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Summary record of the 663rd meeting

Topic:
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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provisions on reservations had been revised by the Drafting Committee; the original three articles, 17, 18 and 19, had been replaced by five new articles, numbered 17, 18, 18 *bis*, 18 *ter* and 19.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.

6. Paragraph 3 dealt with the communication of reservations and was considerably shorter than the previous text, though it retained most of the substance.

7. Mr. ROSENNE said he could accept article 17 as proposed by the Drafting Committee, but would like to suggest a number of changes.

8. To reflect the true intention of the Commission, in the introductory portion of paragraph 1, a reference to "approval" should be added after the words "when signing, ratifying, acceding to or accepting" and the word "multilateral" should be added before the word "treaty".

9. At the end of sub-paragraph 2 (*b*), the words "confirms formally" should be substituted for "confirms in a formal manner".

10. In paragraph 3, the expression "every other state" should be substituted for "any other state".

11. Mr. BRIGGS said he doubted the correctness of the English terminology in paragraph 1 where the introductory portion referred to the "formulation" and the various sub-paragraphs to the "making" of reservations. The difficulty did not arise in the French text.

12. For the sake of simplicity, sub-paragraphs 1 (*b*) and (*c*) could be merged. As he saw it, the distinction was between the case set out in sub-paragraph (*a*), where all reservations were prohibited, and the case set out in sub-paragraphs (*b*) and (*c*), where only some reservations were either expressly prohibited or impliedly excluded.

13. Sub-paragraph 1 (*d*) could be simplified by deleting the words "in the case where the treaty is silent concerning the making of reservations". It was inconceivable that states would authorize reservations that were incompatible with the object and purpose of the treaty.

14. He accordingly suggested that paragraph 1 be redrafted to read:

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

"(*a*) all reservations are prohibited by the terms of the treaty or by the established rules of an international organization; or

"(*b*) any particular reservation is expressly prohibited or impliedly excluded by the terms of the treaty or by the established rules of an international organization; or

"(*c*) the reservation is incompatible with the object and purpose of the treaty."

15. In paragraph 2, sub-paragraphs (*a*) (i) and (*b*), and in paragraph 3, he suggested that the words "the adoption of the text of the treaty" should be substituted for "the adoption of the treaty".

16. In sub-paragraph 2 (*a*) (ii), the desired meaning could be expressed simply by the words "upon signing the treaty".

17. In paragraph 3, he supported Mr. Rosenne's suggestion that the expression "any other state" should be replaced by "every other state".

18. Mr. TABIBI said that, while he would not insist on the deletion of sub-paragraph 1 (*d*), he still maintained the view he had expressed in the general discussion on article 17;[1] he did not favour any rigid rule along the lines of that provision and thought that it was advisable to facilitate rather than to hinder the making of reservations.

19. He noted the reference in sub-paragraph 2 (*a*) (iii) to "a *procès-verbal*". That reference could prove misleading because delegations occasionally made reservations in the course of speeches at a treaty-making conference; on at least one occasion, it had been suggested that, because a "reservation" had been entered in the records of the meetings of a conference, it constituted a valid reservation to the treaty ultimately adopted by that conference.

20. Mr. BARTOŠ said that the drafting of sub-paragraph 1 (*a*) was inadequate. It seemed to suggest that, if two states were members of an international organization, they could not in any circumstances, even by agreement between themselves, make and accept reciprocally a reservation which was at variance with the established rules of that international organization. The intention was, however, to limit the application of that provision to the case where the treaty had been signed under the auspices of the international organization concerned or at a conference convened by that organization, or perhaps where the states concerned had entered into a specific commitment to the organization which conflicted with the substance of the reservation. It should be possible to improve the drafting so as to bring out that intention clearly.

21. In sub-paragraph 2 (*a*) (i) he did not see what "other instrument" could be meant. If the intention was to refer to ratification, he must point out that ratification took place after the adoption of the treaty and not "in connexion with" that adoption. Besides, the formulation of a reservation in the instrument of ratification was already covered by sub-paragraph 2 (*a*) (iii).

22. Sub-paragraph 2 (*a*) (iii) did not specify who would draw up the document recording a reservation formulated upon the exchange or deposit of instruments of ratification, accession or acceptance. It could be either the reserving state itself or all the states which had participated in the adoption of the treaty.

23. Mr. TSURUOKA said he could not agree to the individualistic system of reservation as instituted in the present draft article for the reason that under that system, the criterion of compatibility, which ought to be an objective criterion, was left entirely to the appraisal of each individual state, and a treaty might be put into effect as between a reserving state and an accepting state. He would, however, refrain from further elaborating the point at that stage.

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[1] 651st meeting, paras. 72 and 73.

24. The provisions of sub-paragraph 1 (*d*) were insufficient. The case he had in mind was where a state wished to object to a reservation on grounds other than its incompatibility with the object and purpose of the treaty. For example, a reservation, without being actually incompatible with the object of the treaty, might conflict with some rule of customary international law. Again, a reservation could constitute a breach of the reserving state's obligations toward other states under a pre-existing treaty.

25. For example, a state might have *vis-à-vis* twenty other states a treaty obligation to submit to the International Court of Justice all disputes relating to the interpretation of treaties in general. A multilateral treaty might then be adopted with a clause providing for the submission to the International Court of Justice of all disputes relating to the interpretation of the treaty. If, then, the state in question entered a reservation to that very clause, its reservation might not be incompatible with the object and purpose of the treaty, but it would certainly constitute a breach of its pre-existing treaty obligations to the other twenty states. It was inadmissible to suggest that none of those twenty states could invoke that breach as grounds for objection to the reservation.

26. Sir Humphrey WALDOCK, Special Rapporteur, replied that the point raised by Mr. Tsuruoka related more to the validity of treaties and therefore belonged to the next series of draft articles. It would be an extremely complicated business to cover that point in article 17.

27. In article 18, however, the question of the acceptance or rejection of reservations had not been linked to the compatibility test. A state could therefore make its own decision and, if it considered a reservation inconsistent with the obligations of the reserving state under a pre-existing treaty, it was free to take that fact into account when objecting to the reservation.

28. Mr. TSURUOKA said that he had raised the question because, in the course of the discussion, some members had suggested that the objecting state was bound by the compatibility test. He was, however, satisfied with the explanation given by the special rapporteur that states could take into consideration any valid reason when deciding on the acceptance or rejection of a reservation. He requested that that explanation be included in the commentary.

29. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that that should be done.

30. With regard to the drafting suggestions which had been made, he could accept those by Mr. Rosenne and Mr. Bartoš and also Mr. Briggs' suggestion that in paragraphs 2 and 3 the expression "the adoption of the text of the treaty" should be used instead of "the adoption of the treaty".

31. With regard to Mr. Briggs' point concerning the expressions "formulate a reservation" and "the making of reservations", sub-paragraphs 1 (*a*), (*b*) and (*c*) appropriately used the latter expression because a treaty would not deal with the mere formulation of reservations: if it authorized a particular reservation, explicitly or implicitly, then that reservation would take effect and it was therefore correct to speak of the "making" of a reservation. In the introductory portion of paragraph 1, on the other hand, the reference was to the formulation of a reservation which had not yet taken effect and which could therefore, not be said to have been "made".

32. He could not accept the suggested merging of sub-paragraphs (*b*) and (*c*). Sub-paragraph (*c*) served a useful purpose by making it clear that, where the treaty expressly authorized the making of a specified category of reservations, the implication was that all other categories of reservations were excluded. It was desirable to express that implication clearly.

33. In reply to Mr. Tabibi, the reason for the reference to "a *procès-verbal*" in paragraph 2 (*a*) (iii) was that sometimes at the time of the deposit of an instrument of ratification, a reservation was put in a short "*procès-verbal*" attached to that instrument and deposited at the same time.

34. The question of oral reservations was an important one, but it belonged rather to the question of reservations at the time of the adoption of the treaty, which was dealt with in sub-paragraph 2 (*a*) (i). There had, in fact, been some controversy regarding speeches made in the course of a conference and the claim that statements made in such speeches were to be regarded as the formulation of reservations. In that connexion, he drew attention to the provisions of sub-paragraph 2 (*b*), which required formal confirmation of a reservation formulated upon the occasion of the adoption of a treaty and which should go a long way towards disposing of the difficulty mentioned by Mr. Tabibi.

35. The CHAIRMAN suggested that article 17 should be referred back to the Drafting Committee.

It was so agreed.

ARTICLE 18. — ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

36. Sir Humphrey WALDOCK, Special Rapporteur, said that the new article 18 covered both acceptance of and objection to reservations; the contents of the two former articles 18 and 19 had been considerably reduced in length without, however, leaving out anything of substance.

The text proposed by the Drafting Committee read:

"1. Acceptance of a reservation not provided for by the treaty itself may be express or implied.

"2. A reservation may be accepted expressly:

"(*a*) in any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

"(*b*) by a formal notification of the acceptance of the reservation addressed to the depositary of the treaty, or if there is no depositary, to the reserving state and any other state entitled to become a party to the treaty.

"3. (*a*) A reservation shall be presumed to have been accepted by a state if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

"(*b*) An objection by a state which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not taken the steps necessary to establish its own consent to be bound by the treaty.

"4. An objection to a reservation shall be formulated in writing and shall be notified:

"(*a*) in the case of a treaty for which there is no depositary, to the reserving state and to any other state party to the treaty or to which it is open to become a party; and

"(*b*) in other cases, to the depositary."

37. Mr. TSURUOKA said that he would deal first with the presumption of acceptance set out in paragraph 3 (*a*). As he understood them, the provisions of articles 17, 18 and 18 *bis* embodied a system under which a series of bilateral relationships would be established. He must therefore stress the need to observe the principle of the equality of states, which was the very foundation of international law. That principle would be violated if, as indicated in paragraph 3 (*a*), a state could, by the mere passage of twelve months after its receipt of notice of a reservation, find that, unbeknown to itself, it was in treaty relations with the reserving state.

38. The presumption in paragraph 3 (*a*) could be defended if unanimity were the rule for the acceptance of reservations; it would then serve to introduce an element of flexibility in the application of a somewhat rigid rule. But with the system of bilateral relationships adopted in articles 17, 18 and 18 *bis*, the presumption should be that a state which did not explicitly accept a reservation thereby rejected it.

39. Paragraph 3 (*b*) also violated the principle of the equality of states. Under its provisions, a state which wished to ratify the treaty without reservations but which had made an objection to another state's reservation, was allowed only two years from the date of its objection to establish its own consent to be bound by the treaty. If to the period of two years were added that of twelve months provided in paragraph 3 (*a*) for raising the objection, the non-reserving state would have at most three years in which to complete the process of ratification and acceptance of the treaty. In view of possible parliamentary delays that period was not at all long, and it seemed to him at variance with the principle of the equality of states to specify that the mere passage of that period deprived an objecting state of the right to reject the reservation. He did not believe that the reserving state had the right to impose upon other states treaty relations on its own terms.

40. Mr. ROSENNE said that article 18 was acceptable. He appreciated the reason why the compatibility test was not specifically mentioned; a reference to that test was unnecessary in view of the provision in article 18 *bis*, paragraph 2 (*b*), since the test was inherent in the whole system now proposed by the Drafting Committee.

41. He shared some of Mr. Tsuruoka's doubts about the need for paragraph 3 (*b*). Moreover, if it were retained, it should form a separate paragraph since it dealt with a different point.

42. Although there was force in some of Mr. Tsuruoka's criticisms of paragraph 3 (*a*), it was nevertheless a desirable provision because it helped to clarify the legal position. It was not advisable to make it obligatory for states to reply in writing one way or the other about reservations.

43. He had, however, one suggestion to make for paragraph 3 (*a*), which he hoped was purely of a drafting character. Whereas paragraph 1 referred to the express or implied acceptance of a reservation, paragraph 3 (*a*) introduced the notion of a presumption, which created a legal fiction with all the attendant difficulties that that could cause in international law and in relations between states. The Drafting Committee should consider using the wording of paragraph 1 and stating clearly what was meant by an implied acceptance. The doubts liable to be created by the existing wording of paragraph 3 (*a*) would then be removed.

44. In keeping with his earlier suggestion concerning article 17, paragraph 3, he suggested that the words "any state" in paragraphs 2 (*b*) and 4 (*a*) of article 18 should be replaced by the words "every state" or "all states".

45. Mr. de LUNA said he agreed with Mr. Rosenne that paragraph 3 (*b*) should form a separate paragraph. In substance, that provision was correct. Effect should be given to an objection, provided the objecting state showed an interest in becoming a party to the treaty. Perhaps that idea would be better expressed if some such wording as "manifested in a valid manner" were used instead of "taken the steps necessary to establish".

46. Despite Mr. Tsuruoka's objection, he believed that paragraph 3 (*a*) should be retained so as to safeguard as far as possible the homogeneity of the regime established by the treaty.

47. Mr. BRIGGS said that, if the Commission's approach were accepted as desirable, then the substance of article 18 was acceptable but sub-paragraph 2 (*b*) failed to indicate at what point in time a reservation was accepted.

48. Mr. TABIBI said that, while he had no objection to the substance of article 18, the acceptance of or objection to a reservation should always be express; the presumption allowed in paragraph 3 (*a*) would only create confusion.

49. A minor technical point was that reminders might have to be sent to states to ensure that they sent off notifications of acceptance or objection. The membership of the United Nations had doubled in recent years and included a number of new states which might lack experience in handling legal documents.

50. Mr. VERDROSS, commending the Drafting Committee on its remarkable achievement, said that the article was acceptable but Mr. Tsuruoka was perhaps right in saying that the time-limit of twelve months laid down in paragraph 3 (*a*) was too short: it might be better not to fix a specific period until the comments of governments had been received.

51. Mr. TSURUOKA said that he was still not convinced of the need for paragraph 3 (*a*); it might have the serious result of allowing a minority to impose its will on the majority.

52. If it were retained in the modified form suggested by Mr. Tabibi, states should be required to communicate their acceptance or objection in writing.

53. Sir Humphrey WALDOCK, Special Rapporteur, said he could not agree with Mr. Tsuruoka that the presumption in paragraph 3 (*a*) was unnecessary. It was important that the treaty relations between any two states should not remain undefined until a dispute arose. Moreover, such a presumption appeared in a number of recent treaties, in which the period specified for the lodging of objections was usually a shorter one than that proposed in the text before the Commission.

54. Although he had had some doubts about the provision contained in paragraph 3 (*b*), he had come round to the view that it served some purpose and should not cause undue concern. Any state could put in a notice of objection and withdraw it later. He agreed, however, that the provision could form a separate paragraph.

55. Mr. BARTOŠ said that he was troubled by the way in which the presumption in paragraph 3 (*a*) was expressed. The text did not describe the presumption as conclusive and consequently could be interpreted as meaning that, even after the expiry of twelve months, the presumption could be rebutted, in which case the time-limit became pointless. His recollection of the discussion was that the Commission had decided to the contrary, and had considered the time-limit for the formulation of objections to a reservation as an absolute limit and that once it had expired, the validity of a reservation was unassailable.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that the presumption was meant to be conclusive. Mr. Bartoš's point, which was essentially a drafting one, could be referred to the Drafting Committee, together with the point raised by Mr. Rosenne.

57. Mr. TABIBI said that, for the sake of the certainty of the law, it should be stipulated that states had to notify acceptance or rejection of a reservation. He hoped that the emphatic views expressed on that point by some members would be taken into account by the special rapporteur and the Drafting Committee.

58. Mr. TSURUOKA said that, though still dissatisfied, he would not press for the amendment of paragraph 3 (*a*) but hoped that mention would be made in the commentary that states not wishing to be bound by a reservation should express their objection as early as possible. The precise time-limit for signifying an objection could be left open pending the comments of governments. The slowness of ratification of the conventions concluded at the Geneva Conference on the Law of the Sea of 1958 suggested that three years was by no means too long a period.

59. Sir Humphrey WALDOCK, Special Rapporteur, suggested that it would be prudent to leave the time-limit in paragraph 3 (*b*) blank pending the comments of governments.

60. The CHAIRMAN suggested that article 18 should be referred back to the Drafting Committee.

It was so agreed.

ARTICLE 18 *bis*. — THE VALIDITY OF RESERVATIONS

61. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had prepared a new article, on the validity of reservations, which read:

"1. (*a*) In the cases contemplated in sub-paragraphs (*b*) and (*c*) of article 17, paragraph 1, acceptance of a reservation not excluded by the terms of a treaty is not required to establish its validity;

"(*b*) In the case contemplated in sub-paragraph (*d*) of article 17, paragraph 1, the validity of a reservation depends upon the acceptance of the reservation in accordance with the provisions of paragraphs 2 to 4 of this article.

"2. Except in a case falling under paragraph 3 and unless the treaty shall otherwise provide, the following rules apply in the case of a reservation to a multilateral treaty:

"(*a*) acceptance of the reservation by any state to which it is open to become a party to the treaty establishes the validity of the reservation as between that state and the reserving state, and constitutes the reserving state a party to the treaty in relation to such state, if or as soon as the treaty is in force;

"(*b*) an objection to the reservation precludes the entry into force of the treaty as between the objecting and the reserving states, unless a contrary intention shall have been expressed by the objecting state.

"3. In the case of a treaty which is the constituent instrument of an international organization, when objection is taken by a state to a reservation, the question of the validity of the reservation shall be determined, unless the treaty otherwise provides, by decision of the competent organ of the organization in question.

"4. The provisions of paragraphs 1 and 2 do not apply to a multilateral treaty concluded between a restricted group of states, in which case a reservation shall only be valid if accepted by all the states parties to the treaty or to which it is open to become a party to the treaty, except when:

"(*a*) a different rule is laid down in the treaty itself, or

"(*b*) the rules in force in a regional or other organization otherwise prescribe".

62. The article drew a distinction between general multilateral treaties and multilateral treaties concluded between a restricted group of states. Somewhat reluctantly, as special rapporteur, he had agreed with the majority in the Drafting Committee that the flexible system should apply also to multilateral treaties not of a general character but concluded between a considerable number of states. On the other hand, the unanimity rule would have to be retained for the latter category. In effect, the Drafting Committee had carried the inter-American system a little beyond what had been contemplated by the Commission.

63. Mr. VERDROSS said that there was a flagrant contradiction between article 18 *bis*, paragraph 1 (*b*) and article 17, sub-paragraph 1 (*d*). In no circumstances could a reservation incompatible with the object and purpose of a treaty be acceptable. Consequently, the opening phrase of the former provision should be revised so as to stipulate that in case of doubt as to the compatibility of a reservation with the object and purpose of the treaty, its validity would depend upon the acceptance of the reservation in accordance with the provisions of paragraphs 2 to 4.

64. The distinction between an ordinary multilateral treaty and a multilateral treaty concluded between a restricted group of states was not clear, since no numerical criterion was laid down by which to determine what constituted a "restricted" group. Paragraph 4 should be dropped, or else redrafted so as to be applicable to multilateral treaties which were not general in character.

65. Some definition by reference to the capacity to conclude international treaties should be inserted to qualify the "competent organ" mentioned in paragraph 3.

66. Mr. AMADO associated himself with the tributes paid to the Drafting Committee on its excellent work. The articles it had prepared were remarkable for their clarity and structure.

67. The system proposed in article 18 *bis* did honour to the Latin American continent, but it should be remembered that inter-American practice on reservations had not been very uniform. It had been developed in connexion with law-making treaties and not with agreements concerned with the regulation of conflicting state interests, and therefore aimed to leave certain doors open. He was unable to subscribe to Mr. Tsuruoka's view because in certain branches of international law it was impossible to escape being vague.

68. With regard to paragraph 4, the records of the earlier discussions on reservations would show that he had expressed disagreement with the somewhat extreme views of Mr. Jiménez de Aréchaga on the ground that the principle of the integrity of a treaty should be upheld and the unanimity rule applied unless the states concerned decided otherwise.

69. Mr. CASTRÉN said he agreed with Mr. Verdross that the formulation and content of paragraph 1 were unsatisfactory. Paragraph 1 (*a*) referred to the cases provided for in sub-paragraphs 1 (*b*) and (*c*) of article 17, but sub-paragraph 1 (*b*) of article 17 referred only to reservations expressly prohibited by the treaty, while sub-paragraph 1 (*c*) referred to similar cases, although it was differently phrased.

70. Paragraph 1 (*b*) of article 18 *bis*, however, provided that even a reservation which was incompatible with the object and purpose of the treaty could be accepted by other states and so become valid; article 18 *bis* thus permitted what was expressly prohibited by article 17. Of course, states were free to accept any reservations made by other states, and there were marginal cases in which it could not be said with certainty that a reservation was or was not contrary to the provisions or to the object and purpose of the treaty; but it seemed inadvisable in the draft convention first to prohibit and then to invite states to submit doubtful reservations.

71. He therefore proposed the following more neutral wording for paragraph 1 of article 18 *bis*:

> "The validity of a reservation which is formulated in accordance with the provisions of article 17 and which is not expressly authorized by the treaty depends upon the acceptance of the reservation in accordance with the provisions of paragraphs 2 to 4 of this article".

It was obvious that reservations expressly authorized by the treaty were valid without re-acceptance by the other states concerned, but it was better to say so explicitly in the draft convention.

72. A reference to paragraph 4 should appear in the opening phrase of paragraph 2, since treaties concluded between a restricted group of states were also multilateral treaties, as was stated expressly in paragraph 4. To bring the English and French texts into line the words "if or" in the final phrase of paragraph 2 (*a*) in the English text should be deleted.

73. Paragraphs 1 and 2 should not be referred to in paragraph 4; their mention there might lead to the inference that paragraph 1 was also applicable in the cases dealt with in paragraph 4. He therefore suggested that the opening of paragraph 4 should be redrafted to read: "In the case of a multilateral treaty concluded between a restricted group of states, a reservation shall only be valid ..., except when", after which would follow immediately the provision forming the existing sub-paragraph (*a*). Sub-paragraph (*b*) would be deleted as unclear, for it referred to regional "or other" organizations, whereas organizations in general were dealt with in paragraph 3. To cover the case dealt with in sub-paragraph 4 (*b*), the words "or regional" should be inserted after the word "international" in paragraph 3.

74. The order of paragraphs 3 and 4 should be reversed.

75. Mr. BARTOŠ said there seemed to be some inconsistency between article 18 *bis*, paragraph 1 (*a*), and the provisions in article 18 concerning the acceptance of a reservation not provided for in the treaty.

76. With regard to article 18 *bis*, paragraph 4, it was understandable that that provision should apply to the case where a restricted group of states made a treaty expressly excluding reservations; but if the treaty did

not exclude reservations, then, even if the treaty was concluded by a restricted group of states, the provision should not debar the parties from making reservations if the treaty was not of general interest and the content of the reservation did not conflict with the objects of the treaty.

77. In the case of paragraph 1 (*a*), he would agree to the provision if it were amended to state that, in cases where there was no express acceptance of a reservation and there were no objections, it was unnecessary to establish the validity of a reservation; and he would prefer that it should be stated that paragraph 4 referred only to multilateral treaties which were not of general interest.

78. Mr. AGO said he was grateful to members for drawing attention to faults of drafting. The ambiguity noted in paragraph 1 (*a*) could easily be remedied and he agreed with Mr. Verdross and Mr. Castrén concerning the contradictions between that provision and article 17, paragraph 1. He accordingly suggested that article 18 *bis*, paragraph 1 (*a*) should be redrafted to read:

> " In cases where a treaty contains express provisions on reservations, the acceptance of a reservation which is not excluded by the terms of the treaty is not required to establish its validity ".

79. The contradiction referred to by Mr. Verdross in connexion with paragraph 1 (*b*) was more serious, in that it related to cases where a treaty was silent concerning the making of reservations. He suggested that paragraph 1 (*b*) should be redrafted to read:

> " In the case where a treaty does not contain express provisions on the making of reservations, the validity of a reservation which is not incompatible with the object and purpose of the treaty depends upon the acceptance of the reservation in accordance with the provisions of paragraphs 2 to 4 of this article ".

That wording would be in line with article 17 and would eliminate all ambiguity.

80. The drafting of paragraph 4 presented considerable difficuties. The word " multilateral " might be omitted; in that way a clearer distinction would be drawn between reservations to multilateral treaties *generaliter,* which were dealt with in paragraph 2, and reservations to treaties concluded by a restricted group of states. Also, in the French text the words *" conclu entre "* might be substituted for the words *" conclu par ".* But the Commission could not go very much further in altering the paragraph, since it seemed unavoidable to leave some margin for interpretation.

81. Mr. TUNKIN said that paragraph 4 as drafted might be a source of considerable confusion. The existence of multilateral treaties concluded between a restricted group of states could not be denied, but it seemed dangerous to suggest a specific unanimity rule for the acceptance of reservations to such instruments. First, it was extremely difficult to delimit that category of treaties and, secondly, the advisability of suggesting a specific rule governing reservations to that particular category, instead of merely laying down a rule applicable in most cases, was questionable. It would be much wiser for the Commission to be content with the general rule in paragraph 2 applicable to reservations to multilateral treaties *generaliter.* As he had already said, most " restricted " treaties would contain express provisions concerning reservations and, if such a treaty was silent on the matter, the problem could be settled by some additional agreement among the small group of states concerned. In view of those considerations, he suggested that paragraph 4 might be deleted altogether.

82. He had considerable doubts concerning Mr. Ago's proposed amendment to paragraph 1 (*b*). It seemed somewhat contradictory to say that, if a treaty was silent on the subject of reservations, the validity of a reservation not incompatible with the object and purpose of the treaty depended upon the acceptance of the reservation. Non-acceptance in itself was likely to depend on the compatibility of the reservation with the object and purpose of the treaty, and indeed, the reservation's incompatibility with the object of the treaty might be the sole reason for an objection. Mr. Ago's amendment, however, implied that a compatibility test should first be applied and the problem of acceptance would arise later if the reservation passed the test. In practice, the acceptance or non-acceptance of a reservation by states was determined by their views on whether or not the reservation passed the compatibility test.

83. Mr. de LUNA said he fully endorsed Mr. Ago's amendment to paragraph 1 (*a*).

84. On the other hand, he shared Mr. Tunkin's misgivings over Mr. Ago's amendment to paragraph 1 (*b*). In article 17, sub-paragraph 1 (*d*) affirmed the principle that, where the treaty was silent on the subject, reservations had to be compatible with the object and purpose of the treaty; article 18 *bis* ought not to contain an exception to that principle. The problem was, first, who was to pass judgment on the compatibility of a reservation with the object of the treaty, and, secondly, should the admissibility of a reservation be subject to the unanimity rule, in which event any party or potential party to the treaty would be given the power to act as judge? In his opinion, every state should have the right to express its views on the compatibility of a reservation with the object of a treaty to which it was a party or potential party; it had to be assumed that states, like individuals, were governed by the same moral rules, or at least by the same logic. He could not agree that it was only a drafting point that was involved. Logic demanded that the decision should be left to each state and to the consequent relations between the reserving state and the state which objected on grounds that the reservation was incompatible with the object and purpose of the treaty.

85. He shared Mr. Verdross's and Mr. Tunkin's views concerning paragraph 4. While he understood the underlying idea of the paragraph, he did not see how, in practice, any distinction could be drawn between treaties concluded between restricted groups of states and treaties which were not of general interest. The paragraph might lead to considerable confusion and it would be wiser to omit it altogether and leave only the general rule in paragraph 2.

86. Mr. AGO said he appealed to Mr. Tunkin and Mr. de Luna not to ask members who were in basic disagreement with the majority of the Commission to compromise even further than they had already done. The only remaining safeguard in the matter of reservations was that, in the case of the silence of the treaty, the reservation concerned should not be incompatible with the object and purpose of the treaty. Either the clause had an objective value, and the validity of reservations could not depend solely on acceptance by every state concerned, or it had no value at all. Mr. Tunkin and Mr. de Luna were saying in effect that the validity of any reservation, whether or not it was compatible with the object and purpose of the treaty, depended on the acceptance by states; that thesis completely nullified the provisions of article 17, paragraph 1.

87. With regard to the objections made to paragraph 4, members seemed to be forgetting that the system formerly applicable to all treaties was the rule set out in that paragraph. The new trend in the Commission was to extend the so-called inter-American system to all multilateral treaties, and not even only to general multilateral treaties; however, he did not think that such extreme consequences could extend to treaties concluded between four or five states, since that would have very dangerous consequences for the conclusion of treaties between restricted groups — a category which formed the vast majority of treaties. There were, of course, considerable drafting difficulties involved, but he could not agree to deleting the rule or making it impossible to operate. The Drafting Committee might re-examine the question, but he wished to state categorically that he personally was unable to go any further towards a compromise than he already had done.

88. Mr. CASTRÉN said that Mr. Ago's amendments to paragraph 1 improved the draft, but he still shared the doubts expressed by other members. He urged the Drafting Committee to consider the neutral formulation which he himself had suggested; by avoiding a specific reference to article 17, the need to take a definite position on various controversial points would be eliminated.

89. Mr. VERDROSS, in connexion with paragraph 4, observed that a really restricted group of states concluding a treaty would always come to an agreement on whether or not reservations to the treaty were admissible. If six states were concluding a treaty and one made a reservation which was accepted by one of the other contracting parties, he saw no reason why such a reservation could not be valid between those two states.

90. Mr. AGO said he could not share that view.

91. Sir Humphrey WALDOCK, Special Rapporteur, said it was obvious that, if the parties had to be unanimous in accepting a reservation and a state made a reservation to which another wished to object, the parties would never agree to accept it. The rule, as he saw it, was that a reservation to which an objection was made would exclude the reserving state from the treaty unless it withdrew the reservation.

92. He himself had serious doubts concerning paragraph 4, but on quite different grounds from those given by Mr. Tunkin. Originally the Commission had contemplated applying the relatively new inter-American system of reservations to general multilateral treaties, and had defined general multilateral treaties mainly in order to facilitate the drafting of article 18 *bis*, and, to a lesser extent, article 7 *bis*. But the multilateral system, or rather the system of the Latin American states, had now been expanded to cover multilateral treaties as a whole and some members felt that that went very far because there were treaties between comparatively small groups of states which had certainly never contemplated any such system as governing their treaty relations; that was why it had been thought essential to put in a cautionary paragraph like paragraph 4.

93. Personally he would, of course, have been more inclined to accept the original proposal of Mr. Verdross, which was to distinguish between general multilateral treaties and non-general multilateral treaties;[2] that was the intention when they had begun their discussion. But if they now had to enlarge the application of the Latin American principle to multilateral treaties, then they had to find some formula to cover that smaller group of paragraph 4. The drafting difficulty was a very real one, but the point was one of great substance and they must not simply pass it off as a question of drafting.

94. Mr. TUNKIN said he thought Mr. Ago had exaggerated the danger of omitting paragraph 4; he agreed with Mr. Verdross that, in the case of "restricted" treaties, the small group of states concerned would be able to settle the question whether a reservation was admissible.

95. Furthermore, when the convention which the Commission was drafting entered into force, a new situation would be created, and states would be aware of the implications of adopting the convention; the general rule concerning reservations to multilateral treaties would be known to everyone and, when a restricted group of states concluded a treaty, that group would bear in mind the existence of a residuary rule which might apply if the treaty itself contained no provision on reservations. In his opinion, the Commission should adopt the clear, general and unambiguous provision contained in paragraph 2; he was quite sure that the confusion which paragraph 4 might introduce would not only not advance the practice in the matter, but might even cause disputes between states.

96. Moreover, the meaning of "restricted group" might be interpreted in a number of ways: a group of forty was restricted in comparison with 110 states, and the importance of the article for treaties of local interest should not be exaggerated. There would be no practical difficulties in settling such matters, but the convention would be much more comprehensible without such a provision.

97. Mr. GROS said that the article had been drafted and provisionally accepted with reservations to general multilateral treaties in mind and that those members who had not agreed with the idea of extending the inter-

[2] 642nd meeting, para. 56.

American system to such treaties had made a considerable concession in accepting a compromise solution. The fact that he had agreed to take part in drafting that compromise in no way meant that he had been convinced by the opposing argument, but merely that he had bowed to the majority in the Drafting Committee and in the Commission. As Mr. Ago had pointed out, members who held those views had found it possible to accept that system accompanied by a precise definition of general multilateral treaties ; but since paragraph 2 now applied to all multilateral treaties without exception, it would not be reasonable to extend the inter-American system to treaties concluded by a few states only. The rule laid down in paragraph 4, containing the descriptive term " a restricted group of states ", was not ideal, but it did represent a practical criterion. It was essential to retain the delicate balance on which the compromise had rested: either paragraph 4 should be retained in its existing form, or the Commission should return to the special rapporteur's original text, in which paragraph 2 referred only to general mutilateral treaties.

The meeting rose at 6.5 p.m.

664th MEETING

Tuesday, 19 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 (*continued*)

ARTICLE 18 *bis*. — THE VALIDITY OF RESERVATIONS (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Drafting Committee's new article, 18 *bis*.

2. Speaking as a member of the Commission, he proposed that paragraph 1 should be deleted altogether. The provisions of article 17, paragraph 1, stating the cases in which a reservation to a treaty could not be formulated, raised the question of the validity of reservations, and the deletion of paragraph 1 of article 18 *bis* would not therefore remove any essential concept from the draft articles.

3. On the other hand, the introductory part of paragraph 2 should be amended to read: " Where a multilateral treaty is silent concerning the making of reservations and except in a case falling under paragraph 3, the following rules should apply: . . ."

4. He could not, however, agree with the proposal put forward by other members for the deletion of paragraph 4. The result of that deletion would be that reservations to any multilateral treaty would come within the scope of paragraph 2, whereas it would not be in conformity with current practice to omit all reference to treaties concluded between a restricted group of states. The Commission should take a formal decision on the proposal for the deletion of paragraph 4.

5. Mr. AGO said the Chairman's proposal might be workable in the case of paragraph 1 (*a*), but the difficulty in connexion with paragraph 1 (*b*) would still remain. If paragraph 2 referred only to cases where the treaty was silent concerning the making of reservations, then it would be implied that any reservation, whether or not compatible with the object and purpose of the treaty, could be accepted, in which event the proviso in article 17, sub-paragraph 1 (*d*), would be practically nullified.

6. The CHAIRMAN, speaking as a member of the Commission, said that, although article 17 contained no express mention of the validity of reservations, its sub-paragraph 1 (*d*) prohibited reservations — in cases where the treaty was silent on the matter — which were incompatible with the object and purpose of the treaty. That rule would remain, even if nothing was stated on the subject in article 18 *bis*. Since article 18 *bis* related only to the effects of the acceptance of and objections to reservations, it could hardly affect the terms of article 17, sub-paragraph 1 (*d*), particularly since that provision did not specify who was to decide the question of compatibility. Nothing would be lost by omitting article 18 *bis*, paragraph 1, which was bound to lead to confusion, however it might be formulated.

7. Mr. GROS, speaking as a member of the Commission, said that any substantive change in the structure of article 18 *bis* would destroy the delicate balance which had been achieved as a compromise between two opposing points of view. The prohibition of certain reservations, laid down in article 17, was in itself an indication of the validity of other reservations, and as such referred the reader to the article on validity.

8. The scope of the concept of incompatibility could have been specified, but the Commission had decided against that and in favour of rules providing for a criterion without any control by reference to which a state could decide whether a reservation was or was not incompatible with the object and purpose of the treaty. Thus, the existing compatibility clause opened the door to conflicting views concerning particular reservations. If that vague provision alone were maintained and the principle not reaffirmed in article 18 *bis*, paragraph 1 (*b*), no safeguard would remain: under the amendment proposed by the Chairman, the validity of reservations to any treaty which was not bilateral would be determined by the provisions of paragraph 2. In his opinion, that system was unsatisfactory and, moreover, did not correspond to current practice.

9. The difference between the treaties referred to in paragraphs 2 and 4 respectively was in effect the difference between multilateral and plurilateral treaties; and there could be no denying that in actual practice there was a difference between treaties concluded by, say, eight or ten states, and collective treaties properly so-called. He appealed to the Commission not to upset the balance of the article by deleting paragraph 4 and pointed out to those who wished to change the system