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Summary record of the 648th meeting

Topic:
Law of Treaties

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exchange of ratifications had taken place after five years and had then validated, or legitimated, all the operations in question.

99. The same situation had arisen in connexion with frontier traffic between Italy and Yugoslavia. For three or four years, thousands had crossed the frontier under an agreement between the two countries pending ratification of the agreement.

100. The validity of the arrangement to which he had referred had undoubtedly had its source in a contractual relationship between the two countries. The Ministries of Foreign Affairs of Italy and Yugoslavia had established a practice of including in treaties a provision that the treaty was applied from the date of its signature, but juridically entered into force only on the exchange of ratifications. In strict law, there was perhaps a contradiction between those two propositions, but it was necessary to accept them both for practical reasons. It was a reality in present day international law and should be given a place in any convention on the law of treaties.

101. Mr. TSURUOKA said he agreed with the first sentence in paragraph 2, which reflected the existing international practice.

102. He drew attention, however, to a possible situation which could arise from the discrepancies between the terms of paragraph 2, particularly its second sentence, and those of article 8, paragraph 2 (*c*), on the subject of signature *ad referendum*. Say, for example, a treaty was due to enter into force upon its being signed by twenty states, and was to remain open to signature until 31 December 1962. If the twentieth state to sign the treaty signed it *ad referendum* on 30 October 1962 but only confirmed its signature *ad referendum* on 1 February 1963, according to article 8, paragraph 2 (*c*), the effects of the confirmation of the signature *ad referendum* would be retroactive so that the treaty would apparently have come into force as from 30 October 1962. There would, however, be considerable doubt as to the validity of acts performed in relation to the treaty between 30 October 1962 and 1 February 1963. If, on the other hand, the same state, instead of signing *ad referendum*, were to sign subject to ratification on 30 October 1962, and then to ratify on 1 February 1963, then according to the terms of article 12, paragraph 2, the treaty could only come into force on 1 February 1963. Thus the discrepancy between the terms of the two articles would produce different legal effects from what in substance would serve the same purpose for a state, namely, signature *ad referendum* and signature subject to ratification.

103. The drafting committee should be invited to compare the two texts and bring them into line.

104. Sir Humphrey WALDOCK, Special Rapporteur, said that the practice in regard to signature *ad referendum* was stated in article 8, paragraph 2 (*c*).

105. The inclusion in the draft of paragraph 2 of article 12 was useful in order to dispose of a heresy. A contrary rule had been put forward in the past but was no longer accepted.

106. He suggested that many of the difficulties encountered by members would be avoided if the second sentence of paragraph 2 were deleted and the first and only remaining sentence redrafted to read:

"Unless the treaty itself provides otherwise, or unless the parties otherwise agree, ratification shall not have any retroactive effects."

107. Mr. LACHS, supporting the special rapporteur's new redraft, suggested that when the Drafting Committee had submitted the new text of article 12, the Commission should consider the suggestion by Mr. Briggs of combining accession and ratification because they had some effects in common.

108. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 12 to the Drafting Committee with the comments made during the discussion.

It was so agreed.

The meeting rose at 6 p.m.

648th MEETING

Tuesday, 22 May 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*)

ARTICLE 13. PARTICIPATION IN A TREATY BY ACCESSION

1. The CHAIRMAN said it had been decided earlier in the session to postpone consideration of article 7 until the articles concerning accession came up for discussion. He suggested that article 7 might now be discussed in conjunction with article 13.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that in his view it was desirable that article 13 should be considered before article 7. The provisions in article 7 on the right to sign a treaty did not go as far as those in article 13 on participation by accession. It would therefore be easier for the Commission to consider article 7 if it first settled some of the problems raised by article 13.

It was so agreed.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that when the Commission had discussed the previous special rapporteur's draft articles in 1959, many members had taken the view that the draft should contain an article stating the right of states to become parties to treaties of a general character. That view had encountered some opposition on the ground that it was difficult to divorce the right to participate in a treaty from the particular procedure involved such as signature, accession or acceptance. The Commission had finally decided to defer consideration of a general article on participation until after articles on the right to sign, accede, etc. had been drafted.[1]

[1] *Yearbook of the International Law Commission, 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 108.

4. Accession raised the question of the right to participate in a very distinct form: accession constituted the main method of participating in certain multilateral treaties after the expiry of a comparatively brief period. The question of the right to participate also arose in connexion with the signing and the acceptance of treaties; the right to ratify probably only arose in very few cases, such as the conventions adopted by the International Labour Conference, for which the process of participation was described as ratification.

5. Although in principle he favoured the inclusion of a general article on the right of participation, he thought that there were technical difficulties which might prevent it from being an effective means of opening treaties to the new states. For the convention on the law of treaties now under consideration might not be ratified, until a considerable time had elapsed, by states whose consent, as parties to old treaties, was necessary to open them to participation by additional states. There might in consequence be doubt as to the validity of admitting a new state to the treaty.

6. With regard to article 13, if it were desired to introduce the notion of the right of participation, a distinction should be drawn between two categories of treaties, for there was a very real difference in that respect between general multilateral treaties and treaties which were open to participation by a restricted group of states.

7. The provisions of article 13 dealt with the question which states would have a voice in decisions regarding participation in a treaty. Under existing law, practice seemed to allow in most cases the states which had negotiated a treaty some right to be consulted, and to express their view regarding participation by othe states in the treaty. He did not think, however, that there was any justification for allowing a state which had shown no interest in a treaty a right indefinitely to exclude other states from participating in that treaty. The problem was a real one and he proposed that it should be dealt with in the manner set out in paragraph 2 (*b*) and (*c*). Under those clauses a negotiating state would cease to have the right to object to the participation of other states if it had not become a party to the treaty four years after the adoption of its text.

8. He had put forward paragraph 2 (*d*) with some hesitation. That clause treated in the same manner treaties drawn up in an international organization and those drawn up at an international conferencc convened by an international organization. It was convenient to lay down a simple procedure to cover both situations. In the case of a conference convened by an international organization, it was better to leave decisions on participation to the competent organ of the organization concerned rather than to require a two-thirds majority of the states which had participated in the conference. It would be a very laborious process to put such a majority rule into effect after the conference had broken up.

9. The provisions of article 13 were intended as a basis for discussion. He would welcome comments on his proposals, with a view to the formulation of a generally acceptable text.

10. Mr. BRIGGS said it was clear from the special rapporteur's introduction that the provisions of article 13 constituted residual rules. Modern treaties usually contained accession clauses, and article 13, as proposed by the special rapporteur, particularly in its paragraphs 1 and 5, stated in effect that any provisions which a treaty might contain on the subject of accession would prevail. The article concerning accession should commence with the statement of that rule, in order to avoid a debate on the "right", "faculty" or "privilege" of accession.

11. He proposed the following redraft of article 13:

"1. Where a treaty provides that it is open to accession, either generally or by categories of states, a state may become a party to the treaty in conformity with those provisions.

"2. Where a treaty contains no provision relating to accession, a state may become a party to the treaty by accession in the following circumstances:

"(*a*) In the case of a bilateral treaty or a multilateral treaty concluded between a restricted number or group of states, with the consent of all the parties to the treaty;

"(*b*) In the case of a general multilateral treaty drawn up at an international conference convened by the states concerned, with the consent of two-thirds of the parties to the treaty;

"(*c*) In the case of a multilateral treaty either drawn up in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

"3. When the depositary of a treaty receives a formal request for accession, the depositary shall communicate the request to the states whose consent or objection is material, and, in the case covered by paragraph 2 (*c*) of this article, shall bring the request, as soon as possible, before the competent organ of the organization concerned.

"4. In the case of a general multilateral treaty referred to in paragraph 2 (*b*) of this article,

"(*a*) The consent of a state to which a request for accession has been communicated under paragraph 3 of this article shall be presumed after the expiry of twelve months from the date of the communication, if no objection to the request has been notified by it to the depositary during that period;

"(*b*) If a state to which a request for accession has been communicated notifies the depositary of its objection to the request before the expiry of twelve months from the date of the

communication, but the requesting state is nevertheless admitted, conformably to paragraph 2 (*b*), to accede to the treaty, the treaty shall not apply in the relations between the objecting and the requesting states."

12. Paragraph 1 of his redraft stated the rule to which he had referred.

13. Paragraph 2 dealt with the situation where the treaty was silent on the subject of participation by means of accession. Its various provisions expressed broadly the same rules as the special rapporteur's draft. Paragraph 2 (*a*) stated that accession required the consent of all the parties to the treaty in the case of a bilateral treaty or of a multilateral treaty concluded between a restricted number or a group of states.

14. He did not believe that under existing international law other states had a "right" of accession; but he would be prepared to consider a proposal opening general multilateral treaties to accession by less than unanimity. His paragraph 2 (*b*) therefore stated that participation in a general multilateral treaty drawn up at an international conference was subject to the consent of two-thirds of the parties to the treaty.

15. The rule set out in paragraph 2 (*c*) of his redraft was identical with that proposed in the special rapporteur's paragraph 2 (*d*).

16. He had omitted the special rapporteur's provisions permitting accession to a treaty which had not yet entered into force. Where, by the terms of the treaty itself, accession was possible before its entry into force, the situation would be covered by the terms of his paragraph 1: "... a state may become a party to the treaty in conformity with those provisions." Where the treaty did not contain any provisions on accession, its entry into force would usually depend on its ratification by a number of states. In that case, there would appear to be no advantage to a state in acceding to the treaty before its entry into force, particularly if accession was irrelevant to entry into force.

17. He had also omitted from his redraft the provision proposed by the special rapporteur which would give to negotiating states, during a four-year period, the right to be consulted in regard to participation in the treaty by other states. He questioned whether negotiating states were entitled to be so consulted.

18. By way of analogy, he drew attention to the ruling of the International Court of Justice in its Advisory Opinion on Reservations to the Genocide Convention. The Court was then of the opinion, on question III, "that an objection to a reservation made by a signatory state which has not yet ratified the Convention can have legal effect... only upon ratification", and "that an objection to a reservation made by a state which is entitled to sign or accede but which has not yet done so, is without legal effect."[2] Admittedly, the Court was dealing with reservations, but the analogy was valid and the same rule should apply to objections to accession.

19. Paragraph 3 of his redraft differed from the corresponding clause in the special rapporteur's draft in that it broadened the obligation of the depositary to communicate requests for accession.

20. Paragraph 4 (*a*) of his redraft embodied the same presumption as that in paragraph 4 (*a*) of the special rapporteur's draft.

21. Paragraph 4 (*b*) of his redraft differed from the special rapporteur's draft in that it would limit the legal effect of an objection to accession to the case of a multilateral treaty drawn up at an international conference convened by the states themselves. In the case of a treaty drawn up in an international organization, or in a conference convened by such an organization, the organization's decision regarding participation should be binding on all member states and the treaty should be applicable even between objecting and acceding states.

22. With regard to article 7, he questioned whether any pressing problem connected with the alleged right to sign treaties would remain, once adequate provision had been made for accession.

23. Mr. JIMÉNEZ de ARÉCHAGA said he was in substantial agreement with the main points of the special rapporteur's article 13, on the negative side in not accepting that a general right of participation in treaties really did exist in international law, and on the positive side, of progressive development, in providing for the more flexible rule of a two-thirds majority in order to allow states to accede to certain treaties. He had himself submitted a redraft of article 13, which read as follows:

"Paragraph 1 (*a*) and (*b*) as proposed by the special rapporteur.

"2 (*a*). Unless the treaty itself otherwise provides, a state not possessing the right to accede to the treaty under the provisions of the preceding paragraph may nevertheless acquire the right to accede to a treaty by the subsequent agreement of all the states concerned [as determined in subparagraph (*b*)],[3]

"(*b*) Where the treaty:

"(i) Is not yet in force, or where the treaty is already in force but four years have not yet elapsed since the adoption of its text, with the consent of all the negotiating states;

"(ii) Is already in force and four years have elapsed since the adoption of its text, with the consent of all the parties to the treaty;

"(*c*) In the case of a multilateral treaty [dealing with matters of general concern to all states or to a definite category or group of states];[3]

"(i) Where the treaty is not yet in force or where the treaty is already in force but four years have not yet elapsed since the adoption of its text, with the subsequent consent of two-thirds of the negotiating states, or

"(ii) Where the treaty is already in force and four

[2] *I.C.J. Reports*, 1951, p. 30.

[3] The words in brackets indicate additions to the special rapporteur's text.

years have elapsed since the adoption of its text, with the subsequent consent of two-thirds of the parties to the treaty;

"(*d*) In the case of a multilateral treaty either drawn up in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

"Paragraphs 3, 4 and 5 as proposed by the special rapporteur."

24. The consideration which had inspired his suggested redraft of paragraphs 2 (*a*), (*b*) and (*c*), which would do away with the distinction between plurilateral and multilateral treaties, was that participation of new states in existing treaties of general concern, through accession, on the basis of a majority decision, was an important progressive development of international law proposed by the Commission in its 1959 draft, and it did not seem justifiable to subject new states to a sort of veto on their accession to treaties, which, though of regional scope, were of common concern to all states in the region in question.

25. A treaty could have a regional scope and yet at the same time be of concern to states other than the signatories. The fact that certain treaties were entered into by a restricted group of states was not therefore a valid reason for introducing the unanimity rule.

26. An example was the law-making treaties of the Organization of American States. Many of those treaties were not signed by all the American States but were none the less of concern to all the states in the region. A state which had not signed, possibly for political reasons, or a newly independent state in the region, would have an interest in the treaty. If such a state wished to accede, there appeared to be no reason why any of the original signatories should have the right to veto its accession.

27. During the 1959 discussions, it had been erroneously assumed that law-making treaties could only be world-wide and not regional. But while he would not suggest that there existed a distinct American international law, certain law-making treaties were of specific concern to all the nations of the American region, such as the conventions on diplomatic asylum and on the legal situation of exiles and political refugees.

28. It might be argued that, in certain regions of the world, there were states which did not have the same historical affinity with other states in the region as that existing among the American states. The elimination of the unanimity rule might be said to give such states a right of intrusion into a treaty signed by states of the same region which were linked by some affinity. Such was not of course the purpose of his proposal; under that proposal there were in fact three lines of defence against any such intrusion.

29. First, the treaty itself might restrict the right of accession. After all, the provisions of article 13 were intended to be residuary; they would apply only in the absence of any express provisions on accession in the treaty itself.

30. Secondly, no abuse of the right of accession need be feared since accession would require the consent of a two-thirds majority of the parties to an existing treaty.

31. Thirdly, under the provisions of paragraph 4 (*b*), which would remain unchanged, if a state requesting accession were admitted notwithstanding objections by another state, the treaty would not apply in the relations between the objecting and the requesting states.

32. The progressive development proposed by the special rapporteur with his two-thirds majority rule should not be confined to general multilateral treaties, but extended to regional multilateral treaties as well. The governing criterion should be whether the treaty concerned states other than those which were parties to it, regardless of its univeral or regional character.

POINT OF ORDER

33. Mr. BARTOŠ, on a point of order, said he must formally protest against the breach of the rules of procedure involved in the circulation of proposals in English only, instead of in all the working languages.

34. Mr. LIANG, Secretary to the Commission, said he agreed with Mr. Bartoš on the need for the translation of proposals. In a number of cases, however, the sponsors of amendments had specifically asked that their texts should be circulated informally; only amendments intended to be circulated as formal proposals were submitted to the language services for translation. The translation service was very busy, and he suggested that in future proposals by members should be submitted in good time to the Secretariat for translation and circulation in the three working languages.

35. Mr. BRIGGS said he had certainly expected his proposal to be translated and circulated in all the working languages.

36. Mr. PAREDES and Mr. PESSOU supported Mr. Bartoš.

37. Mr. CADIEUX also supported Mr. Bartoš and said that no one could dispute that important proposals should be circulated in all the working languages and that in the case of amendments suggested in the course of the discussion, an immediate translation, even if only of a provisional character, should be provided.

38. Sir Humphrey WALDOCK, Mr. AGO and Mr. GROS supported Mr. Bartoš and Mr. Cadieux.

39. Mr. PADILLA NERVO said that, while he agreed with the distinction made by Mr. Cadieux, he himself was also participating in the Eighteen-Nation Committee on Disarmament, and had noted that that committee received translations of its documents promptly. The International Law Commission should enjoy similar facilities.

40. The CHAIRMAN said that at a previous session the Commission had decided that every amendment should be submitted a week before the Commission was due to discuss the article to which it related; that did not, of course, apply to proposals like the present one.

41. Mr. LIANG, Secretary to the Commission, said that Mr. Veillet-Lavallée, Chief of the Languages Division of the European Office of the United Nations, was present to explain the situation.

42. Mr. VEILLET-LAVALLÉE (Secretariat) said that the situation was particularly difficult at the moment because the European Office had to provide special services for the Eighteen-Nation Committee on Disarmament, the Sub-Committee on a Treaty for the Discontinuance of Nuclear Weapon Tests, the Commission on Narcotic Drugs, and the Executive Committee of the High Commissioner's Programme, as well as routine services for the Economic Commission for Europe. The multiplicity of conferences, some of them unforeseen, involved serious staffing problems. The Secretary-General had directed that work for the Disarmament Committee should be given priority, but he could assure the Commission that the needs of other bodies were not neglected. He would do everything in his power to see to it that the Commission's requests for urgent translations received attention.

43. Mr. GROS said that immediate translations of amendments proposed by members could and should be provided in writing and he was unable to understand why such a service could not be provided forthwith, if necessary by the secretariat of the Commission.

44. The CHAIRMAN said that, although he realized that special circumstances had arisen in 1962, the Commission was not satisfied with the explanation offered by the Secretariat; he hoped that thenceforward adequate facilities, particularly on the translation side, would be provided to enable it to carry on its work.

45. He invited the Commission to continue its discussion of article 13.

ARTICLE 13 (*resumed from paragraph 32*)

46. Mr. LACHS said that article 13 was a very important one and would need the most careful consideration. He commended the special rapporteur for his lucid exposition in the commentary. One of the main problems was how to reconcile the sovereign rights of the parties with the principle of the widest possible participation in multilateral treaties. As the special rapporteur had suggested, the article called for a general discussion before the Commission took up points of detail.

47. In the history of the law of treaties it was possible to detect the interplay of two trends, which should be reflected in the article. The first was to encourage any state whose participation was important for the implementation of the treaty to become a party, and the second was to encourage any state interested in the subject-matter of the treaty to become a party. In the case of treaties concerned with communications, transport, cultural and scientific relations, the general tendency nowadays was to throw them open to as many states as possible. On the other hand, there had been a contrary tendency in recent years to restrict treaties of a political nature to states which constituted a group with social, economic or political affinities. That he regarded as a retrograde development.

48. In keeping with the special rapporteur's approach, he considered that, in the absence of specific provisions concerning accession in the treaty itself, the presumption was permissible that, unless specifically debarred from so doing, states were free to accede. The view taken by the Permanent Court of International Justice in the Polish Upper Silesia case, in connexion with the Armistice Convention of 1918 and the Protocol of Spa, that because there was no provision for a right on the part of other states to accede to them it was impossible to presume the existence of such a right,[4] no longer corresponded with the requirements of international law or international relations.

49. The question then arose whether a right of accession in fact existed and was enforceable. If it existed, it was an inchoate right, since the only recourse available to a state wishing to accede to a treaty of an open character but prevented from doing so would be to proclaim *urbi et orbi* that the parties to it were practising discrimination and that the treaty had been wrongly designated. It was a right which could only be acquired by its consummation. In the circumstances it seemed wiser, as suggested by Mr. Briggs, not to refer to a right of accession.

50. Although, in principle, where a treaty was silent it should be presumed to be open to accession, there might be exceptions, for example, if the treaty dealt with a technical matter of a restricted character in which other states could have no possible interest, such as whaling.

51. Another question the Commission would have to consider was whether there was such a thing as a duty to accede, as laid down in certain peace treaties, such as the Treaty of St. Germain-en-Laye, the Treaty of Versailles and the Paris Treaties of Peace.

52. Those were the elements which should appear in paragraph 2. The special rapporteur had already indicated that, in the light of the previous discussion, he would abandon the distinction he had drawn in that paragraph between plurilateral and multilateral treaties.

53. Since any time-limit was bound to be artificial and arbitrary, and did not offer any great advantage either for the execution of the treaty or for the mechanism of accession, he doubted the advisability of references to time-limits.

54. On the question how a decision should be reached about accession, he favoured a majority rule because the unanimity rule was declining in international practice. The decision should be made by the parties, for it would not be desirable to allow signatories which had not displayed sufficient interest in the treaty to become parties themselves to debar others from acceding.

55. One further question which should be examined was whether special mention ought to be made of the case of treaties dealing with general principles of international law. There were strong arguments in favour of

[4] P.C.I.J., Series A, No. 7, *Case concerning certain German interests in Polish Upper Silesia (the merits)*, p. 28.

stipulating that any state had the right to accede to such treaties if they included no express provision on accession, since otherwise states debarred from acceding might use the absence of such a stipulation as a pretext for refusing to comply with the rules laid down. That would not be in the interests of the development of international law or of general compliance with its principles.

56. Sir Humphrey WALDOCK, Special Rapporteur, referring to Mr. Lachs' remarks about his intention of dropping the distinction between plurilateral and multilateral treaties in paragraph 2, said that he did not believe it would be possible to avoid making any such distinction, for the presumption that a treaty should be open to all for accession depended on the nature of the treaty.

57. He agreed that the four-year time-limit he had suggested was an arbitrary one but it was a matter of secondary importance. The first question to be settled was whether, in principle, states which had taken part in the negotiations should have a voice in the important decision about accessions and at what point in time, if they had not become parties themselves, they ceased to have the right to debar others from acceding. The practice was that negotiating states had a say in the matter.

58. Mr. AMADO said that the institution of accession had evolved during the 18th and 19th centuries as a means whereby a state could associate itself with a legal instrument created by others. Mr. Jiménez de Aréchaga had just described the rule proposed in the Commission's 1959 draft allowing for participation, by a majority decision, in existing treaties of general concern, as an important progressive development of international law.

59. The special rapporteur in his commentary also had shown himself to be notably progressive and a champion of the ideal of universality. In coming near to advocating an absolute right to accede to treaties, he differed from his predecessor, Sir Gerald Fitzmaurice, who had maintained that "accession implied, and should only be made to, a treaty already in force". Although Sir Gerald Fitzmaurice had recognized that exceptionally accessions prior to coming into force might be admitted, he had criticized the practice as "lax" and one "that ought not to be encouraged".[5]

60. Rousseau had defined accession as the juridical act by which a state which was not a party to an international treaty placed itself under the rule of the provisions of the treaty.[6]

61. One of the problems which the Commission would have to resolve was whether it should go beyond pure codification and admit the possibility of accession to treaties not yet in force.

62. Another problem was whether the right to accede in fact existed. Although it would be difficult in principle to argue that members of the international community were debarred from the right to accede to treaties, there could be no doubt that in certain cases, for instance, regional treaties concluded between Latin American States, that disqualification did exist.

63. In the matter of classifying treaties, he agreed with Mr. Jiménez de Aréchaga and was opposed to making a special category denominated plurilateral treaties; any treaty that was not bilateral was multilateral.

64. The decision on the request of a state to be admitted to accession could certainly not lie with one of the parties only; he favoured a two-thirds majority rule.

65. Mr. YASSEEN said that there was no difficulty when the treaty itself dealt with the question; the difficulties began when there was no provision in the treaty on the question. He was in general agreement with the rules set out in the special rapporteur's draft. With respect to the voting rule as regards accession, the article drew a clear line between, on the one hand, multilateral treaties drawn up at an international conference or in an international organization, and, on the other hand, all other treaties. In the case of treaties called in the article "plurilateral", accession was governed by the same unanimity rule as bilateral treaties; the majority rule applied only to accessions to multilateral treaties. The very fact that an international conference had prepared the text of the treaty justified the application of the majority rule which, however, remained an exception.

66. The draft also satisfied the requirements of sovereignty, while constituting an expression of the wish to enlarge the field covered by international treaties, particularly those which stated principles of international law. Nevertheless, the fact that the majority rule was admitted made it necessary to introduce the safety valve provided in paragraph 4 (*b*). That system for multilateral treaties should not seriously prejudice the principle of sovereignty; the Commission could not go so far as to impose on states, against their will, relations with other states.

67. On the question whether negotiating states which had not yet become parties to a treaty should be able to object to an accession, he believed that such states should have certain rights, since the fact that they had participated in the negotiations endowed them with a special status. It implied that they had definite views on the scope of the treaty, and they should therefore be free to express objections, but not for an indefinite period. The time-limit laid down in paragraph 2, therefore, seemed to be justified.

68. Mr. AGO said that article 13 was one of the most important articles in the draft, and that considerable time and care should therefore be devoted to it. In general, he was in agreement with the special rapporteur's reasons, explained in the commentary, for his choice between several possibilities. The special rapporteur's decision to proceed on the basis of certain

[5] *Yearbook of the International Law Commission, 1956*, Vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), p. 125.

[6] *Droit international public*, 1953, p. 37.

classes of treaties — although those classes were in fact hypothetical — had been a practical expedient.

69. He also agreed with the general considerations expressed by Mr. Lachs, Mr. Amado and Mr. Yasseen and believed that the three proposals before the Commission — those of the special rapporteur, Mr. Briggs and Mr. Jiménez de Aréchaga — had a number of points in common and might ultimately be amalgamated in a single article.

70. A number of speakers had referred to the so-called right of accession, but he agreed with Mr. Briggs that it would be wise to avoid adopting a definite position on that point in the text. Technically, it was open to dispute whether a real right of accession did exist. A treaty was always the result of a meeting of wills, but a state seeking to accede had not expressed its will in the course of the negotiations. An accession clause in a treaty constituted, in effect, an offer to the states which had not negotiated the treaty. Consequently, a state which had not participated in the negotiations had not itself a "right" of accession; it had merely the possibility of accepting an offer if and when an offer was made to it. As Mr. Briggs had rightly pointed out, the problem was more theoretical than substantive, and should not be dealt with in the draft itself.

71. Mr. Briggs' text was considerably simpler than that proposed by the special rapporteur, but in some respects the simplification had gone too far. For example, it omitted the very important point that a state which was invited to participate in the negotiation of a treaty but declined to avail itself of that possibility could nevertheless be regarded as having received the offer and should be able to accede to the treaty without further consultation. A clause along the lines of paragraph 1 (*b*) of the special rapporteur's text should therefore be retained.

72. Difficulties would, however, arise in the case of states which had not participated in the negotiation and had not been invited to negotiate. In such cases, it was impossible to dispense with hypothetical classifications. In the case of bilateral treaties, the answer was simple, for accession required the consent of both parties. In the case of the plurilateral treaties mentioned by the special rapporteur, the situation was more complex, since such treaties had nearly all the characteristics of bilateral treaties, except that they were concluded between more than two parties. Presumably, the parties to those treaties wished them to be restrictive and would be reluctant to admit other parties; the majority rule could not be applied in such cases, and all the parties had to be consulted on a request for accession. Application of the unanimity rule, although not a perfect solution, was the one which would do the least harm and would cover most cases in practice.

73. An even more serious question, however, was whether negotiating states, or only states actually parties to the treaty, should be consulted on requests for accession. The theory that negotiating states should have no say in the matter seemed to provide an unduly facile solution. But it could not be said with any certainty that a state which had taken part in negotiating the treaty would not become a party to it, especially when only a short time had elapsed since the conclusion of the negotiations, and if those who had already become parties were alone empowered to admit other states, their actions might conflict with the intentions of the treaty and even endanger its operation, since negotiating states might refuse to ratify the treaty in those conditions. In his opinion, the negotiating states should have a voice in decisions on accessions but, in that case, a time-limit, as proposed by the special rapporteur, should necessarily apply.

74. In the case of multilateral treaties, there was even less reason to leave the decision on accessions to the full parties alone. States often took a long time to become parties to such instruments, and it would be wrong if a small group of parties could take decisions on a matter which was of general interest. There again, a time-limit would be useful, and the period might be longer in the case of multilateral than in that of other treaties.

75. Moreover, unanimous consent could not be required; a certain majority, the size of which would of necessity be somewhat arbitrary, must suffice. There was a guiding principle in the matter: an international conference would have certain rules, which it had adopted itself or were contained in the statute of the convening international organization, providing that the participation of states in the negotiations was decided by a certain majority; that majority rule should also be applied throughout the life of the instrument arising from the conference. Application of that principle would introduce some unity and clarity into the accession procedure.

76. He had some doubts concerning the acceptability of the thesis that, if a state entitled to be consulted objected to the accession of another state which had been admitted by the requisite majority, then the treaty should be regarded as being in force between the acceding state and the other parties, but not in force between that state and the objecting state. For example, if the accession was assented to by a two-thirds majority of the parties to a treaty, it could hardly be considered desirable for a state to be bound by the treaty with respect to two-thirds of the parties, and not with respect to the remaining one-third. Moreover, there was a contradiction between that conclusion and the fact that it would not apply if the decision regarding the accession of the state concerned had taken place during the conference itself.

77. Finally, with regard to treaties which codified general principles of international law, he understood Mr. Lachs' apprehensions concerning the possibility that a state which was denied accession to such a treaty might claim that it was not bound by the rules laid down in the general treaty in question. While admittedly states which were prevented from acceding, because not invited to participate in the negotiation of the treaty, might not be bound by any new general rules arising from that instrument, they could certainly not claim not to be bound by existing rules of customary law. Never-

theless, he agreed with Mr. Lachs that, as far as possible, it should be open to all states to participate in such codifying conferences.

78. Mr. VERDROSS said he agreed in principle with the special rapporteur, but wished to ask him one question. It was understandable that, in the case of multilateral treaties, a certain time-limit should be fixed for accession, because in that category of instrument accession was admitted with the consent of a majority. What he could not understand was why the special rapporteur provided for a four-year limit in the case of plurilateral treaties, where accession was only possible if it was accepted by all the negotiating states; in a case of that kind, a time-limit was pointless.

79. Sir Humphrey WALDOCK, Special Rapporteur, replied that the time-limit was proposed only for the purpose of determining who had a right to a voice in the decision concerning a request for accession. The underlying idea of the time-limit was that the negotiating states should have a right to decide on any question of opening participation in the treaty to a wider circle of states, but that the time might come when that right would become an abuse. Thus, the parties to the treaty might be quite content to invite new states to accede, but some of the negotiating states who had delayed their ratifications or acceptances indefinitely might raise an objection, perhaps for political reasons. In such cases, the time would come when the negotiating states concerned must be regarded as having ceased to have a voice in the decision.

80. Mr. LACHS said he agreed with Mr. Ago that a state which had not participated in the negotiation of a treaty codifying existing rules of international law could not claim that it was not bound by those rules. If a state argued thus, it would open the existence of such rules to question. For example, the Nuremberg Military Tribunal, in confirming the Geneva Conventions of 1929, which in turn had confirmed existing rules of international law, had expressed the view that, although some of the belligerents had not signed the Geneva Conventions, Germany was bound by those rules. Most such cases would not be brought before the International Court of Justice and it seemed unnecessary to open the door to doubts concerning the existence of general rules of law. The text should therefore be so worded as to encourage the participation of all states in codifying conferences and to open the treaties in question to their accession.

81. Mr. Ago had argued with considerable force the case for enabling mere signatories to bar other states from accession. Nevertheless, he (Mr. Lachs) believed that, although it should naturally be presumed that states acted in good faith, allowance should be made for cases where states with no intention of ratifying treaties or acceding to them confined themselves to the negative function of preventing the accession of other states.

The meeting rose at 1 p.m.

649th MEETING

Wednesday, 23 May 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*)

ARTICLE 13. PARTICIPATION IN A TREATY BY ACCESSION (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 13.

2. Mr. ROSENNE said that the dominant factor in regard to participation by accession was always the treaty itself. It would therefore be desirable to stress that principle in the Commission's draft and thus respond to the need for greater precision in the law of treaties, a need which was apparent in relation both to accession and to other questions.

3. The Commission was drafting a residual rule and was within the domain of progressive development rather than codification of international law. Consequently, the rules it formulated should be genuinely progressive and should take into account the changing needs of the international community.

4. As the point of departure, he accepted the following three propositions: first, that bilateral treaties were, in principle, closed to outside states; secondly, that general multilateral treaties were, in principle, open to all states willing to assume the obligations and the burdens involved; and, thirdly, that multilateral treaties concluded by a restricted number or group of states were in an intermediate position, but had more affinities with bilateral treaties than with general international treaties.

5. There was one broad general exception to the principles which he had mentioned. All treaties creating international organizations, large or small, were in principle closed. The question which arose in connexion with them was not really one of accession to a treaty but of admission to the organization. From the formal point of view, admission was effected by a document similar to an instrument of accession, but the whole process of admission was totally different in character from that of accession and in view of the doubts which had been expressed by certain members, it was desirable to clarify that case.

6. By a logical extension, participation by accession in treaties concluded under the auspices of an international organization should be in conformity with the principles and practices of the organization concerned.

7. With regard to the position of negotiating states, he pointed out that their position was already recognized by international law in regard to the process of the interpretation of treaties. In that process, one of the factors was the intention of the negotiators.