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Summary record of the 798th meeting

Topic:
Law of Treaties

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they would not grant overflying rights over their territory in conformity with article 5 of that Convention. The Organization had taken note of their ratification as a ratification without reservations. Other States, on the contrary, had made express reservations to article 5 and the Council of ICAO had refused to consider their instruments of ratification valid. Yugoslavia had decided to act similarly with respect to Turkey, without restricting the right of the aircraft of other States to fly over Yugoslav territory. That example showed that it was possible for reservations to have only a technical and secondary scope; the essential thing had been to accept the existence of an organization, to collaborate with it and not to contravene the system which it had established.

78. He was therefore inclined to consider reservations necessary in practice in international relations, but he agreed with Mr. Ago that it was sufficient to tolerate them without going so far as to make publicity in favour of reservations, for such publicity might destroy the principle *pacta sunt servanda*.

Membership of the Drafting Committee

79. Mr. AGO said that, in the absence of Mr. Jiménez de Aréchaga, Mr. de Luna sat on the Drafting Committee as the Spanish language member. Since Mr. de Luna was now himself absent, he proposed that the Commission appoint Mr. Ruda to replace him.

80. Mr. PAREDES proposed that, in order to relieve Mr. Jiménez de Aréchaga, who was Chairman of the Drafting Committee, and also in order to ensure a more equitable representation of the Spanish language in the Committee, Mr. Ruda be appointed a permanent member of the Drafting Committee.

It was so agreed.

The meeting rose at 6 p.m.

798th MEETING

Wednesday, 9 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L/107)
(continued)

[Item 2 of the agenda]

ARTICLE 18 (Formulation of reservations) (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 18.

¹ See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.

2. Mr. TSURUOKA said that the uniform world order should be defined in democratic terms and that each State should democratically agree to some sacrifices to safeguard it, since the idea of democracy was based on the principle of the equality of independent States in international law. The general multilateral treaty, which was discussed and adopted by an international conference by the requisite majority, normally a two-thirds majority, was part of the world order defined in democratic terms. The majority rule was a democratic institution and placed a moral duty on all States which had participated in the conference to preserve the treaty, whether they belonged to the majority or the minority, even at the cost of some special interest.

3. In the case of reservations, the Commission was expected to devise a democratic formula which would respect the will of the majority rather than proclaim the individual freedom of States. He preferred the so-called "unanimity" formula to that described as "flexible", as well as to the collegiate formula, although the latter was closer to the majority rule.

4. An individualist solution in cases where the treaty was silent was deplorable, for it conflicted with the democratic principle and its effects were all the more serious because silence, in a general multilateral treaty, was often the result of the manoeuvres of what was called the "blocking minority".

5. The unanimity rule, on the other hand, had the virtue of simplicity and was by no means obsolete, since it safeguarded the decision which had been reached democratically, nor was it conservative. Rather, it was progressive, if "progressive" was understood as meaning whatever furthered the interests of the majority, which in modern times was composed of the newly independent States and the small and medium-sized countries.

6. The unanimity rule was rigid in appearance only. If reservations were reasonable, the common sense underlying the democratic principle would oblige all States to accept them, and only unreasonable reservations would be rejected. Moreover, the unanimity rule might well co-exist with the presumption in favour of acceptance, after a relatively short time, in cases where the treaty said nothing about reservations.

7. The unanimity formula had the further advantage of being objective, for it would make it possible to dispense with the test of the compatibility of a reservation with the object and purpose of the treaty, which was a vague and subjective criterion, inasmuch as it would leave it to each State individually to judge whether a particular reservation satisfied the test.

8. The draft submitted by the Government of Japan (A/CN.4/175, section I) was based on the ideas he had mentioned. It could easily be made even more flexible. It certainly deserved the Commission's attention if the purpose of the second reading was not merely to make a few minor drafting changes and if it was also intended to improve, where possible, the draft adopted at the first reading. He hoped that his reflections would help the Commission to a small extent to gain a better understanding of the Japanese draft, from which it could undoubtedly derive some benefit.

9. Mr. PAREDES said that he wished to clear up certain points in connexion with reservations. First, it was said in article 1 (Definitions) that a "reservation" was a unilateral statement made by a State. While it was true that, ordinarily, each State made reservations on points which in its judgement called for reservations, it could surely not be said that it was not permissible for a number of States to submit a joint, and therefore more forceful, reservation. The eventuality of joint reservation was quite conceivable, and the idea that a reservation was the act of one single State should perhaps be dropped.

10. Secondly, a State's observations on and objections to a part of a treaty were not always true reservations. A State sometimes made statements in order to indicate the scope it attributed to a particular provision or to express doubt as to its efficacy. Should all such statements be regarded as reservations? Surely, some more specific indication was needed. It was sufficient, for example, for the State to declare whether it was or was not formulating a true reservation. In the absence of such an express declaration, a comment made merely in order to indicate its point of view, and not with the intention of making the article inoperative, might be interpreted by the other States as a true reservation. Conceivably, too, the State which had made the comment in the first place in order merely to express doubt might later come to think that its comment should be maintained as a reservation. In his view, therefore, any observation made by a State should be regarded as a reservation unless the State declared that such was not its intention.

11. Lastly, he thought that, in the case of multilateral treaties, acceptance of a reservation depended on acceptance by a number of States; it would not be enough, for the purpose of the admissibility of the reservation, that one State accepted another State's reservation. For if one State's acceptance sufficed, the force of multilateral treaties, which were concluded to express the will of a large number of States for a particular purpose, would be impaired by the reservation. A multilateral treaty would collapse if two States could *inter se* modify a part of the treaty and apply the modified treaty solely as between themselves.

12. Mr. PESSOU said he realized that reservations were in a way a last resort, for they were liable to create legal anomalies. Yet, in a world in which certain attitudes seemed to be at variance with the most elementary principles of ethics, reservations offered the means of at least neutralizing the consequences which those attitudes might produce. For that matter, GATT and other international institutions made frequent use of the facility which reservations offered to States.

13. In spite of the different opinions which had been expressed, the Commission agreed that reservations should be regarded as an accepted practice. The great merit of articles 18 to 20, as reformulated by the Special Rapporteur, was that they reflected faithfully all the suggestions put forward since 1962. The Special Rapporteur's talent for constantly recasting the text was such that, even when faced with suggestions contrary to his initial wording, he could still produce an alternative solution

which might not satisfy everyone but had some legal value all the same.

14. The reservation undoubtedly introduced into treaties a diversity of rules, which was perhaps incompatible with the unifying function of the treaty regulation. Article 18, as revised by the Special Rapporteur, authorized the parties to formulate certain reservations which, in order to be valid, had to be accepted by the other contracting parties. The text made it clear that a State could not be bound in its treaty relations without its consent. Consequently, no reservations could be pleaded against it, so long as it had not given that consent. As a multilateral treaty was the outcome of a free and symmetrical agreement, none of the parties was at liberty to destroy or compromise, by a unilateral decision, the object and purpose of the treaty. Accordingly, article 18 stressed the concept of the integrity of the treaty.

15. In another paragraph, the Special Rapporteur agreed that that principle might be relaxed in multilateral treaties for certain reasons, such as the universality of the United Nations, in order to facilitate a wider participation in treaties concluded under United Nations auspices.

16. Some speakers had criticized article 18 as a whole as being too descriptive, but the Special Rapporteur was surely justified in using the descriptive method when opinion in the Commission was so unsettled.

17. Without discussing once again the practices of the Organization of American States, he thought that article 18 as proposed by the Special Rapporteur was relevant and necessary, unless another text could be drafted which would reflect even better current practice in regard to reservations.

18. The CHAIRMAN said that, as no other members wished to comment further on article 18, he would call upon the Special Rapporteur to sum up the discussion.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that for the most part members had directed their comments to article 18, though he had not always been clear to which of the two texts of that article, but they had also touched on the general scheme of the provisions on reservations. In order to comply with the Chairman's request, he would try to do something by way of a summing up of the discussion on reservations up to that point, without referring to the drafting points that could be left to the Drafting Committee.

20. As he had already indicated at the 796th meeting when introducing section III concerning reservations, in rearranging the material his aim had been not to alter the substance of the 1962 draft, except on a few points concerning which governments had expressed direct and substantive criticisms. He had been surprised at the adverse reaction to his proposals from some members of the Commission on the ground that the new texts were descriptive in character. That was a charge that could with much greater justification be levelled against the 1962 texts which they favoured.

21. One of his difficulties when modifying the presentation of the provisions on reservations in order to take account of government comments had been the very complexity of the 1962 draft. For that complexity the

Commission had no need to apologize, as it had been an extremely arduous business to work out the general lines of section III after the lengthy discussions both in the Commission and in the Drafting Committee on the difficult topic of reservations. The particularly involved form of article 20, which in itself was a reflection of the difficulty of matching its provisions with those of article 18, had been a cogent reason for attempting a rearrangement of the material.

22. Leaving aside what seemed to him the primarily psychological issue of the method of stating the right to formulate reservations, as to which there was a division of opinion in the Commission, the effects of either of the two versions before the Commission would be very much the same when applied to actual treaties. One of the advantages of his revised text, however, was that it distinguished more clearly between the cases to which the flexible system applied and those to which it did not. He wished to remind members that he himself as Special Rapporteur had proposed the flexible system² and believed that, to meet the needs of contemporary international society, it should be given its place in the draft. But ideally, of course, Mr. Ago had been right in his general thesis that reservations were to be deplored as detracting from the universality of the law. In his view, it was particularly important to underline the distinction because of the new rule the Commission had introduced into its draft concerning tacit consent, to which States would undoubtedly give very careful attention. Indeed, one Government³ had already stated its objection to the application of the rule in cases where the reservation was expressly or impliedly prohibited by the treaty itself.

23. If, as certain members preferred, it was decided that the section on reservations should begin with a rule affirming a general right to make reservations, his new arrangement would have to be set aside and something on the lines of article 18, paragraph 1, of the 1962 text would have to be retained. In that event, the rest of the original article 18 would require careful examination so as to see whether the text could be shortened. In paragraph 1, sub-paragraphs (a) and (b) could be fused, but the latter could certainly not be dropped as it dealt with a separate point, while sub-paragraph (c) would also need careful examination. As he had already mentioned at the previous meeting,⁴ a great deal of the discussion at the fourteenth session had been focussed on the wording of those three sub-paragraphs because of the two strongly opposed currents of opinion, the one in favour of the maximum freedom in formulating reservations, and the other apprehensive lest too liberal an approach should prove detrimental to the principle of the integrity of treaties. The whole problem would have to be examined by the Drafting Committee, and subsequently by the Commission itself, and he was only anxious to stress the importance of not upsetting the balance achieved in 1962 by any hasty decision to drop sub-paragraphs (b) and (c).

² See the Special Rapporteur's first report (A/CN.4/144) in *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 60 *et seq.*, articles 17, 18 and 19 and commentary.

³ The Danish Government; see in A/CN.4/175, section I, that Government's comment on articles 18-20.

⁴ 797th meeting, para. 32.

24. It was also important, in view of the delicacy of the whole subject of reservations, in which so much depended on the mechanics of their acceptance or rejection, particularly where multilateral treaties were concerned, not to underestimate the importance of procedural clauses. It might prove necessary, even at the cost of greater length, to delineate fairly precisely the manner in which the flexible system operated. In his new draft for article 20 he had endeavoured to include, in shortened form, the procedural provisions, but part of that text perhaps went beyond procedure, and the new title which he had given to the article needed changing. If his rearrangement failed to find favour, the Drafting Committee might still find it possible to set out the procedural clauses shortly in a slightly different form: essentially, the matter was one of drafting.

25. There seemed to be general agreement that the special case of a treaty concluded between a small group of States had to be covered. In the context of section III, governments had not criticized the phrase "small group" though they had done so where it had been used in article 9. His own view was that alternative wording should be devised to cover those instances where, for various reasons, the unanimity rule was needed. Further attention might have to be given to the best way of expressing the Commission's views on such points as the fewness of the parties, the nature of the treaty or other circumstances indicative of the parties' intentions, so as to forestall likely criticism.

26. He wished to reserve more final conclusions on the trend of the discussion until consideration of articles 19 and 20 had been completed.

27. The CHAIRMAN asked whether the Commission wished article 18 to be referred to the Drafting Committee forthwith.

28. Mr. BRIGGS said it would be premature to do that until the Commission had completed its consideration of articles 18, 19 and 20 as a whole.

29. Mr. YASSEEN said that the article could hardly yet be referred to the Drafting Committee, because the Commission had not yet decided whether it accepted its own 1962 text or the revised version proposed by the Special Rapporteur.

30. The CHAIRMAN said he agreed with that view; he invited the Commission to take up article 19.

ARTICLE 19 (Acceptance of and objection to reservations)⁵

31. Sir Humphrey WALDOCK, Special Rapporteur, said that having already explained at length the considerations that had led him to reshape articles 19 and 20, he had nothing further to add at that stage and would prefer to hear first what members had to say.

32. Mr. ROSENNE said that before discussing article 19 in detail, he wished to make certain general observations further to those he had put forward at the previous meeting.

33. Mr. Tunkin had rightly described reservations as an institution of international law, and as such they were

⁵ See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.

a self-contained and independent subject that had to be considered in the light of the reasons which had given rise to it before it could be decided how it should be integrated into the law of treaties as a whole. Reservations could not be considered in terms of preconceived notions derived from the domestic law of contract, because there was no analogy even between multipartite contracts and treaties concluded between a small group of States.

34. His own experience confirmed what had been said by other members about the embarrassment, not to say distaste, which reservations caused for those who had to deal with them at the governmental level, a feeling that went beyond the issue whether or not a reservation or an objection to a reservation was necessary and how it should be formulated. Personally, he had found them amongst the most difficult international documents to draft, and they created particular difficulties when it came to applying a treaty containing one accepted by one's own country. It was generally true to say that reservations and objections to them were never lightly made.

35. In the development within international organizations of the institution of reservations to multilateral treaties, from the time of the Austrian Government's reservation to the International Opium Convention of 19 February 1925,⁶ which had led to the report of the Committee of Experts for the Progressive Codification of International Law of the League of Nations,⁷ the issue had been posed in terms of the admissibility of a reservation and its consequences for determining whether or not a treaty was in force and whether, in the event of objection, the reserving State was a party to it. That approach had led to the familiar complications connected with the problem of deciding when a treaty requiring a specified number of ratifications actually came into force. Reservations had also been discussed in those terms at the time of the adoption by the General Assembly of its resolution 478 (V), after the problem had arisen for the Secretary-General of deciding whether the Convention on the Prevention and Punishment of the Crime of Genocide had or had not come into force with the deposit of twenty instruments of ratification: and it was also in those terms that the question had been put to the International Court and to the Commission in 1951, and reconsidered by the General Assembly in its resolution 598 (XI).

36. He believed that that aspect of the issue of admissibility had fundamentally been solved in 1962 by the International Law Commission in the compromise between some two or three main trends of opinion as to what was the correct law in the matter of reservations. An element in that compromise had been the inclusion of the reference to treaties between a small group of States in response to Mr. Jiménez de Aréchaga's insistence that, unless the provisions were very carefully drafted, what had come to be known as the Latin American formula would cease to apply in the area where it had originated.⁸

⁶ League of Nations *Treaty Series*, Vol. LXXXI, p. 317.

⁷ League of Nations, *Official Journal*, 1927, pp. 770, 800, 881.

⁸ *Yearbook of the International Law Commission*, 1962, Vol. I, 652nd meeting, para. 4.

37. He was convinced that the compromise represented the view of the great preponderance of governments and of most members of the Commission, and should be maintained *in toto*. He himself had no wish to disturb it, and at the previous meeting had only wished to suggest that, within the frame of that compromise, the Commission should move on so as to cover all the problems posed by the institution of reservations; it should fix its sights on the issue of participation and the effects of permitted reservations on the application of a treaty and their relevance to article 30—if retained—and to article 55, which would surely be retained. If it could complete its presentation of the law on reservations in that way, some of the difficulties attendant upon having to decide when a treaty came into force, or how many times etc., might be overcome. Those problems, which had been so much to the fore during the previous discussion, were perhaps now of diminishing significance.

38. In restudying the problem of reservations in terms of the application of treaties, he had come across a passage in the French translation of Mr. Tunkin's recent book, which read: "Si aucune des parties n'a émis d'objections contre la réserve élevée, cette dernière apporte une modification: le contenu du traité différera lors de son application entre l'État, auteur de la réserve, et tous les autres États signataires."⁹ He thought that was the point and that if the Special Rapporteur's new article started off on that note, the Drafting Committee might be able to complete the thought and in that way it might be possible to avoid some of the difficulties to which Mr. Briggs had drawn attention.¹⁰

39. The Special Rapporteur in his new draft seemed to be moving in the direction he (Mr. Rosenne) was advocating for purposes of completing the Commission's work, and he fully agreed with him as to the confusion caused by the complicated structure of the original text of article 20, which was focussed more on the question of participation in the treaty than on that of the application of the treaty. Certainly he had made out a convincing case for changing the architecture of the 1962 draft of section III as a whole, and, with one exception, he had succeeded in changing it without touching the substance. Mr. Pal had indicated at the previous meeting the lines which the Commission and the Drafting Committee should follow. The latter would have the double function of examining the Special Rapporteur's new presentation of the different provisions in the light of the explanations he had given in his report and during the discussion of the reasons for the changes, and of fitting together the different elements in whatever form was likely to commend itself to the majority. He himself, although in favour of the Special Rapporteur's rearrangement, would not carry his preference to the length of opposing the retention of the 1962 scheme.

40. With regard to the wording of article 19 as reformulated by the Special Rapporteur, he would make certain comments on drafting which also involved some points of substance. He was not satisfied with the expression "Where a treaty is silent" in paragraph 1.

⁹ *Droit international public — Problèmes théoriques*, Paris 1965, p. 70.

¹⁰ 796th meeting, paras. 34-43.

The first United Nations Conference on the Law of the Sea had decided, at its twentieth plenary meeting, that the Convention on the Territorial Sea and the Contiguous Zone “should not contain any clause dealing with reservations”,¹¹ and later that the depositary clause of the Convention should not contain any instructions to the depositary relating to the transmission of notices on the subject of reservations.¹² The question had immediately arisen whether the Convention on the Territorial Sea could be regarded as “silent” on the subject of reservations. At that same twentieth plenary meeting, divergent interpretations had been given by a number of representatives of the effect of the Conference’s decision; some had maintained that “the absence of a reservations clause meant that any State was entitled to make whatever reservations it wished”; others had taken the view that “any reservation made by a particular State would be valid only *vis-à-vis* States which accepted it”.¹³ Subsequently, reservations had been made by some States and objected to by others, and the Convention had nevertheless entered into force.

41. He suggested the deletion of the reference to “the fewness of its parties” in paragraph 2, since the concept was already covered by the references to “the nature of the treaty” and “the circumstances of its conclusion”. Perhaps, in order to make the position fully clear, it might be advisable to refer to the “manner” of the conclusion of the treaty. Since that question was of particular concern to the Latin American members of the Commission, as part of the 1962 compromise, he would be interested to hear their views on the point.

42. The question also arose whether that part of article 19 should not follow closely the language of article 46, paragraph 2 (*b*), relating to severability, thus introducing the idea that, for the type of treaty in question, no reservation was acceptable automatically if it related to a clause which was “an essential condition of the consent of the parties to the treaty as a whole”. That matter had already been mentioned at the 706th meeting¹⁴ and for that type of treaty seemed to be of relevance.

43. He suggested that paragraph 3, dealing with the case of a treaty which was the constituent instrument of an international organization, which he accepted in principle, should be postponed until the Commission came to consider article 48.¹⁵ It should become either the last paragraph of article 19 or a separate article altogether; in its present position, it disturbed the flow of thought.

44. In fact, there were two types of such constituent instruments: the first was that drawn up for the sole purpose of establishing an organization; the second was that in which the establishment of the organization was an incidental outcome of the negotiations on the treaty, as had been the case with some of the commodity

organizations. The ICAO constitution was one example of a sort of hybrid; the provisions constituting it were buried among the hundred or so articles of the Convention on International Civil Aviation of 7 December 1944¹⁶ dealing with a wide variety of problems of air navigation. In the circumstances, it might be advisable that the Commission should make clear to what types of constituent instruments it wished to refer.

45. An instance of a reservation to a treaty which was a constituent instrument appeared to be referred to in the reply of the United Kingdom Government to question 5 of the Secretary-General’s questionnaire concerning depositary practice;¹⁷ the reply referred to the International Sugar Agreement of 1958 (A/5687, p. 38). With regard to the Secretary-General’s own practice in that respect, paragraph 22 of part II of the Secretary-General’s report should be noted (A/5687, p. 93). On that point, and perhaps more generally on article 3 *bis* (article 48) and other related questions it might be as well to invoke articles 25 and 26 of the Commission’s statute and seek the views of the specialized agencies and other international organizations; it was not enough to ask governments for their comments.

46. With regard to paragraphs 4 and 5, he believed that the basic rule embodied in paragraph 5—the only new rule in the revised text proposed by the Special Rapporteur—should constitute the point of departure; paragraph 4 should be limited to the simple proposition that the objecting State had the option of either regarding the whole treaty as inapplicable in its relations with the reserving State or accepting the treaty subject to the reservation. That proposition had been put forward during the discussions at the fourteenth session¹⁸ and accepted by the Special Rapporteur; it had found adequate expression in paragraph 2 (*b*) of article 20 as adopted in 1962. A text of that kind would obviate the difficulty over entry into force and place the emphasis where it belonged, namely, on the application of the treaty in the bilateral relations of the States concerned. With regard to the compatibility criterion, he had been persuaded by the views of the Australian, Danish and United States Governments, referred to in the Special Rapporteur’s observations (A/CN.4/177/Add.1, commentary on paragraph 4 (*b*) of the new article 19), and would no longer insist, as he had done in 1962, that it should apply to objections in the same way as to reservations themselves.

47. Paragraph 5 of the Special Rapporteur’s text was new but could be justified in the light of material contained in the Secretary-General’s report, especially under the heading “Entry into force” in part I (A/5687, pp. 78-83) and part II (A/5687, pp. 96-97).

48. Mr. CASTRÉN said that the new article 19 proposed by the Special Rapporteur incorporated the provisions both of paragraph 1 (*d*) of article 18 in the 1962 draft and of article 20; the latter were the subject of

¹¹ *United Nations Conference on the Law of the Sea, Official Records, Vol. II, p. 71.*

¹² *Ibid.*, p. 72.

¹³ *Ibid.*, pp. 71-72.

¹⁴ *Yearbook of the International Law Commission, 1963, Vol. I, 706th meeting, paras. 25 and 61.*

¹⁵ Article concerning treaties which are constituent instruments of international organizations and provisionally numbered “article 3 *bis*” in the Special Rapporteur’s reformulation.

¹⁶ *United Nations Treaty Series, Vol. 15, p. 296.*

¹⁷ *Depositary Practice in relation to Reservations*: report of the Secretary-General submitted in accordance with General Assembly resolution 1452 B (XIV) (document A/5687; the questionnaire is reproduced in annex I to that document).

¹⁸ *Yearbook of the International Law Commission, 1962, Vol. I, 653rd and 654th meetings.*

most of the objections voiced by governments concerning the rules relating to reservations. The Special Rapporteur had carefully redrafted those rules, and, in his (Mr. Castrén's) opinion, to good effect. Except on a few points of minor importance, he was prepared to accept the new version of article 19.

49. In paragraph 1, the replacement of the verb "formulate" by the verb "propose", in speaking of reservations, was an improvement.

50. The provisions of paragraph 2 were based on the introductory clause of paragraph 3 in the former article 20, but very judiciously developed and supplemented the clause by some new elements and so made the rules more flexible. The solution proposed by the Special Rapporteur was sound and practical, for it would depend not only on the fewness of the parties, but also on the nature of the treaty and the circumstances of its conclusion whether the effectiveness of a reservation should be conditional on acceptance by all the parties.

51. He had no comments to make on paragraph 3, and his comments on paragraphs 4 and 5, which should be read together, related only to the form. In paragraph 4, the saving clause "unless the State concerned otherwise specifies" should apply to sub-paragraph (b) only, as in the 1962 text, for a State which accepted a reservation could hardly refuse to recognize as a party to the treaty the State which had proposed the reservation.

52. Paragraph 5 seemed unnecessary and could be deleted. The Special Rapporteur had not explained clearly, in his commentary, why he had thought it desirable to insert that new provision in his draft. It seemed to duplicate the preceding paragraph, because what was stated expressly in paragraph 5 was at least implicit in paragraph 4. If the words "as soon as the treaty is in force", which appeared in article 20, paragraph 2 (a), as drafted in 1962, were added at the end of paragraph 4 (a) of the new article 19, the text would be more precise and more concise.

53. Mr. YASSEEN said that the Commission would have to choose between the two modes of presentation, that adopted in 1962 and that newly proposed by the Special Rapporteur. More than a drafting question was involved: the decision might also affect the substance of the Commission's proposals on reservations or the importance attached to them. He thought that the 1962 presentation was more in line with the existing institution; it was more methodical and more logical, for it dealt first with the formulation of reservations, then with the acceptance of reservations and with objections, and lastly with the effects, the application and the withdrawal of reservations. That was the general theory of the reservation as an institution of international law. The Special Rapporteur's presentation was based on one very important consideration, the distinction between the case where the treaty itself answered the question and that where it did not, but it did not build up the theory in such a clear and logical way.

54. One very important rule in article 19 as drafted in 1962 should be retained: that of presumed acceptance if there was no objection within twelve months of

notice of the reservation. But the period of twelve months might seem rather short, in view of the way in which the machinery of government worked.

55. He had no objections to the substantive solutions proposed by the Special Rapporteur in his new version. Paragraph 2 of his new article 19 was an improvement on the earlier text; the inclusion of a reference to the nature of the treaty and the circumstances of its conclusion made it slightly less difficult to apply the criterion.

56. At the previous meeting, Mr. Ago had said what a serious step the Commission would be taking if it decided to encourage the freedom to formulate reservations to general multilateral treaties, and had argued that that freedom might impair existing obligations under rules derived from some other source of law, such as custom. But whether the customary rule existed, and more precisely its scope, and whether it was general or special, were controversial questions which had caused numerous difficulties in the contemporary international order. A treaty, however, did not indicate whether the one or other of its rules codified the law or progressively developed international law. The question whether a treaty rule had a source in customary law was not therefore answered by the fact that it occurred in a treaty. An attempt to solve the problem by curtailing generally the freedom to formulate reservations might result in a bad solution, since the customary nature of those rules might not be recognized. In any case, the conference convened to draw up the treaty would be free expressly to prohibit reservations, either to the treaty as a whole or to some of its provisions; by so doing, it would be shielding certain rules from reservations, either because of their importance—if they progressively developed international law—or because they were in any case positive rules of international law.

57. Mr. TUNKIN said that he found the 1962 text of article 19 broadly acceptable; both from the theoretical and from the practical points of view, it contained a better presentation of the whole problem. It dealt with reservations as an institution, unlike the Special Rapporteur's proposed new text, which only dealt with certain groups of cases.

58. Referring to Mr. Rosenne's remarks on the history of reservations, he pointed out that reservations had become a well-established institution by the end of the nineteenth century. Textbooks mentioned such early cases as the reservations by Sweden to the General Act of the Vienna Congress of 1815 and even the Austrian reservations to the Franco-Danish Treaty of 1748.

59. Taking the 1962 text as a basis, he thought that article 19 could be considerably simplified. Paragraph 2 could be omitted. It was hardly necessary to describe the various forms of express acceptance of a reservation; the form could vary, but since the acceptance was given *expressis verbis*, there was no need for any description.

60. Some governments had expressed certain well-founded objections to paragraph 4. They had pointed out that the Commission had introduced an unnecessary complication by incorporating the idea of an objection to a reservation by a State which was not a party to

the treaty. Since, from the practical point of view, there was hardly any need to cover that case, and since the attempt to do so greatly complicated the whole matter, he suggested that paragraph 4 be dropped altogether; article 19 would then refer only to the parties to the treaty.

61. In paragraph 5, the procedural details should be omitted; its provisions should merely state the simple rule that an objection to a reservation had to be formulated in writing.

62. Briefly, he suggested that paragraph 1 should remain as it stood, that paragraph 2 should be omitted, that paragraph 3—to be renumbered 2—should deal with implied acceptance, that paragraph 4 should be omitted, and that the concluding paragraph should state the requirement that the objection should be in writing.

63. Mr. ELIAS said that, although the new text proposed by the Special Rapporteur for articles 19 and 20 embodied most of Mr. Tunkin's suggestions for the improvement of article 19, there appeared to be some advantage in keeping the order of exposition of the 1962 text. However, that question could be safely left to the Drafting Committee. His own remarks would relate to the 1962 text of article 19.

64. In their comments, some governments had put forward the criticism that article 19 seemed to apply to all reservations, including those which were clearly inadmissible. In fact, where a reservation was not permitted by the treaty, there could be no question of acceptance or objection, because the reservation was incompatible with the object and purpose of the treaty.

65. He noted that the Argentine delegation in the Sixth Committee had pointed out that, under the Pan-American doctrine, where a treaty did not contain any provision relating to reservations, a reservation might be valid "even if not compatible with the object of the treaty" (A/CN.4/175, Argentina, and section III of the 1962 draft). However, the Commission had decided at its fourteenth session in 1962 to accept the compatibility test for the validity of reservations, and he saw no reason to depart from that decision.

66. He agreed that paragraph 2 could safely be dropped. Paragraph 3 raised two main questions: the first was whether it was workable as it stood or whether it would not be better to confine the provisions of article 19 to the parties to the treaty. The second was that of the time-limit, a question which was made slightly clearer by the Special Rapporteur's new text of paragraphs 4 (a) and 4 (b) of article 20. In that new paragraph 4 (a), the time-limit of twelve months was rather short, but some time-limit was undoubtedly necessary for the making of an objection to a reservation. The suggestion by one Government¹⁹ for the simplification of the provisions of paragraph 4 and their transfer to a new sub-paragraph (c) of paragraph 3 of article 20 could be examined by the Drafting Committee. In paragraph 5, the wording should be simplified, and the very real problem of laying down a time-limit would have to be considered by the Drafting Committee.

¹⁹ That of Australia; see that Government's comments on article 19 in document A/CN.4/175, section I.

67. The Special Rapporteur's new text for article 19 was generally acceptable in substance, subject to doubts regarding the expression "fewness of its parties" and the cross-reference to article 3 *bis*.

68. Mr. AGO said it was not very easy to come to a decision on article 19 particularly as the Commission was dealing with two texts of different content, since their provisions were distributed differently in the two versions of the section on reservations. Speakers referred sometimes to the one and sometimes to the other of the two texts, and consequently the discussion was somewhat confused.

69. At the previous meeting, he had expressed a certain preference for the 1962 text. After hearing the Special Rapporteur, he perceived certain advantages in his reformulation which he had not seen at first.

70. If a treaty contained provisions on reservations, there was no great difficulty; the Commission would no doubt find a satisfactory wording to cover that case. The problem became more complicated if the treaty was silent on the subject of reservations. Without suggesting that the Commission should abandon the system which it had adopted, after long discussions, in 1962, he wished to point out that that solution was a makeshift which presented many disadvantages; not least, it would have the effect that all inter-State relations would be governed by different rules. Whereas it had been hoped to establish a certain uniformity, the utmost diversity would prevail. In addition, that system might have unfortunate repercussions on certain generally accepted customary rules, which might be badly shaken. If two States decided not to follow one of those rules, the rule would cease to carry weight among the other States.

71. With regard to cases where a treaty was silent on the subject of reservations, the principle which the Commission wished to establish was that reservations were acceptable unless they were incompatible with the object and purpose of the treaty. Actually, despite its seeming objectivity, the "compatibility" test was very subjective. Each State, in every bilateral relationship, would be free to interpret a reservation as compatible, or as incompatible, with the object and purpose of the treaty; in that way, it would not only become possible to derogate bilaterally from the rules which were in fact essential to the treaty, but situations would arise where one group of States would regard a particular reservation as not inconsistent with the purpose of the treaty, whereas another group would hold the contrary opinion.

72. Accordingly, he urged the Commission to state as clearly as possible that the system it proposed was a system applicable to residuary cases, to cases where the parties had failed in their duty to include provisions concerning reservations in the treaty itself. Those cases should be as few as possible.

73. Several speakers had referred to the first Conference on the Law of the Sea. What had happened at that Conference was that, when the participating States had tried to designate the articles in the Convention on the Territorial Sea and the Contiguous Zone to which reservations would be admissible, some States had argued

that reservations should be admissible to a very few articles only, whereas others had thought that reservations should be permissible to a larger number of articles; no State, however, would have proposed that reservations should be admissible to all the rules included in the Convention in question. As the Conference had been unable to reach agreement, and as no reservations clause had been included in the Convention, some States had promptly declared that they interpreted the absence of such a clause as meaning that reservations were not admissible to any of the rules of the convention, whereas others had declared that reservations could be made to all the rules. In a like case, the system contemplated by the Commission would lead to the paradoxical result that, at an international conference where the majority was in favour of restricting the possibility of making reservations, but where a two-thirds majority was necessary for the adoption of a reservations clause, the minority would be able to secure the admission of all reservations, subject only to the proviso—which might not be very effective—that reservations had to be compatible with the object and purpose of the treaty. To guard against that inevitable difficulty, the Commission should express in very clear terms the hope that every treaty would contain provisions concerning reservations indicating whether reservations were admissible and, if so, to which articles.

74. The Commission would help States themselves by adopting that attitude, since the problems which arose in each State in connexion with the ratification of a treaty were greatly simplified if the treaty itself specified the articles to which reservations could be made. If the treaty was silent on that point, the Ministry of Foreign Affairs would probably dislike the idea of expressing reservations, but it often had to yield to other government departments, such as the Ministry of Finance or the Ministry of Justice, which insisted that the State should make certain—not always necessary—reservations.

75. Mr. Tunkin had suggested the deletion of paragraph 4 of the article 19 adopted in 1962; but in his (Mr. Ago's) opinion that would be a dangerous step. For what would happen during the initial phase of ratification? A reservation might be made even by the first State to ratify, whereupon all the States entitled to become parties to the treaty should also be entitled to object to the reservation. That was a technical rather than a fundamental problem, but it deserved consideration nonetheless.

76. At the previous meeting, Mr. Verdross had raised the difficult and important question of interpretative declarations and had rightly observed that the question was not really connected with the interpretation of treaties. If a State proposed to change the contents of a treaty by an interpretative declaration, that was an act closely resembling a reservation. Nor could an interpretative declaration be fully equated with a reservation, since it did not prevent the article to which it related from entering into force; the article certainly entered into force with respect to the State making the declaration, but with one particular meaning rather than another. The question would probably have to be dealt with in a specific provision in the draft.

77. Mr. BRIGGS said that he would comment on the new text for article 19 proposed by the Special Rapporteur. He had been fully convinced by the Special Rapporteur's statement of his reasons for redrafting the articles on reservations and found the new architecture much superior to that of the 1962 articles.

78. With regard to paragraph 2, despite what Mr. Rosenne had said, he thought it was important to retain the reference to the "fewness" of the parties to the treaty; a reference to the manner of the conclusion of the treaty would not cover the point.

79. He wished to make certain general remarks on reservations, with special reference to the provisions of paragraph 4 of article 19. In the Secretary-General's report on "Depositary practice in relation to reservations" (A/5687), the questionnaire sent to governments spoke of the "sovereign right" to make reservations. In fact, there was no sovereign right to make reservations; if there was any "right" to formulate reservations, it was of limited value until the legal effect of the reservation was established, and that legal effect depended, not on any presumed "sovereign right", but on international law.

80. The position was clear in the traditional rule of international law on the subject, and the League of Nations had merely adhered to the existing rule, which antedated both the League and the Pan-American variant which had not been formulated until 1932. According to the traditional rule, the acceptance of a reservation by all the parties to the treaty was necessary in order to give legal effect to the reservation. That rule had the advantage of being a practical rule which worked, and could be applied without ambiguity. Moreover, it preserved the integrity of the treaty, a phrase which had been questioned in the Commission but which was really a clear and simple concept: it referred to the consensus achieved in the formulation of the treaty's provisions in the light of its objects and purposes. It also prevented a State from unilaterally securing for itself a specially privileged position in relation to the rules established in the treaty.

81. In its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice had found the traditional rule of "undisputed value",²⁰ while the Commission itself had recognized that value when it had maintained the rule in its draft, implicitly with regard to bilateral treaties and explicitly with regard to certain treaties mentioned in the Special Rapporteur's new paragraph 2 of article 19. It was, moreover, incorrect, or at least ambiguous, to label that rule "the unanimity rule", for what an objecting State tried to do was to preserve the consensus reached by the conference; it was not arbitrarily vetoing that consensus. In view of the solid advantages of that rule, he ventured to inquire what was the purpose of the proposal to depart from it in respect of certain treaties.

82. The great increase in the number of parties to some multilateral conventions had led to the belief that, where a majority of the parties was willing to

²⁰ *I. C. J. Reports 1951*, p. 21.

accept a particular reservation as compatible with the treaty, it was no longer desirable that a single State, by its objection, should be able to prevent the reserving State from becoming a party. Personally, he was willing to accept the view that the consensus should prevail in the case of such reservations, just as it prevailed in the formulation of the treaty. However, he found quite unacceptable the argument that, because a State had been outvoted on a particular rule incorporated in the treaty by the conference after careful consideration and perhaps even as part of a compromise, that State had a legal right to be a party to the treaty while repudiating that rule. And it was precisely such a right that would be created and conferred by paragraph 4 (a) of the new article 19.

83. The Commission had reacted against the rule according to which one State could prevent a reserving State from becoming a party to the treaty while maintaining a reservation that the majority of the parties found acceptable; in that reaction, however, the Commission had gone to the opposite extreme of permitting the reserving State to dictate the terms upon which it would become a party even if a majority opposed those terms, provided only that one State could be persuaded to accept the reservation objected to by the majority. Such had not been the original proposal of the Special Rapporteur, a proposal which had been intended to limit the rule in question to general multilateral treaties; yet, despite the warnings of the Special Rapporteur at the fourteenth session,²¹ the Commission had adopted the extreme position embodied in paragraph 2 (a) of article 20 of its 1962 draft and reproduced in the Special Rapporteur's revised paragraph 4 (a) of article 19. In that extreme form, the provision applied not merely to general multilateral treaties but to all multilateral treaties except for constituent instruments of international organizations and treaties limited to a small number of parties. In the Special Rapporteur's new text for article 19, the new criterion of the integrity of the treaty had been introduced into paragraph 2, where it was perhaps somewhat vaguely expressed but was nonetheless indispensable to render the draft acceptable to certain States.

84. The new rule thus introduced had been defended principally on the excuse that it promoted the universality of international law. For his part, he was not at all impressed by the argument that it was desirable to secure the widest possible participation in so-called "general multilateral treaties", if it was to be secured at the price of permitting reserving States to choose the rules of international law by which they would be bound. The right of any State to refuse to become a party to a treaty was undisputed, but there was no element of progressive development in encouraging the fragmentation and the undermining of a treaty provided only that one State other than the reserving State was willing to tolerate that situation by accepting the reservation. The result was a fictitious universality of parties which

disguised a lack of genuine universality in the acceptance of the rules of law established by the treaty.

85. For those reasons, he proposed, as a compromise between the two extreme positions, that paragraph 4 of the Special Rapporteur's new article 19 should be replaced by the following provision :

" 4. In cases other than those referred to in paragraphs 2 and 3,

(a) Acceptance of a reservation by a majority of the parties to the treaty permits the reserving State to become a party to the treaty;

(b) Objection to a reservation by any party precludes the application of the provisions of the treaty as between the objecting State and the reserving State, unless otherwise specified."

86. The idea embodied in that proposal was that, since the rules of law formulated in a multilateral treaty were adopted by some form of majority vote, the admissibility of any particular reservation should be based on a comparable rule.

87. There remained a problem which neither that proposal nor the 1962 draft, nor in fact the Special Rapporteur's new draft, solved satisfactorily, that of the wide variety of multilateral treaties. Although both multilateral treaties which were the constituent instruments of international organizations and multilateral treaties between a small group of States had been excluded from the residual rule, the Special Rapporteur, in his report (A/CN.4/177/Add.1, para. 3 of the observations preceding article 18), drew a distinction between "general multilateral treaties" and "other treaties having a large number of parties", and he himself had, at a previous meeting,²² drawn attention to the wide variety of existing multilateral treaties.

88. With the exceptions mentioned, the Commission had endeavoured to adopt a general residual rule for widely differing categories of multilateral treaties. The adoption of the rule proposed in paragraph 4 (a) of the new article 19 would be fatal to many of those treaty régimes. On reflection, he had come to the conclusion that the surest way to promote the progressive development of international law with regard to those multilateral treaties was to require majority acceptance of reservations for treaties not falling under the provisions of paragraphs 2 and 3 of the Special Rapporteur's new article 19.

89. Mr. AMADO, in reply to Mr. Ago, said that the die was cast and that the Commission could not move backwards. States would not agree to renounce what, rightly or wrongly, they considered a gain which had been confirmed by the Commission in its 1962 draft. The gain was no doubt of debatable value, and one might sigh for the times when every treaty had been a harmonious unit; but the fact remained that many things had been changed by multilateralism.

The meeting rose at 1 p.m.

²¹ *Yearbook of the International Law Commission, 1962, Vol. I, pp. 226 and 230.*

²² 791st meeting, paras. 73 and 74.