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Summary record of the 658th meeting

Topic:
Law of Treaties

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658th MEETING

Wednesday, 6 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)*

ARTICLE 27. — THE FUNCTIONS OF A DEPOSITARY

1. The CHAIRMAN invited the Commission to consider article 27.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 27 attempted a comprehensive statement of the duties of the depositary; for that reason, the text was somewhat long. It could perhaps be shortened, for example, in its passages relating to reservations, by a reference back to the articles on the subject as ultimately adopted by the Commission.

3. The duties of the depositary were undoubtedly easier to perform if the depositary was the secretariat of an international organization; they were on the whole more burdensome for a state.

4. Mr. YASSEEN said he agreed with the special rapporteur's view, stated in his commentary, that the depositary was not a mere postbox. The depositary had a very useful and important administrative role to play. It was, however, essential to confine the duties of the depositary to purely administrative functions; there should be no suggestion that the depositary could have a role in any way resembling that of a judge or arbitrator.

5. Most of the provisions of article 27 described administrative functions in perfectly acceptable terms. Some, however, such as those in paragraph 6 (*a*), would give the depositary the right to examine certain situations in the light of the terms of the treaty. That might be easy in some cases, as when a depositary had to verify the letters of credence of a representative. The position would be much more delicate, however, if the depositary were called upon to verify that a particular reservation was admissible, particularly if it were a question of determining whether it was compatible with "the object and purpose of the treaty". The Commission, from its discussion of article 17, was well aware of the difficulties to which that compatibility test could give rise.

6. A depositary could not, of course, be prevented from examining the compatibility of a reservation; there remained, however, the difficult question of determining the effects of that examination. The provisions proposed by the special rapporteur in article 27 did not state that the conclusion which might be reached by the depositary would be binding on the states parties to the treaty. It should be made clear that the opinion of the depositary on the question of compatibility could be circulated to the parties, but that the last word would always remain with the parties to the treaty themselves.

7. Mr. CASTRÉN said he agreed with Mr. Yasseen. It was not desirable to impose upon the depositary, as was done in paragraph 6 (*a*), the responsibility for verifying whether a reservation was "expressly prohibited or impliedly excluded by the terms of the treaty" and consequently inadmissible. It was hard to see what the depositary could do in the circumstances; should it for example, refuse to accept the instrument of ratification or accession? The decision should be left to the interested states themselves, which would be called upon, under the terms of the articles on reservations, to give or refuse their consent. It was the duty of the depositary to communicate any reservations to all states parties to the treaty, without even expressing an opinion on the subject of their validity.

8. The Commission should not feel bound by the practice of the Secretary-General of the United Nations in the matter of the functions of a depositary. The Commission was attempting to codify the law applicable to all depositaries, whether secretariats of international organizations or states.

9. Mr. ROSENNE said that a number of purely legal questions needed to be clarified before article 27 could be formulated in detail.

10. The first was whether there existed any international law in the matter, or whether the functions of a depositary were purely and simply administrative, the depositary performing what was described in the commentary as a "procedural role in what is really the internal administration of the treaty". In his opinion, there existed a substantial body of international law on the subject of the functions of the depositary, the importance of which had only recently become apparent.

11. The next was whether there was any difference in law between the case where the depositary was one of the High Contracting Parties themselves, and the case where the depositary was the secretariat of an international organization. The issue was not purely theoretical. One of the most important questions to be determined, and one which he had encountered very soon after the independence of his country, was whether a party to a treaty which was entrusted with the function of depositary was entitled in law to exercise those functions in the light of its own national policy; was it, for instance, entitled to interpose its national policy on such a delicate issue as recognition? The particulars given in the reply by Israel to a questionnaire circulated in 1949 by the Secretary-General of the United Nations on the subject of the law of treaties[1] were of interest in that connection.

12. In his opinion, there was no fundamental difference in law between the case where the depositary was a party to the treaty and the case where the depositary was the secretariat of an international organization. In both cases, the depositary operated as an organ of the community of states from which it had accepted the depositary functions.

13. On those premises, the question arose by what general principle the depositary should be guided. On that point, he wished to quote two striking statements made by the late Mr. Kerno, the then Legal Counsel of

[1] *Yearbook of the International Law Commission 1950*, Vol. II (United Nations publication, Sales No.: 1957.V.3, Vol. II), p. 217.

the United Nations, at the third session of the International Law Commission. First, Mr. Kerno had quoted from the concluding passage of his own oral statement to the International Court of Justice in the case concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide:[2] "The Secretary-General seeks only to be the faithful, conscientious and impartial servant of all those concerned".[3] His second statement had been made a few meetings later and stressed that the Secretary-General, in exercising his depositary functions, "considered himself to be the trustee of the parties to the convention and of the other Member States."[4] It was significant in the light of the rich common law background of the term, that the late Legal Counsel had used the term "trustee"; that the choice of the term had been deliberate was shown by his having repeated it at the next meeting.[5]

14. That conception of the duties of a depositary was fully consistent with the terms of one of the earliest resolutions adopted by the General Assembly, in which it had attempted to describe the duties of a depositary: resolution 24 (I) of 12 February 1946 on the transfer of certain functions, activities and assets of the League of Nations. Section I A, relating to certain instruments for which the League of Nations had undertaken to act as custodian of the original signed texts and to perform certain secretariat functions, described those functions as "functions, pertaining to a secretariat, which do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties".

15. Yet the General Assembly had never endorsed the mere postbox theory of the functions of the depositary. That was clear from the resolution he had cited and from subsequent resolutions.

16. The depositary should have a recognized power to take provisional decisions in relation to the nature and scope of an instrument submitted to it in the performance of the depositary functions. That conception of the depositary function involved what the Canadian representative at the 616th meeting of the Sixth Committee of the General Assembly, during the discussion at the fourteenth session on the Indian reservation to the Convention of the Inter-Governmental Maritime Consultative Organization, had described as "some adjudicative attributes".[6] The power of the depositary would not, however, extend to final adjudication and any decision would be purely provisional; if disagreement resulted from that provisional decision, adequate machinery existed for resolving the difficulties.

17. With regard to paragraph 6 (*a*), he was not convinced that the depositary had either the duty, the right or the power to verify that a reservation was "not one expressly prohibited, or impliedly excluded by the terms of the treaty and for that reason inadmissible". The depositary could not be given that power, because its exercise would imply a substantive decision. However, the depositary had the power to establish provisionally whether a particular statement constituted a reservation or not. The Secretary-General had done so in the case of a reservation to the IMCO Convention; only subsequently had it been established that a certain statement did not constitute a reservation, but the Secretary-General as a depositary had properly taken a provisional stand on that point.

18. The next question was to whom was a depositary responsible. Where the depositary was a state, it would be responsible to the Contracting Parties or to the community of states from which it had accepted the duties of a depositary. Where the depositary was the Secretary-General of an international organization, even if the treaty mentioned him personally, his appointment was not *ad personam,* but in his capacity as Secretary-General; accordingly, he was responsible to his own organization for the manner in which he discharged his depositary functions, so that the question of his discharge of those functions could be discussed in the appropriate organs of the organization.

19. The experience of the IMCO Convention had also shown the existence of a problem connected with the autonomy of the different international organizations. Although the problem had not actually been solved, he believed that the depositary should not be responsible to any other organization than that which he served as Secretary-General; for instance, in the case of the Indian reservation to the IMCO Convention, he was responsible not to the other organization as such, but to the parties to the IMCO Convention, of which he was the depositary.

20. Another problem arose out of the recent case-law of the International Court of Justice. In its judgment rendered on 26 November 1957 on the preliminary objections in the case between Portugal and India, the Court had decided, particularly with reference to the first and second objections by India, that a legal relationship could be established between India and Portugal by the deposit of an instrument, without India being aware that the instrument had been adopted and that that relationship had been so established.[7] He suggested that, independently of the particular question of the acceptance of compulsory jurisdiction under Article 36 (2) of the Statute of the Court, which was governed by that Statute, that rule was not suitable for inclusion in the draft articles. It was not a satisfactory rule for the purpose of the general law of treaties: a state was in principle entitled to know its precise legal position before that position produced its effects.

21. Thus, while he agreed with the general tenor of the

[2] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Pleadings, Oral Arguments, Documents,* Advisory opinion of 28 May 1951, I.C.J. 1951, p. 325.

[3] *Yearbook of the International Law Commission 1951,* Vol. I (United Nations publication, Sales No.: 1957.V.6, Vol. I), 101st meeting, para. 40.

[4] *ibid.,* 104th meeting, para. 38.

[5] *ibid.,* 105th meeting, para. 55.

[6] *Official Records of the General Assembly,* Sixth Committee, Summary Records of Meetings, p. 83.

[7] *Case concerning the right of passage over Indian territory* (Portugal v. India) (Preliminary objections). I.C.J. Reports 1957, p. 125 *et seq.*

article, he felt that a discussion of the legal issues to which he had referred should be included in the commentary.

22. With regard to the text of the article, he suggested that paragraph 3 (*d*) should be amended to state that the depositary should inform "promptly" all the other interested states of the receipt of the instrument in question.

23. In the same paragraph, he did not think it was necessary to stipulate that the depositary should transmit the actual text of the instrument in question to all the states concerned: preferably, in keeping with the practice followed by the Secretary-General of the United Nations, only the essential contents of the instrument should be communicated.

24. Mr. JIMÉNEZ de ARÉCHAGA said he was in substantial agreement with the article, which constituted an adequate codification of the practice of the Secretary-General as depositary.

25. He suggested, however, that in paragraph 2 (*b*) the words "or established in practice" should be added after the words "such further authentic texts in additional languages as may have been specified in the treaty". The Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7) showed that the Secretary-General also prepared translations into additional languages in cases where the treaty contained no provisions on the subject. The Commission should not give the impression that it intended to change that excellent practice.

26. Paragraph 2 (*c*) indicated that the depositary had the important function of determining which states were entitled to become parties to the treaty. He agreed with Mr. Rosenne that there was no fundamental difference in that respect between the secretariat of an international organization and a state, and that a depositary should always act as an organ of the community of nations. In practice, however, the exercise of the depositary's functions must inevitably be influenced by the international policy of the state or the organization concerned. Neither a state nor an organization could be expected to send communications to, or establish contacts with, a state which it was its policy not to recognize. In fact, the Summary of the Practice of the Secretary-General showed that, where a treaty had been opened to accession by "all states" in accordance with its terms, the relevant clause of the treaty had been interpreted to cover only states Members of the United Nations and specialized agencies, states parties to the Statute of the International Court of Justice and states invited to the conference which had formulated the treaty.

27. There was one significant difference between a state and an international organization acting as depositary; in the case of an international organization, the policy would be that of the majority of the member states rather than the national policy of a particular state. It was therefore desirable to encourage the practice of using international organizations as depositary.

28. With regard to paragraph 3 (*d*), he supported Mr. Rosenne's suggestion for the inclusion of the word "promptly", since the Commission had already agreed, in connexion with the deposit of ratifications, that the mere deposit of an instrument of ratification was sufficient to bring a treaty into force and that its effectiveness was not dependent on the communication of that instrument to other states.

29. In paragraph 4, he suggested the insertion of some indication that one of the duties of the depositary was to ensure that such provisions of the treaty as those on the time-limit for the deposit of instruments were duly complied with. It was necessary to specify in that connexion that the provisions of the treaty itself on the subject would prevail over those of the draft articles.

30. The duty specified in paragraph 6 (*c*) existed also where the treaty was silent. After the words "any such provisions", therefore, some such phrase as "or in the absence of any such provisions" should be inserted.

31. With regard to paragraph 6 (*a*), he agreed with previous speakers that the depositary's functions were limited to a preliminary verification, subject to the final decision of the parties to the treaty themselves. He would not exclude the right set forth in paragraph 6 (*a*), but wished it to be made clear that the depositary should always circulate a reservation to all the states concerned; it had the right, of course, to append its opinion on the subject of the reservation as provided in paragraph 7 (*a*),

32. Mr. de LUNA, after congratulating the special rapporteur for steering a commendable middle course between two extremes, said it was essential not to underrate the importance of the functions of the depositary; the Commission should depart from the tradition established in respect of bilateral treaties, as it had done in respect of reservations. As already mentioned by Mr. Tunkin and Mr. Rosenne, it was necessary to forestall abuses, particularly where a state might allow its functions as depositary to be affected by its national policy.

33. Historically, the law of treaties had its origins in the rules observed with respect to bilateral treaties. Even after the appearance of international congresses, collective treaties had been regarded as a series of individual bilateral treaties where all the signatory states exchanged ratifications with each other, as had been the case with the Final Act of the Congress of Vienna of 1815 and the Geneva Convention of 1864.

34. That elaborate process having been found cumbersome, the custom next grew up of exchanging ratifications with only one state, which had a special interest in the subject matter of the treaty or had acted as host to the conference which had formulated it. Finally, the concept had emerged of a collective treaty that was not just a juxtaposition of bilateral agreements and the functions of a depositary had then increased in importance. It was not possible, however, to go so far as to empower the depositary to determine unilaterally, and with binding force, the date of the entry into force of a treaty: to give the depositary such powers would lead to the abuses referred to by Mr. Tunkin.

35. It was for those reasons that he fully approved the interpretation given in paragraph 6 of the special rapporteur's commentary of the term "to determine" used in paragraph 84 of the Summary of the Practice of the Secretary-General (ST/LEG/7).

36. He agreed with Mr. Yasseen, Mr. Castrén and Mr. Rosenne on the nature of the depositary's functions. While there should be no suggestion that the depositary had any power to take unilateral decisions on substance and thus substitute its own decision for that of the states parties to the treaty, the depositary's functions should not be limited to those of a mere postbox. The postbox theory was a legacy of bilateralism.

37. The most important point in article 27 was that dealt with in paragraph 6 regarding reservations, and the Commission should not take a decision on that paragraph until it had agreed on the provisions on the subject of reservations.

38. He agreed with Mr. Rosenne that there was no difference in law between a state and an international secretariat as depositary, although in practice there would be the difference indicated by Mr. Jiménez de Aréchaga. He did not think, however, that any distinction should be drawn in the draft articles for that reason.

39. It was necessary to ensure legal certainty in relation to the treaty. Certainty was often more important in law than justice, as was shown by the existence of statutory limitations. It was therefore essential not to leave any doubt on such important subjects as the date of the entry into force of a multilateral treaty.

40. The Commission should strike a balance between the need for efficiency in the service of the treaty and the need to prevent any possible abuse by the depositary, particularly where that depositary was a state party to the treaty.

41. Mr. GROS commended the special rapporteur for eschewing theoretical considerations and proposing a set of rules drawn largely from practice.

42. Reference had been made to the possibility of an abuse being committed by the depositary. Such an abuse would imply bad faith on the part of the depositary, something which was extremely unlikely; it was a rule of international law that states must be presumed to be acting in good faith. In any case, he did not see how the contemplated abuse of powers by the depositary could represent any real danger.

43. In practice, the depositary state remained at the same time a party to the treaty. In practice, the depositary state did not have two separate departments to deal with correspondence in connexion with a treaty, one to consider that relating to the state's functions as a depositary and another to examine that relating to the state as a party to the treaty. The fact that a state was a depositary could not debar it from expressing its rights as a party to the treaty.

44. He supported the special rapporteur in not adopting the postbox theory of the functions of the depositary. Since the depositary did not act as a mere postbox, the department dealing with correspondence with other states relating to a treaty, acting of course in good faith and with the knowledge gained as a result of the experience of the depositary state as a negotiator of the treaty, would consider whether the points raised in the correspondence relating to the treaty were acceptable or not. Naturally, in that correspondence, the depositary state would proceed differently, according as it was writing as depositary or as a party to the treaty.

45. If the depositary state were to commit an abuse, through confusing its right as a party to pronounce on the effect of a reservation with its obligation as depositary to transmit the reservation provided it was *prima facie* admissible, the party or parties concerned would have an easy remedy at their disposal: the reserving state could send a copy of its reservation to all the contracting parties and protest against the abuse allegedly committed by the depositary.

46. In view of the existence of that remedy against abuse, he agreed with the special rapporteur that article 27 should contain provisions which would permit the depositary to verify the validity of any communications received by it in connexion with the treaty.

47. All the examples of possible abuses given by Mr. Tunkin at the previous meeting related to problems of concern to the parties as a whole, cases in which the depositary, as a contracting party, had taken a certain position. There had never been any case in which the depositary had taken an abusive final decision where the matter could not be settled by agreement between the parties to the treaty; the depositary had no means of imposing its own views.

48. In short, it was for the parties as a whole to settle any dispute that might arise in connexion with the action of the depositary.

49. He therefore saw no reason why the depositary should be under an obligation to transmit to all the other states concerned the text of an obviously inadmissible reservation, for example, a reservation expressly excluded by the terms of the treaty.

50. A more delicate problem could arise in cases where the assessment of the validity of a reservation proved difficult. However, even under the postbox theory the depositary would transmit the text of all reservations to all the states concerned in compliance with its obligations, and obviously, at the same time, would communicate its opinion as a contracting party to the other states, a capacity which it did not forfeit by reason of its functions as depositary.

51. For those reasons, he found the proposals of the special rapporteur acceptable, subject to drafting improvements.

52. Mr. VERDROSS associated himself with the comments made by Mr. Yasseen, Mr. Castrén and Mr. de Luna. Clearly, a distinction should be drawn between the communication of instruments concerning the treaty to the parties, and decisions of substance. The special rapporteur's text seemed to go too far: a depositary could certainly not determine whether a

reservation was prohibited under the terms of the treaty or was incompatible with its object. That decision could be made only by the parties. The article should stipulate that the function of the depositary was to make any observations necessary on the instrument and to communicate both the instrument and the comments to the parties.

53. Mr. LACHS said that the central issue was the extent of a depositary's functions. A depositary was appointed by the parties for reasons of practical convenience and could not possess any rights beyond those vested in it by them. The depositary could certainly not exercise any interpretative functions which might affect the rights of the parties.

54. Regrettably there had been cases, for example, in connexion with the International Sanitary Conventions of 1894 and 1903 and the International Convention on the Protection of Literary and Artistic Works, of a depositary yielding to the temptation of not keeping separate its functions as a depositary and as a party to the treaty and of attaching its own comments when notifying the other Parties of the receipt of instruments. Some difficulties had also arisen in the early stages of both League of Nations and United Nations practice. Of course, ill will should not be presumed but nevertheless, in order to prevent such occurrences in the future, it was important in the article to circumscribe the depositary's functions as much as possible while taking care not to prejudice the smooth operation of the treaty.

55. In addition to the important restriction that questions of interpretation should be settled by the parties themselves, an express provision was also necessary to prevent the depositary from having any influence on the entry into force of the treaty.

56. On the whole the special rapporteur's text was consistent with his own line of thought, but he had strong objections to paragraph 4 (*b*) and to some of the provisions in paragraph 6, which vested excessive functions in a depositary. Some amendments in the light of the discussion would be essential in order to avoid misconstructions or difficulties such as those which in the past had resulted from an abuse of powers by a depositary.

57. Mr. LIANG, Secretary to the Commission, said that some misunderstanding seemed to have arisen over the wording of the second sentence in paragraph 84 of the Summary of the Practice of the Secretary-General. The document had been drafted in French and there was a slight shade of meaning between the word "*déterminer*", used in the French text, and the words "to determine", in the English. The former had a less rigorous connotation but even the latter could not be held to contain any implication of a unilateral decision or one with binding effect.

58. The functions of a depositary lay midway between serving as a post office and acting as an organ for sovereign determination; it had never been contended that a depositary possessed the latter power. Yet, the depositary had to make determinations of facts and occasionally of mixed questions of fact and law. The Secretary-General of the United Nations, for example, had to determine, as a depositary, questions in accordance with the relevant clauses of the agreement. Thus, if a reservation were filed to a clause which was not open to reservations, the instrument of ratification of the reserving state could not be counted among those necessary to bring the treaty into force.

59. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Yasseen and other members of the Commission that the intention of the article should be made clear. He had used the word "verify", which also appeared in the Summary of the Practice of the Secretary-General, to describe a process, something short of determination, by which the depositary provisionally took a position as to whether on the face of it a ratification or reservation was in order. Some minor element of interpretation was inescapable because, as all members agreed, a depositary could not simply act as a post office and communicate all the instruments received without examination. Apart from the more serious possibility of an intentional attempt by one of the parties to file a reservation that was expressly prohibited by the treaty, the process of verification was useful as a means of calling attention to minor errors or faults due to inadvertence.

60. The draft omitted to indicate, and that omission should be made good, what took place after that provisional process of verification, particularly if a divergence of view arose between the depositary and the state concerned.

61. Clearly, the other parties should be informed if an instrument was not in order and a collective decision should be taken. The depositary certainly could not take a unilateral decision.

62. Mr. LIU said he not only agreed with the special rapporteur's remarks, but would go even further and state that, by virtue of the right possessed by each party to the treaty, the depositary would be free, when transmitting any instrument, to attach its own observations. The fact of being a depositary should not restrict its rights in that regard, and he foresaw no danger of abuse.

63. The international status of the Secretary-General of the United Nations, or of any other international organization acting as a depositary, was such that he would be particularly anxious to be impartial. He knew of no case where the Secretary-General had taken any action beyond that of pure verification or determination of facts.

64. Mr. TUNKIN, amplifying his observations at the previous meeting, said that although article 27 at first sight seemed unobjectionable, closer examination revealed that it failed to provide adequate safeguards against the unlawful acts committed by depositaries in recent years. The article might also lend itself to an excessively broad interpretation as conferring rights going beyond those normlly vested in a depositary.

65. In answer to the question what were the attributes of a depositary, he would reply that they were juridically quite distinct from those of a party to the treaty and

involved very different functions. A depositary's functions were defined by the consent of the parties and prescribed in the treaty itself. It was, for instance, inadmissible for a depositary to refuse to accept the instrument of ratification of a state which it did not recognize but which, under the terms of the treaty, was entitled to become a party; nor should the depositary take advantage of its functions to resort to procedural measures designed to prevent the admission of a certain state. Cases of both types had occurred in practice.

66. The article should include some kind of definition of the nature of the institution of depositary, based on what actually happened in international life, and should specify more precisely the scope of a depositary's functions.

67. He agreed with the special rapporteur that a depositary was not a mere postbox, but emphasized that, if there were any uncertainty about an instrument filed with it, the depositary possessed no right of decision whatever. However, in the sense attributed to it by the special rapporteur, the word "verify" was appropriate to describe a certain formal process of establishing a factual situation that should then be communicated to the parties. He was also right in proposing that the next stage, after that process had been completed, should be covered in the article.

68. Mr. PAREDES said that he could not express a final opinion on article 27 until he had received the Spanish text, but in general found himself in agreement with Mr. Tunkin.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission seemed to be largely in agreement as to the general nature of the institution and that the depositary was an agent or trustee of the parties. The Drafting Committee should be able to improve the text in a manner that would take the Commission's observations into account.

70. The CHAIRMAN observed that there seemed to be a feeling that in some respects the powers the article conferred on a depositary were a little too wide. He suggested that it should be referred to the Drafting Committee.

It was so agreed.

71. Mr. BARTOŠ proposed that the special rapporteur and the Drafting Committee be requested to prepare an article on discrepancies in the texts of a treaty in several languages. The matter had been raised by Mr. Rosenne and himself at the previous meeting.[8]

72. Sir Humphrey WALDOCK, Special Rapporteur, said that in that case it would be helpful if Mr. Bartoš and Mr. Rosenne would provide him with a brief outline in writing indicating the kind of provision they had in mind.

It was so agreed.

[8] 657th meeting, paras. 92 and 93.

DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE *(resumed from the 655th meeting)*

ARTICLE 2. — SCOPE OF THE PRESENT ARTICLES

73. The CHAIRMAN said that the Drafting Committee had prepared the following redraft of article 2:

> "1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph (*a*).
>
> "2. The mere fact that, by reason of the provisions of the preceding paragraph, the present articles do not apply to any kind of international agreements not in written form shall not be understood as affecting in any way such legal force as these agreements may possess under general international law."

74. Mr. TSURUOKA proposed the deletion of the word "may" before the word "possess" in paragraph 2.

75. Mr. CASTRÉN suggested that the word "general" in the same paragraph should also be deleted, since international agreements not in written form might be recognized to possess legal force.

76. Mr. VERDROSS said that the clause had been drafted in that way deliberately so as to leave open the question whether or not a treaty not in written form possessed legal force under international law.

77. Sir Humphrey WALDOCK, Special Rapporteur, confirmed that that part of paragraph 2 had been drafted in that manner because he had understood that, as in 1959,[9] the Commission did not wish to express any view as to the legal effect of agreements not in written form.

78. Mr. BARTOŠ said that the Commission should decide once and for all what was meant in the French text by the expression "*droit international commun*". The adjective "*commun*" seemed to exclude agreements possessing legal force under regional international law. It would therefore be better to use the adjective "*général*".

79. Mr. BRIGGS said that the drafting of paragraph 2 might be improved if it were shortened to read:

> "The fact that these articles do not apply to international agreements not in written form shall not affect in any way such legal force as these agreements may possess under general international law".

80. Mr. GROS, speaking as Chairman of the Drafting Committee, said that the Committee would take Mr. Briggs' suggestions into account. The wording which Mr. Tsuruoka had asked should be changed conformed with the intention of the special rapporteur.

81. Mr. AMADO said that the words "in any way" in the second paragraph appeared to be redundant.

82. Mr. ROSENNE suggested that the wording "such legal force as these agreements may possess under general international law" should be replaced by the

[9] *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 95.

wording "the legal force of these agreements under general international law".

83. Sir Humphrey WALDOCK, Special Rapporteur, said that there was a considerable difference in meaning between the two formulations. The effect of Mr. Rosenne's amendment would be to concede that the agreements in question did possess legal force under general international law.

84. Mr. GROS observed that, while the English text was perhaps more precise than the French, there was no substantive difference between the two.

85. Mr. ROSENNE said he would not press his suggestion.

86. The CHAIRMAN suggested that article 2 should be referred back to the Drafting Committee for redrafting in the light of the comments made during the discussion.

It was so agreed.

ARTICLE 3. — CAPACITY TO CONCLUDE TREATIES

87. The CHAIRMAN said the Drafting Committee had prepared the following redraft of article 3:

"1. Capacity to conclude treaties under international law is possessed by states and by other subjects of international law.

"2. The capacity to conclude treaties may be limited by the provisions of a treaty relating to that capacity.

"3. In a federation, the capacity to conclude treaties depends on the federal constitution.

"4. In the case of international organizations, the capacity to conclude treaties depends on the instrument by which the organization concerned was constituted."

88. Mr. VERDROSS said that the word "federation" in paragraph 3 was ambiguous. For example, the treaty-making capacity of the sovereign states composing the German Federation set up by the Congress of Vienna had surely not depended on a federal constitution. It would be more accurate to say that in a federal state, capacity to conclude treaties depended on the constitution of that state.

89. Mr. YASSEEN said he wished to reserve his position on paragraph 2. The limitations it referred to did not produce incapacity, for a treaty could not render a state incapable of making treaties. A state whose capacity was thus limited could therefore conclude a treaty despite the limitations laid down by treaty. A treaty concluded by that state would not be void, or even voidable, though in departing from the terms of a pre-existing treaty providing for such limitations, the state might have incurred responsibility.

90. Mr. CASTRÉN said that paragraph 1 was not quite satisfactory. Capacity to conclude treaties under international law was not possessed by all states; some states, such as the members of several federal states, lacked that capacity entirely, and some subjects of international law other than states, such as individuals and some international organizations, were in the same position. He proposed therefore that the words "members of the international community" should be inserted after the word "states" and that the adjective "certain" should be inserted before the word "other". More detailed explanations could be given in the commentary.

91. With regard to paragraph 2, capacity to conclude treaties might be limited not only by a treaty, but also by a rule of general international law, for example, the rule governing the right of insurgents recognized as belligerents to conclude treaties. He accordingly proposed that paragraph 2 should be amended to read, either

"Capacity to conclude treaties may be limited by international law", or

"Capacity to conclude treaties may be limited by general international law or by the provisions of a treaty relating to that capacity".

92. So far as paragraph 3 was concerned, it was not enough to refer to federations only; there were other unions of states whose members did not have an unlimited right to conclude treaties. He therefore proposed that the paragraph should be amended to read:

"In a union of states, capacity to conclude treaties depends on the constitution or on the treaty forming the basis of the union".

93. Mr. BRIGGS said that paragraphs 2 and 3 should be deleted.

94. With regard to paragraph 2, when the special rapporteur had introduced his draft of the article, he had stated that it did not deal with restrictions on international capacity,[10] since that question seemed to belong to the group of articles on validity. The statement that capacity to conclude treaties might be limited by the provisions of a treaty represented a denial of the Commission's assumption that, if a state could not conclude any treaties, it was not in fact a state. The Harvard Research draft referred only to limitations of capacity to conclude certain treaties.

95. With regard to paragraph 3, he agreed with Mr. Verdross that "federation" was an ambiguous term. The United States of America, Switzerland, Mexico and Brazil could not properly be called federations. Furthermore, the Drafting Committee's text of the paragraph stated in effect that capacity to conclude treaties depended on a national constitution; but the special rapporteur had drafted the article in his original draft on the premise that international capacity could not be conferred by the constitution of the federal state alone. The use of the term "federation" might be proper in the case of a union of states based on a treaty.

96. His conclusion was that an article consisting of paragraphs 1 and 4 would suffice, although paragraph 4 should be broadened. The instrument by which the organization concerned was constituted might have been modified and, moreover, he was not sure that capacity always derived from such an instrument; in some cases, it might derive from the practice of the organization.

[10] 639th meeting, para. 4.

97. Mr. BARTOŠ said he could not agree with Mr. Castrén that the word "certain" should be inserted before "other subjects of international law" in paragraph 1. It should be explained in the commentary that the reference was to subjects of international law whose treaty-making capacity was recognized by the instruments by which they were constituted or by rules of international law.

98. With regard to paragraph 2, he did not think that reference should be made to "certain" treaties, as had been done in the Harvard Research draft; that point might be explained in the commentary. He agreed with Mr. Castrén that reference should be made to limitations resulting from rules of international law, since certain objective and normative institutions of international law, in addition to the provisions of treaties, imposed such limitations. It would also be advisable to state in the commentary that the limitations in question were those resulting from treaties governing the legal status of subjects of international law.

99. In paragraph 3, the reference to a constitution was inadequate. While most federations had constitutions, some of them were bound by treaties among the component states or by some other instrument of a constituent character. It would therefore be better to refer to the instrument by which the federal state or union of states was constituted rather than to the constitution, particularly with a capital C.

100. Mr. ROSENNE said that paragraph 3 should be deleted; the idea contained in it should be amplified in the commentary. Throughout its work on the special rapporteur's draft, the Commission had taken care to keep the international law of treaties separate from domestic law, and it should not now abandon that approach.

101. Mr. EL-ERIAN said he agreed with Mr. Briggs that paragraphs 2 and 3 should be deleted and that in paragraph 4 reference merely to the instrument by which the organization was constituted might not be sufficiently comprehensive.

102. Sir Humphrey WALDOCK, Special Rapporteur, said that he could not feel particularly enthusiastic about the article as redrafted. He had originally felt that the Commission should give its views on problems arising in connexion with treaty-making capacity, but the Commission had decided that an elaborate provision would be too complex. The truncated article before the Commission was based on quite different conceptions from his own. He agreed with those members who had pointed out that paragraph 3 dealt with national constitutional questions, whereas the Commission should try to confine its texts to the international aspects. He doubted whether it was worth while retaining the article at all.

103. Mr. AMADO observed that the article on capacity in the Harvard Research draft was extremely concise. The Commission too should not adopt a lengthy or detailed article for, as Mr. Briggs had pointed out, much of the substance of such a provision would in fact relate to the question of validity of treaties. The article should be extremely brief and should contain only the essential points relating to treaty-making capacity.

104. Mr. TUNKIN said he saw considerable merit in Mr. Briggs' suggestion that paragraph 2 should be deleted. The possibility of limiting the treaty-making capacity should not even be mentioned in the text of the article itself.

105. He did not think that Mr. Castrén's proposed addition of the words "members of the international community" in paragraph 1 improved the paragraph. States and other subjects of international law were obviously members of the international community, participating in international relations; the addition would therefore only add to the ambiguity which already existed in that paragraph.

106. He endorsed Mr. Briggs' suggestion that the formulation of paragraph 4 might be broadened.

107. Mr. AMADO said he agreed with Mr. Tunkin that Mr. Castrén's proposed addition to paragraph 1 was unnecessary. Indeed, he would support any suggestion which could help to reduce the article to essentials.

108. The CHAIRMAN asked whether the Commission wished to drop the article altogether.

109. Mr. CADIEUX said that, although the Drafting Committee could not be said to have solved all the problems involved, the Commission should not take such a drastic step as to omit the article altogether. Its four paragraphs followed each other logically and broadly reflected the lengthy discussions which the Commission had held on the subject. As much as possible of the text should therefore be retained.

110. Mr. AMADO said that all the suggestions that had been made for shortening the article had been made after mature reflection.

111. Mr. EL-ERIAN considered that the time had come to refer the article back to the Drafting Committee, which would have ample indications from the debate as to what should be kept in the article itself and what should be transferred to the commentary.

112. The CHAIRMAN observed that the Commission had before it a number of proposals of substance, with which the Drafting Committee could not deal.

113. Sir Humphrey WALDOCK, Special Rapporteur, agreed that the Commission should decide whether or not it wished to retain paragraphs 2 and 3. The objection to paragraph 3 was that it stated the matter from the point of view of constitutional law, and not from that of international law. Perhaps the paragraph might be revised to read: "In a federal state, the capacity of the federal state and its component states to conclude treaties depends on the federal constitution".

114. He believed that the criticisms of paragraph 2 were sound, since it dealt with a point which really concerned the articles on validity, particularly if the concept of general international law, as well as that of treaties, was introduced. That would raise the whole question of whether there was *ordre public* in international law and whether certain types of treaties, such as conventions condoning slavery, were, so to speak,

forbidden. He thought that the treaties which the Commission had in mind were instruments of a constitutional type which limited capacity. If the paragraph were retained, he thought it should be transposed to the end of the article, as paragraph 4.

115. In principle, the Commission should retain an article on capacity, but in that case it might have to define "subject of international law". The Commission might be criticized for referring to subjects of international law without definition.

116. Mr. BRIGGS said that the special rapporteur's proposed revision of paragraph 3 did not meet his objection. He still felt that paragraphs 2 and 3 should be deleted, though an article on capacity should be retained in the draft.

117. The CHAIRMAN put to the vote the proposal that paragraph 2 should be deleted.

The proposal was rejected by 7 votes to 7 with 7 abstentions.

118. The CHAIRMAN put to the vote the proposal that paragraph 3 should be deleted.

The proposal was rejected by 12 votes to 8, with 1 abstention.

119. The CHAIRMAN put to the vote paragraph 3 as amended by the special rapporteur.

Paragraph 3, as thus amended, was adopted by 15 votes to none, with 6 abstentions.

120. Mr. EL-ERIAN said that, since paragraph 2 was to be retained, he hoped that the Drafting Committee would take into account Mr. Briggs' suggestion that the provision should relate to capacity to conclude certain types of treaties.

121. The CHAIRMAN suggested that article 3 should be referred back to the Drafting Committee for revision in the light of the decisions taken and of the comments made during the debate.

It was so agreed.

The meeting rose at 1 p.m.

659th MEETING

Thursday, 7 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

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

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

ARTICLE 4. — AUTHORITY TO NEGOTIATE, DRAW UP, AUTHENTICATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

1. The CHAIRMAN invited the Commission to continue its consideration of the provisional articles submitted by the Drafting Committee, whose redraft of article 4 read as follows:

"1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate, or sign a treaty on behalf of their state.

"2. Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their state and the state to which they are accredited.

"3. Subject to the provisions of paragraphs 1 and 2 above, a representative of a state shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his state.

"4. (*a*) Subject to the provisions of paragraph 1 above, a representative of a state shall be required to furnish evidence of his authority to sign (whether in full or *ad referendum*) a treaty on behalf of his state by producing an instrument of full-powers.

"(*b*) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full-powers, unless called for by the other negotiating state.

"5. In the event of an instrument of ratification, accession or acceptance being executed by a representative of the state other than the Head of State, he may be required to furnish evidence of his authority.

"6. (*a*) The instrument of full-powers, where required, may either be one restricted to the performance of the particular act in question or a general grant of full-powers which covers the performance of that act.

"(*b*) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the state concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be provisionally accepted, subject to the production in due course of an instrument of full-powers, executed in proper form.

"(*c*) Similarly, a letter or telegram evidencing the grant of full-powers sent by a state's Permanent Representative to an international organization may also be provisionally accepted, subject to the production in due course of an instrument of full-powers executed in proper form."

2. Mr. ROSENNE said that, although he was in general agreement with the Drafting Committee's redraft, he wished to suggest a few substantive changes. First, under paragraph 4 (*b*) representatives were not obliged to produce an instrument of full-powers in the case of treaties in simplified form. He thought that provision went too far, and that the exemption should be limited to the head of a diplomatic mission in the country to which he was accredited.

3. Secondly, paragraph 5, under which the Head of State was not required to furnish evidence of his authority to ratify, accede to or accept a treaty, did not