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16th meeting of the Committee of the Whole

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to postpone consideration of the proposed new article 9 *bis* until it had disposed of articles 10 to 12, and, if need be, of article 13.

It was so agreed.[6]

The meeting rose at 5.40 p.m.

[6] For resumption of discussion, see 18th meeting.

SIXTEENTH MEETING

Monday, 8 April 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 10 (Consent to be bound by a treaty expressed by signature),[1]

Article 11 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) [2] and

Proposed new article 11 bis [3]

Question of a residuary rule in favour of signature or of ratification

1. The CHAIRMAN observed that several of the amendments before the Committee raised the question whether, when a treaty was silent on the matter, the consent of a State to be bound was expressed by signature (A/CONF. 39/C.1/L.38 and Add.1 and 2) or by ratification (A/ CONF.39/C.1/L.71, L.87, L.105). He therefore invited the Committee to discuss that question before going on to consider the text of articles 10 and 11.

2. Mr. SMEJKAL (Czechoslovakia), introducing his delegation's amendment to article 10 (A/CONF.39/C.1/ L.38 and Add.1 and 2), said that he supported the International Law Commission's endeavour to leave States free to choose between signature and ratification as the means of expressing consent to be bound by a treaty. The text adopted by the Commission would, however, have certain disadvantages in view of existing treaty practice, for owing to the development of relations between States, many treaties were concluded in simplified form and contained no provisions on entry into force. That gap could be filled by the Swiss amendment (A/CONF.39/C.1/L.87) or by the joint amendment submitted by a group of Latin American countries (A/CONF.39/C.1/L.105), but the adoption of those amendments would complicate the procedure in the case of treaties for which ratification was not customary. His delegation therefore considered that as a general rule the consent of a State to be bound by a treaty should be expressed by signature.

3. Mr. CARMONA (Venezuela) reminded the Committee that the International Law Commission had considered it preferable not to include a clause specifying a choice between signature and ratification as the procedure for expressing the consent of a State to be bound by a treaty.

4. After consulting the delegations of the other Latin American countries, the Venezuelan delegation had decided to withdraw its amendment (A/CONF.39/C.1/ L.71) in favour of the joint amendment (A/CONF.39/ C.1/L.105). In the Latin American countries, as in most African and Asian States, ratification was required by internal law.

5. If any other principle was adopted, those countries would not be able to accept a convention based on the rule that ratification was only the exception.

6. Mr. BINDSCHEDLER (Switzerland) said he understood the reasons why the Czechoslovak delegation had submitted its amendment. The object was to fill a gap. the existence of which the International Law Commission had itself acknowledged in paragraph (4) of its commentary on article 11. The Commission had, however, considered that, as the cases where the conditions under which a State consented to be bound by a treaty could not be established were very rare, the drafting of articles 10 and 11 could be simplified by not stating a residuary rule. However, if the Conference intended to codify the law of treaties, it must fill that gap. It should incorporate in the convention a rule which would apply when a treaty was silent about entry into force or when its provisions on that subject were ambiguous or open to contradictory interpretations.

7. The question was how to fill the gap. The Czechoslovak delegation had come out in favour of signature, a principle which took account of the present practice of many States. But it was also necessary to consider the constitutional difficulties to which the Venezuelan representative had drawn attention. The best course would be to opt for a more cautious solution, which would leave some latitude to the States parties to an agreement, in other words to adopt the principle of ratification. The doubtful cases would be very few and would have no influence on practice. Furthermore, that principle would give States a certain amount of time for reflection in case of doubt.

8. Mr. ALVAREZ (Uruguay) said that the object of the nine-country amendment (A/CONF.39/C.1/L.105) to article 11 was to introduce into the convention a general rule to the effect that, where States did not specify in a treaty the act by which they would consent to be bound, the act required was ratification. The amendment was really a return to the standpoint adopted by the International Law Commission in its 1962 draft, which some members had regarded as a compromise. The 1962 formula had been abandoned by the Commission at its seventeenth session in favour of non-committal wording

[1] The following amendments had been submitted to article 10: Czechoslovakia, Sweden and Poland, A/CONF.39/C.1/L.38 and Add.1 and 2; Venezuela A/CONF.39/C.1/L.70; Italy, A/CONF. 39/C.1/L.81; Belgium, A/CONF.39/C.1/L.100; Bolivia, Chile, Colombia, Dominican Republic, Guatemala, Honduras, Mexico, Peru and Venezuela, A/CONF.39/C.1/L.107; Spain, A/CONF. 39/C.1/L.108.

[2] The following amendments had been submitted to article 11: Finland, A/CONF.39/C.1/L.60; Venezuela, A/CONF.39/C.1/L.71; Bolivia, Colombia, Chile, Guatemala, Honduras, Mexico, Peru, Uruguay and Venezuela, A/CONF.39/C.1/L.105; Spain, A/CONF. 39/C.1/L.109.

[3] Switzerland had proposed a new article 11 *bis* (A/CONF.39/ C.1/L.87) reading as follows:

" When the method of expressing consent to be bound cannot be established in accordance with the preceding articles, consent shall be expressed by ratification."

which was merely a way of evading the problem. Many eminent jurists nevertheless considered that the principle of ratification should be adopted in the convention, at least as a residuary rule.

9. There were two main arguments in favour of the precise formulation of a residuary rule. First, it was important for States to know with certainty when, and to what they were bound. Secondly, it was necessary to safeguard the constitutional provisions of States. Although signature could satisfy the first of those requirements, it was far from meeting the second, which was to safeguard the internal system of every State. The only rule which took account, as a residuary rule, of the requirements of the different internal constitutional systems, was the rule requiring ratification.

10. Various arguments had been advanced in the International Law Commission against the principle of ratification. It had been said that if ratification was made obligatory, some States might evade the obligations they had assumed, and that it was inconceivable that a minister or ambassador, who knew his country's requirements for ratification of a treaty, would fail to make them known before signature. The Uruguayan delegation could not support those arguments; for if a State intended to bind itself, either expressly or by implication, recourse to the residuary rule would be unnecessary, while if it did not, the rule would apply. No State wished to bind itself to another State if its obligations were not clear, because that would lead to sterile disputes.

11. It had also been held that ratification was contrary to the interests of States, that it complicated political life and that it accentuated the conflict between the executive and legislative powers. He believed that, on the contrary, ratification introduced into international life an element of order and certainty which made it possible to ensure strict application of the internal law of States.

12. The Uruguayan delegation urged the adoption of the joint amendment to article 11 not only because the principle of ratification was a general norm of international law, but because it had practical advantages which could not be overlooked in the codification and progressive development of international law. The adoption of the amendment would not prevent the retention of article 10 for application to exchanges of notes, a question on which the representative of Czechoslovakia had expressed concern.

13. Mr. NAHLIK (Poland) said that in articles 10 and 11 the Commission had made no provision for cases in which States had not stipulated whether they wished to express their consent to be bound by signature or by ratification. The traditional doctrine of international law had been to presume the need for ratification in such cases; but more recently a number of eminent jurists, such as Fitzmaurice, Blix and Shurshalov, had pronounced against that traditional presumption. The Polish delegation shared their view, for the arguments advanced against that presumption seemed to be the logical consequence of the growth of international co-operation expressed in international agreements on an increasing diversity of topics. The number of such agreements, some of which were very modest in their scope, was constantly increasing, and it was neither necessary nor even possible for all of them to be solemnly ratified by the Head of State or to be approved by Parliament. Furthermore, technical progress in telecommunications made it very unlikely that a negotiator would sign an agreement without being previously informed of any change in his government's intentions.

14. The survey by Mr. Blix, which covered several thousand treaties registered and published in the League of Nations and the United Nations *Treaty Series*, showed that the percentage of treaties requiring ratification was decreasing. The researches of a Polish jurist, Mrs. Frankowska, showed that of 1,000 treaties selected from among those registered and published by the United Nations, about 10 per cent contained no express provision on the mode of conclusion. The parties to all those treaties had been satisfied with signature, and not a single one of them had been made subject to ratification. That was the practice which led the Polish delegation to support the three-State amendment (A/CONF.39/C.1/L.38 and Add.1 and 2) and to oppose the amendment submitted by Switzerland (A/CONF.39/C.1/L.87). On the other hand, the amendment to article 10 submitted by Belgium (A/CONF.39/C.1/L.100) and the Finnish amendment to article 11 (A/CONF.39/C.1/L.60) might make the wording of those articles more precise and should be referred to the Drafting Committee. If the three-State amendment was adopted, the Venezuelan and Italian amendments to article 10 (A/CONF.39/C.1 L.70 and L.81) should be rejected.

15. Mr. FINCHAM (South Africa) said that in contemporary treaty-making practice, the question of the method of expressing consent to be bound by a treaty was nearly always settled in advance by the parties. But a convention of the kind under discussion should nevertheless provide for exceptional cases and lay down a residuary rule. Since treaties were becoming less and less formal, and since there was an increasing number of treaties which, in practice, did not require ratification but were binding on the parties from the moment of signature, it would be easy to provide for ratification in a treaty if it was found necessary.

16. South Africa therefore supported the amendment by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2).

17. Sir Francis VALLAT (United Kingdom) said that he hoped the Conference would support the present wording of articles 10 and 11, which offered a compromise between two sharply divergent views and gave the ultimate pride of place neither to signature nor to ratification. The United Kingdom practice was that where a treaty contained no indication of the method of expressing consent, signature indicated the consent of the State to be bound; if ratification was to be the residuary rule, that would create constitutional difficulties.

18. The task of the Conference was to adopt an international rule which would be generally acceptable in the light of the practices of all States. He thought that when ratification was necessary, express provision for it was generally made in the treaty itself.

19. The articles should be retained in their present form, since they would remind those drafting future treaties

of the need to specify whether consent was to be expressed by signature or by ratification.

20. If the Committee were to select either signature or ratification as the residuary rule, there was a grave risk that neither would obtain a two-thirds majority in plenary, thus leaving a large gap in the convention. He appealed to the Committee to avoid a battle on the issue, and to support the International Law Commission's formulation. However, if the Committee should decide to adopt a residuary rule, it should draw up a separate article stipulating that where the method of expressing consent to be bound could not be established in accordance with articles 10 and 11, consent was expressed by signature.

21. Mr. BOLINTINEANU (Romania) said that the problem was of little practical importance, as the International Law Commission had pointed out in its commentary on article 11. A treaty very seldom omitted to specify the procedure by which a State could become a party to it. The number of treaties concluded by mere signature was continually increasing, so that the present general practice of States seemed to invalidate the argument that ratification was obligatory even if the treaty did not provide for it. In view of the diversity of practice it could be concluded that in some cases States used ratification and in others mere signature. It would therefore be difficult to formulate a general rule requiring either ratification or mere signature. The Romanian delegation was therefore in favour of retaining the formula arrived at by the International Law Commission, the detailed provisions of which appeared to cover all the possible cases quite adequately.

22. Mrs. ADAMSEN (Denmark) said that the wording of article 10 was incomplete, and that a general rule based on the amendment submitted by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2) should be inserted in the convention.

23. Mr. KOUTIKOV (Bulgaria) thought that that amendment was liable to deter representatives of States which, like Bulgaria, attached importance to ratification, or confirmation by the Government, as a mode of expressing the consent of a State to be bound by a treaty. The attitude of the Bulgarian delegation must be determined by Bulgarian Law. It held that ratification should be the rule, and expression of consent by signature the exception, which should always be expressly stipulated.

24. Mr. AL-RAWI (Iraq) said that it was ratification which made treaties binding. The procedure of ratification enabled the State concerned to re-examine the treaty and its effects on the country's interests; thus it could modify the treaty or reject it, even after signature by its representatives. Moreover, the constitutions of most countries required the consent of the legislative power. Ratification should therefore be recognized as a customary rule of international law applicable even if not expressly stipulated in the treaty.

25. There were exceptions to the rule, but only within narrow limits, in particular where speedy execution was required; and ratification was not necessary if the treaty stipulated that States would be bound by signature.

26. Although an increasing number of agreements were being concluded in simplified form, that did not justify making signature the rule for expressing consent.

27. Furthermore, with regard to article 10 of the draft, the delegation of Iraq favoured the deletion of paragraph 1, sub-paragraphs (*b*) and (*c*), which might cause difficulties with regard to interpretation and application. An intention not reflected in any provision of the treaty could have no legal effect. Paragraph 1, sub-paragraphs (*b*), (*c*) and (*d*) and paragraph 2 of article 11 should also be deleted. Lastly, since the draft articles offered no solution for cases in which a treaty contained no provision, either express or implied, that States would be bound by ratification or by signature, his delegation favoured the adoption of a residuary rule to the effect that a treaty required ratification unless it had been decided otherwise.

28. Mr. HARASZTI (Hungary) said he shared the view expressed by the International Law Commission in its commentary to article 11; the result would be substantially the same whether ratification or signature was adopted as the general rule for expression of consent. His delegation considered, however, that a general rule was needed for cases in which the treaty was silent on the subject and the intention of the parties could not be established. That was not a question of principle; the practice of States must be the guide. And as 80 per cent of modern treaties did not provide for ratification, a general rule based on ratification would run counter to the present trend in international affairs. His delegation therefore supported the amendment by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2).

29. Mr. MERON (Israel) said that he could not support the amendment by Czechoslovakia, Sweden and Poland, which introduced a residuary, presumptive rule regarding the expression of the State's consent by signature. A pragmatic enumeration of the methods by which consent was expressed would be preferable. For the same reason, he could not support the proposal to make ratification the general rule. He approved of the International Law Commission's decision to leave the question of ratification to the intention of the parties. It was for the negotiators to decide whether ratification was necessary or not. It was not desirable to introduce doctrinal considerations into the draft alongside practical rules. The best way for countries to safeguard their interests was to include in treaties, when necessary, clauses expressly providing for ratification. In view of the wishes expressed by the advocates of the residuary rule concerning signature, on the one hand, and by the advocates of the residuary rule concerning ratification, on the other, it would be better to accept the International Law Commission's proposal.

30. Mr. THIERFELDER (Federal Republic of Germany) said he was in favour of retaining articles 10 and 11 as drafted by the International Law Commission. It was true that those articles did not establish any applicable rule where the treaty was silent. However, there would be no great harm in failing to seize the opportunity to settle the controversy on whether ratification or signature should be the method expressing consent laid down in a residuary rule, for total silence of a treaty on that question was exceptional. Furthermore, he doubted whether a two-thirds majority for either solution could be obtained at the Conference's second session. If the Committee wished to adopt a residuary rule, however,

his delegation would support the amendment by Czechoslovakia, Sweden and Poland (A/CONF.39/C.1/L.38 and Add.1 and 2), for the current expansion of international relations called for a simplification of procedures.

31. Mr. BLIX (Sweden) observed that the length of the debate was in inverse proportion to the practical importance of the subject, for the problem under discussion in fact arose very seldom. The doctrinal question did not necessarily have to be settled, and there would be no harm in retaining the International Law Commission's text as it stood. If the question had to be decided, however, his delegation thought it preferable to adhere to the practice of States. Draft articles 10 and 11 did not amount, juridically, to more than a statement that States were free to choose the method by which their consent to be bound by a treaty would be expressed. The articles were useful because they enumerated and defined various methods of expressing the intention of the parties.

32. Only a minority of treaties—multilateral treaties, treaties which under internal law required parliamentary consent and treaties for which a certain solemnity was desired—provided that they would become binding by ratification. Consequently, if the parties had made no express stipulation, it was more than probable that they had intended to express their consent by signature. Could the advocates of ratification as a residuary rule point to a single treaty which had entered into force by ratification although the intention of the parties had not been made clear? A residuary rule such as that proposed by the Swiss representative would not be in conformity with the modern practice of States. Nor could it be argued that such a rule would protect States against negligence on the part of their negotiators or their Governments. If, in any event, it could be expressly stipulated in a treaty that signature would make it binding, it was hard to see what danger there would be in adopting a residuary rule to the effect that consent to be bound by a treaty was expressed by signature when the intention of the parties could not be ascertained. Nor could the argument be advanced that many constitutions required parliamentary approval of certain treaties; for in such cases the parties could stipulate in the treaty that their consent was subject to ratification.

33. Despite the fact that it was a sponsor of the amendment in document A/CONF.39/C.1/L.38 and Add.1 and 2, the Swedish delegation did not attach any particular importance to the way in which a residuary rule on signature was introduced into the draft. It might perhaps be preferable, however, to embody the rule in a separate article. If the new provision did not obtain a two-thirds majority, its disappearance would then leave the articles drafted by the International Law Commission intact, which would not be the case if the rule was inserted in the text of article 10.

34. A brief article on the lines proposed by Poland and the United States (A/CONF.39/C.1/L.88 and Add.1)[4] should, in his delegation's opinion, be inserted before article 10. It would become the principal rule, and articles 10 and 11 would state the most common practical applications. An article 11 *bis* would then state the residuary rule on signature or ratification, whichever the Committee decided.

35. Mr. AMADO (Brazil) said that nowadays it was necessary to act quickly and the methods of expressing consent had become so numerous that ratification, that respectable institution of the previous century, had rather faded away. The opinion of the greatest jurists in the world could not take precedence over actual practice as described by the Hungarian representative. His own country's constitution required ratification, but it would comply with that requirement by including an express provision in the treaties it concluded. He could not support the Latin American joint amendment, and would abstain from voting on it.

The meeting rose at 1 p.m.

[4] i.e. the proposal for a new article 9 *bis*.

SEVENTEENTH MEETING

Monday, 8 April 1968, at 3.10 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (*continued*)

Question of a residuary rule in favour of signature or of ratification (continued)

1. The CHAIRMAN invited the Committee to continue its consideration of the preliminary issue of the proposals for a residuary rule.

2. Mr. KEITA (Guinea) said that the International Law Commission's text of articles 10 to 12 fully met the needs of contemporary international practice. The choice of one or other residuary rule was largely an academic issue. The International Law Commission's text would provide a good working instrument for States, whose essential duty in the matter was to avoid silence or ambiguity. If, however, a residuary rule had to be included, he would favour a presumption that ratification was necessary, because it would safeguard the requirements of his country's Constitution, article 33 of which specified that the legislature's approval was necessary for certain categories of treaty, including the vast majority of those of any importance.

3. Mr. MATINE-DAFTARY (Iran) said he strongly supported the presumption that, in the absence of evidence to the contrary, ratification and not signature expressed consent. The opposite rule would ignore the prerogatives of the legislature under the constitution of most countries, including Iran.

4. It was difficult to see what could be the scope of application of the provisions of article 10, paragraph 1. He could only think of the case of a treaty which served merely to implement the provisions of a pre-existing treaty, which had itself been ratified and had already entered into force. In a case of that nature, it might be possible for the States concerned to agree that consent to be bound by the implementation treaty would be expressed by mere signature.