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# Summary record of the 799th meeting

Topic:
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-
**1965, vol. I**

## 799th MEETING

*Thursday, 10 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. Pal, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

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### Organization of Future Sessions

[Item 5 of the agenda]

*and*

### Dates and Places of Meetings in Winter and Summer 1966

[Item 6 of the agenda]

1. The CHAIRMAN announced that the officers had met the previous day to consider questions concerning the Commission's work up to the end of 1966. The officers had considered first the discussions which had taken place at several private meetings of the Commission; secondly, a letter addressed to the Chairman of the Commission by Mr. Stravropoulos, Legal Counsel of the United Nations, confirming and explaining the statements he had made several days before at a private meeting; and, thirdly, the results of an informal inquiry among the members of the Commission as to their availability for a winter session in January 1966 and for extended summer sessions in 1965 and 1966. The officers' conclusions would be presented by the General Rapporteur.

2. Mr. ELIAS, General Rapporteur, said that, in accordance with the Commission's decision at its fourth private meeting on 4 June 1965, the members of the Commission had been consulted by questionnaire. The results of that consultation had been that neither the suggestion to extend the present session by one week nor that to extend it by two weeks had received any measure of support. The suggestion to hold a winter session from 3 to 29 January 1966 had been approved by all those members who had expressed a view on the question, while the suggestion to extend the 1966 summer session by two weeks had received the support of a majority.

3. In the light of those results, the officers of the Commission proposed that a letter should be addressed to the Legal Counsel, in reply to his letter, reaffirming the Commission's decision taken at its previous session[1] to recommend the holding of a winter session in January 1966. In the light of the progress of the work, the Commission would decide, early in the summer session of 1966, whether any extension of that summer session was necessary or not. The Commission's decision on both those points would be mentioned in its report on the current session, so as to show that the Commission had reconsidered the whole matter as requested in the letter from the Legal Counsel and had come to the conclusion that a winter session in January 1966 was both necessary and desirable. An indication would at the same time be given of the possibility that it might prove necessary to extend the 1966 summer session.

4. Mr. WATTLES (Secretariat) said that the Secretariat had studied the cost to the United Nations of the proposed winter session in January 1966; the difference in cost between a Geneva session and one held at Monaco[2] would, of course, be borne by the inviting Government of Monaco. Financial Regulation 13.1 of the United Nations specified that: "No council, commission or other competent body shall take a decision involving expenditure unless it has before it a report from the Secretary-General on the administrative and financial implications of the proposal". In accordance with that regulation, he submitted the following estimate of the expenses of a four-week winter session at Geneva in January 1966:

| | *Dollars* |
|---|---|
| (*a*) Travel costs and subsistence allowances of members of the Commission | 35,750 |
| (*b*) Travel costs and subsistence allowances of four staff members from the substantive services at Headquarters | 5,000 |
| (*c*) Temporary assistance to supplement the regular staff of the European Office | 16,000 |
| | 56,750 |

The figure of $16,000 was predicated on the assumption that certain requested increases in the language staff of the European Office would be approved by the General Assembly, and consequently that part of the need for language services could be met from regular staff.

5. If the Commission envisaged a possible two-week extension of its ordinary summer session in 1966, Headquarters should be advised accordingly so that arrangements could be made for the necessary budgetary appropriation.

6. The CHAIRMAN announced that the Commission had received an official communication from the Minister of State of the Principality of Monaco inviting it to hold its winter session in January 1966 in Monaco. The Commission could therefore make public the decision taken at its private meeting on 2 June 1965 to accept the invitation, of which it had previously had only informal knowledge.

7. If the Commission adopted the proposal of its officers, he would send a telegram to the Minister of State of the Principality to inform him of the Commission's decision gratefully to accept the invitation, adding that the final decision lay with the competent organs of the United Nations. That proviso was necessary for, while the Commission was free to decide on the place and date of its winter session in 1966, the proposal to hold the session would still have to be approved by the General Assembly, which would have to appropriate the necessary funds. The Principality would defray all additional expenses occasioned by the fact

[1] *Yearbook of the International Law Commission, 1964*, Vol. II, document A/5809, para. 38.

[2] The Government of Monaco had invited the Commission to hold its session of January 1966 in Monaco (see para. 6 below.)

that the session would be held in Monaco and not at Geneva, where the Commission met regularly.

8. Mr. TUNKIN proposed that the proposals of the officers of the Commission be adopted, subject to the explanations given by the Chairman.

9. Mr. BRIGGS seconded the proposal.

*The proposal was adopted.*

## Law of Treaties

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

*(resumed from the previous meeting)*

[Item 2 of the agenda]

ARTICLE 19 (Acceptance of and objection to reservations) *(continued)*[3]

10. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 19 and then introduce article 20.

11. Sir Humphrey WALDOCK, Special Rapporteur, said that in the course of the discussion on article 19 some members had stressed that reservations constituted an institution of the law of treaties. Undoubtedly, like ratification, reservations could be so described, but he felt that all the emphasis that was necessary had been given to the institution by allocating to it one whole section consisting of no fewer than five articles.

12. There had also been a number of references to the distinction between a reservation on the one hand and a declaration or statement on the other, a distinction to which he had referred in his report (A/CN.4/177/Add.1, paras. 1 and 2 of the observations preceding article 18). The distinction had not been overlooked by the Commission but had been underlined in the definition of reservations contained in article 1, paragraph 1(*f*). The section under discussion dealt with reservations as defined in that paragraph.

13. Interpretative declarations, however, remained a problem, and possibly also statements of policy made in connexion with a treaty. The question was what the effect of such declarations and statements should be. Some rules which touched the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant.

14. As he understood it, the crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty's provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation. Probably, the Commission would have to examine more closely at a later stage the relationship between interpretation and reservations and might have to add a separate provision on the subject of declarations, but for the time being the question should not detain it.

15. Another and very fundamental point had been raised by Mr. Ago when he had made his plea for a presentation of the whole section in such a manner as to show that reservations constituted a residual institution. The opposite approach had been adopted by Mr. Tunkin, Mr. Yasseen and other members, who wanted a statement of the right to make reservations to be made from the outset, as was done in paragraph 1 of article 18 in the 1962 draft. He himself had steered a middle course in rearranging the articles concerning reservations in such a way that the first article, article 18, dealt with the case of treaties which contained clauses permitting or prohibiting reservations; reservations to treaties containing such provisions were thus excluded from the rules set out in the subsequent articles. Then followed his new version of article 19, which dealt with the other cases, those of treaties silent concerning reservations. That difference of approach on the part of members reflected a real difference of opinion. However, the Commission had reached such a large measure of agreement on substance that it should be possible for the Drafting Committee to formulate a broadly acceptable text.

16. Turning to article 19 as adopted in 1962, he said that paragraph 1 did not call for any comment. With regard to paragraph 2, he was prepared to accept the suggestion that some of the procedural details should be eliminated, though he would urge caution in that respect. For example, the rule that a reservation made on signing a treaty was effective only if confirmed at the time of ratification[4] was not merely procedural and should be clearly stated. Another problem which was not dealt with in the 1962 text was whether an objection to a reservation similarly required to be confirmed on the ratification of the treaty by the objecting State.

17. There was general agreement that paragraph 3 of article 19 should be retained, but it had been suggested that, for the busy legal department of a State, the period of twelve months might be unduly short. Actually, a large number of treaties set a time-limit of six or even three months. Moreover, there was another counterbalancing consideration in that the question whether the multilateral treaty was in operation between the two States concerned would remain in suspense during that given period, and it was surely in the general interest that the period of uncertainty should not be prolonged. He considered accordingly that a time-limit of twelve months was not unreasonable.

18. He agreed that paragraph 4 as drafted in 1962 should be dropped. In his proposed new text, he had in fact eliminated it and had attempted to deal with the time-element in his proposed paragraph 4 for the new article 20.

19. He also agreed that paragraph 5 should be shortened but, there again, would urge caution, so as not to eliminate material that might have a bearing on substance.

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

[4] Rule proposed in the Special Rapporteur's reformulation (A/CN.4/177/Add.1, article 20, paragraph 2).

ARTICLE 20 (The effect of reservations)[5]

20. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 20, said that an important point of substance had been raised in the government comments, in connexion with the presumption embodied in paragraph 2 (*b*). The presumption was that the objecting State did not have the intention to participate in the treaty with the reserving State. Some governments wished the presumption to go the other way, particularly in the case of general multilateral treaties, so that the objecting State would have to indicate clearly that its objection was intended to stop the treaty from entering into force between it and the reserving State; otherwise, the treaty would enter into force between the two States. The Commission would have to give an indication of the way in which it wished the presumption to go.

21. Paragraph 3 raised the question of the meaning of the expression " a small group of States ", and the Commission would have to consider whether the language of that provision might be improved.

22. There remained the extremely difficult question which States were to be considered as relevant from the point of view of the acceptance of or objection to a reservation. The question had given rise to considerable discussion in 1962, and the view had been expressed that the provisions should apply only to the actual parties to the treaty; a broader approach was to include also States which had signed the treaty but had not yet ratified it. It was difficult to formulate a fair rule in the matter, but the Commission would certainly have to re-examine its use of the term " party " and also the fact that there existed other States to which it was open to become a party.

23. Mr. VERDROSS said that the interpretative declaration came within the meaning of " reservation " as defined in article 1, paragraph 1 (*f*). If a State, at the time of signing or ratifying a treaty, declared that it accepted one of its articles only if interpreted in a certain sense, it excluded all other interpretations of that article and its declaration was meant therefore to exclude the legal effect of some provisions of the treaty. It was, admittedly, possible to discuss whether or not such a declaration was a reservation; but the problem it raised was analogous to that raised by reservations. Personally, he would be satisfied if the Commission stated in the commentary, disregarding the theoretical aspect of the question, that the problem of the interpretative declaration should be regarded as analogous to that of reservations.

24. Mr. YASSEEN said he could see a very clear distinction between an interpretative declaration and a reservation. The difference lay in the attitude of the State making an interpretative declaration in respect of a treaty.

25. A State which formulated a reservation recognised that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty in so far as the reserving State itself was concerned.

26. A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.

27. If a State recognized a general interpretation and afterwards gave a subjective one, valid only for itself, it would in effect be formulating a reservation.

28. The CHAIRMAN, speaking as a member of the Commission, said that interpretative declarations could take many forms—a letter, an exchange of letters, or a declaration included in the final act of the conference or in the *procès-verbal* of the adoption of the treaty. In the form of the so-called " Martens clause ", the interpretative declaration had become classical and had produced important legal effects, in particular during the Second World War.

29. The question raised by Mr. Verdross was an important one; the interpretative declaration was certainly an institution closely resembling that of reservations. The Special Rapporteur had been very wise in choosing not to mention the matter in the actual text of the articles. By mentioning it in the commentary, the Commission would show that the question had not escaped its attention.

30. Mr. CASTRÉN said that the problem raised by Mr. Verdross was not a simple one; it was difficult to draw a distinction between the unilateral interpretative declaration and the reservation. Since there were interpretations which could vary laws, some interpretations could also vary treaties. He supported Mr. Verdross's suggestion that the question should at least be mentioned in the commentary.

31. Mr. AMADO hoped that the Drafting Committee would reconsider the phrase " unilateral statement made by a State ", used in article 1, paragraph 1 (*f*), which in his opinion was tautological.

32. Mr. TUNKIN said that he wished to make certain general observations, which went a little beyond the strict framework of the provisions of article 20.

33. Some members had endeavoured to justify their stand in favour of the unanimity rule in the matter of reservations on the ground that it was a democratic principle. Democracy, in Greek, meant the rule of the State by the people, but even in ancient Greece " the people " excluded not only slaves but a number of other persons who were not completely free. The meaning of democracy was conditioned by the class structure of the society to which it was applied. However, there were some general notions on which all would agree.

34. It had been said by some members who opposed the 1962 text that the Commission should not admit that a minority could overrule a majority and that it would be undemocratic if it could. But it should be noted that the unanimity rule would have precisely the effect that a minority could overrule the majority. In fact, one single objecting State could, under the unanimity rule, prevent one hundred States which were willing to enter into treaty relations with the reserving State from entering

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

into such relations. Such a result would certainly be most undemocratic. It was, of course, clear that majority rule, in the sense of deciding all matters in international relations by a majority vote, did not apply in an international society consisting of sovereign States.

35. It had also been suggested that, under the provisions on reservations adopted in 1962, it would be possible for a minority to destroy the uniformity of the treaty régime. That observation ignored the fact that there could be no uniformity in international law; uniformity would presuppose the existence of a super-State organ competent to enact international legislation binding upon all States. States were sovereign, and no such organ existed at the moment. Every effort should be made to arrive at as great a uniformity as possible, but uniformity was not an end in itself; it should be viewed in the light of the realities of the contemporary situation.

36. Reservations constituted exceptions, and the Commission had accepted the rule that they must not be incompatible with the object and purpose of the treaty. A reservation which was compatible with that object and purpose would clearly not break the substantial uniformity of the treaty régime. In the light of those considerations, reservations should be viewed as a useful and valuable institution.

37. The Commission having thus adopted the compatibility test for the validity of a reservation, the problem arose whether the same test should also be applied to the validity of an objection. The Commission had decided at its fourteenth session that the test should apply in the same manner to both, and he urged that that decision be maintained. It would be consistent with the ruling of the International Court of Justice in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. Of course, the test applied only where the treaty itself was silent; if the treaty contained provisions on the subject of the validity of reservations and objections to reservations, those provisions would apply.

38. In general, the wording of article 20 as drafted in 1962 was acceptable. Paragraph 2 (*a*) raised the same problem as had been discussed in connexion with article 19, whether States to which the treaty was open but which had not yet established their final consent to be bound should have some say in the matter of reservations. It was clearly the modern practice that a reservation was valid only if made or confirmed at the moment when final consent to be bound was given, and that was the presumption reflected in the 1962 draft. The same applied to objections to reservations. The point was partially covered in paragraph 6 of the Special Rapporteur's new text for article 20.

39. While paragraph 2 (*b*) of the original text was acceptable, he was inclined to favour a provision expressing the presumption rather differently. The provision might be redrafted so as to state that the objecting State would be regarded as having treaty relations with the reserving State unless it had manifested a desire to the contrary. The point needed further thought.

40. The new title for article 20 suggested by the Special Rapporteur (" Procedure regarding reservations ") was misleading because in fact the points of substance covered were more important than those of procedure. In any case, it was never easy to make a firm distinction between the two, since for any rule to become operative some form of procedure or another was necessary.

41. He continued to think that the 1962 scheme was more logical than the new one, and that view was confirmed by the comments of governments. Subject to the necessary alterations by the Drafting Committee, which should of course take into account suggestions made during the discussion and those of the Special Rapporteur, the original text of article 20 should be maintained.

42. Sir Humphrey WALDOCK (Special Rapporteur) said he had already indicated that the title of article 20 was not exact because it contained substantive as well as procedural provisions, as did articles 18 and 19. In rearranging the content of the three articles he had tried to shorten them and to retain all the procedural elements with a bearing on the substance.

43. The CHAIRMAN said that Mr. Tunkin had raised a question which the Commission should ponder, namely whether a reservation expressed at the moment of signature needed formal confirmation at the time of ratification. He asked whether Mr. Tunkin would consider that the reservation was confirmed if it appeared not in the instrument of ratification itself, but next to the signature of the State's representative in the text of the treaty accompanying or reproduced in that instrument.

44. Mr. TUNKIN replied in the affirmative.

45. Mr. RUDA said that in his opinion article 20 of the 1962 draft referred not so much to the effect of reservations as to the circumstances in which a State that had formulated a reservation became a party to the treaty.

46. The article should contain two basic ideas. The first, which was already stated in the definition of " reservation " in article 1, paragraph 1 (*f*) but which might be restated in article 20, was that the main effect of a reservation was to exclude or vary the legal effect of some provision of the treaty in its application to the reserving State. The second was that the reservation, if valid, made the State a party to the treaty. Those were the ideas which should be included in article 20 in order to bring the text into line with the heading.

47. The right context for paragraph 1 (*a*) was not article 20 but article 19, which was concerned with the acceptance of reservations.

48. Paragraph 2 (*a*) dealt with acceptance by a State to which it was open to become a party to a treaty but not with the normal case of acceptance by a State party to the treaty; it could be replaced by paragraph 4 (*a*) of the new article 19 proposed by the Special Rapporteur, while paragraph 2 (*b*) could be replaced by paragraph 4 (*b*) of the new article 19.

49. Paragraph 3 contained the vague and uncertain expression " small group ", which gave no idea of the number of States which such a group might comprise.

50. Paragraph 3 (*b*) should be retained in some form, since it was intended to cover the practice followed by

Latin American States with regard to the making of reservations to multilateral conventions. Without such a provision that practice, which had been adopted by a great many States, would be of doubtful legality. The wording, however, should be changed, for in Latin America there were treaties which had been concluded by States members of a regional organization but not under the auspices of that organization. Examples were the many treaties governing private international law in criminal, civil and other matters concluded by the countries of the Rio de la Plata region, which in 1881 had set up a special system that had nothing to do with the Organization of American States. Paragraph 3 (*b*) should therefore be retained but modified so as to distinguish between treaties concluded under the auspices of an international organization and other treaties.

51. Mr. CASTRÉN said that the new article 20 proposed by the Special Rapporteur replaced the provisions of paragraphs 2 and 3 of the former article 18 and former article 19 by a simplified version, but it also contained some substantive changes, particularly with regard to the procedure for the tacit acceptance of reservations. In that respect, the Special Rapporteur had been guided mainly by the Australian Government's observations. On the whole, he approved of the substantive and drafting changes but thought that there was a gap in the new system and that the drafting could be further improved.

52. He accepted the idea expressed in paragraph 4 that a State should not be required to raise an objection to a reservation before it was itself a party to the treaty. However, a rule should also be included to cover the very frequent case where the reservation was not proposed or notified until after the other States or some of them had established their consent to be bound by the treaty. In such a case it would seem appropriate to apply the provision of paragraph 3 of the former article 19, under which a reservation would be regarded as having been accepted by a State if it raised no objection during a period of twelve months after receiving formal notice of the reservation. A sub-paragraph (*c*) to that effect should be added to paragraph 4.

53. Paragraph 5 laid down word for word precisely the same procedural rules for objections to a reservation as those applicable under paragraph 1 to the proposal and notification of reservations. Preferably, therefore, the two paragraphs should be amalgamated or else paragraph 5 should say simply that the provisions of paragraph 1 applied also to objections to a reservation.

54. With regard to the order of the first two paragraphs, he suggested that the order of the earlier text should be followed: first would come the opening sentence of the new paragraph 1, " A reservation must be in writing "; secondly the new paragraph 2, which would become sub-paragraph (*b*); thirdly the second sentence of paragraph 1, which would become sub-paragraph (*c*). That would be the chronological order, as the proposal and confirmation of reservations preceded notification.

55. Despite the basically expository nature of the new paragraph 3, it should be retained, for the reasons given by the Special Rapporteur in his commentary. He would merely draw attention to the vague expression in sub-paragraph (*b*): " to the other interested States ".

56. The new paragraph 6 was a useful addition to the 1962 rules.

57. There was an inaccuracy in the Special Rapporteur's commentary on article 20, where it was stated (A/CN.4/177/Add.1, paragraph 13 of commentary preceding article 20) that the sub-paragraphs in article 18, paragraph 2, of the 1962 text could be dispensed with, whereas in fact only sub-paragraphs (*a*) (i), (ii) and (iii) were dropped; the provisions of sub-paragraph (*b*) were retained, with minor changes, in paragraph 2 of the new article 20.

58. Mr. TSURUOKA said that in his statement at the previous meeting,[6] to which one speaker had referred, he had urged the Commission to show due regard for the principle of democracy, and more specifically for the majority decision. That speaker had claimed that the unanimity rule was contrary to the democratic spirit. He was prepared to accept that argument, provided that the speaker conceded that the acceptance of reservations depended on a collegiate or a majority decision. He (Mr. Tsuruoka) had said that the collegiate solution was closer to the majority rule, and that his reason for preferring the unanimity rule to the collegiate solution was that it was simpler to apply.

59. He was still convinced that the unanimity rule for the acceptance of reservations was more satisfactory than the individualist solution, in that it respected and safeguarded the earlier majority decision. The individualist solution, by contrast, presupposed considerable freedom to repudiate the majority decision.

60. The same speaker had referred to a hypothetical case where a single State prevented the reserving State from entering into treaty relations. In his (Mr. Tsuruoka's) opinion, such a case was purely conjectural and could never actually occur: the fact that 114 States had accepted a reservation showed that it was reasonable, and in such a case the objecting State should reconsider its intransigent attitude and withdraw its objection. Moreover, the reserving State was free to withdraw its reservation, so that the question could perhaps be settled in a democratic spirit.

61. Reference had been made to the difficulty of proposing a reservation. But there was also considerable difficulty for a State to oppose it. A State, which hesitated between acceptance and objection would, on grounds of courtesy, be more readily inclined to accept than to object. Personally, he preferred the system proposed by the Special Rapporteur to that of 1962.

62. Mr. YASSEEN said that he had some doubts about the paragraph 2 proposed by the Special Rapporteur in his reformulation of article 20. Ratification related to the treaty as signed by the State: consequently, if the treaty was signed subject to a reservation, the ratification, even if it did not say so specifically, still related to the treaty as it had been signed by the State.

63. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on articles 18, 19 and 20, after which the Commission might wish to consider what kind

[6] See 798th meeting, paras. 2-8.

of general scheme it favoured for the section concerning reservations.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that it was hard to draw definitive conclusions from discussions in which some members had expressed a clear preference for one or other of the two texts. He had no pride of authorship to protect, having been largely responsible for the final shape of the 1962 text. He did not find that text objectionable, but he disliked certain features that made for obscurity and complexity, as governments had not been slow to point out. Of course, that could be remedied by other means than rearranging the material, and he was not asking the Commission to reach a decision at the moment. The three articles could be referred to the Drafting Committee for reconsideration in the light of his new proposals and of the observations of members, leaving the question of the final arrangement still open. The Drafting Committee's task would be to work out something that would reconcile as many views as possible.

65. Attention had been drawn to a number of difficulties inherent in the whole subject of reservations, and no very useful purpose would be served by his reviewing them, but he would have liked more guidance from the Commission, first on whether or not it wished to retain in its original form the presumption in paragraph 2 (*b*) of the 1962 text of article 20, and secondly on the application and scope of the compatibility test. On the latter question he had introduced a change in his new draft in deference to the observation made by some governments that the Commission's draft appeared to restrict the freedom to object to a reservation to cases where the reservation was incompatible with the object and purpose of the treaty; they did not wish to rule out objections that might be prompted by the need to protect some particularly delicate interest of State. To the best of his recollection the conclusion reached on that point at the fourteenth session had been that, although it might be of some theoretical significance, in practice, in the absence of an adjudication clause, States would formulate their objections on grounds of incompatibility. At any event, the point would need further elucidation as the 1962 text was not free of ambiguity.

66. Although it was not easy to judge what was the weight of opinion on certain points, he thought the articles could be referred to the Drafting Committee.

67. Mr. TSURUOKA said that, as he might be absent when the Commission resumed consideration of the articles, he would like to speak on two of the points raised by the Special Rapporteur.

68. If a State objected to a reservation without stating that, its objection notwithstanding, it intended to enter into contractual relations with the reserving State in conformity with the treaty, there should, he thought, be a presumption that it was the objecting State's wish not to establish such relations. Such a presumption was consistent with the prevailing conception of the reservation.

69. With regard to the Special Rapporteur's further question, whether an objection to a reservation had to be based on the criterion of compatibility with the object and purpose of the treaty, he (Mr. Tsuruoka) considered that no such obligation existed. A State made a reservation in order to defend its interests, fully realizing that another State might object to its reservations. Consequently, if States were authorized to make reservations, other States should equally be authorized to defend their own interests by formulating objections to those reservations.

70. Mr. BRIGGS said he agreed that articles 18, 19 and 20 could be referred to the Drafting Committee but would ask that his own amendment[7] to paragraph 4 of the Special Rapporteur's new text of article 19 should also be transmitted.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that although he sympathized with the reasons for the amendment, it would reopen the discussion on the basis underlying the 1962 compromise and his own reformulation.

72. Mr. TUNKIN said that, as it was the Commission's usual practice to refer all proposals made in the course of the discussion on any particular article to the Drafting Committee for examination, he would have no objection to Mr. Briggs's amendment being treated in the same way.

73. Mr. ELIAS said he agreed, but thought that perhaps the Special Rapporteur had raised a more fundamental question; possibly some decision should be taken by the Commission itself on Mr. Briggs's amendment because of its radical implications. As Mr. Amado had urged, the Commission should, as far as possible, refrain from going back on the compromise achieved at the fourteenth session.

74. Mr. TUNKIN said that, although it was the Commission's practice to refer all proposals to the Drafting Committee, that did not mean that the Drafting Committee was called upon to steer some kind of middle course between them. It was free to examine, accept or reject any proposal or part of a proposal. At the fourteenth session, Mr. Briggs had proposed[8] something very similar to his latest amendment which had been discussed at great length, and the issue should not be reopened.

75. Mr. CADIEUX said that a crucial choice had to be made whenever the Commission's instructions to the Drafting Committee were not clear. A distinction had to be drawn between two cases: one which involved simply a matter of drafting, where the Committee was asked to express the tenor of the discussion as a whole; and the other where it was asked to work out a compromise. The two situations might affect each other.

76. It could happen that, as a result of its deliberations, the Drafting Committee would produce a text more or less similar to that of 1962, but taking into account the new elements proposed by the Special Rapporteur, and conclude that most members were more or less in agreement; it would then be fairly confident that it had made some progress, and that a large majority of the Commission's members would accept the solution.

[7] See 798th meeting, para. 85, for the text of the amendment.

[8] *Yearbook of the International Law Commission, 1962*, Vol. I, 651st meeting, para. 28.

77. It could also happen, however, that those members who favoured reservations would reopen the question in the Drafting Committee and that it would prove difficult to draft a text as satisfactory as that of 1962. Since the Committee's function was to facilitate the voting in the Commission, it might then conceivably be very desirable that the Committee should propose an alternative. Those less satisfied with the Drafting Committee's revision might renounce the compromise which they had accepted in 1962; but if they had the choice between a proposal which restricted the acceptance of reservations and a formula giving them wider recognition, they would prefer, on balance, to change their minds and revert to the earlier text. That being so, he thought that Mr. Briggs's proposal should be passed on to the Drafting Committee, which would decide, in the light of its debate, whether the proposal should be adopted as it stood or in an amended form. However, it was premature to say that the debate was exhausted and that the matter was no longer before the Commission.

78. The CHAIRMAN said that he had taken the view that the Commission should settle all questions of substance before referring texts to the Drafting Committee. When Mr. Pal had been Chairman, his practice had been to explain in what way proposals differed from each other and to take a preliminary vote before referring the texts to the Committee. The procedure had been changed on Mr. Amado's proposal; under the new procedure, which had been recorded in a report[9] and which the General Assembly had noted, the Drafting Committee was responsible not only for drafting but also for endeavouring to settle problems of substance. He was not opposed to Mr. Cadieux's opinion, but he was bound to respect the Commission's opinion, since it had been confirmed by the General Assembly.

79. Mr. AMADO said he was disturbed to see that the compromise which the Commission had reached with no little difficulty and a great many mutual concessions was being jeopardized by further discussions of undefined scope. The debate which had just taken place had been of exceptionally high quality, but he wished to reiterate the appeal which he had made to the Commission at the 797th meeting not to try to be perfectionist. It should remember that States were primarily concerned with their own interests, and they could not be blamed for that.

80. Some members of the Commission could make no further concessions than they had already made. He was not prepared to sacrifice a single element of the compromise reached in 1962. His " retreat " at that time had been commented on in his own country, where he had always been regarded as a champion of the unanimity of the parties to a treaty. He hoped the Special Rapporteur would defend at least what amounted to the substance of the draft convention.

81. Even before Mr. Briggs's statement, he had intended to propose that, in view of the clarity of the views expressed, the Commission should refer the three articles in question to the Drafting Committee. The Commission could trust the Drafting Committee which, by the force of circumstances, had come to play an increasingly important part. That development was to be expected, for a jurist saw in a text not merely the form, the arrangement of the words but, above all, the content.

82. Mr. BRIGGS said that he made no apology for proposing reconsideration of a decision reached at the fourteenth session which he had opposed. After all, the Commission was engaged precisely in the task of reconsidering its draft in the light of the comments by governments. He had not asked the Commission to reopen the discussion, since the views of individual members were well known. There were two ways of handling his amendment. Either it could be put to the vote in the Commission itself, but he had not asked for that; or, in accordance with the Commission's usual practice, it could be referred to the Drafting Committee for examination along with the other texts and suggestions. He would be quite content with the latter course.

83. Mr. AGO said he supported Mr. Amado's view as to how the Commission should proceed. Relations between the Commission and the Drafting Committee had always been very elastic. Sometimes the Commission had decided questions by a vote, so as to offer guidance to the Drafting Committee; in other cases it had postponed voting until after a more searching debate on a more elaborate text. The latter procedure was preferable in the present case. The Committee would do its best, for it realized that the Commission's essential task was to prepare a text which might command the greatest measure of support at a codification conference.

84. Sir Humphrey WALDOCK, Special Rapporteur, said that when it had seemed desirable to secure for the Drafting Committee clearer directives than had been given during the discussion, he had sometimes suggested in his summing up what line the Committee might take, so as to elicit further views from the Commission. In the present instance, without wishing to question the idea of referring to the Drafting Committee all the proposals and texts before the Commission, and although he agreed in general with what had been said about the Committee's functions, he thought that the latitude allowed to it had been somewhat exaggerated. Not infrequently, after a full discussion in the Commission itself, the Drafting Committee at some stage in its work had to take the line that on some points it was not competent to make a radical change of substance because the Commission had shown a clear desire to formulate the article on a particular basis. The issues in regard to reservations could not be regarded as completely open, since otherwise the task of the Special Rapporteur would be impossible. Consequently, unless some indication to the contrary were given by the Commission, he would assume that the views which had gained general support should form the foundation of any new draft he might be asked to prepare for the Drafting Committee. Of course, the final decision would be taken at a later stage when the Commission examined the Drafting Committee's proposal.

85. The CHAIRMAN asked whether the Commission accepted the Special Rapporteur's view. If it did, then

[9] *Yearbook of the International Law Commission, 1958*, Vol. II, p. 108, para. 65.

articles 18, 19 and 20 could be referred to the Drafting Committee forthwith.

*It was so agreed.*[10]

The meeting rose at 1 p.m.

[10] For resumption of discussion on the section concerning reservations, see 813th meeting, paras. 1-109, and 814th meeting, paras. 1-30.

## 800th MEETING

*Friday, 11 June 1965 at 10 a.m.*

*Chairman:* Mr. Milan BARTOŠ

*Present:* Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Pal, 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 21 (The application of reservations)

*Article 21*

*The application of reservations*

1. A reservation established in accordance with the provisions of article 20 operates:

(*a*) To modify for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) Reciprocally to entitle any other State party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*.

1. The CHAIRMAN invited the Special Rapporteur to introduce his proposals for article 21.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that two observations by governments would need to be considered. First, the Japanese Government's criticism of the word " claim " in paragraph 1 (*b*) seemed justified, and he accordingly proposed (A/CN.4/177/Add.1, paragraph 2 of the commentary on article 21) that the text should be modified to read:

" Reciprocally to modify the provisions of the treaty to the same extent for each party to the treaty in its relations with the reserving State. "

The effect of that change would be to state the position of the two States on a footing of complete equality.

3. The United States Government had mentioned the possibility of a State objecting to or refusing to accept a reservation, yet nevertheless still considering itself in treaty relations with the reserving State. That hypothesis was in fact already provided for in the draft, but perhaps there was some ground for dealing with that situation in article 21 as well. His only doubt was whether it was correct to regard that situation in terms of a unilateral right of the objecting State to determine the existence of treaty relations between the two States. He would have thought that in all cases there had to be some kind of consent, and he therefore suggested a somewhat different formulation in paragraph 3 of his observations on article 21 for consideration by the Commission,[1] should it decide to take account of the United States Government's observation.

4. The drafting point dealt with in paragraph 1 of his observation would have to be left pending, as its fate would depend on the decision reached about the rearrangement of the content of articles 18 to 20.

5. Mr. YASSEEN said that article 21 did not present any problem, as was proved by the comments of governments, though the Commission should settle the two points mentioned by the Special Rapporteur.

6. First, neither the Government of Japan nor that of the United States accepted the words " to claim ": the former proposed that the right should be stressed and the latter that the words " to apply " should be used. In either case, the result would be the same: if a State was entitled to the benefit of a reservation, it could apply it as stipulated, which meant that the treaty would be modified accordingly. Personally, he would prefer the word " apply " as it was less radical than " modify ".

7. Secondly, the Government of the United States proposed a new paragraph to cover the situation where a State objected to or refused to accept a reservation, but nevertheless considered itself in treaty relations with the reserving State. That situation should probably be dealt with in the draft articles. The Special Rapporteur had remarked, very ingeniously, that the situation should be regarded as one likewise governed by the mutual consent of the parties, for possibly the reserving State might attach a great deal of importance to the reservation and might not entertain the idea of entering into treaty relations with a State which did not accept the application of the reservation. Consequently, if the Commission wanted the article to cover that situation, it should accept the Special Rapporteur's suggestion and consider the treaty *vinculum*, in the event of an objection to a reservation, as also the result of the mutual agreement between the two States, the reserving State and the objecting State.

8. Mr. ROSENNE said that the trend of the discussion on the preceding three articles in the section on reservations made him inclined to favour Mr. Ruda's suggestion[2] that the definition in article 1, paragraph 1 (*f*), if it really comprised the effect of reservations, should be

[1] Additional paragraph suggested by the Special Rapporteur: " Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States ".

[2] See 799th meeting, para. 46.