Document:-
A/CN.4/SR.813

Summary record of the 813rd meeting

Topic:
Law of Treaties

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

down in article 17 had its origin in the principle of good faith, but had since become a legal obligation.

105. Mr. CASTRÉN said that the Drafting Committee had produced a good text.

106. Sub-paragraph (*a*) reflected the view that the obligation already existed at the negotiating stage. He agreed with Mr. Ago and the Chairman that, in the opening passage, the words " in good faith " should be omitted.

107. For sub-paragraph (*b*), it would be desirable to use clearer and more precise wording, introducing the word " notify " or " declare ".

108. The substance of sub-paragraph (*c*) he could accept, but the phrase " provided that such entry into force is not unduly delayed " was too vague; there was no need to restore the ten-year period mentioned in the earlier draft, but something more precise should be found. He would not, however, vote against the sub-paragraph as it stood, even if the passage were left unchanged.

109. Mr. ROSENNE said that he, too, was in favour of dropping the reference to good faith.

110. Sub-paragraph (*b*) required some modification because it was not correct to take signature as a point of departure; as had just been pointed out during the discussion on ratification, some treaties were ratified without any signature at all. The obligation operated from the time of the adoption of the text. The provision should be drafted in such a way as not to impose an actual duty on the State to notify whether or not it intended to become a party.

111. Mr. REUTER said that he could agree to the deletion of the words " in good faith " in the opening passage. If the Commission did not wish to commit itself as to the origin of the obligation, an alternative formulation might be " a State is obliged to refrain in good faith . . . ". The ultimate source of the rule was that it was wrong to deceive the partner.

112. He hoped the Commission would not be too formalistic in drafting sub-paragraph (*b*), where he would prefer the word " express " to the word " notify ". After all, a public speech by the Head of State or, for example, the adoption of a resolution by the United States Senate concerning the Havana Charter, could be regarded as sufficient expression of the intention of the State. If the Commission accepted that suggestion, he would accept the suggestions of other speakers.

113. Mr. YASSEEN said it was correct that the duty to act in good faith was the basis of the rule, but if the words " in good faith " were allowed to stand, they might sow seeds of doubt as to whether the obligation in question was a *de jure* obligation. He would therefore prefer that those words should be dropped, as they had in fact been dropped from the title.

114. Mr. BRIGGS said that if the reference to good faith was dropped, what kind of obligation would remain, particularly at the stage of negotiation when no treaty existed at all?

115. Mr. RUDA said that the Drafting Committee should be very careful in its choice of language for sub-paragraph (*b*), because the intention of a State might not necessarily be either notified or manifested expressly.

116. Mr. AGO proposed that the Commission should refer article 17 back to the Drafting Committee.

117. Mr. TSURUOKA said he supported the proposal, but hoped that the Drafting Committee would study Mr. Briggs's comment very carefully. At the negotiating stage one could conceivably speak of the " object " of the treaty, but from the legal point of view the formula was debatable.

118. The CHAIRMAN suggested that, if there was no further comment, article 17 should be referred back to the Drafting Committee with the comments and suggestions put forward during the discussions.

It was so agreed.[13]

119. The CHAIRMAN said that, in reply to certain criticisms which had been voiced informally, he wished to explain that, as initially most of the articles had been referred to the Drafting Committee without precise instructions regarding substance, he could hardly prevent members of the Commission from re-opening questions of substance, at least as far as new provisions were concerned.

The meeting rose at 6 p.m.

[13] For resumption of discussion, see 816th meeting, paras. 36-40.

813th MEETING

Tuesday, 29 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 18 (Formulation of reservations)[1]

1. The CHAIRMAN invited the Commission to consider the new text of article 18 proposed by the Drafting Committee, which read:

[1] For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

" A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless :

(*a*) The making of the reservation is prohibited by the treaty or by the established rules of an international organization;

(*b*) The treaty authorizes the making of specified reservations which do not include the reservation in question; or

(*c*) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty. "

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, on the subject of reservations, the Commission had had before it two sets of provisions, the articles adopted in 1962 and his own rearrangement of the first three articles, as proposed in his fourth report (A/CN.4/177/Add.1). After the discussion in the Commission, the matter had been referred to the Drafting Committee, which had decided of adhere to the 1962 arrangement to the extent of retaining the first provision of article 18 on the formulation of reservations. In the case of articles 19 and 20, however, the Drafting Committee had adopted many of the provisions suggested by him in his fourth report, thereby greatly simplifying the presentation of the articles, while retaining all the real substance of the 1962 formulation.

3. Article 18 as redrafted embodied the substance of paragraph 1 of the 1962 text of article 18 but contained only three sub-paragraphs because the new paragraph (*a*) covered the substance of sub-paragraphs (*a*) and (*b*) of the former paragraph 1.

4. Mr. RUDA asked that the opening words " A State may " should be rendered in Spanish by *Todo Estado puede*; that formulation would be more categorical and so would conform more with the spirit of the rule which article 18 was intended to embody.

5. Mr. ROSENNE suggested that the opening phrase would be lightened if it read : " A State may, when signing or otherwise expressing its consent to be bound by a treaty, formulate reservations . . . ".

6. He suggested that in paragraph (*a*) the words " the making of " should be deleted as unnecessary; the English text would thus be brought closer to the French.

7. In paragraph (*b*), the wording " authorizes the making of specified reservations " seemed unduly narrow and should be replaced by " authorizes reservations to specific provisions ".

8. In paragraph (*c*), the opening words " [in cases where] the treaty contains no provisions regarding reservations " should be replaced by : " in other cases ".

9. Mr. BRIGGS said that some States had misunderstood the distinction drawn by the Commission in 1962 between the formulation and the making of a reservation. Personally, he preferred the expression " propose a reservation " for the opening sentence of article 18.

10. Moreover, he thought that the compatibility test should not be limited to cases where the treaty contained no provisions regarding reservations; it should apply to all cases. He accordingly suggested that the opening sentence should be amended to read : " A State may, when signing, ratifying, acceding to, accepting or approving a treaty, propose any reservation compatible with the object and purpose of the treaty unless : ". That sentence would be followed by the two exceptions set out in paragraphs (*a*) and (*b*).

11. Mr. YASSEEN said that, in his opinion, paragraph (*b*) could not be reconciled with the principle, which had been adopted by the Commission, of the freedom to make reservations to multilateral treaties. The fact that a treaty authorized reservations to some of its clauses did not mean that reservations to other clauses were inadmissible. He could accept the paragraph if the word " exclusively " was introduced after the word " authorizes ".

12. Mr. CASTRÉN said that the Drafting Committee's redraft of the articles on reservations was based on the articles adopted by the Commission in 1962. But apart from simplifying and rearranging the articles in several respects, the Committee had introduced several ideas taken from the proposals submitted by the Special Rapporteur at the current session. As always, the Drafting Committee's text was very clear and concise, and he was prepared to accept it as a whole, although he had previously supported the system proposed by the Special Rapporteur.

13. He proposed that in paragraph (*b*) the word " only " should be inserted after the word " authorizes "; that amendment would have the same effect as Mr. Yasseen's.

14. Mr. AGO said that the Drafting Committee's redraft of article 18 was a compromise, probably the only one on which agreement was possible. He therefore urged members of the Commission not to try to bias the text to one side or another.

15. He disagreed with Mr. Yasseen's opinion that the system adopted by the Commission was that of freedom to make reservations. If the treaty contained provisions concerning reservations, the matter was settled by the treaty; but if the treaty itself expressly authorized reservations to specific articles, then it followed that reservations to other articles were not authorized.

16. Mr. Briggs's suggested amendment would complicate matters considerably. The compatibility test, which was undoubtedly difficult to apply, should be used only where the treaty was silent on the subject of reservations. Where the parties had been careful to specify in the treaty the clauses to which it was permitted to make reservations, or those to which no reservations could be made, the compatibility test was unnecessary. The parties would undoubtedly not be so careless as to include among the clauses to which reservations were permitted, or to leave out of the list of articles to which reservations were prohibited, clauses that were essential to the object and purpose of the treaty.

17. Mr. PAL, referring to Mr. Rosenne's suggested drafting change in paragraph (*a*), said that it was essential to retain the word " the " before the word " reservation ".

18. Mr. TUNKIN appealed to members not to try to change the substance of article 18, which represented a reasonable compromise. The text proposed by the Drafting Committee reflected existing practice and was based on the relevant General Assembly resolutions. Under the very flexible system embodied in article 18, the way was left open for a supplementary agreement resulting from the making of a reservation by one State and its acceptance by another.

19. Mr. AMADO supported Mr. Tunkin's remarks. The Drafting Committee consisted of members of the Commission representing different legal systems, and if that Committee could not reach agreement on some point, there was little purpose in pursuing the matter further. On the other hand, if the Committee submitted a text which was the outcome of a number of concessions, then it was not necessary to discuss it again; he did not believe in perfectionism.

20. But whenever there was talk of compromise, he always asked himself whether the compromise was on the legal aspect or on the practical aspect. In his view, it was pointless to propose what might be excellent in theory, if it was not acceptable to governments. Provisions like that at the end of article 18 were intended to be applied by States. Even should States accept the provision, how would they apply it?

21. To him, the meaning of the expression " specified reservations " in paragraph (*b*) was obscure; but if the other members of the Commission accepted it, he would do likewise.

22. Mr. YASSEEN said that he was very sensitive to Mr. Ago's appeal, but the view he had expressed was based on the actual wording of the opening sentence of the article, which manifestly laid down a principle, followed by a number of exceptions.

23. With regard to paragraph (*b*) he said that Mr. Ago himself had argued that where the treaty authorized reservations to certain clauses, the implication was that reservations to other clauses were not permitted. But if that was the case, why not say so in the treaty? The problem was a practical one. In order to encourage States to accept a treaty which contained a very controversial clause, the treaty might specify that reservations could be made to that clause. But if the treaty contained no such provision regarding its other clauses, it did not follow that reservations to those other clauses were prohibited. In his view, the principle of freedom to make reservations remained valid, unless the treaty clearly prohibited them.

24. The CHAIRMAN, speaking as a member of the Commission, expressed support for Mr. Castrén's proposal.

25. Mr. TSURUOKA said that, if paragraph (*b*) was amended in the manner proposed by Mr. Yasseen and Mr. Castrén, he would be obliged to vote against it. Where a treaty prohibited reservations to certain specific clauses, it was most unusual to specify that the prohibition related exclusively to those clauses. The sole effect of the addition of the word " only " or " exclusively " in paragraph (*b*) would be to extend the freedom to make reservations, and he was opposed to that because he was opposed to disorder.

26. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that he fully agreed with Mr. Ago and Mr. Tunkin. As redrafted, article 18 represented a delicate balance between the freedom to make reservations and the restrictions which might arise from actual treaty provisions.

27. The Drafting Committee had been fully aware of the considerations put forward by Mr. Yasseen. The question had also been discussed on a number of occasions by the Commission, which had arrived at the conclusion that, where a treaty authorized reservations to certain specific provisions, the natural implication was that those were the only provisions to which reservations were allowed. Any departure from that assumption would open the door wide to the making of reservations. It would also disturb the position with regard to a treaty which prohibited certain specific reservations; in that case, the implication was that all other reservations were admitted. If, however, the concept suggested by Mr. Yasseen were introduced, the point raised by Mr. Briggs would then arise, namely whether the compatibility test in paragraph (*c*) should not also apply to such provisions.

28. The suggestion by Mr. Rosenne concerning the opening sentence of article 18, although it might appear to be an improvement in language, was not acceptable. It should be remembered that signature did not always express consent to be bound. A reservation could be formulated by a State when signing, without thereby giving its consent to be bound; in a case of that kind, article 20[2] provided that the reservation must be confirmed at the time when the State gave its consent to be bound. Accordingly, it would be inaccurate to suggest in the opening sentence of article 18 that a reservation could only be formulated at the time when a State signed a treaty with intent to be bound.

29. He suggested that article 18 be referred back to the Drafting Committee with the various suggestions put forward during the discussion.

It was so agreed.[3]

ARTICLE 19 (Acceptance of and objection to reservations)[4]

30. The CHAIRMAN invited the Commission to consider the new text of article 19 proposed by the Drafting Committee, which read:

" 1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the nature of a treaty, the limited number of the contracting States or the circumstances of its conclusion that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound, a reservation requires acceptance by all the States parties to the treaty.

[2] *vide infra*, para. 72.

[3] For resumption of discussion, see 816th meeting, paras. 41 and 42.

[4] For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

3. When a treaty is a constituent instrument of an international organization, the admissibility of a reservation shall be determined by decision of the competent organ of the organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(*a*) Acceptance by another contracting State of the reservation makes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(*b*) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

6. An act expressing the State's consent to be bound which is subject to a reservation is effective as soon as at least one other contracting State which has expressed its own consent to be bound by the treaty has accepted the reservation. "

31. Sir Humphrey WALDOCK, Special Rapporteur, said that the new text of article 19 represented a rearrangement of the material in the former articles 19 and 20. It contained the substance of the old article 19 and, from the old article 20, the provisions regarding the inferences to be drawn from the absence of objection, in other words, the question of tacit consent. All the procedural elements had been transferred to the new article 22.[5]

32. Mr. LACHS suggested that the Commission should consider the article paragraph by paragraph.

It was so agreed.

Paragraph 1

33. Mr. VERDROSS said that the words " does not require any subsequent acceptance " should be replaced by the words " is valid even if it has not been accepted "; there could be no obligation on States to accept a reservation.

34. Mr. LACHS said he agreed with Mr. Verdross that the question was not one of acceptance but of the validity of a reservation notwithstanding an objection. The wording of paragraph 1 should be changed to make that meaning clear.

35. Mr. ROSENNE said that, if read in conjunction with the provisions of article 21, the formulation in paragraph 1 was quite adequate. It was his understanding that the title of section III was to be amended to read: " Reservations to multilateral treaties ".

[5] See 814th meeting, para. 22.

Paragraph 2

36. Mr. LACHS proposed the deletion of the two phrases, " the nature of a treaty " and " or the circumstances of its conclusion ". The Commission had already adopted in article 18 the compatibility test, and the " nature " of a treaty was determined precisely by its object and purpose. It was sufficient to retain the one criterion, that of the compatibility with the object and purpose of the treaty, which had been adopted by the International Court of Justice. It would be a source of confusion if further criteria were introduced.

37. Mr. RUDA said that paragraph 2 embodied the rules set out in the former paragraph 3 of article 20 of the 1962 formulation. That text, however, had contained in its sub-paragraph (*b*) an exception relating to States which were " members of an international organization which applies a different rule to treaties concluded under its auspices ". In view of the importance of the matter from the point of view of safeguarding the practice of the Organization of American States, he asked the Special Rapporteur whether any provision for that exception would be made in the revised draft articles.

38. Mr. VERDROSS said that the idea underlying paragraph 2 was acceptable, but his comment on paragraph 1 was again applicable. The words " is not valid unless it is accepted " should be substituted for the words " requires acceptance ".

39. Mr. TUNKIN said that the purpose of paragraph 2 was to express the rule relating to reservations to treaties with a limited number of contracting States. He therefore suggested that the provision should be redrafted to read: " When, in a treaty with a limited number of contracting States, it appears from the nature of the treaty or the circumstances of its conclusion that . . . ".

40. Sir Humphrey WALDOCK, Special Rapporteur, pointed out, in reply to Mr. Lachs, that paragraph 2 would operate mainly in cases where a reservation had been formulated under paragraph (*c*) of article 18.

41. The reference to " the nature of a treaty " was intended to cover treaties in which the obligations of the various contracting parties were closely interrelated, for in such cases the treaty clearly had to be binding as a whole or else would not be binding at all.

42. With regard to the expression " limited number of contracting States ", he recalled the difficulties which had arisen with that and similar expressions; the Drafting Committee would have to make a further attempt to find a suitable expression.

43. Mr. LACHS said he agreed to some extent with the Special Rapporteur, but he was concerned at the contradiction between articles 18 and 19. Under paragraph (*c*) of article 18 a State was debarred from making a reservation which was incompatible with the object and purpose of the treaty. Article 19 specified that, for a reservation to be valid, all the parties to the treaty must accept it, thus appearing to open the door which had been closed by article 18. The provisions of paragraph 2 of article 19 should lay stress on the character of the treaty linked with the number of parties.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that there was undoubtedly a logical difficulty, in

that there was an inherent contradiction between the rule in article 18, prohibiting the formulation of a reservation which was incompatible with the object and purpose of the treaty, and the provision in article 19 for the acceptance of a reservation. That contradiction, however, was the basis of the flexible system. It should be remembered that there was no compulsory adjudication of disputes and that there was a strong element of subjectivity in the matter. In the circumstances, the criterion applied was that of acceptance.

45. Mr. LACHS suggested that the point should be referred to the Drafting Committee.

46. Mr. REUTER suggested that the words " the limited number " might perhaps be replaced by the words " the limitation on the number ", since the reference was to treaties intended to be applied by a specified number of States and not to open treaties.

47. The CHAIRMAN, speaking as a member of the Commission, said that the meaning of the expression " limited number " should be explained, because it could denote either a small number or a specified group of States.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that in the past two years he had made several attempts to find wording that would express the idea of a treaty to which a comparatively small number of States were parties; he feared that the problem was not one which language alone could solve.

49. Mr. BRIGGS said that, in view of the looseness of the rule stated in paragraph 4, paragraph 2 served to indicate certain types of treaties to which a reserving State could not become a party if another State objected to the reservation and the reserving State wished to maintain it.

50. With regard to the question of the number of contracting States, he recalled that the Commission's 1962 text had referred to " a small group of States "; Governments had, however, objected to that expression as unduly vague and not providing an adequate criterion. The matter was one in which it had not been found possible to arrive at any decision, just as no precise definition of general multilateral treaties had been adopted. Paragraph 2 accordingly mentioned three factors : the nature of the treaty, the limited number of the contracting States, and the circumstances of its conclusion.

51. Personally, he thought that States would not accept the idea that a reserving State could, while maintaining its reservation, become a party to any treaty merely because one other State accepted the reservation.

52. Mr. ROSENNE suggested the deletion of the word " limited " which, in the context, was ambiguous. It was not the number of contracting States that was relevant but the number of States to which the treaty was initially open. All the members were agreed on the thought which it was desired to express in paragraph 2, and consequently the matter might perhaps be explained in the commentary.

53. He shared Mr. Lachs's doubts concerning the introduction of the concept of " the nature of the treaty "; the essential factors should be the initially limited number of contracting States and the circumstances of the conclusion of the treaty.

Paragraph 3

54. Mr. ROSENNE said that the use of the term " admissibility of a reservation " was not consistent with the terminology adopted in the remainder of the draft, which would have required the use of the term " acceptance ". He also proposed the phrase " competent organ of that organization " in the penultimate phrase. The constituent instruments of WHO and IMCO had been adopted at conferences convened by the United Nations, the Secretary-General of the United Nations being designated as the depositary.[6] In the case of reservations to the WHO Constitution, their acceptance had been decided by the World Health Assembly, but in the case of reservations to the IMCO Convention, the General Assembly of the United Nations had decided, by resolution 1452 A(XIV), that the IMCO Assembly was the competent organ to decide upon their acceptance, and that rule should be included in the Commission's articles.

55. Mr. LACHS recalled the situation with regard to the International Atomic Energy Agency.

56. The CHAIRMAN pointed out that IMCO's constitution had not been adopted by a constituent Assembly of IMCO. Article 19 did not deal with the case where the constituent instrument of an organization was drawn up by the organ of another organization.

Paragraph 4

57. Mr. CASTRÉN said that the substance of paragraph 4 was acceptable to him. He asked in what sense the expression " contracting State " was being used in that paragraph as well as paragraphs 1, 2 and 6 and in articles 20 and 22; the expression " any State to which it is open to become a party to the treaty " had been used in the text adopted in 1962 and the word " party " in the Special Rapporteur's proposal. The meaning of the new expression was not clear. In paragraph 4 it appeared to refer to States which had adopted the text of the treaty, or which had signed subject to ratification.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that the question was both pertinent and awkward. Personally, he would prefer to leave the matter pending until all the draft articles were in final form. It would then be appropriate to go through all the articles to give final form to all the passages which referred to " parties " and to " contracting States ". The latter expression was used in a technical sense and would have to be defined; it had been adopted as a substitute for the very vague notion of " States concerned ". The intention was to refer, in most cases, to the States which had adopted the text and to those to which it was open to accede to the treaty. The question which States constituted " contracting States " had been left open and would have to be re-examined when the work on all the draft articles was completed.

[6] Constitution of the World Health Organization in United Nations *Treaty Series*, Vol. 14; Constitution of the Inter-Governmental Maritime Consultative Organization in United Nations *Treaty Series*, Vol. 289.

59. Mr. CASTRÉN said that he was satisfied with the Special Rapporteur's explanation and his assurance that the question would be dealt with later.

60. Mr. BRIGGS said that he would have to vote against article 19 because of paragraph 4. Quite aside from the principle—with which he disagreed—the drafting of paragraph 4 was defective. Acceptance of a reservation by one contracting State could not make the reserving State a party to the treaty. Nor could an objection to a reservation preclude the entry into force of the treaty as between the objecting and reserving State, but it would preclude the application of the treaty between them.

61. Mr. LACHS said he agreed with Mr. Briggs's objection to sub-paragraph (*a*).

62. He also had misgivings about sub-paragraph (*b*), which should not start with the presumption that an objection to a reservation would prevent the establishment of treaty relations between the reserving State and the objecting State. It should first stipulate that the particular provision to which a reservation had been made would not be binding as between the two States, and then add that the treaty as a whole would not be binding between them if that was the clear intention of the objecting State. There were a number of different possibilities to take into account, particularly those to be found in the practice of Latin American States.

63. Mr. ROSENNE asked what had been the fate of paragraph 5 in the Special Rapporteur's revised text of article 19 in his fourth report (A/CN.4/177/Add.1), which had been an important and welcome innovation introduced to solve the very problem that had prompted the Secretary-General of the United Nations to bring before the General Assembly the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The rule as formulated by the Special Rapporteur in that paragraph had been correct and had filled a serious gap in the draft.

64. Sub-paragraph (*a*) of the Drafting Committee's text for paragraph 4 might require modification, but the structure of sub-paragraph (*b*) seemed to him correct, and he found Mr. Lachs's criticism unwarranted.

65. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Rosenne's question, said that a rule similar to that which had appeared in paragraph 5 of the text in his fourth report was set out in paragraph 6 of the Drafting Committee's proposal for article 19; it laid down that an act expressing consent to be bound became effective when at least one other contracting State that had expressed its consent to be bound by the treaty had accepted the reservation. The former instrument would then count for the purpose of establishing whether or not the treaty had come into force, if its entry into force required a certain number of ratifications or acceptances.

66. With regard to sub-paragraph (*b*), he said the general view in the Commission appeared to be that the natural interpretation of an objection was that the treaty would come into force with the reservation as between the reserving and the objecting State, unless there was some indication to the contrary.

Paragraph 5

67. Mr. ROSENNE said that the phrase " it was notified " was too vague, since it was virtually impossible to determine in general terms the precise moment when a notification had been received, for reasons which he had explained at the 803rd meeting.

Paragraph 6

68. Mr. ROSENNE said that to be consistent with the language used in earlier articles, the phrase " is effective " should be replaced by the phrase " becomes operative ".

69. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said, in reply to Mr. Ruda's inquiry,[7] that the question of safeguarding the position of regional organizations such as the Organization of American States which applied a different rule concerning reservations to treaties concluded under their auspices, might perhaps be examined in conjunction with the proposal he had made in his fourth report (A/CN.4/177) for including an article 3 *bis*, dealing with the constituent instruments of international organizations.[8] The Commission might then consider whether or not such a general provision should be extended to cover the Latin-American practice regarding reservations, which had formed the subject of the 1962 text of article 20, paragraph 3 (*b*).

70. He suggested that article 19 should be referred back to the Drafting Committee in the light of the comments made, particularly on paragraph 2.

71. Mr. RUDA said that the Special Rapporteur's explanation satisfied him entirely. The question had been asked in the Drafting Committee, and he wanted to make sure that the Special Rapporteur's answer would appear in the record and would be taken into account in the drafting of the new article 3 *bis*.

Article 19 was referred back to the Drafting Committee, as suggested by the Special Rapporteur.[9]

ARTICLE 20 (Procedure regarding reservations)[10]

72. The CHAIRMAN invited the Commission to consider the new text of article 20 proposed by the Drafting Committee, which read:

" 1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other contracting States.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been formulated on the date of its confirmation. "

[7] *vide supra*, para. 37.

[8] For text of article 3 *bis*, see 820th meeting.

[9] For resumption of discussion, see 816th meeting, paras. 43-53.

[10] For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2 contained the rule approved by the Commission in 1962 that, when a reservation was formulated at the time of the adoption of the text of a treaty or at the moment of signature subject to ratification, it had to be formally confirmed when the reserving State expressed its consent to be bound.

74. The discussion on the matter at the current session had made him wonder whether one point had been overlooked, namely, how such a provision would dovetail with the rules laid down in article 19 about acceptance, rejection or tacit acceptance of a reservation. The view he had put forward in the Drafting Committee, which had been accepted, was that probably the rules would apply as from the time the reservation had been confirmed; otherwise, it might be difficult to frame a rule governing the case of tacit consent.

75. The CHAIRMAN, speaking as a member of the Commission, asked whether the final passage in paragraph 2, reading " the reservation shall be considered as having been formulated on the date of its confirmation", did not conflict with the provisions of article 17 [11] relating to the obligation of good faith. Was the reserving State bound during the period between the formulation and the confirmation of the reservation?

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the question put by the Chairman was more pertinent to article 17 and to the whole issue of how the obligation of good faith operated when a State made a reservation.

77. The CHAIRMAN, speaking as a member of the Commission, said that article 17 specified that a State was obliged in good faith to refrain from acts calculated to frustrate the object of a treaty when it had expressed its consent to be bound by the treaty pending the entry into force of the treaty.

78. Mr. LACHS said that he was preoccupied by the same kind of problem as that mentioned by the Chairman. Some thought would have to be given to the question what was the status of a reservation between the time it was formulated and the time it was confirmed.

79. Paragraph 1 of article 20 was correct as far as it went, but should be expanded to cover the case of tacit acceptance; States often preferred to accept a reservation tacitly rather than expressly.

80. He was not in favour of retaining the provision requiring an acceptance or an objection to be communicated to the other States direct, particularly as that provision might lead to difficulties if there were no diplomatic relations between some of the parties. Greater flexibility was needed and notification would suffice. Some such wording as was used in article 15 (*c*) would be preferable.

81. Sir Humphrey WALDOCK, Special Rapporteur, explained that the word " communicated " did not necessarily denote the process Mr. Lachs had in mind. The Drafting Committee had endeavoured to simplify the language in response to Mr. Tunkin's criticism of the elaborate earlier texts, where provision had been made for cases where there was a depositary and for cases where there was none.

82. Paragraph 1 would in no way detract from the force of article 19, paragraph 5, which allowed for tacit consent to a reservation. He would not have thought any change was needed to meet Mr. Lachs's objection.

83. Mr. LACHS said that, even at the risk of repetition, article 20 should mention tacit acceptance.

84. He was satisfied with the Special Rapporteur's reply to his second point.

85. Mr. REUTER said that the Chairman had raised a very important point. He himself had asked that the phrase " the object and the purpose of the treaty " should be used at the appropriate point in article 17, because of the link between article 17 and article 20. The Drafting Committee had, however, decided against that symmetrical arrangement.

86. It was not so much the case referred to in article 20, paragraph 2, which raised difficulties in relation to article 17, for if a State formulated a reservation upon signing the treaty, its obligations would be less than if it had formulated no reservation. The reverse situation, however, raised a very serious problem, for the obligation of a State which signed a treaty without formulating any reservation and then formulated one at the time of ratification would be very much stricter during the period between signature and ratification. Article 17 thus encouraged States to formulate reservations at the time of signature. The principle of good faith determined the extent of the obligation under article 17.

87. Mr. TSURUOKA asked whether a State which had objected to a reservation during the period between the signature and the ratification of a treaty had to renew its objection after the reserving State confirmed its reservation.

88. Mr. AGO said that he appreciated the points raised by the Chairman and by Mr. Reuter about the relationship between article 17 and article 20, but thought they were contemplating an extreme case. Article 17 spoke expressly of the " object " of a treaty, and it had been stated clearly that no reservation could be formulated with respect to a clause affecting the essential object of a treaty. Somd of the Commission's members said that under article 17 the obligations of a State would be stricter if it had entered no reservation. That was not really true, for the obligations could not vary so far as the actual object of the treaty, within the meaning of article 17, was concerned.

89. The CHAIRMAN, speaking as a member of the Commission, said that cases might occur in which the formulation of a reservation might partially frustrate the object of a treaty. For example, the various conventions on the conservation of species laid upon the contracting States an obligation to conserve certain species, and not those affected by reservations; it might be said that, in respect of the species not covered by the treaty, the object of the treaty was " frustrated ".

90. Sir Humphrey WALDOCK, Special Rapporteur, said that the answer to Mr. Tsuruoka's question was in the affirmative. An objection to a reservation had to be confirmed, and if within a period of twelve months after

[11] See 812th meeting, para. 97.

the instrument expressing consent to be bound by a treaty had been deposited by the reserving State an objection was not made, the inference was that the reservation had been accepted.

91. The Chairman had raised an interesting academic point, but Mr. Ago was right in thinking that the Commission would run into difficulties if it sought to consider reservations in the context of the application of article 17. The point was covered by the notion of good faith, whether referred to explicitly or not, dealt with in that article.

92. Mr. ROSENNE said that the Special Rapporteur's reply to Mr. Tsuruoka had raised serious doubts in his mind about the advisability of retaining the last sentence in paragraph 2, as it would greatly complicate matters if a double confirmation of an objection to or an acceptance of a reservation was required for multilateral treaties. The Drafting Committee should consider clarifying that point. There should be a precise correlation between article 19, paragraph 6, and article 20, paragraph 2.

93. The CHAIRMAN suggested that article 20 should be referred back to the Drafting Committee.

It was so agreed.[12]

ARTICLE 21 (Legal effects of reservations)[13]

94. The CHAIRMAN invited the Commission to consider the new text of article 21 proposed by the Drafting Committee, which read :

" 1. A reservation established as effective with regard to any other party in accordance with articles 18, 19 and 20 :

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

(*b*) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

2. The reservation does not modify the application of the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agreed nevertheless to consider the treaty in force between itself and the reserving State, the provision to which the reservation relates does not apply as between the two States to the extent of the reservation. "

95. Sir Humphrey WALDOCK, Special Rapporteur, said that the new text of article 21 contained no change of substance. The Drafting Committee had spent some time in considering whether paragraph 1 (*a*) should refer to a reservation modifying the provisions or to one modifying the application of the provisions of a treaty.

96. Paragraph 3 dealt with the case—not altogether easy to express—where a State, though objecting to a reservation, nevertheless regarded the treaty, except for the provision to which the reservation related, as in force between itself and the reserving State.

97. Mr. LACHS said that the meaning of the word " modifies " in paragraph 1 should be carefully explained in the commentary, because it should denote all possible types of reservations : the elimination of a clause, the reduction or the extension of an obligation.

98. It seemed inappropriate to refer to " provisions " (in the plural) when a reservation might apply to only one article or even to one part of one article in a treaty.

99. Some modification of paragraph 3 was necessary in order to indicate that an objection to a reservation to a treaty as a whole, as distinct from a reservation to one of its provisions, should be treated as an exception.

100. Mr. CASTRÉN said that he could accept the changes suggested by Mr. Lachs.

101. He also thought the Drafting Committee could delete paragraphs 2 and 3. Paragraph 2 followed from and merely elaborated on the previous paragraph. Paragraph 3 did not specify whether a State which had objected to a reservation and which agreed nevertheless to consider the treaty in force between itself and the reserving State had to renew the objection, a point to which Mr. Tsuruoka had drawn attention earlier. If the objection was not renewed, it was, in effect, withdrawn.

102. Mr. ROSENNE said that further thought should be given to the question whether or not the word " modifies " was appropriate in the context.

103. Paragraph 1 (*a*) should be re-worded so as to indicate that a reservation affected the application of the treaty and not its provisions.

104. Mr. RUDA asked whether the word " effective " meant " valid " (*válida* in Spanish) or whether it meant something more than the Spaninsh word *efectiva*, which had no meaning in law.

105. Sir Humphrey WALDOCK, Special Rapporteur, said that, as far as the English language was concerned, the word " effective " did not bear any connotation of the reservation being absolutely valid; such a meaning would be injudicious in the context, now that the Commission had decided to adopt acceptance or objection as the criterion for establishing the validity of a reservation in regard to each individual State.

106. Mr. AGO said that in his opinion the Special Rapporteur was right in saying that the word " valid " could not be used. Nor did he think that the expression " established as effective " could be translated into French as *devenue effective;* the correct rendering would be *ayant pris effet*.

107. Mr. Rosenne had suggested that paragraph 1 (*a*) should speak of " the application of the treaty " rather than " the provisions of the treaty "; but surely it was the treaty itself that came into force as between the two parties in its modified form. The modifications made by the reservation did not affect the application of the treaty.

108. Paragraph 3 should stand, for without it very grave doubts might arise, in that the State which had objected to a reservation would be uncertain whether the treaty came into force, with or without that reservation. In international law, the fact that an objection was not renewed would not mean that it had been withdrawn. A question of principle was involved.

[12] For resumption of discussion, see 816th meeting, paras. 54 and 55.

[13] For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

109. Mr. AMADO said that, to his mind, the phrase " a reservation established as effective " meant primarily that the reservation had not been declared void. He was by no means sure that the phrase " established as effective " was correct.

The meeting rose at 12.55 p.m.

814th MEETING

Tuesday, 29 June 1965, at 3.30 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 21 (Legal effects of reservations) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 21 as proposed by the Drafting Committee.

2. Mr. ROSENNE, replying to a remark by Mr. Ago at the previous meeting, said that there was some controversy as to what happened when a reservation was accepted or withdrawn. There was a danger in carrying too far the idea that a separate treaty was thus concluded. Acceptance, rejection and withdrawal of reservations were very frequently effected without bringing into play the full domestic treaty-making process, and it might therefore be better to refer in paragraph 1 to modification of the application of the provisions of a treaty, rather than simply to modification of those provisions. The impact of acceptance, rejection or withdrawal of reservations on domestic processes was a sensitive matter, and the Commission should hesitate before adopting a text which might have the effect of extending it to an area where that sensitivity had not hitherto been particularly noticeable.

3. Mr. TSURUOKA said that the Drafting Committee's attention should be drawn to the use of the word " modifies " in paragraph 1 (*a*) and (*b*). In his opinion, the word " restricts " or " limits " might be more acceptable as a description of the effect of a reservation on the provisions of the treaty, since that effect would bound to be somewhat impaired whenever a reservation was made.

4. He could accept the idea contained in paragraph 3, and even the wording proposed by the Drafting Committee, but would ask the Special Rapporteur to prepare a detailed commentary on the effect of objection to a reservation. The question at issue was the position of States which objected to a reservation and yet consented to maintain treaty relations with the reserving State; that should be made quite clear in the commentary.

5. Mr. YASSEEN said he had considerable doubts about the Drafting Committee's text of paragraph 3. The original text had been acceptable to him because it had reflected the difference between the effects of objection and those of acceptance; when different—or, as in the case under discussion, diametrically opposed—terms were used, objection and acceptance, it was logical to expect that different effects were intended. In the text before the Commission, however, objection to a reservation and acceptance thereof seemed to produce the same effect, and objection was therefore made tantamount to acceptance. Stress should be laid on the principle of objection itself and on the specific effect of expressing such objection.

6. Mr. AGO suggested that Mr. Rosenne's and Mr. Tsuruoka's wishes might be met by replacing the word " modifies ", in paragraphs (*a*) and (*b*), by the word " limits ". That suggestion might be submitted to the Drafting Committee.

7. Paragraph 3 was indispensable if the Commission intended to retain the last phrase of the Drafting Committee's text for article 19, paragraph 4 (*b*),[2] which read: " (*b*) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State ". He could agree with Mr. Yasseen that the objection referred to in paragraph 3 might not be regarded as a genuine objection, but he would submit that the paragraph could not be deleted if the passage which he had cited was retained, for the legal effect of the intention expressed by the objecting State should be set out in article 21, in order to forestall ambiguous situations.

8. Mr. TUNKIN said that the Commission would be going too far if it decided to eliminate both the provisions to which Mr. Ago had referred. In modern practice, States sometimes objected to reservations, but declared that they maintained treaty relations with the reserving State. Paragraph 3 should therefore be retained, even though it was debatable whether the objection was a genuine objection, or a purely political declaration having no legal effect; whatever opinion was held on the matter, however, the situation frequently arose and should be mentioned in the draft convention.

9. With regard to paragraph 1, he considered it of no great importance whether the wording used was " modifies the provisions of the treaty " or " modifies the application of the provisions of the treaty "; he tended to prefer the Drafting Committee's wording, because in

[1] For text of article 21 as proposed by the Drafting Committee, see 813th meeting, para. 94.

[2] *Ibid.*, para. 30.