Document:-
A/CN.4/SR.655

Summary record of the 655th meeting

Topic:
Law of Treaties

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

though not bound by the treaty *vis-à-vis* the former, was bound with regard to the other parties which had made no objection by virtue of the principle of the indivisibility of rights and obligations. In the circumstances, the reserving state might obtain certain advantages. Nevertheless such drawbacks were outweighed by the value of reservations which enabled a minority to undertake to be bound by part of a treaty, a solution which was preferable to their remaining outside altogether.

70. Incompatibility with the object and purpose of a treaty was unfortunately an objective criterion which could only be applied subjectively. In the absence of any other solution, each state should be free to judge for itself.

71. The Commission should take account of practice and respect the express will of the parties. For that reason, he thought that the articles under discussion should be based on the inter-American system.

72. He had no firm opinion about the procedural suggestion put forward by Mr. Verdross and agreed with the view expressed by Mr. Jiménez de Aréchaga.

The meeting rose at 1 p.m.

655th MEETING

Friday, 1 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

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

DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to discuss the texts submitted by the Drafting Committee.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that before the Commission took up the Drafting Committee's texts he would like to have guidance about how it wished him to modify the commentary, which had been prepared primarily for the Commission's own use and contained numerous references to views expressed at the eleventh session.

3. Mr. BRIGGS suggested that the special rapporteur should be requested to redraft the commentary so as to give less prominence to what the Commission had thought in 1959 and more space to explaining the reasons for the decisions reached in 1962.

It was so agreed.

ARTICLE 1. — DEFINITIONS

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared the following new text for a paragraph 1 (*a*) and paragraph 2 of Article 1:

"1 (*a*). Treaty means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), which is governed by international law and is concluded between two or more states or other subjects of international law.

".....

"2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any state."

5. The Commission would note that, in accordance with its wishes, the Committee had amalgamated the definitions of treaty and international agreement in a single clause and had dropped the reference to the possession of international personality as well as the reference to intention in the statement that the agreement was one governed by international law. The Drafting Committee had been hesitant about whether or not to retain the list of appellations attached to treaties, which was not exhaustive, but had decided to retain it so that that point might be considered by the Commission. As special rapporteur, he believed the list to be useful for illustrative purposes, because of the considerable uncertainty as to what was covered by the term "treaty".

6. Mr. TSURUOKA suggested that the whole definition should be qualified by the proviso "for the purposes of the present articles".

7. Mr. CASTRÉN said the new draft of paragraph 1 was a great improvement on the original definition but it failed to make clear whether or not contractual international relations between states and individuals were covered by the draft. Some explanation on that point was certainly necessary in the commentary.

8. He agreed with Mr. Tsuruoka that the article should be prefaced by the proviso he had stated.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the whole series of definitions would certainly be prefaced by the words mentioned by Mr. Tsuruoka. The draft they were discussing related only to one definition.

10. Mr. ROSENNE said he hoped that the list of instruments placed in parentheses was not intended to imply any legal hierarchy among those mentioned. The order was somewhat puzzling; perhaps the most satisfactory solution would be to make it alphabetical and make it clear that the list was merely illustrative by inserting the words "such as" at the beginning.

11. It might be necessary to include in article 1 a separate definition of a treaty in simplified form.

12. Mr. PAREDES pointed out that the element of consent had been altogether overlooked in the definition, which should be amplified by a reference to the fact that international agreements were instruments freely and spontaneously concluded by the parties.

13. Mr. de LUNA said that the Commission would have to give some thought to the fact that individuals and bodies corporate could be subjects of international

law and in the conclusion of treaties could enjoy a special position, whose curious juridical nature he would not discuss. Three examples were the 1937 Convention modifying the International Convention signed at Paris on 21 June 1920 for the creation of an International Institute of Refrigeration,[1] the Agreement with a view to the administrative and technical re-organization of the Southern Railway Companies system together with a Protocol of signature and a provisional Protocol of 1923 between Austria, Hungary, Italy, the Kingdom of the Serbs, Croats, Slovenes and the Südbahn,[2] and the Protocol between the Federal Republic of Germany and the Conference on Jewish Material Claims against Germany.[3] He was not proposing any change in article 1 to take account of that fact; it should be made clear in the commentary, however, that in no case could the phrase "other subjects of international law" cover individuals.

14. Mr. CADIEUX said that, although there was some advantage in adopting an alphabetical order for the list in brackets, such a rearrangement would give rise to difficulties in translation. It should be indicated, however, that the list was not in order of importance.

15. He agreed with Mr. Rosenne that a definition of a treaty in simplified form was necessary, since it occurred often in practice.

16. He suggested that the words "two or more" could be deleted as redundant.

17. Mr. TUNKIN said that the Commission had agreed at its eleventh session, and seemed still to agree, that the definition should cover treaties between states, treaties between states and international organizations and treaties between international organizations, whereas it had decided that the articles themselves should be concerned with treaties between states. The word "or other subjects of international law" might not express that intention clearly and were open to misconstruction owing to the controversy as to whether individuals could be subjects of international law.

18. Mr. BRIGGS said the definition in paragraph 1 (*a*) was acceptable, but unwieldy because of the inclusion of the passage in parentheses. The point should be dealt with in a separate paragraph, as had been done in article 4 of the Harvard draft.

19. It was undesirable that paragraph 2 should be separated from paragraph 1 (*a*) by a whole series of other definitions; the latter could be embodied in the next article.

20. He suggested, as a drafting improvement, that the words "the present articles" in paragraph 2 should be changed to "these articles".

21. Mr. AMADO said that, although he was not opposed to the Drafting Committee's text, he was troubled by a seeming tautology. It was hardly conceivable that an international agreement could not be governed by international law.

22. He was somewhat concerned also at the juxtaposition, in the list within parentheses, of important formal instruments and informal ones.

23. Some explanation, if only in the commentary, should be given of what was meant by "other subjects of international law". Presumably the Drafting Committee had had good reason for using that term, which raised the difficult question whether individuals could be subjects of international law, a question which had been discussed at length in the Commission in connexion with the formulation of the Nuremberg principles.

24. Mr. GROS, speaking both as Chairman of the Drafting Committee and as a member of the Commission, suggested that the answer to the question raised by Mr. de Luna and Mr. Amado could be found in the special rapporteur's commentary, where the concept of subjects of international law was linked with that of capacity to conclude treaties.

25. He believed the Commission's view was that the cases mentioned by Mr. de Luna should be excluded from the scope of the draft because federations of associations, for example, had no capacity to conclude a treaty. In the case of Mr. de Luna's third example, the possibility of such a body cntering into a contractual type of relationship had been recognized by the other partner, but the resultant instrument was not a treaty within the meaning of the Commission's draft. Mr. Tunkin had rightly pointed out that the intention was to deal only with treaties, whatever their designation, concluded between states, between states and international organizations, or between international organizations.

26. Mr. BARTOŠ said that Mr. Amado's first criticism of the text would be justified if the Commission failed to define which international law — public or private — governed treaties. There could be international agreements governed by private international law, an example of which was that concluded between Yugoslavia and Switzerland concerning the insurance of ships leased to the latter at a time when Yugoslavia had still been neutral during the Second World War. At the end of the war, seeing that a ship had been seriously damaged while in Swiss service and Switzerland had been obliged to insure the ship on Lloyds policy terms, a dispute had arisen. To settle it, a *compromis* had been drawn up for submission of the agreement to arbitration under private international law. The Drafting Committee and the special rapporteur should consider inserting the appropriate qualification either in the text of the definition or in the commentary.

27. On the question of the reference to "other subjects of international law", he recalled the ruling of the International Court in the Anglo-Iranian Oil Company case and that one of the grounds on which the Iranian Government had contested the Court's jurisdiction had been that the dispute was between a private company and Iran, and not between the United Kingdom and Iran. Yet in the Commission it had been claimed that

[1] League of Nations *Treaty Series*, Vol. CLXXXIX, p. 361.
[2] ibid., Vol. XXIII, p. 255.
[3] United Nations *Treaty Series*, Vol. 162, p. 270.

"international" companies should have international legal personality and be the subject of *compromis* for international arbitration in disputes with states.

28. Even before the Anglo-Iranian Oil Company case, the United States Government had perceived the problem and initiated the practice of concluding, simultaneously with the signature of the contract between the foreign state and an American company, a treaty with the state in question. By those treaties, known as guaranty agreements, it espoused in advance the claims of private United States companies which had concluded concessionary or financial agreements with another state. That method enabled the United States Government, if necessary, to protect United States' interests by direct intervention, in accordance with international law, by virtue of the guaranty agreement and not of a substitution; in other words, to support a claim at private international law by diplomatic action. In his opinion, in such cases, it was only the guaranty agreement that was governed by public international law. Thus the articles being prepared by the Commission did not affect agreements with companies, but only treaties between states and other true subjects of international law.

29. In his opinion the examples mentioned by Mr. de Luna showed what kind of international agreements were a mixture of public international law treaties and contracts under private international law. They should be mentioned in the commentary but, at least as far as the first reading was concerned, should be excluded from the scope of the draft articles.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that if the Commission so wished, the possibility of individuals being parties to a treaty could be more expressly excluded, but the Drafting Committee had thought that if the definition were read as a whole no misunderstanding on that point could arise. The difficulty in following the course suggested by Mr. Tunkin was that the rest of the draft dealt almost exclusively with treaties concluded between states, and no decision had yet been taken as to whether a separate chapter was to be prepared on treaties between international organizations.

31. The phrase "or other subjects of international law" had been used advisedly so as not to exclude certain entities such as the Holy See, and belligerents which had received *de facto* recognition. Originally, he had excluded individuals by inserting the qualification of treaty-making capacity, but the Drafting Committee had thought that unnecessary.

32. Though there was a certain tautology in the language, the emphasis on the international character of the treaty was necessary to keep the definition on the proper plane.

33. The answer to Mr. Amado's question why it was necessary to describe the instrument as governed by international law had been given by Mr. Bartoš, who had made a strong case for its retention. In addition to his excellent examples, there were treaties of a tripartite character such as those concluded between the International Bank, a private corporation and a government.

34. He saw no serious objection to the somewhat rough and ready order of the list contained in brackets. It was certainly not intended to indicate an order of importance.

35. He assured Mr. Rosenne that a definition of a treaty in simplified form was to be included. Such a definition was important for the interpretation of certain articles, but the Commission had not yet formulated the definition.

36. The drafting suggestions put forward by Mr. Briggs were radical and in his opinion would not make for elegance. He still continued to believe that it would be neater to start with an article on definitions and to deal subsequently with the scope of the articles in article 2; he saw no great drawback in paragraph 2 being separated from paragraph 1 (*a*) by the other definitions.

37. Mr. de LUNA said that, in the interests of clarity and in order to exclude from the application of the draft all concessionary or guaranty agreements, the word "public" should be inserted after the words "which is governed by". He made that suggestion although aware that the remainder of the draft was concerned with public international law.

38. Mr. VERDROSS proposed that the words "which is concluded between two or more states..." should be placed before "and is governed by international law". The existing order of the two provisos in question was not logical: the more important one, which related to the fact that an agreement, in order to be a treaty, had to be concluded between two or more states or other subjects of international law, should be placed first.

39. In order to avoid giving the impression that individuals were included in the expression "other subjects of international law", it would perhaps be advisable to specify that the subjects in question were communities.

40. The term "international" before "agreement" was redundant in view of the subsequent qualification that the agreement must be "governed by international law". The repetition did no harm, however, and he would not press the point.

41. Mr. TUNKIN said that, in the light of the explanations given by the special rapporteur, he accepted the retention of the phrase "or other subjects of international law". The phrase could cover, in addition to the examples already given, a nation which was fighting for its independence but which did not yet constitute a state. The fact that there was no intention to cover individuals could be made clear in the commentary.

42. Lastly, he supported the proposal of Mr. Verdross that the order of the two final provisos should be reversed, though the special rapporteur's wording should be retained.

43. Mr. AMADO said that, in spite of the explanations given by the special rapporteur, he was still uneasy about the use of the expression "which is governed by international law".

44. The expression was adequate if it was merely intended to cover questions of capacity, of the free consent to the treaty and of the other constituent elements of the intention of the states parties to the treaty.

But as far as the contents of a treaty were concerned, it happened very often that agreements between states were made subject to the private law of one of the two countries concerned. An example was the arrangements relating to wheat which existed between Argentina and Brazil. Those agreements constituted treaties; they were entered into within the framework of international law, but were governed as to the substance of their provisions by private municipal law.

45. Sir Humphrey WALDOCK, Special Rapporteur, replied that that was precisely why, in his original draft, he had used the expression "an agreement intended to be governed by international law". The expression "intended to be governed" left the states parties free to decide that the subject-matter of the treaty would be governed by private municipal law. The Commission had, however, decided to delete the words "intended to be".

46. With regard to Mr. Paredes' proposal, the question of freedom and spontaneity in the formation of the treaty would arise at a later stage in the draft articles. The point was a proper one, but hardly suitable for discussion at the definitions stage.

47. Mr. GROS said that the point mentioned by Mr. Amado had been discussed by the Commission when it had first considered the definition of "treaty". The problem of international contracts was a very real one, but the Commission was not called upon to deal at the moment with the nature and force of those contracts between two states, or between a state and a private company or individual. It would therefore be sufficient if the Commission indicated in the commentary that the problem of international contracts was not dealt with in the draft articles.

48. All countries had long-term contracts for the supply of certain commodities, but those contracts did not necessarily constitute treaties within the meaning of the draft articles. Of course, the position was different where contracts entered into by two or more states were governed by international law by the will of the parties; then they were genuine treaties.

49. With regard to Mr. de Luna's suggestion that the expression "public international law" should be used, certainly in French "*droit international*" was quite proper in the context; there could be no doubt in the minds of the reader that public international law was meant. That became all the clearer if the order of the last two provisos were reversed, as proposed by Mr. Verdross.

50. Mr. PAREDES said that, while an individual could not be a party to a treaty, private interests could be protected by a treaty. It was quite common for two states to enter into a treaty for the precise purpose of protecting the interests of private corporations and individuals. The contracting parties to the treaty, however, were invariably states.

51. He suggested therefore that, in article 1 (*c*), the term "Party" should be defined as meaning "a state or other collective subject of international law". The use of the adjective "collective" would exclude individuals.

52. Mr. CASTRÉN said that Mr. Verdross's proposal for the reversal of the order of the last two provisos was acceptable, if made as indicated by Mr. Tunkin.

53. He hesitated, however, to support Mr. Verdross's other suggestion for the introduction of the concept of a "community", because it did not cover international organizations.

54. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the Commission was defining "treaty" solely for the purposes of the draft articles, and consequently the explanations given by Mr. Gros constituted an adequate answer to the point raised by Mr. Amado. It would be sufficient to indicate in the commentary that the Commission did not take any position regarding the legal nature of the international contracts in question.

55. He could not accept the suggestion of Mr. Paredes for the insertion of the term "collective" in the definition of "party" in article 1 (*c*); the interests of corporations were the most important which the parties had in mind when concluding a treaty which affected private interests and a corporation was surely a collective body.

56. He accepted the proposal of Mr. Verdross for the reversal of the order of the last two provisos, as modified by Mr. Tunkin.

57. Mr. AMADO said that he was still not satisfied with the explanations offered as to why international agreements had to be described as being governed by international law. If the international agreements to which he had referred were not treaties, why were they registered with the United Nations and published in the United Nations *Treaty Series*?

58. He was still convinced that the expression "governed by international law" was ambiguous and he suggested that it should be replaced by the expression "considered as such by international law". That formulation would make it clear that the definition covered all agreements regarded as treaties in international law and not merely those agreements the terms of which were governed by international law.

59. Mr. BARTOŠ said that the proviso "governed by international law" provided a clear line of demarcation as far as past treaties were concerned, because former international law practice had not confused treaties and contracts at private law, but the contemporary situation was more complex.

60. Numerous technical assistance agreements had been entered into by the United States of America with other countries. In many respects those agreements resembled private law contracts, but they nonetheless constituted genuine treaties subject to public international law. Although, as far as the performance of the contractual obligations was concerned, those agreements stipulated the application of certain provisions of United States private municipal law, they had all the distinctive features of international treaties. First, the jurisdiction of United States courts was expressly excluded; secondly, the agreements were registered with the United Nations. Moreover, certain discretionary powers in respect of

implementation and suspension were retained by the President of the United States, powers which were out of keeping both with a contractual relationship in private law and with the principle of the equality of states.

61. The practice of states thus showed that there were a great many agreements partaking both of contract and of international treaty; as a rule, however, those agreements were governed by international law. In view of that complex situation, he thought the formulation should stand, with the order of the two provisos reversed in the manner suggested by Mr. Verdross and agreed to by the special rapporteur.

62. He agreed with Mr. de Luna that in everyday use, the expression "international law" meant public international law. For that reason he did not insist on the insertion of the qualifying adjective "public" before "international law" in the text. He urged, however, that the commentary should explain that in the draft articles the term "international law" meant public international law.

63. He did not favour the introduction into the text of the articles of any reference to communities. That could be dangerous and might encourage claims that communities such as minorities would be considered as having legal personality in public international law, seeing that they had been recognized as having certain prerogatives in international law but were not capable of being parties to treaties. A term of that kind was not appropriate to the object of their endeavours.

64. Mr. AGO urged that the text proposed by the Drafting Committee should be adopted with the sole change of the inversion of the order of the last two provisos. That change should meet the point raised by Mr. Amado. The first proviso would specify that the treaty was concluded between two or more states or other subjects of international law; the second proviso would automatically exclude international contracts even when concluded between two states, since those contracts were not "governed by international law". Naturally, it would be necessary in many cases to examine the intention of the parties to the agreement: if the parties, although states, had intended to undertake only obligations under municipal law, the agreement was a contract and not a treaty.

65. He agreed with Mr. Bartoš that all references to "communities" should be excluded. The term would not cover the Holy See, perhaps the most important example of those "other subjects of international law" which concluded treaties.

66. Moreover, if the definition were to specify that it covered only communities, it could lend itself by implication to the erroneous interpretation that the Commission might consider individuals as subjects of international law. In fact, even those writers who, unlike himself, considered individuals as subjects of international law, had never suggested that an individual could be a party to a treaty; therefore the proposed specification was entirely unnecessary.

67. He agreed with Mr. Gros that it was unnecessary to qualify "international law" by the word "public". The point should simply be referred to in the commentary.

68. Mr. BRIGGS said he withdrew his proposal to transfer to a separate paragraph the list of instruments in parentheses.

69. Many of the difficulties encountered during the discussion had been due to the use of the title "Definitions" in article 1. In fact, the Commission did not propose to lay down theoretical definitions, but merely to study the manner in which certain terms were used in the draft articles. He therefore suggested that the title of article 1 should be amended to read "Use of terms".

70. The CHAIRMAN said it appeared to be generally agreed that the final passage of the paragraph should be amended so that the first proviso, "which is concluded between two or more states or other subjects of international law", would precede the second proviso, "and is governed by international law".

71. If there were no objection, he would consider that the Commission agreed to refer the article, with that amendment, back to the Drafting Committee for final drafting.

It was so agreed.

The meeting rose at 11.40 a.m.

656th MEETING

Monday, 4 June 1962, at 3 p.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 (*resumed from the 654th meeting*)

ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS (*resumed from the 654th meeting*)

ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS (*resumed from the 654th meeting*)

1. The CHAIRMAN invited the Commission to resume its consideration of articles 17, 18 and 19 on reservations.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that there seemed to be a strong majority in the Commission in favour of the principle stated in Alternative A, that in the case of general multilateral treaties the admissibility of reservations should be decided by each state within the framework of its relations with the reserving state. Some members had had difficulty in accepting that principle, but seemed to have agreed that for the time being the Commission could do little more than refer in the commentary to its disadvantages. Thus, the whole question seemed to be resolving itself into a matter for the Drafting Committee.

3. Mr. Ago had said that to adopt that principle could not be regarded as a very progressive step; he (the