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Summary record of the 644th meeting

Topic:
Law of Treaties

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concerning the signature or initialling of the treaty.

76. Mr. de LUNA suggested, as a drafting amendment, that the word "conditional" be substituted for the word "provisional" in sub-paragraph 2 (a).

77. Mr. GROS said that, although he was aware that sub-paragraph 3 (a) (i) was modelled on article 10, paragraph 2, of the 1959 draft, he felt bound to point out that it would not be easy to determine the intention referred to in the provision.

78. The remainder of the special rapporteur's text was acceptable and could be referred to the drafting committee.

79. Mr. BARTOŠ said that, in the past, the initialling of a treaty by a Head of State with the intention that it should be equivalent to a full signature would have been regarded as binding on the state, since a sovereign could not go back on his word. Under modern conditions, initialling might not always connote a final commitment.

80. Mr. PAREDES said that article 8 was of great importance, but should take into account those cases where, under constitutional law, the signature of a treaty needed parliamentary approval.

81. Mr. YASSEEN said he agreed with Mr. Bartoš's observation concerning the effect of initialling in modern times.

82. The CHAIRMAN suggested that, in the absence of further comment, article 8 be referred to the drafting committee.

It was so agreed.

ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE

83. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no comparable article in the 1959 draft and that the article had not been easy to formulate because it overlapped with other articles. He believed, however, that such an article was necessary.

84. Perhaps the Commission might find it convenient to consider the article paragraph by paragraph. The first question that would arise in connexion with paragraph 1 was whether, in fact, it was needed at all. He had inserted it for the sake of completeness.

85. Mr. BARTOŠ said that the article raised a problem of drafting, inasmuch as a state should be treated as one single entity and not as two different entities, one of which signed a treaty and then submitted it for ratification to the other.

86. He welcomed the "good faith" clause in sub-paragraph 2 (c), in view of the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification. The Commission had not discussed that practice to any great extent when preparing the 1959 draft.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that the practice mentioned by Mr. Bartoš was covered by article 20, paragraph 6, but that that provision might require amplification.

The meeting rose at 12.30 p.m.

644th MEETING

Wednesday, 16 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)

ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE (continued)

Paragraph 1

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 9, suggested that it be discussed paragraph by paragraph; the substance of paragraph 1 had already been accepted with the approval of article 6, paragraph 2.

2. Mr. TABIBI said that the special rapporteur had prepared a useful article which, as he had himself admitted, had not been easy to draft satisfactorily. A signature, whether only for the purpose of authentication or whether constituting the signature of a treaty that did not require accession or ratification, clearly had some legal force and created certain obligations, for it was an act of the state, though in the exercise of its sovereign power the state was free to withdraw its signature. On that point he agreed with the opinion of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, quoted in the special rapporteur's commentary, that the signatory state entered into some intangible obligation, a view supported by the draft convention on the law of treaties prepared by the Harvard Research. The Permanent Court of International Justice had also recognized in the Polish Upper Silesia Case¹ that a signatory state's misuse of its rights in the interval before ratification might amount to a breach of the treaty.

3. On a point of drafting he observed that the language of paragraph 1 was not altogether clear. It did not indicate what happened in cases where signature did not amount to an act of authentication and where the text was authenticated in some other way agreed on by the parties or by persons other than those representing the parties; for example, the General Act for the Pacific Settlement of International Disputes of 1928 had been authenticated by the President of the League of Nations Assembly and the Secretary-General of the League.

4. Paragraph 1 was closely linked with paragraph 3 and so should be moved.

5. Mr. TSURUOKA suggested that the drafting committee should be asked to eliminate the overlap between article 6, paragraph 2, and article 9, paragraph 1.

6. Mr. CASTRÉN said it would suffice if article 6, paragraph 2, were simply referred to in article 9, paragraph 1.

¹ P.C.I.J., Series A, No. 7, 1926, p. 30.

7. Mr. AMADO said the drafting of paragraph 1 was unsatisfactory, particularly the phrase "automatically constitutes an act authenticating".

8. Mr. ELIAS said he was inclined to think that paragraph 1 could be dropped.

9. Mr. ROSENNE thought there was some value in retaining paragraph 1 but in a shorter form. It would be enough to state that, in addition to authenticating the text, full signature had the effects set forth in the succeeding paragraphs.

10. Sir Humphrey WALDOCK, Special Rapporteur, while agreeing that the wording of paragraph 1 could be improved, thought that for the sake of completeness it should be retained, if only in the form of a reference to article 6, paragraph 2.

11. The CHAIRMAN suggested that paragraph 1 be referred to the drafting committee.

It was so agreed.

Paragraph 2

12. Mr. CASTRÉN said that paragraph 2 was undoubtedly useful but there were certain gaps in it and some obscurities. One or two passages, such as sub-paragraph (a), the latter part of sub-paragraph (b) and sub-paragraphs (d) and (e), were too obvious to need stating.

13. He agreed with the special rapporteur that the obligation stated at the beginning of sub-paragraph (b) was vague, but it might serve a useful purpose to mention it.

14. The obligation dealt with in sub-paragraph (c) had been discussed earlier in connexion with article 5 and had given rise to a difference of opinions. It would seem necessary to define more exactly what was meant by "the other states concerned" and "a reasonable period". The point to be stressed was not so much that a state was under an obligation to indicate what its intentions were about ratification, as that it should not act in a way that might impair the performance of the treaty at any time before ratifying or accepting it. It was interesting to note that the Permanent Court, in its judgement in the Polish Upper Silesia case, had not mentioned the matter of notification concerning the decision about ratification or acceptance during a reasonable period, but had referred to the misuse of rights. Of course, a state was under no obligation if it was not going to become a party to a treaty, but the decision not to become a party was not usually notified; consequently, whether a state had fulfilled its obligations usually had to be judged *ex post facto*.

15. He proposed that sub-paragraph (c) should be redrafted to read:

"The signatory state, provided that it ratifies or accepts the treaty, shall be under an obligation from the time of signature to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance."

16. Mr. YASSEEN said that most careful thought would have to be given to the question whether the

notion of misuse of rights should be introduced into provisions of the kind under discussion.

17. A state should not sign lightly, for under international law signature had some significance, but he would not go so far as to say that it implied any obligation to ratify. He was troubled by the wording of the opening passage in sub-paragraph (b), because no obligation could derive from a treaty that had not yet entered into force.

18. The special rapporteur's proposal in sub-paragraph (c) seemed reasonable and practical.

19. Mr. JIMÉNEZ de ARÉCHAGA said that article 9 was acceptable as regards content, but was too long and too repetitious; the drafting committee should be requested to shorten and simplify it. Sub-paragraphs (a) and (e) might be deleted as self-evident and perhaps the latter part of sub-paragraph (b) could also be omitted.

20. Mr. VERDROSS said he could not agree to the proposition that a treaty subject to ratification imposed certain obligations. In so far as the obligations enumerated in sub-paragraphs (a) to (e) could be said to exist, they did not derive from the signature of a treaty but from general rules of international law. It should be enough to say in the introduction to paragraph 2 that signature subject to ratification did not make the state concerned a party.

21. Sub-paragraph (a) contained something that was self-evident: a state which had signed was entitled to proceed with ratification.

22. If sub-paragraph (b) was intended to express an obligation to submit a treaty for ratification, it should state that the obligation was owed by the government, rather than by the state as such. However, he very much doubted whether such an obligation on governments in fact existed, apart from special provisions such as those in the Constitution of the International Labour Organisation, according to which a convention adopted by a two-thirds majority of the International Labour Conference had to be submitted for ratification.

23. Sir Humphrey WALDOCK, Special Rapporteur, shared Mr. Verdross's doubt as to whether there was a rule of international law requiring a government to submit a treaty for ratification, but in fact the provision put forward in sub-paragraph (b) was very much weaker and only stipulated that the signatory state was under an obligation to examine in good faith the question of referring the treaty to the competent organs for ratification. Perhaps nevertheless there was some value in pointing out what was desirable conduct on the part of states.

24. He would be reluctant to try and draw a distinction between states and governments: the latter acted on behalf of the former.

25. The purpose of sub-paragraph (a) was to indicate that a state had no right to proceed to ratification unless it had gone to the length of signing; that might be obvious, but it needed saying.

26. Mr. TABIBI said he agreed with the remarks of

Mr. Verdross concerning paragraph 2; the phrase "whether actual or presumptive" might cast doubt on the subsequent sub-paragraphs. A provision stating that full signature would not constitute the state concerned a party would suffice, for the rest of the paragraph explained what effect signature had on the rights and obligations of signatories.

27. The meaning of the article would become clearer if paragraphs 1 and 3 were combined in a single clause describing the legal effect of full signature.

28. With regard to sub-paragraph (c), he said that signature should be regarded as having been done in good faith until the terms of the treaty were violated, which was the only way of determining whether the state had acted in good faith or not. There was, however, a danger in such a proviso, for it might be used by other states as a pretext for evading their obligations on the ground that other parties had not acted in good faith.

29. Mr. LACHS pointed out that, although signature did not mean that the state concerned had become a party, it nevertheless gave rise to certain rights and duties. The first was a perfect right to ratify, but the duty to comply with the provisions of the treaty was imperfect and passive, in fact it was a negative duty to refrain from certain acts. The Commission should consider whether it was desirable to encourage states to include in a treaty provisions relating to its substantive effects pending its entry into force; an example of such a provision was article 38 of the General Act of the Congo Conference of Berlin of 1885.²

30. The right expressed in sub-paragraph (d), if it existed at all, was certainly an imperfect right. If a state wished to become a party to a treaty it would presumably comply with its provisions, but he seriously questioned whether other signatories could insist upon its compliance. He was inclined to think that the sub-paragraph should be deleted.

31. Mr. de LUNA, commenting on the first part of sub-paragraph (b), said that it was unlikely that states would ever relinquish their power to keep matters of foreign policy outside parliamentary control in the sense of the distinction between the federative power and the legislative established by John Locke in his "Treatise of Civil Government".

32. He could not agree with Mr. Yasseen that an obligation could not be created by a treaty not yet in force. Although the legal significance of signature had gradually diminished, nevertheless, quite apart from the fact that it authenticated the text of the treaty, it gave rise to a precontract in regard to "service of the convention" which must be respected, as well as to an obligation in good faith to refrain from any act calculated to frustrate the purposes of the treaty before its entry into force, and to certain special obligations, as in the case of the ILO conventions.

33. Sub-paragraph (d) rightly emphasized that, although states were not obliged to ratify, if they did so they had to comply with the provisions of the treaty in that respect and could contest the action of a party which failed to comply.

34. Mr. AMADO said that, as was clearly indicated in article 8 of the Harvard draft, the right of a signatory to refuse to ratify a treaty was incontestable. Refusal could also be an act of the executive on parliamentary authority, which Mr. Scelle had described as discretionary power; other authors had similarly questioned the existence of an international obligation to submit a treaty for ratification.

35. The case was of course different if the treaty itself contained provisions expressly obliging the parties to submit it to ratification by the competent organs.

36. Pallieri, in his *Formation des traités dans la pratique internationale*³ had described treaties as an expression of the concordant will of the contracting parties, even when subject to confirmation, and had added that, pending their expected ratification, states should not do anything that might make the execution of the treaty impossible or difficult. That notion had received practical expression in article 38 of the General Act of the Congo Conference of Berlin of 1885, to which Mr. Lachs has already referred, and more recently in article 24 of the Convention for European Economic Co-operation of 1948.⁴

37. The language of paragraph 2, particularly sub-paragraphs (a) and (c), was not appropriate in a legal instrument.

38. Mr. TSURUOKA said he agreed with those members who had expressed doubts regarding the usefulness of the first part of sub-paragraph (b). The obligation therein specified seemed to be partly moral and partly legal in character; while a reference to such an obligation might be appropriate in a code, it was not suited to a draft convention.

39. As to the second part of sub-paragraph (b), two situations were possible. The obligation therein set forth might result from an existing treaty, such as the Constitution of the ILO, or it might not; in regard to the latter case, it would be necessary to clarify the points mentioned by Mr. Yasseen.

40. The obligation set out in sub-paragraph (c) was similar to that specified in article 5, paragraph 3. The Commission might discuss the relative importance of the two types of obligation, during the period of negotiation and during the interval between signature and ratification, and then, when views had crystallized, draft a suitable commentary illustrated by examples.

41. He suggested that the somewhat unsatisfactory text of sub-paragraph (d) should be redrafted to read:

"The signatory state shall be under a duty to observe the provisions of the treaty regarding

² F. de Martens, *Traité de droit international*, Paris, 1887, Vol. III, p. 443.

³ *Recueil des cours 1949*, Académie de droit international de la Haye, Paris, Vol. I, p. 469.

⁴ *Treaty Series No. 59* (1949), H.M.S.O., London, p. 18.

signature, ratification, acceptance, accession, reservations, deposit of instruments and any other such matters.”

42. He would illustrate his understanding of the purpose of sub-paragraph (*d*) by taking reservations as an example. Sub-paragraph (*d*) was not intended to give every signatory state the right to object to specific reservations by another signatory state; at most, the first state could demand the observance of the procedure specified in the treaty for the making of reservations. In the special rapporteur's text, that intention did not appear clearly.

43. Mr. ELIAS, expressing support for the three main ideas contained in paragraph 2, suggested that those ideas could be set out more concisely if, first, the opening clause and sub-paragraphs (*a*) and (*b*) were combined to read something like:

“(a) Where either the treaty or the signature to it is subject to ratification or acceptance, a signatory state shall be entitled to submit it to its competent organs for ratification or acceptance in accordance with the treaty itself or with the constitution of an international organization within which the treaty was adopted.”

44. Secondly, sub-paragraph (*c*) raised the difficulty of stating a negative obligation for the period when the decision to ratify had not yet been notified. He suggested that it be redrafted to read:

“(b) Before the expiration of the period stipulated in the treaty for ratification or acceptance, or, if no period is stipulated, within a reasonable period, the signatories shall refrain from any action calculated to frustrate the objects of the treaty.”

45. Thirdly, he suggested that sub-paragraphs (*d*) and (*e*) be merged in a single provision to read:

“(c) A signatory state shall have the right, as regards the other signatory states, to insist on the observance of the provisions of the treaty or of the present articles regulating signature, ratification, acceptance, accession, reservations, deposit of instruments and any other such matters.”

46. He submitted his redraft for the consideration of the drafting committee.

47. Mr. ROSENNE said he found himself in general agreement with the ideas contained in paragraph 2, subject to the following observations.

48. First, he suggested the deletion of all the references to “acceptance”. That term, as defined in article 1 (*k*), covered both the classical method of concluding treaties by means of signature followed by ratification and the modern method of acceptance, or accession, not preceded by signature. It was better for the Commission, in article 9, to confine itself to the classical process of concluding treaties by signature followed by ratification.

49. Secondly, he suggested the deletion of the words “whether actual or presumptive” in the fourth line of the introductory portion. The term “presumptive party” was defined in article 1 (*c*) as a state which had qualified

itself to become a party to a treaty, but he thought it should mean a state which was qualified to become a party to a treaty. The basic question was that of the provisional status conferred upon a state by signature subject to ratification, a question dealt with by the International Court in its reply to Question III in its Advisory Opinion on Reservations to the Genocide Convention,⁵ to which reference was made by the special rapporteur in the appendix to his report. From the treatment of reservations by the International Court and by the General Assembly, he concluded that even in a treaty subject to ratification, a distinction should be made between the final clauses and the other provisions of the treaty. In practice, the final clauses entered into force, at least in an inchoate or imperfect manner, as soon as the treaty was authenticated.

50. Thirdly, in view of the contents of article 10, which covered not only treaties specifically subject to ratification, but also treaties which had been signed by a party subject to ratification, the words “or where the signature itself has been given subject to subsequent ratification or acceptance” were unnecessary in the introductory portion and he suggested their deletion.

51. Fourthly, he agreed with the explanation given by the special rapporteur regarding the intention of the provision contained in sub-paragraph (*b*) and hoped that the idea of that provision would be retained.

52. Fifthly, he also agreed with the idea contained in sub-paragraph (*c*), but thought that its provisions, by enunciating merely a negative duty, might not fully cover the legal situation. In the case concerning the Arbitral Award of 23 December, 1906,⁶ between Honduras and Nicaragua, the parties had, before a treaty had entered into force, proceeded with the organization of a Mixed Boundary Commission. The International Court of Justice had drawn certain legal conclusions from that action, in the context of the facts of the case as a whole. In the light of that example, it was doubtful whether the negative form of sub-paragraph (*c*) was sufficient. The possibility should not be excluded of some positive conclusion being derived from action taken by the parties in implementation of the substantive provisions of a treaty which had not yet entered into force. He emphasized that he was referring to the substantive and not to the procedural provisions of a treaty.

53. Also with regard to sub-paragraph (*c*), he could not accept the new formulation proposed by Mr. Castrén. It was difficult to see how an obligation could arise from the time of the signature of a treaty, when the existence of that obligation was stated to be dependent upon an uncertain future event, namely, the subsequent ratification or acceptance of the treaty.

54. Lastly, he interpreted sub-paragraphs (*d*) and (*e*) as applying in effect to the final clauses of the treaty, and on that assumption could see little reason for those provisions.

⁵ *I.C.J. Reports*, 1951, p. 15.

⁶ *I.C.J. Reports*, 1960, p. 192.

55. Mr. AGO said he noted that most of the remarks made during the discussion related to questions of form which could be dealt with by the drafting committee.
56. With regard to substance, he was in broad agreement with the special rapporteur's proposals. However, it was advisable to simplify the text by eliminating certain superfluous provisions which were a survival from previous drafts. The presence of those provisions in the earlier drafts had been understandable because those drafts had been intended to serve as a basis for a code. Now that the Commission was drafting a convention, the questions covered by those provisions could safely be covered in the commentary.
57. In the introductory portion, the words "or where the signature itself has been given subject to subsequent ratification or acceptance" could be deleted. The purpose of that passage appeared to be already covered by the preceding words "subject to ratification or acceptance".
58. With regard to the essential problem of paragraph 2, which was the enumeration of the effects of signature, the special rapporteur's explanation of the purpose of sub-paragraph (a) was that it was to provide that signature was necessary to enable a state to proceed to the next stage and ratify the treaty. In that case the drafting committee would have to improve the wording so as to reflect that idea more adequately. As it stood, the provision seemed to suggest that the effect of signature was to grant to the signatory state a kind of right at international law to ratify the treaty.
59. Sub-paragraph (b) contained two different statements. The first related to the obligation to examine in good faith the question of ratification. That statement was vague; it was difficult to see what that obligation implied when a treaty had only been signed and the ratification still remained open; he therefore suggested that the first portion of sub-paragraph (b) should be deleted.
60. Sub-paragraph (b) contained, however, a second idea which it might be essential to retain in the text itself and not merely in a commentary. That idea related to a specific legal obligation which existed within the framework of certain organizations. In those organizations, states members had sometimes the obligation not only to submit the treaty to their competent organs for ratification, but also to report to the organization on the progress made, and, in the case of refusal by the competent organs to authorize ratification, to inform the organization of the reasons for that refusal. The drafting committee should examine the constitutions of those organizations and prepare a text broad enough to cover not only the provisions of those constitutions, but possible future developments in the same field.
61. The idea expressed in sub-paragraph (c), relating to the duties of a signatory state during the period between signature and ratification, was very similar to that in article 5, paragraph 3, which concerned the period of negotiation. He could accept the formulation proposed by the special rapporteur, but not that proposed by Mr. Castrén, which suggested that the obligation would operate only retrospectively, in other words, where signature was followed by ratification.
62. He suggested that the drafting committee should consider whether two separate sets of provisions were necessary; it might be advisable to combine in a single clause the provisions relating to the obligations of states throughout the period from negotiation to ratification.
63. With regard to sub-paragraph (d), he noted that the special rapporteur himself did not object to amending or deleting the reference to the right "to insist upon the observance" of certain provisions. It was necessary to state in clearer language whether a right existed or not; if it was not intended to set forth an actual right at law, the matter should be relegated to the commentary.
64. Sub-paragraph (e) raised, among others, an important question relating to a modern practice of democratic states, which were often faced with the problem that the terms of a treaty needed to be carried out urgently, whereas it was known that it would take a long time to obtain the necessary authority of Parliament for ratification. The practice had, therefore, developed of including sometimes in that type of treaty a clause to the effect that the treaty was subject to ratification in accordance with the constitutional provisions of the parties thereto, but that its terms entered into force, in whole or in part, at the time of signature. The drafting committee should adjust the wording to sub-paragraph (e) so as to cover that practice.
65. Mr. YASSEEN, replying to Mr. de Luna, said that he had not denied that signature could produce legal effects in international law; he had only referred to the source of the obligation which might arise in such circumstances. He did not think that such an obligation could be derived from the treaty itself, where the treaty was subject to ratification. Such a treaty could not have any binding force before ratification because it did not enter into force until it was ratified.
66. By way of analogy, he quoted the example of donations or gifts, which under the law of France and a number of other countries had to be made by notarial deed. The courts had further ruled that, in order to be valid, the promise of a gift must also be made in notarial form.
67. Mr. VERDROSS said he questioned the validity of the idea expressed in the first part of sub-paragraph (b), since a government, after new elections or any other change in government, could hardly be expected to assume any obligation with regard to a treaty signed by a previous government, but not ratified. That part of the sub-paragraph should therefore be deleted.
68. A most important principle was embodied in the second part of sub-paragraph (b) regarding the obligations deriving from the constitution of an international organization. It was clear that member states should respect the obligations arising out of the constitution of the organization. The obligations did not derive from the treaty itself, whether ratified or not, but from the constitution of the international organization in which

it was concluded. It would therefore be wiser to delete from the introductory portion of the paragraph the phrase "with the following effects", and to specify in paragraph 3 what obligations flowed from general international law, because all the obligations set out in paragraph 2 flowed not from the treaty but from general principles of international law or from the constitution of the international organization concerned.

69. With regard to sub-paragraph (e), undoubtedly there were treaties which entered into force immediately on signature, but that case should be dealt with under article 10. Naturally, if the signatories had full powers to conclude a treaty definitively, the treaty would enter into force immediately, but if a treaty was signed subject to ratification and not ratified, no obligation would arise. That would not, of course, preclude the practice mentioned by Mr. Bartoš at the previous meeting, whereby a treaty, once signed, might be put into effect if given practical application even before ratification; it would then be ratified *de facto*. Sub-paragraph (e) should preferably be deleted.

70. Mr. BARTOŠ said that the debate on article 9 showed that many matters in the draft had either not been cleared up or were controversial in the theory of international law, though found in practice. The basic idea had been clearly explained by Mr. Verdross. Two subjects appeared to have become confused: the effect of a treaty signed but not yet ratified and the legal fact that a treaty had been signed. It was not the negotiations that counted, but the fact of signature or the constitution of international organizations or conferences which conferred certain legal effects on signature. The Commission had perhaps been wrong in dealing with the two concepts together and in drawing similar inferences. It would be the duty of the special rapporteur and the drafting committee to keep the two ideas apart.

71. Objection had already been raised to certain expressions in the introductory portion of the paragraph, particularly to the word "presumptive". It was a practical question. The draft did not refer to a treaty which had presumptively come into effect, but to the parties which might eventually be the parties bound by the treaty—in other words, the potential parties.

72. Another point was that raised by Mr. Rosenne. In the modern practice followed by governments and the United Nations Secretariat with regard to the right to sign, acceptance raised a difficult problem. A case had occurred where the full powers of the Yugoslav permanent representative had had to be changed because he had been authorized to sign and accept, whereas, in the view of the Secretariat, he was required merely to accept. A strict distinction should therefore be drawn between signature and acceptance. In United Nations practice, an agent could sign only if his country had participated *ab initio* and, once a certain period had elapsed, only if the treaty was still open for signature, whereas in practice acceptance was an act not much different in form from accession, though the two institutions might differ in substance. The Commission should decide whether to use the term "acceptance" or not. He did not oppose it, for he regarded acceptance

as equivalent in its effects to ratification; but from the point of view of technical terminology they were two different things.

73. With regard to sub-paragraph (b), he said that the special rapporteur's idea was sound. The practice of the International Labour Organisation had been cited, and Mr. Ago had shown that it involved not only the duty to submit the question of ratification for consideration by the competent organ of the signatory state, but also the duty of the government—government delegates participated as a separate group in the work of the ILO Assembly—to report on the decision of that competent organ and to explain the reasons if the organ refused to accept a recommendation or to ratify a convention adopted by the International Labour Conference.

74. The practice was even clearer in the World Health Organization. Any member state which refused to ratify a convention adopted by the World Health Assembly had to give the reason for its refusal. If the World Health Assembly accepted that reason, the matter rested there; if it did not do so, the state was given time until the next Assembly, and, if by then it still refused to ratify, the Assembly decided whether that state should be permitted to remain a member of the Organization or not. That was an entirely new practice, which pertained rather to international legislation than to contractual law. In any case, it was not provided for in the traditional law of treaties, and should be stated separately for its future implications.

75. He had been and remained in agreement with the idea contained in sub-paragraph (c), but the formulation was as repugnant to him as that of article 5, paragraph 3. There might be some question, as Mr. Ago had pointed out, whether the Commission should retain the duplication or combine the two statements in a single article, but the idea should be preserved.

76. It was to be presumed that the notification mentioned in sub-paragraph (c) meant notification of a decision to refrain from ratifying. If the decision was a positive one, the obligation would be that much stronger. Even though a state might eventually refuse to ratify, it had the moral obligation during the provisional stage to refrain from any action calculated to frustrate the objects of the treaty, because it was hoped that the state in question would become a party to the treaty.

77. Another question was raised by the phrase "during a reasonable period", in the same sub-paragraph. The special rapporteur, in paragraph 6 of his commentary, said he hesitated to suggest a specific period of years. The question of the length of the period was therefore not a question of law, but of fact. In international law many such questions had never been settled, a circumstance which made the Commission's task even harder and gave rise to uncertainties in practice.

78. He could not support the amendments proposed by Mr. Castrén and Mr. Elias. He agreed with previous speakers that Mr. Castrén's amendment would be retrospective. It could hardly be enforced; if a government which had signed a treaty was overthrown and succeeded by another government with a completely

different policy, the new government could hardly be bound by the signature of its predecessor. The new government might have an obligation of good faith to refrain from any action calculated to frustrate the objects of the treaty, but that obligation would not derive from the treaty itself, for in effect the treaty did not exist for the new government. The obligation derived really from general international law, which gave a certain legal effect to the act of signature considered as a legal fact, and to that extent would remain entirely valid, even if the new government refused to ratify the treaty. Indeed, a breach of that obligation might even attract sanctions if such could be imposed under the terms of the treaty. On the other hand, ratification in that case would not have retrospective effect, since the duty to refrain from frustrating the objects of the treaty continued to exist even in the interval.

79. The right referred to in sub-paragraph (d) was somewhat dubious. It might be tantamount to the protection of a legitimate position. He did not agree with the opinion of Mr. Lachs concerning that provision. The fact that a state had signed a treaty placed it in a position where the commission of certain acts in law by the other signatories might influence the validity of the treaty and affect the legal relations among the signatories. It was therefore authorized to defend itself against any abuse or any act by the other signatories liable to produce drawbacks or to aggravate its position as a potential signatory.

80. With regard to the right of a signatory state to insist on the observance by other states of the provisions of the treaty concerning reservations, he said the question was not so much whether the reservations had been made in the prescribed form as whether they existed at all within the meaning of the relevant provisions of the treaty. That was a substantive rather than a procedural question, but it was settled by a later provision, as would be seen from articles 17 to 19.

81. With regard to sub-paragraph (e), Mr. Verdross had rightly stated that the "other rights" were those specifically conferred by the treaty itself, or rather by the rules of international law concerning the consequences of the legal fact of signature of a treaty. That was the view that he (Mr. Bartoš) had maintained from the outset.

82. Mr. BRIGGS said that it was difficult to discuss article 9 paragraph by paragraph since the whole structure of the article needed revision. It had a certain architectural unity, but should preferably begin with paragraph 3, which dealt with the most important principle.

83. Paragraph 1 was unnecessary, for its substance was covered elsewhere.

84. With regard to sub-paragraph 2 (a), it had been said that the signatory state had undoubtedly the right to proceed to ratification, but that no corresponding obligation to ratify was stated. However, the corresponding obligation was that other states would have to permit the signatory state to ratify; he did not know of

any case in which a signatory state had been denied that right.

85. Two different ideas had been combined in sub-paragraph 2 (b). The first was too broad and too vague and the second did not properly belong in the article, as it dealt with the constitution of international organizations such as the International Labour Organisation. It might be preferable to delete that sub-paragraph.

86. Mr. Ago had noted that an idea comparable to that stated in sub-paragraph 2 (c) had already been stated in article 5, paragraph 3, and it was again stated in article 9, paragraph 3 (b) (i). The idea might be placed in a separate article dealing with the obligation to refrain from any action calculated to frustrate the objects of the treaty from the date of signature, but in article 5, paragraph 3, the implication was that the obligation might arise even before signature.

87. With regard to sub-paragraph 2 (d), he noted that certain provisions of certain treaties might enter into force on signature. An example was the treaty between the United States and the Philippines, signed on 4 July 1946, subject to ratification. The treaty as a whole had come into force in October 1946, but article 1, recognizing the independence of the Philippines, had been given application by Presidential Proclamation on 4 July 1946, and articles 2 and 3, providing that the United States would temporarily represent the Philippines diplomatically and would train Philippine diplomats, had entered into force on the date of signature by an express provision of the treaty. That example might be used by the Commission to explain that certain provisions of a treaty might come into force at the time of signature even though the remainder of the treaty was subject to ratification.

88. The problem arose when the treaty itself did not so specify, and that raised the question whether the Commission wished to establish obligations which would be binding upon signature, but prior to ratification, as was suggested in sub-paragraph 2 (d). His suggestion, however, went beyond what had been set down by the special rapporteur. He raised the question whether it might not be desirable to revert to sub-paragraph 2 (c) and write in a provision to the effect that, pending the entry into force of a treaty, the obligation not to frustrate the objects of the treaty would be not merely one of good faith but one which derived from a rule of general international law.

89. Mr. LIANG, Secretary to the Commission, said that, in his opinion, paragraph 2 (b) did not belong in draft article 9. The conventions of the International Labour Organisation, which had been given as an example, did not involve signature; they were adopted and authenticated under article 19 of the ILO Constitution and communicated to governments for ratification. Such treaties should therefore have been dealt with under article 10.

90. That raised a wider issue, which concerned, as Mr. Bartoš had cogently argued, the effort to improve international legislative technique in connexion with multilateral treaties. In 1947 the United Nations

General Assembly had appointed a Committee on the Development and Codification of International Law to study methods of encouraging the progressive development of international law and its eventual codification, and the Secretariat had undertaken to present certain suggestions for the encouragement of ratifications and accessions.⁷ It had been felt at the time that many multilateral treaties signed by States were not being implemented by the States concerned, and especially in scientific circles it had been thought that certain measures might be devised to give an impetus to the process of ratification and accession. The Secretariat had therefore suggested that the Committee might consider continuing the practice of the League of Nations of publishing periodically information on the progress of ratifications of, and accessions to, conventions completed under the auspices of the League of Nations and procedures which the Secretary-General of the United Nations might take in order to encourage ratifications and accessions on the part of the States concerned. The Secretariat had had in mind especially the experience of the ILO, whose Member States were under an obligation to submit conventions and recommendations to their competent organs for ratification, and if no ratification ensued, to report the reasons for the delay. Some other specialized agencies had similar procedures. It was mainly a follow-up technique. In the state of international society in 1947, however, governments had not been ready to accept that novel technique and the Secretariat's suggestions had not met with an enthusiastic response. The Commission might wish to consider whether it was desirable to generalize the practice of the ILO.

91. If the second part of sub-paragraph 2 (b) were retained, it should be placed in article 10, but it would be quite unnecessary to retain the first part of the sub-paragraph. When a state had signed a treaty, it would normally proceed to ratification if impelled by national interest, or if it wished to promote an international interest by becoming a party thereto. Doubts had been expressed as to whether it was appropriate for an international organization to follow the practice of the League of Nations of publishing a list of states which did not ratify the treaties signed by them.

92. Mr. CASTRÉN said that Mr. Rosenne and other members had criticized his proposal; nevertheless, he thought it presented no great difficulty, for it hinged on the attitude of the state concerned. Under his proposed provision, a state which did not ratify a treaty signed by it would be under no obligation whatsoever, which was surely a reasonable proposition; conversely, under that provision, a state which ratified would not be entitled to take any action calculated to frustrate the objects of the treaty. Consequently a signatory state would have to be careful to refrain from such action before it had decided its eventual attitude. If a change of government occurred, the new government would, of course, be entitled to decide its attitude freely, but the state as

such naturally remained responsible for obligations incurred by the previous government. The advantage of the proposal was that it would avoid all difficulties arising from provisions about ratification and the reasonable period for notification.

93. Mr. ROSENNE replied that Mr. Castrén's idea was perhaps too subtle; his text seemed open to various interpretations.

94. The question raised by Mr. Ago, Mr. Verdross and the Secretary assessing the specialized treaty-making techniques of certain international organizations was extremely complex. It might be preferable to draft a separate article containing a provision somewhat similar to that in article 25 of the 1958 Convention on the Territorial Sea and the Contiguous Zone⁸ and article 30 of the Convention on the High Seas,⁹ to the effect that the provisions of the Convention should not affect conventions or other international agreements already in force as between states parties to them. At the least, some such statement might be made in the commentary. That would draw attention to the cogent points made by previous speakers.

95. Mr. de LUNA said that he apologized to Mr. Yasseen if he had misunderstood him. He realized, in the light of Mr. Verdross' explanation, that Mr. Yasseen had been correct.

96. Mr. EL-ERIAN said that, like Mr. Briggs, he was not aware of any case in which any state had denied to another state the right to ratify a treaty.

97. The special rapporteur's views concerning the nature of the obligation of a state to proceed with ratification were not so far-reaching as those of Sir Hersch Lauterpacht, quoted in the special rapporteur in his commentary, that signature implied "an obligation to be fulfilled in good faith to submit the instrument to the proper constitutional authorities with a view to ratification or rejection." He was still not sure that such an obligation really existed. Although, as the special rapporteur had argued, imperfect obligations existed in international law, it might not be desirable to mention such obligations in a draft convention. He suggested that sub-paragraph (b) might begin: "The signatory state shall examine..."

98. He could accept the provision in sub-paragraph (c) that a signatory state was under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty.

99. The provision in sub-paragraph (d), however, was not clear, for it would mean that a treaty would be in a provisional status pending an inquiry into the compatibility of reservations with the terms of the treaty. The problem might be further considered when the Commission came to deal with the articles concerning ratification and reservations.

⁷ Supplement to *American Journal of International Law*, Vol. 41, No. 4, October 1947, p. 113.

⁸ United Nations Conference on the Law of the Sea, *Official Records*, Vol. II (United Nations publication, Sales No. : 58.V.4, Vol. II), p. 132.

⁹ *ibid.*, p. 135.

100. He interpreted sub-paragraph (e) as implying that a signatory to a treaty might dispense with ratification with regard to certain parts of it, if it was expressly stated in the treaty itself that those parts did not require ratification. If that was the correct interpretation, he would have no difficulty in accepting the provision.

The meeting rose at 1.5 p.m.

645th MEETING

Thursday, 17 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE
(*continued*)

Paragraph 2 (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of paragraph 2 of article 9.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not himself share the view of some of the speakers in the discussion, that in his draft he had been unduly faithful to the texts prepared by previous special rapporteurs. In fact, the Commission had not previously considered the questions covered by article 9, and the fruitful discussion which had taken place had shown that it had been useful to set out the detailed proposals of his predecessors for the Commission's consideration. The discussion now enabled him to outline a new formulation for article 9.

3. Paragraph 1 could easily be redrafted, in accordance with the Commission's decision at the previous meeting, so as to take into account the various observations during the discussion, which had all related to drafting points.

4. The position was, on the whole, similar in regard to the introductory portion of paragraph 2, which could be re-worded so as to refer to article 10 and article 16.

5. The fact that the term "acceptance", like many others used in international practice, had two meanings should not deter the Commission from using it throughout paragraph 2, for it was clear that in the context it could only mean acceptance equivalent to ratification.

6. The right set out in sub-paragraph (a) was undisputed and that was a good reason for including it in the draft; he saw no merit in the suggestion that because a point of law was undisputed it should be omitted from the draft.

7. Emphasizing the importance of the right of a state to participate in a treaty, he said the aspect of that right mentioned in sub-paragraph (a), the right to proceed to ratification after signature, was perhaps sufficiently

obvious as not to be essential to the draft, but other aspects of that right, such as the right to sign or to accede to a treaty, were of greater significance.

8. A matter of importance had arisen in regard to sub-paragraph (b). He had at first hesitated to include the provisions of that sub-paragraph, which related to an obligation of good faith of a very tenuous kind, but had finally decided to follow the example of his predecessors and retain it; a provision on the subject was desirable in order to encourage states to ratify treaties which they had signed. Such an encouragement was necessary in view of the disappointingly large number of cases in which treaties were signed by states but not ratified. That experience went back to the time of the League of Nations and the situation had unfortunately not improved since the establishment of the United Nations.

9. The Commission should decide whether it wished to retain a provision on the subject of that obligation of good faith. If it decided to retain it, the provision should set out the obligation not of the signatory state itself but, as Mr. Bartoš had suggested, of its authorities — not necessarily its government — to examine in good faith the question whether to follow up signature with ratification or not.

10. The discussion had emphasized the differences between the two portions of sub-paragraph (b). The first portion set out the obligation of good faith in general terms; the second set out an obligation which had its source not in the law of treaties but in the constitutional law of the international organization concerned. If the first portion were retained, it would be possible to keep the second in an amended form. He could not, however, accept the suggestion that the first should be deleted and the second retained, since the latter did not properly belong to the law of treaties. The only justification for including the second sentence was that it reserved the position of the ILO conventions if the rule set out in the first sentence were maintained.

11. Sub-paragraph (c) also set out an obligation of good faith and he saw much force in the suggestion that a separate article should be formulated to include all the provisions of the draft on the subject of the rights and obligations of states prior to the entry into force of a treaty. That new article could be placed at the end of the chapter on the conclusion of treaties, so as to precede the chapter on entry into force. It would cover three types of rights and obligations: first, the obligations, if any, of states which adopted the text of a treaty, obligations dealt with in article 5, paragraph 3; secondly, the rights and obligations of signatory states during the period between signature and ratification, dealt with in article 9, paragraph 2; and thirdly, the rights and obligations of a state which was a full party to a treaty, pending the entry into force of that treaty. There were cases, in modern practice, where a state could accept a treaty, or even accede to it, before the treaty came into force. A state which thus committed itself to a treaty which was not yet in force was entitled to expect that its objects would not be frustrated. The matter was dealt with in article 9, paragraph 3.