Document:-
A/CN.4/SR.649

Summary record of the 649th meeting

Topic:
Law of Treaties

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

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.

8. He therefore saw no reason for not recognizing the special position of negotiating states in connexion with accession for a specified period, although it might be shorter than the four-year period proposed by the special rapporteur. The Commission's 1951 report, cited by the special rapporteur in his report, stated "that a period of twelve months would be a reasonable time within which an objecting state could effect its ratification or acceptance of a convention".[1] Although that statement had been made in the context of reservations, analogous considerations applied to the special position of negotiating states recognized in paragraph 2 of the special rapporteur's article 13. He would be willing to consider any reasonable period up to four years. The period might in fact be longer because of the modern practice of keeping conventions open for signature for several months after the authentication of the text.

9. He accepted the presumption set out in sub-paragraph 4 (*a*), which reflected the general practice in the matter.

10. The Commission was engaged in the progressive development of international law and should avoid creating anything in the nature of a right of veto by individual states on participation in a treaty by other states. There was a tendency in contemporary international law to avoid such a right of veto in relation to general international conventions. That tendency had been one of the points of departure of the International Court of Justice in its Advisory Opinion on Reservations to the Genocide Convention. The necessity for flexibility had been repeatedly stressed in relation to general international conventions; that necessity was implicit in the abandonment of the unanimity rule as a rule of voting in international organizations. For those reasons, he was prepared to accept the special rapporteur's text as a reasonable compromise between the various tendencies on the subject.

11. Since the provisions under discussion would constitute progressive development, they would apply to the future. The Commission would therefore have to consider the question of the time at which the new rule would come into force.

12. At that stage, however, there was a much more urgent problem, that of the opening up for accession by newly independent states of old general international conventions such as those concluded under the auspices of the League of Nations. Those conventions were technically closed and there was little possibility of opening them to accession by new states except by a political decision. The matter had been discussed in connexion with the conclusion in 1946 of the various arrangements by which the functions previously exercised by the League of Nations in regard to treaties were transferred to the United Nations. The purely depositary functions of the League, being of an administrative character, had then been simply transferred to the United Nations. Other functions, of a technical and non-political character, had been taken over on the basis of some element of choice on the part of the United Nations.

13. Subsequent developments in the United Nations in that sphere had been less satisfactory. Except where the old treaty had been suitably amended, the consent of the parties remained necessary for the accession of new states. The paradoxical result was that a treaty which had been open to all Members of the League of Nations was not open to all Members of the United Nations. The absurdity of that situation had been emphasized in the discussions on the Slavery Convention of 1926 at the eighth session of the General Assembly.

14. The United Nations should adopt a bold approach similar to that taken by the Administrative Council of the Permanent Court of Arbitration, which had succeeded in cutting through the theoretical issues involved and re-opening to accession the first Hague Convention of 1907. The remarkable result had been that the number of parties to that convention had grown from 35 to 60 in two and half years. The principle should be recognized that a treaty which had originally been open to accession by all Members of the League of Nations should be open to accession by all Members of the United Nations without the formal consent of the original parties. Such a rule would be a corollary of article 4 of the Charter and of the universality of the United Nations.

15. He had been impressed by the considerations in paragraph 16 of the special rapporteur's commentary on article 13 and he urged the Commission to bring the problem of the accession of new states to the older multilateral treaties to the special attention of the General Assembly.

16. Mr. TABIBI said that accession was, with signature and ratification, one of the most important acts in the treaty-making process. In certain cases, it combined both signature and ratification in one act. Some countries made even accession subject to ratification, a practice which had been recognized as permissible by the Assembly of the League of Nations in 1927.

17. He agreed that the main element in the process of the negotiation and formulation of treaties was the participation of the states concerned, but the criteria for participation should be, first, the interest of a state and second, the usefulness of that state in the process of negotiation and in the operation of the treaty.

18. He supported an "open" policy for the participation of states in treaty making. Naturally, treaties which concerned only a group of countries could remain open only to that group, but as a rule the open character of treaties should be encouraged. In particular, treaties of a universal character should be open to participation by all states; new states should be enabled to participate in them by means of a simple procedure such as a resolution of the General Assembly.

19. He agreed that, in the case of a bilateral treaty or of a multilateral treaty concluded by a restricted number of states, the consent of all the parties was necessary for accession by an outside state. However, in the case of a multilateral treaty drawn up by an international

[1] *Yearbook of the International Law Commission, 1951*, Vol. II (United Nations publication, Sales No.: 1951.V.6, Vol. II), p. 130.

conference convened either by states or under the auspices of an international organization, it was advisable that the rule should not be a strict one; even a time-limit of four years after entry into force was not feasible.

20. Numerous conferences were now convened for the purpose of treaty-making and there were a large number of new states, many of which were either unfamiliar with treaty-making techniques, or did not have the means to follow the process of negotiation.

21. For those countries, mostly new Asian and African nations, the process of accession was a safety valve in cases in which they were unable to appear among the signatories to a treaty. For financial reasons, it was not uncommon for one of those states to be kept informed of developments at a treaty-making conference by the representative of another state of the same region. Cases had even occurred where, owing to unfamiliarity with the practical advance arrangements required, a country had not been represented at a conference.

22. In view of the difficulties facing those new nations, the rule concerning participation in a treaty by accession should be a flexible one. He had been surprised to hear an Asian member of the Commission defend the view that the parties to a treaty could refuse accession to new states. He supported the special rapporteur's suggestion in his commentary that the General Assembly should adopt a resolution for the purpose of opening to accession certain multilateral treaties of a universal character.

23. Mr. GROS said that the Commission's function was not to settle academic problems but to propose precise rules for states, practical and convenient rules intended to establish a uniform practice for the conclusion of treaties; the Commission had abandoned the scheme for a code or repertory of the theory and practice of the law of treaties.

24. The question of the "right" of accession, which had been raised in the discussion, was a typical academic problem. In practice, it did not often happen that a state approached the parties to a treaty and claimed as a general right to be allowed to join their circle, when the treaty was not open to accession.

25. The case he had in mind was where the treaty itself was silent on the question of participation by accession. Such silence might be due to the fact that the parties had considered the matter and decided not to include an accession clause in the treaty; in that event, it was clear that the intention of the parties was not to permit accession.

26. On the other hand, the fact that the treaty was silent on the subject of accession might also mean that its negotiators had felt certain that the problem would never arise. For instance, in the case of restricted economic communities such as those recently set up in Europe, no one imagined that a state which was not a signatory of one of the treaties in question would approach the parties with the claim that, because it was a European state, if there was no accession clause it was entitled, as a matter of right, to accede to the treaty. The best proof that such an attitude would be quite abnormal was that when a state expressed the wish to join one of the European economic communities, it had to negotiate with all the member states of the community and could not put forward any pre-existing "right" of accession.

27. If, therefore, the Commission were to embark on a discussion of the right of accession, it would be complicating its work unnecessarily and running the risk of rendering its draft less acceptable to states. Any attempt to settle the theoretical aspect of the question should be avoided.

28. The Commission should make a recommendation to states on the question of accession; it should advise them to consider the question when negotiating treaties and direct their attention to the desirability of including an express provision on the subject.

29. He agreed with Mr. Rosenne that the contents of article 13 constituted a residual rule. The rule was that, for accession to be possible, there should be a provision to that effect in the treaty itself. That was what the Commission had decided in 1951 and that was the opinion of the International Court. In the absence of such a provision, in the case of bilateral or multilateral treaties the consent of all the states parties to the treaty was necessary in order to repair that grave omission.

30. The position was no different in the case of collective treaties concluded within, or under the auspices of, an international organization. It would be a serious mistake not to include a formal accession clause in such treaties. In fact, the problem of accession was invariably considered during the negotiations and if the parties did not agree to include an accession clause, he did not see how it was possible for the Commission to accept as a rule of law that accession could take place against the will of the parties.

31. Whether a treaty was concluded within an international organization or not, it was a treaty between states, and states were bound only by their consent. It was not possible to impose on the states parties to a treaty an accession which they did not wish to accept since, *ex hypothesi,* they had not agreed to include an accession clause in the treaty.

32. He failed to see by what means such participation by an outside state could be imposed on the parties to the treaty. It could not be done, for example, by a decision of an organ of the international organization concerned, unless, of course, the constitution of the organization contained a provision empowering it to do so. In the absence of a provision to that effect, such power could only be conferred by an express clause of the collective treaty. For those reasons he could not approve the suggestion that the Commission recommend that, by a specified majority, an organ of an international organization be empowered to admit another state to the relations between certain states.

33. He had been interested by Mr. Tabibi's remarks on the position of the newly independent states. If, however, as mentioned by Mr. Tabibi, a newly independent state was kept informed of developments at a treaty-making conference, it would be in a position either to sign the

treaty or to make a request, if necessary by cable, for the inclusion of an accession clause. Mr. Tabibi's remarks merely served to underline the need for an accession clause in multilateral treaties; if the parties to the treaty refused to include such a clause, how could it be argued that they should be compelled to accept accession?

34. He recognized that his presentation of the problem of the so-called right of accession might appear oversimplified; the special rapporteur's approach was perhaps intellectually more satisfying, but it was also unfortunately much too complicated. A community of over one hundred states needed extremely simple rules in order to avoid difficulties of interpretation.

35. With regard to the possibility of accession to a treaty before it entered into force, the excellent commentary on article 13 summarized the arguments for and against allowing accession in such circumstances. He favoured extremely simple and clear rules. Accession before entry into force should be permitted if allowed by a provision of the treaty itself; such a provision had meaning where accessions counted towards the number of consents necessary for the entry into force of the treaty and also because such accessions might encourage the negotiators of the treaty to ratify it themselves. On the other hand, in the absence of an express provision, the consent of the parties which had negotiated the treaty was necessary to permit accession by a new state before the treaty's entry into force.

36. In that connexion, the question arose which states had the right to be consulted, and it was appropriate that the Commission should make a recommendation in that respect. Should all the negotiating states have that right, or only those which had taken positive action to accept the treaty? Where the treaty itself was silent on the point, he favoured a system which would give the right to all negotiating states for a specified period of time.

37. Reference had been made by Mr. Rosenne to the need to re-open certain old multilateral treaties to accession by all states. That problem concerned the succession of states; it should be dealt with by the subcommittee on that topic.

38. The example of the Hague Convention of 1907 was not convincing. None of the states which had recently acceded to that Convention had actually had recourse to arbitration; it was the old parties to the Hague Convention which systematically submitted their disputes to arbitration. The number of accessions to an arbitration treaty was not in itself of any great importance; what was important was that the states should participate in the effective application of the treaty.

39. He had only wished at that stage to state a first opinion on article 13 as a whole and he looked forward to hearing the views of other members.

40. Mr. CASTRÉN said that the special rapporteur's draft of article 13 was progressive and generally satisfactory. He agreed that accession could take place before a treaty came into force, and also that the consent of all the parties should not be required, provided the four-year time-limit and the two-thirds majority rule were observed. The accession of an outside state to a bilateral or plurilateral treaty was subject to the consent, express or tacit, of the negotiating states, as the special rapporteur had pointed out in his commentary.

41. Mr. Briggs' redraft was more explicit in that it did not start from a right of accession, but, on the other hand, it suffered from certain omissions. For example, it contained no provision along the lines of the special rapporteur's paragraph 1 (*b*) and no reference to accession by a third state through an ancillary treaty.

42. He would submit that the classification of a treaty for accession purposes depended not only on the number of states concerned, but also on the nature of the treaty. General instruments which codified international law should be open to the entire international community, and there should be an assumption of free entry to such instruments; but surely such treaties were likely to contain express provisions on accession.

43. With regard to the classification of treaties, while he did not object to the three categories proposed by the special rapporteur, or, with a somewhat different nomenclature, by Mr. Briggs, the text proposed by Mr. Jiménez de Aréchaga had the advantage of simplicity in that respect, although it did not differ greatly in principle from the special rapporteur's text. The drafting committee should certainly be able to produce a satisfactory draft on the basis of the three texts before the Commission.

44. In the definition of accession in the special rapporteur's article 1 (*i*), the word "definitively" should be deleted: in fact, the whole phrase "to 'accede' or 'adhere' to the treaty and thereby definitively gives its consent" seemed unnecessary. On the other hand, the words "or by the subsequent consent of the states concerned" should be inserted after the word "instrument".

45. Mr. YASSEEN said he agreed with Mr. Gros that states should be encouraged to formulate rules with regard to accession. It was precisely by establishing a rule which would apply where the treaty itself was silent on the matter that the Commission would be encouraging states to make rules on the subject of accession.

46. At the previous meeting, he had emphasized the classification of multilateral treaties into those drawn up at international conferences and those drawn up in international organizations. In paragraph 2 (*d*) of article 13, the special rapporteur equated with the latter treaties drawn up at conferences convened by an international organization. He doubted whether the fact that a conference had been convened by an international organization affected the question of accession. The special rapporteur had produced the somewhat facile solution of saying that in such cases the competent organs of the organization concerned would decide on requests for accession in accordance with the voting rules applicable to that organization; he (Mr. Yasseen) did not consider, however, that that solution settled certain serious difficulties. A treaty drawn up by a

conference, even if that conference had been convened by an international organization, was still a treaty between the states which had negotiated, signed and ratified it; it was not a treaty of the organization. Moreover, while some member states of the organization might not have participated in the conference, the resulting treaty might have been signed by non-members; in such a case it would be wrong to deprive those non-members of a voice in a decision on accession.

47. Besides, the number of states attending a conference might be relatively small. For example, the United Nations Conference on Statelessness, held at Geneva in 1959, had been attended by some thirty or more states, not all of them Members of the United Nations; if such a treaty contained no express provision on accession, it would hardly be possible to bind the negotiating states by a General Assembly resolution. Even where it was possible to invite all member states, as in the case of the provision of the Statute of the International Court of Justice concerning the election of judges, it was not certain that the body thus convened was in fact an organ of the organization; it was an *ad hoc* body, convened to carry out a specific act. It had been asserted during the fifteenth session of the General Assembly that the body competent to elect the judges of the Court, which was the General Assembly, should be governed by the rules of procedure of the Assembly; after some discussion, however, it had been decided that in that case the rules of procedure of the General Assembly did not apply. It would therefore be more logical if multilateral treaties drawn up at conferences convened by international organizations were governed by the same rules as treaties drawn up at conferences not convened by international organizations.

48. Mr. EL-ERIAN said the special rapporteur's draft of article 13 was a workmanlike instrument, which showed an awareness of current practice in the matter. But on such an important subject as accession, it was desirable that the Commission should be agreed on three or four general principles and in that connexion, he wished to raise a question relating to the Commission's method of work. The special rapporteur had submitted some very lengthy articles, dealing with a number of separate problems together; it might be advisable to split those articles into several parts and to concentrate on one main problem at a time; such a procedure would be helpful to subsequent plenipotentiary conferences on the law of treaties. At the Commission's ninth and tenth sessions, preliminary general debates had been held on each article and decisions had even been taken on whether or not certain principles should be included; only afterwards had articles been considered paragraph by paragraph.

49. The first general principle which should guide the Commission's work was that of the widest possible participation in multilateral treaties. The modern trend was towards international legislation; a proof of that was that the Commission itself submitted its drafts to the General Assembly in the form of draft conventions. Sir Hersch Lauterpacht, as the special rapporteur had pointed out in paragraph 3 of his commentary on article 13, had stated that the entire tendency in the field of the conclusion of treaties was in the direction of elasticity and elimination of restrictive rules; the Commission would undoubtedly endorse that view, particularly since it took into account the position of newly independent states.

50. He was glad to see that the special rapporteur had taken into account the modern tendency to regard the question of accession as independent of the entry into force of a treaty. Mr. Tabibi had pointed out the difficulties of new states in the matter of accession, since many of them had had no opportunity to participate in the negotiation of important treaties; the special rapporteur had rightly made invitation to participate, rather than actual participation in negotiations, the criterion for accession.

51. The question of accession to multilateral treaties drawn up at conferences convened by international organizations, or in international organizations, was controversial, and the special rapporteur had rightly stressed that the practice of international organizations in the matter was not uniform. That comment applied even to the United Nations family. For example, at the first Conference on the Law of the Sea in 1958, there had been controversy not only with regard to accession, but even as to whether the Conference was bound by the invitations of the United Nations, or whether, as a plenipotentiary Conference, it could invite other states.

52. It was the Commission's duty to recommend to the General Assembly the course it should take to enable newly independent states to accede to old multilateral law-making treaties.

53. Mr. ELIAS said that, although the special rapporteur's article was a useful basis for a final text, he had serious doubts concerning certain provisions. Paragraph 1 (*b*) seemed to conflict with the principle of the widest possible participation in multilateral treaties and, moreover, was likely to give rise to three difficulties. First, if invitation was taken as the main ground for accession, it should be borne in mind that the invitation itself might be based on an error; a state invited by the negotiating parties might not be interested in the treaty itself. Secondly, the inviting states might change their minds, thus placing the state invited to accede in a difficult position. Thirdly, states which were invited as observers only, and consequently did not participate in the negotiations, might be prevented from acceding. It would therefore be wiser to omit paragraph 1 (*b*) altogether.

54. Paragraph 2 (*c*) should be amended. A three-year time limit seemed preferable and the two-thirds majority rule should be made more flexible by adding the words "at least" before "two-thirds". That would bring the provision into line with the statutes of certain regional organizations, such as the Inter-African and Malagasy Organization, the charter of which provided that the consent of four-fifths of the members was required.

55. It would be difficult to accept paragraph 3 (*a*) unless the phrase "states whose consent or objection is material for determining the admission of additional states

to participation in the treaty" was more clearly defined. The treaty itself might not make it clear enough which those states were.

56. Finally, while paragraph 4 (*b*) covered such cases as that of the United Nations Charter, which allowed sovereign states to become members and allowed some of them to make reservations under the so-called optional clause of the Statute of the International Court, the position of regional organizations, such as the one he had mentioned, would be different. If accession to a treaty was allowed to create a situation in which objecting and acceding states would have no treaty relations, it was difficult to see how both of them could be members of the same organization, particularly if the treaty in question constituted the basis of membership of the organization.

57. Mr. BARTOŠ said he would confine his remarks to the main principles governing accession to multilateral treaties of general interest. The form of the relevant provision would be determined by the answer to the question whether, in principle, participating states should have a free choice of their partners in the treaty in cases where no express provision to that effect was stipulated in the treaty itself, or where the treaty was not governed by the rules of an international organization. The principle of free choice certainly existed as a general rule of international law, but there was also another principle in the modern international community, that of the duty of universal collaboration. In order to harmonize those new principles and develop international law, the Commission should recognize the right of states to be admitted to such collaboration on a basis of equal sovereignty. While he acknowledged that the right of accession *stricto sensu* did not exist, he maintained that every state had the right to participate actively in the life of the international community; it was to the advantage of all states to develop international law and to promote its universality. Consequently, a general rule providing that states could be excluded from participation in a treaty at the will of other states would tend to hamper international collaboration. And yet, sovereign states were free to exclude, by an expression of will, states with which they did not wish to have contractual relations, provided they did not abuse their right of exclusion by vexatious acts designed to exclude such states from international collaboration.

58. The special rapporteur and Mr. Briggs had rightly taken the view in their drafts that all general agreements were open to accession. The question was whether a state had a valid claim to accede or whether it could be debarred by a simple declaration of the will of the negotiating states. Both the drafts he had mentioned provided that, although the mediating states could exclude others from accession to a treaty by a declaration of that will, that will would be ineffective to prevent such accession as regards the other parties to the treaty, if more than one-third of the negotiating states took a different view. It seemed to be reasonable for the Commission to adopt that proposition for all multilateral treaties of a general character, including regional treaties of general interest, which did not contain an explicit clause declaring the instrument restrictive.

59. In the case of treaties concluded within international organizations or under their auspices, the rules of those organizations were applicable, and it was for them to decide whether or not a treaty was open for accession, if it contained no express clause limiting accession. In accepting the constitution of an organization which conferred certain powers on various organs of that organization, a state also accepted the competence of those organs in that matter. Such treaties could not be regarded as something apart from the organization; rather, they were the instruments whereby the organization pursued its aims and carried out its functions.

60. As regards the contractual relationship in cases where certain states parties to a treaty repudiated accessions by other states, the solution proposed by the special rapporteur seemed to have been derived from a system, formerly known as restricted unions of collective treaties, which had been extensively used during the two world wars, when direct relations between the belligerent parties to certain treaties had been suspended, whereas the neutrals had always been in relations with all the participants. There would be four groups, the neutrals, the neutrals and one belligerent party, the neutrals and the other belligerent party, and the states belonging to one belligerent party. That practice had been known in the Berne Union for the Protection of Literary and Artistic Property and the Paris Union for the Protection of Industrial Property. A similar practice was followed in Latin America with regard to reservations and was known as the Pan-American system. Under the rules of that system, if there was opposition to a reservation, the reserving state remained in the contractual union, but no contractual relations existed between that state and the objecting states. Accordingly, two groups were formed, one consisting of states opposing the reservation and states which had not expressed any reservation, and the other of the states accepting the reservation and the state making it. Thus the rule proposed by the special rapporteur and also by Mr. Briggs on the comparable question of objections to an accession, was already known in international practice; it reconciled the principle of the broadest possible participation with that of the free choice of partners. Moreover, it was in conformity with the general principles of the United Nations Charter, which called for the widest possible collaboration among states, on the basis of justice, the rules of international law and the principles of the Charter.

61. Apart from that general rule he had spoken of, a rule should if possible be devised stating that in general there was a presumption that treaties originally restricted to a limited number of states and concluded before the recent emergence of new states, whether newly created or those which had gained independence before the principle of the equality of states had been enunciated, should be open to their accession. But that was a political matter and should be settled outside the Convention the Commission was preparing, perhaps by a resolution of the United Nations General Assembly.

62. But to revert to the special rapporteur's draft and the question which category of states could reject an application to accede, he favoured a broad solution, namely, that it should be all the interested states, which meant all the states entitled to participate in the treaty. Admittedly, some signatories might be slow in ratifying, but nonetheless they would be closely concerned to know with which others they might be entering into treaty relations, and should be free to choose not to enter into relations with certain states while at the same time proceeding with the execution of the treaty together with other parties.

63. Finally, the argument that general treaties codifying custom should by their very nature be open to accession by all states in order to ensure the observance of the custom was not decisive. If it was a universally recognized legal custom, whether codified or not, it was generally binding. The issue was not whether a treaty had consequences for states outside the parties, but which were to be the parties.

64. Mr. ROSENNE said that Mr. Gros' contention, that the question he had raised concerning general conventions drawn up under the auspices of the League of Nations came within the purview of the Sub-committee on State Succession, was mistaken. The question he had raised was that of a new state acceding to a general universal convention drawn up under the League's auspices, to which the metropolitan state either had not itself acceded at the time or had acceded after ceasing to be the metropolitan state, and was totally unconnected with the question of state succession.

65. In referring to the first Hague Convention of 1907, he had merely wished to point out that the recent invitation by the Administrative Council of the Permanent Court of Arbitration to accede to that Convention furnished a useful illustration of a practical solution that avoided difficult political and theoretical problems connected with state succession.

66. Mr. TABIBI, replying to Mr. Gros, said that he was certainly not opposed to the inclusion of accession clauses in future treaties. On the contrary, he had emphasized the importance of the institution of accession and of allowing a considerable measure of flexibility, and of not giving too much weight to the prerogatives of the parties. It would be particularly undesirable to refuse accession to states whose participation in a treaty would be specially useful.

67. Mr. VERDROSS said that at the previous meeting he had expressed support for the special rapporteur's proposal, or that of Mr. Briggs which was in a simpler form, because they propounded reasonable rules *de lege ferenda* in a manner consistent with the Commission's function of furthering the progressive development of international law. He would be all the more in favour of such rules if they were formulated as legal presumptions in the sense outlined by Mr. Bartoš.

68. From the standpoint of positive law, the principle stated by Mr. Gros was unassailable, namely, that accession was only possible if expressly provided for in the treaty or with the consent of all the parties; but it would be contradictory not to allow all states to accede to treaties "declaratory of international law" which purported to enunciate general rules binding on all states.

69. Mr. TSURUOKA said that article 13 should be drafted in simpler form: complicated provisions were liable to provoke difficulties. The article should state clearly the general principle of contractual autonomy; the succeeding provisions would be more in the nature of exceptions to the general rule. The Commission would have to settle such questions as whether or not to insert a time-limit and what were the relations between the two groups of states described by Mr. Bartoš, before it could decide on the structure of the article.

70. He recognized the desirability of universality where appropriate, but believed that the effective execution of a treaty was equally important. Before making a bold excursion into the realm of the development of international law, the Commission should carefully examine the nature of treaty relationships between the parties.

71. One further question to be considered was what effect the present draft, if it took the form of a convention, would have on existing treaties.

72. Mr. CADIEUX said that the clarity of the special rapporteur's text and commentary had greatly facilitated the Commission's task. His proposals were admirably reasonable and moderate, steering a middle course between codification and progressive development and skilfully avoiding certain political shoals. The special rapporteur had wisely pointed the way to a system which would not be controversial, and he did not think that a majority of states would be prepared to go much beyond what the special rapporteur had proposed. The best known treaty "declaratory of international law" was the United Nations Charter and that by no means enunciated an absolute right of accession but hedged it about with a number of definite limitations such as the two-thirds majority rule. On the whole he favoured the provision contained in paragraph 2 (*d*), and hoped the Commission would be cautious in not framing rules that would raise difficult problems of recognition.

73. He agreed with Mr. Jiménez de Aréchaga that in the case of plurilateral treaties a right of veto would be most undesirable. The intention of the parties, particularly in regard to regional treaties, should be the touchstone, as also in the case of multilateral treaties. It had been argued that the negotiating states could always insert accession clauses in the treaty, but it should be recognized that they might not wish to include general machinery for accession open to all states, in which event the procedure for deciding on accession by specific states should be the same as that adopted for drawing up the text. In regard to accession to multilateral treaties, he favoured the rules put forward by the special rapporteur.

74. The CHAIRMAN invited the special rapporteur to comment on the more important issues raised during the general discussion.

75. Sir Humphrey WALDOCK, Special Rapporteur, said he entirely agreed that the text should not speak

of a right of participation in abstract terms. In paragraph 1 he had used the words "the right to become a party" to describe a concrete right deriving from a particular source, whether the treaty itself or the consent of the interested states. He had never intended to introduce any philosophical concept.

76. It would be helpful if the Drafting Committee could formulate the article in general terms covering all forms of participation, not only accession. There were treaties which only provided for participation through the procedure of signature, and it would therefore be preferable to deal with participation in a general way.

77. The points made by Mr. Jiménez de Aréchaga concerning regional law had been in his mind, particularly in connexion with plurilateral treaties, and should be taken into account by the Drafting Committee. The main object should be to formulate provisions relating to treaties of general application and to avoid the kind of language that would give rise to the difficulties Mr. Jiménez de Aréchaga had mentioned.

78. As to whether the decision on requests for accession lay with the negotiating states or with the parties, the same question arose in connexion with reservations and the functions of the depositary. In his view, the negotiating states should have a voice in the matter, at least for a reasonable period, a view supported by modern practice, for they had an important interest in the question of the future participants. If the decision were left to the parties alone, and they acted in a manner contrary to the views of the states which had participated in the negotiations, some of the latter might find themselves unwilling to proceed to ratify the treaty.

79. It was not easy to decide on the length of the period on the expiry of which the states originally entitled to be consulted on requests for accession should cease to have that right. In examining practice, he had noted that where a time-limit existed it was usually less than four years, but on the other hand it had to be recognized that many multilateral treaties were slow in coming into force.

The meeting rose at 1 p.m.

650th MEETING

Thursday, 24 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 special rapporteur to continue his reply to the points made during the discussion of article 13.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the scheme of article 13 seemed to be generally acceptable. The language might be simplified but as far as substance was concerned, if the simpler redraft submitted by Mr. Briggs were amplified by the inclusion of the points which most members seemed to want included, the resulting text would not differ greatly from his original draft.

3. Mr. El-Erian's suggestion that the article should be divided into two parts might be referred to the Drafting Committee. Though it would be possible to detach paragraphs 3 and 4, he would have thought it more convenient to incorporate all the provisions concerning participation in a treaty by accession in a single article.

4. In general he found the simplified version of paragraph 1 as drafted by Mr. Briggs acceptable, but thought it should contain a reference to the presumption mentioned in paragraph 1 (*b*) of his own text. That point could be referred to the Drafting Committee.

5. The presumption he had stated in paragraph 2, that unless the treaty itself otherwise provided, the negotiating states should be presumed not to have intended to rule out the possibility of accession by other states in the future, was broader, and he thought rightly so, than in Mr. Briggs' formulation.

6. In regard to the classification of different types of treaty, the Commission seemed inclined to accept a distinction, but appeared to prefer some such expression as "treaties concluded by a restricted group of states" to the term "plurilateral". Actually, almost all treaties were concluded between a restricted group of states, which was the very reason why article 13 was needed. The question was to determine in what cases the treaties were open or were restricted to a specified circle of states. Perhaps the Commission should wait until the Drafting Committee had submitted a new text before continuing to discuss the difficult problem of the treaties to which the article should apply.

7. On the question of the rule which should govern accession in cases where a multilateral treaty had been drawn up at an international conference convened by the states concerned, Mr. Ago's suggestion that the same rule should be applied as that applied to the adoption of the text itself was logical. He had stated the two-thirds rule in paragraph 2 (*c*) because it was so frequently used in practice. In answer to Mr. Elias' point that a larger majority might at times be desirable, he could only observe that it was unlikely that something between a two-thirds rule and unanimity would be chosen; the former was already a quite stringent rule.

8. In answer to Mr. Yasseen's comment on paragraph 2 (*d*), he recognized that the equation of treaties drawn up at conferences convened by international organizations with those drawn up within the organization itself might be regarded as an enchroachment on the sovereignty of the participating states, for they normally had sovereign competence to determine all questions pertaining to participation in the proceedings. He had put forward the rule in paragraph 2 (*d*) for the purely practical reason that once a conference had ended it was a very laborious matter to obtain a consensus of opinion on the participation of new states. Procedurally,