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Summary record of the 786th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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the parties' internal requirements as to ratification might differ.

89. The formula he was proposing, although occasionally criticized in scientific writings, had been used by the General Assembly in resolution 1991 (XVIII) concerning amendments to the Charter and in resolutions 91 (I), 363 (IV), 805 (VIII) and 806 (VIII) concerning applications of non-Member States to become parties to the Statute of the International Court of Justice.

90. Mr. TSURUOKA said he supported Mr. Ago's proposal, and hoped that the Commission would adopt it as the basis for the Drafting Committee's work. The formula was neutral and prejudged nothing. It was true that it made no reference to a presumption, but in his view that was a merit, not a defect; for every year dozens of countries concluded treaties and silence was very rarely a cause of dispute. If there was a dispute, the fault lay with the parties, of which there were generally only two, since the rare examples that could be found related to bilateral, not to multilateral, treaties. The two parties would be sure to agree on a settlement so he could not see what purpose would be served by stating a presumption.

91. Moreover, he thought it would be dangerous for the Commission to adopt either of the conflicting positions, for it might meet with complete lack of understanding at the international conference convened to adopt the text. If the conference were to adopt a rule of that kind, since the question was governed by constitutional rules in most countries, it would be difficult for the participating States to accept it; either they would not become parties to the treaty or they would enter reservations, and the Commission's work would be nullified.

92. The CHAIRMAN, speaking as a member of the Commission, said it was the Commission's duty to establish how the will of States to bind themselves was to be expressed. The Commission could accept signature, but it must be the signature of those authorized to sign: that was where international law referred back to internal law, as in the United Nations Charter itself.

93. As to the terms "approval" and "ratification", the meaning attached to them in internal law should be ignored. In international law, ratification was the instrument by which the competent authorities of a State confirmed that the State was bound. "Approval" meant that the competent organ had given its approval, which was not parliamentary approval. He remembered concluding sixteen conventions with Austria, which the Austrian Foreign Minister had not signed until they had been approved by the Austrian Council of Ministers.

94. The important point was to establish how States should express their will. If the members of the Commission thought it should be by signature, and believed that possible under the conditions of modern international life, he would agree. But since signature alone was not enough in all cases, what should be required? Ratification and approval, in the sense in which the terms were used in United Nations practice, were only guarantees that an organ expressed the will which bound the State. If the other hypothesis were adopted, it was to be feared that the plenipotentiaries might take it upon themselves to express the will of the State and circumvent the control established by its constitution by saying or implying that ratification was not necessary. Hence the danger that the nation might be deprived of that opportunity of expressing its will which it was the duty of the Commission to safeguard. In his view, it would be a historic error to adopt that formula; it might perhaps correspond to the practice, but it was a practice which should be reformed.

95. Speaking as Chairman, he said it appeared that the majority of the Commission wished the Drafting Committee to base its work on the Special Rapporteur's alternative B and Mr. Ago's proposal.

96. Sir Humphrey WALDOCK, Special Rapporteur, said that the course suggested by the Chairman would place him in some difficulty. Before the Commission had been enlarged, he had often taken part in the exchange of views on individual articles, but since then he had deliberately refrained from doing so, in the belief that it would save time if he were to sum up and offer his own observations at the close of the discussion. He thought he should be given an opportunity of doing that before article 12, which was an important one, was referred to the Drafting Committee.

97. Mr. BRIGGS said he fully supported the Special Rapporteur. He could not altogether endorse the Chairman's summing up, as he considered that all the alternatives discussed by the Commission should be referred to the Drafting Committee for review, together with the Special Rapporteur's comments.

The meeting rose at 6 p. m.

786th MEETING

Wednesday, 19 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Filling of a Casual Vacancy in the Commission

(A/CN.4/178 and Add.1)

[Item 1 of the agenda]

1. The CHAIRMAN announced that at a private meeting the previous day, the Commission had held an election, in conformity with its Statute, to fill the vacancy caused by the resignation of Mr. Kanga. After considering the biographical data provided, the Commission had elected Mr. Bedjaoui, Minister of Justice of the

Democratic and Popular Republic of Algeria, by secret ballot. It had decided to send a telegram to Mr. Bedjaoui inviting him to take part in the Commission's proceedings.

Working Arrangements

2. The CHAIRMAN said that, at the same private meeting, after learning of a proposal that it should meet elsewhere than at the Palais des Nations, the Commission had decided to adopt an appropriate resolution, to be drafted by the General Rapporteur.

3. Mr. ELIAS, General Rapporteur, said that in accordance with the Commission's request, he had drafted a resolution on arrangements for the present session, which read :

" The International Law Commission,

Recalling articles 12 and 14 of its Statute,

Requests the Secretary-General to make the necessary arrangements for the Commission to be provided with the accommodation and facilities essential for the work of members and of the Secretariat, so that its entire session can be held at the Palais des Nations. "

4. The CHAIRMAN suggested that the officers of the Commission be authorized to transmit the resolution to the Director of the European Office of the United Nations.

It was so agreed.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN/4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

ARTICLE 12 (Ratification) *(continued)* [1]

5. The CHAIRMAN invited the Commission to conclude consideration of article 12, so that the Special Rapporteur could sum up the discussion.

6. Mr. TUNKIN said there was one difficulty which the Commission had not considered and which might arise because of the fact that on the international level ratification was not the final act performed by the State in establishing its consent to be bound by a treaty. A change of government could occur between the time when a treaty was ratified and the time when the instruments of ratification were exchanged or deposited. If the new government did not wish to proceed with the matter, the State could not be regarded as bound by the terms of the treaty, because the final stage of consent on the international level had not been completed. He hoped that the Drafting Committee would be able to prepare a text setting out the different stages in the process of establishing consent to be bound.

7. He pointed out that the first part of paragraph 1 of Mr. Ago's proposal [2] had not been correctly rendered in English : the words " *un acte de ratification* " had been translated as " an instrument of ratification ".

8. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that two lines of thought had emerged on the major issue of whether or not any rule requiring ratification in certain circumstances could be said to exist. Some members had emphasized the need to safeguard the internal constitutional provisions of States, while others—and fundamentally he agreed with their approach—were anxious that reasonable security in the treaty-making process should be assured, so that States could know with some degree of certainty when they could rely on acts that would commit both themselves and others to being bound by the terms of a treaty.

9. He did not subscribe to the Chairman's view that large and small States tended to adopt a different approach to the matter, and believed that such differences were primarily due to the different historical and political development of the countries concerned.

10. In drafting provisions about the institutions whereby States expressed their consent to be bound by a treaty, the Commission had to take account of the growth of differing procedures in modern times. In addition to the more traditional methods of signature and ratification, there were also accession, acceptance and approval, and other methods were also to be found in particular treaties, reflecting to some extent a development both on the national and on the international plane. The method of expressing consent by approval had been inspired by the practices of particular groups of States and each of the labels used to describe the process had acquired its own significance in international law. Although some relationship between national and international law on the matter could be discerned, in practice there was no exact correspondence between the two. To illustrate that point, it was enough to draw attention to the well-known fact that, if a treaty was made subject to approval, that did not necessarily entail, for each of the parties, submission of the instrument to their legislature.

11. At its fourteenth session the Commission had attempted to indicate in articles 12, 13 and 14 the cases in which a particular act expressing the consent of a State to be bound by a treaty was required, and in article 15 what process was required to complete the act; the legal effect of such acts had been dealt with in a somewhat disparate way in articles 11, 16 and 17. In his own country the institution of ratification did not possess the significance it had on the internal level for many States, but as Special Rapporteur he had been anxious to frame provisions that would be acceptable to the majority of States.

12. There was considerable force in the general view of Sir Gerald Fitzmaurice and others that it would be difficult to formulate any residuary rule in the matter because of the modern trend towards concluding treaties in simplified form.

13. If a rule had to be stated, perhaps it should be in favour of ratification, for the reasons given by Mr. Jiménez de Aréchaga at the previous meeting;[3] such a rule would allay the concern of those States which might feel obliged to safeguard their internal constitutional requirements. That line had also been taken by McNair [4] and Lauterpacht.[5]

[1] See 783rd meeting, following para. 81, and 784th meeting, para. 2.

[2] See 784th meeting, para. 70.

[3] 785th meeting, paras. 25-33.

[4] *The Law of Treaties*, Oxford, 1961, p. 134.

[5] *Yearbook of the International Law Commission, 1954*, Vol. II, p. 127.

14. It had been solely for such pragmatic reasons that in his first report he had inclined towards a residuary rule in favour of ratification whenever an intention to the contrary had not been evinced by the parties. But after examining the comments of governments and listening to the discussion on article 12 at the present session, he had come round to thinking that it would be wiser not to formulate any definite residuary rule, even though one might be found to arise by implication from the rules stated concerning signature, ratification, etc.

15. One of the difficulties in trying to formulate a residuary rule was the tendency to regard signature and ratification as two complementary yet slightly opposed institutions, while in any event mention had to be made of such procedures as approval and acceptance.

16. As far as he could judge, there was a majority in the Commission in favour of alternative B of his proposal, namely, that signature was binding unless there was evidence of the parties' intention to follow some other procedure; there were also, however, some members who favoured alternative A or B, but at the same time were ready to accept a middle course on the lines advocated by Mr. Ago and Mr. Lachs. Possibly the best approach would be to express the provisions in terms of the intention of the parties, even though that might be open to the criticism that it left a gap in the draft where no evidence of intention could be found. Even that somewhat theoretical weakness could be overcome by adopting Mr. Ago's proposal to provide that in such cases treaties would be subject to ratification.

17. Those considerations led him to make a perhaps rather radical new suggestion for handling the whole problem. First would come an article on the rules concerning signature, which might read :

" Signature of a treaty establishes the consent of the State to be bound by the treaty when

(*a*) The treaty itself provides that it shall be binding on signature;

(*b*) The intention of the State concerned that the treaty shall be binding upon signature appears from the form of the instrument, from the full powers of the representatives or from the circumstances of the conclusion of the treaty;

(*c*) The intention of a particular State to bind itself by signature appears from the full powers of its representative or from statements made by the representative in the course of negotiations. "

Possibly something would also have to be added to that article on the lines of paragraph 3 (*b*) of his earlier proposal for article 12.[6]

18. The next article might then read :

" Except as provided in the preceding article the consent of the State to be bound by a treaty is established by the completion of an act of ratification, accession, acceptance or approval, according as the particular act required may be

(*a*) specified in the treaty; or

(*b*) indicated in the full powers of the representatives or in statements made by them during the negotiations. "

19. If that general scheme found favour, the Commission might be able to avoid the pitfalls of trying to be precise in a sphere in which modern practice was so diverse, as was demonstrated by contemporary multilateral treaties. An example of the difficulty of achieving precision in statement was provided even by the wording of articles 48, 49 and 50 of the Vienna Convention on Diplomatic Relations.[7]

20. Approval was becoming so common in practice that it must be mentioned. According to the figures given by Blix in an article published in the British Yearbook of International Law,[8] 90 of the treaties published in the United Nations Treaty Series for the years 1946-1951 had been brought into force by approval.

21. A solution on the lines he had suggested would be consistent with existing practice; if it were generally acceptable and members did not wish to comment at great length on the procedures of acceptance or approval dealt with in article 14, articles 12 and 14 could be referred to the Drafting Committee together.

22. Article 13 would need to be taken up together with articles 8 and 9, and it might be found more convenient to put accession in an article by itself, separate from ratification, acceptance and approval. If his general scheme were followed, the legal effects of ratification, accession, acceptance and approval would have been covered, with the exception of the difficult problem of good faith, which had been discussed at length at the fifteenth session and was dealt with in article 17.

23. Mr. BRIGGS said he could agree to the Special Rapporteur's suggestion, except that he had misgivings about a very comprehensive new article 12, because that would mean going into considerable detail about the institutions of approval and acceptance.

24. With regard to Mr. Tunkin's point, he drew attention to the provision contained in article 11, paragraph 3 (*a*) and the definition in article 1, paragraph 1 (*d*) concerning the establishment on the international plane of a State's consent to be bound by a treaty. Clearly those provisions should be subject to the further proviso " when the treaty comes into force " and those words might have to be inserted in the text to be prepared on the legal effects of each institution. The only other possibility would be to make a clear distinction between a draft treaty, which was an instrument that had been signed but was not yet in force, and a treaty which by definition was one that had already entered into force. It was not quite accurate to state that consent was established by signature or by the deposit of an instrument of ratification before the entry into force of the treaty.

25. As the Special Rapporteur had suggested that article 14 be referred to the Drafting Committee together with article 12, he wished to draw attention to paragraph (1) of the commentary on article 14[9] in which the Commission had said that " acceptance " had become established as a name given to two new procedures, one analogous to ratification and the other to accession, and

[6] See 784th meeting, para. 2.

[7] *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. II, p. 87-88.

[8] Vol. XXX, p. 352.

[9] *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 173-174.

had gone on to add that on the international plane " acceptance " was an innovation more of terminology than of method. It had been said that where there was provision for a treaty being open to signature " subject to acceptance ", the process was very like signature subject to ratification, and similarly that if it were made open to acceptance without prior signature, the process was very like accession.

26. He had been struck by the suggestion made by the Government of Luxembourg in the last paragraph of its comment on article 1 (A/CN.4/175, section I.12) that the Commission should take advantage of the opportunity to perfect the terminology used in the draft articles in order to eliminate the misunderstandings that had arisen as a result of the term " approval " being confused with " ratification ". One possible explanation for terms being used loosely was that treaties made subject to ratification could involve constitutional difficulties for certain States; the Commission should not encourage efforts by officials to circumvent constitutional difficulties by such means. It seemed preferable to deal in article 12 itself with ratification as such and to indicate in the commentary what was meant by acceptance or approval.

27. Mr. VERDROSS said that the Austrian Government, in its comments (A/CN.4/175, section I.3 para. 6), had expressed regret that the draft articles did not define " ratification ". As he had not been present during the earlier discussions, he did not know whether the Commission had considered the matter, but it seemed to him important.

28. The CHAIRMAN said the matter had been discussed several times and that it appeared that the term " ratification " could be easily misunderstood, since it did not have the same meaning in international law as it did in internal law. The Special Rapporteur had drawn attention to that point and had taken the Austrian Government's comment into account.

29. Mr. AGO said he fully agreed with the Special Rapporteur. The Drafting Committee would, of course, have to examine certain drafting problems, but the course suggested by the Special Rapporteur was the right one.

30. There could be an article 11 on signature and an article 12 on ratification, approval and acceptance. He would then have some doubts about the advisability of mentioning accession there too, and thought it could be better dealt with in a separate article; the other procedures would gain by being grouped together in a single article. The position would be different if the Commission were to proceed on a functional basis, grouping in one article all the forms of authentication and in another all the means of expressing the final consent of a State to be bound by a treaty.

31. If he had understood him aright, Mr. Briggs was concerned because when a State ratified, the treaty was not necessarily yet in force, so that the Commission might be adopting an incorrect formula if it said that a State's consent to be bound was established by ratification or signature. In his (Mr. Ago's) opinion, the formula proposed by the Special Rapporteur was correct. It did not say that ratification was evidence of the fact that the State was bound, but that ratification expressed the State's consent to be bound. The fact of giving its consent did not mean that the State was bound automatically and immediately. Naturally, if twenty ratifications were necessary, when the twentieth had been deposited the treaty entered into force automatically and the consent previously expressed took effect at that moment. The Commission could therefore correctly say that ratification expressed the consent of the State to be bound.

32. The CHAIRMAN, speaking as a member of the Commission, observed that writers interested in the theory of the subject had recently examined the question whether a State could withdraw its consent in the interval between the deposit of its instrument of ratification and the date of entry into force of the treaty. Some held that a State gave final consent by ratification; others took the opposite view. The Commission had not discussed the point, however.

33. Mr. JIMÉNEZ de ARÉCHEGA said it was clear from the Special Rapporteur's summing up that the Commission was now faced with about six alternative proposals for article 12. Personally he was somewhat apprehensive about the Special Rapporteur's latest suggestion for dealing with signature in article 11 and with other methods of expressing consent in a comprehensive new article 12, because that might detract from the historical and political importance of ratification which, as an institution, was on a different footing from acceptance and approval—new institutions to which States could not resort except by express provision in the treaty itself.

34. In view of the turn which the discussion had taken it would be wise to follow the Commission's established practice and refer the whole problem, together with the various alternatives, to the Drafting Committee, leaving it wide discretion to prepare new texts; it would obviously be premature to try to determine where the majority view lay.

35. Sir Humphrey WALDOCK, Special Rapporteur, said he had assumed that the Commission would follow precisely that course and had only sought to indicate in his summing up the kind of shape his new proposal to the Drafting Committee might take. His aim was to arrive at a text that would gain as wide a degree of acceptance as possible, rather than one that might be finally approved by only a very narrow majority.

36. Mr. ROSENNE said he agreed that the matter could safely be referred to the Drafting Committee, though its task would be by no means easy. If the kind of rearrangement outlined by the Special Rapporteur were adopted, the articles in question should perhaps be closely followed by articles 23 and 24, as that would result in a more logical order than the present one, in which the section on reservations broke what he would regard as the proper sequence.

37. With regard to the point made by Mr. Briggs, he was not convinced that it would be either possible or desirable to eliminate terminological variants in current use, because they were due to the complexity of both national and international administration and to political exigencies. It should be remembered that, although towards the end of the treaty-making process the work was often in the hands of foreign ministry officials, during the

earlier stages it might be the responsibility of other government departments. Further terminological innovations could certainly be expected in the future.

38. The CHAIRMAN, speaking as a member of the Commission, said that in his view " ratification " established that the State had definitely expressed its will to be bound. The terms " acceptance " and " approval " were now widely used in practice and were no less valid than the term " ratification ". They had the merit of placing later signatories on the same footing as the original signatories, whereas " accession " ranked them lower, since a State acceded only to an instrument which had already been concluded. Hence it was impossible to disregard those two institutions, which were already accepted in United Nations practice. Moreover, in the constitutional practice of some States, the declaration of acceptance or approval was given in the same form as ratification.

39. Some States distinguished between treaties that were ratified and treaties that were approved; so far as the international effects were concerned, however, it was the same thing—a definitive declaration by a State expressing its will to be bound by a treaty.

40. Irrespective of his position as to principle, he thought it convenient to treat ratification, approval and acceptance as means whereby a State expressed its will to be bound. He was not opposed to signature having the same effects, but thought that would have to stated expressly in a rule of international law. If the Commission stopped half-way between two institutions, the misunderstanding would remain and it would still be uncertain what act bound a State. Some authorities even spoke of a " provisionally binding will ", which was difficult to imagine, but could exist.

41. Mr. CASTRÉN said he thought articles 11 to 14 should be referred to the Drafting Committee; the Commission would thereby save time, and it would be in a better position to discuss the articles after they had been redrafted.

42. As Mr. Jiménez de Aréchaga had said, approval and ratification should not be linked too closely, because the term " approval ", like " acceptance ", had several meanings.

43. With regard to the procedure of ratification and other methods, he thought, like the Special Rapporteur, that there should be an article to settle the question. Article 15 should therefore be retained, but it should first be discussed, together with articles 16 and 17, which related to the effects of ratification.

44. Mr. TABIBI said he was in favour of referring articles 11 to 14 to the Drafting Committee as they were closely interrelated; Mr. Ago's proposal should be taken as the basis for the new draft.

45. In his part of the world important treaties were subject to ratification, but treaties in simplified form could enter into force on signature, even though they were generally submitted to the legislature afterwards.

46. Despite the difficulty of defining the latter type of treaty some mention should be made of it in the new article 12. It was also important to cover the point raised by Mr. Tunkin at the beginning of the discussion.

47. Mr. VERDROSS said he agreed with the Chairman's view that approval produced the same effects as ratification, but it must be admitted that in practice the terminology was fluid. The Commission should promote clarity in terminology; in order to avoid confusion it should reserve the term " ratification " for the act performed by the Head of State—or, if he did not have authority to ratify treaties, by the highest organ competent to do so—and the term " approval " for the act performed by another organ.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that when preparing his first report, he had felt the same urge to try to bring some order into the terminology. However, he had long since realized that it was neither possible nor even proper to try to dictate to States which terms they should employ, what institution they should use, or what appellation they should give it.

49. What really mattered, from the point of view of the draft articles, was to determine whether consent to be bound by a treaty had been given by a State. From that point of view, it would be sufficient for the relevant provision to state that, unless consent to be bound was given by signature alone, consent took the form of ratification, accession, approval or acceptance. The Drafting Committee should be able to prepare a formulation that would prove more acceptable than any proposed so far.

50. Mr. AMADO said he had serious doubts about the term " approval ". When the Special Rapporteur referred, in article 15, paragraph 2, to an " instrument of ratification, accession, acceptance *or* approval ", did he mean to place acceptance and approval on the same level? What was the difference in meaning?

51. For some States, approval was an act of internal law. Under the Constitution of Brazil, approval was the act by which the Senate approved the work of the negotiators, which was then submitted for ratification.

52. He was glad to note that Mr. Ago had set accession apart; for it was when a treaty had already been signed that States acceded to it; they could accede only to something which already existed.

53. Acceptance was a new procedure brought into being by practical necessities—by the difficulties of ratification, which were harmful to States, which complicated the political life of even the most advanced of them and which aggravated the struggle between the executive and the legislature.

54. As to approval, he was always concerned for clarity and was not convinced by the Special Rapporteur's arguments that " acceptance, at least, is sometimes used rather as a substitute for simple signature than for either of the other two procedures ", namely, ratification and accession, and that "' acceptance ' and ' approval ' should be retained, where they are in the scheme of the draft articles " (A/CN.4/177, *ad* article 14). Apart from that, he agreed with the Special Rapporteur.

55. Sir Humphrey WALDOCK, Special Rapporteur, said it was essential to take into account the large number of recent treaties which provided for acceptance or approval. Both those institutions could have the same effect as ratification; they were variants of, or different names for, the act of giving consent to be bound by a

treaty. In view of that practice, it would be surprising if the Commission did not include any provision on acceptance or approval in its draft; it would be still more surprising if it included a provision on acceptance, but none on approval. The draft articles should reflect existing practice. In fact, there were treaties which were open to ratification, accession, acceptance and approval; the intention of that broad type of participation clause was to obtain the consent of the largest possible number of States to be bound by the treaty.

56. The CHAIRMAN, speaking as a member of the Commission, said, in reply to Mr. Amado, that the articles under study dealt with accession, acceptance and approval, not as internal acts, but only as written international instruments. Modern practice was for a State to deposit a written instrument issued by the appropriate authority—usually the Head of State—by which it affirmed to the other party its consent to be bound by the treaty.

57. Approval, which was now more common than ratification, was an act by which a State definitively bound itself when a treaty had been signed subject to approval by a competent authority other than the Head of State.

58. According to the terminology introduced by the United Nations Secretariat, where a treaty did not contain an accession clause, States other than the original signatories could only " accept " it, they could not accede.

59. If the Commission confined itself to experience before the second World War, it would be ignoring present practice, which was calculated to facilitate international relations. There had been a time when he had had the same doubts on the subject as Mr. Amado; but in the course of his work as legal adviser to the Yugoslav Ministry of Foreign Affairs, he had grown accustomed to the new practice and become convinced that accession —where it was possible—acceptance and approval produced the same legal effects as ratification. Each of those terms denoted the instrument by which a State expressed, at the international level, its will to be definitively bound by the treaty.

60. Mr. AMADO said that if, as he hoped, he had the honour to represent Brazil at the conference convened to consider the Commission's draft, he would use the arguments just advanced by the Chairman and the Special Rapporteur to reply to States which expressed doubt concerning approval.

61. The CHAIRMAN said that the Commission had before it a proposal by the Special Rapporteur that articles 12, 13 and 14 should be referred to the Drafting Committee. He took it that that proposal was acceptable, but he must first allow members of the Commission who had not yet commented on articles 13 and 14 to do so for the benefit of the Drafting Committee.

It was so agreed.[10]

ARTICLES 13 (Accession) and 14 (Acceptance of approval)

Article 13

Accession

A State may become a party to a treaty by accession in conformity with the provisions of articles 8 and 9 when :

(*a*) It has not signed the treaty and either the treaty specifies accession as the procedure to be used by such a State for becoming a party; or

(*b*) The treaty has become open to accession by the State in question under the provisions of article 9.

Article 14

Acceptance or approval

A State may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 8 and 9 when :

(*a*) The treaty provides that it shall be open to signature subject to acceptance or approval and the State in question has so signed the treaty; or

(*b*) The treaty provides that it shall be open to participation by simple acceptance or approval without prior signature.

62. Mr. PAREDES said that at a previous meeting he had stressed the importance of ratification from the point of view of constitutional law. Constitutional requirements had to be borne in mind when discussing the question whether ratification should be specified in the draft articles. His own view was still that, where the treaty was silent on the subject, the presumption was that ratification was necessary. As to whether that rule was internal or international in character, it was like many other provisions which were internal but governed international relations between States.

63. Clarity and precision of terminology were essential, as Mr. Amado had pointed out. A body like the Commission should always use accurate terms. Confusion in terminology could lead to confusion in regard to the institutions themselves. In particular, it was essential not to confuse approval and ratification; those two terms referred, in the vast majority of Latin American constitutions, to two completely different acts. Approval was an act by the legislature giving consent to ratification by the executive of a previous act performed in connexion with a treaty. If the terms " approval " and " ratification " were to be treated as interchangeable, the resulting confusion would give rise to the most serious problems of internal law.

64. There was undoubtedly a contemporary trend towards simplified treaty-making procedures, but such procedures were suited only to treaties which did not involve matters vitally important for the State. He therefore suggested that the Commission, without attempting to give directives to States, should encourage them to adopt a common approach to ratification.

65. For treaties that were silent on the question of ratification, the Commission should state the residuary rule that ratification was required. It was the Commission's duty to lay down residuary rules to fill such gaps in the expression of the parties' intention and a rule requiring ratification would take account of the fact that, in a great many States, including Ecuador, the constitution laid down that legislative approval was necessary for the ratification of all treaties.

66. Lastly, he fully agreed with the view expressed by the Chairman at the previous meeting, that weak countries should be protected against possible abuses by more powerful ones.[11]

[10] For resumption of discussion, see 812th meeting, paras. 35-64.

[11] 785th meeting, para. 40.

67. Mr. TSURUOKA said he hoped the Drafting Committee would try not to use the expression " become a party to a treaty " which appeared in the first line of article 14. That expression had no doubt been found convenient because it was applicable both where consent was expressed before the treaty's entry into force and where it was expressed afterwards. But to prevent any misunderstanding, it would be better to distinguish between those two cases. That also applied to articles 17, 18 (paragraph 3), 19 and 20, where the expression " become a party " was repeated.

68. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that, in his new formulation for the provisions on ratification, accession, acceptance and approval, the expression " become a party " had been avoided. He agreed, however, that throughout the draft articles the term " party to a treaty " had not always been used very precisely and the Drafting Committee would have to improve the text in that respect.

69. Mr. ROSENNE said that, from the trend of the discussion, it seemed that acceptance and approval would emerge as independent institutions, and he agreed with that. Since ratification had been dealt with in article 12 without any connexion with articles 8 and 9, it was also appropriate to consider article 14 apart from articles 8 and 9, which dealt with a different matter.

70. With regard to drafting, he did not like the use of the passive voice in the Special Rapporteur's revision of articles 13 and 14 (A/CN.4/177) and suggested that it be replaced by the active voice.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that both the points raised by Mr. Rosenne would be borne in mind by the Drafting Committee.

72. With regard to the first point, the formulation he had proposed at the present meeting did not contain any reference to articles 8 and 9. Those articles dealt with the right to become a party to a treaty and contained special substantive provisions; there was no need to link the question of acceptance or approval with those provisions.

73. The CHAIRMAN, speaking as a member of the Commission, said it was important that the Drafting Committee should bear in mind that the terms " acceptance " and " approval " had a particular meaning in international parlance, in order to avoid any confusion with usage in internal law.

74. Mr. JIMÉNEZ de ARÉCHAGA asked whether the Special Rapporteur was now proposing that ratification, accession, acceptance and approval should all four be dealt with in a single article.

75. Sir Humphrey WALDOCK, Special Rapporteur, said that that was his intention, subject to a reservation with regard to accession. In principle, his present proposal and that of Mr. Ago were intended to deal, in two separate sets of provisions, first, with signature as expressing consent to be bound and, second, with the other institutions which established consent. Personally, he would be prepared to include accession in the second set of provisions, but he realized that some members might wish to discuss the contents of articles 8 and 9 before they decided whether to agree to that or not.

76. Mr. JIMÉNEZ de ARÉCHAGA, thanking the Special Rapporteur for his explanation, said that accession was very different in character from ratification and therefore deserved separate treatment. If ratification, acceptance and approval were lumped together in a single provision, the result would be to depreciate ratification. At any conference convened to discuss the draft articles, the States which favoured the ratification requirement would probably form the majority and they would not accept any formulation that might detract from the importance of an institution to which they were attached.

77. Acceptance and approval were new institutions, with no historical background, which had emerged during the post-war years. Naturally, acceptance or approval were not required unless the treaty contained an express stipulation to that effect, but the traditional institution of ratification could not be put on the same plane; if it were, the inevitable effect would be to diminish the historical, political and constitutional importance of a long-established institution. If the Commission were to adopt that course, it would run the risk of being overruled by the conference of plenipotentiaries.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that the position would depend entirely on the language which the Drafting Committee adopted. He hoped, however, that its wording would meet Mr. Jiménez de Aréchaga's point.

79. Mr. BRIGGS suggested that article 13 be taken after articles 8 and 9; otherwise, he would find it extremely difficult to discuss. Both the preamble and sub-paragraph (*b*) of article 13 specifically referred to articles, while the revised text proposed by the Special Rapporteur for article 13 (A/CN.4/177) opened with a reference to them.

80. The CHAIRMAN pointed out that articles 12, 13 and 14 referred to procedures subsequent to signature and therefore at least presupposed the existence of a document that had been signed. In fact, article 12 was even more closely linked to articles 8 and 9 than article 13 was; but the Commission had decided to refer articles 12, 13 and 14 to the Drafting Committee.

81. If the Commission wished to adopt Mr. Briggs's suggestion, it would have to go back on its decision on article 13 in order to discuss it further in conjunction with articles 8, 9, 10 and 11.

82. Speaking as a member of the Commission, he said he could adduce further arguments in support of Mr. Briggs's view. In the new practice followed by international conferences and international organizations, there were cases in which a State was bound by mere accession, without any previous signature. The practice was to establish—in other words, to authenticate—the text of the treaty and to set a date until which the treaty would be open for signature. On closer analysis, the act of signing would be found to be equivalent to accession by those who had had an opportunity of influencing the drafting of the text. After the final date for signature, only accession was possible. That was an ingenious device invented by international officials in order to establish a distinction between signature and accession, but the distinction introduced no change of substance.

83. Moreover, the Special Rapporteur had stressed several times that accession was not an act of the same nature as ratification, acceptance and approval.

84. Sir Humphrey WALDOCK, Special Rapporteur, said he would be quite willing to discuss articles 13, 8 and 9 together. His own feeling was that articles 8 and 9 dealt with a completely different question from that with which article 13 was concerned, but some members obviously felt that a link existed between the two sets of provisions.

85. Mr. TUNKIN said that approval might be considered analogous to ratification; sometimes the same treaty was approved by one State and ratified by another. However, if members felt that the dignity of ratification might be diminished if it were mentioned in the same provision as approval, the two acts might perhaps be separated.

86. The provisions of article 13 were almost entirely descriptive; any substantive content was already covered by articles 8 and 9. As to the language, he agreed that the expression " a State may become a party " was inappropriate in the context.

87. Mr. AGO recognized that there was a connexion between article 13 and articles 8 and 9, but he did not think the Commission need discuss articles 8 and 9 before referring article 13 to the Drafting Committee. Articles 8 and 9 were substantive articles which specified the circumstances in which a State had the right to become a party to a treaty, whereas article 13 specified the act by which a State became party to a treaty when it had that right. The two things were thus different enough for the Commission to be able to discuss them separately.

88. With regard to the different acts referred to, there was certainly some confusion of terminology in State practice, and the Commission could not expect to clarify a matter that was confused in fact. For instance, the Special Rapporteur had said that acceptance was sometimes similar to ratification and sometimes to accession.

89. After some hesitation he had abandoned the idea that the Commission should deal with accession separately. If it chose the descriptive method, it would have to deal successively with signature, ratification, accession, acceptance and approval; but that method was too pedantic and would entail much repetition. If on the other hand the Commission considered the legal effects of the acts, it could deal with them in a single article, in which it would stress that they were all means by which States definitively expressed their consent to be bound by a treaty; and that was the only point of consequence in a set of articles such as the Commission was drafting.

90. Mr. EL-ERIAN said that his doubts about the terminology question had not been dispelled.

91. He also had misgivings concerning the relationship between the substantive provisions on participation in articles 8 and 9 and the procedural matters dealt with in article 13.

92. He was not convinced that ratification, accession and acceptance should be dealt with in a single article. The term " ratification " was used where a treaty had already been signed; in the case of accession, the State concerned did not sign the treaty, for the process of accession had the combined effects of signature and ratification.

93. As to signature subject to acceptance or approval, it could serve a purpose similar to that of signature subject to ratification. Ratification was applicable to both bilateral and multilateral treaties, but accession only to multilateral treaties. He did not believe that it was possible to treat ratification and accession in the same manner.

94. The CHAIRMAN said that in 1962 the Commission had taken as a basis the practice of the United Nations Office of Legal Affairs. According to that practice, ratification, where necessary, must always be preceded by signature, whereas accession was reserved for non-signatory States and was possible only if the treaty contained a clause providing that other States—whether specified or not—could accede to it. There had even been bilateral treaties which provided that a particular third State could accede to them subsequently. For example, a treaty concluded between Greece and Yugoslavia had provided that Italy and Bulgaria could accede to it with the agreement of the two parties. But the United Nations Office of Legal Affairs also accepted the thesis that accession created a provisional obligation which needed subsequent confirmation by ratification. On the other hand, it considered that acceptance was a definitive act requiring neither signature nor ratification, whereas approval was the act of a competent organ which confirmed the consent given by signature subject to that organ's approval.

95. The Commission was not bound to follow that practice, which it might consider illogical or ill-founded; but in taking it as a basis in 1962, it had sought to follow the direction of the new international law which was developing within the United Nations.

96. Speaking as a member of the Commission, he added that later researches had not convinced him that acceptance was truly a procedure calculated to simplify the conclusion of treaties.

97. Mr. ROSENNE, referring to the procedural issue raised by Mr. Briggs, said that the substance of articles 8 and 9 really affected all the articles from 10 to 14. He saw no need to reverse the decision to refer article 13 to the Drafting Committee.

98. Mr. BRIGGS said he could not agree with Mr. Ago and Mr. Rosenne. The legal content of articles 8 and 9 was principally a problem of accession. It would therefore be extremely difficult to discuss article 13 without articles 8 and 9. He accordingly reserved the right to revert to the matter at a later stage.

99. Sir Humphrey WALDOCK, Special Rapporteur, said that, in view of the somewhat confused terminology to be found in State practice, nothing that the Commission could say with regard to the use of the institutions under discussion would be fully true. The truth was that each of the various institutions was used when the parties decided to use it.

100. With regard to procedure, he suggested that, after completing its discussion of article 13, the Commission should proceed to discuss article 15. It could then pass on to deal with articles 8 and 9, on the understanding that, in the course of the discussion on those articles, any member could make a proposal on article 13 as well.

101. As to article 16, its contents would no longer be necessary if a formulation such as he proposed, or one on the lines proposed by Mr. Ago, were adopted.

The meeting rose at 1.5 p.m.

787th MEETING

Thursday, 20 May 1965 at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Filling of a Casual Vacancy in the Commission

(resumed from the previous meeting)

[Item 1 of the agenda]

1. The CHAIRMAN said he had received a telegram from Mr. Bedjaoui, the newly-elected member, asking that his most sincere thanks should be conveyed to the Commission for the honour it had done him and assuring the Commission of his full co-operation. He hoped that Mr. Bedjaoui would soon be taking part in the Commission's work.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

2. The CHAIRMAN, referring to the discussion at the end of the previous meeting, asked whether Mr. Briggs thought it essential for article 13 (Accession) to be considered in detail by the Commission before being referred to the Drafting Committee for examination with the rest of the group of articles 11-15.

3. Mr. BRIGGS said he could agree to article 13 being referred to the Drafting Committee, but reserved the right to revert to the question of its relationship with articles 8 and 9 at a later stage.

ARTICLE 15 (The procedure of ratification, accession, acceptance and approval)

Article 15

The procedure of ratification, accession, acceptance and approval

1. (*a*) Ratification, accession, acceptance or approval shall be carried out by means of a written instrument.

(*b*) Unless the treaty itself expressly contemplates that the participating States may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

(*c*) If a treaty offers to the participating States a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory States, the instrument shall become operative:

(*a*) In the case of a treaty for which there is no depositary, upon the formal communication of the instrument to the other party or parties, and in the case of a bilateral treaty normally by means of an exchange of the instrument in question, duly certified by the representatives of the States carrying out the exchange;

(*b*) In other cases, upon deposit of the instrument with the depositary of the treaty.

3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with paragraph 2 (*b*) above, the State in question shall be given an acknowledgement of the deposit of its instrument, and the other signatory States shall be notified promptly both of the fact of such deposit and the terms of the instrument.

4. The CHAIRMAN invited the Commission to consider article 15.

5. Sir Humphrey WALDOCK, Special Rapporteur, referring to the comments by governments (A/CN.4/175) and to the proposals in his report (A/CN.4/177) concerning the text of article 15, said that in response to the United States Government's contention that the words " by means of a written instrument " in paragraph 1 (*a*) did not go far enough, he had proposed the addition at the end of that paragraph of the words " signed by a representative possessing or furnished with the necessary authority under the provisions of article 4 ". Since his report had been prepared, the Commission had discussed article 4 and had decided to omit from it any reference to authority, so that the wording of his proposal would require modification; but that was a matter that could be left to the Drafting Committee, together with the rather delicate question whether reference should be made to the fact that the instrument ought to emanate from a person appearing to be furnished with full powers in accordance with article 4—a point which the Commission had tried to cover in article 31.

6. In paragraph 3 of his observations he had also raised a small point concerning paragraph 1 (*b*), which might leave room for doubt about the relationship between a provision dealing with election to become bound by part or parts of a treaty, and the right to make reservations on specific articles as expressly allowed in the treaty itself. The effect in practice might be substantially the same and the question was whether a proviso reading " Subject to article 18 and " should be inserted at the beginning of paragraph 1 (*b*) or whether it would suffice for the difference between the two procedures to emerge from the texts of the relevant articles themselves.