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Summary record of the 800th meeting

Topic:
Law of Treaties

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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.

transferred to the section on reservations, preferably article 21.

9. It would be more accurate to substitute the word " application " for the word " provisions " in the new text suggested by the Special Rapporteur as a substitute for paragraph 1 (*b*).

10. The United States unilateral approach to the situation it had mentioned in its observations concerning paragraph 2 was more in line with the general structure of the Commission's provisions on reservations and preferable to the Special Rapporteur's reciprocal approach, because if a State proposed a reservation, that step automatically brought into play the whole of the law governing the institution of reservations; if an objection was made to the reservation, the objecting State should have some option to decide whether or not it wished to be in treaty relations with the reserving State subject to the reservation. It would unnecessarily complicate matters to require a further agreement between the two States as to whether or not they wished to be in such treaty relations with each other.

11. Mr. RUDA, referring to what he had said at the previous meeting regarding article 20 and its title,[3] said that the article which actually dealt with the effect of reservations was article 21; indeed, it began with the words " A reservation . . . operates : " (*Las reservas . . . tendrán por efecto.*) The 1962 commentary to article 21 stated " This article sets up the rules concerning the legal effects of a reservation which has been established under the provisions of articles 18, 19 and 20 . . . "; the title of article 21 therefore did not reflect its content.

12. With regard to the form, he approved the text of paragraph 1 (*a*), but a change was needed in paragraph 1 (*b*), at least in the Spanish version, where the word *pretendan* was meaningless.

13. With regard to the substance, he agreed that a paragraph should be added to cover the situation where a State objected to or rejected a reservation but nevertheless considered itself in treaty relations with the reserving State. That idea had appeared, as an innovation, in resolution X adopted at the Fourth Meeting of the Inter-American Council of Jurists in 1959,[4] which took into account the procedure for reservations followed in the inter-American system. As to whether the situation could be represented as arising from a unilateral or from a bilateral expression of will, he was rather inclined towards the unilateral idea, advocated by the United States Government, for the reasons which Mr. Rosenne had just mentioned.

14. Mr. CASTRÉN said that he was prepared to accept the article as drafted by the Commission in 1962, with the drafting amendment to the introductory sentence proposed by the Special Rapporteur. It might also be possible to reword paragraph 1 (*b*) along the lines suggested by the Special Rapporteur.

15. He saw no need for the additional paragraph suggested by the Special Rapporteur, since paragraph 1 (*b*), whether in its old form or in the new form, already covered the case in question.

16. Mr. TUNKIN said he agreed with Mr. Ruda that the title of article 21 was inadequate because in fact it dealt with the legal effects of reservations : the point should be considered by the Drafting Committee, particularly in view of the existing title of article 20.

17. The text of article 21 formulated at the fourteenth session was, in general, acceptable. Paragraph 1 should be simplified as there was no need for two separate subparagraphs; all that was needed was a provision stating the rule that, as a result of a reservation, a treaty applied between the reserving State and other parties accepting the reservation, except for the clauses to which the reservation related.

18. He agreed with the Special Rapporteur that the situation described by the United States Government in its observations was not the result of a unilateral expression of will, but thought that the Special Rapporteur's suggested provision to deal with the situation might lead to unnecessary procedural complications in that it would require the two States to specify whether or not they regarded themselves to be in treaty relations with each other. The United States formulation, being simpler and free from ambiguity, was probably preferable.

19. As it was clear that a reservation only affected treaty relations between the reserving State and those parties which had accepted the reservation or those which, while objecting to it, nevertheless intended to remain in treaty relations with the reserving State, he was not entirely convinced of the need to retain paragraph 2.

20. Mr. VERDROSS said that the idea on which article 21 was based was clear but, in order to avoid any confusion, he thought it would be preferable to retain paragraph 2.

21. Mr. YASSEEN said that the reservation might be of capital importance for the State proposing it, for it might wish the provision to which the reservation related to be applied in a certain manner; the treaty as a whole, and the will of the State to be considered a party to the treaty, might be affected.

22. Could it be presumed that the reserving State would agree to be in treaty relations with a State objecting to the reservation? He did not think so, for such a presumption did not correspond to the general rule in the matter. The reserving State had the right to think that there would be no treaty relations between it and the State which objected to its reservation. It happened very rarely that a State which objected to a reservation accepted, at the same time, certain treaty relations with the reserving State.

23. He considered therefore that the State making the reservation which was not accepted should be allowed to have its say, and that a clause should be added such as " unless the reserving State is opposed thereto ".

24. Mr. PAL said that, for the reasons given by Mr. Yasseen, the ultimate formulation of the additional paragraph suggested by the Special Rapporteur in the light of the United States Government's observation would largely depend on how article 20, paragraph 2 (*b*), concerning the legal effect of objections to reservations,

[3] *Ibid.*, para. 45.

[4] *Yearbook of the International Law Commission, 1960*, Vol. II, p. 133, para. 94.

was drafted. He preferred the Special Rapporteur's text to that of the United States Government as being more logical and because of its emphasis on the two-sided relationship between the two States. The decision to be in treaty relations with another State could not be taken unilaterally.

25. Mr. TUNKIN said that he had not fully understood Mr. Yasseen's argument. In certain circumstances, an objection of principle to a reservation might be made but would amount to no more than a political declaration, because in fact the objecting State was ready to apply the treaty in all respects except for the provision to which the reservation related. He had an open mind in the matter and believed that it was of no great consequence for practical purposes because the mutual consent between the two States to apply the treaty would probably exist.

26. Mr. YASSEEN said that there was also a difference of effect between the objection to the reservation and the acceptance of the reservation. According to the additional paragraph suggested by the Special Rapporteur to cover the situation where a State objected to the reservation of another State but the two States nevertheless considered themselves to be mutually bound by the treaty, " the provision to which the reservation relates shall not apply in the relations between those States. " Actually, the reservation might modify a certain provision; it might be intended to preserve the provision in a modified form. The State which objected to a reservation might agree to a treaty relation with the reserving State, except that the provision to which the reservation related would not apply between them. The difference consisted in the fact that, in the event of acceptance, the provision was applied as amended by the reservation, whereas in the event of an objection it was not applied at all. That difference justified the reserving State's right to express its will.

27. Mr. AGO said he did not quite understand Mr. Yasseen's argument. A State made a declaration of acceptance with a reservation : its acceptance with the said reservation being established, it had no further need to express its intention. The other State made an objection, but let it be understood that its objection had a political value only and would not have the legal effect of preventing the treaty from entering into force between the two States, subject to the reservation. The consent was therefore established as from that moment, and it would be strange to provide for any further discussion between the parties in order that the treaty could enter into force.

28. Mr. BRIGGS said that, on the question what was the legal effect of a reservation for the reserving State and those States which accepted it, the rule was correctly stated in paragraph 1 (*a*) of the 1962 text. A reservation modified the treaty and not merely its application. In some circumstances, it might even have the effect of doing away with a certain clause altogether.

29. No great difficulty arose when a State objecting to a reservation did not regard itself as bound by the treaty in its relations with the reserving State, because although both were parties to the treaty, it was not applicable *inter se*.

30. The United States Government had suggested an option by which the objecting State might consider the treaty to be applicable in its relations with the reserving State, except for the provisions reserved. On that point he preferred the text of the United States Government, for reasons given by Mr. Rosenne.

31. Sir Humphrey WALDOCK, Special Rapporteur, summing up said that he was able to agree with both currents of opinion about the additional paragraph that might be inserted in order to satisfy the United States Government. As had been indicated, the practical effect of either of the two versions would be much the same and in that particular situation both States would probably be ready to regard the treaty as being in force between them without the reserved provisions. His real objection to the United States text was to the words " considers itself ", which gave the impression that the objecting State possessed some kind of unilateral right to take up a certain position because of the reservation. Surely the reserving State, if confronted with an objection couched in unacceptable terms, was entitled to refuse to be in treaty relations with the objecting State, even although the latter was willing. Possibly the case might be a rare one, but there were recent instances of reservations to multilateral treaties having given rise to serious controversy. The United States text went too far in one direction, and in his own the element of mutual agreement had perhaps been too clearly stressed. It could be left to the Drafting Committee to work out a formula.

32. Admittedly the title of article 21 was not very exact, but in 1962 difficulty had been encountered in finding suitable titles for articles 20 and 21, both of which treated aspects of the effect of a reservation. The Drafting Committee would no doubt succeed in remedying that defect.

33. With regard to Mr. Tunkin's suggestion that paragraph 1 might be abbreviated, he said that such a change would need great care. The " flexible " system was so delicate, and its consequences, particularly for multilateral treaties, so important, that the text would probably need to be fairly full and explicit.

34. As to paragraph 2, which Mr. Tunkin thought could be dropped, he shared Mr. Verdross's view that there would be merit in retaining the text in the interests of clarity, but it was, of course, open to improvement by the Drafting Committee.

35. Mr. AMADO said that the Drafting Committee should reconsider paragraph 2, which stated that a reservation operated only in the relations between the other parties to the treaty which had accepted the reservation and the reserving State and that it did not affect in any way the rights or obligations of the other parties to the treaty *inter se*. He did not think that the draft could be quite so explicit or that such a conclusion could be drawn from practice.

36. Mr. CASTRÉN said that, like Mr. Pal, he could see a very close connexion between the additional paragraph proposed by the United States Government and the Special Rapporteur, and paragraph 2 (*b*) of article 20. He hoped the Drafting Committee would

consider whether it would not be better to deal in article 20 with the question raised by the United States Government.

37. The CHAIRMAN, speaking as a member of the Commission, said it was perhaps a little too categorical to say that a reservation operated only between such and such States and that it did not affect in any way the rights and obligations of the other parties. It would be better to find a more moderate expression, for even in that situation there were certain legal implications.

38. In the case of a multilateral treaty, if some States were bound by a reservation and others participated without any reservation, what was the relationship between the parties? Were they or were they not bound to perform duties, without any discrimination?

39. For example, Argentina and Guatemala invariably made reservations to treaties in which the United Kingdom participated. Those reservations were not of a juridical nature, but were political reservations based on juridical claims. In that case, was there really any equality of the parties, in view of the fact that the reservations excluded mutual application? Certain States ignored the declarations and reservations of the two States in question, but others rejected the reservations: were the latter in treaty relations with Argentina and Guatemala, or only the former?

40. Mr. TSURUOKA asked what would be the effect of an objection to a reservation if the objection was accompanied by a statement by the objecting State to the effect that it was nevertheless willing to enter into a contractual relationship with the reserving State. If the reservation was meant to exclude an entire article, and the objecting State said that it did not accept the reservation but wished to enter into a contractual relationship with the reserving State, then acceptance and objection amounted to the same thing, from the point of view of legal effect. In his opinion, the situation should be clarified in the commentary.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that admittedly paragraph 2 might be regarded as repetitive but it probably should be retained, although it was by no means easy to express the idea. He hoped Mr. Amado's point, which he had had very much in mind, could be met.

42. The CHAIRMAN suggested that article 21 should be referred to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[5]

ARTICLE 22 (The withdrawal of reservations)

Article 22

The withdrawal of reservations

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

43. The CHAIRMAN invited the Special Rapporteur to introduce his proposed revised version of article 22, which read:

Unless the treaty otherwise provides —

(*a*) A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal;

(*b*) Such withdrawal becomes operative when notice of it has been received by the other States concerned from the depositary or, if there is no depositary, from the reserving State;

(*c*) On the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that at the fourteenth session the Commission had thought it important to include the rule that a reservation could be withdrawn at any time and that the consent of the States which had accepted it was not required for its withdrawal. The Commission had also considered it appropriate to provide that the withdrawal should not take effect until notice of it had been received by the other States concerned; that was a departure from the normal rules governing the moment when instruments took effect within the general system of multilateral treaties.

45. Two suggestions arising out of observations by governments could be dealt with by the Drafting Committee without much further discussion in the Commission itself. The first was that article 22 should take the form of a residual rule, and he suggested that the article should be prefaced by the clause " Unless the treaty otherwise provides, ". The second arose out of the Israel Government's comment that, owing to the absence of a reference to the possibility of notice of withdrawal being given through the depositary, the 1962 text gave the impression that the notice had to be addressed direct to the other parties individually. He explained that the omission had been due to inadvertence. The distinction between treaties for which there was a depositary and those for which there was none had to be kept in mind throughout the draft.

46. Two other more important comments on the substance had been made. The Government of Israel considered that notice of the withdrawal of a reservation should normally take effect in accordance with the terms of the treaty, or, if no provision was made, in accordance with the rules laid down in the present draft articles. He did not believe that many treaties in fact contained detailed provisions of that sort, and consequently the rule devised by the Commission was likely to be the one applied. The problem of the time when notice of withdrawal made through a depositary would take effect had been discussed in the Commission or in the Drafting Committee at the fourteenth session and, as far as he could remember, the agreement had been that

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

it should become operative, upon receipt by the depositary. In its comments on article 29, the Government of Israel made a proposal designed to allow for the normal administrative processes necessary for the depositary to prepare the relevant communications and for them to reach individual States through the normal channels. The point would need examination in connexion with article 29 in order to determine whether the Commission would have to modify the assumptions on which it had been working. The Government of Israel referred to the *Right of Passage case*,[6] where the problem had been one of critical importance because of its bearing on the issue of jurisdiction. In effect, that Government was proposing that the Commission, instead of following the line taken by the International Court in that case, should not regard notice of the withdrawal of a reservation as automatically taking effect at once but should provide for an interval of time for the other parties to obtain cognizance of the notice.

47. The United Kingdom Government had pointed out that States might need time to adjust their internal laws or administrative practices as a result of the withdrawal of a reservation. In the light of that observation, he suggested in paragraph 5 of his commentary a revised text involving a slight change in the presentation of the article, and providing in paragraph (*c*) for a period of three months for the requisite legislative or administrative action to be taken, where necessary.

48. In his new paragraph (*c*), he was proposing a provision according to which the reserving State could not complain of any infringement of the treaty in its altered form for a certain period, if the only reason for such infringement was the failure of the other States concerned to make the necessary changes in their law or practice. That might be regarded as a complicated way of dealing with the matter but it had seemed to him more appropriate than suspending the effect of a withdrawal for a certain period.

49. Mr. VERDROSS said that where a reservation had been proposed by one State and accepted by another State, an agreement existed between those two States. In principle, an agreement could not be modified unilaterally. Consequently, article 22 stated an exception to the general principle and also an exception to article 21. The exception was defensible if it was admitted that the State which accepted a reservation did so in a spirit of conciliation but preferred the treaty in its complete form. It might happen, however, that the State which accepted the reservation was in full agreement with the reserving State. In that case, there was no reason why the reserving State should be free to withdraw the reservation without the consent of the accepting State. He wished to make that observation, but was not submitting any specific proposal, as no government had raised an objection on that point.

50. The CHAIRMAN, speaking as a member of the Commission, said that he had never come across a case where a State had protested against the withdrawal of a reservation by another State. Normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated He agreed with Mr. Verdross in theory but did not think that the point had any practical importance.

51. Mr. AGO said that the question raised by Mr. Verdross made it necessary to distinguish between two cases. If the State which had accepted a reservation to a multilateral treaty had itself accepted that treaty without making the same reservation, then clearly, its consent was not a necessary condition of the reserving State's ability to withdraw the reservation. It might happen, however, that two States parties to a multilateral treaty each formulated the same reservation; in that case, if one of the States wished to withdraw its reservation, the consent of the other was necessary in order that the withdrawal should take effect between them. For otherwise, as between two States which had made the same reservation, the mere fact that one of them withdrew its reservation would oblige the other to withdraw its reservation as well. The Commission would do well to take that case into account.

52. He accepted the idea expressed in paragraph (*c*) of the Special Rapporteur's revised text, but thought that a less involved wording might be found.

53. The CHAIRMAN, speaking as a member of the Commission, said he recognized that a problem arose in the second of the two cases mentioned by Mr. Ago. Another case which occurred in practice was that where a group of States agreed *inter se* to accept a treaty with the same reservations. He explained that he had not thought of that possibility when making his previous remarks.

54. Mr. TSURUOKA, referring to paragraph (*c*) of the revised text proposed by the Special Rapporteur, said that although in 1962 he had not been radically opposed to the principle of freedom to withdraw a reservation without preliminary consultation with the other parties, he had thought of the situation to which the United Kingdom Government had drawn attention in its comments. Furthermore, acceptance of a reservation created a *de facto* situation, which could last for some time. In order to change that situation, to change a trade practice, for example, the State which had accepted the reservation should be allowed time to adapt itself to the new situation created by the withdrawal of the reservation. Accordingly, he thought that paragraph (*c*) should stand in one form or another, or, alternatively, that the necessary explanation should be given in the commentary.

55. As for the problem mentioned by Mr. Verdross, it was clear that, especially in the circumstances mentioned by the Chairman—joint action by a group of States—the withdrawal of a reservation by one of the members of the group would produce its effect in relation to States outside that group, but not in relation to the members of the group. The effect of such a withdrawal on relations between the members of the group deserved clarification.

56. Mr. ELIAS said he supported the Special Rapporteur's new formulation of article 22, but suggested that paragraph (*c*) should be shortened : the indication that the three-month period was intended to permit

[6] *Case concerning right of passage over Indian territory (Preliminary objections), I.C.J. Reports 1957*, p. 125.

the necessary changes in internal law should be transferred to the commentary.

57. Mr. RUDA said that the Special Rapporteur's proposed opening proviso " Unless the treaty otherwise provides " was both useful and necessary.

58. He had no strong objection to the inclusion of the Special Rapporteur's paragraph (*b*) but thought that the idea embodied in it was already contained in article 21.

59. He was not in favour of the three-month period of grace proposed by the Special Rapporteur in paragraph (*c*). In strict law, there was no difference between the entry into force for a State of one of the clauses of a treaty as a result of the consent given by that State to be bound and the entry into force of a clause as a result of the withdrawal of a reservation to that clause by another State. There was no reason for allowing three months' grace for the adjustment of internal law in the second case when no such provision existed in the first case. Paragraph (*c*) should therefore be dropped.

60. Mr. AMADO said that, while the withdrawal of a reservation by a State might satisfy the other States, it was also possible that it might worry them and give rise to complicated problems. In the case of some multilateral treaties of a commercial or economic nature, for instance, the withdrawal of a reservation might, by modifying the rules in force, have very serious practical consequences for some of the countries parties to the treaty.

61. With regard to paragraph (*c*) of the Special Rapporteur's revised text, he said that he shared, to some extent, Mr. Ruda's opinion on the question of the time-limit. Moreover, it would be going too far to mention internal action to be taken by States. If the Commission wished some such provision to appear in the article, it should draft the provision in less rigid and much more discreet language, stating simply that the parties to the treaty would take the necessary administrative steps in the event of the withdrawal of a reservation.

62. Mr. ROSENNE said that perhaps the treaties to which Mr. Amado had alluded were of a type to which reservations would not be permissible under the Commission's own proposals.

63. Where two States each made identical reservations on the basis of some ancillary agreement between them, the unilateral withdrawal of that reservation by one of them might well be a breach of the ancillary agreement. But the legal situation would otherwise remain unchanged, for the maintenance of the reservation by the other State would keep it in force between itself and the State withdrawing the reservation. Cases could be cited of a number of countries making an identical reservation; if one of them withdrew its reservation, there could be no doubt that the reservation still stood in its relations with the others, which had not withdrawn theirs.

64. He accepted in principle the Special Rapporteur's proposal for paragraph (*c*). In that connexion, his own proposal (A/CN.4/L.108) for an addition to article 29, or a new article 29 *bis*, to the effect that any notice communicated by the depositary to the interested States became operative 90 days after the receipt by the depositary of the instrument to which the communication related, could have some bearing on the drafting of paragraph (*c*). Certainly the adoption of his proposal would permit those provisions to be shortened.

65. In paragraph (*b*), the passage concerning notice " received by the other States concerned " was not as clear as it appeared, because of the varieties of methods of transmission, a matter to which he would refer when introducing his proposal.[7]

66. Mr. TUNKIN said that the Special Rapporteur's introductory phrase in the revised text of article 22 was useful: where the treaty contained provisions on the subject of the withdrawal of reservations, those provisions should prevail.

67. He suggested that in the new paragraph (*b*) the concluding words " from the depositary or, if there is no depositary, from the reserving State " should be deleted. The provision would then state simply the substantive rule, and the procedural details could be transferred elsewhere. He added that the Drafting Committee should consider whether all the procedural provisions should not be placed in two separate articles. With regard to the case where a depositary existed, article 29, on the functions of a depositary, would be the appropriate place for a provision giving those procedural details. The case where there was no depositary should perhaps be dealt with in a separate article stating that all communications regarding the treaty, any reservations thereto and any notice of the withdrawal of reservations should be addressed directly by the parties to each other.

68. He was in favour of paragraph (*c*), which provided for a three-month period for necessary adjustment of internal law, but agreed with Mr. Elias that it was desirable to simplify the text. He did not think that the case was comparable to that where a State gave its consent to be bound. In the latter case, if the treaty stipulated that it was to enter into force on signature, a State which foresaw difficulties in adjusting its municipal law could delay the entry into force of the treaty for the necessary period of time by signing *ad referendum*, or subject to ratification. If the treaty stipulated that it would enter into force on ratification, a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law.

69. In the case under consideration, the change in the situation did not depend on the will of the other States concerned, but on the will of the reserving State which decided to withdraw its reservation, as the example given by Mr. Amado showed. The withdrawal could then lead to considerable embarrassment for those States which needed to adjust their internal legislation.

70. Commenting on the point raised by Mr. Verdross, he said that there was no problem where identical reservations were made by several States; if one of them withdrew its reservation and another did not, the latter's

[7] See 803rd meeting, paras. 30-35.

reservation would stand in its relations with the withdrawing State. The problem was in fact covered by the existing text of article 22.

71. Mr. CASTRÉN said that, subject to a few drafting changes, he accepted the Special Rapporteur's redraft.

72. On the problem referred to by Mr. Verdross, he shared the opinion expressed by Mr. Rosenne and Mr. Tunkin. Where identical reservations had been made by several States acting independently of each other, any one of those States had the right to withdraw its own reservation without consulting the others and without having to obtain their consent; such withdrawal did not affect the validity of the other identical reservations. But if a group of States had agreed to accept a treaty while making identical reservations, the withdrawal of the reservation by one of those States presented a separate problem—perhaps that of the breach of the separate agreement; however, he did not think that that problem should be dealt with in the draft articles.

73. Mr. BRIGGS said that the case mentioned by Mr. Amado illustrated the danger of accepting reservations just as much as the dangers involved in the withdrawal of reservations.

74. He found the Special Rapporteur's paragraph (*a*) satisfactory: it represented the only possible approach to the problem.

75. With regard to paragraph (*b*), he said the first point to be considered was the need to make the withdrawal of a reservation immediately operative for the withdrawing State. It should be remembered that the notice of withdrawal would be received at different dates in different parts of the world. The question therefore arose, under the text proposed by the Special Rapporteur, how long the State would have to wait for the withdrawal of its reservation to become operative. He agreed with Mr. Tunkin that the concluding portion of paragraph (*b*) should be dropped; the idea embodied in it could probably receive expression elsewhere in the draft articles.

76. With regard to paragraph (*c*), he said he had been fully convinced by the logic of Mr. Ruda's argument. No such period of grace was provided for when a State assumed the obligations of the treaty by giving its consent to be bound. Moreover, the contents of paragraph (*c*) related not to treaty law but to international responsibility.

77. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that all members were agreed on the need for the introductory proviso which he proposed in his revised text.

78. With regard to the point raised by Mr. Verdross, he said that the making of parallel reservations by a number of States was quite a common feature of multilateral treaties. There was tendency for the legal departments of governments to use, for the purposes of a particular reservation, the very terms which had been worked out by the State first making the reservation. Although the result was to produce parallel reservations, those reservations were quite independent of each other and did not involve any special understanding among the countries making them. A situation of that type did not call for any special provisions on the subject of the withdrawal of reservations, because the withdrawal of its reservation by one State would clearly not affect the others.

79. A different situation would arise if there was a separate agreement, ancillary to the principal agreement, between two or more reserving States to make the same reservation. The withdrawal of its reservation by one of the States concerned would give rise to the problem of incompatible treaties, which was not a matter for article 22.

80. The question dealt with in paragraph (*c*) was of some importance to States like the United Kingdom, in which no constitutional provision existed for automatically incorporating the provisions of international law, in particular those of a treaty, in domestic law. In such countries, legislation was necessary in order to give effect to treaty obligations, and he agreed with Mr. Tunkin that the case envisaged in paragraph (*c*) was not comparable to that where a State gave its consent to be bound by a treaty; in the latter case, the State concerned could foresee the situation and act accordingly. The position was quite different where a reserving State had opted out of some clause of the treaty; its subsequent withdrawal of its reservation could make it difficult for some other parties to the treaty to adjust their internal law. Conceivably, a situation of a somewhat similar kind might arise for some States when a treaty in force became binding upon a new party, an event necessitating an addition to internal legislation but in practice that situation did not give rise to difficulties.

81. He agreed that the provisions of paragraph (*c*) should be simplified, but thought that that simplification should not go to the length of laying down so radical a rule as that the effects of withdrawal should be suspended for a given period of months.

82. Mr. Tunkin's drafting suggestion regarding the procedural elements should be referred to the Drafting Committee; a change on those lines would affect a number of other articles as well.

83. Mr. AMADO said that the difficulty which he saw in paragraph (*c*) was that the Commission was mainly concerned with the codification of the existing rules of international law; its incursions into the field of the progressive development of international law had been timid. Was there a sufficient body of practice to support such a clause? In his statement, the Special Rapporteur had explained that it would be useful to draft a rule to settle the difficulties arising for States in the event of the withdrawal of a reservation. In his (Mr. Amado's) opinion, the case was real, though not frequent, and consequently the Commission should adopt the rule in question.

84. The CHAIRMAN said that, although not wishing to decide whether paragraph (*c*) codified or developed the law, he must point out that, according to its Statute, the Commission was expected both to codify and to progressively develop international law.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that the point was being taken into account increasingly by States in their more recent treaty practice. He thought, therefore, that it would be appropriate to

include the provisions of paragraph (*c*), so as to meet the difficulty which might result from the need to adjust internal law to a new treaty situation, and especially in the case of States whose consitution did not provide for the incorporation of international law in municipal law. If paragraph (*c*) did not meet with the approval of States, it could be dropped.

86. A further question that could be discussed by the Drafting Committee was the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States between which it had not previously been in force.

87. Mr. ROSENNE said that, in the circumstances last mentioned by the Special Rapporteur, the intended effect of the withdrawal of the reservations was precisely to bring the treaty into force between the two States concerned.

88. The CHAIRMAN suggested that article 22 be referred to the Drafting Committee with the suggestions and comments made by members.

It was so agreed.[8]

The meeting rose at 1. p.m.

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

801st MEETING

Monday, 14 June 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tunkin, Mr. Tsuruoka, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Also present: Mr. Zakariya, Observer for the Asian-African Legal Consultative Committee.

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 25 (The registration and publication of treaties)

Article 25

The registration and publication of treaties

1. The registration and publication of treaties entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. Treaties entered into by any party to the present articles, not a Member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

3. The procedure for the registration and publication of treaties shall be governed by the regulations in force for the application of Article 102 of the Charter.

1. The CHAIRMAN invited the Special Rapporteur to introduce his revised version of article 25, which read;

1. Members of the United Nations are under an obligation, with respect to every treaty entered into by them, to register it in conformity with Article 102 of the Charter of the United Nations.

2. Parties to the present articles which are not Members of the United Nations agree to register every treaty entered into by them after the present articles come into force.

3. The procedure for the registration of treaties under the foregoing paragraphs and for their publication shall be governed by the regulations from time to time adopted by the General Assembly of the United Nations for giving effect to Article 102 of the Charter.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, in 1962, the Commission had encountered some difficulties with article 25, because, while not wishing to appear in any way as proposing an amendment of Article 102 of the Charter, it wished to include a provision on registration, a well-established institution of treaty practice. At the same time, it had considered that, in a codifying venture of that nature, the Commission could not confine the provisions it adopted merely to States Members of the United Nations.

3. The Commission had accordingly adopted a text which, in its paragraph 1, provided for the observance by Member States of the existing Charter provisions; paragraph 2 extended the application of the principles embodied in those Charter provisions to any other States that might become parties to the future convention on the law of treaties. Paragraph 3 dealt with the regulations in force for the procedures of registration under Article 102 of the Charter.

4. His proposed new text for article 25 took into account certain Government comments on which he had made his own observations in his report (A/CN.4/177/Add.1).

5. Mr. ROSENNE said that, in general, his thoughts were very close to those of the Special Rapporteur; in particular, the arguments of the Special Rapporteur had allayed his own doubts regarding the possibility of a concealed amendment of the Charter. He agreed that registration was a sufficiently well-established institution of the contemporary law of treaties to justify the retention of article 25, but it would be difficult for him to accept even the amended formulation of the article proposed by the Special Rapporteur. Instead, he proposed that the whole article be replaced by a text reading:

" The registration of treaties "

" The registration of all treaties with the Secretariat of the United Nations shall be performed in accordance with the regulations from time to time adopted by the General Assembly of the United Nations for giving effect to Article 102 of the Charter of the United Nations. "