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Summary record of the 650th meeting

Topic:
Law of Treaties

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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 encroachment 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,

it would be much simpler if requests for accession could be referred to the competent organ of the organization. He doubted whether there was real substance in the objection to the residual rule he had stated in paragraph 2 (d), which was no invention of his own, but could be found in a number of recent treaties, including the Conventions adopted at the Geneva Conference on the Law of the Sea. That Conference had been attended by a number of states which were not members of the United Nations, but which appeared to have felt no qualms about leaving the matter of future accessions to the General Assembly in which they had no voting rights.

9. In connexion with paragraph 4 (b), Mr. Ago had persuasively argued against a provision allowing a state which objected to an accession to maintain its objection and decline to enter into treaty relations with the requesting state. He had contended that if the objecting state could have been outvoted during the conference on the question of the accession clause, it should subsequently accept the majority decision. At first sight the argument had some weight, but on careful examination he doubted whether it could be sustained, for the position of the state in question after the conference was not the same as during the proceedings when it had not yet committed itself to participation in the treaty. The matter was not one on which he wished to take an extreme view. It was necessary to find some reasonable compromise between the principle of state sovereignty over treaty relations and the ideal of achieving the widest possible participation in treaties.

10. The objection put forward by Mr. Elias that the consequence of such a rule might be that two states would become members of the same organization after one had objected to the membership of the other did not seem to carry weight, because paragraph 2 (d) was concerned with treaties drawn up at conferences convened by international organizations or in an international organization. It presupposed the existence of the organization and only dealt with subsequent treaty-making by the organization to carry out its purposes.

11. Attention should be drawn in a special paragraph of the report to the question raised by Mr. Rosenne concerning the extension of old treaties of general concern, whose circle of eligible parties was at the moment closed, to new states, a matter he had discussed in paragraph 16 of his commentary. It raised serious difficulties because, in principle, the consent of the contracting parties would have to be obtained and no one could foresee whether they would all ultimately become parties to the draft convention being prepared by the Commission which would lay down the necessary procedures. Perhaps a political approach would be the most effective, and a recommendation might be made to the General Assembly to take special action.

12. The Commission might forthwith refer the various points raised to the Drafting Committee and discuss any further matters of substance after the Committee had submitted a redraft of article 13.

13. Mr. JIMÉNEZ de ARÉCHAGA said that, since the special rapporteur had made it clear that he did not

intend to exclude special regional treaties from the application of the two-thirds rule governing accession and had agreed that a single state should not have the power to veto an accession to such treaties, there was no need for the Commission to take a separate decision on the amendment to paragraph 2 (c) that he (Mr. Jiménez de Aréchaga) had submitted. It could be referred to the Drafting Committee which, he felt sure, would find an appropriate wording to meet his point.

14. It seemed desirable to abandon the attempt to distinguish between plurilateral and multilateral treaties, but the Commission appeared to be agreed on the need to find an expression to describe the restrictive type of multilateral treaty, accession to which should not be subject to the rigorous unanimity rule but to the two-thirds rule. The expression should exclude constitutions of international organizations, for states which applied for participation in those cases were applying not so much for accession to the constitution as for membership of the organization; it should also exclude agreements analogous to those governing the European or South American Common Market, admission to which depended on the acceptance of the other members by a decision in accordance with a prescribed majority.

15. In his amendment he had suggested a special designation to cover those multilateral treaties "dealing with matters of general concern to all states or to a definite category or group of states", which called for a flexible rule. In those cases the crucial issue was not so much whether the treaty had been drafted in an international organization, under its auspices, or through the ordinary diplomatic channels, but whether it affected the interests of other states. The judges of whether it did so would be a two-thirds majority of the parties, or of the negotiating states, as the case might be.

16. He was certain that, if the Drafting Committee could reach agreement on an appropriate expression to describe those special categories of multilateral treaties, all members of the Commission would be satisfied, including Mr. Gros who thought that the proposed rules were too liberal. The implication of a rule making accession to multilateral treaties of general concern conditional on the consent of two-thirds of the parties, or negotiating states, would be that accession to other multilateral treaties not of "general concern" would be governed by the unanimity rule. Perhaps Mr. Gros would then be able to meet halfway those members of the Commission who had favoured the progressive proposal for a two-thirds rule put forward by the Commission in 1959.

17. In reply to the remarks of Mr. Gros, he said that if a group of states decided to conclude a treaty on matters of general concern limited only to themselves, they were legally entitled to refuse accession to an outside state, but at least they should be required to indicate their position clearly in the text of the treaty so as to apprise other members of the international community of their restrictive intention.

18. It was hardly arguable that to impose a two-thirds majority rule on a group of states which had not voted in favour of the inclusion of an accession clause in the

treaty prepared at a conference would frustrate the will of the parties. Under article 5 of the draft, treaties drawn up at an international conference were adopted in conformity with the voting rules, and the voting rules themselves were adopted by a simple majority. Consequently, during the conference no single state possessed a power of veto on the insertion of an accession clause; but Mr. Gros contended that, once the conference was over, any participating state acquired a right of veto to exclude accessions. If a conference decided to apply the two-thirds rule for the adoption of the treaty, as was standard practice, and a proposal that the treaty should be open for accession did not obtain the necessary two-thirds majority, then presumably a subsequent request for accession would also fail. Of course, if the participating states subsequently changed their views and decided that accessions should be permitted, they should not be prevented from doing so by the single dissentient voice of one state. At that stage, as Mr. Ago had suggested, the same voting rule as had been applied during the conference should be maintained.

19. There was no need to dwell on the political abuses to which a power of veto was liable to give rise, and it would be deplorable if, in the case of general law — making treaties concluded under the auspices of the League of Nations, one state were able to frustrate the wish of the majority to open them to the accession of new states. On that point the Commission's views would carry great weight with the General Assembly.

20. As Mr. Verdross had pointed out, the Commission was engaged in codifying what were mostly subsidiary rules, in other words, rules which would apply in cases where the text of the treaty itself was silent on the question of accession. Yet that was an important task. Such rules might in future encourage states not to leave treaties silent on the question of accession and should help them to reach agreement on the necessary provisions.

21. Mr. TSURUOKA said he feared that the proposed residuary rules *de lege ferenda* were going to cause so much uncertainty as to outweigh their advantages. The Commission should not generalise from exceptions. It would be preferable to deal with a number of the issues in the commentary and to await the observations of governments.

22. Mr. LACHS paid a tribute to the way in which the special rapporteur looked for compromise solutions, but before the text of article 13 was referred to the Drafting Committee he wished to revert to some essential problems of substance.

23. The Commission should certainly pay heed to Mr. Gros' warning to refrain from philosophical discussions, but questions that to him might appear theoretical were to others of practical importance. Mr. Gros was no doubt correct in arguing that a state should be free to choose its partners in a treaty or any other instrument, but on the other hand the Commission should not overlook the general trend to open treaties to all states, particularly to those that could contribute to their implementation or had an interest in participating in them. International law had progressed considerably from

the time when a special instrument had to be negotiated to enable Spain to accede to the Treaty of Aix-la-Chapelle of 1748. Accession was being increasingly simplified, and it was of interest to note that the 1923 Convention relating to the Regime of the Straits, for example, even contained an express provision — article 19 — under which the Parties undertook to “use every possible endeavour to induce non-signatory Powers to accede.”¹

24. Obviously, if a treaty was silent on the question of accession, the intention of the parties had to be interpreted by reference to the will they had manifested in the treaty itself, but it should not be forgotten that silence was sometimes the result of inadvertence. Certain treaties, such as the Pan-American Sanitary Code of 1924,² had omitted to include a clause about the date of entry into force. Silence did not necessarily mean that the treaty was intended to be closed, and sometimes, as in the General Agreement on Tariffs and Trade of 1947, Article XXXIII, the parties had decided to leave the terms of accession to be agreed between the requesting government and the contracting parties.

25. The Commission was not concerned with trying to impose upon states a certain course of action, but to point out what presumptions were permissible in the light of the apparent intention of the parties, if no express provision had been included in the treaty. Such presumptions were rebuttable.

26. The problems could be handled in a way that was not at variance with the principle of the sovereign will of the parties and allowed fully for the general trend of development which he had mentioned. Treaties such as the Hague Conventions on Private International Law of 1902 and 1905 had formed the subject of special protocols in 1923 and 1924³ to enable new states that had emerged after the First World War to accede, since the original text did not provide for that possibility. Limiting clauses such as those contained in those conventions were not favourable to the development of the rules the conventions were intended to promote.

27. He recognized that by their very nature some treaties, such as special regional agreements, required a special approach.

28. The special rapporteur had been wise in suggesting a two-thirds majority rule in certain cases where the treaty itself made no provision for accession. Such a rule was becoming frequent in practice and was found in the constitutions of a number of international organizations.

29. The Drafting Committee would have to discuss five essential questions in connexion with article 13. First, whether or not treaties should be classified into categories and, if so, how. Secondly, whether a distinction should be drawn between treaties in force and those not yet in force, when no provision on accession had been inserted in the text. Thirdly, whether the decision concerning

¹ League of Nations *Treaty Series*, Vol. 28, p. 135.

² League of Nations *Treaty Series*, Vol. 86, p. 44.

³ *Conférence de la Haye de Droit international privé, Documents relatifs à la sixième session, 1928.*

accession should lie with the parties, with the parties and the signatories or with the parties, the signatories and the members of an international organization in which the treaty had been drafted. Fourthly, whether a two-thirds majority rule for accession should be laid down. Fifthly, what should be the effect of one state's objection to another's accession if the process of accession had been completed.

30. Mr. PAREDES said that he had been impressed by Mr. Bartoš' view that article 13 should reconcile two opposing principles, namely, freedom of choice of partners and the duty of universal collaboration. He also endorsed Mr. Lachs' view that a clear distinction should be made between two types of treaties, those which introduced new principles of international law binding on all the countries of the world, and others which covered less universal laws and principles. In the case of the former, it seemed contradictory to ask all states to accept certain principles and yet to refuse them the possibility of acceding to such universal instruments as, for example, the covenants on human rights. The Drafting Committee should therefore bear in mind the difference between universal treaties and treaties of limited interest.

31. Mr. AGO said he was not sure that the time had yet come to refer the article, together with members' observations, to the Drafting Committee. Perhaps the Commission could quickly consider the draft paragraph by paragraph, or the special rapporteur might put a number of questions on which the Commission could express its views, in order to give the Drafting Committee some definite guidance in its work.

32. Mr. de LUNA said that, although Mr. Gros' theory of *jus cogens* was correct, he was more inclined to endorse Mr. Jiménez de Aréchaga's view that the Commission should lay down a rule of *jus dispositivum* concerning accession which would supplement the will of individual states. A provision designed to encourage the widest possible international collaboration, without the power of veto, and particularly one supported by a rule for so large a majority as two-thirds, was wise and progressive and fully compatible with the current trend of international law. States wishing to take different action in the matter could always insert provisions for limited accession in the treaty itself. He was convinced of the wisdom of such a rule, which would soon be accepted as one which promoted the well-being of the international community.

33. Mr. ROSENNE said he thought that the article could now be referred to the Drafting Committee, though he was somewhat disturbed at the emphasis laid in the draft on the text of the treaty itself. Elucidation of the intentions of the parties might be a much more sophisticated process than the mere reading of the text of the treaty. That was a lesson to be drawn from the whole problem of reservations as it had been dealt with, for example, in connexion with the Convention on Genocide. A great deal could be inferred from the silence of a treaty; the Drafting Committee should therefore try to find a form of words which would make it clear that the mere presence or absence of a certain clause in a

treaty was not the only relevant factor. The wording "Except to the extent that the particular context may otherwise require" at the beginning of article 2, paragraph 1, of the special rapporteur's draft, seemed generally to be a more suitable formulation than, "Unless the treaty itself otherwise provides", the wording employed in article 13, paragraph 2, and, with slight variations, in paragraph 1 (b).

34. Mr. TSURUOKA said that he had no wish to deny that international collaboration should be encouraged and the development of international law promoted; that was obviously the Commission's objective in preparing the draft of article 13. But there were different methods of attaining that objective. Some believed that it could be attained by indicating in the treaty itself that it should be open to all countries in a given category, but he would hesitate to support a rule *de lege ferenda* which was obviously not quite perfect. Emphasis should be placed on the possibility of attaining the Commission's objective by simpler means, with due respect for the contractual sovereignty of states.

35. Mr. LIU said that he did not see in paragraph 4 (b) the right of veto referred to by some members. In his opinion, the special rapporteur's draft was quite reasonable, in that it did not prejudice accession if approved by two-thirds of the parties, and did not bind the objecting state *vis-à-vis* the requesting state. However universal a treaty might be, it usually had a specific purpose, and the parties should be able to determine whether accession by a given state would further the purposes of the treaty. He hoped that the Drafting Committee would agree that paragraph 4 (b) was satisfactory.

36. Mr. GROS, speaking as Chairman of the Drafting Committee, said that there were two courses open to the Committee. Either it could give the Drafting Committee more specific directions after further debate on the article, or it could instruct the Drafting Committee to consider the article, with the comments made in the discussion, and prepare a simplified text, which would then be discussed in the Commission. In his opinion, the latter procedure was the more practicable.

37. Speaking as a member of the Commission, he said that he was as anxious as any other member to extend the circle of states participating in treaties; nevertheless, he was convinced that the overwhelming majority of the new treaties concluded after the Commission's articles had been adopted would contain provisions on accession.

38. He agreed with Mr. Rosenne that, if an accession clause had been discussed at a treaty-making conference and rejected, there was no rule of international law which permitted states to act subsequently as though such a clause had been included.

39. The accession of new states to older treaties admittedly gave rise to a problem, but the point had perhaps less legal importance than some members had suggested and he believed that the special rapporteur and the Drafting Committee could find a solution.

40. It had been rightly pointed out by Mr. Lachs that a distinction should be drawn between general law-making and regional treaties; in addition, however, it

would be necessary to determine in any particular case whether the state applying to accede was objectively qualified to accede, and Mr. Lachs had admitted, if only implicitly, that the problem was not entirely a legal one.

41. Mr. BRIGGS said he supported the second course indicated by the Chairman of the Drafting Committee. The Commission was not yet in a position to settle the questions raised by the special rapporteur and Mr. Lachs, and it seemed desirable to postpone further discussion until the Drafting Committee had prepared a simplified text.

42. He had been impressed by Mr. Rosenne's suggestion at the previous meeting that the Commission should bring the problem of the accession of new states to the older multilateral treaties to the special attention of the General Assembly. A paragraph in the Commission's report might not suffice for that and it would be better for the Secretariat to prepare a separate report on the problem, perhaps listing the categories of League of Nations and other old treaties which were not open to accession by new states and analysing the possible ways of opening them to accession by General Assembly action or recommendation.

43. Mr. AMADO said that Mr. Tsuruoka had voiced a legitimate doubt: should the silence of a treaty on the matter of accession be construed as permitting accession? Although he (Mr. Amado) supported the thesis expounded by Mr. Bartoš and Mr. de Luna, he quite saw that the problem of principle remained and that the Drafting Committee would have a difficult task in reconciling the opinions expressed by members.

44. The CHAIRMAN observed that it would probably be best to follow the second course indicated by the Chairman of the Drafting Committee, although an analysis of the debate showed that, while a number of guiding philosophical views had been presented, few specific suggestions had been put forward for the assistance of the Drafting Committee. Of course the guiding value of those philosophical utterances must not be underestimated. They were an expression of the will to measure even the subtlest oscillations of the period especially those characteristic trends of group behaviour with regard to the matter under consideration. Yet they might not assist formulation of what was needed since they were more concerned with the phenomena than with their underlying cause. The only point made in the discussion on which a decision might have to be taken was that dealt with in paragraph 4 (b), which also had a bearing on paragraph 2 (c), since the determining character of the two-thirds majority rule laid down in paragraph 2 (c) might be laid open to question if the objecting states were not affected by the accession.

45. With regard to the distinction between plurilateral and multilateral treaties, the Drafting Committee might be able to find more suitable expressions for them, but it was unquestionable that the two classes existed.

46. Mr. AGO said he agreed that the article could be referred to the Drafting Committee on a provisional basis, but two points should be taken into account in connexion with paragraph 4 (b). First, certain types of

treaty should, if possible, be differentiated; it seemed hardly acceptable, for example, in the case of treaties such as the one the Commission was drafting, which would in fact define international law, to allow the objecting state not to regard itself as automatically bound by the treaty to the requesting state. Secondly, the rule might, so to speak, be reversed, and made non-automatic. If a state, on being asked whether it agreed to an accession, replied in the negative, the treaty should not automatically be held not to be in force between that state and the acceding state, but the objecting state should be granted the faculty of requesting that the treaty should not be regarded as being in force between it and the acceding state. That would probably reduce the number of the situations covered by paragraph 4 (b).

47. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's second suggestion was quite acceptable, but his first point raised a more delicate matter. Paragraph 8 of his commentary on article 13 showed that there might be jurisdictional clauses, either in the treaty or in other instruments, which were brought into play by the linking together of the two mutual treaty relations.

48. The CHAIRMAN suggested that article 13 be referred to the Drafting Committee, on the understanding that the resulting text would be reconsidered in the Commission; the special rapporteur could then introduce article 14.

It was so agreed.

ARTICLE 14. — THE INSTRUMENT OF ACCESSION

49. Sir Humphrey WALDOCK, Special Rapporteur, said that the content of article 14 was similar to that of article 11 (The procedure of ratification); all the points, except that dealt with in paragraph 3, had already been discussed in connexion with ratification. Article 14, article 16 (Participation in a treaty by acceptance) and article 11, might ultimately be amalgamated into a single article on instruments of ratification, accession, acceptance and approval.

50. The point raised in paragraph 3 arose also in connexion with article 15 (Legal effects of accession) and might belong in that article. The Commission would have to decide whether it should take account of the occasional practice of accession subject to ratification, which was practically a contradiction in terms, for the notion of accession was that of a commitment on the part of the state. His only reason for mentioning the practice had been to emphasize that accession subject to ratification did not really constitute accession. It was the practice of the Secretary-General of the United Nations when, as depositary of multilateral treaties, he received an instrument of accession subject to ratification, to inform the state concerned that that act was regarded merely as a notification of intention. In any case, the point was covered in article 15 and could be dealt with in that article.

51. Mr. VERDROSS, with regard to the expression "an authority competent under the laws of the acceding state," used in paragraph 1 (a), said that in many countries, constitutional law gave the Head of State the power

to conclude treaties; in practice, however, treaties were concluded by the government or even by a minister. For example, under the United States Constitution, the President had the power to enter into treaties, subject to Senate approval; the practice, however, had grown of concluding "executive agreements" without Senate approval. It was rare for a constitution to specify, as was the case in Austria, that the government, as distinct from the President, was authorized to enter into treaties which did not require approval by Parliament. It would have been more appropriate, therefore, in paragraph 1 (a), to refer not to "the laws" but only to "the usages" of the acceding state.

52. Paragraph 1 (b) stated that the form of instruments of accession was governed "by the internal laws and usages" of the acceding state. It would be more correct to refer to "laws or usages", since it was not uncommon for usages at variance with the letter of the law to become current practice.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that when article 16 was brought into line with the amended text of the corresponding provisions on ratification, both expressions criticised by Mr. Verdross would be eliminated.

54. Mr. BRIGGS suggested that the contents of article 14, paragraph 3, and of article 15 should be transferred to the commentary; they had no place in the articles.

55. Mr. AGO said he favoured the elimination of paragraph 3 in order to avoid misunderstandings. An instrument of accession expressly declared to be subject to subsequent ratification constituted a mere promise of accession.

56. The CHAIRMAN stated that, if there were no objection, he would consider that the Commission agreed that the provisions of paragraph 3 should be transferred to article 15 and the remainder of article 14 referred to the Drafting Committee, with the comments made during the discussion; the special rapporteur could then introduce article 15.

It was so agreed.

ARTICLE 15.—LEGAL EFFECTS OF ACCESSION

57. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2 consisted of a mere reference to the legal effects stated in article 12; that paragraph would not be necessary if the provisions relating to the legal effects of ratification, accession and acceptance were included in a single article.

58. The only point which arose in connexion with article 15 was whether paragraph 1 was necessary, or whether its contents could be transferred to the commentary. The previous special rapporteur had appeared to take the view that the practice of making accession subject to ratification or approval was dying out. In fact, however, the Secretariat document, "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7), indicated that it was not uncommon for states to deposit instruments of accession which were expressed to be subject to ratification. In such cases, the Secretary-General would inform the

state concerned that its instrument of accession did not have the effects of an accession but operated only as an expression of the intention to accede to the treaty.

59. Mr. ROSENNE said he did not agree that the contents of paragraph 1 should be transferred to the commentary, since the commentary would disappear after the convention had been drawn up. Paragraph 1 dealt with an important practical point and should be retained in the draft articles.

60. Mr. JIMÉNEZ de ARÉCHAGA said that he would not object to the contents of paragraph 1 being transferred to the commentary. In that event, the wording should be toned down so as not to appear to criticize the state practice referred to. Since the constitutional provisions of certain states required prior approval by Parliament to enable the Executive to sign a treaty, those states could not do otherwise than make their accession subject to ratification. It would therefore be going too far to suggest that such an accession was invalid.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no such suggestion; paragraph 1 merely stated that the act would not have the positive legal effects of an accession. If parliamentary authorization was required, the government concerned should obtain it before depositing its instrument of accession.

62. The main value of paragraph 1 was that it would guide a depositary state which might not be as familiar as the Secretary-General of the United Nations with the problem dealt with in that paragraph. The Secretary-General had an enormous practice as a depositary of treaties.

63. Mr. JIMÉNEZ de ARÉCHAGA pointed out that in many countries it was not possible to take any constitutional action regarding a treaty until it had been signed by the Executive. In the case of those countries, it was not possible to obtain prior authorization for the purpose of acceding to a treaty; the only form of accession possible was accession subject to ratification. He therefore urged that the practice under discussion should not be condemned.

64. The CHAIRMAN said that there was no question of condemning the practice.

65. If there were no objection, he would consider that the Commission agreed to refer article 15, with the comments made during the discussion, to the Drafting Committee; the special rapporteur could then introduce article 16.

It was so agreed.

ARTICLE 16.—PARTICIPATION IN A TREATY BY ACCEPTANCE

66. Sir Humphrey WALDOCK, Special Rapporteur, said that he had considered acceptance in each of the two meanings in which the term was used; the first, where it was almost equivalent to ratification, as in the cases falling under paragraph 1 (a), and the second, where acceptance was an original act, as in the cases falling under paragraph 1 (b).

67. Paragraph 2 stated that the principles governing ratification applied in the first category of cases, and

paragraph 3 stated that the principles governing accession applied in the second category of cases. If the Commission agreed on that proposition as to substance, there would be no serious drafting problems.

68. The previous special rapporteur had not dealt with the question of "approval", which was covered in paragraph 4. An examination of the final clauses of treaties showed that the term was becoming quite common. He was not altogether certain as to its correct use, but it appeared to be almost synonymous with "acceptance".

69. Mr. BRIGGS said that an article written by Mr. Liang a few years ago on the subject of acceptance seemed to suggest that the method was no longer used. He asked whether acceptance and approval were still as current in international practice as they had been in the period immediately after 1946.

70. Sir Humphrey WALDOCK, Special Rapporteur, replied that acceptance was a continuing practice; approval was a growing practice, particularly in the case of treaties entered into by international organizations with governments.

71. Mr. LACHS said he approved the special rapporteur's decision to deal with acceptance, which was becoming more frequent in international practice. At the fourth session of the General Assembly in 1949, the Sixth Committee had rejected the term "acceptance" and urged the retention of the institutions of signature and ratification or accession, as appropriate. Unfortunately, that advice had not been heeded and many international instruments continued to use the term "acceptance". The Commission should therefore take the practice into account.

72. The term "approval" had a special meaning in the practice of certain countries. In Poland, for example, some treaties were subject to ratification by parliament whereas others were subject to approval by the government. In paragraph 4, the reference was clearly to an international act and not to approval in constitutional law.

73. Mr. LIANG, Secretary to the Commission, said that he did not recall having expressed the view which Mr. Briggs had referred to, but remembered the criticism in the Sixth Committee of the term "acceptance". The Sixth Committee had, in the light of that criticism, decided not to use the term in a particular convention, but he did not think it had gone so far as to reject the use of the term altogether.

74. With regard to paragraph 4, "approval" was a general term and had not yet become a legal institution. Logically, it could include such processes as ratification, accession and acceptance. It did not therefore have the same significance as acceptance, which had, in a sense, become a legal institution.

75. Mr. ROSENNE agreed that approval was sufficiently established in international practice to require separate treatment. From the international point of view, it could be equivalent to either ratification or accession. The Commission could either include in its draft a separate article on approval, or insert a definition of "approval" in article 1.

76. Mr. LIU said that acceptance had been introduced as a device to avoid the delays involved in complying with the constitutional requirement of authorization for ratification. From the international point of view, acceptance without prior signature was analogous to accession.

77. Paragraph 2 stated that the procedure and legal effects of acceptance in cases falling under paragraph 1(a) would be determined by reference to the provisions of articles 11 and 12 on ratification. Paragraph 3, however, in stating that in cases falling under paragraph 1(b) the provisions of articles 14 and 15 governing accession would apply *mutatis mutandis*, omitted all reference to article 13, even though that article also related to accession. He asked whether the omission was intentional.

78. Mr. AGO, criticizing the use of the term "approval" in paragraph 4, said that a state might approve of the conclusion of a treaty between two other states, but such approval would not necessarily make it a party to the treaty. The term "approval" could also be used to describe the authorization given to the Head of State by the competent bodies under constitutional law for the ratification or acceptance of a treaty; however, it was the act which followed that approval which constituted the acceptance of the treaty, and not the "approval" which preceded it.

79. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that "approval" was commonly used as a substitute for "ratification". That use was particularly frequent in treaties concluded between a government and an international organization, where it was stated that the treaty would come into force upon its approval by the organization and by the government concerned.

80. He agreed that the international practice in the matter stood in need of improvement, but he doubted whether the Commission could exert much influence in that respect.

81. Mr. GROS said that the special rapporteur had indicated, in paragraph 4 of his commentary to article 16, that he did not favour the modern use of the inadequate term "approval", which led to confusion in practice. If the Commission shared that view, it would be doing a service if it helped to introduce more order in the matter.

82. "Approval" was not a legal term; it was an ordinary word which could cover the implementation of a treaty by any of the processes of ratification, accession or acceptance. Its use should not be encouraged in legal documents of international scope. It could, on the other hand, be used to describe a situation such as that to which Mr. Lachs had referred in municipal constitutional law.

83. The CHAIRMAN said that the Commission appeared to be in agreement that the contents of paragraph 4 on "approval" should be placed elsewhere in the draft; "approval" should not be mentioned in article 16 as being equivalent to "acceptance".

84. Mr. AGO urged that the Drafting Committee should be free to rearrange the provisions of paragraph 4 and

to transfer part of them to the provisions on ratification and part to those on accession.

85. The CHAIRMAN said that the Drafting Committee always had authority to take such action. If there were no objection, he would consider that the Commission agreed to refer article 16 to the Drafting Committee, with the comments made during the discussion.

It was so agreed.

The meeting rose at 12.45 p.m.

651st MEETING

Friday, 25 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 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS

ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS

ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS

1. The CHAIRMAN invited the Commission to consider articles 17, 18 and 19, on reservations.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the three articles would be amended in respect of certain points of detail on which the Commission had already expressed its views. For example, the references to the "competent authority" of the reserving state would be deleted, in keeping with the decisions concerning earlier articles relating to ratification and accession.

3. For the moment, he wished to discuss only certain questions of principle which affected the ultimate shape of the draft articles. The first concerned the freedom to formulate reservations. His approach was not based on the notion of absolute sovereignty; he considered that there existed a presumption that states were free to formulate reservations unless the treaty, either expressly or by implication, clearly excluded that right, or unless the reservation in question was contrary to the established usage of an international organization.

4. In article 17, paragraph 2(a), he had attempted to give expression to the principle stated by the International Court of Justice on question I in its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.¹ The principle was a sound one, although it did not provide any objective test of the legitimacy of a reservation, other than the opinion of each state as to whether the reservation was compatible with the object and purpose of the treaty.

5. Admittedly, the statement of the principle in article 17, paragraph 2(a), was imperfect; no sanction was

laid down and no effects were indicated in articles 18 and 19. He had had considerable hesitation on that point because he had been anxious to confine the draft articles to the statement of effective principles and to avoid mere exhortations. However, the ruling of the International Court had great value as a statement of principle and the debates in the General Assembly had shown that it enjoyed a measure of support from states.

6. For the purpose of determining the effective law in the matter, the objective tests remained consent, dealt with in article 18, and objection, dealt with in article 19. A subjective criterion such as that laid down in article 17, paragraph 2(a), could only be applied if an independent authority could decide on the question of the compatibility of reservations; that would be possible if, as a general rule, treaties contained an arbitration clause for judicial settlement.

7. Articles 18 and 19 raised again the problem of the distinction between multilateral and plurilateral treaties which the Commission had already discussed at length in connexion with article 13. They also raised the question which states would have a voice in the matter of consenting or objecting to reservations, as well as the more complicated question of the time-limit after which objections were to be considered as having ceased to have effect.

8. His attention had been drawn to the 1959 debates in the Sixth Committee and in the plenary General Assembly on the item entitled "Reservations to Multilateral Conventions; the Convention on the Inter-Governmental Maritime Consultative Organization". The debate had resulted from the objections by France, and in a somewhat modified form by the Federal Republic of Germany, to a reservation made by India in its instrument of acceptance of that Convention, and had led to the adoption of General Assembly resolution 1452 (XIV) of 7 December 1959.

9. By operative paragraph 1 of part B of that resolution, the General Assembly had amended paragraph 3(b) of its resolution 598 (VI) of 12 January 1952. The amendment had had the effect of broadening the instructions given in 1952 to the Secretary-General to communicate to all states concerned the text of reservations or objections made to conventions concluded under the auspices of the United Nations, of which he was the depositary. Whereas the 1952 instructions had referred only to conventions that might be concluded in the future under United Nations auspices, the 1959 resolution requested the Secretary-General, in his capacity as depositary, to apply paragraph 3(b) to his practice "in respect of all conventions concluded under the auspices of the United Nations which do not contain provisions to the contrary", and not only to those concluded after 1952. The debate in the General Assembly which preceded its 1959 decision had indicated a tendency on the part of the Assembly to assert authority in regard to conventions concluded under United Nations auspices.

10. Mr. AMADO noted that the special rapporteur had cited in paragraph 2 of the appendix to his report a memorandum which he (Mr. Amado) had submitted to

¹ I.C.J. Reports, 1951, p. 29.