Document:-
A/CN.4/SR.660

Summary record of the 660th meeting

Topic:
Law of Treaties

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

660th MEETING

Friday, 8 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 5. — ADOPTION OF THE TEXT OF A TREATY

1. The CHAIRMAN said that, as requested at the previous meeting, the special rapporteur had prepared a redraft of article 5 that read:

"The adoption of the text of a treaty takes place:

"(*a*) in the case of a treaty drawn up at an international conference convened by the states concerned or by an international organization, by the vote of two-thirds of the states participating in the conference, unless by the same majority they shall decide to adopt another voting rule;

"(*b*) in the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question;

"(*c*) in other cases, by the mutual agreement of the states participating in the negotiations."

Article 5 as thus redrafted was approved.

ARTICLE 8. — SIGNATURE AND INITIALLING OF THE TREATY

2. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had prepared a redraft of article 8 that read:

"1. (*a*) Signature of a treaty shall normally take place at the conclusion of the negotiations or of the meeting or conference at which the text has been adopted.

"(*b*) The states participating in the adoption of the text may, however, provide either in the treaty itself or in a separate agreement:

"(i) that signature shall take place on a subsequent occasion; or

"(ii) that the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

"2. (*a*) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the state concerned, in which case the signature is subject to confirmation.

"(*b*) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

"(*c*) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

"3. (*a*) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the state concerned a signatory of the treaty.

"(*b*) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the state concerned shall become a signatory of the treaty."

3. Mr. de LUNA said that he agreed with the substance of article 8 but thought the drafting could be simplified by combining paragraphs 2 and 3 in a single paragraph. Both signature *ad referendum* and initialling had the effect of authenticating the text of the treaty and it should be possible to express that fact in a single sentence. The main difference, which could be expressed by means of another sentence, was that the confirmation of a signature *ad referendum* had a retroactive effect, whereas in the case of initialling followed by the subsequent signature of the treaty, it was the date of the signature and not that of initialling which was the operative date.

4. Neither signature *ad referendum* nor initialling implied an obligation in good faith not to frustrate the purposes of the treaty. If the states concerned did not intend to assume even such a limited obligation, they acted as in the case of the Locarno Treaty of 1925, which had been first initialled and later signed by the Contracting Parties.

5. Mr. AMADO suggested that sub-paragraphs (*a*) and (*b*) of paragraph 1 might be combined in a single provision reading:

"Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text has been adopted, the states participating in that adoption may provide:"

6. The CHAIRMAN suggested that article 8 should be referred back to the Drafting Committee with the observations of Mr. de Luna and Mr. Amado.

It was so agreed.

ARTICLE 9. — LEGAL EFFECTS OF A SIGNATURE

7. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had prepared a redraft of article 9 reading as follows:

"1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 6, paragraph 2, signature of a treaty shall have the effects stated in the following paragraphs.

"2. Where the treaty is subject to ratification under the provisions of articles 10 or 16 of the present articles, signature shall not establish the consent of the signatory state to be bound by the treaty. However, signature shall:

"(*a*) qualify the signatory state to proceed to the ratification of the treaty in conformity with its provisions; and

"(*b*) bring into operation the applicable provisions of article 19 *bis*.

"3. Where the treaty is not subject to ratification under the provisions of articles 10 or 16 of the present articles, signature shall:

"(*a*) establish the consent of the signatory state to be bound by the treaty and,

"(*b*) if the treaty is not yet in force, bring into operation the applicable provisions of article 19 *bis*."

8. Mr. de LUNA pointed out that all the rules so far adopted by the Commission referred to written treaties not in simplified form. But in practice, as far as bilateral treaties were concerned, the simplified form was the more usual. For the majority of bilateral treaties, therefore, the rules adopted by the Commission would not apply.

9. Mr. CASTRÉN suggested that, in paragraphs 2 and 3, the words "of the present articles", which appeared after the words "the provisions of articles 10 or 16", should be omitted as superfluous, for all the references to articles were references to "the present articles".

10. Furthermore, article 16 concerned participation in a treaty by acceptance or approval; he therefore suggested that, after the word "ratification" in both paragraphs 2 and 3, the words "acceptance or approval" should be added.

11. Mr. BARTOŠ said he wished to make a reservation in respect of paragraph 3. That paragraph contained a reference to article 10, paragraph 2 (*a*) of which stated that a treaty would not be subject to ratification if it provided that it would come into force upon signature. That statement was only true if the signature was affixed by a representative endowed with authority to give final consent to the entry into force of the treaty. Otherwise, the modern conception of the institution of ratification as a means of parliamentary control would be impaired. He proposed to raise the point when the Commission came to adopt article 10.

12. Mr. BRIGGS said the drafting of article 9 struck him as awkward.

13. He shared the doubts of Mr. Bartoš as to the references to article 10, and pointed out that article 16 did not refer to ratification.

14. He suggested that the article should be re-arranged so that the first paragraph set out the main legal effect of signature, which was to establish the consent of the state to be bound by the treaty. The article would then be worded along the following lines:

"1. Except where signed *ad referendum*, the signature of a treaty which is not subject to ratification shall establish the consent of the signatory state to be bound by the treaty.

"2. Where a treaty is subject to ratification, the signature serves as a method of authentication.

"3. The signature of a treaty, whether or not subject to ratification, shall bring into operation the applicable provisions of article 19 *bis*."

15. Mr. TSURUOKA drew attention to the situation which would arise in the case of a signature *ad referendum*. Under existing law, when such a signature was confirmed, its effective date became that on which the treaty became binding. Such retroactive effect could cause technical difficulties in the counting of signatures for the purpose of the entry into force of the treaty, because it could give rise to doubt as to the date of entry into force, a matter to which he had already drawn attention in connexion with article 12.[1]

16. Mr. AGO said that Mr. Briggs' suggestion and Mr. Tsuruoka's point could be referred to the Drafting Committee.

17. He suggested the deletion from paragraphs 2 and 3 of the words "under the provisions of articles 10 or 16 of the present articles" and supported the suggestion that the words "or acceptance" should be added after the word "ratification". A treaty was subject to ratification or acceptance under the general rules of international law and not only under the provisions of the draft articles.

18. He did not like the drafting of paragraphs 2 (*b*) and 3 (*b*), particularly the French version. It would be more correct to state that, in the event of signature, the relevant provisions of article 19 *bis* shall apply.

19. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that it would be better to drop the passages mentioned by Mr. Ago and to add, after the expression "subject to ratification" the words "acceptance or approval".

20. With regard to the redraft suggested by Mr. Briggs, the order of the provisions in article 9 was a reflection of the attitude adopted by the Commission to article 10. If the Commission finally agreed to state in article 10 that in principle treaties required ratification, it would be appropriate in article 9 to deal first with treaties subject to ratification and then with treaties not subject to ratification.

21. The point raised by Mr. Tsuruoka involved a minor question of substance.

22. Mr. de LUNA, with regard to the point raised by Mr. Tsuruoka, said it was difficult to see how signature *ad referendum* could be legally interpreted otherwise than as a signature subject to a suspensive condition. By virtue of the legal character of the condition, its fulfilment necessarily had a retroactive effect.

23. Mr. TSURUOKA said that he did not wish to press his point; he had merely raised the question because he felt that it deserved study.

24. The CHAIRMAN suggested that article 9 should be referred back to the Drafting Committee.

It was so agreed.

ARTICLE 10. — RATIFICATION

25. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had prepared a redraft of article 10 reading as follows:

"1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in the next paragraph.

"2. A treaty shall be presumed not to be subject to ratification by a signatory state where:

[1] 647th meeting, para. 102.

"(*a*) the treaty itself provides that it shall come into force upon signature;

"(*b*) the credentials, full-powers or other instrument issued to the representative of the state in question authorize him by his signature alone to establish the consent of the state to be bound by the treaty, without ratification;

"(*c*) the intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

"(*d*) the treaty is one in simplified form.

"3. However, even in cases falling under the preceding paragraph, ratification is necessary where:

"(*a*) the treaty itself expressly contemplates that it shall be subject to ratification by the signatory states;

"(*b*) the intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

"(*c*) the representative of the state in question has expressly signed 'subject to ratification' or his credentials, full-powers or other instrument duly exhibited by him to the representatives of the other negotiating states expressly limit the authority conferred upon him to signing 'subject to ratification'."

26. Mr. CASTRÉN said that during the earlier debate he had expressed the view that, in the absence of any express provision on ratification, the presumption should be that ratification was not necessary. However, the majority view had been to the contrary, and the Drafting Committee's text had taken that majority view into account. Actually, in state practice, nearly all treaties in simplified form entered into force without ratification, and that fact had been recognized in the Drafting Committee's text.

27. The Drafting Committee had admitted so many exceptions to the rule laid down in paragraph 1 that there was little rule left. Nevertheless, he would accept the majority decision and put forward only drafting amendments.

28. In paragraph 2, sub-paragraph (*d*) should be placed at the beginning of the paragraph, because treaties in simplified form were the more usual.

29. The whole of paragraph 3 should be deleted. The cases mentioned in its various sub-paragraphs constituted exceptions to the exceptions provided for in paragraph 2, and accordingly came within the scope of the general rule laid down in paragraph 1. In fact, all the provisions of paragraph 3 were in reality exceptions to those contained in sub-paragraph (*d*) of paragraph 2, which dealt with treaties in simplified form. If, therefore, it were decided to maintain the provisions of paragraph 3, they should be linked with those of paragraph 2 (*d*). Another possible solution would be to transfer the contents of paragraph 3 to the end of paragraph 1 where they would serve to illustrate the general rule in paragraph 1, preceded by some such formula as "In particular".

30. Mr. ROSENNE said the statement of principle contained in paragraph 1 should be transferred to the commentary. Article 10 would then consist of a paragraph along the lines of paragraph 3, stating what types of treaty were subject to ratification, followed by a second paragraph along the lines of paragraph 2, indicating what types of treaty were not subject to ratification.

31. Mr. BARTOŠ said that the Drafting Committee's text was a praiseworthy attempt to reconcile the different views expressed in the Commission during the earlier debate on the subject of ratification, but like all compromises, it suffered from a number of defects. He could accept paragraphs 1 and 3, but not paragraph 2. So far as sub-paragraphs 2 (*a*) and (*b*) were concerned, he could agree to the possibility of the exceptions mentioned but only on condition either that the signature was given by the organ competent to dispense with ratification, or that ratification was dispensed with by virtue of full-powers issued by that competent organ.

32. He was opposed to the provisions of sub-paragraphs 2 (*c*) and (*d*) on grounds of principle. So far as sub-paragraph 2 (*c*) was concerned, it was not advisable to formulate a provision in terms which might give rise to a dispute as to the intention of the parties a purely subjective element which destroyed the principle.

33. So far as sub-paragraph 2 (*d*) was concerned, the external form of a treaty should not determine whether it was subject to ratification. For that purpose, the substance of the treaty should be decisive.

34. Another reason why he opposed the form as the criterion was that it would invite anti-democratic practices, in that it would enable active diplomats to bind their states without consulting the competent organs, thereby avoiding the control of the representative body of the people. It would be regrettable if diplomats, by being able to choose the form of a treaty, acquired the power to contract irrevocable obligations for their states under international law.

35. He would like his statement to be recorded in the summary record and treated as a vote against article 10, paragraph 2, though he was not asking for a formal vote on it.

36. Mr. VERDROSS said that paragraph 1 correctly stated the existing practice in respect of treaties not in simplified form. Treaties in simplified form, however, were not subject to ratification.

37. He suggested, therefore, in order to meet the point raised by Mr. Castrén, that article 10 should commence with a paragraph along the following lines:

"In principle, treaties not concluded in simplified form require ratification unless they fall within one of the exceptions provided for in the next paragraph".

38. A second paragraph would then set out the exceptions to that rule.

39. Mr. CASTRÉN said he could accept Mr. Verdross' suggestion.

40. Mr. BARTOŠ said that if Mr. Verdross' suggestion were adopted, he would be compelled on principle to vote against the article as a whole.

41. Mr. YASSEEN said he had some misgivings with regard to sub-paragraph 2 (*c*), which referred to the intention to dispense with ratification, an intention which would appear from statements made in the course of negotiations. It seemed difficult to admit that an abstract intention, which was not reflected in any way in the provisions of the treaty, could have any legal effect on the formation of the treaty. Such a solution would be difficult to reconcile with the accepted rules of legal interpretation.

42. Mr. JIMÉNEZ de ARÉCHAGA said that it would be inadvisable to upset the delicate balance of the article, the provisions of which reflected a compromise between the various views expressed in the lengthy discussion during the first reading.

43. Paragraph 1 stated the basic rule in the matter which would serve to decide doubtful cases; it was therefore essential.

44. With regard to paragraph 2, he did not agree with the exception stated in sub-paragraph (*d*), but was prepared to accept it as part of the compromise.

45. With regard to paragraph 3, its provisions were necessary in order to enable states like the Latin American states to use treaties in simplified form. In the practice of those states, it was the substance of a treaty which determined whether it was subject to ratification; paragraph 3 made it possible for those states to use the simplified form and at the same time observe their rules concerning ratification, where applicable.

46. For those reasons, he concluded that it would be dangerous to disturb the structure of article 10.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the redraft represented a compromise and the drafting could hardly therefore be very elegant. The various paragraphs had been introduced in order to take into account the different points of view expressed during the discussion.

48. Mr. GROS, supporting the special rapporteur, said that after a prolonged discussion, article 10 had been referred to the Drafting Committee, which had taken into account all the remarks made during that discussion. A delicate balance had been struck in the Committee between the opposing views. Like all compromise solutions, the redraft had its defects but if any of its components were take away, the whole structure would collapse. That applied particularly to paragraph 1.

49. He hoped the Commission, unless it wished to re-open the whole discussion on the substance, would accept the compromise formula reflected in the Drafting Committee's text, whatever its defects, because it was the text most likely to gain acceptance by states.

50. The CHAIRMAN suggested that article 10 should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.

ARTICLE 7. — PARTICIPATION IN A TREATY, ARTICLE 7 *bis*. — THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES, and ARTICLE 7 *ter*. — THE PROCEDURE FOR PARTICIPATING IN A TREATY.

51. Sir Humphrey WALDOCK, Special Rapporteur, said that at the 643rd meeting, it had been agreed that consideration of article 7 should be postponed until the Commission took up the articles concerning accession. At the opening of the 648th meeting, it had been agreed that it should be further postponed until after the Commission had settled some of the questions raised by article 13. After article 13 had been discussed at length for nearly three meetings, it had been decided to refer the text to the Drafting Committee, the Commission had then passed on to article 14, and article 7 had never been considered at all. The Drafting Committee had now prepared three new articles, 7, 7 *bis* and 7 *ter*, based on the previous articles 7 and 13; they read as follows:

"ARTICLE 7. — PARTICIPATION IN A TREATY

"1. A treaty is open to the participation of every state whose participation is expressly provided for in the treaty itself.

"2. Moreover, unless a contrary intention is expressed in the treaty or otherwise appears from the circumstances of the negotiations, a treaty shall be deemed to be open to the participation of any state which took part in the adoption of its text or which, though it did not take part in the adoption of the text, was invited to attend the conference at which the treaty was drawn up.

"ARTICLE 7 *bis* (*former article 13*) — THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES

"1. Participation in a treaty may be opened to states other than those mentioned in article 7 by the subsequent agreement of all the states which adopted the treaty; provided that, if the treaty is already in force and ... years have elapsed since the date of its adoption, the agreement only of the parties to the treaty shall be necessary.

"2. Unless a contrary intention is expressed in the treaty or otherwise appears from the circumstances of the negotiations, a general multilateral treaty may be opened to the participation of states other than those mentioned in article 7:

"(*a*) in the case of a treaty drawn up at an international conference convened by the states concerned, by the subsequent consent of two-thirds of the states which drew up the treaty, provided that, if the treaty is already in force and ... years have elapsed since the date of its adoption, the consent only of two-thirds of the parties to the treaty shall be necessary;

"(*b*) in the case of a treaty drawn up either in an international organization, or at an international conference convened by an international organization, by a decision of the competent organ of the

organization in question, adopted in accordance with the applicable voting rule of such organ.

"3. (*a*) When the depositary of a general multilateral treaty receives a formal request from a state desiring to be admitted to participation in the treaty under the provisions of paragraph 2 of this article, the depositary:

"(i) in a case falling under sub-paragraph 2 (*a*), shall communicate the request to the states whose consent to such participation is specified in that sub-paragraph as being material;

"(ii) in a case falling under sub-paragraph 2 (*b*), shall bring the request, as soon as possible, before the competent organ of the organization in question.

"(*b*) The consent of a state to which a request has been communicated under sub-paragraph 3 (*a*) (i) shall be presumed after the expiry of twelve months from the date of the communication, if it has not notified the depositary of its objection to the request.

"4. When a state is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more states, an objecting state may, if it thinks fit, notify the state in question that the treaty shall not come into force between the two states.

"ARTICLE 7 *ter*. — THE PROCEDURE FOR PARTICIPATING IN A TREATY

"Unless a different procedure has been agreed upon by the negotiating states, participation in a treaty takes place in accordance with the principles and procedures laid down in articles 8 to 18 of the present articles."

52. Those three new articles constituted an attempt to deal comprehensively with the question of participation in a treaty, so as to cover signature, ratification, accession and acceptance. In his original draft, the question of the so-called "right of participation" had been dealt with, although not specifically mentioned, in articles 7 (The states entitled to sign a treaty) and 13 (Participation in a treaty by accession).

53. The Commission should choose between the general approach as reflected in the new articles 7, 7 *bis* and 7 *ter* and the traditional approach of dealing first with signature and then with the other forms of participation in a treaty.

54. The three new articles showed that the question of participation arose not only in connexion with signature but also in connexion with the other processes. In the case of certain general multilateral treaties, for example, acceptance was the only procedure for participation contemplated in the treaty.

55. In article 7 *bis*, the rules laid down in paragraph 2 (*a*) were in line with the two-thirds majority rule adopted by the Commission as the residual rule for the adoption of the text of the treaty by an international conference.

56. Mr. BARTOŠ said that the Commission should take a decision on whether to deal with the three articles separately or together.

57. Mr. de LUNA pointed out that subjects of international law other than states could participate in treaties: the statement in article 7, paragraph 1, was therefore not strictly correct. It was true that the Commission had decided not to deal with international organizations, but it was equally true that subjects of international law other than states or international organizations could enter into treaties.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of articles 7, 7 *bis* and 7 *ter* could not very well apply to belligerent communities. The only other possible subject of international law would be the Holy See, which could, if necessary, be expressly included in a definition of the term "state".

59. Mr. VERDROSS proposed the deletion of the inelegant word "Moreover" at the beginning of article 7, paragraph 2.

60. Mr. CASTRÉN proposed the deletion of the passage "though it did not take part in the adoption of the text" in the same paragraph.

61. Mr. LACHS said that article 7 raised the problem of the relationship between open and closed treaties to which he had drawn attention during the earlier general discussion on article 13.[2] In his opinion the article ought to open the door more widely to general participation. The silence of a treaty on that point ought not necessarily to be interpreted as meaning that the treaty was closed to other states; it might have been due to the inability of the parties to reach agreement on the relevant clauses or to their desire to await events and see how the treaty operated.

62. Certain general multilateral treaties ought by their very nature to be as widely open to accession as possible. Paragraph 1 should therefore be transferred to the end of the article, since it stated a residual rule.

63. The proportion between states invited and states not invited to participate in an international conference for drawing up a general treaty had changed since the codification conferences of The Hague, and in the interest of full implementation it was desirable not to debar states which had not taken part in the drawing up of a treaty from participating in it.

64. Mr. LIANG, Secretary to the Commission, pointed out that in the final acts of the Geneva Conference on the Law of the Sea and the Vienna Conference on Diplomatic Relations and Immunities, the Holy See had been listed among the states represented.

65. Mr. ROSENNE said the Drafting Committee should give some thought to the meaning it wished to attach to the word "participation", which had been used in a different sense in some of the articles already adopted. It should also consider whether or not it wished to retain the word "deemed" in article 7, paragraph 2. That

[2] 650th meeting, paras. 22-29.

word had the effect of creating a legal fiction, as he had learnt from painful personal experience when he had lost a case before the International Court that had turned on that word.

66. The form of words devised by the Drafting Committee to meet the point he had raised during the discussion about the attendant circumstances of the negotiations was excellently conceived.

67. Mr. AGO said that he had no objection to the substance of article 7, but the order violated the rules of logic. As it stood, it might almost be construed to mean that states which took part in the adoption of the text could not participate in the treaty unless that was expressly provided for in the treaty itself. But they were first and foremost the states which could participate automatically, and that should be stated in a paragraph at the beginning of the article. That paragraph should be followed by the provision concerning states which had been invited to attend the conference but which had not taken part in the adoption of the text. Paragraph 1 should then be moved to form the last paragraph of the article.

68. Mr. BRIGGS said he was uncertain of the scope of article 7. Was "participation" to be understood as identical in meaning with "becoming a party"?

69. Article 7 *bis* seemed to be concerned with accession or acceptance; was it intended to cover any other forms of participation?

70. Article 7 *ter* seemed too broad and too vague. What were the implications of the reference to articles 8 to 18?

71. Sir Humphrey WALDOCK, Special Rapporteur, suggested that Mr. Briggs had perhaps adopted too narrow an approach. Some multilateral treaties were only open to participation by acceptance while others only contemplated signature. It would therefore be a mistake to provide for accession only. Any of the procedures dealt with in the succeeding articles up to article 18, with the exception of that concerned with the legal effects of ratification, might apply according to the terms of the treaty. Perhaps that should be stated more explicitly.

72. He agreed with Mr. Ago's suggestion for reversing the order of the paragraphs of article 7 and for dealing separately with the questions of participation by the states that took part in the adoption of the text and participation by those attending the conference but not taking part in the adoption of the text.

73. Mr. LACHS had raised a major problem of substance. The Drafting Committee's text was based on the Commission's discussion, from which it emerged that there should not be anything in the nature of a general right of participation without reference to the proccdure by which participation was effected, or to some form of consent either by the states which had taken part in the drafting of the treaty or by the parties. The general view in the Commission appeared to be that in repect of general multilateral treaties states should have some say in the matter of the partners with which they would or would not have treaty relations and that the Commission should go as far as it could in the direction of opening such treaties to accession. But modern practice indicated that there was a limit beyond which states were unwilling to go. For example, participation by others was sometimes made subject to the approval of the General Assembly.

74. Mr. LACHS noted that the special rapporteur had conceded that the question of participation in general multilateral treaties raised a major problem. There were general treaties in existence, and there would no doubt be others in the future, not necessarily drawn up within the United Nations, with different provisions from those put forward in article 7 concerning participation. The presumption based on the nature of the treaty itself in the case of silence should be in favour of its being open to additional states. If the negotiating states had not expressly provided to the contrary, they should not have the power to prevent others from participating.

75. Mr. YASSEEN said that Mr. Lachs' comment was entirely correct and consistent with modern realities, particularly with regard to general multilateral treaties of universal concern such as conventions codifying rules of international law. It was not only in the interest of the parties that the rules laid down in such treaties should be as nearly as possible universal but also in the interests of the international community as a whole. Accordingly, it was undesirable to formulate any presumption whereby, if the treaty was silent, other states would be debarred from participation.

76. Mr. CADIEUX considered that the Drafting Committee had faithfully followed the Commission's instructions; the discussion on substantive issues should not be reopened.

77. Mr. TABIBI said he fully supported the view expressed by Mr. Lachs; he saw no objection to reopening the discussion on a matter of such importance. If a treaty contained no express provision on participation and if its nature was such that wide participation was desirable, a presumption to that effect should be the rule.

78. Difficulties were likely to arise from the reference to the circumstances of the negotiations. Who was to judge what could be inferred from them? Moreover, the attitude of parties might well undergo a change with the passage of time.

79. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that, contrary to what the Commission appeared to have favoured, Mr. Lachs seemed to be arguing for the insertion in article 7 of provisions concerning participation by states not invited to the conference or contemplated in the treaty itself. His understanding had been that the Commission wished to deal with that matter in a separate article.

80. Mr. GROS, speaking as Chairman of the Drafting Committee, pointed out that the Committee had been asked to deal with the subject under the two different aspects of the states which were the original parties to the treaty and the states which could later become parties to the treaty by other procedures.

81. Speaking as a member of the Commission, he said that it had been understood, both in the Commission and in the Drafting Committee, that the general discussion on the articles concerned could be re-opened. He accordingly wished to point out that there was nothing dramatic about the provision in article 7, paragraph 1. It did not contain, as some members had alleged, any restriction preventing wide-scale accession to collective treaties. Indeed, a great deal had to be assumed to arrive at Mr. Lachs' argument. For example, it had to be assumed that, in the case of a treaty of general interest to the community of states, there had been two major errors of negotiation, those of silence and oversight. If it was merely a question of the silence of the treaty, despite the fact that the problem had been discussed at the conference, the obvious inference was that the negotiating states had been unable to agree, in most cases for lack of a two-thirds majority, on the conditions under which the treaty should be open for accession by other states. But how were the negotiators to have a new general rule of law imposed on them by which the treaty would be open to all states, although the problem had been discussed but no agreement reached on that very point? Such a rule was juridically incomprehensible and could have no justification either in logic or in law. Moreover, during the negotiation of any multilateral treaty of general interest, there were always discussions on the conditions on which the treaty could be opened for accession by other states than the states participating in the negotiations. The only case to which Mr. Lachs' argument applied was the highly unlikely case where the question had not been discussed at all by the negotiators, in other words, the case of complete oversight.

82. Mr. LACHS agreed with Mr. Gros that there would be nothing dramatic about accepting the formulation in article 7, paragraph 1, but suggested that the amendment he had proposed would also not produce any dramatic effect. Mr. Gros had said that the two elements involved were silence and oversight; he (Mr. Lachs) would suggest that those elements fell into different categories, because silence in itself might be the consequence of two different factors, absence of agreement, or oversight.

83. However, he was more concerned with another point. In the course of the operation of the treaty, states might change their views and alter their positions; even if at the time the treaty was drafted and signed the necessary majority could not be achieved owing to lack of agreement, that did not mean that it might not be achieved later. The consequences of a decision taken at the time of negotiation should not be perpetuated throughout the existence of the treaty; the possibilities of evolution, of which there were many examples in history, could not be ignored.

84. While he agreed with Mr. Gros that it was inadmissible to impose on states any decision as to the states with which they should be bound by a treaty, he believed that, in the matter at issue, the Commission should proceed on certain presumptions. If a treaty related to a vital issue affecting the whole international community, and if owing to forgetfulness the treaty was silent on the subject of participation, the presumption should be in favour of giving the treaty an open character; if that silence was due to lack of agreement, the Commission's draft would allow for changes in position. In article 7 the Commission was really concerned with the drafting of a residuary rule.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Lachs' view was not borne out by state practice; had it been so, he would have been ready to write in such a rule. To take an instance from real life, no more general treaty than the Convention on Diplomatic Relations could be imagined, and yet, as in other recent multilateral treaties, the procedure for the participation of additional states followed broadly the lines of that laid down in article 7 *bis*.

86. The CHAIRMAN said that the drafting changes suggested by Mr. Rosenne and Mr. Ago could be referred to the Drafting Committee, which might also be asked to see whether Mr. Lachs' point could be covered.

87. Mr. GROS said that he could not accept the Chairman's last suggestion because Mr. Lachs' point was one of substance and his proposal could not be taken into account without disregarding the Commission's decision. Presumably Mr. Lachs wished to delete the rest of paragraph 1 of article 7 after the words "every state".

88. Mr. LACHS said that he had not made any such far-reaching proposal. What he had hoped to persuade the Commission to do was to reverse the order of the paragraphs and to state in the existing paragraph 2 that, in the absence of any express provision in general multilateral treaties, the presumption should be in favour of their being open to participation by all states.

89. Sir Humphrey WALDOCK, Special Rapporteur, asked that the Commission should come to a decision on the issue of substance so that he could proceed with the preparation of the commentary. He hoped that, drafting changes apart, the general structure of articles 7 and 7 *bis* would be preserved.

90. Mr. AMADO said that, for the time being, the structure of the two articles should be kept. After the comments of governments had been received, the Commission could give further consideration to the extremely interesting view propounded by Mr. Lachs.

91. Mr. YASSEEN asked that Mr. Lachs' view be recorded in the commentary so that governments would be encouraged to comment on it.

It was so agreed.

Article 7, with the drafting changes suggested by Mr. Rosenne and Mr. Ago, was referred back to the Drafting Committee.

92. Mr. VERDROSS suggested that the second part of paragraph 1 of article 7 *bis* should be deleted. According to that provision, if four states concluded a treaty and two others were admitted to participation after the treaty had entered into force, the number of

contracting parties would be raised to six, but the consent of only the first four would be needed for the admission of a seventh state. But all six had to have a say in the matter. The situation dealt with in paragraph 2 of that article was quite diffcrent, since it referred to trcaties drawn up at international conferenccs or within international organizations.

93. Mr. CASTRÉN said that article 7 *bis* seemed to be generally satisfactory, but he wished to make a comment on paragraph 2. He had already agreed that no distinction should be made between conferences convened by the states concerned and conferences convened by an international organization. In both cases, the conference should be free to decide whether other states should be allowed to become parties to the treaty drafted and adopted by the conference. He accordingly suggested that the words "convened by the states concerned" should be deleted in sub-paragraph 2 (*a*) and the words "or at an international conference convened by an international organization" in sub-paragraph 2 (*b*).

94. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that Mr. Castrén's suggestion affected the substance of the article, on which the Commission had already taken a decision, and could not be treated as a drafting amendment.

95. Mr. YASSEEN said he had already stated his views on sub-paragraph 2 (*b*) of article 7 *bis* during the discussion on article 13.[3] Although it was an acceptable proposition that a decision of the competent organ of an international organization was necessary in order that a state could bccome a party to a treaty drawn up within the organization, the same was not true in the casc of a treaty drawn up at an international conferencc, even one convened by an international organization. He reserved his position on that subject.

96. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Verdross' argument should really give rise to an amendment different from that he had proposed. Mr. Verdross had been concerned at the possibility that states admitted to participation in the treaty might have no say in the decision to admit further states. A slight drafting amendment to paragraph 1 should cover that point, but it was not necessary to delete the second part altogether; that had been included because the Commission had agreed that the time might come when states which had not taken advantage of their rights to become parties to a treaty should not be allowed a say in the decision to exclude other states from participation.

97. Mr. EL-ERIAN said he agreed with Mr. Castrén that in the context no distinction should be drawn between conferences convened by the states concerned and those convened by an international organization.

98. Mr. TUNKIN, reverting to article 7, said that the Commission should be careful, in drafting its article on participation in a treaty, to approach the problem from the point of view of the progressive development of international law. Treaties relating to matters of interest to all states should be open to the participation of all states, and no group of countries had the right to debar any state from participation in such treaties: in international rclations, no particular group of countries was entitled to lay down rules on matters of common interest. The Drafting Committee had been told that there was a practice in the United Nations whereby only certain states were allowed to participate in treaties concluded under United Nations auspices: examples of such treaties were the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations. That practice was dictated by cold war policy and designed to prevent certain socialist states from participating in such general multilateral treaties. It denied the very basis of contemporary international law. The Commission should be guided not by that practice, but by the purposes and principles of the United Nations as laid down in the Charter, and should therefore beware of taking any step which might result in consecrating the practice as a rule of law. The only way to contribute to the progressive development of international law in respect of the issue before the Commission was to reject that practice, to be guided by the principles of contemporary international law and to draw from those principles the inevitable conclusion that treaties dealing with subjects of general interest should be open to all states.

99. The CHAIRMAN observed that the Commission's decision on the basic principles of articles 7 and 7 *bis* remained unchanged.

100. Sir Humphrey WALDOCK, Special Rapporteur, said the Commission had already decided that the arguments advanced in opposition to those principles should be fully set out in the commentary.

101. It was hardly worth beginning to discuss article 7 *ter*, which merely provided an introduction to articles 8 to 18. Indeed, the Commission might decide that the article was superfluous.

102. The CHAIRMAN suggested that article 7 *bis* should be referred to the Drafting Committee for revision in the light of the drafting suggestions made in the Commission, and that discussion of article 7 *ter* should be deferred for the time being.

It was so agreed.

The meeting rose at 12.30 p.m.

---

[3] 649th meeting, para. 46.