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Summary record of the 665th meeting

Topic:
Law of Treaties

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*Paragraph 6**Paragraph 6 was approved without comment.**Paragraph 7**Paragraph 7 was approved without comment.**Paragraph 8*

97. Mr. de LUNA, observing that much had been said about the possibility of depositaries abusing their functions, said it would be advisable not to give them the discretionary power implied in the phrase "if it deems it necessary". Those words should accordingly be deleted.

98. Mr. CASTRÉN said he agreed that the discretion given to the depositary was too wide. The phrase to which Mr. de Luna objected might be replaced by the words "if the difference is not settled within a reasonable period".

99. Mr. TABIBI said that the article omitted to provide for the case where a depositary ceased to exercise its functions. That might happen in the case of a succession of states or the winding up of an international organization.

100. Mr. BARTOŠ said that he would not go so far as Mr. de Luna or Mr. Castrén, but would suggest the insertion of the words "at the request of the state concerned or" after the words "the depositary shall". A state might not necessarily wish to have a difference with the depositary communicated to other interested states. It might feel that its difference was not worth bringing to the attention of other states. In that case its wish should be respected and the incident regarded as closed.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Bartoš's amendment was acceptable. Mr. Tabibi's point could be covered by an appropriate addition to article 26, paragraph 2.

*Paragraph 8 as amended by Mr. Bartoš was approved.**Article 27, as amended, was approved.*

The meeting rose at 1 p.m.

665th MEETING*Wednesday, 20 June 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*)**DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE** (*continued*)

1. The CHAIRMAN invited the special rapporteur to read out the new texts of four articles which had been submitted by the Drafting Committee. Article 11, in its original form as article 13, had been referred to the Drafting Committee at the 650th meeting; article 12, formerly 16, had also been referred to the Drafting Committee at the 650th meeting; article 13, formerly

article 11, had been referred to the Drafting Committee at the 647th meeting; and article 14, formerly article 12, had also been referred to the Drafting Committee at the 647th meeting.

ARTICLE 11. — ACCESSION

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 11, formerly article 13, read:

"A state may become a party to a treaty by accession in conformity with the provisions of articles 7 and 7 *bis* of the present articles when:

"(a) it is not a signatory to the treaty or, being a signatory, has failed within a prescribed time-limit to establish its consent to be bound by the treaty; and

"(b) the treaty specifies accession as the procedure to be used for becoming a party to it."

*Article 11 was approved.***ARTICLE 12. — ACCEPTANCE OR APPROVAL**

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 12, formerly article 16, read:

"A state may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 7 and 7 *bis* when:

"(a) the treaty provides that it shall be open to signature subject to acceptance (or approval) and the state in question had so signed the treaty; or

"(b) the treaty provides that it shall be open to participation by simple acceptance (or approval) either without any prior signature or after signature by a state which has failed within a prescribed time-limit to establish its consent to be bound by the treaty."

*Article 12 was approved.***ARTICLE 13. — THE PROCEDURE OF RATIFICATION, ACCESSION, ACCEPTANCE AND APPROVAL**

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 13, formerly article 11, read:

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

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

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

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

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

“(b) in other cases, upon deposit of the instrument with the depositary of the treaty.

“3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with sub-paragraph (b) of the preceding paragraph, the ratifying state shall be given an acknowledgment of the deposit of its instrument of ratification, and the other signatory states shall be notified promptly both of the fact of such deposit and of the terms of the instrument.”

5. Mr. CASTRÉN pointed out that, in the English text of paragraph 3, the fifth and sixth lines mistakenly referred to “its instrument of ratification” instead of just to “its instrument”.

6. Mr. ROSENNE in turn pointed out that, in the fourth line, the English text referred to “the ratifying state” instead of to “the state in question”.

7. The CHAIRMAN said that the necessary corrections would be made to the English text.

Article 13 was approved.

ARTICLE 14. — LEGAL EFFECTS OF RATIFICATION,
ACCESSION, ACCEPTANCE AND APPROVAL

8. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 14, formerly article 12, read :

“The communication of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 13 :

“(a) establishes the consent of the ratifying, acceding, accepting or approving state to be bound by the treaty, and

“(b) if the treaty is not yet in force, brings into operation the applicable provisions of article 19 *bis*, paragraph 2.”

9. Mr. de LUNA noted that the new article 14, which dealt in a single provision with the legal effects of ratification, accession, acceptance and approval, did not contain any indication as to whether those acts had a retroactive effect or not. Some reference to that question was necessary, particularly since the position was not the same in all cases ; it was simple where ratification was concerned, but more complex in the case of accession, acceptance or approval.

10. Paragraph 4 of the special rapporteur's draft article 12 had stipulated that : “Unless the treaty provides otherwise, ratification shall not have any retroactive effect” and he (Mr. de Luna) had approved that rule, which was consistent with the modern conception of ratification.

11. For, as he had pointed out during the discussion of article 9,¹ ratification was no longer regarded, on the analogy of the power of attorney of private law, as the confirmation by the principal that his agent had not acted *ultra vires* ; it was not considered as the fulfilment of a suspensive condition and had therefore no *ex tunc* or retroactive effect.

12. He would not go so far as to say that it was an established rule of customary international law that ratification was effective *ex nunc*. For although the non-retroactivity of ratification had been recognized by an English Court as early as 1813 in the “Eliza Ann” case,² and in international case-law by the Italian-Venezuelan Mixed Claims Commission in 1903 in the “Sambiaggio” case³ and more recently by the award in the case between Germany and the Reparations Commission⁴ in 1924, a contrary practice had been followed by United States Courts, despite the fact that the non-retroactivity rule was laid down in article 8 of the Havana Convention on Treaties of 20 February 1928 and in article 11 of the Harvard Draft.

13. As far as accession, acceptance and approval were concerned, they were generally effective from their date, but not invariably. For example, whereas in cases where a state acceded to a treaty in response to an invitation by the states parties to the treaty, the accession was effective only *ex nunc*, the position was different in cases where accession, in order to be effective, required the consent of the states which were parties to the treaty or which had participated in the formulation of the treaty ; in that case, it was more logical to regard the accession as taking effect not from its date but from the date on which the necessary consent to it had been given. Acceptance followed by signature was similar to accession.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that, as the Commission was aware, he had originally proposed a provision stating that ratification did not operate retroactively, even though practice in that regard was well enough established not to make such an express statement strictly necessary.

15. As the article on entry into force was to provide that, unless otherwise stipulated in the treaty, it would become effective for each party on the date on which the state established its consent to be bound, the Drafting Committee had decided that the point would have been adequately covered. But as far as ratification was concerned, some mention of non-retroactivity could be made in article 14 as well.

16. He had not quite grasped Mr. de Luna's point concerning the effect of acceptance. Where there was a right of acceptance under article 7 or 7 *bis*, it was hard to see how, in the absence of an express provision

¹ 645th meeting, para. 22.

² Dodson, *Reports of cases argued and determined in the High Court of Admiralty, 1811-22*.

³ *Reports of International Arbitral Awards*, Vol. X, pp. 499-525.

⁴ *ibid*, Vol. I, pp. 429-430 and 518-524.

to the contrary, the treaty could come into force for the accepting state on any date other than that of the instrument of acceptance.

17. Mr. de LUNA said that he would be quite satisfied if article 14 stated that ratification did not operate retroactively. Though the non-retroactivity of ratifications was recognized quite generally and was consistent with the modern conception of the institution of ratification, he was uncertain whether it had acquired the force of a customary rule of international law. Such a clause would therefore constitute a mildly progressive element in the draft.

18. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like to know the Commission's views on the desirability of including a reference to the non-retroactivity of ratifications in article 14.

19. Mr. BRIGGS said he was uncertain whether an express clause to that effect was needed in article 14 itself; he suggested that, instead, the substance of the special rapporteur's original draft article 12, paragraph 4, should appear in the commentary.

20. Mr. ROSENNE supported Mr. Briggs' suggestion.

21. Mr. de LUNA said the course suggested by Mr. Briggs was acceptable to him.

Mr. Briggs' suggestion was adopted.

Article 14 was approved.

22. Mr. TSURUOKA said that he wished to revert to a point he had raised in connexion with the original article 12,⁵ because of the uncertainty that might arise about the date of entry into force when some of the signatures appended were given *ad referendum*. Perhaps there was room for an innovation by stipulating that such signatures would not have retroactive effect.

23. Sir Humphrey WALDOCK, Special Rapporteur, observed that such an innovation would alter the character of *ad referendum* signatures which, with the speed of modern communications, had become more rare. That method of attaching, as it were, a provisional signature because of uncertainty about the precise powers of the signatory or for some other reason, could admittedly give rise to an anomaly, but the practice was that, once confirmed, such a signature took effect from the date when it had been made. It should be borne in mind that signature *ad referendum* was a different thing from signature subject to ratification.

24. Mr. TSURUOKA said that he would not press for any change in the draft to meet his point, but would like at least to see some reference to it in the commentary.

The meeting rose at 10.35 a.m.

666th MEETING

Friday, 22 June 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*)

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

ARTICLE 1. — DEFINITIONS

1. The CHAIRMAN invited the Commission to consider the redrafts of a number of articles which had been referred to the Drafting Committee a second time. Article 1 should be considered paragraph by paragraph; it read:

"1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

"(a) 'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more states or other subjects of international law and governed by international law.

"(b) 'Treaty in simplified form' means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.

"(c) 'General multilateral treaty' means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to states as a whole.

"(d) 'Signature', 'Ratification', 'Accession', 'Acceptance', and 'Approval' mean in each case the act so named whereby a state establishes on the international plane its consent to be bound by a treaty. Signature, however, also means, according to the context, an act whereby a state authenticates the text of a treaty without establishing its consent to be bound.

"(e) 'Full-powers' means a formal instrument issued by the competent authority of a state authorizing a given person to represent the state either for the purpose of carrying out all the acts necessary for concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

"(f) 'Reservation' means a unilateral statement made by a state, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that state.

"(g) 'Depositary' means the state or international organization entrusted with the functions of

⁵ 647th meeting, para. 102.