Document:-
**A/CN.4/SR.812**

**Summary record of the 812th meeting**

Topic:
**Law of Treaties**

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—signature, signature *ad referendum* and initialling—but he could not agree to an innovation which was at variance with the terminology in use in legal texts.

98. Mr. ROSENNE said that, as the draft articles were being confined to treaties between States, the word " in " should be substituted for the word " by " after the words " treaty adopted " in sub-paragraph (*b*).

99. The CHAIRMAN, speaking as a member of the Commission, said that he accepted the notion of authentication, for he believed that a distinction should be drawn between the establishment and the adoption of the text of a treaty. But he was opposed to the idea of the signature of a final act, for often a final act was not signed : the president of the conference certified that the text had been adopted. He did not, however, feel so strongly in the matter that he would vote against the article; on the other hand, the drafting was not good enough for him to vote for it. He would abstain.

100. He agreed with Mr. Rosenne that it would be better to say " adopted in one of its organs " than " by one of its organs " in sub-paragraph (*b*).

101. The text should be referred back to the Drafting Committee.

102. Sir Humphrey WALDOCK, Special Rapporteur, said he hoped that the Chairman would not feel compelled to abstain in the vote on article 7 which, he would see, was formulated as a residual rule.

103. The CHAIRMAN, speaking as a member of the Commission, said that the residual rule applied where there was no express decision by the parties, and it might well happen that there was none. In that case, it would be necessary to follow the rule. Though he did not much like the introductory paragraph to article 7, he would not vote against it.

*Article 7 was adopted by 16 votes to none, with 1 abstention.*

104. The CHAIRMAN invited the Commission to take a formal vote on the new first article and article 1, paragraph 1, which had been adopted without a vote at the previous meeting.[12]

*The new first article was adopted by 17 votes to none.*

*Article 1, paragraph 1* (a) *was adopted by 17 votes to none.*

The meeting rose at 1 p.m.

[12] 810th meeting, paras. 10 and 11.

## 812th MEETING

*Monday, 28 June 1965, at 3 p.m.*

*Chairman:* Mr. Milan BARTOŠ

*Present:* Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

### Law of Treaties

**(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)**

*(continued)*

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 11 (Consent to be bound expressed by signature), incorporating Article 10 (Initialling and signature *ad referendum* as forms of signature)[1]

1. The CHAIRMAN invited the Commission to consider the new text of article 11, incorporating in its paragraph 2 the substance of article 10, which had been prepared by the Drafting Committee and which read :

" 1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when :

(*a*) The treaty provides that signature shall have that effect;

(*b*) It appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that signature should have that effect;

(*c*) The intention of the State in question to give that effect to its signature appears from the full powers of its representative or from statements made by him during the negotiations.

" 2. (*a*) The initialling of a text is considered as a signature of the treaty when it appears from the circumstances that the contracting States so agreed;

(*b*) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, is considered as the equivalent of a full signature of the treaty ".

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had incorporated in paragraph 1 the rules relating to those cases where, either expressly or by implication in the light of the circumstances, the States had shown their intention that signature should express consent to be bound.

3. Paragraph 2 dealt with two subsidiary questions. The first, covered by sub-paragraph (*a*), expressed in general terms the rule in cases where the initialling of the text amounted to signature; the Drafting Committee had dropped the distinction between initialling by the Head of State, Head of Government or Foreign Minister, on the one hand, and initialling by other representatives on the other.

4. In paragraph 2 (*b*), relating to signature *ad referendum*, the text adopted by the Drafting Committee did not state any rule respecting the date at which confirmation would be taken as operative. Government comments, especially those by the Government of the United States, had shown that a certain practice had emerged of using signature *ad referendum* as equivalent to signature subject to ratification. The Drafting Committee had adopted a text which was intended not to encourage that practice, although it actually contained the implication

[1] For earlier discussion, see 782nd meeting, at which it was agreed (paras. 74-95) that articles 7, 10 and 11 would be discussed together, and 783rd meeting, paras. 1-81.

that signature would operate from its date, if subsequently confirmed.

5. Mr. YASSEEN said that the last phrase in paragraph 1 (*c*) was somewhat dubious and should be deleted; how could mere statements be regarded as on a par with the provisions of a treaty?

6. The Special Rapporteur had said that paragraph 2 (*b*) did not settle the question whether confirmation of a signature *ad referendum* was retrospective or not. In his (Mr. Yasseen's) opinion, the inference to be drawn from the wording, especially the English text, was definitely that such confirmation had retrospective effect to the date on which the signature *ad referendum* was appended.

7. Mr. REUTER said that paragraph 1 (*b*) stated a more general rule than paragraph 1 (*c*) and therefore the order of the two provisions should be reversed. That change would perhaps dispose of Mr. Yasseen's objection; even if the words " or from statements made by him during the negotiations " were deleted, it would still remain doubtful whether such statements formed part of the " circumstances " of the conclusion of the treaty.

8. Mr. TUNKIN said he supported Mr. Yasseen's suggestion for the deletion from paragraph 1 (*c*) of the words " or from statements made by him during the negotiations ". A statement by a representative would either be an expression of his full powers, or it would represent one of the " circumstances of the conclusion of the treaty ". He also supported Mr. Reuter's suggestion for transposing paragraphs 1 (*c*) and 1 (*b*).

9. With regard to Mr. Yasseen's remarks on paragraph 2 (*b*), he said that the provision was intended to state that signature *ad referendum*, if confirmed, would be taken as final; there was no intention to introduce a subjective element.

10. The CHAIRMAN, speaking as a member of the Commission, said that he would be forced to vote against the article, for he still held that ratification was normally necessary; any enlargement of the opportunities of dispensing with the requirement of ratification tended to lessen the role of national representative assemblies.

11. Mr. LACHS said that it was necessary to retain article 11 now that the Commission had abandoned the distinction between formal treaties and treaties in simplified form, which constituted the majority.

12. He supported Mr. Yasseen's suggestion that the concluding portion of paragraph 1 (*c*) should be deleted. The expression " statements made by him " was unduly broad; a representative might make a casual statement during the negotiations or might even make a number of contradictory statements.

13. Mr. AGO said that, while appreciating Mr. Yasseen's concern, he thought paragraph 1 (*c*) should stand as drafted. The provision covered two cases affecting a particular State: the case where the representative had full powers specifying that signature would express the State's definitive consent to be bound, and the case where the representative himself regarded himself as authorized to make a statement to that effect. In the latter case, how could the representatives of the other States question the statement? That was not, however, a point of prime importance.

14. With regard to Mr. Reuter's proposal that the order of paragraphs 1 (*b*) and 1 (*c*) should be reversed, he said that paragraphs 1 (*a*) and 1 (*b*) were inter-connected: both dealt with cases where the fact that the signature sufficed to express the State's definitive consent was recognized by agreement among all the parties. That agreement was explicit in the case covered by paragraph 1 (*a*), implicit in that covered by paragraph 1 (*b*). Paragraph 1 (*c*) dealt with a different case, that where one of the parties could express its final consent by signature whereas another could append its signature subject to ratification. Paragraph 1 (*b*) was not therefore a residual rule in relation to paragraph 1 (*c*).

15. Mr. AMADO asked whether the confirmation referred to in paragraph 2 (*b*) was an act equivalent to ratification. If a representative of Brazil, for instance, appended his signature *ad referendum*, that meant that the matter had to be submitted to the National Congress for approval.

16. With regard to the " statements " mentioned in paragraph 1 (*c*) he said that, as he had mentioned before, when States negotiated, they tried to obtain as much as they could, and too much importance should not, therefore, be attached to statements and *travaux préparatoires* in general.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the confirmation in question was the confirmation of the signature itself; " ratification " was the ratification of the treaty, not of the signature. The signature was confirmed as a signature; it might, or might not, amount to consent to be bound.

18. Mr. AMADO said that the Special Rapporteur's explanations had not entirely allayed his misgivings.

19. Mr. REUTER said he admitted that Mr. Ago's interpretation was correct with regard to paragraph 1 (*b*), since in that provision the word " States " was in the plural. But it was by no means certain that the provision was right; if, for example, the representatives of States were provided with powers specifying that after signature the treaty would have to be ratified, could they agree that signature would express definitive consent? If that were the case, the capacity of the representatives could be changed by mutual agreement—a very bold idea. It would therefore be better to draft paragraph 1 (*b*) with the word " State " in the singular. If that was done, his earlier remark would still apply.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that he entirely agreed with Mr. Ago regarding paragraphs 1 (*b*) and 1 (*c*). Paragraph 1 (*b*) dealt with a case, quite common in treaty practice, where there was a clear agreement, usually made by correspondence, before the negotiations began, that representatives would be empowered to give their signature that effect. Of course, a representative would not be able to alter the basis of his authority; if he did so, the case would be covered by article 32 (Lack of authority to bind the State).

21. Paragraph 1 (*c*) dealt with the case where a State unilaterally pronounced that it was bound by signature; such a pronouncement could not be prevented, even if other States were in the same position. The point was one on which Governments had insisted strongly.

22. Mr. ROSENNE said that, in the light of the discussion, he doubted whether paragraph 1 (*c*) was really necessary. He therefore suggested that sub-paragraphs (*b*) and (*c*) of paragraph 1 be amalgamated to read :

" it appears from the full powers or the circumstances of the conclusion of the treaty that it was agreed that signature should have that effect ".

If, however, the Commission decided to retain the three sub-paragraphs of paragraph 1, he would support the remarks of Mr. Ago regarding the logic of the present formulation.

23. In both sub-paragraphs of paragraph 2, he did not favour the use of the expression " is considered as ", which was the language of a legal fiction. He suggested that in sub-paragraph (*a*) it should be replaced by the words " is the equivalent of ", and in sub-paragraph (*b*) should simply be deleted. Also in sub-paragraph (*b*), the word " if " should be replaced by " when ".

24. Mr. RUDA said that the provisions of paragraph 1 corresponded to the title " Consent to be bound expressed by signature ". Those of paragraph 2, however, dealt with a different matter : initialling and signature *ad referendum* might or might not express the consent of a State to be bound. It would therefore seem more appropriate to make paragraph 2 a separate article.

25. Mr. AGO said he agreed that a hasty reading of the article might give the impression that it suffered from the defects to which Mr. Ruda had drawn attention. But the intention of its two paragraphs fully reflected the title of the article in that they were concerned with cases where the definitive consent of a State to be bound was expressed by signature or by an equivalent act. The article would probably have to be redrafted in such a way that the connexion between the two paragraphs became clearer.

26. Mr. RUDA said that he fully agreed with Mr. Ago and found the provision quite acceptable in the light of his explanation regarding its intention. However, it would be necessary to amend the wording to make the contents of the provision conform more closely to the title of the article.

27. Mr. TSURUOKA said it was quite possible to get the impression from reading the article that paragraph 2 dealt with a matter unrelated to that in paragraph 1; he would, however, accept the explanations given by Mr. Ago. He also supported what Mr. Rosenne had said.

28. In sub-paragraph 2 (*b*) the word " full " before " signature " might be omitted, or else the expression might be amended to " unconditional signature ". That sub-paragraph did not mean that confirmation of a signature *ad referendum* was equivalent to ratification; such confirmation meant that the State gave its definitive consent, but that consent was expressed by signature, not by an act analogous to ratification.

29. Mr. CASTRÉN said that he was prepared to accept the redraft of article 11 with the amendments suggested, especially those by Mr. Rosenne.

30. He noticed that, in the English title, there was nothing corresponding to the words *de l'Etat* which appeared in the French title.

31. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that a number of suggestions had been made during the discussion, which should be considered by the Drafting Committee. He did not think that the words " is considered as " in paragraph 2 were inappropriate or that they indicated a fiction. In sub-paragraph (*a*) they served to indicate that the initialling of a text amounted to a signature when such was the intention of the parties; in sub-paragraph (*b*) they served to stress the fact that signature *ad referendum* was tantamount to a full signature if it was confirmed, and certainly did not introduce an element of fiction.

32. With regard to the same sub-paragraph, he was opposed to Mr. Rosenne's suggestion for replacing the word " if " by " when ", since that change would introduce a change of substance. The traditional rule in the matter was that signature *ad referendum* was an actual signature upon a condition. In adopting the wording suggested, the Drafting Committee had intended not to exclude the possibility of an agreement between the parties on a special date on which the signature was to become operative.

33. He suggested that article 11 should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

34. The CHAIRMAN said that, if there was no objection, he would consider the Commission agreed to refer article 11, incorporating article 10, to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*[2]

ARTICLE 12 (Consent to be bound expressed by ratification, acceptance or approval)[3]

35. The CHAIRMAN invited the Commission to consider the new text of article 12 proposed by the Drafting Committee, which read :

" 1. The consent of a State to be bound by a treaty is expressed by ratification when :

(*a*) the treaty or an established rule of an international organization provides that ratification is required;

(*b*) it appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that ratification should be required;

(*c*) the representative of the State in question has signed the treaty subject to ratification, or it appears from his full powers or from statements made by him during the negotiations that he intended to sign the treaty subject to ratification.

" 2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification ".

36. Sir Humphrey WALDOCK, Special Rapporteur, said that article 12 consolidated a number of previously separate provisions, on the subject of ratification, acceptance and approval. Accession had been left aside for the time being.

[2] For resumption of discussion, see 816th meeting, paras. 14-17.

[3] For earlier discussion, see 783rd meeting, paras. 82-98, 784th and 785th meetings, 786th meeting, paras. 5-101, and 787th meeting, paras. 99-110.

37. To some extent, the draft represented a compromise. Ratification was dealt with separately in paragraph 1, so as to stress its importance and thereby give some satisfaction to those members who considered that a residual rule should have been included, stating the requirement of ratification.

38. The language of paragraph 1 (*a*) needed some adjustment, in the light of the statement in paragraph 2 that the consent of a State to be bound by a treaty could be expressed by acceptance or approval " under conditions similar to those that apply to ratification ". It would clearly not be correct to say that the treaty or an established rule of an international organization would necessarily provide that acceptance or approval " is required ". He suggested that, instead of " provides that ratification is required ", the end of paragraph 1 (*a*) should read " provides for such consent to be expressed by means of ratification ". It was quite common for a treaty to give States the choice between acceptance, approval and other means of expressing their consent to be bound.

39. Mr. VERDROSS pointed out that if, as was the case in article 12, ratification, acceptance and approval were to be treated as having the same legal force, the article could be simplified by adding the words " acceptance or approval " at the end of the introductory passage in paragraph 1, replacing the word " ratification " by the words " such an act " in sub-paragraphs (*a*) and (*b*), and adding the words " acceptance or approval " after the word " ratification " in sub-paragraph (*c*). In that way, paragraph 2 could be deleted. Otherwise, three paragraphs containing the same particulars would be required for each of the three acts : ratification, acceptance and approval.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that in principle he entirely agreed with Mr. Verdross, but the language of article 12 represented a compromise; there had been a strong current of opinion in the Commission in favour of a rule stating the requirement of ratification. In particular, Mr. Jiménez de Aréchaga had accepted the formulation of article 12 only because of the special place given to ratification.

41. Mr. VERDROSS asked whether different definitions of the three acts in question would be included in the article on definitions. If the Commission wished to make its terms clear, it should specify that the term " ratification " meant exclusively the act performed by the supreme authority of the State—which might be the Head of State or the Government—whereas the term " acceptance " designated the act of a subordinate authority. If the Commission did not establish that distinction, it would be using different words to designate one and the same thing.

42. The CHAIRMAN, speaking as a member of the Commission, said that he would abstain in the vote on article 12, because in that article ratification was presented not as a general rule but as an exception. He shared the view that, in the article, acceptance and approval had the same legal force as ratification.

43. Mr. ROSENNE said that he accepted article 12 as proposed by the Drafting Committee. A certain lack of symmetry in the matter was not undesirable. One party might consider itself required by its constitutional law to ratify a treaty, whereas another might be satisfied with approval.

44. Mr. LACHS said he supported the redraft suggested by Mr. Verdross, which would facilitate the adaptation of the treaty to the constitutional provisions of States. He also supported the drafting improvement proposed by the Special Rapporteur for paragraph 1 (*a*).

45. Mr. YASSEEN said that he would abstain in the vote on article 12 because it contained no provision indicating that ratification was the general rule.

46. Mr. AGO said he did not understand why not even the supporters of ratification were able to endorse article 12; after all, it corresponded to practice.

47. He saw the logic of Mr. Verdross's suggestion, but preferred the present wording precisely because the traditional rule was ratification, whereas acceptance and approval were still rather ill-defined practices. The text would become very unwieldy if the three acts, " ratification, acceptance and approval ", had to be mentioned each time; and if repetition was to be avoided, the formula " such an act " would not always be very clear. Moreover, so far as sub-paragraph (*c*) was concerned, it would sometimes be inaccurate to speak of a State signing a treaty subject to acceptance or approval, for some of those acts were not necessarily preceded by a signature.

48. Mr. YASSEEN said that Mr. Ago's observation compelled him to explain his view. The text proposed by the Drafting Committee had been over-simplified; it offered no means of solving the problem in cases where it was not clear from the treaty, explicitly or implicitly, that ratification was necessary or signature sufficient. He would agree that, in the cases mentioned in the article, signature would be sufficient to express the consent of the State to be definitively bound, but he believed it was essential to lay down, as an additional rule, that a treaty should be ratified.

49. The CHAIRMAN, speaking as a member of the Commission, explained in reply to Mr. Ago that he subscribed to the principle that a treaty should be ratified. In article 12, however, that principle was reversed, since it provided that a treaty should be ratified only if ratification was required.

50. Mr. REUTER said that it might be better if article 12 was drafted on exactly the same plan as article 11, using the same language. If the words " shall have that effect " were substituted for " is required " in paragraph 1 (*a*), the resulting wording would be more neutral in the dispute between the supporters and the opponents of the principle that a treaty must be ratified. In actual fact, the question could not be settled one way or the other in international law, but States were under a legal obligation to make their position clear.

51. The end of paragraph 1 (*b*) should read ". . . the States concerned have recognized that ratification is required ", in deference to constitutional provisions.

52. The CHAIRMAN, speaking as a member of the Commission, said that an important issue of substance was involved. In his view, the rule was that the nation,

through its duly qualified representatives, decided on the validity of the treaty by means of ratification.

53. Mr. TUNKIN said that Mr. Verdross's suggestion did not touch the substance; it only affected the presentation. If adopted, it would logically require three separate sets of provisions on ratification, acceptance, and approval respectively. Considerable repetition would thereby result.

54. Mr. Reuter's suggestion could be considered by the Drafting Committee.

55. Mr. TSURUOKA said he agreed with Mr. Tunkin. He would willingly accept article 12, as he regarded it as a well-conceived attempt to reconcile the opposing views to the fullest possible extent.

56. So far as the drafting was concerned, he said that since ratification was a more solemn and the more common procedure, it would be more correct to mention it first and to deal with the analogous acts afterwards.

57. In the French text of paragraph 2, the words *sont requises* should be substituted for the word *valent*.

58. Mr. BRIGGS said that he fully accepted the compromise embodied in articles 11 and 12. The purpose of that compromise was to avoid the doctrinal dispute which had arisen during the discussion of those articles, and which related to the question whether a residual rule should be laid down to the effect that the ratification of treaties was necessary.

59. The Drafting Committee had merely listed in article 11 those cases in which consent to be bound was expressed by signature and, in article 12, those cases in which consent was expressed by ratification, acceptance or approval. The two articles contained parallel provisions. In paragraph 1 (*c*) of article 12, however, provision was made for the case where one State might regard ratification as necessary, whereas the full powers of the representative of another State indicated that, for the purpose, signature was sufficient.

60. The resulting wording of article 12 was perhaps not perfect but it represented a satisfactory working compromise. The Drafting Committee should consider the various suggestions for the improvement of the wording.

61. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that if paragraph 1 (*a*) of article 12 was amended as he had suggested, the provisions of articles 11 and 12 would be almost symmetrical. Complete symmetry was not possible because of the inherent difference between signature and ratification. Ratification always expressed the consent of the State to be bound; signature, on the other hand, was equivocal and might or might not express consent to be bound.

62. He was not in favour of using the word " recognized " instead of " agreed ", which was a term he always tried to avoid using otherwise than in its technical meaning.

63. He agreed with Mr. Briggs regarding the difference of opinion in the Commission on the laying down of a residual rule. The purpose of the Drafting Committee had been to state no rule in the matter, one way or the other. The text consequently disappointed the expectations of those who wished the principle to be laid down that ratification was required. In 1962, the Commission had tried to solve the problem by laying down two different presumptions, one for treaties in simplified form and another for other treaties; the new formulation was an attempt to avoid the whole issue. Undoubtedly, on the basis of treaty practice, it would be difficult to justify laying down a firm rule to the effect that ratification was always required.

64. The CHAIRMAN suggested that article 12 should be referred back to the Drafting Committee for redrafting in the light of the discussion, and that the Commission should pass on to consider article 15.[4]

*It was so agreed.*[5]

ARTICLE 15 (Exchange or deposit of instruments of ratification, accession, acceptance or approval)[6]

65. The CHAIRMAN invited the Commission to consider the new text of article 15 proposed by the Drafting Committee, which read :

" Unless the treaty otherwise provides, instruments of ratification, accession, acceptance or approval become operative :

(*a*) By the exchange of the instruments between the contracting States;

(*b*) By deposit of the instruments with the depositary; or

(*c*) If so agreed, by notification to the contracting States or to the depositary. "

66. Sir Humphrey WALDOCK, Special Rapporteur, said that the new article 15 incorporated the material formerly contained in article 15, paragraph 2, of the text adopted at the fourteenth session. The Drafting Committee had endeavoured to set out in shortened form the rules governing the procedures by which, and the time at which, an instrument of ratification, accession, acceptance or approval became operative as an instrument. The treaty might not necessarily enter into force, for a specified number of ratifications might be required.

67. Sub-paragraphs (*a*) and (*b*) referred to the traditional procedures, but sub-paragraph (*c*) was new and had been inserted as a result of the emphasis which some members had placed on the modern trend towards a less formal procedure by means of notification through the diplomatic channel. Recourse to that method had, however, been made subject to agreement between the States concerned.

68. Mr. CASTRÉN said that the new wording was an improvement and the text as a whole acceptable, but the new sub-paragraph (*c*) seemed unnecessary. It was true that the Commission had discussed the problem, but the parties to the treaty were always free to agree on another rule. If the Commission wished to retain that idea, it would be better to express it in the introductory sentence or to include it in the commentary.

[4] Article 13 (Accession) and article 14 (Acceptance or approval) were discussed at the 786th meeting, paras. 61 *et seq.* It was eventually agreed that a decision on article 13 would be postponed pending decisions on articles 8 and 9 (dealing with participation in a treaty); and article 14 was deleted, its substance being incorporated in article 12.

[5] For resumption of discussion, see 816th meeting, paras. 18-27.

[6] For earlier discussion, see 787th meeting, paras. 4-98.

69. Mr. AGO said he fully approved of the new version of article 15.

70. In sub-paragraphs (*a*) and (*b*) the words " the instruments " should perhaps be replaced by " those instruments ", while in sub-paragraph (*c*) the purpose of the notification should be specifically stated.

71. The CHAIRMAN, speaking as a member of the Commission, siad he supported Mr. Ago's last remark. In practice, the notification could be effected in two ways: either by indicating that ratification had taken place, or by sending a copy of the instrument of ratification.

72. For the rest, he approved of both the substance and the form of the article.

73. Mr. REUTER, to meet the point made by the Chairman and Mr. Ago, proposed that the wording " . . . by notification of their content or of the formality completed " should be used in sub-paragraph (*c*).

74. Sir Humphrey WALDOCK, Special Rapporteur, explained that it had been decided to refer simply to notification, without going into further detail, because the methods varied. Perhaps the point could be left to the Drafting Committee.

75. Mr. ROSENNE said that, as far as the English version was concerned, the meaning was perfectly clear and the text acceptable; it would only complicate matters to go into detail. Perhaps the drafting point raised by Mr. Ago, which affected the French text, could be left to the Drafting Committee.

76. Mr. LACHS said that there was some force in Mr. Castrén's criticism of sub-paragraph (*c*). It should be couched in more general terms, leaving States freedom in the choice of procedure.

77. The CHAIRMAN suggested that the Drafting Committee should be requested to review sub-paragraph (*c*) in the light of the discussion.

*It was so agreed.*[7]

ARTICLE 16 (Consent relating to a part of a treaty or to alternative clauses)[8]

78. The CHAIRMAN invited the Commission to consider the new article 16 proposed by the Drafting Committee, which read:

" 1. The consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits the contracting States to choose between alternative clauses is effective only if it is made plain to which of the alternatives the consent relates. "

79. Sir Humphrey WALDOCK, Special Rapporteur, said that the new article 16 incorporated the substance of the 1962 text of article 15, paragraph 1 (*b*) and (*c*), but the rule was stated somewhat differently. The earlier text might have been interpreted to mean that the instrument would be void altogether unless it applied to the treaty as a whole, whereas in its new form the provision was more flexible.

80. Paragraph 2 dealt with the case where a treaty permitted a choice between alternative clauses, and stipulated that the consent to be bound would only be effective if it was made plain to which of the alternatives it related. Again, the rule had been stated in less rigid terms than in the original text.

81. Mr. ROSENNE said that the drafting of paragraph 1 seemed inconsistent with the whole section on reservations and he was unable to see how, in its present form, it could fit in with the scheme of the articles on reservations. Its wording would require very careful review by the Drafting Committee.

82. Mr. YASSEEN said that, in his opinion, paragraph 2 was superfluous, because the case with which it dealt was governed by the general principles regarding the expression of will.

83. Mr. AGO said he regretted that paragraph 2 referred to a choice between alternative " clauses ". The corresponding provision adopted in 1962, article 15, paragraph 1 (*c*), referred to " texts ", which he found preferable. The provision was meant to cover cases where there were two different versions of a treaty. If only a few clauses were involved, it would be excessive to state that the ratification would not be effective because it was not made plain to which of the alternatives it related.

84. Mr. LACHS said he agreed with Mr. Ago that the existing wording of article 16 could place the whole treaty in jeopardy. A clear distinction should be drawn between the treaty as a whole and those of its parts for which alternative clauses existed, as was the case in certain international labour conventions.

85. Mr. TUNKIN said he agreed with what had been said by Mr. Rosenne about paragraph 1. Its drafting called for careful re-examination.

86. Paragraph 2 was unnecessary and too rigid. A State might, by an oversight, fail to indicate which of the alternatives it preferred when depositing its instrument of ratification, but it would be a simple matter for the depositary to find out. Paragraph 2 failed to answer the question of the date when, in such cases, the instrument would be effective.

87. The CHAIRMAN, speaking as a member of the Commission, said that he shared Mr. Ago's view: the reference in paragraph 2 should be to alternative texts. To speak merely of alternative clauses overlooked the fact that the differences in the obligations and rights derived not just from those clauses, but from the treaty as a whole. The rule stated in the paragraph was essential in practice.

88. In reply to Mr. Tunkin, he said that the text was clear: an initial ratification which did not specify the alternative to which it related was without effect.

89. Mr. TUNKIN said that he wished to make it clear that he had no specific objection to paragraph 2, but believed it could be omitted.

90. Mr. TSURUOKA said that he shared Mr. Rosenne's misgivings regarding paragraph 1. He could accept the provision if the phrase " the other contracting States " meant " all the other contracting States ".

[7] For resumption of discussion, see 816th meeting, paras. 28 and 29.

[8] For earlier discussion of a provision on this matter, see 787th meeting, paras. 6-98.

91. Mr. BRIGGS said that there could be treaties offering a choice between two different sets of provisions; it was not always a question of differing texts.

92. He agreed with Mr. Rosenne that, in the text as drafted, there was some conflict between paragraph 1 and the provisions concerning reservations.

93. He preferred the original versions of paragraph 1 (*b*) and 1 (*c*) of article 15, as adopted in 1962, which were less rigorous and did not impose the rather strong sanction laid down in paragraph 2 of the new article 16.

94. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the Drafting Committee had tried to reflect the views expressed in the Commission; he would be reluctant to revert to the earlier text which had been criticized for failing to formulate a positive rule. There was certainly some overlapping between the subject of partial acceptance of a treaty and reservations, and possibly a cross-reference at the beginning of article 16 to the section on reservations should be made in some such form as " Without prejudice to articles 18 to 22 ", as indeed he had proposed in his fourth report.[9] With a modification of that sort, paragraph 1 should be retained.

95. Paragraph 2 dealt with the not uncommon case where an instrument was defective owing to the State's failure to indicate to which alternative its consent related. The other parties could claim that such an instrument was not effective, but if the omission was regarded simply as the result of an oversight, presumably the treaty would be considered to be in force from the date of the deposit of the instrument. He would not have thought there was any harm in retaining paragraph 2, but the Drafting Committee might be able to improve the text in the light of the comments made.

96. The CHAIRMAN suggested that article 16 should be referred back to the Drafting Committee with the comments made during the discussion.

*It was so agreed.*[10]

ARTICLE 17 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force)[11]

97. The CHAIRMAN invited the Commission to consider the new text of article 17 proposed by the Drafting Committee, which read :

" A State is obliged in good faith to refrain from acts calculated to frustrate the object of a treaty when :

(*a*) It has agreed to enter into negotiations for the conclusion of the treaty, while the negotiations are in progress;

(*b*) It has signed the treaty subject to ratification, acceptance or approval, until it shall have become clear that it does not intend to become a party to the treaty;

(*c*) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. "

98. Sir Humphrey WALDOCK, Special Rapporteur, said that in the new text of article 17 the obligation of good faith was set out in three different stages. Members would recall that a number of governments had been opposed to the idea that the obligation should extend to the phase of negotiation, and the Drafting Committee had been instructed to produce a rather more cautious provision on that point than that approved at the fourteenth session.

99. Mr. VERDROSS said that, while he agreed with the ideas underlying article 17, he had some doubt concerning sub-paragraph (*b*). The passage " until it shall have become clear that it [the State] does not intend to become a party . . . " was too weak; indeed, it was meaningless, for if a State had committed acts calculated to frustrate the object of the treaty, it had *ipso facto* disclosed the absence of any intention to become a party to the treaty. The passage should be amended to read : " . . . so long as it has not notified the other States that it does not intend . . . ". Such notice was surely the least that could be expected.

100. Mr. LACHS said that article 17 would be acceptable provided that sub-paragraph (*b*) was modified so as to remove the vague qualification contained therein. The words " until it shall have become clear " should be replaced by some such wording as " until the State concerned has made it clear " because, under the provision as it stood, the matter was left to the judgement of individual parties which could draw differing and sometimes conflicting conclusions about the intention of the State in question. Some might be willing to wait for a considerable time for ratification, acceptance or approval, while others might be less patient.

101. Mr. AGO, supporting Mr. Verdross's remarks, said that the Special Rapporteur had made provision for such notice in his earlier draft.[12]

102. With regard to the opening passage of the article, he said that admittedly the rule stated was an application of the principle of good faith, but there was no need to mention good faith expressly. The essential point was that the State was bound to refrain from acts calculated to frustrate the object of a treaty; it would be better to leave it to the commentators to ascertain the source of the obligation. If, nevertheless, the Commission wished good faith to be mentioned expressly, then, in the French version, the words *en toute bonne foi* should be replaced by the words *de bonne foi.*

103. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Verdross's comment was perfectly sound. It could happen that a State acted in a manner contrary to the object of the treaty while, at the same time, its representatives continued to announce its impending ratification. The least that could be asked for was that the State should make its intentions clear.

104. He agreed with Mr. Ago that the words " in good faith " should be omitted. Some jurists contended that the obligation of good faith was a moral, not a legal obligation. To put an end to such arguments, it could be explained in the commentary that the obligation laid

[9] A/CN.4/177, para. 3 of the Special Rapporteur's observations *ad* article 15.

[10] For resumption of discussion, see 816th meeting, paras. 30-35.

[11] For earlier discussion, see 788th meeting and 789th meeting, paras. 1-58.

[12] A/CN.4/177, para. 5 of the Special Rapporteur's observations *ad* article 17.

down in article 17 had its origin in the principle of good faith, but had since become a legal obligation.

105. Mr. CASTRÉN said that the Drafting Committee had produced a good text.

106. Sub-paragraph (*a*) reflected the view that the obligation already existed at the negotiating stage. He agreed with Mr. Ago and the Chairman that, in the opening passage, the words " in good faith " should be omitted.

107. For sub-paragraph (*b*), it would be desirable to use clearer and more precise wording, introducing the word " notify " or " declare ".

108. The substance of sub-paragraph (*c*) he could accept, but the phrase " provided that such entry into force is not unduly delayed " was too vague; there was no need to restore the ten-year period mentioned in the earlier draft, but something more precise should be found. He would not, however, vote against the sub-paragraph as it stood, even if the passage were left unchanged.

109. Mr. ROSENNE said that he, too, was in favour of dropping the reference to good faith.

110. Sub-paragraph (*b*) required some modification because it was not correct to take signature as a point of departure; as had just been pointed out during the discussion on ratification, some treaties were ratified without any signature at all. The obligation operated from the time of the adoption of the text. The provision should be drafted in such a way as not to impose an actual duty on the State to notify whether or not it intended to become a party.

111. Mr. REUTER said that he could agree to the deletion of the words " in good faith " in the opening passage. If the Commission did not wish to commit itself as to the origin of the obligation, an alternative formulation might be " a State is obliged to refrain in good faith . . . ". The ultimate source of the rule was that it was wrong to deceive the partner.

112. He hoped the Commission would not be too formalistic in drafting sub-paragraph (*b*), where he would prefer the word " express " to the word " notify ". After all, a public speech by the Head of State or, for example, the adoption of a resolution by the United States Senate concerning the Havana Charter, could be regarded as sufficient expression of the intention of the State. If the Commission accepted that suggestion, he would accept the suggestions of other speakers.

113. Mr. YASSEEN said it was correct that the duty to act in good faith was the basis of the rule, but if the words " in good faith " were allowed to stand, they might sow seeds of doubt as to whether the obligation in question was a *de jure* obligation. He would therefore prefer that those words should be dropped, as they had in fact been dropped from the title.

114. Mr. BRIGGS said that if the reference to good faith was dropped, what kind of obligation would remain, particularly at the stage of negotiation when no treaty existed at all?

115. Mr. RUDA said that the Drafting Committee should be very careful in its choice of language for sub-paragraph (*b*), because the intention of a State might not necessarily be either notified or manifested expressly.

116. Mr. AGO proposed that the Commission should refer article 17 back to the Drafting Committee.

117. Mr. TSURUOKA said he supported the proposal, but hoped that the Drafting Committee would study Mr. Briggs's comment very carefully. At the negotiating stage one could conceivably speak of the " object " of the treaty, but from the legal point of view the formula was debatable.

118. The CHAIRMAN suggested that, if there was no further comment, article 17 should be referred back to the Drafting Committee with the comments and suggestions put forward during the discussions.

*It was so agreed.*[13]

119. The CHAIRMAN said that, in reply to certain criticisms which had been voiced informally, he wished to explain that, as initially most of the articles had been referred to the Drafting Committee without precise instructions regarding substance, he could hardly prevent members of the Commission from re-opening questions of substance, at least as far as new provisions were concerned.

The meeting rose at 6 p.m.

[13] For resumption of discussion, see 816th meeting, paras. 36-40.

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## 813th MEETING

*Tuesday, 29 June 1965, at 10 a.m.*

*Chairman:* Mr. Milan BARTOŠ

*Present:* Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

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### Law of Treaties

**(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)**

*(continued)*

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 18 (Formulation of reservations)[1]

1. The CHAIRMAN invited the Commission to consider the new text of article 18 proposed by the Drafting Committee, which read:

[1] For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.