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Summary record of the 654th meeting

Topic:
Law of Treaties

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freedom of reservation to states in the event of a treaty's silence on the subject of reservations; such a system would impair the chances of an agreement on a reservations clause. Negotiators would not make a sufficient effort to reach agreement during the negotiations, knowing that failure in that respect would leave states free to make reservations at will.

77. Mr. VERDROSS said he favoured the system proposed by the special rapporteur. He also agreed with the special rapporteur that the main question to be decided by the Commission was whether the acceptance of reservations should be left to the individual decision of states, or be the subject of some sort of collegiate decision.

78. Since the draft articles were being adopted by the Commission only on first reading, perhaps the Commission might wish to consider submitting alternative texts, as it had done on previous occasions. States would thus be offered a choice between the Latin American system and the system proposed by Mr. Ago. In the light of their reactions and of the preferences expressed by them for one or the other system, the Commission could then come to a decision on second reading.

The meeting rose at 1.5 p.m.

654th MEETING

Wednesday, 30 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. Mr. YASSEEN said that the discussion on the draft articles concerning reservations showed that there was a good deal of common ground on many essential points.

3. On the question of freedom to make reservations, there was agreement on the necessity to examine first and comply with the provisions of the treaty itself. Some controversy had arisen, however, over the case where the treaty contained no provisions on the subject of reservations.

4. Some members interpreted the silence of the treaty as meaning that reservations were admissible; that might be correct in some cases, but not in all. The answer hinged on the interpretation of the intention of the parties and that involved an examination not only of the text of the treaty, but also of the will of those who had formulated the text.

5. On the question of the effects of the acceptance of a reservation, there was agreement on the essential point that acceptance brought into force between the reserving state and the accepting state all the provisions of the treaty except those to which the reservation related.

6. On the question of objections to reservations, it was agreed that the objecting state was entitled not to consider the reserving state as a party to the treaty. That was not, however, the result in all cases. It could happen that the objecting state did not intend to debar the reserving state from becoming a party to the treaty. It was necessary to examine the document containing the objection for the purpose of determining the objecting state's intentions in that respect. If, however, an objection was categorical without any suggestion that the objecting state did not wish to debar the reserving state from becoming a party, then the reserving state could not be considered a party to the treaty.

7. The one important question on which there was a division of opinion was that of the system to be recommended for the acceptance of reservations to a general multilateral treaty. Some members favoured a system based on the Latin American practice, according to which an objection to a reservation did not debar the reserving state from becoming a party to the treaty with respect to those states which accepted the reservation. Other members thought that admission of the reserving state as a party to the treaty should be subject to the unanimous consent of the parties, or to the consent of a specified majority of the parties. In view of that division of opinion, it would be advisable for the Commission to adopt the suggestion of Mr. Verdross, and leave it to the states themselves to decide that question.

8. Mr. TUNKIN said he agreed with Mr. Yasseen that there was no great difference of views in the Commission on the main points of articles 17, 18 and 19, and consequently those articles could soon be referred to the Drafting Committee.

9. The Commission might adopt the principle of article 17, that states were free to formulate reservations unless the making of reservations was implicitly excluded by the treaty itself. The article itself could be shortened by the Drafting Committee; in particular he saw no need to refer to the usage of international organizations, which might vary from one organization to another.

10. He said the Commission might also adopt the leading principle which ran through all the paragraphs of article 18, except paragraph 4 which conflicted with that principle. He saw no reason for drawing any distinction between treaties formulated within or under the auspices of international organizations and other treaties. The Drafting Committee should therefore consider omitting paragraph 4.

11. There appeared also to be general agreement in regard to the basic principles laid down in article 19. With reference to paragraph 4 (*c*), he recalled the suggestion he had made at the previous meeting,[1] a

[1] 653rd meeting, para. 26.

suggestion which had since received some support, that the Commission should not try to impose the consequences of an objection. The objecting state should be free to decide for itself what consequences it attached to its action; it might wish merely to state its position in regard to the reservation, without going so far as to preclude the entry into force of the treaty as between itself and the reserving state. It would be both correct in theory and advisable in practice to leave it to the objecting state to declare whether it wished to preclude the entry into force of the treaty as between itself and the reserving state.

12. He saw no need to request the opinion of states on the suggested system of collegiate decisions for the admission of reservations. He found the system proposed by the special rapporteur in his formulation of article 19 generally acceptable.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that a number of points still required clarification by the Commission before the Drafting Committee could know how far it could go in the simplification of articles 17, 18 and 19. The main point was what recommendation the Commission was to make in respect of reservations to general multilateral treaties, leaving aside for a moment the question of plurilateral treaties. Three courses were open to the Commission. The first was to make a recommendation along the lines of his proposals, which considered acceptance and objection as a matter for each individual state, so that the treaty relations would depend upon the action taken by individual pairs of states; those proposals could be said to embody the Latin-American system with certain modifications; the second was for the Commission to propose a scheme for reservations similar to that adopted in respect of accession; the third was that suggested by Mr. Verdross, namely, that the Commission should submit to states the two alternatives, and leave the states to choose between them.

14. He would confine himself to one point, the central issue, but in formulating that issue he was obliged to set it in the framework of his main proposals. It seemed to him that the central issue presented itself as follows.

15. There appeared to be agreement in the Commission that, where a general multilateral treaty contained no express or implied indication as to the admissibility of reservations, states were free to formulate reservations compatible with the object and purposes of the treaty. On the other side, other states participating in the treaty might object to a reservation which they did not consider to be compatible with the object and purpose of the treaty.

16. In that framework there were two alternative solutions which had been discussed. The first was that which was in his report and which he would call Alternative A; the second was that which had been indicated by various speakers at the previous meeting and which he would call Alternative B. Those two alternatives could be formulated more or less as follows:

Alternative A:

"The consent of any other state to the reservation shall establish its admissibility as between that state and the reserving state, and, subject to the provisions of the treaty on entry into force, the reserving state shall become a party to the treaty with respect to that state."

Alternative B:

"In the event of an objection, the admissibility of the reservation shall be determined:

"(*a*) in the case of a treaty drawn up at a conference convened by the states concerned, by the consent of the same number of such states as would have been necessary to adopt the text of the treaty at the conference in question;

"(*b*) in the case of a treaty drawn up either in an international organization, or at a conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with its applicable voting rule."

The essential difference between those two alternatives was that in Alternative A the reaction was entirely dependent on the attitude of the individual state, whereas in Alternative B it was dependent on a collegiate decision by the majority rule followed at the conference or by the majority applicable in the international organization in question.

17. To conclude the picture, the rest of the framework would be as follows:

"The state which has objected to the admissibility of a reservation may, if it thinks fit, notify the reserving state that the treaty shall not come into force in the relations between the two states in question."

18. With regard to a minor issue that had been raised, the Commission appeared to be of the opinion that it would be wrong to impose the rule that an objecting state was automatically not in treaty relations with the reserving state.

19. The CHAIRMAN recalled that, towards the close of the discussion on article 13, Mr. Ago had made two suggestions, the second of which, relating to the non-automatic effect of a negative answer, the special rapporteur had accepted.[2] Perhaps, therefore, article 19, sub-paragraph 4 (*e*), could be recast on those lines.

20. Sir Humphrey WALDOCK, Special Rapporteur, confirmed that he had agreed that article 13, paragraph 4 (*b*), should be amended so as to render the rule stated therein non-automatic. As far as reservations were concerned, he proposed that both in Alternative A and in Alternative B, an objection should not have an automatic effect. The Commission should confine itself for the moment to the main issue of the choice between Alternative A, Alternative B and the suggestion of Mr. Verdross that both alternatives should be submitted to governments.

21. Mr. LACHS said he must reserve the right to express his views in regard to the consequences of an objection on the bilateral relationships between the

[2] 650th meeting, paras. 46 and 47.

objecting and reserving states. It was his understanding that the Commission would not prejudge the question, but would deal with it later.

22. Mr. TSURUOKA said he had some misgivings in regard to the precise content of the term "admissibility". On a previous occasion he had asked for clarification of the legal nature of the rule expressed in article 17, sub-paragraph 1 (*a*) (i) and paragraph 3. The question was whether a state's reservation in contravention of those provisions was unlawful and consequently invalid. In other words, would an objection to such a reservation merely preclude the entry into force of the treaty between the objecting and reserving states, while theoretically a state maintaining the invalid reservation could not be a party to the treaty?

23. Sir Humphrey WALDOCK, Special Rapporteur, said that if article 17, paragraph 1, were considered in the light of the views expressed in the Commission, the conclusion was that members had agreed on the following proposition: that, where a general multilateral treaty contained no express provision or implied rule on the admissibility of reservations, a state was free to formulate reservations compatible with the object and purpose of the treaty. Both Alternative A and Alternative B dealt with the objection by a state which regarded a reservation as incompatible with the object and purpose of the treaty. The difference between the two alternatives was that in one case, the view taken by the objecting state decided the relationship between that state and the reserving state, and that in Alternative B, compatibility was a matter for a collegiate decision.

24. In his original proposal, he had not introduced the compatibility test into article 18 and article 19. The Commission, however, had favoured making consent and objection to reservations subject to the compatibility test.

25. Mr. AGO thanked the special rapporteur for his clear formulation of the two alternatives and said that he preferred Alternative B, particularly since its provisions were limited to the case where the reservation affected the very purpose of the treaty.

26. He was not satisfied with a system such as that set out in Alternative A, which left the decision entirely to the objecting state, without taking into account either the interests of other states or the general interest. However, he would be prepared to accept the suggestion of Mr. Verdross that both alternatives should be submitted to states so that they could choose between the existing practice, reflected in Alternative A, which took into account the individual interest of states and which could be said to be in line with the traditional rules in the matter, and Alternative B, which was more progressive and took into account the general interest.

27. The opinion of the states themselves should be asked before making a choice between the two systems. Since the Commission was examining the text only on first reading, a vote to decide its choice was undesirable at that stage.

28. Mr. BARTOŠ said that he also was much concerned with the question raised by Mr. Tsuruoka. An illustration of his point was provided by the Convention on the Political Rights of Women, which had been concluded under United Nations auspices; it had been adopted by General Assembly Resolution 640 (VII) and had entered into force on 7 July 1954. A number of states had made reservations which conflicted directly with the very purpose of that Convention. Some of those reservations stated that, in the reserving country, certain provisions were not applicable to women and certain posts were not open to women; some South American countries had indicated that they would apply the Convention only subject to their constitutional provisions, which limited the enjoyment of specific political rights by women and the access of women to certain offices; a number of African countries had made a reservation to the effect that they would only introduce measures gradually, where they conflicted with their customary law.

29. In the case of that Convention, a situation had been created in which reservations had thus been made to what might be termed a fundamental rule of United Nations constitutional law: the rule that there should be no discrimination between the sexes, in law at least. Since very few objections had been made to the reservations in question, and since time limits had been set by the Convention both for the making of reservations and for objections, it could be claimed on formal grounds that the Convention was in force between a reserving state and the states which had not objected to its reservation. He doubted, however, whether the operation of such time limits could mean that a flagrant violation of essential rules of modern international law could no longer be challenged. The question was an extremely difficult one and he urged that, at any rate in the commentary to the articles and in the Commission's report, it should receive some attention.

30. Mr. TUNKIN, with regard to Mr. Verdross's suggestion that two alternatives should be submitted to governments, said that, although that had been done before by the Commission, it was not a regular practice and its advisability was debatable. In the case in point, the Commission should recommend the alternative for which there was a considerable majority.

31. The second alternative, first advocated by Mr. Briggs and then supported by some other members, would mean that a reservation would be treated as admissible if accepted by the same majority as that which had adopted the final text of the treaty at the plenipotentiary conference. It should not be submitted to governments as an opinion of the Commission, since it cast doubt on the very possibility of making reservations. The procedure it suggested was tantamount to prolonging the conference, and would be meaningless, since the reserving state would in most cases have already made a similar proposal during the conference. The purpose of the institution of reservations was to promote international co-operation, and the proposal that the majority rule should apply denatured the very essence of that institution. The same argument applied to treaties concluded in international organizations; a reservation could not properly be called a reservation if its admissibility was

decided by a fixed majority under the rules of the organization concerned. He was therefore opposed to the submission of that alternative to governments.

32. Mr. AMADO said that, during his years of service on the Commission, he had acquired a reputation for advocating the traditional procedures of codifying the practice of states, and also for promoting the establishment of rules *de lege ferenda*. In the case at issue, he had no hesitation as to the position he should adopt.

33. The Commission had before it the special rapporteur's draft, which corresponded to the current practice of states submitting reservations to multilateral treaties; indeed, Mr. Ago had referred to that practice as "classical". Some members had compared it to the so-called inter-American system of reservations and had asserted that a similar patchwork of bilateral relationships between states would be the result. He did not deny that the proliferation of such relationships was deplorable in theory, but would submit that, in the fraternal community of the Latin American countries, with their similarity of interests, the system was workable and presented no serious dangers. In the universal framework of important multilateral treaties, however, the participating states would be fully aware of the far-reaching and vital interests at stake, and would refrain from making reservations which threatened the entire structure of the treaty; they were as anxious as any member of the Commission to maintain the principles of international law.

34. On the one hand, therefore, the Commission had before it the current practice of states, and on the other the proposed alternative, a creation *ex nihilo,* which had no foundation whatsoever in practice. The government representatives to the General Assembly, who all had the very precise interests of their countries in mind, were bound to regard the submission of such an academic and theoretical rule with faint derision. He therefore opposed the suggestion that the two alternatives should be submitted to the General Assembly and considered that the special rapporteur's original draft should be retained.

35. Mr. VERDROSS said he had suggested that two alternatives should be submitted to the General Assembly not only in a conciliatory spirit, but also because, although the first alternative alone corresponded to current practice of positive international law, some members had pointed out that it was a practice that could lead to very dangerous results. Since the second alternative represented a considerable innovation in international law, the Commission could not opt for it or recommend it without first receiving the comments of governments. Where there were two contrary opinions, one of which, upheld by the majority, represented current practice, while the other, advocated by the minority, would lead to a rule *de lege ferenda*, it was obvious that the Commission's work could only be facilitated by government comments.

36. Mr. JIMÉNEZ de ARÉCHAGA said he would confine his remarks to the second alternative and to Mr. Verdross's proposal that both alternatives should be submitted to the General Assembly.

37. With regard to the second alternative, the application of the voting rule seemed to be contrary to the purpose of reservations in modern international practice. There was a close connexion between voting rules and reservations, since multilateral conventions were more and more often adopted by a fixed majority; consequently, it was becoming increasingly necessary to provide a safety valve for states which were outvoted at the conference on specific clauses, but which nevertheless wished to become parties to the treaty. The second alternative would have the effect of giving a reservation the same status as a substantive proposal. But that was not the purpose of a reservation; its purpose was to cover the position of a state which regarded as essential a point on which a two-thirds majority had not been obtained. The second alternative thus represented a negative position towards the most important function of the institution of reservations.

38. With regard to Mr. Verdross's suggestion, it was true that the Commission had submitted alternative proposals to the General Assembly in the past, but that procedure had been employed when two essential conditions had been present. The first was that opinion on the issue had been equally divided, and the second, that there had been an element of the unknown in one of the alternatives. In the case in point, however, the majority of the Commission was clearly in favour of the special rapporteur's solution, and the second alternative was already well known to governments and their legal advisers. The only result of submitting the second alternative would be to reopen the discussion on an already much-debated question in the Sixth Committee of the General Assembly, which, moreover, had already requested the Commission to provide it with guidance in the matter. He therefore thought it would be sufficient to draw attention in the commentary to the fact that the second alternative had been supported by some members.

39. Mr. GROS said he could assure Mr. Amado that the defenders of traditional international law were not necessarily unaware of what was happening around them. On the contrary, those of them who were legal advisers to their governments were in daily contact with the realities of international life. He had examined and explained the question of reservations objectively and considered that, after a three-day discussion, the Commission should decide whether to abandon the search for agreement on that capital issue, or whether there was any basis for agreement and if so, what that basis was.

40. There were different ways of stating the fundamental rule. Mr. Tunkin had taken one of the possible courses by emphasizing the freedom of all states to propose reservations; he (Mr. Gros) could accept that proposition, provided there was no mention of a "right" to make reservations, for no such right existed, only a faculty to propose.

41. Personally he would state the rule differently. He would say that if a treaty laid down the conditions on which reservations were admitted, those conditions must be applied, and that no reservation which failed to fulfil the conditions could be regarded as valid. Actually, there

was little difference over that starting point in the reasoning, so long as it kept to the question of the formulation of reservations; the real difference began with the question of their validity.

42. It could be regarded as a rule of law that a multilateral treaty was one in which the system of reservations was regulated. The first difficulty that arose was that certain treaties were silent on the subject of reservations and Mr. Ago had rightly pointed out that in most cases the silence of the treaty was due to the fact that no agreement had been reached on the clause concerning the faculty of making reservations. For example, if a clause admitting reservations to all the provisions with the exception of three articles were submitted to a conference of ninety-nine states, and sixty-five states voted in favour, there would be no two-thirds majority and consequently no reservations clause. If, in such a case, certain states, under the proposed system of complete freedom to make reservations, submitted reservations to the three articles which the majority of sixty-five states regarded as essential, would it have to be admitted that a minority of the parties, as a result of the silence of the treaty, could make reservations which were unacceptable to the majority? He did not think that he could be labelled as reactionary in expressing the view that the fundamental factor of such a case was equality before the law for all the states which had concluded a treaty. The supremacy of international law must be recognized; it should, therefore, be clearly recognized that some reservations were acceptable and others were not. When it was through the accident of a vote, the lack of a majority, that a treaty contained no clause on reservations, then reservations were only possible with the consent of the parties.

43. The special rapporteur had rightly provided in his draft articles that reservations incompatible with the object and purpose of the treaty were inadmissible. But it was at that point that opinions began to differ. In the absence of a specific reservations clause, who was to decide whether a reservation was admissible or not? In view of the difficulty of deciding that point, he was in favour of the second alternative suggested by the special rapporteur, which consisted in concerted examination of the reservation by the states concerned. The uniformity of international law did not permit the fragmentation of a collective treaty into a series of bilateral relationships; to those who asserted that the adoption of such a system would represent progress in international law, he would reply that the adoption of such a system, the triumph of bilateralism, would set international law back three hundred years to the age of individual relationships between one state and another, one city and another. Collective treaties must not be destroyed; if states accepted a legal regime, it was dangerous deliberately to fragment the agreement by allowing all or a large number of states to go back on the agreement by making reservations to those articles which did not square with their own views.

44. He believed that all members were prepared to accept the principle that, if a treaty contained formal clauses, those clauses should be applied. If a reservations clause had been discussed and not adopted, the Commission might consider some special provision to cover that situation and that provision should refer to the agreement of all the parties to the treaty. If the negotiators had not considered the question, a solution should be adopted which took account of the realities of life. For example, in a case like that of the 1960 Convention on the Safety of Life at Sea, which laid down certain measures for protecting the health of the population of ports visited by certain kinds of ships, would those members who claimed that they were in favour of progress really be satisfied if their states accepted a reservation by another state which would have the effect that ships of those kinds could enter its ports without observing the precautions laid down by the Convention and without inspection? Could bilateral acceptance of such a reservation, which was incompatible with the object and purpose of the treaty, and entailed danger to the health of the population, be regarded as progressive? The answer was obviously in the negative. Not all reservations were acceptable. The Commission must have the courage to recognize that and to provide that the question of their acceptability should be decided by objective examination. Individual decision by each state could be no guarantee of objectivity.

45. Mr. LACHS said that he had originally wished to speak only on the procedural point raised by Mr. Verdross, but since Mr. Gros had referred to substance, he felt obliged to make some reply. Mr. Gros and some other members had gone so far as to assert that the admissibility of reservations carried with it the danger of destroying international law. No member of the Commission was interested in the destruction of international law; their presence in the Commission served as a proof that they were interested not only in maintaining international law, but in promoting its progressive development.

46. The interpretations of the word "progress" during the debate had admittedly been contradictory. Mr. Ago had said that he could not rejoice at the existence of reservations; but he (Mr. Lachs) would submit that there was no question of rejoicing at or deploring the existence of certain institutions of international law. It was essential to bear in mind the facts which were the outcome of a historical process; a broad view of the issue of reservations showed that they were a phenomenon of a changing age, and had reached the crossroads between the majority rule and the unanimity principle. Some members wished to press the majority principle as the acme of wisdom and law; but he would recall the fifty-year-old dictum of an eminent French jurist, "*la majorité ne fait pas loi en matière internationale*", which still held good. The institution of reservations had grown out of the tripartite relations between the phenomenal extension of the majority principle, the recession of the unanimity rule and the principle of the equality of states. References to progress and to the defence of international law could hardly be reconciled with advocacy of what would in fact become closed treaties, open only to some states. On the

contrary, it was by opening the way to increasingly wide participation, compatible with the vital interests of states, that a contribution could be made to the progress of international law. Closed treaties had represented an unfavourable tradition of international law, irrespective of where and when they were concluded.

47. The Commission should assume a certain wisdom on the part of states, and leave it to them to ponder and decide in each case whether it was more important to extend participation as widely as possible or to establish certain bilateral relationships within the treaty. States did not take such decisions lightly, especially in the case of treaties in which they were vitally interested. Naturally, the ideal situation was one where states subscribed to the whole treaty and where they all took an equal interest in the instrument; but it was essential to take into account the variety of interests involved in modern treaty-making. The solution offered by the special rapporteur allowed for reliance on the wisdom of states and for the compatibility of the treaty provisions with state interests; accordingly, that was the solution which should be adopted.

48. While accepting certain general principles, Mr. Gros had implicitly advocated reintroducing the majority principle by the back door, which would fundamentally alter the position.

49. The Commission should proceed with circumspection so as not to take any step that might be at variance with practice and what was an established institution of international law. Since the General Act of Brussels of 1890 many thousands of reservations had been made.

50. While appreciating the reason behind Mr. Verdross's procedural suggestion, he greatly doubted whether it should be followed. Such states as would reply, and they might be few, would only indicate what was their own practice and that was already known to the Commission. Furthermore, states had already expressed their views concerning reservations on numerous occasions in the General Assembly. If those which replied were fairly evenly divided, the situation would in no way be changed. His final objection was that, by asking states for guidance the Commission would seem to be anticipating the issue and binding itself to follow the majority view. Such an outcome would be extremely prejudicial to the Commission's prestige, and any hesitancy on its part would diminish its standing in the eyes of the world. The Commission should be in a position to come to a decision in the light of practice during the past fifty years and more particularly the past decade.

51. Mr. TSURUOKA asked whether the Commission had reached any decision on the suggestion by Mr. Rosenne that the compatibility test should also be applied to consent or objection to a reservation.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had not yet taken any decision, but he had suggested, as part of the general framework of the articles, that states making a reservation and those consenting or objecting to it, should have regard to the compatibility principle.

53. Mr. BARTOŠ said that although, as he had already indicated, his own views had changed during the past ten years and he had come round to accepting reservations as a necessary institution, he nevertheless considered that regulatory provisions should be laid down to check the possibility of abuse.

54. He also considered that reservations should be part of the contractual system, and he could not subscribe to the theory that, since states in the exercise of their sovereign rights could make reservations, others were bound to accept them. To his mind, that reasoning meant an expansion of the sovereignty of the reserving state at the expense of the sovereignty of those states which had accepted the treaty in complete good faith and without reservations. Some means should be found of reconciling the freedom to make reservations with respect for the will of the parties in the sense suggested by Mr. Tunkin, if he had understood him correctly.

55. With regard to Mr. Verdross's suggestion, he was not in principle opposed to the idea of the Commission submitting alternatives to states in its draft but considered that such a course should only be adopted when the Commission was very divided or very hesitant and needed guidance from governments to help it form an opinion. In the present instance, although there was some difference of opinion, there appeared to be sufficient support for the special rapporteur's approach. He favoured the idea of Mr. Jiménez de Aréchaga that the difference of opinion should be reported in the commentary and that the special rapporteur's proposals should be accepted, subject to possible amendments by the Drafting Committee.

56. With regard to the rule for the acceptance or rejection of reservations, if the treaty was silent on the subject of reservations, the presumption was that states which did not object accepted the reservation and there the two-thirds majority rule, which was that commonly adopted in United Nations conferences for the adoption of texts, should be applied. If a treaty specifically stipulated a two-thirds majority rule and states neglected to register their objection to reservations, then, if one-third expressly opposed them, the reservations should be regarded as rejected absolutely *erga omnes*. In other cases the inter-American system, as proposed by the special rapporteur, should be followed.

57. Mr. LIU said that an excessively flexible rule concerning reservations might have an adverse effect on the conclusion of multilateral treaties by diminishing the inducement to states to compromise and subordinate their individual views to that of the majority at the negotiating stage; it could thus have certain consequences even before the treaty was drawn up.

58. The inter-American system worked admirably for a closely-knit group of states with a great deal in common, and the stage at which the Secretary-General of the Organization of American States notified parties of a reservation and, where necessary, sought to persuade the reserving state to bring the reservation more into line with the object and purpose of the treaty, was almost tantamount to resumption of negotiations. United

Nations practice did not go so far and its Secretary-General was only required to transmit reservations to the other contracting states, a process which committed no one to any appraisal of the validity of the reservation itself. The procedure envisaged in the special rapporteur's draft seemed to go somewhat further and he doubted if states would be prepared to accept it.

59. He was not denying the utility of reservations or arguing in favour of the unanimity rule for their acceptance; even with a strict rule there was nothing to prevent states from making reservations.

60. Mr. EL-ERIAN said that he had already explained his general attitude to the question of reservations but wished to make some further comments in the light of the subsequent discussion. Little purpose would be served by the Commission adopting a rigid attitude in such a controversial and delicate matter: it should frame a flexible, acceptable and constructive rule appropriate to the needs of the international community.

61. The principle of the integrity of treaties had perhaps been overstressed. Although as far as possible obligations under a treaty should be uniform, he doubted whether reservations to any of the provisions would in fact seriously impair the integrity of a treaty. If there were such a danger, presumably the negotiating states would insert an express prohibition against reservations to specific provisions which they regarded as essential, as had been done in the case of the Geneva Conventions on Fishing and Conservation of the Living Resources of the High Seas and on the Continental Shelf of 1958 and the Convention on the Liability of Operators of Nuclear Ships signed in Brussels only five days previously. He appealed to Mr. Gros and Mr. Ago not to carry to extreme lengths their defence of the principle of integrity.

62. It was, in his opinion, equally important to secure the widest possible participation in general treaties, particularly in order to obviate the possibility, implicit in the comments of the United States Government in connexion with the choice between the Commission's draft on diplomatic privileges and immunities being embodied in a draft convention or in a code, that a convention codifying customary law which failed to secure a large number of ratifications would weaken that law.

63. The argument that rules restricting the effects of objections to reservations impaired the sovereignty of states could be advanced against any rule which in some way or another limited the absolute freedom of states. The Commission should be guided by what was necessary and useful. The issues under discussion were important and called for clear-cut decisions.

64. On the procedural question, in general he favoured the special rapporteur's approach and agreed that the points on which views had diverged could be stated in the commentary. The Commission was, after all, engaged on the first reading, and there would be ample opportunity to reconsider both the texts of the articles and the commentary.

65. Mr. AGO said that, to state the problem in its simplest terms, there was no dispute over the need for reservations, which all members recognized; the only question was how reservations could be prevented from nullifying the object and purpose of the treaty. Admittedly the remedy of giving the General Assembly power to decide by a majority, where the treaty was silent because no decision had been possible as to which articles were essential, whether or not a reservation was compatible with the objects and purpose of a treaty, was a makeshift, but he could not agree that it would destroy the very essence of the institution of reservations. There was no reason why failure to reach agreement on the inclusion in the treaty itself of a clause indicating to which articles no reservations could be accepted should prevent the negotiating states from reaching agreement on that point at a later stage, and particularly as to the itself into believing that any progress had been made.

66. Admittedly questions of interpretation might arise as to whether a particular article of a treaty was essential and not open to reservations, and the objections to submitting such a question for decision to a body like the General Assembly rather than, as he would prefer, a judge, were only too obvious. But the decision of a collegiate body was always to be preferred to a series of contradictory decisions taken individually by the different states. Since, however, the majority of members did not favour such a system, they should at least be clear as to the implications of that choice and recognize that, because an objective rule could not be devised, the logical consequence was that the matter had to be left for decision by each state, with the serious drawback that one state's decision as to the essential character of an article might conflict with that of another state. That was the so-called "classical" rule of which he had spoken earlier. If the Commission could not do better than bow to practice, at least it should not deceive itself into believing that any progress had been made.

67. In any case, the Commission should at all costs avoid admitting tacitly that, where the treaty was silent, any provision could be subject to reservations and any reservations could be accepted. In every treaty there were some articles to which reservations could not be accepted if the object of the treaty was to be safeguarded. Even if the Commission could do no more, it should at least urge states to be sure to include reservations clauses in treaties specifying which articles were essential, and to take seriously their responsibilities towards other parties when they accepted reservations to what might be essential provisions. A statement on those lines should be inserted either in the draft articles to be prepared by the Commission or at any rate in the commentary.

68. Mr. de LUNA said that reservations were necessary in modern treaty-making because of the evolution from the absolute to the democratic form of government with parliamentary control over international relations, the trend towards the universality of international law, and the substitution of the majority rule for the unanimity rule in the adoption of treaties.

69. Obviously, reservations affected the integrity of treaties and, even if the principle of reciprocity were applied, could produce inequality as between the reserving and the objecting state, because the latter,

though not bound by the treaty *vis-à-vis* the former, was bound with regard to the other parties which had made no objection by virtue of the principle of the indivisibility of rights and obligations. In the circumstances, the reserving state might obtain certain advantages. Nevertheless such drawbacks were outweighed by the value of reservations which enabled a minority to undertake to be bound by part of a treaty, a solution which was preferable to their remaining outside altogether.

70. Incompatibility with the object and purpose of a treaty was unfortunately an objective criterion which could only be applied subjectively. In the absence of any other solution, each state should be free to judge for itself.

71. The Commission should take account of practice and respect the express will of the parties. For that reason, he thought that the articles under discussion should be based on the inter-American system.

72. He had no firm opinion about the procedural suggestion put forward by Mr. Verdross and agreed with the view expressed by Mr. Jiménez de Aréchaga.

The meeting rose at 1 p.m.

655th MEETING

Friday, 1 June 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*)

DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to discuss the texts submitted by the Drafting Committee.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that before the Commission took up the Drafting Committee's texts he would like to have guidance about how it wished him to modify the commentary, which had been prepared primarily for the Commission's own use and contained numerous references to views expressed at the eleventh session.

3. Mr. BRIGGS suggested that the special rapporteur should be requested to redraft the commentary so as to give less prominence to what the Commission had thought in 1959 and more space to explaining the reasons for the decisions reached in 1962.

It was so agreed.

ARTICLE 1. — DEFINITIONS

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared the following new text for a paragraph 1 (*a*) and paragraph 2 of Article 1:

"1 (*a*). Treaty means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), which is governed by international law and is concluded between two or more states or other subjects of international law.

".....

"2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any state."

5. The Commission would note that, in accordance with its wishes, the Committee had amalgamated the definitions of treaty and international agreement in a single clause and had dropped the reference to the possession of international personality as well as the reference to intention in the statement that the agreement was one governed by international law. The Drafting Committee had been hesitant about whether or not to retain the list of appellations attached to treaties, which was not exhaustive, but had decided to retain it so that that point might be considered by the Commission. As special rapporteur, he believed the list to be useful for illustrative purposes, because of the considerable uncertainty as to what was covered by the term "treaty".

6. Mr. TSURUOKA suggested that the whole definition should be qualified by the proviso "for the purposes of the present articles".

7. Mr. CASTRÉN said the new draft of paragraph 1 was a great improvement on the original definition but it failed to make clear whether or not contractual international relations between states and individuals were covered by the draft. Some explanation on that point was certainly necessary in the commentary.

8. He agreed with Mr. Tsuruoka that the article should be prefaced by the proviso he had stated.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the whole series of definitions would certainly be prefaced by the words mentioned by Mr. Tsuruoka. The draft they were discussing related only to one definition.

10. Mr. ROSENNE said he hoped that the list of instruments placed in parentheses was not intended to imply any legal hierarchy among those mentioned. The order was somewhat puzzling; perhaps the most satisfactory solution would be to make it alphabetical and make it clear that the list was merely illustrative by inserting the words "such as" at the beginning.

11. It might be necessary to include in article 1 a separate definition of a treaty in simplified form.

12. Mr. PAREDES pointed out that the element of consent had been altogether overlooked in the definition, which should be amplified by a reference to the fact that international agreements were instruments freely and spontaneously concluded by the parties.

13. Mr. de LUNA said that the Commission would have to give some thought to the fact that individuals and bodies corporate could be subjects of international