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Summary record of the 651st meeting

Topic:
Law of Treaties

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to transfer part of them to the provisions on ratification and part to those on accession.

85. The CHAIRMAN said that the Drafting Committee always had authority to take such action. If there were no objection, he would consider that the Commission agreed to refer article 16 to the Drafting Committee, with the comments made during the discussion.

It was so agreed.

The meeting rose at 12.45 p.m.

651st MEETING

Friday, 25 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (*continued*)

ARTICLE 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS

ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS

ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS

1. The CHAIRMAN invited the Commission to consider articles 17, 18 and 19, on reservations.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the three articles would be amended in respect of certain points of detail on which the Commission had already expressed its views. For example, the references to the "competent authority" of the reserving state would be deleted, in keeping with the decisions concerning earlier articles relating to ratification and accession.

3. For the moment, he wished to discuss only certain questions of principle which affected the ultimate shape of the draft articles. The first concerned the freedom to formulate reservations. His approach was not based on the notion of absolute sovereignty; he considered that there existed a presumption that states were free to formulate reservations unless the treaty, either expressly or by implication, clearly excluded that right, or unless the reservation in question was contrary to the established usage of an international organization.

4. In article 17, paragraph 2(a), he had attempted to give expression to the principle stated by the International Court of Justice on question I in its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.¹ The principle was a sound one, although it did not provide any objective test of the legitimacy of a reservation, other than the opinion of each state as to whether the reservation was compatible with the object and purpose of the treaty.

5. Admittedly, the statement of the principle in article 17, paragraph 2(a), was imperfect; no sanction was

laid down and no effects were indicated in articles 18 and 19. He had had considerable hesitation on that point because he had been anxious to confine the draft articles to the statement of effective principles and to avoid mere exhortations. However, the ruling of the International Court had great value as a statement of principle and the debates in the General Assembly had shown that it enjoyed a measure of support from states.

6. For the purpose of determining the effective law in the matter, the objective tests remained consent, dealt with in article 18, and objection, dealt with in article 19. A subjective criterion such as that laid down in article 17, paragraph 2(a), could only be applied if an independent authority could decide on the question of the compatibility of reservations; that would be possible if, as a general rule, treaties contained an arbitration clause for judicial settlement.

7. Articles 18 and 19 raised again the problem of the distinction between multilateral and plurilateral treaties which the Commission had already discussed at length in connexion with article 13. They also raised the question which states would have a voice in the matter of consenting or objecting to reservations, as well as the more complicated question of the time-limit after which objections were to be considered as having ceased to have effect.

8. His attention had been drawn to the 1959 debates in the Sixth Committee and in the plenary General Assembly on the item entitled "Reservations to Multilateral Conventions; the Convention on the Inter-Governmental Maritime Consultative Organization". The debate had resulted from the objections by France, and in a somewhat modified form by the Federal Republic of Germany, to a reservation made by India in its instrument of acceptance of that Convention, and had led to the adoption of General Assembly resolution 1452 (XIV) of 7 December 1959.

9. By operative paragraph 1 of part B of that resolution, the General Assembly had amended paragraph 3(b) of its resolution 598 (VI) of 12 January 1952. The amendment had had the effect of broadening the instructions given in 1952 to the Secretary-General to communicate to all states concerned the text of reservations or objections made to conventions concluded under the auspices of the United Nations, of which he was the depositary. Whereas the 1952 instructions had referred only to conventions that might be concluded in the future under United Nations auspices, the 1959 resolution requested the Secretary-General, in his capacity as depositary, to apply paragraph 3(b) to his practice "in respect of all conventions concluded under the auspices of the United Nations which do not contain provisions to the contrary", and not only to those concluded after 1952. The debate in the General Assembly which preceded its 1959 decision had indicated a tendency on the part of the Assembly to assert authority in regard to conventions concluded under United Nations auspices.

10. Mr. AMADO noted that the special rapporteur had cited in paragraph 2 of the appendix to his report a memorandum which he (Mr. Amado) had submitted to

¹ I.C.J. Reports, 1951, p. 29.

the Commission in 1951² and in which he had taken a very radical stand. He had since modified his views, having re-examined the question in the light of the advisory opinion of the International Court of Justice to which the special rapporteur had just referred.

11. The ten years which had elapsed since he had submitted his memorandum had brought much closer the proponents of different theories regarding reservations to multilateral conventions. Opinions had inevitably been influenced by the new forces at work in the international community; for example, the principle of universality, which had once been a mere rhetorical formula, had since asserted itself as a very real fact.

12. The progressive approach adopted by the special rapporteur took those new developments into account and he found himself in broad agreement with what the special rapporteur had to say in his commentary on the subject of the compatibility of reservations.

13. He urged the Commission to avoid a general discussion on matters of principle concerning reservations, a discussion which could become unduly prolonged. It would be better to concentrate on the text of the draft articles, so well elucidated by the special rapporteur's excellent commentary.

14. The CHAIRMAN said that, since no one was asking to speak, he would take the initiative of calling on members to speak, starting with Mr. Verdross, Mr. Tunkin and Mr. Briggs.

15. Mr. VERDROSS said he agreed with Mr. Amado that the Commission should analyse the draft provisions, article by article. He commended the special rapporteur for his proposals, which broadly reflected developments in international law over the past decade.

16. Mr. TUNKIN said that articles 17, 18 and 19, although generally acceptable, were too detailed for the purposes of a draft convention.

17. The provisions on reservations should first of all specify the right or faculty of a state to formulate reservations. They should then envisage two possibilities: when the treaty contained a provision on reservations, and when the treaty was silent.

18. The provisions of article 17, paragraph 1 (a), could be condensed more or less along the following lines: "A state is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation, as defined in article 1, unless the making of reservations is prohibited or restricted by the terms of the treaty".

19. The contents of sub-paragraphs 1 (a) (ii) and (iii) could then be dropped. He also doubted the advisability of including the provisions contained in paragraph 1 (b) and paragraph 2.

20. After the Commission had completed its general discussion on articles 17, 18 and 19, the special rapporteur should submit a simplified redraft of those

articles. That procedure would expedite the work of the Commission.

21. Mr. BRIGGS said he agreed with Mr. Tunkin that article 17 could be drastically simplified. Paragraphs 1 (a) and 1 (b) could be combined into a single paragraph, consisting of the opening sentence of paragraph 1 (a) followed by the proviso: "Unless the treaty prohibits or restricts the making of reservations . . ."

22. At the same time, the opening words of paragraph 1 (a), "A state is free", should be replaced by the words "a state is legally entitled", since the provision dealt with the "formulation" rather than the "making" of reservations.

23. The principle enunciated in paragraph 2 (a) was sound but not easy to apply. He suggested that the contents of that paragraph should be retained as guidance for states which had to make a decision whether to consent or object to particular reservations.

24. He did not know whether paragraph 3 (b) reflected existing custom, but he would have no objection to the inclusion of that provision.

25. With regard to article 18, he accepted as a sound basis for discussion the principle stated in paragraph 1. There had been some objection to the presumption of consent expressed in paragraph 3, but he thought it would be desirable to retain that presumption.

26. With regard to paragraph 4 (a), he accepted the proposition that in the case of a bilateral treaty the consent of both parties was necessary for the acceptance of a reservation. He also accepted the proposition that the unanimous consent of states was necessary in the case of reservations to a multilateral treaty restricted to a group of states.

27. He was not at all certain, however, that the two provisos laid down in sub-paragraph (b) (i) were necessary.

28. The essential provision of paragraph 4 was that contained in sub-paragraph (b) (ii). That sub-paragraph went too far, however. He had already drawn attention during the general discussion³ to the three propositions put forward by the late Sir Hersch Lauterpacht and quoted by the special rapporteur in the appendix to his report. In line with those propositions he favoured a system under which a State could not append reservations to a multilateral treaty and become a party to it unless those reservations were approved by two-thirds of the states parties to the treaty.

29. With regard to article 19, paragraph 4 (c) was unduly broad. There were serious grounds for doubting the wisdom of allowing states to formulate any reservation they desired. For example, in a disarmament treaty, the system of paragraph 4 (c) could well result in two completely different systems, inspection and control for some parties, and absence of inspection or control for others, existing for different states under one and the same treaty.

² *Yearbook of the International Law Commission 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), pp. 17-23.

³ 637th meeting, para. 21.

30. Mr. AGO said that the special rapporteur had had the choice between two approaches to the problem of reservations to multilateral conventions. He could either have considered the admissibility of reservations as the rule, and laid down the exceptions to that rule; or he could have considered as the rule that reservations were admissible only in specified cases. Before the Commission went on to examine the procedure, the effects and the admissibility of reservations, it should reach agreement on the fundamental question of the choice between those two approaches.

31. He commended the special rapporteur for taking account of the current situation in international practice and adopting the first approach. Multilateral conventions had grown in number and the process of accession had become more and more general. An unduly rigid rule in regard to reservations would hamper international legislation. He therefore proposed that the Commission should adopt the same approach as the special rapporteur and consider reservations as admissible in principle, provided it was clearly stated when they were not admissible.

32. When signatory states prepared a multilateral convention and opened it for signature or accession by other states, they were in fact making an offer to other states. The question then arose whether the signatory states had meant that offer to be indivisible, so that other states would have only the choice between accepting the whole treaty and deciding not to join it. If the offer was indivisible, no reservations were possible. If however, the signatory states had left the door open to partial acceptance of their offer, it would be possible for other states to make reservations.

33. The special rapporteur had proceeded on the assumption that the most frequent case was that of an offer which admitted of partial acceptance. The problem was an easy one if the treaty contained express provisions on the subject. Those provisions could contain one of three types of statement: either, that reservations were possible to any of the clauses of the treaty; or, that reservations were possible to all the clauses, except a few specified ones; or, that reservations were possible only to certain specified clauses. The question of reservations would in all those cases be governed by the actual terms of the treaty; the detailed formulation contained in paragraph 1 (a) of article 17 did not appear necessary, except perhaps in so far as sub-paragraph (iii) referred to a comparatively easy problem of interpretation.

34. The real problem arose when the treaty was silent on the subject of reservations. The omission of a reservations clause could give rise to considerable difficulties. Heated debates had taken place at the Geneva Conference on the Law of the Sea in 1958 between those who had advocated freedom of reservation in respect of certain articles of the Second Geneva Convention and others who had proposed that that freedom should be restricted.⁴ In the event, no provision

on reservations had been included in the Convention, with the result that widely different interpretations had been given. Some had maintained that reservations were not admissible to any of the articles of the Geneva Convention. Others had claimed that reservations were possible to all the articles.

35. He did not believe that, as a general rule, either of those extreme views was correct. The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible.

36. There were cases, particularly where the text of the treaty was short, where the various parties to the treaty made mutual concessions, each accepting one of the clauses of the treaty in return for the other's acceptance of another clause. In such cases, if reservations to an isolated clause were permitted, the result might well be that each state would select that part of the compromise which suited it and reject the counterpart, thus vitiating the compromise. The basic purpose of a compromise solution was not to work out an agreed text, but to formulate an effective universal rule which would be binding on all parties.

37. The problem was how to interpret the intention of the parties as expressed at the time of the preparation of the treaty, in order to determine the contents of the offer made by the signatory states to other states.

38. In view of the serious difficulties which had arisen in practice at the time of acceptance of, or accession to, multilateral treaties, he urged the Commission to recommend that states should not fail to include a reservations clause in multilateral treaties, specifying the articles to which reservations were admissible or, alternatively, those to which reservations were not admissible. Certainty was one of the foundations of law, and the Commission would be rendering a great service to states by helping to dispel uncertainties in the legal relationships between them.

39. Mr. BARTOŠ said that, like Mr. Amado, he had changed his views over the past ten years. In the past, he had opposed the Latin-American doctrine favourable to reservations and had been a determined advocate of the doctrine of the integrity of treaties then generally held on the continent of Europe. That doctrine maintained that there should be a strict balance of obligations in a treaty. Reservations were only admissible in two cases: first, where the signatory states had included an express provision to that effect in the treaty; and, second, where all the states participating in the treaty accepted the reservations.

40. A new trend had become apparent in international law in consequence of the opinion given in 1951 by the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, and of the General Assembly debates on the subject of reservations to multilateral conventions which had led to the adoption of resolu-

⁴ *United Nations Conference on the Law of the Sea, Official Records, Vol. II* (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 71.

tions 598 (VI) of 12 January 1952 and 1452 (XIV) of 7 December 1959. The tendency was now to examine whether reservations were compatible with the general tenor of a multilateral treaty and whether they did not conflict with the aims of the treaty.

41. He had arrived at the conclusion that in certain cases reservations could serve to facilitate the application of rules of international law laid down in multilateral treaties. He agreed with Mr. Ago that the question of the admissibility of reservations could only be answered by interpretation of the intention of the signatory states to the treaty; the question to be determined was whether the offer made by the signatory states to other states was an indivisible one or not.

42. It was possible in multilateral conventions to draw a distinction between those clauses which admitted reservations and those to which reservations were clearly impossible. On the analogy of private law, the latter could be considered as in the nature of *jus cogens* and the former as in the nature of *jus dispositivum*.

43. The General Assembly at its sixth session had not been particularly favourable to reservations but had accepted their admissibility in principle; it had then adopted its resolution 598 (VI) recommending to states that they should consider, in preparing multilateral conventions, the insertion of provisions relating to the admissibility or non-admissibility of reservations and to the effects to be attributed to them. In adopting that resolution, the General Assembly had moved away from the rigid doctrine of the integrity of treaties.

44. The Commission should steer a middle course between two extremes: rejection of reservations unless accepted by all the signatory states, and absolute freedom to make reservations. The former doctrine would hamper the development of international relations, while the latter would lead to innumerable conflicts on the compatibility of reservations with the essential purpose of a treaty.

45. The special rapporteur had acted wisely in adopting an intermediate position between those extreme views; the articles he proposed provided for freedom to make reservations, but restricted it within reasonable limits; they also provided for freedom to object to reservations, again within reasonable limits. He supported generally the special rapporteur's approach which safeguarded the principle that reservations had to be compatible with the object and purpose of a multilateral treaty.

46. Mr. LACHS said that, on the whole, the special rapporteur's draft articles and commentary represented an important advance in the matter of reservations; the draft would tend to encourage the widest possible participation in treaties. The special rapporteur had been largely successful in drawing the proper conclusions from the various elements of the question discussed in the commentary.

47. He disagreed with Mr. Ago and Mr. Bartoš that any treaty open to accession constituted an offer, for a state whose application to accede was refused had no redress. The analogy with private law was therefore a false one, because in private law if an offer had been

accepted and the offerer declined to carry out his share of the bargain, a claim could lie.

48. Mr. Ago's thesis, if accepted, would imply that the increasing trend towards accessions to multilateral treaties would take the form of a series of bilateral agreements.

49. On the whole the definition of reservations proposed by the special rapporteur in article 1 (I) was a sound one and should help to prevent the misuse of the term to describe conditions which were not reservations. He agreed that an essential feature of a reservation was its unilateral character. On the other hand he doubted whether the use in the definition of the word "condition" was appropriate; surely what was meant was more in the nature of a proviso. The second sentence in the definition was correct, and he particularly congratulated the special rapporteur on the felicitous precision of the phrase "which will vary the legal effect of the treaty". That sentence also covered the cases, which were not unknown, where a reservation, instead of restricting, extended the obligations assumed by the party in question, as had happened with one of the reservations to the General Agreement on Tariffs and Trade.

50. Perhaps the definition would need to be amplified by explicit reference to the kind of reservations that had to be made by federal states and similar entities in accordance with their constitutional requirements.

51. With regard to article 17, he agreed with Mr. Tunkin that no problem arose if the treaty itself made provision for reservations. What the Commission was concerned with was the presumptions to be made if the text of the treaty was silent.

52. The phrase the "nature of the treaty" in article 17, sub-paragraph 1 (a) (i), might need to be interpreted. On that point the special rapporteur had correctly relied on the advisory opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

53. However, he had some doubts about the reference in the same clause to the "established usage of an international organization", for the problem of reservations could arise at the outset of its existence when no usage had yet grown up.

54. As to the limits to be set on reservations, he believed that the special rapporteur had rightly linked the two criteria, that they must be compatible with the object and purpose of the treaty and must be accepted by other states, while admitting that the two might give inconsistent results.

55. He had some doubts as to the wisdom of the view taken by Sir Hersch Lauterpacht in the fourth of his alternative drafts for an article on reservations, that the question whether a reservation was compatible with the objects of the treaty should be determined by the International Court of Justice⁵ or, as suggested some time

⁵ *Yearbook of the International Law Commission, 1953, Vol. II* (United Nations publication, Sales No. : 59.V.4, Vol. II), p. 134.

ago by Fenwick, by the Legal Committee of the General Assembly. The decision should be made by the parties, for they were the masters of the treaty.

56. Though he agreed with other speakers that the drafting of article 17 could be made more concise and that some of the points could be transferred to the commentary, that in no way detracted from the value of the special rapporteur's work.

57. Mr. AGO, in reply to Mr. Lachs, said that in speaking of offer and acceptance he had not drawn an analogy with private law but had drawn attention to the nature of consent. If a treaty was not open to accession, or if a state's request for accession was refused, there had been no offer and could be no acceptance. The Commission should not overlook the essential element of consent.

58. However, he had been reassured to hear Mr. Lachs' conclusion that, because of the difficulty of applying the criterion of compatibility with the object of a treaty, the consent of the parties would be decisive.

59. A whole series of questions would have to be considered, particularly those connected with reservations to constituent instruments of international organizations or conventions concluded within the framework of international organizations, and the Commission would have to differentiate clearly between those questions.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that what he had had in mind in drafting the second proviso in article 17, sub-paragraph 1 (a) (i), was the Charter of the United Nations which, by its nature, was not open to reservations, and in the third, treaties such as those concluded within the International Labour Organisation.

61. He had sought to cover existing practice. Of course, article 17 could be simplified but the Commission should first be absolutely clear as to the consequence of any suggested omission and take some general decision on the principle, which he did not think could be separated from the machinery of making reservations. Some objective criterion should be laid down, since otherwise the admissibility of reservations would be left to be determined by the parties. Admirable as were Sir Hersch Lauterpacht's ideas, they were inapplicable: the Commission had to face the realities of international life, one of which was that it was often not possible to include in treaties a jurisdictional clause for the handling of disputes, including disputes as to reservations.

62. Mr. LACHS, in reply to Mr. Ago, said that his argument could not be so lightly dismissed. It was extremely dangerous to transpose institutions of domestic law to the plane of international law.

63. Mr. YASSEEN said that the principles governing the question of reservations should derive from the treaties themselves, and he had in mind not only express provisions but also the tacit intention of the parties, as well as the nature and purpose of the treaty.

64. The faculty of making reservations should be accepted as the general principle, particularly where

open treaties were concerned; it was similar to the right to accede. In his opinion, a state which had the right to accede could also formulate reservations, unless reservations were barred by the terms of the treaty itself. The special rapporteur seemed to be more or less of that view and the Commission should be able to achieve an acceptable result on the basis of the three articles he had prepared, which, though detailed, provided a better foundation for discussion than something in more summary form. Once agreement had been reached on the questions of principle, the texts could be simplified.

65. Mr. CADIEUX said that, in drafting the provisions on reservations, the Commission would have to choose between stating the rule that, in general, reservations were admissible except in certain instances, and stating the contrary rule that they were only allowed exceptionally. The former had greater regard for the will of the parties, and since treaties were often the outcome of a delicate process of negotiation and compromise, the possibility of making reservations might be considered necessary. It was, however, no easy matter to determine whether a treaty could be regarded as divisible and which elements could be open to reservations.

66. The contrary rule could prove arbitrary. He therefore found the special rapporteur's solution acceptable.

67. Mr. CASTRÉN said that he had not yet made up his mind about the three articles and reserved the right to comment further at a later stage in the discussion. The four alternatives proposed by Sir Hersch Lauterpacht in 1953 were not acceptable. At first sight the articles proposed by the special rapporteur appeared to be satisfactory and took account of new developments in the practice of states and of the United Nations. The special rapporteur had borne in mind the Court's advisory opinion and also various systems of making reservations but had arrived at a set of rules independently.

68. Article 17 could be shortened. He agreed with Mr. Tunkin's suggestion for paragraph 1; paragraph 1 (b) was redundant and could be omitted.

69. Mr. TSURUOKA said that, in its draft provisions concerning reservations, the Commission's task was to reconcile the principle of the integrity of treaties with the ideal of the universality of treaties, especially of general multilateral instruments. As it would not be easy to reconcile the two, the Commission should seek the golden mean and establish a rule which would satisfy the greatest possible number of states. That course was particularly desirable because the basis of successful drafting was respect for the will of states.

70. The whole question of reservations had given rise to vigorous discussion and had become serious as a result of a recent tendency to make reservations with a view to deriving certain advantages therefrom. Broadly, the practice in the past had been to make and admit reservations only if states were obliged to take that course to protect their vital interests. The new psychological shift was regrettable, and in remedying the situation, the Commission would be rendering a

service to the international community. It should not give the impression that it was in any way encouraging reservations, but on the other hand, the rule it laid down should be flexible enough to take modern developments into account.

71. Mr. TABIBI said that the question of reservations had acquired greater importance in the past fifty years, as a result of the increase in the number of treaties concluded, in the number of the parties to treaties, and of the number of topics covered by treaties. Landmarks in the history of reservations had been the treatment of the reservation of China to the Treaty of Versailles in 1919, the rejection of the Austrian reservation to the 1925 Opium Convention and the manner in which the International Court of Justice had dealt with reservations to the Genocide Convention in 1951. The special rapporteur's draft took those developments into account.

72. It also reflected the principle of the consent of states, which was supreme in the modern development of international law on the matter. Indeed, among all the important cases which the special rapporteur had studied, no case could be found where the consent of the other parties to a reservation had not been given, either expressly or implicitly. On the other hand, no case could be quoted as a precedent for the theory that any state could make any reservation it wished. Nevertheless, the attitude of the law to treaty-making gave the parties wide discretion in the practice of concluding treaties; subject to the maintenance of the principle of consent, the parties were free to adopt the machinery most acceptable to them. There was nothing to prevent the parties from stipulating that reservations would not be permitted to a particular treaty, as had been done in the case of Article 1 of the covenant of the League of Nations. He agreed with Mr. Ago that, even if a treaty was silent on the subject, reservations could be made on the basis of the interpretation of the treaty itself. In short, he supported the theory of the supremacy of consent, and the right of every state to make reservations.

73. Although there was no denying the right of states parties to a treaty to object to a reservation, a difficult question arose if a minor reservation made for purely constitutional reasons was rejected for political or other reasons, in order to prevent the reserving state from becoming a party to the instrument. That point should be referred to in the draft, and machinery should be devised to obviate such abuses.

74. Mr. ROSENNE, expressing general agreement with the approach of the special rapporteur, said he thought that, since the phenomenon of an organized international society had now become a reality, the scope of the general debate on the subject of reservations should be limited to the major preoccupation of international law, of international organizations and, indeed, of international relations, namely, the problem of reservations to multilateral general treaties. The question of reservations to bilateral or plurilateral treaties should therefore be set aside, since the considerations which applied to them were quite different. Moreover, it was mainly in connexion with reservations to universal multilateral

conventions that the General Assembly had asked the Commission for guidance.

75. The general multilateral convention was a special and unique instrument of public international law, and its use and significance were bound to develop with the expansion of the international community and as the needs of that community became increasingly varied; no one could prophesy an end to the development of that institution. As a result of that expanded use, the problem of reservations had long ceased to have a merely juridical or doctrinal significance, but had also acquired political importance.

76. The multilateral convention was essentially an institution of public international law, and he agreed with Mr. Lachs and other members as to the decreasing value of concepts derived from any system of civil law, since civil law systems had no comparable institution performing simultaneously both legislative and contractual functions and which was in principle based on the consent of the states.

77. He also agreed with Mr. Lachs that the Commission was drafting a residual rule, and that it would be wise to base it on a series of presumptions. However, those presumptions should be flexible; Mr. Tabibi had rightly pointed out that the draft should not encourage reservations, but it would be unrealistic, and probably contrary to the functions of multilateral conventions, to exclude reservations altogether.

78. Furthermore—and that was another consideration which should limit the discussion—reservations to general multilateral conventions were entirely distinct from so-called reservations sometimes encountered in connection with the admission of states to international organizations. The unilateral character of reservations had been rightly stressed, whereas the applications for admission to which he had referred were essentially contractual; that type of problem therefore did not fall within the scope of the debate, although it might be dealt with at a later stage. In that connexion, he did not consider that the term “the established usage of an international organization” used in article 17, subparagraph 1 (a) (i), applied to the constitution of the organization concerned, but only to treaties concluded under its auspices, where the constitution of the organization contained treaty-making provisions.

79. Despite the widespread criticism levelled against the advisory opinion of the International Court in 1951 in the case of Reservations to the Genocide Convention, the special rapporteur had boldly incorporated the compatibility test as a general guide to the making of reservations in article 17, paragraph 2. In his (Mr. Rosenne's) opinion, that provision represented a considerable step forward in clarifying the international law on the subject, especially when accompanied by the more objective tests of articles 18 and 19. Admittedly, some extremely delicate problems of application might arise, but the system was essentially workable. Some differentiation should, however, be made between the application of the test by states and its application by the depositary, whether the secretariat of the organization concerned or a state designated for that purpose.

Where the Secretariat was the depositary, the principle laid down by the General Assembly in its resolution 598 (VI) was that the depositary should adopt a neutral position, and should not pronounce on the legal effects of the reservation or of objections to it. The Commission would have to consider whether the same principle should not also apply where the depositary functions were entrusted to one of the Contracting Parties. The principle proposed by the special rapporteur for determining the compatibility of a reservation with the object of a treaty seemed to be reasonable, but it might be wise to extend it to all the three articles. Its application to article 19, in particular, would correspond to the opinion of the International Court in 1951 on Question II in the Genocide Convention case, when it had applied the compatibility test to objections as well as to the reservations themselves.⁶

80. The general principle laid down in General Assembly resolution 598 (VI), operative paragraph 1, which recommended that organs of the United Nations, specialized agencies and states should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them, should receive special mention in the Commission's report to the Assembly. And yet the text of that recommendation carried some inherent difficulties: thus, experience at the First Conference on the Law of the Sea had shown that the question of an article on reservations might raise political difficulties in a plenipotentiary conference and that the silence of a treaty on the matter might in itself give rise to difficult problems of interpretation. In that connexion, he wished to repeat the view he had expressed at the previous meeting, namely, that reference to the text of a treaty as such frequently involved a far more sophisticated interpretation than a mere reading of the treaty itself; it involved consideration of the text of a treaty against the whole background of diplomatic acts, and the Drafting Committee would help to clarify all the articles on the law of treaties if it could find a formula to cover that more complex mode of interpretation.

81. Those considerations had once led him, in his capacity as his country's representative to the General Assembly, to introduce an element of criticism of the Commission's earlier work. The Assembly's recommendation which he had mentioned related to all organs of the United Nations and, consequently, to the Commission itself. In the examination of the Commission's drafts on the law of the sea and on arbitral procedure, for example, the task of the representatives of the different governments might have been facilitated if at least some of the final clauses had been included, in particular reservations clauses, which could be regarded as partially substantive. It would, moreover, be particularly incongruous if no final clauses, and particularly no article or articles on reservations, were to be included in the Commission's draft on the law of treaties.

82. Reverting to the question of the compatibility test, he said that, although it was true that, in the absence of a universal system of compulsory jurisdiction, it might be difficult to settle disputes concerning the application of the test, there was considerable danger in exaggerating those difficulties. Since the test had first been introduced in 1951, the number of serious disputes on its application had been small. Moreover, although the judicial settlement of disputes was often advocated, exclusive preference for that method was not always compatible with Article 33 of the Charter, which enumerated a number of other possible methods of pacific settlement. The experience of the so-called Indian reservation to the constitution of the International Maritime Consultative Organization showed that other modes of settlement could be found. Accordingly, it seemed inadvisable to lay stress on the absence of a universal system of compulsory jurisdiction.

83. Mr. Briggs had referred to the possibility of making the admissibility of reservations in residual cases subject to approval by a predetermined majority of states. He (Mr. Rosenne) did not favour that approach, for it carried too far the analogy between the treatment of reservations to multilateral conventions and the system of admission to international organizations, and also the notional authority of the majority over the accession of states which were *prima facie* not qualified to accede. That very difficult problem might perhaps be settled on a bilateral basis between the consenting and objecting states; it was not suitable for solution by majority rule. In that connexion, a clear distinction should be drawn between the problems of reservations and accession. A state acceded to a treaty in its existing form; what would be the position of a state which applied for accession, was admitted, and then purported to formulate a reservation in circumstances which brought the residual rule into play?

84. He thought that the time had come to ask the special rapporteur to draft a simpler or fragmented text of the articles, taking into account the changes agreed to in the debates on earlier articles.

85. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Briggs and Mr. Rosenne, said that he had inserted the provision concerning the test of compatibility with the object and purpose of the treaty in article 17 only, and not in articles 18 and 19, because to extend the test to the latter articles might result in altering the position of states with regard to reservations rather drastically. The general law as he saw it was that if a state objected to a reservation, it would not be a party to the treaty *vis-à-vis* the state making the reservation, and he had thought it right to keep that point independent of the question of compatibility with the object and purpose of the treaty. If a state, for its own reasons, considered that the reservation related to an important matter and was consequently not prepared to have relations under the treaty with the reserving state, it could make an objection by virtue of its sovereignty and so prevent the treaty from operating between the two states. Only if that interpretation of the general law was incorrect could compatibility with the object and

⁶ *Reservation to the Convention in Genocide, Advisory Opinion*: I.C.J. Report 1951, p. 18.

purpose of the treaty be made decisive in the application of articles 18 and 19.

86. Mr. Rosenne had suggested that the article should now be redrafted, but he still felt that he needed more guidance from the Commission on various points of substance. He had already made the articles more detailed than was perhaps necessary, with a view to eliciting the Commission's views on the points it wished to retain.

87. Mr. PAREDES, drawing attention to the definition of the word "reservation" in article I (1), said that he did not quite agree that a reservation was "a unilateral statement". Perhaps a different adjective could be used, to cover cases where more than one state made identical reservations, jointly or separately.

88. He asked whether the phrase "a certain term which will vary the legal effect of the treaty", in the same definition, meant that reservations which completely denatured the treaty were admissible. Articles 17, 18 and 19 suggested that such reservations would not be admissible.

89. The Ministries of Foreign Affairs of a number of American States had discussed at length the important question whether an acceding state could make reservations to an existing treaty. In view of the conclusions reached by those Ministries, he was glad to see that the special rapporteur was in favour of allowing not only signatories, but acceding states also, to make reservations. He also agreed that, since the signatory states in opening a treaty for accession were in effect offering it for either total or partial acceptance, it was only fair, in the case of partial acceptance, to allow the original parties to reconsider the whole matter before accepting the accession of a state whose reservation might alter the entire purpose of the treaty.

90. It was obviously essential to interpret the intention of the parties. If a reservation was capable of disturbing the normal operation of the treaty, it should not be accepted, but if the essence of the treaty was maintained, and the reservation related to detail only, the parties should give their consent. In any case, the express or implied will of the parties prevailed.

91. It was most desirable that all treaties should contain an express indication of the provisions to which reservations were admissible. For that purpose, a treaty could either enumerate the clauses to which reservations were admitted, or else enumerate those to which reservations were not admitted. Personally, he preferred the negative formula, because it laid greater emphasis on what the signatories regarded as the essence of the treaty.

The meeting rose at 1 p.m.

652nd MEETING

Monday, 28 May 1962, at 3 p.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (continued)

ARTICLE 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS (continued)

ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS (continued)

ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the three articles on reservations.

2. Mr. JIMÉNEZ de ARÉCHAGA said that he was in substantial agreement with the special rapporteur's approach to the subject of reservations and, with one exception, was prepared to accept his proposals. He commended his progressive draft rules, particularly in connexion with the most controversial question, that of the effect of objections to reservations.

3. On that question, the special rapporteur proposed as the residuary rule what had been called the Pan-American system, which appeared to have obtained the support of a majority of the members, including those who, like Mr. Amado and Mr. Bartoš, had formerly held a different opinion. He was gratified to see so distinguished an English jurist as the special rapporteur show that changed attitude towards the Pan-American system which, on past occasions, he recalled, had been disapproved of by the special rapporteur's countrymen as a legal heresy.

4. However, the Pan-American system would lose much of its original force and vitality if adopted in the manner proposed by the special rapporteur. The residuary rule proposed by the special rapporteur would apply the system of multilateral treaties, but would cease to apply it precisely in the region where it had originated. In effect, the special rapporteur proposed that reservations to plurilateral treaties should be subject to the unanimity rule, with the result that the objection of a single party would veto the participation of the reserving state. Actually, if the Pan-American system was so convenient and flexible as to be adopted as the world-wide residuary rule for reservations to multilateral treaties, there was no reason why it should cease to be the residuary rule in the regional sphere where it was born and where it still applied. There again, the distinction between multilateral and plurilateral treaties was unnecessarily complicating an already complicated matter.

5. The question of the effect of objections to reservations on the reserving state's ability to become a party to the treaty had arisen in connexion with all multilateral treaties, whether of world-wide or only regional scope. The only distinction suggested by some had been that between multilateral conventions capable of being split up into a series of bilateral agreements, and multilateral conventions where integral agreement by all the parties was required. He did not recall that it had even been suggested that the limited scope or the restricted number