Document:-
A/CN.4/SR.647

Summary record of the 647th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1962 , **vol. I**

647th MEETING

Monday, 21 May 1962, at 3 p.m.

Chairman: Mr. Radhabinod PAL

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

ARTICLE 11. THE PROCEDURE OF RATIFICATION

1. The CHAIRMAN invited the special rapporteur to introduce article 11.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that in order to take account of some of the points raised during the discussion on previous articles and some of the Commission's tentative conclusions, he had prepared the following redraft of article 11:

"1. Ratification shall be carried out by means of a written instrument containing an express declaration of the ratification of the treaty by the state in question.

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

"(*b*) The instrument of ratification must be definitive and may not be made conditional upon the occurrence of a future event, such as the deposit of the ratifications of other states. Any conditions embodied in an instrument of ratification shall be considered as equivalent to reservations, and their validity and effect shall be determined by the principles governing the validity and effect of reservations.

"3. Instruments of ratification shall be communicated to the other signatory state or states. If the treaty itself lays down the procedure by which they are to be communicated, instruments of ratification become operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory states, instruments of ratification shall become operative —

"(*a*) In the case of a bilateral treaty, upon the formal communication of the instrument of ratification to the other party, and normally by means of an exchange of such instruments, duly certified by the representatives of the states carrying out the exchange;

"(*b*) In other cases, upon deposit of the instrument with the depositary of the treaty provided for in article 26 of the present articles.

"4. When an instrument of ratification is deposited with a depositary in accordance with sub-paragraph (*b*) of the preceding paragraph, the ratifying state shall have the right to an acknowledgment of the deposit of its instrument of ratification; and the other signatory states shall at the same time have the right to be notified promptly both of the fact of such deposit and of the terms of the instrument of ratification."

3. To meet the point made by Mr. Briggs at the previous meeting regarding confirmation of consent, he had dropped the reference to consent in paragraph 1. He had also dropped the references to the competent domestic authority and to internal laws and usages, because most members considered that matters of domestic law should not be mentioned.

4. The new paragraph 2 was substantially the same as in his original draft, but he had simplified the drafting.

5. In paragraph 3, which was concerned with the question of the communication of instruments of ratification to other signatories, he had dropped the distinction between plurilateral and multilateral treaties. Instead, the paragraph mentioned only bilateral and "other" treaties. In the case of treaties which were not bilateral, the communication of instruments of ratification would be a matter for the depositary, and hence a reference to article 26, which was to deal with depositaries, sufficed.

6. Paragraph 4 was in essence the same as that in the original text but was simpler in form and omitted the references to the depositary government and to the secretariat of an international organization.

7. The CHAIRMAN invited the Commission to discuss the redraft of article 11 paragraph by paragraph.

Paragraph 1

8. Mr. ROSENNE said that, while he appreciated the special rapporteur's reason for deleting the original sub-paragraph 1 (*b*), its content should appear in some form in the commentary.

9. Mr. AGO said that the new paragraph 1 was not free from tautology. Perhaps the latter part of the sentence might be remodelled on the lines of the original text and the sentence redrafted to read: "Ratification shall be carried out by means of a written instrument containing an express declaration of the consent of the state to be bound by the treaty to which its signature is already affixed."

10. Mr. CADIEUX said that the article should describe clearly the nature of ratification, which was a legal act, the conditions to be fulfilled and the way in which it became operative. Paragraph 1 should be amplified so as to indicate that an instrument of ratification confirmed that a state assumed the obligation to be bound by the treaty and that ratification could be neither conditional nor partial.

11. Paragraph 2 might also require amendment on similar lines.

12. Mr. YASSEEN said that article 11 dealt not only with the procedure but also with the substantive characteristics of ratification; to that extent the title and the content did not correspond. The provisions concerning the conditions to be fulfilled by an instrument of ratification should be transferred to a separate article.

13. He presumed that in paragraph 2 (*b*) the special rapporteur had really meant to say that ratification, as distinct from the instrument, could not be conditional.

14. Mr. PAREDES said he agreed with the views of

Mr. Yasseen; the various elements of article 11 should be dealt with separately and with greater precision.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that he was prepared to re-word paragraph 1 in the way suggested by Mr. Ago. He agreed that the title of the article was not exact. Discussion on the other paragraphs would show whether the title or the contents needed amendment.

Paragraph 2

16. Mr. ROSENNE suggested that the drafting committee might consider what was the most suitable wording to describe the "whole treaty", which was also referred to in article 14, paragraph 2 (*a*). In article 23, paragraph 1 (*a*), the phrase "a true and complete copy" was used to convey what he presumed to be essentially the same idea. A case had come up before the International Court of Justice in which the Court had had to examine the instrument of ratification in order to establish what was the "whole treaty". Difficulties might arise if the instruments of ratification conflicted on that point and did not coincide in reflecting the intention of the parties.

17. He had some doubts about the second sentence in paragraph 2 (*b*). The definition of "reservation" in article 1 (i) properly distinguished between a reservation in the commonly accepted sense and an explanatory statement or statement of intention or of understanding as to the meaning of the treaty. Such statements did not affect the legal effect of the treaty and were not true reservations. Statements of that kind were sometimes attached to an instrument of ratification, and consequently paragraph 2 (*b*) should allow for a considerable amount of flexibility on that point.

18. Mr. VERDROSS, with regard to the first sentence in paragraph 2 (*b*), pointed out that one instrument of ratification at least was always conditional upon the deposit of one other, for one instrument of ratification could not by itself create a common will. There was therefore no reason to forbid a state to make its ratification conditional on ratification by one or more other contracting states.

19. Mr. AMADO said that paragraph 1 was unnecessary and pleonastic. The article should be confined to matters pertaining to an instrument of ratification. The special rapporteur had allowed other issues to enter in.

20. Mr. AGO said that the statement at the beginning of paragraph 2 (*b*) presumably meant that the ratification, rather than the instrument of ratification, should be definitive. But was it absolutely true to hold that ratification could never be conditional upon the occurrence of a future event? A ratifying state could stipulate that its ratification would only become valid when followed by a certain number of others, or by the ratification of a specified state.

21. He was not convinced of the wisdom of equating conditions embodied in an instrument of ratification with a reservation.

22. Mr. LACHS said he agreed with Mr. Rosenne that, in order to avoid misunderstanding, it was desirable that the Drafting Committee should discuss what was the best form of words to express the idea of a "whole treaty".

23. Paragraph 2 (*a*) should be amplified to cover the case where states could become parties to alternative or optional parts of a treaty, as provided for by International Labour Conventions, for example, No. 81 of 1947 and Nos. 96 and 97 of 1949.

24. With regard to the first sentence in paragraph 2 (*b*), which Mr. Verdross had criticized on the theoretical plane, he pointed out that in practice ratification was often made conditional on the occurrence of a future event, particularly on ratification by other states which were sometimes specifically named, as had been the case with the United Nations Charter and the Paris Treaties of Peace. Furthermore, the United Kingdom Government had expressly made its ratification of International Labour Convention No. 19 conditional on its being ratified by certain other states. The existence of that practice should be recognized and provided for.

25. He shared Mr. Rosenne's doubts about the second sentence in paragraph 2 (*b*), which treated conditions embodied in an instrument of ratification as equivalent to reservations. In practice, various kinds of declarations and general statements were often made at the time of ratification which did not qualify as reservations, for example, the declaration by the United States Senate concerning the status of NATO forces. He therefore suggested that the subject matter of the second sentence of paragraph 2 (*b*) should be discussed in connexion with the articles on reservations.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that some members in their comments had tended to blur the distinction between entry into force of the treaty and ratification by one state conditional upon ratification by others.

27. The provisions he had put forward in article 11 derived from the drafts of Sir Gerald Fitzmaurice, who evidently considered that if states were allowed to make an instrument of ratification conditional upon a future event, it would be a very undesirable practice. He could not accept the argument of Mr. Verdross, which related to the entry into force of the treaty. The act of ratification went beyond signature: it committed the state to consent to be bound by the treaty. His predecessor, in laying down that an instrument of ratification should be definitive, had certainly not intended to imply that a treaty could never contain provisions making its entry into force dependent upon the deposit of a certain number of ratifications.

28. The purpose of the second sentence in paragraph 2 (*b*) was to remove any impression that might be created by the first sentence, that conditions could never be attached to an instrument of ratification; what it said was that the validity of such conditions would be determined by the principles governing the validity and effect of reservations.

29. He would be prepared to cover in paragraph 2 (*a*) the possibility of states electing to become bound by an alternative part of a treaty, as suggested by Mr. Lachs, if a suitable wording could be devised.

30. Mr. AGO said he agreed with the special rapporteur that conditions determining entry into force should be kept separate, but believed it would be unwise to debar states from attaching conditions to an instrument of ratification.

31. Mr. AMADO said the essential feature of ratification was that it was definitive. He did not know of a single case in which ratification had been made subject to conditions.

32. He expressed the strongest doubts about the second sentence in paragraph 2 (*b*), which was a provision *de lege ferenda*; neither jurisprudence nor practice gave any authority for such an innovation.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission was faced with an issue of substance in the first sentence of paragraph 2 (*b*). Surely it would be a very undesirable practice of states to attach suspensive conditions to an instrument of ratification. One of the consequences would be that a depositary would not be able to judge whether the ratification was a valid one. A suspended ratification was a contradiction in terms.

34. The CHAIRMAN suggested that the special rapporteur might consider deleting the second sentence in paragraph 2 (*b*) and dealing with its subject-matter under the heading of reservations.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that if the Commission decided to retain the first sentence in paragraph 2 (*b*), some additional statement might be needed to the effect that the validity of conditions would be determined by the principles governing the validity of reservations.

36. Mr. LACHS said that the special rapporteur, in mentioning the difficulties that might face a depositary, had advanced into the domain of entry into force. A depositary supervised the collection of documents concerning the treaty, such as ratifications, and if one were received with conditions attached, would notify the other states which had ratified of that fact. States could not be debarred from attaching conditions to ratification, which in fact were often the subject of express provisions in the final clauses of treaties themselves.

37. Mr. GROS said he agreed with Mr. Lachs, but would like to comment briefly on the important issue under discussion. Quite often treaties provided that they would come into force on ratification by a specified number of states. Another situation to be taken into account was that where the treaty itself was silent on the subject but was of such importance to three or four states that, unless it was ratified by all of them, it would be pointless for the first to deposit its instrument of ratification so long as the position of the other states was not known. The first state had every right to make its own ratification conditional on that of the others, a condition which could in no way be regarded as a reservation since there was no unilateral proposal for modifying the regime resulting from the treaty. He saw no reason to disallow such a practice and that special case could perhaps be mentioned in the commentary.

38. If the second sentence in paragraph 2 (*b*) were transferred to the provisions dealing with reservations, the remaining paragraphs of article 11 would conform more closely to its title.

39. The CHAIRMAN, speaking as a member of the Commission, said that if the treaty itself included provisions making its entry into force conditional on a given number of ratifications, repetition of or reference to that stipulation in the instruments of ratification would not make them conditional. In the absence of any such provision in the treaty, if any instrument of ratification sought to impose such a condition for its entry into force, it would be conditional within the meaning of the draft article.

40. Mr. LIANG, Secretary of the Commission, drew attention to the passage on partial ratification, accession or acceptance in the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7, para. 42), which provided that a state could not become a party to an agreement on a provisional basis, or with respect to certain of its provisions only, unless such a possibility was provided for in the agreement. In the case of a conditional ratification by a state which wanted to become a party to a multilateral treaty, since a depositary had the obligation to count the number of states which had ratified for the purpose of ascertaining the date of entry into force of the treaty, he could not count the state in question because the ratification was conditional. That would not mean, however, that the ratification itself was invalid, or had to be rejected. What would take place was that, when the condition was fulfilled, the ratification would be counted and the state would become a party. No additional act on the part of the state would be necessary.

41. In the example given by Mr. Ago, when state A made its ratification conditional on the ratification by state B, state A would not become a party to the treaty before state B ratified. When the depositary received such a conditional ratification, he would probably wait until state B ratified and then he would count state A as having become a party to the treaty. Therefore, a conditional ratification was only suspensive as far as the question of the full effect of ratification was concerned.

42. Mr. VERDROSS said that the practical effect of the adoption of the first sentence of paragraph 2 (*b*) would be to nullify a ratification made on the condition that certain other countries also ratified. A rule of that kind would oblige the other contracting parties to reject a ratification made conditionally on ratification by another state, and to consider it as void. The act of ratification, however, was similar to a unilateral declaration by a state, and could be regarded as comparable to a declaration under Article 36, paragraph 3, of the Statute of the International Court of Justice: there seemed to be no reason why ratification should not be made unconditionally or on condition of reciprocity, as were the declarations referred to in that article.

43. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with those members who had opposed the inclusion of the provision in that part of the draft. The rules

governing treaty-making should not be too rigid; Mr. Lachs had cited cases from practice in which conditions had been attached to ratification. The distinction drawn by Sir Gerald Fitzmaurice, to which the special rapporteur had referred, was too subtle; any state which wanted to do so could make a conditional, and not a definitive, ratification, which would make the entry into force of the treaty in question subject to the fulfilment of the conditions. On the other hand, that distinction had not been made in the original draft, which had provided that ratification could not be conditional and nowhere stated that conditions could be made in connexion with entry into force. It would be wiser to consider the whole question in connexion with the articles on entry into force and on the functions of the depositary, and to return to article 11 later if necessary.

44. Mr. AGO, referring to Mr. Verdross's basic question whether conditional ratification should or should not be regarded as valid, drew attention to the burden which would be placed on the depositary if he had to decide that certain conditional ratifications were not valid. For example, if twenty ratifications were needed to bring an agreement into force, and the nineteenth state declared that it was ratifying only on the condition that another specified state also ratified, the depositary would be placed in a very difficult position: if he regarded the nineteenth ratification notwithstanding its conditional character as valid, all would be well. As soon as the state indicated by the nineteenth state had also deposited its instrument of ratification, he would regard the condition to which the nineteenth ratification was subject as fulfilled, and would recognize that the agreement had come into force, twenty valid ratifications having been collected. If, on the other hand, he regarded the nineteenth ratification as not valid, because conditional, there would be only nineteen ratifications by the time the twentieth state deposited its instrument. He quite saw the disadvantages of conditional ratification as described by the special rapporteur and realized that it was possible to regard the issue of conditional ratification as a question *de lege ferenda*; but he also agreed with Mr. Gros that, in cases where a few key states, whose ratification was essential to the execution of the agreement, were involved, any state which wished to take positive steps in persuading the others to ratify should not be prevented from doing so by an unduly rigid rule, but should be allowed to ratify on the condition that the others also ratified.

45. Mr. ROSENNE said a distinction should be drawn between two entirely different types of conditions. The first type, being of a material character which derived from the actual text of the treaty, might be left aside, as it fell within the scope of reservations. If, despite a provision of the treaty stating that ratification by three states would suffice, a state submitted a ratification containing the condition that twenty other states should also ratify, such a condition would be of that type and would have to be dealt with as though it were a reservation. The second type, being of a personal character, related to the parties to the treaty; in his opinion, in the case of important treaties at least, states should not be debarred from attaching to their ratification, otherwise fully valid, conditions which would suspend the entry into effect of that instrument of ratification pending ratification by other states.

46. Mr. CASTRÉN said he agreed with the special rapporteur and Mr. Amado that in principle the ratification of a treaty should never be conditional. He could not see the usefulness of a provision allowing such a loophole: surely state A could agree with states B and C to wait until they were able to ratify the agreement simultaneously? He would not, however, go so far as to say that a conditional ratification was invalid.

47. Mr. BARTOŠ endorsed the views expressed by Mr. Ago. Perhaps, as Mr. Castrén had said, there was no need always to be in such a hurry to ratify a treaty, but there was also no reason to delay too much. Any ratification, whether conditional or not, represented a step forward and had a certain legal efficacy, since if the event on the occurrence of which the ratification was contingent took place, the ratification, even though conditional, was binding. There were many cases in practice where ratifications were made conditional on reciprocity. In any case, ratification as an act had an intrinsic value in the relations between the states participating in the treaty if they were to grant an equivalent benefit; reciprocity meant the application of the rule *do ut des*.

48. He supported in principle the idea of the integrity of ratification, but wished to point out that the special rapporteur had in effect proposed an exception to that rule, to which no member had objected. Nor did he himself object to it. If a condition for ratification was accepted subsequently, the situation would be exactly the same as if the parties had agreed in advance to dispense with the integrity of ratification; the time when that took place was immaterial. He was in favour of a flexible formula for the paragraph which was both useful and even necessary.

49. Mr. CADIEUX thought that the difficulty might be due to terminology rather than to actual concepts; perhaps the adjective "definitive" could be replaced by "complete". The effect of a conditional ratification would be to delay the execution of the treaty, whereas definitive ratification carried the connotation of immediacy.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that he had hesitated considerably before drafting paragraph 2 (*b*), for he realized that states occasionally resorted to conditional ratification. Although he believed that the practice was undesirable and could lead to absurd situations, he would not offer strong resistance if the majority thought it inadvisable to exclude the possibility of conditional ratification. If it were decided to delete the first sentence, the second should also be omitted, since it would give an erroneous impression if left by itself.

51. He explained that the word "definitive" was used to mean something which, by law, could not be withdrawn. If that interpretation were clearly stated in the

commentary, the uncertainty which seemed to prevail in the matter would probably be largely dispelled.

52. Mr. YASSEEN said that there seemed to be no serious objection in the Commission to a provision admitting conditional ratification. Such a provision would not offend any basic principle of law and, moreover, was defensible in logic, inasmuch as a state was free not to ratify at all, whether conditionally or otherwise. The practice of conditional ratification, though rare, existed and was sometimes useful; there was no plausible reason for condemning it in advance, so long as the condition was not incapable of fulfilment and was not unlawful.

53. Mr. AMADO said he could not agree with the thesis propounded by Mr. Ago, Mr. Gros, Mr. Bartoš and Mr. Lachs. In his experience, treaties were not in fact ratified conditionally. Mr. Cadieux had rightly stressed the time factor: ratification was an act which had an immediate effect. The special rapporteur should maintain his text, and the possibility of conditional ratification might be mentioned in the commentary.

54. Mr. BRIGGS said that if paragraph 2 had any place at all in the draft, it was not in article 11. The problem might arise in relation not only to ratification, but also to signature, accession and acceptance. In his opinion, the article should contain only three main elements: first, it should describe ratification as constituting the acceptance of the treaty as binding; secondly, it should mention the formal documentary evidence of ratification; thirdly, it should refer to the communication of the instruments.

55. He therefore suggested that the following text should be substituted for the special rapporteur's draft of article 11:

"The acceptance as binding of the provisions of an instrument which is subject to ratification is effected through the exchange or deposit of duly certified instruments of ratification."

56. Mr. BARTOŠ said that conditional ratification was sometimes resorted to in cases where several different treaties were interdependent. Certain treaties could not be applied equitably if the other partners were not bound by the other treaties, since those other treaties were really the condition of the application of the treaty in question. Thence arose the necessity for prior assurance that the other parties would apply the treaties whose operation was considered desirable if the treaty to be ratified was to be applied realistically. Since such cases existed in practice, the Commission was offered an opportunity to develop international law by drafting appropriate provisions which would have the character of *de lege ferenda*. The question was one not only of reciprocity, but also and especially of the equality of conditions of application.

57. Mr. EL-ERIAN observed that the simplified text suggested by Mr. Briggs considerably altered the picture, since the article would thus be confined strictly to the procedure of ratification indicated in its title. Nevertheless, irrespective of the Commission's choice between that simple text and the more complex one proposed by the special rapporteur, the question of the integrity and finality of ratification as an act should be made absolutely clear. The discussion had been concerned mainly with conditional ratification in connexion with reciprocity, but further explanation seemed to be required of the relationship between such conditions and reservations and entry into force.

58. Mr. TSURUOKA said that, in pondering the question of conditional ratification on a basis of reciprocity, he had been struck by the absurdity of a hypothetical situation in which, for example, Italy might refuse to ratify an agreement until the United Kingdom had done so, while the United Kingdom might similarly make its ratification contingent on Italy's. It would seem that someone should have the last word in the matter.

59. Secondly, it would not always be easy to decide whether an event on the occurrence of which ratification was conditional had indeed occurred. It seemed that the country stipulating the condition would be the only one competent to take that decision, but if the special rapporteur's explanation of the meaning of the word "definitive" was accepted, the results would be most confusing.

60. In practice, cases such as that cited by Mr. Gros were settled in advance by specialized negotiators and diplomats. Of course, there were both advantages and disadvantages in a system of conditional ratification, but he was certain that explicit admission of the advantages would merely serve to encourage an undesirable trend.

61. Mr. AGO, replying to Mr. Tsuruoka, said that, in the example which he had given, Italy's ratification would have been definitive, that was, complete and irrevocable; its effects would merely have been suspended until the condition laid down by Italy was accomplished. Upon the United Kingdom ratifying the treaty, Italy's ratification would automatically take effect. There would be no question of playing shuttlecock with ratifications.

62. Mr. Tsuruoka had also referred to the difficulty of ascertaining that a condition had been fulfilled. Where the condition related to ratification by other states, it was easy to know when it was fulfilled. He admitted that in other cases difficulties might arise; such difficulties, however, were inherent in all conditional acts.

63. As to the inadvisability of encouraging the practice of making ratifications conditional, he fully agreed with Mr. Amado and Mr. Tsuruoka. Equally, however, it should not be suggested that a ratification was invalid because its operation had been made subject to a condition. Such a suggestion would create difficulties for the depositary state or the United Nations, as the case might be.

64. Mr. TSURUOKA thanked Mr. Ago for his explanation. As he had surmised, in the example he (Mr. Tsuruoka) had given, the condition specified by Italy would not have been fulfilled.

65. He suggested that the matter should be dealt with in the commentary, so as to avoid giving any encouragement to the practice of making the effects of ratification conditional.

66. Mr. ROSENNE proposed the following redraft for paragraph 2 (*b*):

> "The instrument of ratification must be definitive, and may not be made conditional upon the occurrence of a future event, apart from the deposit of the ratifications of other named states."

67. That formulation would follow naturally from the terms of the definition of "ratification" contained in article 1 (i); it would also serve as a basis for the discussion of the effects of ratification, described in article 12 and other articles of the draft.

68. He made his proposal subject to the reservation that a reference to accession might be introduced into his text, to cover the case of a treaty which provided for entry into force on ratification or accession.

69. He understood from the statement of the Secretary to the Commission that that formulation, which would clarify the type of condition allowed, would not present insuperable difficulties for the depositary.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that if the text put forward by Mr. Rosenne met with general approval, he, for his part, would have no objection to its being referred to the Drafting Committee.

71. Mr. YASSEEN said that the discussion had been focused on a certain type of condition relating to ratification by other states. Actually, that was not the only type of condition that could be specified by states.

72. There did not exist any rule of positive international law to prevent states from making ratification conditional. He saw no reason why that freedom should be limited in any way and he therefore urged the deletion of paragraph 2 (*b*). If the condition specified by the state concerned were lawful, there could be no grounds for disallowing it. There was no question of encouraging states to make ratification conditional.

73. Mr. LACHS said that the discussion had indicated that it might be advisable to transfer the contents of paragraph 2 to the commentary and to confine article 11 to the contents of paragraphs 1, 3 and 4.

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the rule set out in paragraph 2 (*a*) was good law and it was advisable to retain it in the draft. The legal advisers of the many newly independent states would find the provisions of paragraph 2 (*a*), which set out the principles governing ratification, useful in the process of treaty-making.

75. Paragraph 2 (*b*) raised a more difficult question. He would accept Mr. Rosenne's formulation, but the Commission as a whole might consider that certain conditions other than those specified in that proposal were equally unobjectionable. For example, a state might well wish to make its ratification effective only after a period of three months. In that situation the state was prepared to commit itself in advance on the condition that its undertaking was suspended until a given date; there seemed much value in retaining a provision covering ratification in that form.

76. In the light of the discussion, he was inclined to favour the suggestion that the contents of paragraph 2 (*b*) should be transferred to the commentary. However, he urged that the idea expressed by the term "definitive", as used in that paragraph, should be incorporated in paragraph 1.

77. Mr. LACHS pointed out that the subject of paragraph 2 (*a*) was also dealt with under reservations. It might therefore be easier to transfer the provision to the section on reservations.

78. Sir Humphrey WALDOCK, Special Rapporteur, staid he could not accept the suggestion of Mr. Lachs. The case mentioned in paragraph 2 (*a*) was that of a choice laid down in the treaty itself; it was a situation created by the participating states themselves, which wished to allow states to accede to certain parts only of the treaty if they so desired. Although there was some similarity to the question of reservations, it would be arbitrary to transfer the contents of paragraph 2 (*a*) to the section on reservations.

79. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt paragraphs 1 and 2 (*a*) subject to drafting changes; those paragraphs would therefore be referred to the Drafting Committee. He would also consider that the Commission agreed to transfer the contents of paragraph 2 (*b*) to the commentary, subject to drafting improvements.

It was so agreed.

Paragraphs 3 and 4

80. Mr. BRIGGS said that implicit in his earlier proposal for the redrafting of the whole of article 11 was the deletion of paragraph 3 as it now stood. Most of the contents of that paragraph were self-evident and were sufficiently covered by the words in his proposal, "... effected through the exchange or deposit of duly certified instruments of ratification."

81. Mr. ROSENNE said that if Mr. Briggs' proposal were adopted, it would be necessary to retain the idea of the supremacy of the text of the treaty. The agreement of 10 September 1952 between Israel and the Federal Republic of Germany was a case where, for special reasons, the instruments of ratification of a bilateral treaty had been deposited with the Secretary-General of the United Nations in accordance with express provisions of the treaty itself.[1]

82. Mr. LIANG, Secretary to the Commission, pointed out that the opening sentence of paragraph 3 might not apply to cases where the depositary was called upon to notify the other signatory states. In that case, there would be no question of the communication of the instruments of ratification to the other signatory states, unless by "communication" it was merely intended to cover information. In the case to which he had referred, the instruments of ratification were deposited and, as specified in paragraph 4, the other parties were advised by the depositary.

[1] United Nations *Treaty Series*, Vol. 162, p. 205.

83. Sir Humphrey WALDOCK, Special Rapporteur, said that the term "communication" was used in a general sense. He assumed that a copy of the text of the instrument of ratification was communicated at the time of notification.

84. Mr. LIANG, Secretary to the Commission, said that it was not a copy of the instrument itself but merely the terms of the ratification that were communicated, when necessary.

85. The CHAIRMAN said that the matter was one of drafting and could be left to the Drafting Committee.

86. If there were no objection, he would consider that the Commission agreed to refer paragraph 3 to the Drafting Committee with the comments made during the discussion. Also, if there were no comment on paragraph 4, he would consider that the Commission agreed to adopt that paragraph subject to drafting changes.

It was so agreed.

ARTICLE 12. LEGAL EFFECTS OF RATIFICATION

87. Sir Humphrey WALDOCK, Special Rapporteur, said he had redrafted article 12 to read:

"1. Ratification of a treaty shall:

"(*a*) Constitute a definitive expression of the consent of the ratifying state to be bound by the treaty; and

"(*b*) If and so long as the treaty is not yet in force, shall bring into operation the applicable provisions of article 19 (bis).

"2. Unless the treaty itself provides otherwise, ratification shall not have any retroactive effects. In particular, the ratifying state's consent to be bound by the treaty shall operate only from the date of ratification and shall not operate from the date of its signature of the treaty."

88. Article 19 (bis), to which reference was made in paragraph 1 (*b*), was the article which, as the Commission had agreed, would include all the provisions relating to the rights and obligations of states pending the entry into force of the treaty. Of course, the Commission's discussion of article 12 would be subject to reservations regarding the contents of that article 19 (bis), the text of which was not yet known.

89. He had deleted the reference to "a presumptive party to the treaty", which appeared in his original draft, because when the Commission had discussed the question of signature, it had been found that a comparable provision properly belonged to the article on entry into force. There had also been some duplication between the deleted words in article 12 and the provisions on entry into force.

90. With regard to paragraph 1 (*a*), it was not easy to state the rule it contained without repeating what was already said in connexion with entry into force.

91. Paragraph 2 was the more important provision in that it denied any retroactive effect to ratification.

92. Mr. AGO said that the redraft of paragraph 1 was an improvement on the earlier draft. The drafting committee, however, should be asked to find a more suitable expression than the term "definitive", which lent itself to the criticism put forward by Mr. de Luna at the previous meeting, that it might convey the impression that the Commission considered consent to a treaty as being given in two stages, at the time of signature and at the time of ratification. In fact, it was ratification alone which gave expression to the consent of a state.

93. With regard to paragraph 2, it was true that the instrument of ratification itself could only operate as from its date. That question, however, ought to be more clearly distinguished from the question of entry into force of the treaty. The treaty itself could enter into force on a date which might be earlier or later than the date of ratification; it could state that it would enter into force at a later date, or it could state that, after ratification, it would enter into force with effect from the day of its signature, for example.

94. Much of the contents of paragraph 2 could be transferred to the provisions on entry into force.

95. Mr. BARTOŠ pointed out, for the benefit of the Drafting Committee, that in paragraph 1 (*a*) of the redraft, the term "definitive" was used in the sense of "firm" or "irrevocable"; the French word "définitif" had a different meaning, so some other term would have to be found for the French translation.

96. With regard to paragraph 2, first, he must make an express reservation regarding the possible contents of article 19 (bis); he was never prepared to state his views on a text until he had seen it.

97. Secondly, he shared the concern just expressed by Mr. Ago. In fifteen years' practice, it has been his experience that in over one-third of the international agreements with which he had dealt it had been stipulated that the treaty should be applied from the day of signature, whereas the treaty's binding force was conditional on the exchange of the instruments of ratification. Ratification in those cases had the practical effect of validating a number of operations which had taken place since the signature of the agreement. From time to time it happened that the exchange of the instruments of ratification did not take place till some time after the provisions of the treaty, though up to that point only of provisional validity, had been applied in full. But it was a mistake to consider that in such a case ratification was only of historical interest because the treaty had already been consummated. On the contrary, ratification in such a case gave binding force to the effects of the treaty and to acts based on the treaty.

98. In recent years a number of important agreements had been signed between Italy and Yugoslavia relating to trade and payments between the two countries. Those agreements had provided for provisional application pending ratification and had remained unratified for some five years, but the governments of the two countries had instructed their appropriate authorities, the Exchange Office in Italy and the National Bank in Yugoslavia, for example, to do whatever was necessary, just as if the agreements had been in force. The

exchange of ratifications had taken place after five years and had then validated, or legitimated, all the operations in question.

99. The same situation had arisen in connexion with frontier traffic between Italy and Yugoslavia. For three or four years, thousands had crossed the frontier under an agreement between the two countries pending ratification of the agreement.

100. The validity of the arrangement to which he had referred had undoubtedly had its source in a contractual relationship between the two countries. The Ministries of Foreign Affairs of Italy and Yugoslavia had established a practice of including in treaties a provision that the treaty was applied from the date of its signature, but juridically entered into force only on the exchange of ratifications. In strict law, there was perhaps a contradiction between those two propositions, but it was necessary to accept them both for practical reasons. It was a reality in present day international law and should be given a place in any convention on the law of treaties.

101. Mr. TSURUOKA said he agreed with the first sentence in paragraph 2, which reflected the existing international practice.

102. He drew attention, however, to a possible situation which could arise from the discrepancies between the terms of paragraph 2, particularly its second sentence, and those of article 8, paragraph 2 (*c*), on the subject of signature *ad referendum*. Say, for example, a treaty was due to enter into force upon its being signed by twenty states, and was to remain open to signature until 31 December 1962. If the twentieth state to sign the treaty signed it *ad referendum* on 30 October 1962 but only confirmed its signature *ad referendum* on 1 February 1963, according to article 8, paragraph 2 (*c*), the effects of the confirmation of the signature *ad referendum* would be retroactive so that the treaty would apparently have come into force as from 30 October 1962. There would, however, be considerable doubt as to the validity of acts performed in relation to the treaty between 30 October 1962 and 1 February 1963. If, on the other hand, the same state, instead of signing *ad referendum*, were to sign subject to ratification on 30 October 1962, and then to ratify on 1 February 1963, then according to the terms of article 12, paragraph 2, the treaty could only come into force on 1 February 1963. Thus the discrepancy between the terms of the two articles would produce different legal effects from what in substance would serve the same purpose for a state, namely, signature *ad referendum* and signature subject to ratification.

103. The drafting committee should be invited to compare the two texts and bring them into line.

104. Sir Humphrey WALDOCK, Special Rapporteur, said that the practice in regard to signature *ad referendum* was stated in article 8, paragraph 2 (*c*).

105. The inclusion in the draft of paragraph 2 of article 12 was useful in order to dispose of a heresy. A contrary rule had been put forward in the past but was no longer accepted.

106. He suggested that many of the difficulties encountered by members would be avoided if the second sentence of paragraph 2 were deleted and the first and only remaining sentence redrafted to read:

"Unless the treaty itself provides otherwise, or unless the parties otherwise agree, ratification shall not have any retroactive effects."

107. Mr. LACHS, supporting the special rapporteur's new redraft, suggested that when the Drafting Committee had submitted the new text of article 12, the Commission should consider the suggestion by Mr. Briggs of combining accession and ratification because they had some effects in common.

108. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 12 to the Drafting Committee with the comments made during the discussion.

It was so agreed.

The meeting rose at 6 p.m.

648th MEETING

Tuesday, 22 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 13. PARTICIPATION IN A TREATY BY ACCESSION

1. The CHAIRMAN said it had been decided earlier in the session to postpone consideration of article 7 until the articles concerning accession came up for discussion. He suggested that article 7 might now be discussed in conjunction with article 13.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that in his view it was desirable that article 13 should be considered before article 7. The provisions in article 7 on the right to sign a treaty did not go as far as those in article 13 on participation by accession. It would therefore be easier for the Commission to consider article 7 if it first settled some of the problems raised by article 13.

It was so agreed.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that when the Commission had discussed the previous special rapporteur's draft articles in 1959, many members had taken the view that the draft should contain an article stating the right of states to become parties to treaties of a general character. That view had encountered some opposition on the ground that it was difficult to divorce the right to participate in a treaty from the particular procedure involved such as signature, accession or acceptance. The Commission had finally decided to defer consideration of a general article on participation until after articles on the right to sign, accede, etc. had been drafted.[1]

[1] *Yearbook of the International Law Commission, 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 108.