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Summary record of the 788th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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prepared to accept the complete deletion of article 16 if the rule were included in another article.

102. Mr. AGO said that the Special Rapporteur was quite right. Since the Commission had decided to draft a comprehensive article on ratification, which would begin by specifying how the consent of States was established, article 16 was entirely unnecessary.

103. The CHAIRMAN, speaking as a member of the Commission, said he shared Mr. Ruda's opinion. Even if article 16 were deleted, the idea in sub-paragraph (*a*) must be stated expressly, perhaps at the beginning of article 15, so as to lay down that the operations in question established the will of the State to be bound by the text of the treaty.

104. Sir Humphrey WALDOCK, Special Rapporteur, said it was not desirable to instruct the Drafting Committee to include in article 15 the idea contained in sub-paragraph (*a*) of article 16. That idea was already embodied in the definition in article 1, paragraph 1 (*d*) and would appear again in articles 11, 12 and 14. He could assure Mr. Ruda that the substance of sub-paragraph (*a*) would be retained in the draft articles, but he urged that its position be left to the Drafting Committee.

105. Mr. AMADO thought that article 15 might open with the provision that ratification, accession, acceptance and approval established the consent of the State.

106. Mr. CASTRÉN said he agreed with the Special Rapporteur that the idea in sub-paragraph (*a*) was contained in the definition in article 1, so that article 16 could be deleted entirely.

107. The CHAIRMAN pointed out that the Commission had referred only paragraph 1 (*a*) of article 1 to the Drafting Committee and had reserved the rest.

108. Sir Humphrey WALDOCK, Special Rapporteur, said his earlier reference to the definition in article 1, though correct, had perhaps misled members as to his suggestion; it was not at all his view that the idea in article 16, sub-paragraph (*a*) should be incorporated in the definitions article. He now wished to emphasize that, from the formulations which had been discussed for articles 11 onwards, it was clear that there was every intention of including the idea in that group of articles.

109. Mr. TSURUOKA said he supported the Special Rapporteur's proposal. He hoped that the Drafting Committee would place the formula chosen not among the definitions, but in the body of another article.

110. The CHAIRMAN said that, in the light of the discussion, he took it the Commission agreed that article 16 should be deleted, and that the Drafting Committee should be instructed to incorporate the idea in sub-paragraph (*a*) in an appropriate place in the draft articles.

It was so agreed.[9]

111. Sir Humphrey WALDOCK, Special Rapporteur, said he would like to have the views of the Commission on the order in which the remaining articles should be discussed. Article 17 dealt with a matter which was connected not with the conclusion of treaties, but with an obligation of good faith pending the entry into force of a treaty. Articles 18-22 dealt with reservations and interrupted the logical sequence; articles 23 and 24 could perhaps be discussed first, so as to complete the examination of the provisions on the conclusion of treaties before proceeding to those on reservations. Articles 8 and 9, dealing with participation, were also still outstanding.

112. Mr. TUNKIN said he had no strong objections to considering articles 23 and 24 before articles 18-22, but he thought it would be easier to deal with the articles in their numerical order and leave the question of rearrangement to the Drafting Committee.

113. Mr. ROSENNE said it would facilitate discussion if the Commission were to discuss the articles in the following order: first, article 17; second, articles 23 and 24 on entry into force; third, articles 8 and 9 on participation; fourth, articles 18-22 on reservations; and fifth, articles 25-29.

114. Mr. BRIGGS supported that proposal.

115. Sir Humphrey WALDOCK, Special Rapporteur, said that the order proposed would be convenient, as it would enable the Commission to dispose of articles 17, 23 and 24 before beginning its discussion on reservations, which was bound to take some time.

116. The CHAIRMAN said that the proposed order would be provisionally adopted, but the Commission need not consider itself bound to adhere to it.

The meeting rose at 1 p.m.

788th MEETING

Friday, 21 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.

Law of Treaties

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

(continued)

[Item 2 of the agenda]

ARTICLE 17 (The rights and obligations of States prior to the entry into force of the treaty)

Article 17

The rights and obligations of States prior to the entry into force of the treaty

1. A State which takes part in the negotiation, drawing up or adoption of a treaty, or which has signed a treaty subject to ratification, acceptance or approval, is under

[9] See 812th meeting, paras. 35-38.

an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

2. Pending the entry into force of a treaty and provided that such entry into force is not unduly delayed, the same obligation shall apply to the State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty.

1. The CHAIRMAN invited the Commission to consider article 17, for which the Special Rapporteur had suggested the following revised text:

1. Prior to the entry into force of a treaty

(*a*) A State which has signed the treaty subject to ratification, acceptance or approval is under an obligation of good faith to refrain from acts calculated to frustrate its objects unless such State shall have notified the other signatory States of the renunciation of its right to ratify or, as the case may be, to accept or approve the treaty;

(*b*) A State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty is under the same obligation, unless the treaty is subject to denunciation and that State shall have notified the other States concerned of its withdrawal from the treaty.

2. However, the obligations referred to in the preceding paragraph shall cease to apply ten years after the date of a State's signature, ratification, acceptance, or approval of the treaty if the treaty is not then in force.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that with the exception of those of the United States and the United Kingdom, all the government comments (A/CN.4/175 and Add.1-3) had been to the effect that the rule stated in article 17 was too wide, in that it subjected a State to the obligation of good faith merely because of its participation in the negotiation, regardless of whether it had given any support to the text. The rule might seem to apply, at any rate for a short period, even to a State which had left the negotiating conference or had protested strongly against the adoption of a particular provision. Even the United States Government took the view that article 17 went beyond what was generally considered to be the existing position, though it would be a desirable improvement in the law.

3. In the light of those comments, he had reduced the scope of article 17 and proposed a revised text, paragraph 1 (*a*) of which limited the application of the rule to States which had signed the treaty subject to ratification, acceptance or approval.

4. Paragraph 1 (*b*) covered the point raised by the Finnish Government regarding withdrawal of consent in cases where the treaty was subject to denunciation and where notification of withdrawal was given to the other States concerned.

5. Mr. CASTRÉN said that the almost unanimous criticisms made by governments showed that the Commission had gone too far in 1962, when it had laid an " obligation of good faith " on States which had merely taken part in the negotiation or drawing up of a treaty or in the adoption of its text. The Special Rapporteur had revised the text accordingly, and made other changes which constituted a real improvement.

6. For instance, his revised paragraph 1 (*b*) provided that a State which had established its consent to be bound by the treaty could revoke that consent before the entry into force of the treaty and thereby divest itself of the obligation to refrain from acts calculated to frustrate the treaty's objects. The comments by the Netherlands Government on article 16 (A/CN.4/175/Add.1) showed that there had already been two instances of instruments of ratification being withdrawn a short time after they had been deposited.

7. He also noted with satisfaction that the Special Rapporteur had added a paragraph 2 setting a time-limit after which the obligations referred to in paragraph 1 would cease to apply if the treaty was not then in force. The time-limit seemed rather long, but since the procedure for ratification, acceptance or approval often took some time, and since several modern conventions would not enter into force until a fairly large number of States had established their consent to be bound, it would probably be difficult to shorten the period by more than two or three years.

8. He accepted the main lines of the new text proposed by the Special Rapporteur.

9. Mr. de LUNA said he noted that certain governments had criticized article 17 as imposing an unduly heavy obligation on States; they had pointed out that its application depended on a necessarily imprecise subjective criterion. Those governments had accordingly proposed that the article should be deleted altogether, but he did not favour that course.

10. He supported the Special Rapporteur's new formulation, which took account of the pertinent comments of certain governments. Some of the comments, however, would suggest that governments had forgotten that the duty to fulfil obligations in good faith was embodied in article 2 of the United Nations Charter itself. That provision of the Charter had been criticized by some writers as otiose, on the grounds that it was unnecessary to reiterate an obvious rule of *jus cogens*. In fact, as the government comments on article 17 of the present draft had shown, there was everything to be gained by reiterating that rule of *jus cogens*, which, in his view, governed even such fundamental rules of international law as *pacta sunt servanda* and *consuetudo est servanda*.

11. The duty to fulfil obligations in good faith was stated in article 1 of the Constitution of UNESCO. The rule that good faith should govern the relations between States was laid down in article 5 (*c*) of the Charter of the Organization of American States.[1] The Rome Treaty establishing the European Economic Community stipulated in article 5 that the Member States undertook to " abstain from any measures likely to jeopardise the attainment of the objectives " of the treaty,[2] a provision which was identical in content with article 17 of the draft. A similar rule was contained in article 86 of the treaty instituting the European Coal and Steel Community.[3] A provision on the same lines had also been included in the draft Convention on the Protection of Foreign Property

[1] United Nations *Treaty Series*, Vol. 119, p. 52.
[2] *Op. cit.*, Vol. 298, p. 17.
[3] *Op. cit.*, Vol. 261, p. 221.

prepared by the Organization for Economic Co-operation and Development.

12. International case-law provided no instances of the direct application of the principle, but a number of rulings on the legal character of recommendations made by international organizations were relevant; they provided some legal criteria on the question of obligations of good faith. For instance, Sir Hersch Lauterpacht, in his separate opinion in the South West Africa—Voting Procedure—case of 7 June 1955, had said that the State in question, while not bound to accept the recommendation, was " bound to give it due consideration in good faith.[4] In the same case Judge Klaestad, in his dissenting opinion, had gone even further and said that the State was in duty bound not only to consider the recommendation in good faith, but also to inform the General Assembly of the attitude it had decided to take,[5] in other words in the event of its not accepting the recommendation, to give the reasons for such non-acceptance. On the latter point, however, he was unable to follow the learned judge.

13. Equally relevant to the issue was the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which had met at Mexico City from 27 August to 2 October 1964. He himself preferred to describe the subject-matter of that meeting as the principles of peaceful co-existence—to use a brief and expressive formula which had gained general acceptance. The Special Committee had only been able to agree on two fundamental principles: first, the " principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;[6] and, secondly, the " principle of sovereign equality of States ",[7] which implied that the structure of the international community was one of co-ordination, and in no wise one of subordination.

14. Personally, he was a firm believer in integration, but was resolutely opposed to the idea of a world State and therefore welcomed the Special Committee's conclusions. The decisions of the Committee on those two agreed principles, and its discussions on the other two fundamental principles on which no agreement had been reached—those relating to the peaceful settlement of disputes and to non-intervention—provided abundant evidence of recognition of the obligation to carry out international obligations in good faith, as provided in article 17.

15. That obligation was a necessary corollary to the existence of sovereign States forming an international community; without it, there could be no international society.

16. He supported the new formulation of article 17 proposed by the Special Rapporteur, which took into account the valid point raised by governments, that the obligation to act in good faith existed only where there was an intention on the part of the State to undertake obligations in the future. It was not enough that the State should have taken part in the negotiations; the obligation resulted from a pre-contractual agreement of the *pactum de contrahendo* type.

17. Mr. YASSEEN said that the Commission would have to abandon its 1962 position in view of the almost unanimous opposition of States to the scope of the rule it had formulated.

18. That attitude of States was understandable. They were not considering an obligation to refrain from acts which were unlawful in themselves, or responsibility based on some intrinsically unlawful act, but another obligation which produced another responsibility: the obligation not to undermine the confidence created by the act of entering into talks or negotiations for the conclusion of a treaty.

19. For the purposes of international relations it would be very useful to recognize the obligation of good faith, but the Commission had been too bold. States had accepted the obligation only to a limited extent and, without condemning it outright, had sought to restrict its scope. The obligation of good faith existed if the treaty was only signed subject to ratification, because then the treaty was not binding until ratified. In his view, it would be enough to recognize the obligation of good faith to that extent only; for the reasons given by governments in their comments and largely approved by the Special Rapporteur, the Commission should not go too far.

20. Paragraph 1 (*a*) of the revised text was well proportioned and well drafted: it established the obligation of good faith to an extent that could be accepted by many of the States which had commented on the 1962 draft, and by a large number of States in general.

21. Paragraph 1 (*b*), which reflected a suggestion by the Government of Finland, also seemed justified. If a State could withdraw from a treaty after ratification, then *a fortiori* it could do so before the treaty had entered into force.

22. The idea underlying paragraph 2 was fully justified; an obligation of good faith could not be imposed on a State indefinitely. The innovation in the new text, which consisted in replacing the idea of " unduly delayed " entry into force by a specific period—ten years—was justified in principle, for a codification should avoid formulae which might give rise to too many disputes. In view of the institutional inadequacy of the international legal order, it was preferable to lay down specific criteria where possible. The time-limit of ten years seemed to him to be acceptable, for history showed that many treaties had entered into force long after signature.

23. In general, he was satisfied with the new text proposed by the Special Rapporteur for article 17.

24. Mr. TABIBI said there was general agreement that good faith should be shown by all those participating in treaty negotiations. But that was not the subject matter of article 17: even in the new version proposed by the Special Rapporteur, the article purported to create a binding obligation on States prior to the entry into force of the treaty. The comments of governments showed that, with the exception of those of the United States of

[4] *I.C.J. Reports 1955*, p. 119.
[5] *Ibid.*, p. 88.
[6] A/5746, para. 106.
[7] *Ibid.*, para. 339.

America and the United Kingdom, they were not in favour of introducing that new rule.

25. By virtue of their sovereignty, States were entirely free to assume or not to assume obligations. State responsibility could not be invoked on the basis of a unilateral act performed by a State prior to the entry into force of a treaty. The Commission should be concerned only with legal matters; the proposed new rule invaded the field of morals.

26. The Polish Government had commented that the introduction of a rule which would impose an obligation upon States merely because they had participated in negotiations, might deter them from taking part in negotiations for the conclusion of international multilateral treaties. The Swedish Government had pointed out that the proposed new rule was couched in such broad terms that it would cover States which had only reluctantly taken part in the negotiation of a treaty and States which had expressed reservations, or even voted against the adoption of the text.

27. As he had stressed during the discussion in 1962 and again a few meetings previously, ratification was extremely important in that it gave States time for reflection and study; only thus could they appreciate the full implications of a treaty. Certain agreements which had seemed satisfactory at the time of their conclusion could prove unsatisfactory on further examination. That was particularly true of treaties involving scientific problems; the number of such treaties was constantly increasing and the smaller countries were not equipped to decide on their implications immediately. One example was an agreement for sharing the waters of a river separating Afghanistan from a neighbouring country, which, on examination of the scientific problems involved, had proved quite unfavourable, although the apportionment of the waters had seemed at first sight rather generous to Afghanistan.

28. The *Polish Upper Silesia Case*,[8] mentioned by the Special Rapporteur in paragraph 1 of his observations (A/CN.4/177) did not seem relevant: it related to a treaty which had come into force, whereas article 17 applied to a treaty which had not yet entered into force.

29. It was significant that the only two countries which had expressed support for the proposed new rule were large, well-equipped countries, which were in a position to appreciate in advance the implications of a treaty under negotiation. It was recognized by all that the proposed rule was entirely new: the United States Government considered that the article went beyond existing law, but regarded the innovation as a desirable progressive development.

30. In his opinion, article 17 should be dropped, because its provisions would create more problems than they would solve and were contrary to a rule of *jus cogens*.

31. Mr. RUDA said he was in favour of retaining article 17, which provided for an obligation of good faith not to frustrate the objects of the treaty in advance.

32. Many governments had urged, in their comments, that States which had merely taken part in the negotiation, drawing up or adoption of a treaty should be excluded from the obligations set out in article 17. They held that a State which had voted against the adoption of a text or had otherwise expressed its disapproval should not be subject to the obligation of good faith. He agreed with that view, but thought it was already covered in the original text by the proviso " unless and until it shall have signified that it does not intend to become a party to the treaty ". Since the position was perhaps not fully clear in the original text, however, he was prepared to support the new formulation proposed by the Special Rapporteur, which was intended to avoid giving the impression that States in the situation described could be made subject to the obligation of good faith.

33. The Government of Finland had raised the interesting question of the withdrawal of ratification, particularly in cases of treaties containing a denunciation clause. He supported the Finnish Government's comments and the Special Rapporteur's new formulation, which took them into account.

34. With regard to paragraph 2 of the revised text, he was not in favour of the time-limit of ten years. First, it was too long, and secondly, treaties varied greatly in character and did not lend themselves to the application of a uniform time-limit. He therefore urged the Commission to revert to the former flexible formula " provided that such entry into force is not unduly delayed ". Only a flexible formula of that kind was suitable for application to all types of treaty.

35. Mr. REUTER observed that two members of the Commission had perhaps quite legitimately argued, on the basis of *jus cogens*, one for retaining and the other for deleting the article. Personally, he thought it should be retained, since no legal system had ever been based on bad faith, and he congratulated the Special Rapporteur on his revised text.

36. It should be noted that, while the provision related to the obligation of good faith, it also related to what should be called a transitional period. The draft articles contained other provisions concerning transitional periods: they too had been difficult to formulate and were not very satisfactory. The provision under discussion was concerned with the transitional period which began when a State had expressed its will to be bound—the situation dealt with in paragraph 1 (*a*)—or when it had expressed that will without yet having found a corresponding will among its partners—the situation dealt with in paragraph 1 (*b*). States which drafted a treaty were well aware of that transitional period and included provisions designed to solve the problem, either by the immediate, provisional entry into force of the treaty or by rules which gave it some degree of retroactive effect. Consequently, some of the problems raised by article 17 could be solved by agreed clauses in the treaty: the matter should be left to States.

37. Paragraph 1 (*b*) required a State wishing to be released from its obligation—a heavier one than that provided for in paragraph 1 (*a*)—to give notice of the fact; but notice was also required under paragraph 1 (*a*), and he doubted whether it was necessary to be so strict in the latter case.

38. The most important part of the article was the passage stating the " obligation of good faith to refrain

[8] *P.C.I.J.*, 1926, Series A, No. 7.

from acts calculated to frustrate its [the treaty's] objects " —the French text of which, incidentally, did not exactly correspond to the English. That was the passage on which the Commission should concentrate. It had a choice between adopting an objective criterion or a subjective criterion.

39. In conformity with the Commission's wishes, the Special Rapporteur had adopted an objective criterion by referring to the treaty—a solution which linked the obligation created to the treaty itself. If the objective criterion was chosen, he [Mr. Reuter] had doubts about the words " its objects " : would the acts in question have to be contrary to all the objects or to only one of them? Perhaps the Commission could adopt the better balanced though hardly more precise formula used by the International Court of Justice in connexion with reservations and speak of acts calculated to frustrate the " object or purpose " of the treaty;[9] the problem was not entirely different, for there was an analogy with the question of compatibility of reservations.

40. Another problem arose in that connexion : with respect to whom were the objects frustrated? Was it with respect to the States which had actually become parties to the treaty, or only with respect to the State which was to become a party subsequently, but which had reduced its obligation? If the Commission chose the objective criterion, it should retain paragraph 2, subject to discussing the question of the time-limit.

41. Perhaps a better solution would be to adopt a subjective criterion. Instead of referring to the text of the treaty, which had the disadvantage of leaving some doubt as to whether a fresh obligation was created, the Commission might take the position that when a State definitively expressed its will to be bound, it created a certain expectation in its partners, and that it was the non-fulfilment of that expectation that was incompatible with good faith.

42. By adopting some such wording as " to refrain from acts calculated to disappoint the legitimate expectation of its partners ", the Commission would show that the question of a breach of good faith must be considered in each individual case in the light of the statements made, the object of the treaty and the circumstances as a whole. For instance, in the very common case of an economic treaty comprising undertakings concerning tariffs, if a State made heavy imports or exports before the treaty entered into force, so as to suffer less when fulfilling its undertakings, that action might or might not be incompatible with good faith : it would depend on the circumstances. Such a formula might perhaps be too loose, but it would seem to have the advantage of better respecting the independence of the principle of good faith and better separating the observance of that principle from the actual execution of the treaty.

43. If the Commission adopted such a formula, paragraph 2 would become unnecessary; for during the initial period following the conclusion of a treaty, it was the normal practice to refrain from certain acts. It was later, as time went on, that States, believing the treaty would never be ratified, might be tempted to act in a manner at variance with the treaty. Yet it had sometimes happened that a treaty which, it had been thought, would never be ratified, had nevertheless eventually entered into force through a last ratification made for political reasons.

44. He therefore had a slight preference for the subjective formulation and the deletion of paragraph 2; but for the time being he did not wish to be more positive than the Special Rapporteur himself had been.

45. Mr. BRIGGS said that article 17 was a useful one and the Special Rapporteur's revision in the light of government comments was an improvement on the former text. He welcomed the limitation introduced in paragraph 1 (*a*).

46. He had some doubts, though he was unable to substantiate them with positive facts, about the time-limit of ten years proposed in paragraph 2.

47. His other comments related mainly to drafting. The phrase " obligation of good faith " had always seemed to him juridically imprecise. It could be avoided if the words " Good faith requires " were inserted at the beginning of paragraph 1 (*a*) and the rest of the text appropriately modified. The words " as the case may be " could with advantage be dropped.

48. In the context of paragraph 1 (*b*), it would be premature to provide for withdrawal from the treaty itself and he suggested referring to withdrawal of the State's consent to be bound by the treaty.

49. Mr. ROSENNE said he had some serious misgivings about the revised text of article 17. The Special Rapporteur had rightly pared down the original text, but in so doing had created new difficulties, some of which had already been mentioned by other speakers.

50. First, the Special Rapporteur had perhaps been mistaken in taking signature as the starting point for bringing the obligation into play, since provision was often made in multilateral conventions for the original parties to choose between signature followed by ratification and accession without signature, the two being treated on an equal footing.

51. If the article were to be recast, the obligation should be made to attach to States which had declared themselves positively in favour of supporting the adoption of the treaty. While a multilateral convention was being negotiated States could, and did, vote against individual clauses or articles, but at the close of the proceedings it was rare for participants to vote against the text as a whole; the more usual practice was to abstain and, unless a roll-call vote was taken, it might not always be possible to determine which States had done so. In view of the growing practice of accession without signature, there seemed no justification for basing the article on the classical procedure of signature followed by ratification.

52. Another objection to giving such prominence to signature and its consequences was that some treaties were not signed at all, but only authenticated; that was true of the international labour conventions, and the recent Convention on Settlement of Investment Disputes between States and Nationals of Other States drawn up by the International Bank for Reconstruction and Development. Of course, the Constitution of the

[9] *I.C.J. Reports 1951*, p. 29.

International Labour Organisation did contain detailed provisions on the entry into force of the conventions, but he was uncertain whether the point would be fully covered in the Special Rapporteur's new proposal for article 3 (*bis*) (A/CN.4/177).

53. The second difficulty was that there was a real difference of substance between the provisos in paragraph 1 of the earlier text and paragraph 1 (*a*) of the revised text. Was the renunciation of the right to ratify referred to in the latter to be understood as a renunciation once and for all, so that the State could not subsequently go back on its decision and proceed to ratify? That hypothesis seemed to be too far-reaching.

54. Nor could he agree to the Special Rapporteur's proposal to impose upon States which merely signed a treaty subject to ratification, a general duty to notify others whether they intended to take the necessary steps to become parties to the treaty after the actual negotiation and adoption of the text, unless such a requirement had been written into the treaty itself. He thought it would be going too far to attach legal consequences of such a character to mere signature in those circumstances.

55. The difficulty of expressing the idea of " acts calculated to frustrate the objects of the treaty " had been discussed at great length at the previous session in the slightly different context of article 55.[10]

56. Paragraph 1 (*b*) dealt with an entirely separate matter which had nothing to do with the subject of article 17 and might need to be considered in conjunction either with articles 15 and 16 or with article 38.

57. He shared the doubts expressed about the time-limit provided for in paragraph 2. Ten years might be too long and five years too short.

58. The underlying idea of article 17 should be retained, at all events for the time being, despite the difficulty of giving it appropriate form, but the provision should be more closely linked with articles 30 and 55, so as to bring out its purport more clearly. The Commission should perhaps postpone a final decision until those two articles had been examined.

59. Mr. AGO said that when he had seen the Special Rapporteur's conclusions and the revised text proposed for article 17, he could not help regretting that what he had regarded as an important achievement by the Commission was being given up so easily, simply because of the objections raised by six of the eight governments which had commented.

60. It seemed that—perhaps partly owing to the drafting—those governments had not always grasped the point at issue. As Mr. Reuter had pointed out the phrase " *réduire à néant les objets du traité* ", which accurately expressed the Commission's intention, had not been very satisfactorily rendered in English or Spanish.

61. The objections of governments related mainly to multilateral treaties. For where such treaties were concerned, it was difficult to accept the idea that between the time when the treaty was adopted, or even negotiated, and the time when it was ratified, a single State could commit acts which " frustrated " its objects. When drafting article 17 the Commission had been thinking mainly of bilateral treaties. Among the examples given had been a treaty providing for the cession by a State of installations owned by it in the territory of another State, and a treaty relating to the return by a State of works of art formerly taken from the territory of another State. If the State which was to cede the installations or return the works of art destroyed them or allowed them to be destroyed during the negotiation of the treaty, that was obviously a breach of the obligation of good faith. Was it necessary for the treaty to be signed before that obligation could come into being?

62. If one considered, not the obligation of good faith, but an obligation to observe the clauses of the treaty in advance, even the time of signature would be too early for that obligation to come into being. But in fact the obligation did not derive from the treaty or its provisions at all; it derived from a general rule of international law. He would accept the majority view, but he urged the Commission to consider carefully the basic purpose of the provision.

63. He would not comment on the drafting of the article, since his concern went deeper than that. He was in favour of deleting paragraph 2, however, for any time-limit would be arbitrary : it was bound to be too long in some cases and too short in others. The question must be decided by what was reasonable, and that test would apply automatically : after a certain time it would appear perfectly natural for the obligation to lapse.

64. Mr. PAL said that the elements of what had now become article 17 had originally appeared in articles 5 and 9 of the draft submitted by the Special Rapporteur in his first report.[11] After examination of those provisions and some discussion on the source of the obligation of good faith, the Commission had referred the matter to the Drafting Committee with the request that a separate article be prepared, and the outcome had been article 19 (*bis*), which had ultimately become article 17. At the 668th meeting, Mr. Bartoš had expressed appreciation of the way in which the Drafting Committee and the Special Rapporteur had found suitable language to express the obligation of good faith to be observed between the signature and the entry into force of a treaty [12] and the Commission as a whole had appeared satisfied with the text.

65. What might be described as interim obligations were recognized in virtually all systems of law, so that the principle stated in what had now become article 17 was no innovation, even though some governments might have criticized the way in which it had been expressed. He was wholly in favour of retaining the principle of interim obligations, but the wording could certainly be improved; the article should therefore be referred to the Drafting Committee, together with the suggestions made during the discussion. Care should be taken to ensure that, in redrafting, the principle was not extended beyond its interim character and that it was not capable of abuse to serve hidden interests or purposes.

[10] *Yearbook of the International Law Commission, 1964*, Vol. I, p. 162 *et seq.*

[11] *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 39 and 46.

[12] *Op. cit.*, Vol. I, p. 258, para. 33.

66. Mr. TUNKIN said that his misgivings about article 17 had increased during the discussion. While accepting the underlying principle of the article, he shared the views of those who feared that it might entail certain consequences not easily discernible at the outset. The Special Rapporteur's revised text was certainly an improvement, but as Mr. Ago had pointed out, greater attention should be given to the negotiating stage.

67. The Drafting Committee would be well advised to consider bilateral treaties separately from multilateral treaties, because the obligations set out in article 17 certainly applied to the former for States taking part in the negotiations leading up to the adoption of a text, but applicability to the latter might vary widely according to the circumstances. In regard to multilateral treaties, one case that should be examined was that of a Member State of an international organization taking part in a conference held to draft an international convention, even though it disapproved of the whole object of the convention. How would the obligation of good faith operate then?

68. It was not clear from paragraph 1 (*a*) at what precise stage in the formation of the agreement the obligation began to be operative. Signature was mentioned, but sometimes a text was only initialled.

69. He shared Mr. Rosenne's view of paragraph 1 (*b*), in which an attempt had been made to introduce by the back door an entirely new rule having no connexion with the subject of article 17. It had not yet been discussed by the Commission and though some case might be made out for such an obligation, it could create uncertainty that might seriously hamper international relations. Sometimes a State considering ratification was influenced by the actions of others, and it could be placed in an exceedingly awkward position if in the meantime certain other ratifications had been withdrawn.

70. The question of a time-limit, dealt with in paragraph 2, would certainly need further examination.

71. Mr. JIMÉNEZ de ARÉCHAGA said that the comments of some governments might point to the need to distinguish, in separate paragraphs, between the kind of loose restriction on the complete freedom of States that might derive from the act of participating in the negotiations, and the more serious restrictions created by signature. The Drafting Committee would have to explore ways of bringing out that distinction and of retaining in some form the requirement of good faith in negotiation, since a rule was obviously necessary to ensure that, while engaged in negotiations, States would refrain from conduct inimical to the principal object of the treaty.

72. Mr. Tunkin had already drawn attention to the difficulties that would result from the withdrawal of instruments of ratification already deposited, before the entry into force of the treaty. Another instance of such difficulties would be when a State ratified a treaty on the sole consideration that another State had already done so, and later found that the other State's ratification had been withdrawn. Some way should, however, be found to meet the point raised by the Finnish Government concerning paragraph 1.

73. Mr. EL-ERIAN said that the Special Rapporteur in his revised text had tried to narrow the wide scope of the obligation embodied in article 17, to give precision to some of the general terms and to set a time-limit for its application. He agreed that some revision was necessary so as to avoid an excessively rigid obligation prior to the adoption of the text of the treaty, because the true objects of a treaty could not be said to be finally defined or legally established until its text had been adopted by the negotiating States.

74. The Special Rapporteur had been right to take signature as the starting point for the obligation coming into existence, rather than the earlier stages in the creation of a treaty. The position of Member States of an international organization which opposed the instrument it adopted was but one illustration of the varied circumstances in which, and the complex network of institutions through which, treaty-making took place. But the proposal that States should be required to notify others of their intention was not acceptable, as it might lead to unnecessary difficulties.

75. The expression " unduly delayed ", in paragraph 2 of the original text, had been criticized by governments as lacking in precision. Nevertheless it was an expression that possessed a definite legal connotation. Its exact meaning would have to be interpreted in the context of each case.

76. It was by no means easy to define precisely what was meant by good faith, but the words did appear in Article 2, paragraph 2, of the Charter and had also been used by the Commission itself in article 55. For the purposes of article 17, greater precision would not be desirable.

77. He also shared the doubts expressed regarding the desirability of setting a time-limit in paragraph 2.

78. The CHAIRMAN, speaking as a member of the Commission, said he had little to add concerning substance, as the attitude he had taken in 1962 had been so aptly recalled by Mr. Pal. He was still convinced that the rule accepted by the Commission in 1962 fulfilled a need—that of strengthening the obligations of the parties from the moment negotiations began. Article 17 did credit to the Commission and contributed to the progressive development of international law.

79. In the course of informal discussions, he had learned that some people found it surprising that the Commission should amend its articles to take account of certain comments by governments, when very often, particularly among the Latin American States, absence of comment implied support for the draft. Thus, in deferring to a few States, the Commission might be going against the wishes of the majority. It should, of course, consider all comments on substance, irrespective of how many States had made them, but he expected that in many cases the diplomatic conference which considered the draft would decide to revert to the text adopted in 1962.

80. For some time, the Commission had been asking itself whether the 1962 text reflected existing legal rules or not. What had been enthusiastically accepted as a contribution to the progressive development of international law was being called in question again, not because the value of that progressive development was in doubt, but on the pretext that the rule did not exist in positive law. He feared that at the present session the Commission was confining itself to pure codification instead of combining

codification with the progressive development of international law as it had done before. As he had often pointed out, those of the conventions on the law of the sea which had clearly contributed to the progressive development of international law had satisfied many States, whereas the others had given rise to many objections on the ground that they were contrary to existing law.

81. During the second reading of the draft, the Commission could certainly ask itself whether what it had laid down was logical and corresponded to the facts; it could also correct certain mistakes and fill certain gaps. In article 17, for example, it had completely disregarded change of circumstances, whereas in article 44 it had laid down a rule to the effect that a treaty already in force could lose its validity by reason of a change of circumstances. That example showed that the draft should be examined with great care and attention.

82. With regard to paragraph 2, he shared the view of Mr. Ago and Mr. Briggs on the question of the time-limit.

83. He agreed with Mr. Ago and Mr. Tunkin that the same rule should not be applied indiscriminately to bilateral and to multilateral treaties. Furthermore, he found it hard to accept that certain States should be able to release themselves from their obligations, while others continued to be bound for the sole reason that they had not given express notification of withdrawal from the treaty.

The meeting rose at 1 p.m.

789th MEETING

Monday, 24 May 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, 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. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

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

(continued)

[Item 2 of the agenda]

ARTICLE 17 (The rights and obligations of States prior to the entry into force of the treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 17.

2. Mr. CASTRÉN said he would like first to make a few general remarks about the value and implications of the comments by governments (A/CN.4/175 and Add.1-3) and the attitude he thought the Commission should adopt concerning them.

3. No one would deny that the members of the Commission met in their personal capacities and not as representatives of their countries; they were therefore completely free to express their personal opinions on every problem that had to be solved. But the Commission must bear in mind that it was a United Nations body whose principal task was to prepare draft conventions to be placed before diplomatic conferences. Under article 22 of its Statute, the Commission was required to take comments by governments into consideration when preparing the final draft on the topic being codified. That meant that during the second reading of its drafts, the Commission was required to pay special attention to the comments made by governments.

4. It was regrettable that, generally, whatever the reasons might be, only relatively few governments submitted comments on the Commission's drafts. The Commission should express its gratitude to governments which stated opinions during a preliminary stage of codification, for as outsiders they sometimes saw things more clearly than those who had been studying the subject for a long time. Moreover, in preparing their comments, governments usually consulted distinguished experts—the Commission itself had on several occasions recognized that its work was defective in certain respects.

5. It mattered little that only a few—perhaps six out of ten—of the governments which has submitted comments had criticized the Commission's proposals; it must not be concluded that all the other Members of the United Nations—more than one hundred—approved of the draft. When the diplomatic conference was convened, a number of those who had kept silent would express dissent if the Commission had not acted on the well-founded suggestions put forward by governments which had taken an active interest from the outset.

6. True, the Commission had the right and the duty also to propose progressive rules if it thought fit, but in order to achieve practical results, it should proceed with moderation.

7. The Special Rapporteur's new text of article 17[2] marked a considerable advance in the development of international law on treaties, and was a reasonable compromise likely to be accepted by States. Why revert to the 1962 text and risk losing all that had been gained since then? He readily acknowledged that the new text, too, could be improved, both in substance and in form; for example, it might be that some obligations of good faith could also be placed on States which had done no more than participate in the negotiation of a treaty, but as Mr. Jiménez de Aréchaga had rightly said, those obligations were of a different nature from the obligations attaching to States which had already expressed their will to be bound by the treaty.

8. He agreed with Mr. Reuter that in paragraph 1 (*a*) of the new text, the words " its objects " should be replaced by the words " its object or purpose ". On the

[1] See 788th meeting, preceding para. 1.

[2] *Ibid.*, para. 1.