting States, as would have been necessary if it had been put forward in the course of the negotiations. The difficulty of applying this principle lies in defining the States whose acceptance of a reservation is necessary in order that it may take effect. The practice followed by the Secretary-General

¹³ Sub-paragraph (3) read as follows:

"(3) A duly accepted reservation to a multilateral convention limits the effect of the convention in the relations of the reserving State with the other States which have become or may become parties to the convention."

¹ See summary record of the 101st meeting, footnote 1.

² See summary record of the 104th meeting, paras. 104-152.

³ *Ibid.*, footnote 6.

of the United Nations, which has been described in paragraph 9 above, requires that the reservation should be accepted only by States which are in the strict sense 'parties' to the convention; it does not require acceptance by States which are merely signatories. It is true that a signatory State, unless by ratification or acceptance it later becomes a party to the convention, has no legitimate interest in the convention, and that States are under no obligation to ratify or accept a convention which they have signed, and it is therefore conceivable that a single signatory State, having itself no intention of becoming a party, might object to a tendered reservation from motives unrelated to its merits and thus prevent the reserving State from becoming a party to the convention. The Commission thinks that, while theoretically a signatory State might thus abuse its right of objection, the risk is not so serious as to constitute a reason for withholding from it a right to object; in any case the risk can be reduced by limiting the duration of a signatory's right of objection to a period during which there is a reasonable likelihood of its becoming a party. The procedure of ratification prescribed by the constitution of some States often entails considerable delay, and a State which genuinely intends to proceed to the ratification of a multilateral convention is entitled to expect that the terms of the convention which it intends to accept will be the same as those of the convention which it signed."

PARAGRAPH 19 (*paragraph 34 of the "Report"*) (resumed from the 104th meeting)

*Sub-paragraphs (1) and (2)*⁴ (*sub-paragraphs 4 and 5 of paragraph 34 of the "Report"*)

3. The CHAIRMAN said that the second draft text would replace paragraph 19 (1) and (2) of the draft report. It read:

"(1) When, whether before or after the entry into force of a multilateral convention, a State signs, ratifies, accepts or accedes to the convention subject to a reservation, that State may become a party to the convention if all the States which at the time the reservation is tendered have signed, ratified, accepted, or acceded to the convention, expressly or tacitly consent to the reservation, provided, however, that the consent of a State which has not ratified or accepted the convention within . . . shall cease to be required."

4. He was doubtful whether a subject to which the Harvard draft had devoted three articles, each consisting

⁴ Sub-paragraphs (1) and (2) read as follows:

"(1) When, prior to the entry into force of a multilateral convention, a State signs, ratifies, accedes to or accepts the convention subject to a reservation, that State may become a party to the convention if all States which, by the time of its entry into force, have ratified, acceded to or accepted the convention, expressly or tacitly consent to the reservation.

"(2) When, after the entry into force of a multilateral convention, a State signs, ratifies, accedes to or accepts the convention subject to a reservation, that State may become a party to the convention if all States which have, up to the time of the reservation, ratified, acceded to or accepted the convention, expressly or tacitly consent to the reservation."

of several paragraphs, could be compressed into a single rule.

5. Mr. HUDSON was glad to find that the Chairman admitted that he himself was not satisfied with the revised text he was proposing. Personally, he had come to the conclusion that it was absolutely essential for the matter to be dealt with more fully. It must be borne in mind that certain multilateral conventions did not require ratification and could enter into force after they had merely been signed.

6. He had drafted a text to replace paragraph 19 (1) and (2) of Mr. Brierly's report. Sub-paragraph (1) would read as follows:

"(1) If a convention enters into force as a consequence of its signature only, no further action being requisite, a State which makes a reservation at the time of its signature may become a party to the convention only if no objection is expressed by any State which has previously signed the convention, or which may become a signatory during a limited period for which the convention is open to signature."

Sub-paragraph (2) would cover a second category, and would read as follows:

"(2) *a.* If ratification or acceptance in some other form after signature is requisite to bring a convention into force, a reservation made at the time of signature is not to be taken into account unless it is repeated in the later ratification or acceptance of the convention.

"*b.* In such case, a State which tenders a ratification or acceptance with a reservation, whether the reservation was made at the time of its signature or later, may become a party to the convention only in the absence of objection made by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention: provided, however, that an objection made by a State which at that time had merely signed the convention will cease to have the effect of excluding the reserving State if after a period of 12 (possibly 18) months the State making the objection has not proceeded to effect its ratification or acceptance of the convention."

7. He explained the difficulties which the drafting of his text had presented. If it were stated that the consent of a mere signatory was necessary to enable a State which had formulated a reservation to become a party to a convention, there would be a period of uncertainty.

8. He had got away from the viewpoint of Mr. François who would like to see the three year period start from the date of signature by a State making an objection. He personally would like to see the period begin from the time the reservation was formulated, or perhaps from the time when the objection to the reservation was made. He was inclined to think that the period should run from the latter date. As the State making an objection might already have set in motion the procedure for ratification, which often took a long time, he was anxious to minimize, in the case of States which must be assumed to be acting in good faith, the "sanction", as it might be called implicit in the prescribed time limit.

9. With regard to the new text of paragraph 18 drafted by Mr. Brierly, he was not happy about the first sentence, insofar as it referred to relations with the State tendering a reservation. Moreover, the allusion to the practice followed by the Secretary-General of the United Nations and explained in paragraph 9 of the draft report did not seem to him accurate.

10. With regard to the redraft of paragraph 19 (1) and (2) prepared by Mr. Brierly on the basis of Mr. François' proposal, the Commission should not take into account, as a great many writers on the subject had done, the fact that a convention might or might not already have entered into force at the time when a State signed or ratified or accepted it with a reservation. For that reason, he was in favour of deleting from the redraft the words "before or after the entry into force".

11. Mr. FRANÇOIS said that he was perfectly willing to do away with that distinction. The purpose of the words "whether before or after the entry into force of a multilateral convention", which appeared in his text, was to make it clear that his text was intended to replace the first two sub-paragraphs of paragraph 19 of the draft report.

12. Mr. HUDSON pointed out further that in the text he was proposing for paragraph 19 (1) and (2) he had nowhere used the words "parties" or "contracting States" to designate States which might object to a reservation. He did not like the expression "all the contracting States" used in the fourth line of Mr. Brierly's new paragraph 18. In addition, he would like to see the expression "of the agreement negotiated by the plenipotentiaries" in the third line of the same text replaced by "embodied in the text of the convention".

13. Still on the subject of the first sentence, he remarked that a State tendering a reservation did not call upon the other States to modify the convention, but merely to recognize the position it had adopted as expressed in the reservation.

14. He was also in favour of adding a sentence following the final sentence of the proposed re-draft for paragraph 18, to allow for the fact that under the constitutional law of certain countries the acceptance of a reservation must have parliamentary approval. He mentioned the instance of the reservations formulated by the Dominican Republic to the Havana Convention of 20 February 1928 on consular agents. The United States Government had not approved the reservations, and had therefore not submitted them to the Senate for approval.⁵

15. Mr. KERNO (Assistant Secretary-General) said that the discussion at the previous meeting, together with Mr. Hudson's observations, had clearly brought out the great practical difficulties facing the Commission in its attempt to include signatories in the rule that there must be unanimity of consent to reservations. That was why the practice adopted by the Secretary-General had not included signatory States, even though logically their inclusion was fully justified. If the Commission wanted

to include signatory States, it must seek a satisfactory formula.

15a. The Commission was endeavouring to make a single formula cover all cases. In spite of all his efforts, Mr. François had not managed to resolve all the difficulties. Nor had Harvard Research managed to find a satisfactory single formula. Actually, treaty-making procedure was such that certain conventions might be kept open for signature for a given period or even indefinitely. Moreover, the mere signature of a convention might in certain instances make the convention binding on the State; in other instances it might constitute a preliminary to ratification.

16. There was some virtue in Mr. Hudson's attempt to set forth the matter in two paragraphs.

17. Following an exchange of views with various members of the Commission, he too had tried to find a formula. He did not of course claim that it was perfect; he was not even sure how useful it might be, but he would read out the text he proposed as a substitute for the first two sub-paragraphs of paragraph 19 of Mr. Brierly's report:

"1. When, either before or after the entry into force of a multilateral convention, a State undertakes to be finally bound by the convention, whether by signature, ratification, accession or acceptance as the convention may provide, subject to a reservation, that State may become a party to the convention if all the States which at the time the reservation is thus tendered have signed, ratified, accepted, or acceded to the convention expressly or tacitly consent to the reservation, provided, however, that the consent of a signatory State which has not ratified or accepted the convention within . . . shall cease to be required."

18. Mr. EL KHOURY pointed out that the words "undertakes to be finally bound by the convention" were not to be found in Mr. François' proposal. He regarded the change as extremely important.

19. Mr. HUDSON was of the opinion that the Commission had undertaken too much in trying to find a single rule. He thought his own approach to the matter was preferable. It was not necessary to use the word "accession"; the word "acceptance" was sufficient.

20. Replying to a question by Mr. FRANÇOIS, the CHAIRMAN said that there must be a full discussion of the point.

21. Mr. FRANÇOIS did not agree. What remained to be done was more in the nature of a skilful piece of drafting.

22. Mr. HUDSON also felt that the members of the Commission had found themselves largely in agreement during the discussion at the previous meeting.

23. Mr. SPIROPOULOS thought the best plan was to work out a formula covering all the proposals which had been submitted. The various instances mentioned by Mr. Hudson might be taken as a basis, and the Commission might see whether in a general way the new formula proposed by Mr. Kerno covered all cases. If Mr. Hudson considered that the new formula covered

⁵ See Comment on article 13 of the Harvard draft on the Law of Treaties, *American Journal of International Law*, vol. 29 (1935), Supplement, p. 853.

substantially all the cases he himself had had in mind, the Commission might perhaps accept Mr. Kerno's text.

24. Mr. HUDSON did not think Mr. Kerno's text covered all the cases he had had in mind. He instanced the Red Cross Conventions of 12 August 1949, which had been kept open for signature by the States represented at the Conference until 12 February 1950. Supposing State A and State B ratified without making reservations; State C ratified with reservations; and then ratifications came in from States D, E, F, etc. According to Mr. Kerno's proposal, the consent of the latter States to the reservations made by State C was not necessary.

25. Mr. KERNO (Assistant Secretary-General) said that he had not put forward his text without some diffidence; but he did feel that it was to some extent an improvement on the formula proposed by Mr. François, in that the crucial moment for deciding which States constituted the group that must give their consent to a reservation would, under his own scheme, not be the date of notification of the reservation, but the date on which the State making the reservation was finally bound. Mr. Hudson's text went much further and included among the States required to give consent the States he called D, E, F, etc. in the example he had given.

26. Mr. SPIROPOULOS took the same view as Mr. Hudson. It was not right to select the date of ratification by a State formulating a reservation as the decisive moment for determining the group of States entitled to withhold consent to that reservation.

27. The CHAIRMAN was of the opinion that it would undoubtedly be going too far to exclude from that group States signing the convention before the final date up to which the convention was open for signature.

28. Mr. HUDSON pointed out that another case not covered by Mr. Kerno's text was, for example, that of a convention which provided for entry into force following mere signature, and where all the signatures were affixed on the same day.

29. Mr. FRANÇOIS would not be averse to accepting a formula under which, if it were laid down that a convention was open for signature for a certain length of time, all the States which had signed before the expiry of that period would be included in the group.

30. Mr. KERNO (Assistant Secretary-General) said that the question was still further complicated by the fact that there were conventions which were open for signature indefinitely.

31. Replying to Mr. FRANÇOIS, who maintained that such cases were not provided for in the draft report, Mr. AMADO read out article 14 (c) of the Harvard draft, which did, he thought, cover such cases.

32. Mr. HUDSON said he could not accept article 14 (d) of the Harvard draft, which in his opinion went much too far.

33. At the request of Mr. YEPES, the CHAIRMAN suggested that the text read by Mr. Hudson be circulated to the members of the Commission, which in the meantime⁶ would carry on with the examination of paragraph 19 of his report. He read out sub-paragraph (4).

⁶ See paras. 83 *et seq.* below.

*Sub-paragraph (4)*⁷ (*sub-paragraph 1 of paragraph 34 of the "Report"*).

34. Mr. HUDSON pointed out that the sub-paragraph actually described the practice to be followed by depositaries of multilateral conventions, especially the Secretary-General of the United Nations. He thought that in the circumstances it would be better to say not "shall" but "should".

It was so decided.

35. Mr. SPIROPOULOS said that, as he had already intimated, in his view communication to the other States by the depositary of a multilateral convention was not an obligation. However, he had no objection if the Commission felt that such a measure would be useful.

*Sub-paragraph (5)*⁸ (*sub-paragraph 2 of paragraph 34 of the "Report"*).

36. Mr. HUDSON wondered whether in the first sentence the word "signed" should not be added before the words "ratified, acceded to or accepted".

37. Mr. KERNO (Assistant Secretary-General) supported Mr. Hudson. The obligation on the depositary under sub-paragraph (5) extended to mere signatories where they belonged to the group of States whose consent was necessary according to the formula to be adopted for sub-paragraphs (1) and (2). A reference back to that formula would be enough.

38. Mr. HUDSON was not in favour of reference from one article to another, as being inconsistent with good drafting.

39. On a proposal by Mr. HUDSON, the CHAIRMAN suggested replacing the words "no such information is received" in the second sentence of the sub-paragraph by the words "no objection is received".

40. Mr. YEPES asked whether the term "he may assume" left the depositary free to assume or not to assume that the State had consented to the reservation. He felt that that would be allowing the depositary rather too much latitude, and he would prefer to say "he should assume".

41. The CHAIRMAN accepted the suggestion, though he explained that that was what was meant by "may assume".

42. Mr. EL KHOURY considered that the second sentence of sub-paragraph (5) raised the very important question of tacit consent. In his opinion, it was expecting too much from States having the right to object to a reservation to regard them as having consented to the

⁷ Sub-paragraph (4) read as follows:

"(4) The depositary of a multilateral convention shall, upon receipt of each reservation, communicate it to all States which are or may become parties to the convention."

⁸ Sub-paragraph (5) read as follows:

"(5) The depositary of a multilateral convention, in communicating a reservation to the convention to a State which has ratified, acceded to or accepted the convention, shall at the same time request that State to express within a reasonable specified period of time its attitude towards the reservation. If no such information is received by the depositary within the specified period of time he may assume that the State has consented to the reservation."

reservation if they did not tender their objections to the depositary within the specified period. It was not a question of forcing the hand of possible subscribers, as was the practice of certain newspapers. Personally, he was not inclined to agree to such a formula, since he felt that consent should be expressed.

43. Mr. KERNO (Assistant Secretary-General) agreed that it was a very important question. Unless some sort of tacit consent were recognized, it would never be possible to ascertain what was the attitude of States and thus the status of the convention. The more extensive the group of States whose consent was necessary, the more desirable it was to recognize tacit consent. In practice, of course, any such rule would invariably be relaxed. Where a State found difficulty in making up its mind as to a reservation, it would always be at liberty to intimate that its silence must not be construed as acceptance, and the depositary would await a declaration from it in due course.

44. Mr. EL KHOURY pointed out that the other party might not accept that way of thinking. In any case an attitude of the kind on the part of the depositary would induce States to make provisional declarations to prevent their right to make objections from lapsing.

45. Mr. KERNO (Assistant Secretary-General) added that moreover it would never be possible to achieve perfection, and that he had given a great deal of thought to the problem.

46. Mr. CORDOVA thought it would be better if the idea put forward in the second sentence of sub-paragraph (5) — which he approved — were expressed differently. He did not care for the wording, which would give the depositary the right to determine the juridical effect for the States concerned of failure to make known their attitude, i.e. the loss of their right to make objections to the reservation.

47. The CHAIRMAN and Mr. KERNO (Assistant Secretary-General) thought the rule meant that if a State had not expressed any opinion within the specified period, the depositary would assume that it had given its consent, though it was understood that the State was at liberty to make any declaration it wished.

48. Mr. CORDOVA thought that, for that very reason, it would be preferable to express the idea differently and not to speak of “rules”, as at the beginning of paragraph 19, but of “practices”.

49. Mr. HUDSON agreed.

50. Mr. SPIROPOULOS, supported by Mr. CORDOVA, thought that instead of stating that the depositary might assume that the State had consented to the reservation it might be better to say that the State was “deemed” to have consented to the reservation.

51. Mr. SCALLE asked whether Mr. KerNO agreed that a State could ask for an extension of the time-limit for making objections to reservations, but lost that right failing any such request.

52. Mr. KERNO (Assistant Secretary-General) replied that that was so. The formula compelled States to reply to the communication of a reservation by the depositary.

53. Mr. SANDSTRÖM said that the sub-paragraph did not constitute a rule for the Secretariat, except in form. In actual practice, it would not be concluded that a State which had not made objections was deprived of its right.

54. Mr. HUDSON and Mr. SCALLE thought that if any extension of the specified period was to be allowed in practice, the fact should be mentioned in the text.

55. Mr. KERNO (Assistant Secretary-General) assured the members of the Commission that the Secretary-General of the United Nations, as depositary for multi-lateral conventions, had no desire to impose his will on States. At the same time, in the capacity of trustee for the parties, it was only natural that he should try to prevent a state of uncertainty lasting for an indefinite period. If States did not reply and it was not permissible to assume that they had given tacit consent, the situation would become impossible. All that States were asked to do was to make known their attitude within a period of x months. There was nothing abnormal or ominous about stating that if they had not made known their views by the time that period expired, they would be deemed to have given their consent.

56. Mr. HUDSON pointed out that the text which the Commission was endeavouring to draft would apply not only to the Secretary-General of the United Nations but to all depositaries.

57. Mr. EL KHOURY was not convinced that States would be legally bound to observe the specified period. It would amount to a virtual ultimatum. Unless there were any such obligation, silence could not be regarded as tantamount to consent. States anxious for a convention to become universal in scope could surely be assumed to be reasonable enough not to make objections to a reservation.

58. Mr. KERNO (Assistant Secretary-General) argued that tacit consent would actually promote universal application of the convention.

59. Mr. AMADO said that a State formulating a reservation to which an objection was made would always be entitled to accede to the convention by withdrawing its reservation.

60. Mr. CORDOVA thought that, if Mr. KerNO's idea were accepted, the sentence should be altered, so that the last part: “he may assume that the State had consented to the reservation” would read: “the State should be deemed to have consented to the objection”. He favoured giving the depositary that directive, but he did not favour granting him the power to determine the juridical effects of a State's declaration.

61. Mr. YEPES thought the wording should be “shall be deemed” since it was a presumption *juris et de jure* and the State waiving its option of making an objection must be deemed to have accepted the reservation.

62. The CHAIRMAN pointed out that Mr. CORDOVA's amendment covered that hypothesis.

63. Mr. HUDSON pointed out that sub-paragraph (4) read: “communicate it to all States” whereas sub-paragraph (5) read: “in communicating a reservation . . . to a State”. He thought the text should be redrafted as follows:

"The depositary of a multilateral convention, in communicating a reservation to the convention to States which have ratified, acceded to or accepted the convention, shall at the same time request such States to express within a specified period of time their attitude towards the reservation, and such period may be extended if this is deemed to be necessary. If within the period specified or extended a State fails to make its attitude towards the reservation known to the depositary, that State may be deemed to have consented to the reservation."

64. Mr. SCALLE said that even if by objecting a State could prevent a convention from entering into force, its failure to make known its attitude could not be allowed to produce the same effect. The line must be drawn somewhere. Mr. el Khoury had referred to the practice followed in regard to newspaper subscriptions. It might equally be argued that the Secretary-General of the United Nations was not a mere private individual but an international official. A time-limit must be laid down.

65. Mr. SANDSTRÖM mentioned that Mr. el Khoury had cited an instance where failure to tender an objection was not tantamount to consent. Such instances might be provided for by using the words "may be".

66. Mr. CORDOVA thought that a State which had not replied to the communication of a reservation could not indefinitely prevent the State making the reservation from becoming a party to the convention, and similarly that the depositary could not be kept waiting indefinitely. If a State did not reply, some sanction must be applied. Either the words "shall be deemed" should be used or nothing should be said about it.

67. Mr. EL KHOURY asked what, supposing a State declared that it did not accept an objection after it had been deemed to have given its consent and had been recorded as having done so, the position would then be? He did not see why one State should be excluded in favour of another. When the time-limit had expired the Secretary-General should inform the State in question that it was deemed to have given its consent. The reply from the State would show what the position was.

68. After a discussion of the terms "shall be deemed", "may be deemed", "should be deemed", and "is deemed", it was decided to use the expression "is deemed".

Sub-paragraph (5) as amended by Mr. Córdova, Mr. Hudson and Mr. Spiropoulos was adopted subject to drafting changes.

*Sub-paragraph (6)*⁹

69. Mr. SANDSTRÖM thought that the wording of sub-paragraph (6) should be brought into line with that of sub-paragraph (5).

70. Mr. HUDSON wondered whether the provision was really necessary. Sub-paragraph (5) was surely sufficient.

⁹ Sub-paragraph (6) read as follows:

"(6) When a State, subsequent to notice of a reservation to a multilateral convention, ratifies, accedes to or accepts the convention without express objection, the depositary may assume that the State has consented to the reservation."

71. Mr. KERNO (Assistant Secretary-General) maintained that it was a new notion and a very valuable one. The sub-paragraph laid down the rule of consent *per factum concludens*. In other words, it specified that a State performed an act and that act implied consent; where for example the State had been apprised of a reservation and accepted the convention without reference to the reservation, it could be deemed to have accepted it. Of course, if that State had already objected to the reservation, the objection would continue to be valid.

72. Mr. HUDSON assumed that if a State remained silent during the time-limit of x months, it would then be deemed to have given its consent.

73. Mr. KERNO (Assistant Secretary-General) replied that the case was not the same. A time-limit of x months was allowed for States to tender objections. In the instance referred to in the sub-paragraph under discussion, it was not necessary to wait until the end of that period to assume consent.

74. Mr. SCALLE asked whether it would not be better for sub-paragraph (6), which stated the general rule, to come before sub-paragraph (5), which referred to a specific case.

75. Mr. KERNO (Assistant Secretary-General) replied that sub-paragraph (4) laid down that the depositary of a multilateral convention would notify the other States on receipt of a reservation, without making any request; sub-paragraph (5) stipulated that those States having the right to make objections should be notified and asked to reply within a specified period — and incidentally be informed of the consequences of not making their attitude known; while sub-paragraph (6) dealt with the *factum concludens*.

76. Mr. SCALLE appreciated Mr. Hudson's objection. There did indeed appear to be some repetition.

77. Mr. CORDOVA took it that the depositary was to communicate the reservation to all States, allowing them a time-limit of x months to submit any objections. Supposing that meanwhile a State came along, tendered no objection, and ratified the convention. Would that mean that it had waived the rest of the period allowed?

78. The CHAIRMAN said it would.

79. Mr. HUDSON suggested the following version: "When a State, subsequent to notice of a reservation to a multilateral convention, ratifies, accedes to or accepts the convention within a period of x months without making objection, it is deemed to have consented . . ."

80. The CHAIRMAN suggested: "Within the period fixed in the preceding sub-paragraph after having received notice".

Sub-paragraph (6) was adopted with the above amendments.

*Sub-paragraph (7)*¹⁰ (*sub-paragraph (3) of paragraph 34 of the "Report"*)

81. The CHAIRMAN read out the sub-paragraph and

¹⁰ Sub-paragraph (7) read as follows:

"(7) The depositary of a multilateral convention shall communicate all replies to his enquiries, in respect of any reservation to the convention, to all States entitled to receive notice of such reservation."

remarked that the words "should communicate" might be substituted for "shall communicate".

82. Mr. HUDSON said that the sub-paragraph mentioned the replies to the communication referred to in sub-paragraph (4). He thought it better to use the same wording to express the same point, and instead of: "to all States entitled to receive notice of such reservation" to say: "to all States which are or may become parties to the convention".

Sub-paragraph (7) was adopted with the above amendment.

Sub-paragraphs (1) and (2) (sub-paragraphs 4 and 5 of paragraph 34 of the "Report") (resumed)¹¹

83. The CHAIRMAN invited the Commission to resume discussion of the following text submitted by Mr. Hudson:

"(1) If a convention enters into force as a consequence of its signature only, no further action being requisite, a State which makes a reservation at the time of its signature may become a party to the convention only if no objection is expressed by any State which has previously signed the convention, or which may become a signatory during a limited period for which the convention is open to signature.

"(2) *a.* If ratification or acceptance in some other form after signature is requisite to bring a convention into force, a reservation made at the time of signature is not to be taken into account unless it is repeated in the later ratification or acceptance of the convention.

"*b.* In such case, a State which tenders a ratification or acceptance with a reservation, whether the reservation was made at the time of its signature or later, may become a party to the convention only in the absence of objection made by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention: provided, however, that an objection made by a State which at that time had merely signed the convention will cease to have the effect of excluding the reserving State if after a period of 12 (possibly 18) months the State making the objection has not proceeded to effect its ratification or acceptance of the convention."

84. Mr. LIANG (Secretary to the Commission) did not see the point of the words "during a limited period" in sub-paragraph (1). If the convention provided for a time-limit, the period might or might not be limited. It was of no importance.

85. The CHAIRMAN agreed. One might say "during the period".

86. Mr. HUDSON said that the text applied to the very rare instances where States could sign a convention at any time and their mere signature would bring it into force.

87. Mr. KERNO (Assistant Secretary-General) said there had been instances of that during the League of Nations days.

88. Mr. SCALLE pointed out that there might be a considerable number of specialized agency conventions open for signature without any specified time-limit.

89. Mr. HUDSON thought that the idea of a time-limit was necessary.

90. Mr. KERNO (Assistant Secretary-General) pointed out that the Harvard draft (article 14 (c)) embodied the same idea. If the time-limit was not specified, the time of entry into force of the convention would be decisive. If the State making a reservation signed after the convention had entered into force, the time of signature would be decisive in determining what States were entitled to raise objections to the reservation.

91. The CHAIRMAN confirmed that if the convention was open for signature indefinitely, it remained so until its entry into force.

92. Mr. HUDSON thought that the examples were not sufficiently numerous to justify provision for such instances.

93. Mr. YEPES said that though he was sure the majority of the Commission would not share his view, he would like to make a final effort to prevent a mistake being made. He would like the wording to be: "only in the absence of objections formulated by a majority of the States". He wished to prevent the veto from being extended to a sphere where it had no place.

94. The CHAIRMAN pointed out that the proposal would mean an entirely different text. He did not imagine the Commission would wish to go back on its previous decision.¹²

Sub-paragraph (1) was adopted subject to drafting changes.

95. Mr. YEPES asked whether the expression "any State which has previously signed the convention" meant that a single State could object to another State becoming a party to the convention, in other words whether the article implied the unanimity rule.

96. Having received an affirmative reply from the Chairman, he pointed out that he had voted against the adoption of the sub-paragraph.

Sub-paragraph (2)

97. Mr. FRANÇOIS was not altogether happy about the text. So long as the convention was not ratified, the reservation would of course be taken into account, e.g. the depositary would be required to communicate it; but the reservation would only become fully effective at the time of ratification. He did not think the words "is not to be taken into account" were suitable.

98. Mr. KERNO (Assistant Secretary-General) saw Mr. François' point. The question was which States were entitled to submit objections and at what juncture that right would apply. If a given convention provided for signature and ratification, the important time was not the time when the State making a reservation signed the convention, but the time when it ratified.

99. With regard to the drafting, he had certain misgivings about sub-paragraphs (2) *a* and *b*. Sub-paragraph (2) *b* started off: "In such case...". Thus it appeared to refer to cases in which signature was followed by ratification or acceptance. But accession was also a

¹¹ See paras. 5 to 33 above.

¹² See summary record of the 103rd meeting, paras. 45 and 62-63.

method of becoming a party to a convention and accession was not preceded by signature. The latter case was not covered by the present wording of sub-paragraph (2) *b*.

100. Mr. HUDSON took the case of an instrument which was not signed at all, for example an instrument open merely for accession, such as the Geneva General Act of 26 September 1928. A new sub-paragraph would be needed beginning with the words "In such case" and then repeating the first two lines of sub-paragraph (2) *a*. The case of accession would not be covered; it was, however, desirable to cover it.

101. Mr. LIANG (Secretary to the Commission) asked whether accession was not covered in (2) *a* by the words "in some other form".

102. Mr. HUDSON said that by deleting the words "after signature", accession would be covered. He suggested deleting the phrase "whether the reservation was made at the time of signature or later". He also suggested making a single sub-paragraph and deleting the letters *a* and *b*.

103. Mr. FRANÇOIS asked whether it would not be advisable to add in (2) *b* also the words "or which may become a signatory..." as given at the end of sub-paragraph (1). Sub-paragraph (2) should also provide for the case of States which still had the right to sign. If signature was permissible within a certain time-limit, and before the time-limit for submitting reservations had expired a State had not signed but was at liberty to do so, it should enjoy the same rights.

104. The CHAIRMAN suggested: "or otherwise accepted the convention if the convention is open to signature; provided...".

105. Mr. HUDSON agreed to the amendment. He suggested "shall have no effect".

106. Mr. FRANÇOIS again proposed the addition of: "or which may become a signatory during a specified period for which the convention is open to signature" before the word "provided".

107. There was another point on which his proposal differed from Mr. Hudson's. In Mr. Hudson's proposal the period of twelve or eighteen months during which a mere signatory could object to a reservation started from the moment the objection to the reservation had been communicated. According to his own system, the three-year period would start from the time of signature by the State making the objection. That was a considerable difference. In practice, his own system would be preferable; suppose, for example, that immediately after signing a treaty, a State communicated an objection to a reservation. According to Mr. Hudson, the State would be told that it had twelve months in which to ratify. Twelve months was a very short time. If it made its objection three years after signature it would be told that though it had waited three years, it still had another twelve months. He saw no advantage in the system advocated by Mr. Hudson and he could not understand why Mr. Hudson should object to the specified period starting from the moment of signature by the State making the objection.

108. Mr. AMADO drew attention to the words "in some other form". The procedures for acceptance of a convention were so cut and dried that it was not clear why the expression "in some other form" should be used, since it could only refer to accession.

109. Mr. HUDSON explained that the words "in some other form" or "otherwise" referred to accession and acceptance. He thought it could be left to the rapporteur to put the text into proper shape.

110. Mr. François' observation worried him somewhat; but the opposite case might arise, namely, delay in ratification. Supposing a State signed, and two or three years elapsed before another State decided to ratify the convention with a reservation. The first State then raised an objection, but if its objection was to be effective, that State must deposit its ratification within three years of signature. In that case the specified period would have to be extended. That, rather than the necessity for taking signature as the starting point for the specified period, was the logical conclusion to be drawn from Mr. François' argument.

111. He was prepared to delete the reference to twelve or eighteen months and merely to say *x* months, which might mean thirty-six months. The Assembly might possibly adopt the text and still leave the period unspecified.

112. Mr. FRANÇOIS thought that the period could be left blank, but that a choice would have to be made between the two systems. Was the period to start from the date of signature or from the time when the objection was made?

113. Mr. HUDSON was opposed to Mr. François' system. Years might elapse before any State made a move.

114. Mr. FRANÇOIS replied that if a period of three years were fixed, it would be most unusual if no State made a move.

115. Mr. HUDSON said that he could cite many examples to the contrary. There must in any case be at least one year and then another six months. Suppose then that at the end of eighteen months a State came along and made a reservation; the signatory would still have eighteen months. He repeated that it was an argument for extending the period.

116. The CHAIRMAN pointed out that the *terminus a quo* was not mentioned in the text of sub-paragraph (2) *b*. He would like to know when the period of eighteen months would start.

117. Mr. HUDSON replied that the period would count from the time when the objection was made, and he agreed to insert words to that effect in the text.

118. Mr. ALFARO thought that if the system were adopted under which the period would begin on the date on which the objection was made, every signatory State would come up against a difficulty. There must be a starting-point for each State. He suggested that the period should be three years, starting from the date of signature.

119. Mr. KERNO (Assistant Secretary-General) asked what would happen if the signatures were not affixed simultaneously.

120. Mr. ALFARO replied that the period would begin from the time the treaty was open for signature or from some other date. The essential point was that the beginning of the period should be the same for all signatories.

121. Mr. HUDSON said that supposing only one State among twenty signatories of a convention had submitted an objection. It had the right to do so, but it would be told that if it made an objection, it should give evidence of its good faith by ratifying. The important point was to lay down a rule which would provide a safeguard against abuse of the right to make objections. If in the course of the specified period ratification by the State which had tendered the objection were not forthcoming, the reservation would become effective in respect of the other States. If later the State which had tendered the objection decided to ratify, it would have to ratify on the basis of acceptance of the reservation.

122. Mr. FRANÇOIS pointed out that, under Mr. Hudson's system, a signatory State acting in bad faith got the advantage of an additional period of grace after it had already delayed ratification for three years.

123. Mr. HUDSON replied that in such circumstances the period of grace should be curtailed. In his opinion it was nonsense to speak of the right of veto in the matter.¹³ A State acting in bad faith would abuse its right as a signatory by presenting and maintaining an objection. Hence the specified period must not be too long.

124. Mr. FRANÇOIS thought that as the two viewpoints had been clearly explained the Commission should make its choice.

125. The CHAIRMAN asked the Commission to decide as to when the prescribed period should begin. He himself thought the date of the objection should be adopted.

It was so decided by 6 votes.

126. The CHAIRMAN considered it would be better not to specify the actual period but to call it x months.

127. Mr. FRANÇOIS asked why the period should not be specified.

128. Mr. HUDSON thought the General Assembly might be told that twelve months would be a suitable period.

129. Mr. SPIROPOULOS thought the important point was to decide whether that question came within the scope of codification. If so, a definite period must be fixed.

130. Mr. HUDSON replied that it was being dealt with in connexion with codification. The Commission was not stating that that was the law, but that it was the best method of achieving results.

131. The CHAIRMAN pointed out that the question would be dealt with in a special report to the Assembly.

132. Mr. SPIROPOULOS said that the rules in question would be inserted in Mr. Brierly's report. There was no doubt on that point. The Assembly wished the Commission to give priority to that section of Mr. Brierly's report, but the section in question would come within the general framework of the draft on treaties. Hence a definite period must be fixed.

133. The CHAIRMAN thought it would be time enough to do so when the Commission examined the draft Convention on Treaties.

134. Mr. AMADO thought Mr. Spiropoulos was right. The Commission was reaching a conclusion which he considered scientific. The fact that the Commission was replying to a specific question put by the General Assembly did not make its reply any less significant.

135. The CHAIRMAN replied that it was too soon to embark on that question.

136. Mr. SPIROPOULOS said he would not press the point, though he thought that the same rules should apply in both cases.

137. Mr. HUDSON agreed that they should be consistent, though not necessarily identical.

It was decided that the period should be specified, and the duration should be 12 months.

The meeting rose at 6 p.m.

106th MEETING

Tuesday, 19 June 1951, at 9.45 a.m.

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Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

¹³ See para. 93 above.