United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/SR.11

Eleventh plenary meeting

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, Second Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

78. Mr. TAYLHARDAT (Venezuela) said that in view of the result of that vote his delegation withdrew its request for a separate vote on paragraph 2.

79. The PRESIDENT invited the Conference to vote on the USSR amendment to paragraph 4 (*b*).

The USSR amendment (A/CONF.39/L.3) was adopted by 49 votes to 21, with 30 abstentions.

80. Mr. ROMERO LOZA (Bolivia) said that he had voted for the Soviet amendment because Bolivia considered that an objection to a secondary clause of a treaty should not preclude the entry into force of the treaty as a whole between the reserving and objecting States. He wished to make it clear, however, that, although such a reservation would not affect the entry into force of the treaty as between the two parties concerned, it would still apply with respect to the article concerned.

81. Mr. USENKO (Union of Soviet Socialist Republics) said that he agreed with the representative of Switzerland that paragraph 3 should be deleted; it was already covered by the provisions of article 4. He therefore asked for a separate vote on paragraph 3.

82. The PRESIDENT invited the Conference to vote on paragraph 3.

Paragraph 3 was adopted by 61 votes to 20, with 18 abstentions.

Article 17 as a whole, as amended, was adopted by 83 votes to none, with 17 abstentions.

The meeting rose at 6.35 p.m.

ELEVENTH PLENARY MEETING

Wednesday, 30 April 1969, at 3.15 p.m.

President: Mr. AGO (Italy)

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)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Article 17 (Acceptance of and objection to reservations) *(continued)*

1. The PRESIDENT invited any representatives who wished to do so to explain their votes on article 17 at the previous meeting.

2. Mr. STEVENSON (United States of America) said his delegation wished to make clear what it understood to be the meaning of the term " object and purpose " as used in articles 15, 16 and 17 and in various subsequent articles. At the first session, his delegation had co-sponsored an amendment (A/CONF.39/C.1/L.126 and Add.1) to replace the words " object and purpose " in article 16, sub-paragraph (*c*) by the words " character or purpose ", because it had been uncertain whether the traditional reference to the object and purpose of the treaty was intended to cover the concept of the nature and character of a treaty. The amendment had been referred to the Drafting Committee, which had not considered it proper to change the expression " the object and purpose of the treaty ", which had been used by the International Court of Justice and was to be found in many legal texts.

3. His delegation noted that the International Court of Justice, in its advisory opinion on the Genocide Convention, had used the term " object and purpose " in summarizing its conclusions on the admissibility of reservations, thus setting up the criterion of compatibility with the object and purpose of the treaty. In reaching its conclusions, however, the Court had emphasized that the kind of reservation that might be made was governed by the " special characteristics " of the Convention; the Court had stated that " The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties ".[1] In the light of that opinion, the United States understood the expression " object and purpose of the treaty " in its broad sense as comprehending the origins and character of the treaty and the institutional structure within which the purpose of the treaty was to be achieved.

4. Mr. BADEN-SEMPER (Trinidad and Tobago) said that his delegation had voted in favour of article 17, although the wording and content of some of its provisions, such as paragraphs 3 and 4 (*c*), left much to be desired. In particular, his delegation wished to state categorically that it did not regard paragraph 5 as *lex lata*. The provision clearly represented a progressive development of international law, but it was not a wholly satisfactory one. His delegation had no doubt concerning the existence of the principle of acquiescence in international law and would have been quite prepared to accept that principle instead of paragraph 5; on the other hand, there was no rule or principle in customary law under which a reservation would be regarded as accepted by a State merely by reason of its silence or of the passage of time. Indeed, in the Committee of the Whole his delegation had consistently refrained from supporting amendments advocating acquiescence through the mere passage of time, and it therefore had considerable doubts as to the desirability or workability of paragraph 5.

Article 18 [2]

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing

[1] *I.C.J. Reports, 1951*, p. 23.

[2] For the discussion of article 18 in the Committee of the Whole, see 23rd and 70th meetings.

and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

Article 18 was adopted by 90 votes to none.[3]

Article 19 [4]

Legal effects of reservations

1. A reservation established with regard to another party in accordance with articles 16, 17 and 18:

(*a*) Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) Modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the reservation has the effects provided for in paragraphs 1 and 2.

5. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had made no change in the title of article 19 proposed by the International Law Commission. It had, however, altered the wording of paragraph 3 so as to take into account the USSR amendment (A/CONF.39/L.3), which the Conference had incorporated in article 17, paragraph 4 (*b*) at the previous meeting.

6. Mr. HADJIEV (Bulgaria) said that, at the first session, the Bulgarian, Romanian and Swedish delegations had submitted an amendment (A/CONF./39/C.1/L.157 and Add.1) with a view to reformulating paragraph 1 of article 19 in more precise terms. The amendment had been referred to the Drafting Committee which, however, had not taken it into account. His delegation was convinced that it would be desirable to incorporate such an amendment, and proposed that it should be referred once again to the Drafting Committee. If the amendment were adopted, it would not only eliminate some unnecessary repetition from the text, but would have the advantage of stressing the bilateral relationship which the reservations machinery established between the reserving State and the State accepting the reservation.

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had considered the amendment, but had decided not to incorporate it in the text of article 19. Nevertheless, if the Conference so wished, the Drafting Committee was prepared to review the text.

8. The PRESIDENT suggested that the Conference should vote on the text before it, on the understanding that the Drafting Committee would again consider the amendment submitted by the Bulgarian delegation.

9. Mr. WERSHOF (Canada) asked whether the Conference would have an opportunity to reconsider the text of article 19 in the event of the Drafting Committee deciding to incorporate the amendment, which some delegations regarded as substantive.

10. The PRESIDENT said that, if the Drafting Committee decided to alter the text after the vote, the article would be resubmitted to the Conference.

Article 19 was adopted by 94 votes to none.[5]

Article 20 [6]

Withdrawal of reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative in relation to another contracting State only when notice of it has been received by that State.

11. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not altered the title of article 20, but had considered that paragraph 2 did not indicate clearly enough the State in relation to which the withdrawal of a reservation became operative. It had therefore replaced the last phrase of that paragraph by the words " the withdrawal becomes operative in relation to another contracting State only when notice of it has been received by that State ".

12. The PRESIDENT drew attention to the two amendments to article 20 submitted by the Hungarian delegation (A/CONF.39/L.17 and L.18).

13. Mrs. BOKOR-SZEGÓ (Hungary) said that her delegation's amendment to paragraph 1 (A/CONF.39/L.17) related to drafting only and was designed to bring that provision into line with article 18, where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing. The Hungarian delegation had submitted a similar amendment (A/CONF.39/C.1/L.178) during the first session, but the Drafting Committee had not taken that suggestion into account, although it had not given any reasons for its decision.

14. The Hungarian proposal to include a new para-

[3] For a subsequent change in the text of article 18, see 29th plenary meeting.

[4] For the discussion of article 19 in the Committee of the Whole, see 25th and 70th meetings.

[5] For further discussion of article 19, see 29th, 32nd and 33rd plenary meetings. The title and text of the article were amended.

[6] For the discussion of article 20 in the Committee of the Whole, see 25th and 70th meetings.

Amendments were submitted to the plenary Conference by Hungary (A/CONF.39/L.17 and L.18).

graph 2 (A/CONF.39/L.18) had been submitted in the belief that, if a provision on the withdrawal of reservations was included, it was essential that there should also be a reference to the possibility of withdrawing objections to reservations, particularly since that possibility already existed in practice. The proposal to amend paragraph 3 followed logically from the proposed new paragraph 2. Paragraph 3 restated the provisions of paragraph 2 as revised by the Drafting Committee at the first session, with the addition of a new sub-paragraph (*b*), to make it clear that the withdrawal of an objection to a reservation became operative only when notice of it had been received by the State which had formulated the reservation concerned; her delegation believed that, whereas the withdrawal of a reservation affected the existing relations between the reserving State and the other parties, withdrawal of an objection directly concerned only the objecting State and reserving State. If the amendment were adopted, the title of article 20 would have to be changed.

15. Mr. YASSEEN, Chairman of the Drafting Committee, said that, at the first session, the Drafting Committee had not incorporated the Hungarian amendment to paragraph 1 on the ground that it was a substantive proposal on which a decision should be taken by the Conference.

16. Mr. PINTO (Ceylon) said that the International Bank for Reconstruction and Development had suggested in its second written statement (A/CONF.39/7/Add.2, paragraph 10) that the words " or organization " should be inserted after the words " of a State " in article 20, paragraph 1. He believed that that was a useful amendment, which would eliminate the apparent inconsistency between the text of article 17, paragraph 3, as adopted by the Conference at the previous meeting and article 20, paragraph 1 as submitted by the Drafting Committee. He therefore suggested that the Drafting Committee should consider inserting the words " or organization " in paragraph 1.

17. Mr. MAAS GEESTERANUS (Netherlands) supported that suggestion.

18. Mr. BRAZIL (Australia) noted that the title of Section 2 of Part II which had been " Reservations to multilateral treaties " in the International Law Commission's draft, had been abbreviated to " Reservations ", without any reference to multilateral treaties. The Chairman of the Drafting Committee had stated at the previous meeting that the deletion had been made in order to avoid prejudging the question of the possibility of entering reservations to bilateral treaties. The Australian delegation did not wish to engage in a discussion of that theoretical question, but wanted to ascertain whether its understanding that articles 16 and 17 applied only to multilateral treaties was correct. If so, it might be best to revert to the title proposed by the International Law Commission.

19. The PRESIDENT said that, personally, he had been surprised to hear that the Drafting Committee had entertained the idea of reservations to bilateral treaties. As a law student, he had been taught that that idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation. He had interpreted the abbreviation of the title of Section 2 as an admission that the applicability of reservations only to multilateral treaties was self-evident. If there were any doubt on the matter, the Drafting Committee would do well to revert to the title proposed by the International Law Commission.

20. Mr. YASSEEN, Chairman of the Drafting Committee, said that some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties. The deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudge the question in any way.

21. Speaking as the representative of Iraq, he said he fully shared the President's view that any change proposed to a bilateral treaty represented a new offer and could not be regarded as a reservation.

22. The PRESIDENT asked whether the Drafting Committee agreed that the procedures set out in the articles in Section 2 related only to multilateral treaties.

23. Mr. YASSEEN, Chairman of the Drafting Committee, said he was not in a position to confirm that statement on behalf of the entire Drafting Committee, which had not been unanimous on the point.

24. The PRESIDENT said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties.

25. Mr. BRAZIL (Australia) said that his delegation was satisfied with the explanation given by the President.

26. Mr. MARESCA (Italy) said that diplomacy, of which treaties were the solemn conclusion, was a written art: the most eloquent oratory was of no avail unless the provisions agreed upon were satisfactorily written down. All the component parts of the convention must be governed by that fundamental requirement of diplomatic style. Reservations must of course be formulated in acceptable terms, and all representatives who had experience of drafting in ministries of foreign affairs were well aware of the difference between the general idea of a reservation and its actual written formulation. That consideration applied equally to the converse operation of the withdrawal of a reservation; reservations might be regarded as the disease of treaty-making, and the withdrawal of reservations as the convalescence and cure.

27. The relations between a reservation and an objection to a reservation was the same as that between a claim and a counter-claim. The extinction of a claim, or the withdrawal of a reservation, was counterbalanced by the extinction of a counter-claim or the

withdrawal of an objection to a reservation, which was equally a diplomatic and legal procedural stage in treaty-making.

28. His delegation therefore whole-heartedly supported both the Hungarian amendments.

29. Mr. CASTRÉN (Finland) said that his delegation, too, supported the Hungarian amendment to paragraph 1 (A/CONF.39/L.17), particularly since Austria and Finland had submitted a similar amendment (A/CONF.39/C.1/L.4 and Add.1) during the first session. His delegation also agreed with the idea and content of the second Hungarian amendment (A/CONF.39/L.18).

30. Sir Francis VALLAT (United Kingdom) said he considered that both the Hungarian amendments were substantive, and should be voted on by the Conference. His delegation could support the amendment to paragraph 1, in the belief that clarity of action in that respect was desirable.

31. The United Kingdom also considered it useful to lay down a procedure for the withdrawal of objections to reservations, and could therefore support the Hungarian proposal for a new sub-paragraph 3 (*b*). On the other hand, it believed that the last phrase of the proposed new paragraph 2 was superfluous, in view of the differing nature of reservations and objections to reservations; the consent of the reserving State was self-evidently not required for the withdrawal of the objection, and an express provision to that effect might suggest that there was some doubt on the point. His delegation would therefore support both the Hungarian amendments if the concluding phrase were omitted from the proposed new paragraph 2.

32. Mr. VEROSTA (Austria) said that his delegation agreed with the Australian representative that it might be inadvisable to drop the reference to multilateral treaties from the title of section 2.

33. His delegation could support both the Hungarian amendments.

34. The PRESIDENT suggested that the words " in writing " might be inserted after the word " withdrawn " in the new paragraph 2 proposed by the Hungarian delegation.

35. Mrs. BOKOR-SZEGÓ (Hungary) said that her delegation could accept that suggestion and the United Kingdom proposal to delete the words after " at any time " from the new paragraph 2.

36. The PRESIDENT invited the Conference to vote on the Hungarian amendment to paragraph 1 (A/CONF.39/L.17).

The amendment was adopted by 92 votes to none, with 3 abstentions.

37. The PRESIDENT invited the Conference to vote on the Hungarian proposal for a new paragraph 2 and paragraph 3 (A/CONF.39/L.18).

The proposal was adopted by 93 votes to none, with 3 abstentions.

38. Mr. WERSHOF (Canada) said that his delegation had abstained in the vote on the second Hungarian amendment (A/CONF.39/L.18) because paragraph 3 of the Hungarian draft was based on the text approved by the Committee of the Whole at its 70th meeting, whereas the Drafting Committee had since improved that wording. It would be a pity if that improvement were to be lost merely because the Hungarian amendment had been submitted before the Drafting Committee's text. His delegation's abstention had not been prompted by the substance of the Hungarian amendment.

39. Mr. YASSEEN (Iraq) said that his delegation had abstained from voting on the first Hungarian amendment because the inclusion of the words " in writing " introduced an unnecessary additional condition into a procedure which should be facilitated as much as possible. It had abstained from voting on the second Hungarian amendment because it considered the new paragraph to be self-evident and therefore redundant.

40. The PRESIDENT suggested that the problem raised by the Canadian representative could be solved simply by requesting the Drafting Committee to align the text of the Hungarian amendment with the wording submitted by the Drafting Committee.

It was so agreed.

41. The PRESIDENT invited the Conference to vote on article 20, as amended.

Article 20, as amended, was adopted by 98 votes to none.[7]

Statement by the Chairman of the Drafting Committee on articles 21-26

42. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 21 to 26 constituted Section 3 of Part II and Sections 1 and 2 of Part III.

43. Section 3 of Part II consisted of articles 21 and 22. Article 22 in the International Law Commission's draft had been entitled " Entry into force provisionally ". The amendments made by the Committee of the Whole to the text of article 22 had led the Drafting Committee to alter that title to " Provisional application ". It had accordingly changed the title of Section 3 to read: " Entry into force and provisional application of treaties ".

44. Section 1 of Part III consisted of articles 23 and 23 *bis*. Article 23 *bis* was a new article [8] which the Drafting Committee had entitled " Internal law and observance of treaties ".

45. Section 2 of Part III consisted of articles 24, 25 and 26. The Drafting Committee had not altered the titles of articles 24 and 26. It had, however, changed the title of article 25 to " Territorial scope of treaties ", a change based on the wording of an amendment by the Ukrainian SSR (A/CONF.39/C.1/

[7] For subsequent changes in the title and text of article 20, see 29th plenary meeting.

[8] See 72nd meeting of the Committee of the Whole, paras. 29-33.

L.164). It had also altered the Spanish title but had left the French title unchanged because it corresponded to the new English title.

46. The Drafting Committee had made very few changes, all of them strictly of a drafting character, to the texts of articles 21 to 26. He would only mention one of those changes. The earlier English version of article 23 *bis* began with the words " No party may invoke the provisions ... ". The Drafting Committee had considered that it would be more appropriate to begin the text of the article with the words " A party may not invoke the provisions ... " rather than with the words " No party ". Corresponding changes had been made in the other language versions.

Article 21 [9]

Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

47. Mr. KEARNEY (United States of America) said that, as the Conference was about to adopt article 21 on entry into force, it was a matter for gratification to learn that the Treaty for the Prohibition of Nuclear Weapons in Latin America had entered into force on 25 April 1969 with its ratification by Barbados. That development was an example of the high participation by the Latin American States in the control of armaments. His country was proud to have been associated with that effort by countries of the Western Hemisphere and wished to pay a warm tribute to them for that historic achievement.

48. Mr. SINCLAIR (United Kingdom) said he noted with satisfaction that the new paragraph 4 of article 21 contained the substance of an amendment which had been proposed by his delegation (A/CONF.39/C.1/L.186). In recording his approval of article 21 on entry into force, he wished in turn to express his country's deep satisfaction at the news of the entry into force of the Treaty for the Prohibition of Nuclear Weapons in Latin America, which represented an important advance in the field of arms control and disarmament, and he congratulated the Latin American Governments concerned in that great and historic enterprise, with which the United Kingdom had been glad to be associated.

49. Mr. SUAREZ (Mexico) said he sincerely appreciated the good wishes extended by the United States and United Kingdom delegations at the entry into force of the treaty, known as the Treaty of Tlatelolco, which was the work of all the Latin American countries and which was evidence of their love of peace and sense of international solidarity.

50. Mr. KHLESTOV (Union of Soviet Socialist Republics) requested the Drafting Committee to find a better Russian translation for the words " in such manner " in article 21, paragraph 1; the one given in the present version was unsatisfactory.

51. The PRESIDENT said that the necessary correction would be made to bring the Russian text into line with the others.

Article 21 was adopted by 99 votes to none.

Article 22 [10]

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) The treaty itself so provides; or

(*b*) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

52. Mr. MOLINA ORANTES (Guatemala) said that his delegation opposed article 22. Guatemala's Constitution precluded its Government from contracting international obligations by means of treaties unless such treaties were first approved by the Legislature. That was in order to ensure that such obligations did not conflict with Guatemala's internal legislation or vital interests. Legislative approval meant that there was no such conflict and that consquently the treaty could be ratified by the Executive and enter into force.

53. The provisional application provided for under article 22 would have the effect of creating obligations for the signatory State without the prior approval of the legislature; although the government might subsequently decide not to participate in the treaty, the obligations created during the period of provisional application would have given rise to legal relations whose validity would be questionable, and that might lead to objections on the ground of their unconstitutional character.

54. Because of those constitutional considerations, his delegation could not vote for article 22 in the form proposed by the Committee of the Whole.

55. Sir Francis VALLAT (United Kingdom) said that his delegation approved of article 22 as proposed by

[9] For the discussion of article 21 in the Committee of the Whole, see 26th and 72nd meetings.

[10] For the discussion of article 22 in the Committee of the Whole, see 26th, 27th and 72nd meetings.

the Committee of the Whole, subject to the following comments.

56. It was his delegation's understanding that the inclusion of the phrase " pending its entry into force " in paragraph 1 did not preclude the provisional application of a treaty by one or more States after the treaty had entered into force definitively between other States. A régime where a treaty had entered into force definitively between certain States, but was nonetheless being applied provisionally by other States, was not unknown in international practice.

57. Another point arose in connexion with paragraph 1. There were instances in international practice where the text of a general multilateral convention had been adopted but where the necessary number of ratifications required for entry into force had not subsequently been forthcoming. If that situation occurred, certain of the negotiating States, but not necessarily all of them, might come together and agree that the treaty or part of the treaty should be applied provisionally between them. Accordingly, it was his delegation's understanding that paragraph 1(*b*) of article 22 would apply equally to the situation where certain of the negotiating States had agreed to apply the treaty or part of the treaty provisionally pending its entry into force.

58. Lastly, he wished to point out that the last sentence of paragraph (3) of the International Law Commission's commentary to article 23 stated: " The words 'in force' of course cover treaties in force *provisionally* under article 22 as well as treaties which enter into force definitively under article 21 ". At the first session, the Drafting Committee had redrafted article 22 in terms of provisional application rather than of provisional entry into force. It was his delegation's understanding that the rule in article 23 continued to apply equally to a treaty which was being applied provisionally under article 22, notwithstanding the minor drafting changes which had been incorporated into the International Law Commission's text.

59. Mr. VEROSTA (Austria) said that his delegation fully realized that the present closely-knit structure of international relations might require the immediate application of a treaty, and Austria accordingly supported article 22 in its amended form. However, careful study revealed an aspect that appeared to have been overlooked in the text, although it had been referred to several times during the discussion on the article. That aspect related to the time-limit between the moment when the provisional application began, and the moment of final acceptance of the treaty.

60. His delegation considered that provisional application of a treaty was an exception to the rule, and ought not to become an established legal institution offering a State the possibility of making use of the advantages of a treaty while at the same time giving it the opportunity of ending its application of the treaty unilaterally at any time, in contradiction to the obligations under article 15.

61. The Austrian delegation therefore suggested that article 22 be amended by the inclusion of a new paragraph 3 providing that the provisional application of a treaty did not release a State from its obligation to take a position within an adequate time-limit regarding its final acceptance of the treaty. The rather vague term " adequate time-limit " might be objected to, but a prior determination of what the time-limit ought to be would be difficult, since it would vary from case to case. His delegation believed that the amendment it had suggested did not imply any obligation regarding a final acceptance of the treaty, but clearly established an obligation to take a position regarding acceptance as soon as possible. It would help to ensure stable and unambiguous legal relations.

62. Mr. MATINE-DAFTARY (Iran) said that paragraph 2, which was not part of the International Law Commission's original text, went beyond the scope of provisional application. It referred to the possibility of withdrawal by a State which had already signed a treaty and would seem to undermine the *pacta sunt servanda* rule.

63. Sir Humphrey WALDOCK (Expert Consultant) said that it was implied in the notion of provisional application that such application was provisional pending definitive entry into force.

64. At the first session, the Committee of the Whole had introduced paragraph 2 into article 22 in order to cover the case where a State, after a treaty had begun to be applied provisionally, ultimately decided that it did not wish to become a party to the treaty at all. The Committee of the Whole had taken the view that, in that event, provisional application would have to end.

65. The PRESIDENT said that it was difficult to understand the opening proviso of paragraph 2, " Unless the treaty otherwise provides ". If a State which was applying a treaty provisionally decided that it did not wish to become a party to the treaty, the provisional application of the treaty would have to end, regardless of any provisions of the treaty itself. It would seem very strange for a treaty to provide that it would apply provisionally to a State which was not, and would not become, a party to it.

66. Mr. YASSEEN, Chairman of the Drafting Committee, said that paragraph 2 resulted from an amendment adopted at the first session by the Committee of the Whole; its text must be read in conjunction with that of paragraph 1. The faculty afforded by paragraph 1 was open to States that wished to become parties to the treaty at some time. A State which had accepted the provisional application of a treaty could, however, decide later that it did not wish to become a party; upon that intention being notified to the other States concerned, provisional application would cease.

67. Mr. REDONDO-GOMEZ (Costa Rica) said that the provisions of article 22 gave expression to a new practice which should be commended on grounds of flexibility. Much as his delegation would have wished to contribute to that new practice by supporting

article 22, it would be obliged to abstain from voting on it because of constitutional difficulties. The Constitution of Costa Rica contained explicit provisions to cover such a situation where treaties concluded within the framework of the Central American Common Market were concerned; but there was no similar constitutional provision to cover the case in general international law.

68. Mr. JAGOTA (India) said that his delegation would have had no difficulty in accepting article 22 in the proposed text, but the United Kingdom and Austrian delegations had now raised a number of new and weighty points, which deserved careful consideration. If article 22 were pressed to a vote, his delegation would vote for it on the understanding that there was a basic distinction between it and article 21; article 21 dealt with entry into force, whereas article 22 dealt with provisional application and not provisional entry into force.

69. His delegation agreed with the first two points of interpretation made by the United Kingdom representative. The first was that the words " pending its entry into force " in paragraph 1 would not exclude the possibility of entry into force for some States and not for other States. The second was that the words " the negotiating States " in paragraph 1 (*b*) should be taken to cover also " some negotiating States ".

70. He could not, however, agree with the United Kingdom representative's third point of interpretation, that the obligations of article 23 would also apply to the case mentioned in article 22. The paragraph in the International Law Commission's commentary to which that representative had referred related to an article 22 which had been drafted in terms of " entry into force provisionally ", whereas the text of article 22 now under discussion dealt with " provisional application ". The rule in article 23 applied only to a " treaty in force ". He was inclined therefore to agree with the Austrian representative that any obligations that might arise under article 22 would come under the heading of the general obligation of good faith on the basis of article 15 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) rather than of article 23 (*Pacta sunt servanda*). It would probably be desirable to lay down some time-limit for States to express their intention in the matter, so that the provisional application of a treaty might not be perpetuated.

71. Mr. MATINE-DAFTARY (Iran) said that, despite the explanations of the Chairman of the Drafting Committee, he still had misgivings regarding the text of paragraph 2. It was essential to clarify that text, which seemed to enable a State to withdraw from a treaty which it had signed and perhaps ratified.

72. Mr. BILOA TANG (Cameroon) said that he had been impressed by the remarks of the representative of Guatemala. The constitutional law of Cameroon did not contain any provisions specifying that certain categories of treaties could enter into force, provisionally or otherwise, without the approval of Parliament. He would therefore be obliged to abstain from voting on article 22.

73. Mr. EUSTATHIADES (Greece) said that the principle embodied in article 22 responded to the necessities of international practice. But the difficulties to which the Guatemalan representative had drawn attention were not purely academic. The provisions of article 22 could lead to a conflict between international law and the constitutional law of a State and thereby give rise to delicate situations.

74. He fully agreed with the second point raised by the United Kingdom delegation and thought that the text of paragraph 1 (*b*) should de reworded so as to cover provisional application by agreement among some negotiating States only.

75. He also supported the Iranian delegation's request that the text of paragraph 2 should be made clearer. The provisions of paragraph 2, which were intended as a safety valve, could paradoxically give rise to insecurity. They raised the question whether the intention expressed by a State that it did not wish to become a party to the treaty would be taken as final. Actually, in a parliamentary system, it was possible for a government to change its mind and to express a different intention at a later stage. Accordingly, under the provisions of paragraph 2, a State which had accepted the provisional application of a treaty would be able to suspend that application by expressing the intention not to become a party, although that intention need not be final.

76. Mr. ALVAREZ (Uruguay) said that he had serious objections to the idea of the provisional application of a treaty before it entered into force. Either a treaty was in force, in which case it was applied, or it was not in force, in which case it was not applied.

77. Furthermore, provisional application conflicted with his country's Constitution, under which a preponderant part in forming the will of the State was given to the Legislature, whose consent was essential for the entry into force and application of every international agreement that had been concluded by the Executive.

78. He realized, however, that the constitutional system of his country was one thing, while international practice in the provisional application of treaties — which was most important and could not be disregarded — was something else. Perhaps the solution for countries which, like Uruguay, had a constitutional system incompatible with the international practice in question was not to sign or conclude treaties which contained provisions stating that they would be applied provisionally once they had been signed.

79. He wished to point out, however, that paragraph 2 had not been contained in the International Law Commission's original draft but had been based on amendments by Belgium (A/CONF.39/C.1/L.194) and Hungary and Poland (A/CONF.39/C.1/L.198) at the first session. The Belgian amendment in particular had proposed the addition of a new paragraph 3 to

article 22 to read: " Unless otherwise provided or agreed, a State may terminate the provisional entry into force with respect to itself, by manifesting its intention not to become a party to the treaty. " Both the Belgian amendment and the amendment by Hungary and Poland had been adopted by the Committee of the Whole by 69 votes to 1, with 20 abstentions. For those reasons, his delegation was prepared to vote for article 22.

80. Mr. WERSHOF (Canada) said that his delegation would support article 22 for the same reasons as those advanced by the representative of Uruguay. At the first session, the Drafting Committee had worked out the present text of that article, which had been adopted by the Committee of the Whole without any formal change. It seemed to his delegation that there was nothing in article 22 which would force a country which for constitutional reasons could not contemplate becoming bound provisionally by a treaty to get into such a position.

81. One representative had expressed the view that the word " party " in paragraph 2 might be confusing, but the answer to that objection was surely to be found in the definition of " party " in article 2 (*g*), namely, " a state which has consented to be bound by the treaty and for which the treaty is in force ". It seemed quite clear that a country which had merely undertaken to apply a certain treaty provisionally was not yet a " party " to that treaty.

82. Mr. REDONDO-GOMEZ (Costa Rica) said that article 22 established a special régime for the purpose of giving greater flexibility to international law, which had not previously contained any provision to regulate the consequences of the provisional application of a treaty. It was a similar situation to that which arose in private law in connexion with so-called pre-contractual instruments where a kind of specific relationship was established between a contract and the instruments preceding it. His delegation, however, still hesitated to support article 22, since it did not consider it sufficiently clear.

83. Mr. MARESCA (Italy) said it was well known that in international practice there were certain kinds of treaties which, if the parties so agreed, could enter into force before reaching their final stage of perfection. The purpose of article 22 as merely to reflect that practice and to provide the necessary element of flexibility to regulate present international treaties.

84. Paragraph 1 in no way prevented States whose constitution did not permit the provisional entry into force of a treaty from becoming parties to treaties which provided for provisional entry into force. Plenipotentiaries could be assumed to know their country's laws and could decide during the negotiations whether their country could be bound provisionnally by a treaty. However, paragraph 2, which had not been drafted by the International Law Commission, did give rise to certain difficulties. The first part of it was obviously in need of some clarification, since it stated something which was either unnecessary or contradicted the second part, while the second part raised a serious problem concerning the termination of the provisional application of treaties. In particular, was termination to take effect *ex tunc* or *ex nunc*? In order to permit the application of paragraph 1, which was in conformity with current practice, the Drafting Committee should be asked to reflect further on paragraph 2.

85. Mr. BAYONA ORTIZ (Colombia) said that his country's Constitution was similar to that of several other Latin American countries, so that his delegation might be expected to have the same objections to article 22 as those raised by several previous speakers. However, after studying article 22 carefully his delegation had decided that those objections were more apparent than real.

86. As the Canadian representative had pointed out, article 22 did not force the parties to a treaty to agree to its provisional entry into force. Whether a country would wish to permit such provisional entry into force would, as the Italian representative had said, depend on the attitude taken by its plenipotentiaries at the preliminary negotiations. Any State which negotiated a treaty was free to say whether it wished that treaty to be applied provisionally before its final entry into force. His own country could not agree to such provisional application, but since article 22 was sufficiently flexible and did not impose any obligation with respect to provisional application, his delegation was prepared to vote for it. He hoped, however, that the Drafting Committee would try to work out a more satisfactory text.

87. Mr. WYZNER (Poland) said that earlier speakers had pointed out that the idea of adding a new paragraph 2 to article 22 had originally been proposed at the first session by the delegations of his country, Hungary and Belgium. The general question of provisional application was a fact of international life which had to be taken into account. He fully understood that certain countries might have constitutional difficulties in accepting that idea; nevertheless, it was impossible to forbid countries to conclude treaties provisionally if they so wished. For that reason, article 22 was perfectly logical, since it filled what would otherwise be a gap in the proposed convention.

88. Paragraph 2 was the result of amendments which had been adopted by overwhelming majorities in the Committee of the Whole at the first session; perhaps, however, it involved a certain element of risk as far as the security of treaty relations was concerned. As that paragraph read now, the termination of a provisional application would take effect at the very moment when a State notified other parties of its intention to discontinue its provisional application. In other articles dealing with the question of the application of treaties, the Conference had provided for at least one year's notice. In the interests of the security of treaty relations, therefore, a matter of the utmost importance, it might be advisable to provide for a time-limit which would be acceptable to delegations, and he accordingly suggested that paragraph 2 be amended to read: " . . . the provisional application of a treaty . . . shall be terminated six months after that

State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty ". He hoped the Drafting Committee would consider that suggestion, so that after further consultations the Conference could take a quick decision and adopt article 22.

89. Sir Humphrey WALDOCK (Expert Consultant) said that he had been surprised at the degree of anxiety to which paragraph 2 had given rise during the discussion, since to him that paragraph seemed to offer a protection to the constitutional position of certain States rather than the contrary. The practice of provisional application was now well established among a large number of States and took account of a number of different requirements. One was where, because of a certain urgency in the matter at issue, particularly in connexion with economic treaties, it was highly desirable that certain steps should be taken by agreement in the very near future. If the treaty was one which had to come before a parliament, for example, there might be a certain delay in securing its ratification which would deprive it of some of its value. States might also resort to the process of provisional application when it was not so much a question of urgency, as that the matter was regarded as manifestly highly desirable and almost certain to obtain parliamentary approval.

90. As drafted, article 22 did not seem to involve any real risks to States which might have very strict constitutional requirements because, as had already been pointed out, there was no need for the State concerned to resort to the procedure of provisional application at all. On the other hand, there were many States which did have important constitutional requirements but which also had a very general practice of entering into treaties in simplified form. In those cases, the practice of provisional application had been found highly convenient. Paragraph 2 offered a perfect safeguard, since if a treaty was brought before parliament and it became apparent that parliamentary approval was not likely to be forthcoming, the government could change its decision and terminate the treaty.

91. The Polish representative had suggested that the interests of States might be further safeguarded by introducing into paragraph 2 some element of notice; as Expert Consultant and former Special Rapporteur, however, he personally was unable to see all the bogeys which had been evoked during the debate.

92. Mr. MATOVU (Uganda) said that the provisions of article 8 made it clear that a majority of States might conclude a treaty over the heads of a minority of States, so that where there was no unanimity the majority would be able to impose their will on the minority. He endorsed the observations of the representative of Guatemala. Under the Constitution of Uganda every treaty must be ratified by the Cabinet, but article 22, as proposed, would have the effect of tying the hands of the Government. His delegation could support it if it was made clear that a State participating in the negotiation of such a treaty would always be at liberty to reserve its position despite the provisions of article 16 and 17.

93. He wished to ask the Expert Consultant if he would agree to amending the text of paragraph 2 of article 22 to read: " Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall not take place or shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. " That amendment involved adding the phrase " shall not take place ". The reason was that the termination referred to would be later in time, which would mean that the State was first bound but was later able to withdraw from the obligation. The purpose of the amendment was to permit the State to say " No " at the initial stage, before it was bound.

94. Sir Humphrey WALDOCK (Expert Consultant) said that he was not sure what was the object of the suggested addition. He could not easily conceive that a provisional application should not take place if a State notified the other States between which the treaty was being applied provisionally of its intention not to become a party. Was it being suggested that a State might in bad faith, as it were, try to apply a treaty provisionnally, and almost in the same breath inform other States of its intention not to become a party? The Drafting Committee had not attempted to provide for such a situation because it had not envisaged the possibility.

95. The PRESIDENT asked the representative of Uganda whether, in view of that explanation, he wished to press his amendment.

96. Mr. MATOVU (Uganda) said that the question was really a drafting problem and he would suggest that it be referred to the Drafting Committee.

97. The PRESIDENT said that the Drafting Committee would consider the suggestion.

98. Mr. KHLESTOV (Union of Soviet Socialist Republics) asked whether the President intended to put the amendment by Poland, to include in the article a reference to the period of six months, to the vote.

99. The PRESIDENT said he had understood the representative of Poland to have made a suggestion rather than a formal proposal.

100. Mr. WYZNER (Poland) said that he would be satisfied if his suggestion were referred to the Drafting Committee and if that Committee subsequently reported on it to the Conference.

101. The PRESIDENT invited the Conference to vote on article 22.

Article 22 was adopted by 87 votes to 1, with 13 abstentions.[11]

[11] The Drafting Committee did not propose any change in the text of article 22 (see 28th plenary meeting). For a further statement on the article, see 29th plenary meeting.

102. Mr. YU (Republic of Korea) said that he had abstained from voting on article 22. While the practical need for the article was understandable, the legal definition of the provisional application of a treaty was not really clear to his delegation, and furthermore, the article might place his Government in a difficult position because of constitutional considerations.

103. Mr. GALINDO-POHL (El Salvador) said that although article 22 raised certain problems for his delegation, he had voted for the article.

104. El Salvador considered that its Constitution took precedence over all treaties, and moreover certain kinds of treaties — formal treaties — required ratification by the Legislature. Nevertheless, he had voted for the article in recognition of the importance of the international practice involved. It was certain that no representative of El Salvador would invoke the provisions of the article in relation to formal treaties, because its constitutional law did not permit an affirmative answer to the hypothetical questions in the article. However, the provisions of the article could be applied to certain treaties of a less formal character with respect to which the Executive had constitutional authority to bind the State.

105. Mr. VEROSTA (Austria) said that he had stated during the debate that in order not to delay the work of the Conference he was prepared to vote for article 22 on the clear understanding that the Drafting Committee would take into account the suggestions put forward during the discussion by several delegations. He realized that a lot was being asked of the Drafting Committee, since those suggestions might involve questions of substance. However, since the text of article 22 in its final form had been made available to the Conference only such a short time before the debate, delegations had not been fully prepared to take a firm position. He therefore hoped that the Drafting Committee would take full account of the comments made during the discussion.

106. The PRESIDENT said he could assure the representative of Austria that the Drafting Committee would take due note of his request.

The meeting rose at 6.20 p.m.

TWELFTH PLENARY MEETING

Tuesday, 6 May 1969, at 10.40 a.m.

President: Mr. AGO (Italy)

Tribute to the memory of Mr. Zakir Husain, President of the Republic of India

On the proposal of the President, representatives observed a minute's silence in tribute to the memory of Mr. Zakir Husain, President of the Republic of India, who had died on 3 Mai 1969.

1. Mr. DADZIE (Ghana), Mr. OGUNDERE (Nigeria), Mr. TABIBI (Afghanistan), Mr. LATUMETEN (Indonesia), Mr. MATINE-DAFTARY (Iran), Mr. KHLESTOV (Union of Soviet Socialist Republics), Mr. SINHA (Nepal), Sir Francis VALLAT (United Kingdom) on behalf of all the Western European delegations, Mr. GONZALEZ GALVEZ (Mexico), Mr. PINTO (Ceylon), Mr. KEARNEY (United States of America), Mr. TEYMOUR (United Arab Republic), Mr. WERSHOF (Canada) and Mr. JACOVIDES (Cyprus) paid tributes to the memory of the President of the Republic of India.

2. Mr. KRISHNA RAO (India) said he was deeply moved by the expressions of sympathy from the delegations of Asia, America, Africa, Western Europe and the socialist countries. He would certainly communicate them to the Government and people of India.

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

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Article 23 [1]

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

3. Mr. ALVAREZ TABIO (Cuba) said he did not propose to submit an amendment to article 23, since he had become convinced that the text produced by the Drafting Committee now seemed to satisfy the Conference. However, the Conference was not unanimous in regard to defining the scope of the *pacta sunt servanda* rule, as the debate in the Committee of the Whole at the first session had shown.

4. His first concern was the precise meaning of the words " treaty in force ". Since article 23 came immediately after the provisions relating to the entry into force of treaties, it would seem that it simply referred to a treaty concluded in accordance with the formal requirements laid down in Part II of the draft articles. If that was so, the words " in force " were superfluous, because they added nothing new. It was obvious that no one could be required to perform a treaty unless it was in force. The words " treaty in force " must therefore mean something more. In point of fact, the expression " in force " referred not only to the obligations incumbent upon the parties during the process of concluding the treaty but also to the obligations deriving from the conditions essential for the very creation of treaties, particularly the requirement

[1] For the discussion of article 23 in the Committee of the Whole, see 28th, 29th and 72nd meetings.

An amendment was submitted to the plenary Conference by Yugoslavia (A/CONF.39/L.21).