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Summary record of the 662nd meeting

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sive process of the conclusion of the treaty, including all the various stages involved. That change would involve the elimination of the unsatisfactory term "generally".

69. The CHAIRMAN suggested that sub-paragraph (e) should be referred back to the Drafting Committee.

It was so agreed.

70. Sir Humphrey WALDOCK, Special Rapporteur, introducing sub-paragraph (f), explained that the Drafting Committee had dropped the reference to a "condition" and had decided that the substance of the second sentence in the original definition of a reservation could be dealt with in the commentary. The point was of importance because explanatory statements were quite often made and sometimes constituted a concealed reservation.

71. Mr. ROSENNE suggested that, as "approval" had been mentioned specifically in sub-paragraph (d), the word "approving" should be added in sub-paragraph (f).

It was so agreed.

Sub-paragraph (f) as thus amended was approved.

72. Sir Humphrey WALDOCK, Special Rapporteur, introducing sub-paragraph (g), said that the Drafting Committee had discussed the possibility, particularly in relation to the Red Cross, that there could be other depositaries, but not one of the Committee's members who were legal advisers to their governments could recall a single instance of a depositary not being either a state or an international organization.

73. Mr. ROSENNE pointed out that the word "authentic" had been used in a different sense in the revised version of article 24. In order to avoid confusion it should be replaced by the word "original" in sub-paragraph (g).

74. Mr. BRIGGS suggested that the reference was to the "original instrument" rather than the text.

75. Mr. LACHS agreed with Mr. Briggs.

76. Mr. TSURUOKA observed that no adjective was needed to qualify the word "text".

77. Mr. YASSEEN agreed with Mr. Tsuruoka.

78. Mr. CADIEUX said that if the word "authentic" were deleted, the words "of the treaty" should be inserted after the word "text".

Sub-paragraph (g) as thus amended was approved.

79. Sir Humphrey WALDOCK, Special Rapporteur, introducing paragraph 2, said that the provision had been discussed at the 655th meeting in connexion with article 1, on definitions, and its general form appeared to have commended itself to the Commission, except that Mr. Briggs had suggested that it should follow sub-paragraph (c). Personally, he would prefer that it should remain at the end of the article as a general provision.

80. Mr. BRIGGS said he could agree to that.

81. Mr. de LUNA and Mr. CADIEUX asked that the French text should be brought into line with the English.

It was so agreed.

Paragraph 2 was approved.

The meeting rose at 12.25 p.m.

662nd MEETING

Thursday, 14 June 1962, at 11.15 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 (*continued*)

ARTICLE 25.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS A DEPOSITARY

1. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had made a number of drafting changes in his original article 25 and proposed the following redraft:

"1. (a) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the states which participated in the adoption of the text and to the attention of any other states which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction.

"(b) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the states which are or may become parties to the treaty.

"2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the states mentioned in paragraph 1 (b) of the present article.

"3. The provisions of paragraph 1 shall likewise apply where two or more authentic texts of a treaty are not concordant, and a proposal is made that the wording of one of the texts should be deemed to be inaccurate and to require correction.

"4. If an objection is raised to a proposal to correct a text under the provisions of paragraph 1 or 3 of the present article, the depositary shall notify the objection to all the states concerned, together with any other replies received in response to the notifications mentioned in paragraphs 1 and 3. However, if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

"5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the states concerned shall otherwise decide."

2. Mr. BARTOŠ said that paragraph 1 (a) of the new draft should indicate who would be responsible for pointing out that there was a mistake in the text. A passage should be added to the effect that either the depositary or a state might raise the matter.

3. Sir Humphrey WALDOCK, Special Rapporteur, said he thought the Drafting Committee might be asked to draft a suitable passage to cover the point.

4. Mr. CASTRÉN suggested that paragraph 4 should be amplified so as to indicate what would happen if one state maintained against all the others an objection to a proposed correction. Mr. de Luna had drawn attention to that gap in the special rapporteur's original draft.¹

5. Mr. BARTOŠ supported that suggestion, and added that the commentary at least should also mention that a depositary should notify the United Nations Secretary-General of any corrections made in the text of a treaty registered with the United Nations.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that the point raised by Mr. Castrén had been discussed by the Drafting Committee, which had confirmed the view he had expressed during the earlier debate that it would be undesirable to lay down a procedure to cover the case where the parties could not reach agreement on a correction. It would be wiser not to regulate the matter by an express provision, but to leave it to be settled by consultation between the states concerned.

7. He agreed with the addition suggested by Mr. Bartoš and considered that it belonged logically to paragraph 5.

8. Mr. de LUNA said that he could not entirely accept the special rapporteur's view. Paragraph 4, as it stood, might result in the objecting state exercising a kind of veto which could obstruct corrections. Surely, it should be possible to insert a rule under which a dispute concerning a proposed correction to a treaty would be settled by the same voting rule as governed the adoption of the text.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be interested to know the Commission's opinion on what was admittedly a gap in the text. A rule of the kind suggested by Mr. de Luna would certainly be reasonable but would involve an elaborate process of notification and consultation.

10. Mr. CADIEUX suggested that the question might be dealt with in the commentary which should indicate that the Commission had discussed the two alternatives of either inserting a rule, or leaving the question to be settled by consultation between the states concerned. Personally, he favoured the latter course.

11. The CHAIRMAN suggested that, as no formal

amendment had been proposed, the special rapporteur might be requested to draft an appropriate passage covering the point, for inclusion in the commentary.

It was so agreed.

12. Mr. LIANG, Secretary to the Commission, pointed out that the wording of the last part of paragraph 3 should be changed so as to bring it into line with the amended text of paragraph 2 of article 24.

It was so agreed.

Article 25 as thus amended was approved.

ARTICLE 26. — THE DEPOSITARY OF MULTILATERAL TREATIES

13. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared the following redraft of article 26, which was a condensed version of his original provisions concerning the appointment of a depositary in cases where the treaty was silent.

"1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the states which adopted it shall have otherwise determined, the depositary shall be:

"(a) in the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

"(b) in the case of a treaty drawn up at a conference convened by the states concerned, the state on whose territory the conference is convened.

"2. In the event of a depositary declining or failing to take up its functions, the negotiating states shall consult together concerning the nomination of another depositary."

Article 26 was approved.

INTRODUCTION TO CHAPTER II IN THE COMMISSION'S DRAFT REPORT

14. The CHAIRMAN said that the special rapporteur wished to have the guidance of the Commission as to the content of the introduction to the chapter in the Commission's report to the General Assembly, dealing with the law of treaties.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that section A of the introduction to his own report was largely an account of what had been done at past sessions and though it might not be of great value, it should perhaps be retained and brought up to date with a statement on the work done at the current session.

16. Mr. TABIBI said that although the introduction to the special rapporteur's report had been extremely useful, particularly to new members like himself, its inclusion in the Commission's draft report might not only create difficulties for governments because of the need for additional translation and study but also encourage them, instead of concentrating on the draft

¹ 657th meeting, para. 89.

articles, to comment on such matters as the Commission's previous decision to prepare a convention rather than a code. The introduction would, in any case, be reproduced in the Commission's *Yearbook*.

17. Mr. CADIEUX said that an introduction would be needed in the chapter on the law of treaties in the Commission's report, and the introduction contained in the special rapporteur's report could serve with some modifications.

18. First, a clearer exposition should be given of the reasons why the Commission had reversed its original decision in favour of a code and decided to prepare draft articles suitable for a convention. The reasons for its earlier decision to prepare a model code had been adequately explained in the Commission's report in its eleventh session.²

19. Secondly, at the beginning of section B some explanation should be added of the Commission's decision to confine itself for the time being to the preparation of a draft containing articles on the conclusion, entry into force and registration of treaties.

20. Thirdly, it should be explained that the treaties of international organizations were not being dealt with in the present draft.

21. An introduction in that modified form would certainly be helpful to governments in preparing their comments on the draft.

22. Mr. ROSENNE said that an introduction on the lines of that prepared by the special rapporteur was necessary but should be condensed and brought up to date.

23. First, a new section should be added to follow section A, summarizing the discussions in the General Assembly since 1946 on the law of treaties, covering the functions of the depositary, reservations, lack of concordance between versions in different languages, the amendment of treaties, and registration. There had also been a general discussion on the codification of the law of treaties, culminating in resolution 1686 (XVI). As the Commission was presenting, for the first time, a fully articulated set of articles in response to the General Assembly's request, it was important to indicate in the introduction that it had taken full account of the General Assembly's discussions. There was a precedent for such a course in the introduction to the Commission's draft on consular relations.³ It would also be fully in conformity with article 20 (a) of the Commission's Statute.

24. Secondly, the Secretariat might be asked to prepare a paper for the Commission's next session and for future deliberations on the question, reproducing various decisions taken by the General Assembly on the law of treaties and pertinent extracts from the reports of the

Sixth Committee to the plenary Assembly, which constituted an explanation of the Assembly's decisions.

25. Thirdly, it was essential to include in the Commission's report on the current session a fuller explanation of its reasons for its decision preferring a convention on the law of treaties to a code. He did not question the wisdom of the Commission's decision in 1961 to consolidate its work on the law of treaties in that form⁴ and agreed substantially with the views expressed by Mr. Ago at the 620th meeting. Nevertheless, he wished to draw attention to the passage in the Commission's report on its eleventh session in 1959 which stated that the law of treaties was not itself dependent on treaty, but was part of general customary international law.⁵ In his opinion, the Commission owed it to the General Assembly, to governments and to the legal profession as a whole to elaborate on the reasons for that change and to explain how to overcome the theoretical barrier of giving binding force to a convention on the law of treaties.

26. Mr. BRIGGS said it would be easier to discuss the introduction if the special rapporteur could submit a text to the Commission.

27. Mr. TUNKIN said that the special rapporteur's text constituted a good basis for an introduction to the draft articles, although some alterations were obviously necessary.

28. He noted that in paragraph 6 of the introduction to his report, the special rapporteur had stated that in its report for 1959 the Commission had drawn particular attention to the fact that it did not envisage its work on the law of treaties as taking the form of one or more international conventions but had favoured the idea of "a code of a general character". He (Mr. Tunkin) had re-read the summary records of the eleventh session, and his impression was that the Commission had not in fact favoured a code, but had merely left aside the question of the form which its work on the law of treaties was to take; it had simply discussed the draft articles as submitted by Sir Gerald Fitzmaurice. It might, however, be said that the Commission had tended to favour the idea of a code in 1956, when Sir Gerald had submitted his preliminary report.

29. Secondly, with regard to treaties concluded by international organizations, the Commission had decided not to deal with the question for the time being, and it would be premature to suggest in the introduction that that complex problem, which was different from that of treaties concluded between states, should be dealt with in a chapter or in a separate convention.

30. Mr. LIANG, Secretary to the Commission, said that the nature of the Commission's report to the General Assembly should be borne in mind. Since the Commission was submitting some of the draft articles on the law of treaties to governments for comment, it

² *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No. : 59.V.1, Vol. II), p. 91.

³ *Yearbook of the International Law Commission, 1961*, Vol. II (United Nations publication, Sales No. : 61.V.1, Vol. II), p. 90.

⁴ *ibid.*, p. 128.

⁵ *Yearbook of the International Law Commission, 1959*, Vol. II (United Nations publication, Sales No. : 59.V.1, Vol. II), p. 91.

could not produce a definitive report. The report on the current session would be similar to that on its twelfth session, in 1960, when the draft articles on consular intercourse and immunities had been transmitted to governments by circular letter of 27 September 1960, asking them to communicate their comments by 1 February 1961. The report on the thirteenth session stated that, during the discussion by the General Assembly of the International Law Commission's report on the work of its twelfth session, of which the draft articles on consular intercourse and immunities formed the main part, there had been an exchange of views on the draft as a whole and on the form it should take, although owing to its provisional nature, the draft had been submitted to the Assembly for information only.⁶ The same procedure should obviously be followed in the case of the draft articles on the law of treaties. Consequently, the report on the fourteenth session should not be as elaborate as when a definitive draft was completed. The introduction should be succinct, and should not enter into questions which should be reserved for the final report.

31. With regard to Mr. Rosenne's suggestion that a summary of earlier General Assembly debates on the law of treaties should be prepared, he thought that that should appear in the final report, rather than in the preliminary documentation. In any case, he very much doubted whether the special rapporteur would be able to prepare such a report in the short time remaining. Naturally, in 1963, the Commission would examine ways and means of making its commentary on the law of treaties as rich in content and as useful in substance as was envisaged in article 24 of the Statute. The best course therefore seemed to be for the special rapporteur to submit to the Commission a draft introduction which would take into account the observations made during the debate.

32. Mr. TUNKIN said the Commission had decided, two or three years previously, that governments should have two years in which to submit their comments on drafts prepared by the Commission. An exception had been made in the case of the draft on consular intercourse and immunities, owing to special circumstances. If, therefore, the articles which the Commission was discussing were submitted to the General Assembly, the Commission would not be able to hold the second reading until 1964. It should be stated in the introduction that that part of the draft was to be submitted to governments.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that he was anxious to obtain the Commission's advice on the introduction. It was obvious that he could not prepare the summary which Mr. Rosenne had asked for, since the Secretariat was much better equipped than any special rapporteur to deal with the matter.

34. The most important point raised during the debate was that of the switch from the idea of a code to that

of a convention. The question had been discussed briefly at the thirteenth session, and his impression of the debate had been that members all had different reasons for considering a convention desirable. He had been convinced that, in the existing international situation, a code could never serve the same effective purpose as a convention drawn up satisfactorily and then adopted by states. Moreover, governments would not have the same interest in an academic code as they would in a convention, which they would sign and take seriously at every stage of its conclusion. A convention would therefore represent a more valuable end-product of the Commission's work than a code. But since the question had not been discussed in detail at the previous session, he would welcome observations from members to reinforce the position that had been taken.

35. Mr. de LUNA said that the experience of the two Conferences on the Law of the Sea, held at Geneva in 1958 and 1960, and of the 1961 Vienna Conference on Diplomatic Relations bore out the wisdom of the Commission's decision to formulate the draft articles on the law of treaties with a view to a draft convention rather than a code.

36. Even where certain rules of customary international law were not in dispute, it was of great practical utility to give the newly independent states an opportunity to state their position on those rules as reflected in a draft convention submitted to an international conference of plenipotentiaries. The new states thereby gave their formal approval to the rules in question, thus clarifying the position and establishing the law on a firm footing.

37. The CHAIRMAN said that the Commission had no intention of altering its decision to formulate the draft articles with a view to the conclusion of a convention on the law of treaties.

38. With regard to the introduction to the chapter on the law of treaties in the Commission's report for the present session, there appeared to be general agreement that, subject to minor corrections, the introductory part of the special rapporteur's report constituted a satisfactory basis.

39. With regard to Mr. Rosenne's suggestion, he thought the session was too far advanced for it to be considered for the present session; it might be considered in connexion with the second reading. Meanwhile, he joined other members in requesting the Secretariat to prepare a comprehensive paper on the subject of the discussions in the General Assembly relating to the law of treaties.

40. Sir Humphrey WALDOCK, Special Rapporteur, said he would take Mr. Tunkin's observation into account and make the necessary adjustments in the relevant passage of the introduction which he would prepare.

41. With regard to the treaties of international organizations, he had done a good deal of research on the subject and prepared a number of draft articles. He had not, however, submitted them to the Commission because he felt it was not advisable to finalize articles on the treaties of international organizations before the

⁶ *Yearbook of the International Law Commission 1961*, Vol. II (United Nations publication, Sales No. : 61.V.1, Vol. II), p. 90.

Commission had completed the draft articles on treaties between states. The introduction to the report would, of course, reflect the Commission's decision to deal only with treaties between states.

42. Another point which would have to be mentioned in the Commission's report was the decision of the Commission that, at its next session, he would submit a report on the validity of treaties.

43. Lastly, for the purposes of the publication of his report as part of the 1962 *Yearbook* of the Commission, he would supplement the appendix with a short addendum dealing with the question of reservations to the IMCO Convention, which had been brought to his attention after he had written that report.

44. Mr. BARTOŠ stressed that, as a matter of principle, when the Commission adopted one of its reports, the approval of each of the paragraphs by a vote of the Commission represented a decision on the part of the Commission. By voting in favour of the paragraph of the report which stated that the Commission would prepare the convention on the law of treaties, it had pronounced in favour of that decision. The Commission's decisions were not irreversible, but their existence could not be ignored.

45. The CHAIRMAN said that the special rapporteur would prepare, in the light of the discussion, a draft of the introduction to chapter II of the Commission's report for submission to the Commission at a later meeting.

The meeting rose at 12.35 p.m.

663rd MEETING

Monday, 18 June 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)

DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (resumed from the previous meeting)

ARTICLE 17.—FORMULATION OF RESERVATIONS

1. The CHAIRMAN invited the special rapporteur to introduce the new draft articles on reservations which had been prepared by the Drafting Committee.

2. Sir Humphrey WALDOCK, Special Rapporteur, explained that the various provisions on reservations had been revised by the Drafting Committee; the original three articles, 17, 18 and 19, had been replaced by five new articles, numbered 17, 18, 18 *bis*, 18 *ter* and 19.

3. Article 18 *ter* on the legal effect of reservations and article 19 on the withdrawal of reservations were short, since most of the substance was contained in article 17, formulation of reservations, article 18, acceptance of and objection to reservations, and 18 *bis*, validity of

reservations. The drafting of those three articles had involved a considerable rearrangement of his original draft provisions. The rearrangement did not, however, greatly affect article 17, the new text of which read:

"1. A state may, when signing, ratifying, acceding to or accepting a treaty, formulate a reservation unless:

"(a) the making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

"(b) the treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

"(c) the treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

"(d) in the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

"2. (a) Reservations, which must be in writing, may be formulated:

"(i) upon the occasion of the adoption of the treaty, either on the face of the treaty itself or in the Final Act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

"(ii) if, after being adopted, the treaty remains open for signature, upon signing the treaty; or

"(iii) upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.

"(b) A reservation formulated upon the occasion of the adoption of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving state, when carrying out the act establishing its own consent to be bound by the treaty, confirms in some formal manner its intention to maintain its reservation.

"3. A reservation formulated subsequently to the adoption of the treaty must be communicated (a) in the case of a treaty for which there is no depositary, to any other state party to the treaty or to which it is open to become a party to the treaty; and (b) in other cases, to the depositary, which shall transmit the text of the reservation to any such state."

4. In paragraph 1, the compatibility test was set out in sub-paragraph (d) for the case where the treaty was silent concerning the making of reservations.

5. Paragraph 2 dealt with the method of formulating reservations.