Document:-
A/CN.4/SR.664

Summary record of the 664th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1962 , **vol. I**

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

The meeting rose at 6.5 p.m.

664th MEETING

Tuesday, 19 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

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

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

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

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

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

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

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

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

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

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

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

of reservations that to destroy the whole structure of the existing system was not the best means to that end.

10. Sir Humphrey WALDOCK, Special Rapporteur, observed that the Chairman had not proposed the deletion of paragraph 4.

11. He (Sir Humphrey) suggested that the Chairman's proposed amendment to the introductory part of paragraph 2 should include a reference to paragraph 4, so that the second phrase would read "... and except in cases falling under paragraphs 3 and 4...".

12. Mr. CADIEUX said he agreed with Mr. Gros that it was only logical to retain paragraph 4, in order to maintain the balance of the compromise that had been achieved with such difficulty. Perhaps the objections of certain members to paragraph 4 were based on the ambiguity of the expression "a restricted group of states". The meaning of that expression might be explained in the commentary, or the Drafting Committee might find a new wording.

13. Mr. TUNKIN said he would concede that Mr. Gros had a point, since the existence of "restricted" treaties, where the problem of reservations arose in a particular light, could not be denied.

14. If current practice were taken into account and if reference were made to the advisory opinion of the International Court of Justice in the Reservations to the Genocide Convention Case and to General Assembly resolution 598 (VI), it would be found that the only rule on the subject was entirely general, that in cases where the treaty was silent on the subject of reservations states could make reservations which were compatible with the object and purpose of the treaty, and that parties to the treaty might accept or reject reservations. Furthermore, the advisory opinion of the International Court implied that reservations should be accepted if they were compatible with the object and purpose of the treaty and that each state should decide for itself on the issue of compatibility.

15. The rule he had cited was the only general rule of international law which was currently accepted. Some members, however, seemed anxious to retain something of the old League of Nations unanimity rule for reservations. Although they had been obliged to yield to the majority, they were still trying to insert into the draft remnants of that former practice, which had not been accepted by the General Assembly. Paragraph 4 as drafted might open the door to many disputes, since the expression "a restricted group of states" was extremely vague. In practice, in the rare cases where a treaty concluded between a few states was silent on the subject of reservations, the states concerned would have no difficulty in reaching agreement on how to deal with the question and, if not, the general rule of paragraph 2 of article 18 *bis* would be applicable. The Commission, therefore, should not retain vestiges of the old practice in the matter of reservations but should accept the clear-cut rule laid down in paragraph 2.

16. Sir Humphrey WALDOCK, Special Rapporteur, said that although, in drafting his original articles on reservations, he had naturally paid great attention to the General Assembly's debates on reservations and to the advisory opinion of the International Court, he had not formed the view that the General Assembly had taken the position refered to by Mr. Tunkin — although of course it might do so at some later date. Nor could he agree that the advisory opinion of the International Court of Justice went as far as Mr. Tunkin contended, for it contained a number of very cautious phrases. For example, it said "it is well established that in its treaty relations a state cannot be bound without its consent, and that consequently no reservation can be effective against any state without its agreement thereto". And it referred to the notion of the integrity of the Convention as adopted as "a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations". It described that concept, which was directly inspired by the notion of contract, as "of undisputed value as a principle".[1] Nevertheless, as far as the Genocide Convention was concerned, the Court had thought it proper to refer to various circumstances, particularly to the clearly universal character of the United Nations under whose auspices the Convention had been concluded, which would lead to a more flexible application of the principle. Extensive participation in conventions of that type had, the Court noted, already given rise to greater flexibility in the international practice concerning multilateral conventions and to a departure from the unanimity rule.

17. In an earlier draft of article 18 *bis* on which the Drafting Committee had worked, the principle contained in paragraph 2 had been limited to general multilateral treaties, but the whole structure of the article had gradually been altered in the Committee, which had decided that the limitation might be relaxed if the position of what he had called "plurilateral" treaties were properly safeguarded in paragraph 4. Despite the difficulty of defining the meaning of "a restricted group of states" in paragraph 4, that paragraph and paragraph 2 represented the balance on which the whole article was based.

18. If paragraph 4 were deleted, the Commission should consider adopting Mr. Verdross's proposal that, for the purpose of the admissibility of reservations, multilateral treaties of general interest should be distinguished from multilateral treaties of limited interest. That seemed to be a practical solution, because there would then be no indication that the principle laid down in paragraph 2 would apply to plurilateral treaties.

19. Mr. AGO said he quite agreed with the special rapporteur that, even in the event of compliance with the provisions of article 17, acceptance was an essential prerequisite of the effect of reservations in the relations between the reserving and the accepting state.

20. The whole point was that when the treaty was silent on the matter of reservations it was essential to be

[1] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports, 1951, p. 21.

consistent with the rule already accepted that a reservation incompatible with the object and purpose of the treaty was inadmissible.

21. As had been rightly pointed out by Mr. Verdross, the rule concerning the compatibility of a reservation with the object of a treaty was to be confirmed also in regard to acceptance, and he (Mr. Ago) could not agree that any reservation automatically became valid upon its acceptance. In his opinion, there could not be two different principles, one governing the formulation of reservations and the other governing their acceptance. If that were accepted, the compatibility test would not become an objective test of the admissibility of reservations but merely a test by reference to which particular states might freely decide in every case on the acceptability of the reservation. In that case, it seemed unnecessary to retain the rule set out in article 17, subparagraph 1 (*d*). Indeed, he would prefer to see that provision deleted, rather than reversed in article 18 *bis*. He hoped that those views would be clearly set out in the commentary and in the summary record.

22. As for Mr. Tunkin's defence of his proposal for the deletion of paragraph 4, he (Mr. Ago) would submit that the actual practice in the matter was not as described by Mr. Tunkin. Members who held the opposite view were not trying to return to an out-moded practice, as Mr. Tunkin had suggested; on the other hand, Mr. Tunkin seemed to be going rather far in his speculation regarding the future. The Commission's best course would be to reflect the current practice by reverting to Mr. Verdross's proposal, which seemed to be the only way of breaking the deadlock.

23. Mr. TUNKIN said he could not accept Mr. Ago's views. All the principles of international law were objective, and the compatibility test as laid down in the advisory opinion of the International Court was one such objective principle. On the other hand, opinions might differ as to whether a particular reservation was compatible or incompatible with the object and purpose of a treaty. Such differences of opinion occurred frequently in international law, since there was no authority over sovereign states, but that did not mean that the rules in themselves were not objective. Mr. Ago's argument, carried to its logical conclusion, could only lead to a denial of the existence of objective rules of international law.

24. He would agree, however, that the compatibility test should be reflected in article 18 *bis*, in accordance with the advisory opinion of the International Court, which had stated, on question II, "that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving state was not a party to the Convention."[2] That had been the view expressed by Mr. Rosenne at the beginning of the Commission's discussion of the articles on reservations.

25. Mr. Gros, Mr. Ago and the special rapporteur proposed that, if paragraph 4 were deleted, the Commission should return to the original formulation of paragraph 2, and refer only to general multilateral treaties. That could, however, lead to difficulties because the expression "general multilateral treaties" might be held to cover only such instruments as the Geneva Convention on the Law of the Sea, the Vienna Convention on Diplomatic Relations, and various Red Cross conventions. Such a view would exclude from the application of the rule in question a very large group of international treaties, such as the Convention on Fisheries in the North-East Atlantic and the Convention on Fisheries in the North Pacific, which would thus be assimilated to the third group of treaties, concluded by some five or six states, and instruments affecting perhaps thirty or forty states might be subjected to the unanimity rule. Such an outcome could hardly be regarded as a contribution to the progressive development of international law.

26. Mr. AMADO said he noted that the members of the Drafting Committee were unfortunately not unanimous in their support of the Committee's proposals for article 18 *bis*; Mr. Tunkin in particular dissented from the views of the Chairman and the other members of the Committee.

27. At the previous meeting, he himself had supported paragraph 4.[3] He still felt, notwithstanding the able arguments of Mr. Tunkin, that the principle of the integrity of treaties and the unanimity rule for the acceptance of reservations formed part of the irreducible nucleus of essential principles of international law. As a great French poet had said, "You should always know how far too far you can go". Personally he could not go so far as to accept, and he was sure that no professor of international law in any Brazilian university would believe that he ever could accept, the idea that a treaty with only eight or ten parties could be open to reservations in the manner provided in article 18 *bis*, paragraph 2.

28. It was not possible, in regard to reservations, to treat in the same manner a general multilateral treaty signed by eighty or more states and a treaty signed by eight or ten states. Normally, a small group of states would take the precaution of including a reservations clause in the treaty itself but, in the event of the treaty being silent, the provisions of paragraph 2 (*a*) could not be applied.

29. There had been a tendency towards a partial departure from the principle of the integrity of treaties in the case of leading general multilateral treaties. That partial departure had been based on the consideration that it was not reasonable to permit a single state to thwart the wishes of perhaps eighty states, in connexion with the statement of rules of international law. The position in regard to that type of law-making treaty was radically different from that obtaining in respect of the traditional contractual treaty.

30. He therefore readily accepted paragraph 4, although he would favour a more precise formulation of the idea embodied in the expression "a restricted group of

[2] *ibid*, p. 29.

[3] 663rd meeting, para. 68.

states". Greater precision of language was essential if the Commission was to perform its duty to formulate rules of international law which would be acceptable to states.

31. Mr. VERDROSS said that, contrary to what had been implied by some speakers, he had not proposed that paragraph 4 should be retained, but had merely expressed the view that, if it should be retained, the expression "multilateral treaties concluded between a restricted group of states" should be clarified. Mr. Ago obviously had in mind a special category of treaties by which economic communities were established; it followed from the very nature of such treaties that reservations were inadmissible. On the other hand, there were other treaties concluded between a relatively small number of states, to which the unanimity rule could be applied; for example, if a convention on the status of aliens contained a provision that aliens might be allowed to practise law, it would be absurd not to allow any state to submit a reservation to that provision. The question whether a reservation was admissible between the reserving state and the accepting state did not therefore depend on the number of contracting parties, but on the nature of the treaty. The solution might therefore be to lay down a special rule in which reference would be made to the character of the treaty itself.

32. Mr. de LUNA said he completely failed to see how the deletion or maintenance of paragraph 4 could possibly affect the principle of compatability as set out in article 17, paragraph 1 (*d*). It had been decided that that principle was applicable to multilateral treaties under article 18 *bis*, paragraph 2, and paragraph 4 merely contained an exception to the rule stated in that paragraph. He agreed with Mr. Verdross that the existing formulation of paragraph 4 was unsatisfactory; if better wording could not be found, he was in favour of its deletion, since deletion would in no way affect the application of the compatability rule to paragraph 2.

33. Mr. TUNKIN said that Mr. Amado seemed to have misunderstood him. He had admitted at the previous meeting that there were treaties between certain groups of states to which the general rule should not apply if the treaty was silent on the matter of reservations;[4] the reason was that such instruments were closer to bilateral treaties than to multilateral treaties.

34. With regard to the problem of the advisability of retaining paragraph 4, the main point was that the expression "a restricted group of states" was open to different interpretations. His idea had therefore been to leave it to the parties to settle the question among themselves in each of those special cases, and simply to state the general rule in the matter. On the other hand, the special rapporteur might suggest an amended form of paragraph 4 which would give the idea clearer expression.

35. Mr. YASSEEN said that he favoured freedom to make reservations to treaties. Although absolute freedom of reservations did not constitute a rule of positive international law, there was a definite trend in the direction of such freedom. The Commission had therefore acted wisely in stating in article 17, paragraph 1, the principle of freedom of reservations.

36. He was well aware of the difficulties which the Drafting Committee had had to face before arriving at the formula embodied in paragraph 4 in order to meet certain special situations. There undoubtedly existed multilateral treaties of limited scope which ought not to be open to reservations and the integrity of which should be maintained. Unfortunately, the language adopted by the Drafting Committee was unsatisfactory because of the vagueness of the term "restricted group of states"; the discussion in the Commission had demonstrated that any attempt to apply the provisions of paragraph 4 would lead to controversy on that account.

37. He had been impressed by the remark of Mr. Bartoš at a previous meeting[5] that the number of contracting parties was not the decisive factor in distinguishing between general and other multilateral treaties. The number of the parties did not affect the nature or the character of the treaty; certain treaties concluded among a few states had all the characteristics of general multilateral treaties, although their application might be confined to a particular region or to a small group of states.

38. For those reasons, he could not accept paragraph 4 in the form submitted by the Drafting Committee and supported by Mr. Gros. He suggested that, to the criterion based on the number of states parties to a treaty, should be added a further criterion derived perhaps from the object of the treaty or from the distinction between treaties dealing with matters of general concern and those dealing with matters of concern to a particular region or to a particular group of states.

39. Unless a criterion of that type could be found, it would be preferable to drop paragraph 4 altogether because its provisions were likely to lead to controversies in their interpretation. The omission of those provisions would not involve any real danger, because a small number of states should normally be able to reach agreement easily on an express reservations clause for inclusion in the treaty.

40. Mr. GROS pointed out that the new version of article 18 *bis* was in no sense his proposal and that he was radically opposed to the system it advocated, which represented the collective decision of the Drafting Committee. He could not subscribe to the doctrine that a state could make any reservation it wished and that a reservation became valid simply because another state accepted it.

41. Paragraph 4 was the only provision of article 18 *bis* which in any way reflected his views. Unless that paragraph were retained, he could not accept the article as a whole.

42. Mr. YASSEEN said he was aware that Mr. Gros did not favour the system provided in article 18 *bis*.

[4] 662nd meeting, para. 95.

[5] 656th meeting, para. 56; see also, however, 643rd meeting, para. 73.

He had merely mentioned Mr. Gros as one of the members whose views differed from his own.

43. Mr. AGO said that all members of the Commission knew how far state practice went in the matter of reservations and should not endeavour to represent that practice as favouring their own views; nor should members suggest that there was an element of progress in favouring reservations. Reservations had a negative character in that they prevented certain rules of international law from entering into force; it could not therefore be suggested that to favour reservations would contribute to the progressive development of international law.

44. The rule stated in paragraph 4 did not apply to all treaties; it was simply a residuary rule which would apply, to use the words of paragraph 4 (*a*), "except when a different rule is laid down in the treaty itself". It was perfectly logical that the presumption stated in paragraph 4 should be the opposite of that stated in paragraph 2. In the case of a general multilateral treaty, the possibility of making reservations could be regarded as the rule; it was rather exceptional for reservations not to be permitted. In the case of a multilateral treaty concluded between a restricted number of states, the reverse was true; it was only exceptionally that reservations were permitted; therefore, the residuary rule for that case should be that a reservation would only be valid if accepted by all the states which were parties to the treaty or to which it was open to become parties to the treaty.

45. A criterion based on the nature of the treaty had been suggested, but any such criterion would be open to arbitrary interpretation. He therefore urged the Commission to adopt the suggestion he had made at the previous meeting, that the only criterion in paragraph 4 should be that relating to the restricted number of states.[6]

46. Mr. TUNKIN said that members should admit that different opinions were held with regard to the new tendencies in international law and its progressive development; the problem had been thoroughly discussed in the Sixth Committee during the sixteenth session of the General Assembly and the various views expressed during that discussion had reflected the political tendencies of states.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of paragraph 2 reflected a developing practice with regard to general multilateral treaties. Those treaties should be open to the widest possible participation because they established the law for the community of nations. It was therefore appropriate to adopt more flexible rules concerning reservations to such treaties. The same approach, however, could not be adopted for treaties which did not present those features.

48. As he saw it, there were two courses open to the Commission. One was to draw a distinction between general multilateral treaties and other multilateral treaties; the other was to draw a distinction between treaties which dealt with matters of concern only to a restricted group of states and treaties which dealt with matters of more general concern.

49. The concept of treaties of concern only to a restricted group of states had been introduced by him in his definition of "plurilateral treaty" in his original draft of article 1 (*d*). With some drafting improvements, that provision might form the basis for an acceptable compromise for paragraph 4. Without paragraph 4, he could not accept article 18 *bis* as a whole.

50. Mr. AGO said that he yielded to none in his support for the progressive development of international law. But the institution of reservations, though necessary, nonetheless constituted a brake on the progressive development of international law because it hindered the adoption of rules of international law.

51. Mr. BARTOŠ said he agreed with Mr. Yasseen that paragraph 4 should be re-drafted. If it were amended as suggested by Mr. Yasseen he would support it, but if it were left in the form proposed by the Drafting Committee and a vote were taken, he would have to abstain.

52. The criterion proposed by the Drafting Committee, based on the number of states parties to the treaty, was not sufficient; it was necessary to have regard also to the object of the treaty. Indeed, the criterion based on the object of the treaty must be regarded as fundamental. The Commission should never lose sight of the fact that it was called upon not only to codify existing rules of international law, but also to contribute to the progressive development of international law. It was for that reason that he differed, for once, from Mr. Ago.

53. Jurists were, by the very nature of their profession, inclined to be conservative, but, in the case under discussion, it was necessary to eschew conservatism and take into account the modern developments of society; the need to adopt that approach had been stressed by an institution generally regarded as the most conservative of all, namely, the Roman Catholic Church, which, in the latest Papal encyclicals, showed itself to be a progressive factor in international affairs. He could not understand why conservatism should appear so marked in the Commission, which had always enjoyed the well-merited reputation of being favourable to the progressive development of international law, which was what was now at stake.

54. Mr. CADIEUX said that there appeared to be no real disagreement in the Commission on substance. All realized that many members could accept the provisions of paragraph 2 only if a provision along the lines of paragraph 4 to cover treaties between a restricted group of states were also included. Any apparent disagreement was due to the difficulty of finding satisfactory language for the provisions of paragraph 4. He therefore suggested that paragraph 4 should be referred back to the Drafting Committee for re-drafting in the light of the discussion.

55. Mr. TUNKIN suggested, as a compromise, that the opening clause of paragraph 4 should be amended: the term "restricted group of states" to be replaced by "a small group of states", and the criterion suggested

[6] 663rd meeting, para. 80.

by Mr. Verdross and Mr. Yasseen, based on the nature of the treaty, to be introduced.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that the term "small" was perhaps preferable to "restricted" or "limited", both of which were somewhat inadequate because very few treaties were in fact completely open in the sense that any state could participate in them. Members knew what they wished to describe by means of expressions such as "a restricted group of states" or "a small group of states", but it was difficult to find a perfect formula.

57. He suggested that the Drafting Committee be asked to redraft paragraph 4, taking into consideration not only Mr. Tunkin's last proposal but also the need to introduce an additional criterion in the form of a reference to treaties of concern to a small number of states.

58. The CHAIRMAN said there appeared to be general agreement to refer paragraph 4 back to the Drafting Committee for redrafting along the lines proposed by the special rapporteur.

59. Mr. CASTRÉN pointed out that the Chairman himself had proposed the deletion of paragraph 1 and the redrafting of paragraph 2.[7] He supported that proposal and withdrew his own proposal.[8]

60. Sir Humphrey WALDOCK, Special Rapporteur, recalled that Mr. Ago had suggested that a distinction should be drawn between acceptance of and objection to a reservation for the purpose of the application of the compatability test. Mr. Ago had pointed out that a reservation which was incompatible with the object and purpose of the treaty could not possibly be "accepted". In addition, he had not disputed that it was possible to object to a reservation on grounds other than its incompatibility with the object and purpose of the treaty.

61. Mr. AGO proposed that the Drafting Committee should be invited to review paragraphs 1 and 2, taking into account the proposals made by the Chairman, Mr. Castrén and himself.

62. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer the whole of article 18 *bis* back to the Drafting Committee for redrafting in the light of the various amendments proposed and views expressed in the course of the discussion.

It was so agreed.

ARTICLE 18 *ter*. — THE LEGAL EFFECT OF RESERVATIONS

63. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared a draft of a new article, 18 *ter*, which read:

"1. A reservation established as valid in accordance with the provisions of article 18 *bis* operates:

"(*a*) to exempt the reserving state from the provisions of the treaty to which the reservation relates to the extent of the reservation;

"(*b*) reciprocally to entitle any other state party to the treaty to claim the same exemption from 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 and the reserving state; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*."

64. Mr. CADIEUX pointed out that, in paragraph 1 (*a*), the French version "*soustraire ... à l'application des dispositions du traité*" did not correspond to the original English, "to exempt ... from the provisions of the treaty".

65. Mr. BARTOŠ suggested that, in the first sentence of paragraph 2, the words "the other parties of the treaty" should be qualified by some such words as "which have accepted the reservation". Without such qualification, the sentence in question would, if taken literally, completely nullify the right to object to a reservation.

66. Sir Humphrey WALDOCK, Special Rapporteur, said he accepted the suggestion of Mr. Bartoš; the Drafting Committee would re-examine the French version of paragraph 1 (*a*) to take into account the comment by Mr. Cadieux.

Article 18 ter *was approved, subject to those changes.*

ARTICLE 19. — THE WITHDRAWAL OF RESERVATIONS

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

"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.

"2. Upon withdrawal of a reservation the provisions of paragraph 1 of article 18 *ter* cease to apply."

68. Mr. BARTOŠ said that the article failed to indicate at what point in time the withdrawal of a reservation took legal effect. In view of the disputes to which that matter had given rise in international practice, he asked the special rapporteur to state in the text precisely when the legal effects of a declaration of withdrawal of a reservation began to operate.

69. Sir Humphrey WALDOCK, Special Rapporteur, said it might be provided that the withdrawal would be operative as from the time of its notification.

70. Mr. BARTOŠ said that lack of a provision to that effect might result in a violation of the treaty, seeing that while a reservation was still in force, other states were entitled to assume that the principle of reciprocity would apply in their relations with reserving states; it should be stipulated that the withdrawal of a reservation was effective from the time of receipt of the notification by each individual state party to the treaty.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that a provision to that effect could be incorporated in the article. Notification of the withdrawal of a reservation would normally be made through a depositary.

Article 19 was approved, subject to that change.

[7] *vide supra*, paras. 2 and 3.
[8] 663rd meeting, para. 71.

ARTICLE 27. — THE FUNCTIONS OF A DEPOSITARY

72. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared a redraft of article 27, which read:

"1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all states parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

"2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in the subsequent paragraphs of this article.

"3. The depositary shall have the duty:

"(*a*) to prepare any further authentic texts in additional languages that may be required either under the terms of the treaty or the rules in force in an international organization;

"(*b*) to prepare certified copies of the original text or texts and transmit such copies to the states mentioned in paragraph 1;

"(*c*) to receive in deposit all instruments and ratifications relating to the treaty and to execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument relating to the treaty;

"(*d*) to furnish to the state concerned an acknowledgment in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the other states mentioned in paragraph 1 of the receipt of such instrument or notification.

"4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

"5. On a reservation having been formulated, the depositary shall have the duty:

"(*a*) to examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations;

"(*b*) to communicate the text of any reservation and any notifications of its acceptance or objection to the interested states as prescribed in articles 17 and 18 of the present articles.

"6. On receiving a request from a state desiring to accede to a treaty under the provisions of article 7 *bis*, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

"7. Where a treaty is to come into force upon its signature by a specified number of states or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty:

"(*a*) promptly to inform all the states mentioned in paragraph 1 when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

"(*b*) to draw up a *procès-verbal* of the entry into force of the treaty, if the provisions of the treaty so require.

"8. In the event of any difference arising between a state and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if it deems it necessary, bring the question to the attention of the other interested states."

73. The Drafting Committee's main concern had been to take into account the views expressed during the discussion about the character of the depositary's functions, particularly in regard to the verification of instruments and acts connected with the treaty, and to shorten the original text. It had sought to express the notion that the depositary acted on behalf of all the signatories in an impartial manner and that in the matter of verification the depositary was not called upon to make any determination but only to examine the instruments. What happened after that examination was left undefined because it would depend on the nature of the treaty. In the event of a difference of opinion between the depositary and one of the interested states, the depositary was bound, under paragraph 8, to bring the matter to the attention of the other states concerned.

74. The CHAIRMAN suggested that the article should be discussed paragraph by paragraph.

It was so agreed.

Paragraph 1

75. Mr. CADIEUX asked whether the word "custodian" had been correctly rendered into French.

76. Mr. GROS said that the point had been discussed by the Drafting Committee which had rejected the word "*conservateur*" as unsatisfactory. It realized that the French expression "*à la garde*" was not an exact rendering of the English.

Paragraph 1 was approved.

Paragraph 2

Paragraph 2 was approved without comment.

Paragraph 3

77. Mr. BARTOŠ, referring to the French text of paragraph 3 (*a*), said that the word "*établir*" signified something that went beyond the function contemplated. The depositary had no authority to "establish" the authentic texts. The English and French texts of the paragraph did not agree.

78. Mr. AMADO said that he also was dissatisfied with the French version of paragraph 3 (*a*); he saw no reason why the word "*préparer*", which would bring the text

more closely into line with the English, should not be used.

79. Mr. LACHS said that the Drafting Committee had not intended that the depositary should be responsible for the translation of authentic texts; its function under the paragraph in question was only to supply additional copies. The French text should be rectified to conform with the English.

It was so agreed.

80. Mr. ELIAS proposed the substitution of the words "such additional language as" for the words "additional languages that", in paragraph 3 (*a*).

81. Sir Humphrey WALDOCK, Special Rapporteur, accepted Mr. Elias's amendment.

Paragraph 3 as thus amended was approved.

Paragraph 4

Paragraph 4 was approved without comment.

Paragraph 5

82. Mr. BARTOŠ, with regard to sub-paragraph (*a*), asked what would be the depositary's duty if examination disclosed that the formulation of the reservation was not in conformity with the provisions of the treaty.

83. Sir Humphrey WALDOCK, Special Rapporteur, replied that the Drafting Committee had thought it best to leave the matter open. If, on the face of it, the reservation seemed not to be in conformity with the treaty, the depositary would take the matter up with the reserving state, but if a serious difference of opinion arose, the provisions of paragraph 8 would apply. It was probably better to trust the wisdom of the depositary than to be too explicit.

84. Mr. BARTOŠ said that a clause should be added stating the depositary's obligation to communicate the results of its examination to the interested states so that they were not left in the dark.

85. Mr. AMADO said that the beginning of sub-paragraph (*a*) should be redrafted in more precise terms to read: "to examine whether the reservation is formulated in conformity with, etc."

86. Mr. CADIEUX suggested that some flexibility was needed: it should not be obligatory for the depositary to notify other interested states of the result of its examination of reservations.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that he would hesitate to be more specific in sub-paragraph (*a*) as urged by Mr. Bartoš, because, in cases where through inadvertence the reservation was not in conformity with the provisions of the treaty, it would be much better if the matter could be put right by the depositary's communicating with the reserving state without having to notify the other states. The "Summary of the Practice of the Secretary-General" indicated that irregularities of that kind did occur and no state would wish to have them publicised.

88. Mr. LACHS said that the Drafting Committee fully realized that the depositary could not be empowered to interpret the treaty. All it could do, on receipt of a reservation, was to verify that the reservation conformed with the provisions of the treaty and, if any defect was noted, to bring it to the attention of the reserving state. It would certainly be undesirable to notify others of any such defect; the matter could be left to the good sense of the depositary. If, however, a treaty expressly prohibited all reservations but a reservation was nevertheless communicated, then the depositary would have to remind the state in question of the provision prohibiting reservations and notify the other parties.

89. Mr. BARTOŠ said he had raised the matter not out of any theoretical considerations but because instances had actually occurred in which the secretariat of an international organization had taken it upon itself to interpret a reservation, and, despite the terms of General Assembly resolution 598 (VI), had prevented certain states from participating in an organization or a treaty; that had happened in the case both of the International Civil Aviation Organization and of the Universal Postal Union. Being firmly opposed to any such practice, he was anxious that its recurrence should be prevented by the inclusion of an appropriate provision in the text.

90. Mr. AGO said that he also considered that it was possible to be a little more specific in sub-paragraph (*a*), which dealt with an important and delicate matter. The present wording left room for doubt as to the object of the examination. If the reservation was not apparently in conformity with the provisions of the treaty, the depositary should communicate with the reserving state before notifying the other states. There was a risk that the other states might not enter their objections in time, in which case a reservation patently at variance with the provisions of the treaty might come into force.

91. Mr. de LUNA said he agreed with Mr. Bartoš and Mr. Ago. Unless sub-paragraph (a) were amplified, paragraph 8 would lose much, if not all, of its force.

92. Sir Humphrey WALDOCK, Special Rapporteur, asked whether Mr. Bartoš would be satisfied if the provision contained in paragraph 5 (*a*) were explicitly linked with paragraph 8 and it were made clear that the depositary had no power to adjudicate in the event of a difference on the subject of a reservation.

93. Mr. BARTOŠ said that he would be satisfied with the special rapporteur's new proposal if some such words as "and if necessary to communicate with the state which formulated the reservation" were added at the end of the sub-paragraph.

94. Mr. AGO emphasized that the purpose of the examination was to avoid unnecessary differences. Clearly, it was the duty of the depositary to inform a state which had formulated a reservation which was not admissible under the terms of the treaty that its reservation was not admissible.

95. He supported Mr. Amado's amendment.

96. The CHAIRMAN suggested that sub-paragraph (*a*) be amended in the way proposed by Mr. Amado and Mr. Bartoš.

It was so agreed.

Paragraph 5 as thus amended was approved.

Paragraph 6

Paragraph 6 was approved without comment.

Paragraph 7

Paragraph 7 was approved without comment.

Paragraph 8

97. Mr. de LUNA, observing that much had been said about the possibility of depositaries abusing their functions, said it would be advisable not to give them the discretionary power implied in the phrase "if it deems it necessary". Those words should accordingly be deleted.

98. Mr. CASTRÉN said he agreed that the discretion given to the depositary was too wide. The phrase to which Mr. de Luna objected might be replaced by the words "if the difference is not settled within a reasonable period".

99. Mr. TABIBI said that the article omitted to provide for the case where a depositary ceased to exercise its functions. That might happen in the case of a succession of states or the winding up of an international organization.

100. Mr. BARTOŠ said that he would not go so far as Mr. de Luna or Mr. Castrén, but would suggest the insertion of the words "at the request of the state concerned or" after the words "the depositary shall". A state might not necessarily wish to have a difference with the depositary communicated to other interested states. It might feel that its difference was not worth bringing to the attention of other states. In that case its wish should be respected and the incident regarded as closed.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Bartoš's amendment was acceptable. Mr. Tabibi's point could be covered by an appropriate addition to article 26, paragraph 2.

Paragraph 8 as amended by Mr. Bartoš was approved.

Article 27, as amended, was approved.

The meeting rose at 1 p.m.

665th MEETING

Wednesday, 20 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

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

1. The CHAIRMAN invited the special rapporteur to read out the new texts of four articles which had been submitted by the Drafting Committee. Article 11, in its original form as article 13, had been referred to the Drafting Committee at the 650th meeting; article 12, formerly 16, had also been referred to the Drafting Committee at the 650th meeting; article 13, formerly article 11, had been referred to the Drafting Committee at the 647th meeting; and article 14, formerly article 12, had also been referred to the Drafting Committee at the 647th meeting.

ARTICLE 11. — ACCESSION

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 11, formerly article 13, read:

"A state may become a party to a treaty by accession in conformity with the provisions of articles 7 and 7 *bis* of the present articles when:

"(*a*) it is not a signatory to the treaty or, being a signatory, has failed within a prescribed time-limit to establish its consent to be bound by the treaty; and

"(*b*) the treaty specifies accession as the procedure to be used for becoming a party to it."

Article 11 was approved.

ARTICLE 12. — ACCEPTANCE OR APPROVAL

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 12, formerly article 16, read:

"A state may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 7 and 7 *bis* when:

"(*a*) the treaty provides that it shall be open to signature subject to acceptance (or approval) and the state in question had so signed the treaty; or

"(*b*) the treaty provides that it shall be open to participation by simple acceptance (or approval) either without any prior signature or after signature by a state which has failed within a prescribed time-limit to establish its consent to be bound by the treaty."

Article 12 was approved.

ARTICLE 13. — THE PROCEDURE OF RATIFICATION, ACCESSION, ACCEPTANCE AND APPROVAL

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 13, formerly article 11, read:

"1. (*a*) Ratification, accession, acceptance, or approval shall be carried out by means of a written instrument.

"(*b*) Unless the treaty itself expressly contemplates that the participating states may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

"(*c*) If a treaty offers to the participating states a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

"2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory states, the instrument shall become operative: