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Summary record of the 652nd meeting

Topic:
Law of Treaties

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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 1 (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

of parties required the unanimous acceptance of reservations. The system which rejected unanimity had originated in the regional sphere and in 1951 the Commission had declared that such a system, the Pan-American system, was particularly appropriate for regional conventions.

6. The distinction between plurilateral and multilateral treaties should be eliminated as irrelevant to the question of reservations and the same residuary rule proposed by the special rapporteur should apply to all multilateral conventions, whatever their scope.

7. Earlier in the session, the Commission had decided to eliminate the same distinction in connexion with the voting rules for the adoption of a treaty. There was an evident and close connexion between the voting on the text of a treaty and the capacity to make reservations and to become a party to the treaty despite such reservations. More and more multilateral conventions, whether world-wide or regional, were being adopted by the majority rule, and therefore a safety valve should be provided for those states which had been out-voted on particular articles, if they were ever to become parties to a treaty thus negotiated.

8. He therefore suggested the deletion of article 18, subparagraph 4 (*b*) (i), and article 19, paragraphs 1 (*b*), 3 (*b*) and 4 (*b*). Those deletions, along with certain drafting changes, would greatly simplify the text.

9. He was in entire agreement with the proposed rule in article 17, paragraph 5, that the decision on the admissibility of a reservation to a treaty which was the constituent instrument of an international organization should be made by the competent organ. However, decisions by competent organs could be made in the case of certain other types of treaties. For instance, the Protocol to the Convention relating to the Simplification of Customs Formalities, 1923 [1] gave competence to the Council of the League of Nations to decide as to the admissibility of a reservation, and the organs of the World Health Organization and the Universal Postal Union had that same prerogative with regard to sanitary and postal conventions. The saving clause "unless the treaty otherwise provides" should therefore be employed, to make it clear that in all the three articles the Commission was merely codifying rules which would be applicable if the treaty itself did not provide for a different procedure.

10. Mr. de LUNA commended the special rapporteur for his realistic proposals, for his clear and convincing commentary to the articles, and for the historical summary contained in the appendix to his report.

11. The Commission could not disregard the fact that the majority of states had declared themselves in favour of freedom of reservations. The practice of entering reservations undoubtedly conflicted with the traditional law of treaties, but it had been rendered necessary by developments in international relations. In the past, when international law had been the law of the Great Powers of Europe, at that time governed by absolute sovereigns, even a multilateral treaty had normally been adopted by unanimity at an international conference, but the number of signatories had always been comparatively small.

12. Absolute rule had given way to constitutional rule, and modern international conferences were attended by a large number of states; international law was tending to become truly universal. More and more frequently, the text of a treaty was being adopted by a majority instead of by unanimity and it had become necessary to admit reservations.

13. Reservations should be permissible in order to enable a legislature to protect itself from certain legal consequences of a treaty submitted to it by the Executive, instead of having to face the choice between accepting or rejecting the treaty in its entirety.

14. An additional reason for the proposed rule was, as had been argued by Mr. Lachs in the Sixth Committee of the General Assembly, that the majority rule for the adoption of the final text of a treaty logically implied the same rule for the approval of the conditions subject to which the minority could join the treaty.[2]

15. The United States of America, in its written statement to the International Court of Justice in the case of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, had pointed out that, apart from a rule that a state had the right to make reservations which it deemed desirable and the rule that any other state had a co-equal right to determine for itself whether or not it should be bound by such reservations, there were no settled rules respecting the juridical status of reservations to multilateral treaties.[3] The Commission should, therefore, advance prudently, though without undue timidity, along the path of progressive development of international law in the matter, for the rules which it was formulating were in the nature of *jus dispositivum* and so would come into operation only where the treaty itself was silent on the subject of reservations.

16. For those reasons, he approved the special rapporteur's proposals, which were in line with the Pan-American system, although the formulation of the articles could be simplified as suggested by Mr. Tunkin at the previous meeting. The distinction between plurilateral and multilateral treaties should be dropped, so that the Pan-American formula would apply to all treaties except bilateral treaties.

17. As the special rapporteur said in his report, "the effect of the reservation on the *general* integrity of the treaty is minimal"; moreover, its effect was generally compensated by the fact that the admission of reservations enabled a larger number of states to participate in the treaty.

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[1] League of Nations *Treaty Series*, Vol. XXX, p. 409.

[2] *Yearbook of the International Law Commission 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 5.

[3] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, Oral Arguments, Documents*, p. 30.

18. He did not approve of the provision in article 17, paragraph 2 (*a*), which was based on the principle of "the compatibility of the reservation with the object and purpose of the treaty"; although quite exact, that criterion was unfortunately dependent on the subjective appreciation of states and therefore impossible to apply with any certainty in practice.

19. Mr. CASTRÉN said he found the special rapporteur's proposals generally satisfactory.

20. It was often of great importance that the number of parties to a treaty should be as large as possible. Where it was desired to conclude a universal convention, in an international community of more than 100 members, that result could not be achieved without recourse to the institution of reservations. Some treaties were of course indivisible, while others contained certain provisions which every party must accept as they stood; the special rapporteur had taken those possibilities into consideration. Moreover, if a signatory state considered that a reservation was incompatible with the purpose of the treaty or in any way contrary to its own interests, it could object to the reservation and prevent the entry into force of the treaty between itself and the reserving state.

21. But recourse to reservations should not be encouraged. For that reason, he fully agreed with the provision in article 17, paragraph 3 (*b*), that a reservation formulated at the time of a signature, which was subject to ratification or acceptance, should continue to have effect only if repeated in the instrument of ratification or acceptance.

22. He did not believe that the admissibility of reservations within reasonable limits, as proposed by the special rapporteur, would give states any undue latitude. If reservations went too far, they would generally be rejected and, under the reciprocity rule of article 18, sub-paragraph 5 (*a*) (ii), the other parties to the treaty could avoid the application of the provisions in question in their relations with the reserving state.

23. The admissibility of reservations could, of course, lead to unexpected results. For example, a multilateral convention between five states might become in effect ten bilateral treaties different in content, or even a single bilateral treaty; even that result, however, was better than complete failure.

24. In contrast to the case of accession, there was a presumption in favour of the admissibility of reservations if the treaty was silent on the subject. The difference between the two cases arose from the fact that the acceptance of a new state as a party to the treaty was generally more important than the exclusion from some of its provisions of a state which was qualified to become a party to the treaty.

25. With regard to the criteria for the admissibility of reservations, only objective criteria should be laid down, based on the reactions of the other states concerned to the reservations formulated. At the same time, there was no reason why the draft should not contain a provision, on the lines of article 17, paragraph 2 (*a*), requesting states not to make reservations to certain articles.

26. He noted with interest that no sanction was laid down in the provision in article 17, paragraph 2 (*a*).

27. With regard to the definition of "reservation" in article 1 (1), he doubted the wisdom of retaining the second sentence; the explanatory and other statements referred to were rare in practice; moreover, if they occurred, it was difficult to see which authority was to decide the nature of the statement.

28. Some of the language used in articles 17, 18 and 19 was rather vague, for example, the expressions "the nature of the treaty" and "the established usage of an international organization" in article 17, paragraph 1 (*a*). In paragraph 1 (*b*) of the same article, reference was made to "interested states" without any precise indication as to which states were meant.

29. He agreed with other members that the drafting of articles 17, 18 and 19 should be simplified. In particular, the distinction between plurilateral and multilateral treaties should be dropped, so that the same rule would apply to both, as indicated by Mr. Jiménez de Aréchaga.

30. He had already suggested the deletion of article 17, paragraph 1 (*b*). He now wished to suggest the deletion of article 18, sub-paragraph 2 (*a*) (iii), because the case there envisaged was very rare in practice; of article 18, paragraph 2 (*b*), because it added nothing to sub-paragraph 2 (*a*) (i) of the same article; and of the last portion of article 18, paragraph 3 (*b*), commencing with the words "provided that, in the case of a multilateral treaty...", since a state which was not yet a party to the treaty but which had been notified of the reservation could submit its objections within the normal time-limit, though its objections would naturally be without legal effect if it did not become a party to the treaty.

31. In article 19 also there were certain provisions which could be deleted or shortened in the light of the amendments to article 18, but he did not wish to enter into such detail.

32. Mr. VERDROSS, expressing his general agreement with the provisions in articles 17, 18 and 19, said they reflected international practice in the matter of reservations. The drafting, however, might be clearer. Three different situations should be considered successively. The first was that of a treaty which contained specific provisions on the subject of reservations; in that case, those provisions would apply. In that connexion, he agreed with the view expressed by Mr. Yasseen at the previous meeting that the nature and purpose of the treaty had to be taken into consideration, since they were of the essence of the treaty.

33. The second case was that of a treaty which specifically prohibited reservations; that case did not present any difficulties.

34. The third and difficult case was that of a treaty which did not contain any provisions on the subject of reservations. There were then three possibilities. The first was that a state might make reservations which all the contracting parties accepted. The second was that a state might make a reservation which the contracting parties did not actually reject but to which they failed to take any attitude; to meet that case, some presump-

tion should be laid down in the draft articles. The third was that the reservation might be accepted by some contracting parties but not by others: in that event it would be a complicated problem to determine whether the treaty was in force between the reserving state and the states which had accepted its reservation and not between the reserving state and the states which had not accepted its reservation.

35. He could not accept article 17, sub-paragraph 1 (*a*) (i). Even if the making of reservations were excluded by the nature of the treaty, the admissibility of reservations would depend on the content of the treaty and on the agreement of the parties.

36. Mr. GROS commended the special rapporteur for the lucid manner in which he had presented the subject in his commentary and for the valuable historical summary given by him as an appendix to his report, a summary which would remain invaluable to all students of the subject of reservations to multilateral conventions.

37. A treaty was an instrument for establishing a legal regime. It was not an instrument for establishing a number of different legal regimes, since then it would no longer be a treaty but a series of international agreements at different levels. It was the notion of the integrity of the treaty to which that of flexibility had been opposed.

38. In its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice had stated that the concept of the integrity of the treaty was of "undisputed value as a principle" in international law.[4] The integrity of a treaty was an indispensable principle of international law, for it followed directly from the fundamental rule *pacta sunt servanda*. That principle and that rule meant that a treaty must be respected as formulated by the parties to it; the legal regime prescribed by the treaty could not therefore be altered by a state which had remained outside the treaty but wished to impose its own conditions for joining it.

39. As had been pointed out by Mr. Ago, a state which wished to participate in a treaty with a reservation was in effect proposing the unilateral amendment of the treaty. A treaty concluded for the purpose of establishing certain legal relations could not be amended by a prospective party to it; a prospective party could only ask the contracting parties whether they agreed to the amendments it was proposing.

40. In his remarkable commentary, the special rapporteur had been very lenient to the flexible system and he (Mr. Gros) could not agree with his remarks in the concluding sentences of paragraph 5. He was not at all convinced by the arguments put forward and considered that they provided no justification for the rules of law proposed for the interpretation of a treaty which contained no clause on reservations.

41. He would illustrate his point by three practical — and topical — examples. First, in 1954, a number of interested states had concluded an international Convention for the Prevention of Pollution of the Sea by Oil,[5] the essence of which was an obligation on the parties to install at their main ports facilities for the disposal of oily residues from ships' tanks. But two states had made a reservation in respect of that very obligation. Could the special rapporteur still contend, as in paragraph 5 of his commentary, that when a reserving state refused to carry out one of the most important provisions of a Convention, "the position of the non-reserving state is not made more onerous if the reserving state becomes a party to the treaty on a limited basis"?

42. His second example was provided by the Convention on Fishing and Conservation of the Living Resources of the High Seas, signed at Geneva on 29 April 1958.[6] The essential feature of the system of fisheries protection instituted by the Convention was the provisions for technical control and arbitration. Was it conceivable that a state should accede to such a Convention, subject to a reservation in respect of those very provisions?

43. The international discussions on the subject of outer space provided his third example. Efforts were being made to draft an international convention on the subject of outer space. That convention would doubtless provide: first, for the exchange of information relating to space vehicles; secondly, for state liability for damage caused by space vehicles. If a convention of that sort were formulated and a state signed it but made reservations in respect of its international liability for damage, would not the other signatory states be entitled to refuse to give the reserving state the information provided for in the treaty?

44. Those three examples clearly showed that reservations, where they affected such issues, caused grave prejudice to the signatory states, quite apart from the fact that apparent acceptance of a treaty when in fact the effect of acceptance was destroyed by reservations, was not an international phenomenon to be encouraged.

45. The support given in some quarters to the so-called flexible system was merely the result of an obsession with statistics; it reflected the desire for universality at any price. But fifty signatures which established a collective regime of general scope were preferable to 105 signatures when fifty-five of them were subject to a variety of reservations which impaired the unity of the legal regime established by the treaty.

46. For those reasons he agreed with Mr. Briggs in his criticism of the provision contained in article 8, sub-paragraph 4 (*b*) (ii). Instead of paying lip-service to the idea of universal collective treaties, the Commission should try to ensure respect for the rule of law established by agreement between states. A collective treaty ought not to be split up into a series of bilateral agreements.

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[4] *Reservations to the Convention on Genocide, Advisory Opinion:* I.C.J. Reports 1951, p. 21.

[5] United Nations *Treaty Series*, Vol. 327, p. 4.

[6] *United Nations Conference on the Law of the Sea, Official Records*, Vol. II (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 139.

47. His provisional conclusion was that there was no place for any reservations other than those provided for in the treaty itself. A reservations clause was therefore an essential feature of multilateral treaties. Where such a clause was included in the treaty, there was no problem. If, however, the negotiating parties had discussed the question of reservations but had not been able, through lack of a majority, which nowadays was often two-thirds, to arrive at an agreement, the only valid inference from that situation was that the treaty admitted of no reservations at all. In the extremely unlikely and rare event of the negotiating parties not having even discussed the question of reservations, their admissibility could only be decided in the light of the intention of the parties in each case, bearing in mind the nature of the treaty.

48. The special rapporteur had clearly shown that there was no objective criterion for determining whether, as a general rule, a reservation was or was not admissible. Also, in the existing state of international law and international relations, there was no judicial authority to rule on the question of compatibility; there were, of course, exceptions, such as the WHO and UPU Conventions which provided for the necessary machinery.

49. He entirely accepted the special rapporteur's analysis of the ruling given by the International Court of Justice in its advisory opinion on the subject of reservations. He must point out, however, that the Court's opinion had only been adopted by a very narrow majority and that one of the leading authorities on the law of treaties had been among the dissenting minority. In addition, the Court had been careful to point out that its opinion was limited to the particular case before it, a case where control was possible and the treaty was of a special character. How could that system be generalized if there were no judicial control?

50. In the circumstances, it could not be claimed that that ruling was anything more than a mere guide, a recommendation to states as to the attitude they should take up towards reservations.

51. The only genuine rule in the matter was that, in the residual case where the treaty was silent on the subject of reservations, the consent of the parties was necessary for the reservation to have any effect. A state did not have a right to make reservations, only a right to request reservations, and he did not believe that a general rule could be laid down that such a right could be acknowledged after the event by a two-thirds majority of the negotiating or participating states. The only proper approach was to enquire into the intention of the parties in each particular case. The two-thirds majority rule could only lead to the admission of reservations; the desire to achieve unanimity was so keen that more often than not it would lead to the mustering of the necessary two-thirds majority.

52. If, on the other hand, the requirement of the consent of the parties were maintained, the reserving state would have to negotiate with the signatory states and by such negotiation might be led either to withdraw its reservation or to modify it in a manner acceptable to the parties.

53. Having thus expressed his general views on articles 17, 18 and 19, he was prepared to discuss the provisions, paragraph by paragraph.

54. Mr. LIANG, Secretary to the Commission, said that he was in full agreement with Mr. Gros. He was not familiar with the 1954 Convention for the Prevention of Pollution, but with regard to the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Mr. Gros had been right in pointing out that if there had been many reservations to the provisions on technical control and arbitration, the Convention would have lost all meaning. The situation was, however, covered by article 19 of the Convention itself, the first paragraph of which read:

> "1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 6, 7, 9, 10, 11 and 12." [7]

55. The articles to which no reservation was possible included those which contained the elaborate provisions on technical arbitration.

56. The 1958 Geneva Convention on the Continental Shelf contained a similar provision in article 12, paragraph 1: [8]

> "1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."

57. Article 1 was the article which defined the term "continental shelf". Article 2 set out the rights enjoyed by the coastal state over the continental shelf. Article 3 stated that the rights of the coastal state over the continental shelf did not affect the legal status of the superjacent waters as high seas or that of the air space above those waters.

58. The system adopted in those conventions was to allow reservations to all the articles, except those in respect of which reservations were expressly prohibited. That system arrived at the same result as that of prohibiting reservations execept in respect of certain specified articles.

59. Those two Geneva conventions seemed to constitute an object lesson in the prevention or, at any rate, diminution of the possibilities of occurrence, of so-called residuary situations.

60. Mr. AMADO said that in his 1951 memorandum, to which he had referred at the previous meeting, he had expressed the view that "generally speaking the collective treaty possessed a systematic unity which should be safeguarded as far as possible. That was one of the reasons why he had disagreed with his Latin American colleagues in the discussions in the Sixth Committee on the procedure adopted by the Pan-American Union." [9] From the

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[7] *United Nations Conference on the Law of the Sea, Official Records*, Vol. II (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 141.

[8] ibid., p. 143.

[9] *Yearbook of the International Law Commission, 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 21.

practical point of view he would like to ask Mr. Gros whether it was not likely that states would take defensive measures against the threat created by the right of unlimited reservations and prohibit certain types of reservations. With a two-thirds majority rule, the international community could express its opposition to such a right.

61. Mr. GROS said that he had taken the 1958 Convention on Fishing as an example, although it contained a formal reservations clause, of the case where, if a state were free to make any reservation it wished, an international legal system would be undermined and rendered meaningless. The 1954 Convention on the Prevention of Pollution had not admitted reservations to articles, and yet two states had made such reservations. Thus Mr. de Luna's argument was not watertight; numerous examples could be quoted to prove that a state which made reservations might prejudice the interests of states which did not.

62. Nowadays, in a large international conference, there was an urge to try to secure as many signatures as possible in the cause of universality, to the detriment of another legal desideratum, the integrity of the collective treaty. Experience showed that it was unwise to trust in the wisdom of the majority which tended to work for compromises and to accept reservations. The danger was that if, after discussion, no provisions concerning reservations were adopted for lack of the necessary majority, and the treaty was consequently silent on the matter, states would conclude that any reservation was possible. The starting point should therefore be a clear statement by the Commission that, if reservations were admissible, the treaty must say so expressly.

63. Mr. TSURUOKA said that he would like to know whether a reservation that failed to comply with the rules laid down in article 17 should *ipso facto* be regarded as invalid.

64. The Commission should make a distinction between a declaration concerning the interpretation of the treaty and a reservation. It was conceivable that a reservation might be received without comment by the other parties because they thought it a declaration, and at a later stage the state in question would declare itself not bound by certain provisions of a treaty on the grounds that its reservation had not provoked any objection.

65. As regards the conflicting claims of universality and the integrity of the treaty, he agreed with the special rapporteur that for the purpose of the former some flexibility should be allowed, but he also agreed with Mr. Gros that universality would become an empty principle if in its name a whole series of regimes — instead of a single regime — were established under the treaty. Obviously, to prevent that from happening, states should be prepared to make sacrifices and the Commission should say something to that effect in the commentary.

66. The need to safeguard the principle of the integrity of treaties was the greater in modern times because with the increasing number of new states, there was a greater danger of more reservations being made.

67. Under the system adopted in the draft, the interests of states which did not make reservations did not receive the same measure of protection as those of states which did make them, and some inequality resulted, since the only recourse open to the former was to object to a reservation and to refrain from entering into treaty relations with the reserving state. But that did not provide sufficient protection for the objecting state in the case of a normative treaty. For instance, an objecting state could be placed in a disadvantageous position *vis-à-vis* the reserving state in the case of an international labour convention, because it would still be bound by all the provisions of the convention, while the latter would be bound only by some of them, so that the objecting state's competitive position in relation to the reserving state would be weakened.

68. Again, what was the position if a proposal that certain articles should not admit of reservations were rejected by a narrow majority at the negotiating conference, and the resulting treaty contained no provision concerning reservations? If the presumption were made that the treaty's silence implied that reservations were admissible, some time later a reservation might be made and communicated to the states concerned. By then, however, the situation could have changed and with the lapse of time chanceries have become less vigilant so that some would forget to oppose the reservation within the prescribed time-limit of twelve months, with the result that the reservation might be accepted by a single vote, thus producing the reverse effect to that desired at the conference itself. Perhaps the special rapporteur's draft made too strong a presumption in favour of allowing reservations, to the detriment of the interests of states which did not make them. He (Mr. Tsuruoka) suggested that, as a counterpoise to that tendency, the rule might be stated in contrary terms, so that if the other parties failed to make any reply to a notification of a reservation, their silence should be interpreted as an objection.

69. Mr. BRIGGS said that, after moving away from the unanimity rule, the Commission should not swing too far in the direction of the Pan-American system, even in a modified form. If too many reservations were allowed, universality would become fictitious.

70. He was concerned to find an answer to two questions raised by articles 17, 18 and 19. First, could a state which formulated a reservation not authorized by the treaty become a party to it in the face of the objection of a substantial number of the other parties? Secondly, what was the legal effect of a reservation established as admissible by a majority of the parties?

71. Taking the first question, it would appear from article 18, paragraph 1, in the special rapporteur's draft that if the reservation was admissible and 99 out of the 100 parties objected to it but one party accepted it, the state making the reservation would in effect become a party to a bilateral treaty with the latter.

72. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the case would fall within the terms of

article 17, paragraph 1 (*b*): the reservation would be inadmissible because the consent of all the other interested states had not been obtained.

73. Mr. BRIGGS replied that he was not discussing a reservation which was prohibited. He believed it might be possible to arrive at a different formulation on the lines of his own redraft of article 13. It might be provided that if a state formulated a reservation not authorized but also not forbidden by the treaty, its admissibility would be determined, in the case of a bilateral treaty or a multilateral treaty concluded by a restricted number or group of states, by the consent of all the parties, and in the case of a general multilateral treaty, by the consent of two-thirds of the parties.

74. He noted that in article 18 the special rapporteur had abandoned the distinction between a general multilateral treaty negotiated at an international conference convened by the states concerned, and one drawn up in an international organization. Perhaps in both cases the voting rule for determining the admissibility of a reservation should be the same as that applied for the adoption of the text of the treaty itself.

75. With regard to his second question, there were two possible solutions. One was that put forward in the special rapporteur's text of article 19, paragraph 4 (*c*), and the other was a bolder provision stating that a reservation accepted by a majority vote of the parties would be binding on all in their relations with the reserving state.

76. Mr. de LUNA said that Mr. Gros had overemphasized part of his argument and in doing so had attributed to him something that was illogical. He (Mr. de Luna) had pointed out that, even if the principle of reciprocity in regard to the rights of the parties were upheld, the principle of the integrity of obligations in law-making treaties might result in a reserving state's enjoying a privileged position *vis-à-vis* a non-reserving state. That result might have varying degrees of seriousness according to the nature of the treaty. But the situation would certainly be no better if, in the example given by Mr. Gros, a state which could not make reservations could not be a party to the 1954 Convention and could consequently be at liberty to pollute the waters of the sea to its heart's content.

77. The principle *pacta sunt servanda* was certainly a cornerstone of the law of treaties and would not necessarily be undermined if, for example, all parties except one accepted a reservation and the obligations assumed by the parties were not uniform. There was an advantage in allowing reservations because the general regime established by the treaty, and not the reservations, would in the long run, gain recognition as establishing certain rules. A draft convention was being negotiated at the moment in Paris concerning the property of aliens, and one country, because of its economic position and balance of payments problems, was unable to subscribe to the provisions concerning freedom of transfer. It would be most undesirable, in the circumstances, to debar that country from making a reservation, possibly purely temporary, to the provisions in question and so to deny it the possibility of accepting all the other provisions of the treaty, including those concerning arbitration. His two proposals were inter-related and respected the principle *pacta sunt servanda*.

78. Mr. AGO said that the discussion, which at the previous meeting had centred on questions of law, had veered round to certain practical considerations as to whether reservations should be encouraged or not. The Commission should strive to frame precise, universal rules generally applicable and consider the question within that framework. As a realist he was aware that the possibility of making reservations had to be admitted, but he must draw attention to the dangers of abuse which might frustrate the aim all had in view.

79. The principle of universality had been defended with varying degrees of conviction by different members and there was no doubt that the practice of reservations helped to encourage more states to sign treaties. But if the reservations were so numerous as to create in effect a series of different regimes, universality would become a mirage.

80. The two-thirds majority rule for the adoption of treaties was regarded as marking a great advance in the conclusion of general international treaties but if, by means of reservations, the will of a majority could be overturned by a minority, the result would be illusory. Another possibility that had to be borne in mind was that many states, perhaps even the majority, at a codification conference, while fully prepared to accept a convention concluded without reservations, might hesitate to ratify because a few states had already made reservations to what they, the many, regarded as essential clauses.

81. It was true that even a majority of states at a treaty-making conference might adopt too liberal a view as to which provisions of a treaty could be open to reservations. But the other possibility mentioned during the discussion, that an international conference might actually overlook the problem of reservations, was almost inconceivable. The real danger arose when, being unable to reach agreement on which articles should be open to reservations, an international conference failed to include any provision at all about reservations, as had been the case with the 1958 Convention on the High Seas. He hoped such a practice would be emphatically discouraged. To prevent its recurrence, the Commission should suggest a way in which the problems involved might be settled *ex post facto*.

82. The Commission should come down on the side of a certain stringency in order to discourage excessive recourse to reservations.

83. Mr. EL-ERIAN, commenting upon the practical rather than the theoretical aspects of the problem, said that the special rapporteur had succeeded in reconciling two major considerations — that of ensuring the widest possible acceptance of treaties and that of preserving their integrity and the uniformity of obligations.

84. Nearly eleven years had elapsed since the Commission had submitted to the General Assembly its views concerning reservations to multilateral conven-

tions[10] and since the International Court had delivered its Advisory Opinion on reservations to the Convention on Genocide. The time had now come when it could make a signal contribution towards the settlement of a controversial problem.

85. Rather than discuss whether a unanimity rule existed and what should be regarded as a restriction on the sovereignty of states, the Commission should be guided by the clear endorsement by recent practice of the right to make reservations to multilateral treaties. The special rapporteur had rightly sought to endorse that right so long as the reservation was compatible with the nature and main purpose of the treaty. That criterion had been criticized as being subjective, but subjective criteria were by no means unknown in international law; an example was article 28 (*rebus sic stantibus*) in the Harvard draft.[11] He saw no danger in such a criterion and did not believe it would undermine the principle of the integrity of treaties.

86. The CHAIRMAN said that, after the conclusion of the general discussion, he would request the special rapporteur to indicate which issues of substance would need a decision by the Commission before the article could be referred to the Drafting Committee.

The meeting rose at 5.55 p.m.

653rd MEETING

Tuesday, 29 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 (*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. Speaking as a member of the Commission, he said that the main points on which the opinions of members differed related to the so-called principle of the integrity of the treaty and to the advisability of reverting to the traditional doctrine which seemed to have been generally accepted at least until 1951. Thus in 1938 Lord McNair could state that the analogy between international treaties and the contracts of private law was frequently pressed too far, but that in solving the problems to which the practice of attaching reservations to the signature or ratification of treaties gave rise, the analogy had been found useful.[1] He had gone on to compare reservations to counter-offers in domestic systems of law: the terms of the treaty were an offer to the parties for acceptance; the reserving state did not accept them, but instead made a fresh offer in a modified form to the participants for their acceptance. The fate of the reservation thus depended on the manner in which the counter-offer was received by the parties. That seemed to have been the general view at the time and a similar opinion had prevailed in the Commission in 1951, as was shown by the memorandum then submitted by Mr. Amado.[2]

3. However, as the special rapporteur's commentary showed, the General Assembly, on the Commission's recommendation, had not accepted that principle, and the International Court of Justice, in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, had also refused to accept the so-called traditional doctrine as having been transformed into a rule of law. In view of that opinion, of the practice of states and of the debates in the General Assembly on the Commission's recommendation of 1951, he did not believe that it would be in keeping with the progressive development of international law to think of returning to the unanimity rule.

4. He was in substantial agreement with the special rapporteur's formulation of the underlying principles of the three articles. Their actual wording could be left to the Drafting Committee; the Commission should concern itself solely with the question of improving the statement of the basic principles.

5. He agreed with the special rapporteur and other members that the criterion of the compatibility of the reservation with the object and purpose of the treaty, taken from the opinion of the International Court, should be accepted, although it constituted no real guiding principle. Mr. Rosenne had suggested that the compatibility test should also be adapted to articles 18 and 19. That would limit objections, which would then be allowable only on the ground that the reservation was incompatible with the object and purpose of the treaty; if Mr. Rosenne's view was accepted, the question of consent would lose in importance. Nevertheless, even in that event, article 18 would still be necessary. If objections to a reservation could be made only on the ground of its incompatibility with the object of the treaty, they would remain without any immediate legal consequences and the matter would be left to the risk of the parties, as the special rapporteur had pointed out in paragraph 4 of the commentary. The question of consent in that case might seem irrelevant, but the principle laid down in article 17, paragraph 1 (*b*), still remained; under that provision, a reservation could still

[10] *Yearbook of the International Law Commission, 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 125.

[11] Supplement to the *American Journal of International Law*, Vol. 29, No. 4, p. 662.

[1] *The Law of Treaties*, 1938 Edition, p. 105.

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