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place or when it had been ratified by only a few contracting States, and not when it had been ratified by all the contracting States.

51. Mr. BEVANS (United States of America) said he did not think the retention or deletion of article 22 would make the slightest difference to existing practice, although the retention of the article might cause confusion in foreign affairs departments. For example, some countries regarded treaties, and even international law, as forming part of their internal law, and the inclusion of article 22 would introduce a new element into international law which would override their internal practice. Such difficulties could perhaps be solved by a disclaimer such as " Nothing in the present provisions shall prevent the provisional application of treaties ".

52. Mr. YASSEEN (Iraq) said he favoured the retention of article 22. He preferred the wording of the amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1) because it was clearer and would result in the deletion of a paragraph which did not seem essential. He could not, however, agree to the replacement of the words " may enter into force provisionally " by the words " may be applied provisionally ". From the legal point of view, the situation was the same as when the treaty entered into force. The only difference was in the time factor. In article 22, entry into force was provisional.

53. The Indian amendment (A/CONF.39/C.1/L.193) improved the wording of paragraph 1.

54. Mr. KRISPIS (Greece) explained that the object of the amendment submitted by his delegation (A/CONF.39/C.1/L.192) was to combine paragraphs 1 and 2 of article 22 so as to state the rule in more precise form, and to combine sub-paragraphs (*a*) and (*b*) of paragraph 1 in order to bring the drafting of the paragraph into line with that of paragraph 1 of article 21.

55. The Greek delegation approved of the change proposed by the Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1), which preserved the idea of provisional application. It might be advisable to add some words in an appropriate place in the article about the duration of the provisional application, as had been rightly suggested during the discussion.

56. With regard to the deletion of article 22, his delegation thought that its presence in, or absence from, the convention would in no way alter existing practice. It would therefore abstain in the vote on the deletion. If the article was retained, it would like its amendment to be referred to the Drafting Committee.

57. Mrs. THAKORE (India) explained that her delegation's amendment (A/CONF.39/C.1/L.193) concerned matters of drafting and could therefore be referred to the Drafting Committee. The first change seemed necessary if articles 9 *bis* and 12 *bis* were adopted. The reason for the second change was that, in view of the definition of the term " contracting State " given in article 2, paragraph 1(*f*), it was preferable not to use the words " contracting States " in the context in question, because pending ratification a State was not a contracting State. Those words might be replaced by the words " States concerned " which were also to be found in the International Law Commission's commentary to article 22.

58. The Indian delegation supported the Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1).

59. Mr. KOUTIKOV (Bulgaria) said that article 22 contained the essentials for solving a situation which seldom arose. He could vote in favour of it. It gave the impression, however, that its authors had intended to distinguish between provisional entry into force as provided in the treaty and provisional entry into force as otherwise provided. That impression was confirmed by the following sentence in paragraph (1) of the International Law Commission's commentary to the article: " Whether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text may be a question ". Possibly the article merely gave that impression, but it was better to be precise. The Bulgarian delegation, jointly with the Romanian delegation, would submit an amendment [6] on that point to make it clear that the will of States was a decisive factor, whether entry into force was provided for in the treaty or elsewhere. That amendment would only relate to paragraph 1 and could be referred to the Drafting Committee.

60. The amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1) offered a version of the article as seen from a different standpoint, both practically and theoretically. That amendment and the Indian amendment (A/CONF.39/C.1/L.193) could be considered by the Drafting Committee.

The meeting rose at 1 p.m.

[6] See document A/CONF.39/C.1/L.195.

TWENTY-SEVENTH MEETING

Wednesday, 17 April 1968, at 5.30 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)*

Article 22 (Entry into force provisionally) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 22 of the International Law Commission's draft.[1]

2. Mr. CASTRÉN (Finland) said that his delegation was in favour of retaining article 22 in its entirety, and was opposed to the deletion of paragraph 2. It could support the amendments submitted by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1), Belgium (A/CONF.39/C.1/L.194) and India (A/CONF.39/C.1/L.193). On the other hand, it could not support the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.176), for the same reasons as it had advanced at

[1] For a list of the amendments submitted, see 26th meeting, footnote 4.

the 26th meeting [2] against that delegation's amendment to article 21 (A/CONF.39/C.1/L.175).

3. Mr. MAKAREWICZ (Poland), introducing the amendment submitted jointly by his delegation and that of Hungary (A/CONF.39/C.1/L.198), said that it had already been pointed out in the Polish Government's comments on article 22 (A/CONF.39/6/Add.1) that the article did not seem to provide for termination of what was essentially a provisional state of affairs and, consequently, was not covered by article 51. In view of the general agreement with the Yugoslav and Czechoslovak proposal to substitute the term " provisional application " for " entry into force provisionally " (A/CONF.39/C.1/L.185 and Add.1), which they fully supported, the Polish and Hungarian delegations had included that term in their amendment. Sub-paragraph (*c*) of the new paragraph they proposed (A/CONF.39/C.1/L.198) brought out clearly the difference between termination of the provisional application of a treaty and termination under article 51.

4. Mr. SARIN CHHAK (Cambodia) said his delegation was in favour of the principle set out in article 22, which was justified by current practice and met the needs of States. In practice, provisional application of a treaty had few disadvantages, since States very seldom withdrew from a treaty between signature and ratification, acceptance, approval or accession. His delegation was in favour of the International Law Commission's text, but if the majority did not support that wording, he would vote for the Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1).

5. Mr. POP (Romania) said that, in drafting its realistic text of article 22, the International Law Commission had taken into account the fact that, in State practice, some treaties were applied provisionally pending ratification, acceptance or approval, and also the need to meet the actual requirements of States by setting up machinery through which delays in ratification, approval or acceptance could be avoided in cases where immediate application was necessitated by the urgency of the content of the treaty. The practice was often used by Romania, particularly in trade and transport agreements.

6. His delegation considered that the Hungarian and Polish amendment (A/CONF.39/C.1/L.198) and the Belgian amendment (A/CONF.39/C.1/L.194) improved the Commission's text. It also considered that sub-paragraphs (*a*) and (*b*) should be amalgamated, and had therefore joined the Bulgarian delegation in sponsoring an amendment to that effect (A/CONF.39/C.1/L.195). His delegation could support the Yugoslav and Czechoslovak proposal (A/CONF.39/C.1/L.185 and Add.1) to replace the expression " may enter into force provisionally " by " may be applied provisionally ".

7. Mr. ARIFF (Malaysia) said that article 22 raised some problems of practical application, since it tended to encroach upon the true functions of articles 11 and 12, which clearly indicated ratification, acceptance, approval and accession as the methods whereby a State declared its consent to be bound by a treaty. The option which article 22 gave a State to avoid compliance with the usual machinery and to fall back on the clause on provisional entry into force might ultimately render the traditional forms of consent null and void. Moreover, there seemed to be nothing to prevent a State from delaying formal ratification of a treaty indefinitely on the pretext that the treaty had entered into force provisionally. Indeed, in the course of negotiations States were sometimes reluctant to introduce into the treaty a clause on provisional entry into force for fear of constitutional difficulties and because the negotiators often lacked authority to agree to such flexible arrangements. On the other hand, there were some sound arguments in favour of retaining article 22: it was often expedient to avoid the unnecessary delay entailed by going through the traditional channels, and the advantages of the treaty could be obtained much sooner. Accordingly, his delegation was on the whole in favour of retaining paragraph 1 of the article, but paragraph 2 seemed to entail unnecessary complications, particularly if the treaty was a long one and part of it entered into force provisionally, whereas the rest remained inoperative until the traditional procedures had been performed. His delegation could support the Greek amendment (A/CONF.39/C.1/L.192), with the exception of the phrase " in whole or in part ".

8. Mr. SUPHAMONGKHON (Thailand) said he agreed with the view that it was unnecessary to retain paragraph 2 of article 22 but considered that, in order to remove all possible doubts, it might be advisable to amalgamate the two paragraphs, as was proposed in the Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1). The Thai delegation also supported the proposal by those delegations to replace the words " enter into force " by " be applied ". Nevertheless, it considered that the wording of the amendment might be improved by changing the first eight words to read "A treaty or any part thereof " and by replacing the words " it shall be applied provisionally " in sub-paragraph (*a*) by " it shall be so applied ". The amendments by Belgium (A/CONF.39/C.1/L.194) and by Hungary and Poland (A/CONF.39/C.1/L.198) seemed to contain some useful elements.

9. His delegation would appreciate some explanation from the Expert Consultant concerning the use of the word " accession " in sub-paragraph (*a*). It could visualize States, having concluded a treaty, agreeing to apply it provisionally pending ratification, acceptance or approval, but it was not quite clear how accession could be preceded by provisional application, since the States concerned would not be contracting parties before accession.

10. Mr. HARRY (Australia) said that his delegation had at first sight considered article 22 to be unnecessary in view of the existence of article 21, and had believed that the International Law Commission had perhaps not quite fully reflected modern State practice in the matter. In any case, it had thought that the Commission's text would need considerable redrafting. The Yugoslav and Czechoslovak amendment (A/CONF.39/C.1/L.185 and Add.1) might help, though it would not solve all the problems.

11. The debate had, however, considerably clarified the issues, and in the opinion of his delegation there were now only two gaps to be filled. First, there was the question of the number of acceptances, approvals or accessions needed to bring the treaty into force and to end the state of provisional application: perhaps that gap

[2] Para. 14.

could be filled by inserting the words " the requisite number of " before " contracting States " in sub-paragraph (*a*). A second problem was the one raised in the Belgian amendment (A/CONF.39/C.1/L.194), concerning the right of a contracting State party to the subsidiary agreement on provisional application to withdraw from that subsidiary agreement. The Hungarian and Polish amendment (A/CONF.39/C.1/L.198) might fill that gap, but it would perhaps be better to follow the Belgian amendment in stating the provision in residual terms, and to preface the new paragraph with the phrase " Unless otherwise provided or agreed ". His delegation would like to hear the Expert Consultant's views on that question.

12. Mr. SEVILLA-BORJA (Ecuador) said that his delegation wished to have it placed on record that articles 21 and 22 related to the formal aspect of the entry into force of treaties; the fact that a treaty had entered into force did not necessarily mean that it was valid in law. Entry into force only created a presumption regarding that validity, and the presumption did not preclude the invocation of grounds of voidability or grounds for nullity or termination.

13. The Ecuadorian delegation had considered it appropriate to make that statement despite the clarity of the International Law Commission's text, in order to avoid in the future any interpretation of articles 21 and 22 which might depart from the true meaning of the rules therein embodied, and for that reason it requested that its opinion be reflected in the report of the Rapporteur of the Committee of the Whole.

14. He supported the amendment by Yugoslavia and Czechoslovakia to article 22 (A/CONF.39/C.1/L.185 and Add.1), because the reference to " provisional application " had a more legal connotation and was more accurate than " entry into force provisionally ".

15. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission, and especially its Drafting Committee, had discussed at length the choice between the expressions " provisional application " and " entry into force provisionally ", as well as the placing of article 22 in the general scheme of the draft articles.

16. The Commission had finally decided to refer to " entry into force provisionally " because it understood that the great majority of treaties dealing with the institution under discussion expressly used that term. Subsequent evidence had corroborated that impression. Moreover, to the Commission's knowledge, the use of the expression had not given rise to any difficulty from any quarter.

17. From the point of view of juridical elegance, it also seemed preferable not to speak of application, since it was clear that before any treaty provisions could be applied, some international instrument must have come into force. That instrument might be the main treaty itself, or an accessory agreement such as an exchange of notes outside the treaty. Of course, the necessity to use the term " treaty " to describe the international instrument in question raised some difficulty. However, since most treaties spoke of " entry into force provisionally ", the Commission had decided that, on balance, it was desirable to use that term, notwithstanding the problems which it undoubtedly raised.

18. Another reason why it was desirable to speak of " entry into force provisionally " was that it was very common for that institution to be used in cases where there was considerable urgency to put the provisions of the treaty into force. In those cases, ratification sometimes never took place, because the purpose of the treaty was actually completed before it could take place. Clearly such acts must have a legal basis, and for that reason reference should be made to entry into force provisionally.

19. The suggestion, which had been made in the course of the present discussion, that the provisions of article 22 should be transferred to that part of the draft which dealt with the application of treaties raised the problem that the provisions in question would speak of the application of a treaty which had apparently not come into force.

20. The other main question which had been raised during the discussion was that of making provision for the termination of a treaty which had entered into force provisionally. The International Law Commission had discussed that question and in its earlier drafts had actually made provision for termination. Later, however, it had felt it inelegant to talk of termination in connexion with such a treaty. Moreover, it had arrived at the conclusion that the contents of any provision on the subject of termination would either go without saying, or would be covered by article 51 on the termination of treaties by agreement. However, he wished to make it clear that, except for the minor question of juridical elegance, the International Law Commission would certainly not have objected to the substance of a proposal such as that contained in the amendment by Hungary and Poland (A/CONF.39/C.1/L.198).

21. The reference to accession had been included in article 22 as a measure of caution; it was quite common to make a multilateral treaty open to signature for only a short period of, say, six months, after the expiry of which it would be open only to accession, acceptance or approval.

22. Mr. BEVANS (United States of America) said he would request that the amendment by his delegation and those of the Republic of Korea and the Republic of Viet-Nam to delete article 22 (A/CONF.39/C.1/L.154 and Add.1) be not put to the vote. That request was made on the understanding that article 22 would not effect any change in internal law governing the entry into force of treaties. When he had submitted his amendment, he had sought to avoid confusion on that point with regard to international instruments which were " treaties " under domestic law and subject to specific procedures before coming into force or being applied.

23. On the understanding which he had expressed, he would now be prepared to support the amendment by Yugoslavia (A/CONF.39/C.1/L.185 and Add.1), combined with the amendment by Belgium (A/CONF.39/C.1/L.194).

24. Mr. JAGOTA (India) said that the United States proposal to delete article 22 had been made because of the possibility that provisional entry into force would conflict with constitutional limitations, but he would have thought that article 22 was only a variant of article 21, and the provisional entry into force would be the same as full entry into force, in which case there should be no differ-

ence as between the two articles so far as constitutional limitations were concerned.

25. Sir Humphrey WALDOCK (Expert Consultant) said that the procedure in article 22 took place by virtue of special consent embodied either in the main text of the treaty or in a separate agreement, often a treaty in simplified form. It was a special procedure which most constitutions now recognized, even those with very strict provisions.

26. The CHAIRMAN said he would invite the Committee to vote first on the amendments by the Philippines (A/CONF.39/C.1/L.165) and by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1, paragraph 2) to delete paragraph 2 of article 22.

The deletion of paragraph 2 of article 22 was rejected by 63 votes to 11, with 12 abstentions.

27. The CHAIRMAN invited the Committee to vote on paragraph 1 of the Yugoslav and Czechoslovak amendment.

Paragraph 1 of the amendment by Yugoslavia and Czechoslovakia (A/CONF.39/C.1/L.185 and Add.1) was adopted by 72 votes to 3, with 11 abstentions.

28. The CHAIRMAN invited the Committee to vote on the principle of including a new paragraph 3 on the termination of the provisional entry into force or provisional application of a treaty as proposed by Belgium (A/CONF.39/C.1/L.194) and by Hungary and Poland (A/CONF.39/C.1/L.198).

The principle was adopted by 69 votes to 1, with 20 abstentions.

29. The CHAIRMAN said that the amendments adopted, together with the drafting amendments by the Republic of Viet-Nam (A/CONF.39/C.1/L.176), Greece (A/CONF.39/C.1/L.192), India (A/CONF.39/C.1/L.193 and Bulgaria and Romania (A/CONF.39/C.1/L.195), would be referred to the Drafting Committee.[3]

The meeting rose at 6.15 p.m.

[3] For resumption of the discussion on article 22, see 72nd meeting.

TWENTY-EIGHTH MEETING

Thursday, 18 April 1968, at 10.45 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)*

Texts proposed by the Drafting Committee

1. The CHAIRMAN invited the Chairman of the Drafting Committee to make a statement concerning the titles of the parts, sections and articles, and to introduce the text of articles 3, 4 and 5 adopted by the Drafting Committee (A/CONF.39/C.1/3).

Titles of parts, sections and articles

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had come to a general decision regarding the titles of the parts, sections and articles, which was recorded in the footnote to its report (A/CONF.39/C.1/3). The Drafting Committee had thought it advisable to defer consideration of those titles, because their wording would necessarily depend on the eventual content of the articles themselves.

Article 3 (International agreements not within the scope of the present articles) [1]

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that a further general decision by the Drafting Committee, to which effect was given in the wording it had adopted for article 3, concerned sub-paragraphs which did not form a grammatically complete sentence. In the printed text of the International Law Commission's draft articles, including that of article 3, those sub-paragraphs began with a capital letter. The Drafting Committee considered, however, that for grammatical reasons it would be preferable for them to begin with a small letter.

4. The text for article 3 adopted by the Drafting Committee read:

"*Article 3*

" The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

"(*a*) the legal force of such agreements;

"(*b*) the application to them of any of the rules set forth in the present Convention to which they would be subject, in accordance with international law, independently of the Convention;

"(*c*) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties."

5. The text reproduced, in sub-paragraphs (*a*) and (*b*), the International Law Commission's text, with slight drafting changes which improved the wording. The Drafting Committee had not accepted the proposals to delete the words " independently of these articles "; it had considered those words necessary in order to show that the rules stated in the convention could apply, not as articles of the convention, but on other grounds, because they had another source: for example, custom.

6. On the other hand, the Drafting Committee had thought fit to accept the Mexican amendment (A/CONF.39/C.1/L.65) introducing the words " in accordance with international law ". Those words had, however, been inserted before the words " independently of these articles ", not in place of them, as proposed. The effect of adding those words was to clarify the text and emphasize that article 3 permitted the application not only of the old rules which had been codified, but also of new rules drawn up to promote the progressive development of international law, so that if a new custom grew up on the basis of the articles which stated new rules, that custom would apply.

[1] For earlier discussion of article 3, see 6th and 7th meetings.