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Summary record of the 787th meeting

Topic:
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101. As to article 16, its contents would no longer be necessary if a formulation such as he proposed, or one on the lines proposed by Mr. Ago, were adopted.

The meeting rose at 1.5 p.m.

787th MEETING

Thursday, 20 May 1965 at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Filling of a Casual Vacancy in the Commission

(resumed from the previous meeting)

[Item 1 of the agenda]

1. The CHAIRMAN said he had received a telegram from Mr. Bedjaoui, the newly-elected member, asking that his most sincere thanks should be conveyed to the Commission for the honour it had done him and assuring the Commission of his full co-operation. He hoped that Mr. Bedjaoui would soon be taking part in the Commission's work.

Law of Treaties

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

(resumed from the previous meeting)

[Item 2 of the agenda]

2. The CHAIRMAN, referring to the discussion at the end of the previous meeting, asked whether Mr. Briggs thought it essential for article 13 (Accession) to be considered in detail by the Commission before being referred to the Drafting Committee for examination with the rest of the group of articles 11-15.

3. Mr. BRIGGS said he could agree to article 13 being referred to the Drafting Committee, but reserved the right to revert to the question of its relationship with articles 8 and 9 at a later stage.

ARTICLE 15 (The procedure of ratification, accession, acceptance and approval)

Article 15

The procedure of ratification, accession, acceptance and approval

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 paragraph 2 (*b*) above, the State in question shall be given an acknowledgement of the deposit of its instrument, and the other signatory States shall be notified promptly both of the fact of such deposit and the terms of the instrument.

4. The CHAIRMAN invited the Commission to consider article 15.

5. Sir Humphrey WALDOCK, Special Rapporteur, referring to the comments by governments (A/CN.4/175) and to the proposals in his report (A/CN.4/177) concerning the text of article 15, said that in response to the United States Government's contention that the words " by means of a written instrument " in paragraph 1 (*a*) did not go far enough, he had proposed the addition at the end of that paragraph of the words " signed by a representative possessing or furnished with the necessary authority under the provisions of article 4 ". Since his report had been prepared, the Commission had discussed article 4 and had decided to omit from it any reference to authority, so that the wording of his proposal would require modification; but that was a matter that could be left to the Drafting Committee, together with the rather delicate question whether reference should be made to the fact that the instrument ought to emanate from a person appearing to be furnished with full powers in accordance with article 4—a point which the Commission had tried to cover in article 31.

6. In paragraph 3 of his observations he had also raised a small point concerning paragraph 1 (*b*), which might leave room for doubt about the relationship between a provision dealing with election to become bound by part or parts of a treaty, and the right to make reservations on specific articles as expressly allowed in the treaty itself. The effect in practice might be substantially the same and the question was whether a proviso reading " Subject to article 18 and " should be inserted at the beginning of paragraph 1 (*b*) or whether it would suffice for the difference between the two procedures to emerge from the texts of the relevant articles themselves.

7. The Government of Luxembourg had rightly criticized the expression " two differing texts " in paragraph 1 (*c*) : The Commission had certainly meant " alternative " texts. The practice of offering a choice between two texts was followed in a restricted number of treaties.

8. Some modification might be also needed to meet the Swedish Government's objection that by saying nothing about what would happen when there was no indication as to which text had been subscribed to by a party, the Commission had failed to lay down a substantive rule in paragraph 1 (*c*). Members would find in his observations a suggested revision to meet that point, which read :

> " If a treaty offers to the participating States a choice between two alternative texts, the instrument of ratification must indicate the text to which it relates. In the event of a failure to do so, the ratification shall not be considered as effective unless and until such indication has been given by the State concerned. "

That text would have to be amplified so as to refer not only to instruments of ratification, but also to instruments of accession, acceptance and approval. As there were cases in which alternative texts were offered for only part of a treaty, if any rule at all had to be stated perhaps it should be worded rather broadly.

9. With regard to paragraph 2, the Government of Luxembourg had questioned whether the distinction between an instrument of ratification producing its effects, and treaty obligations coming into force for the parties, had been adequately brought out; he had suggested that possibly other provisions which made that distinction clear, namely, articles 11, 16, 17 and 20, had been overlooked. That comment, of course, presupposed that those articles would be retained; but that might not be the case, particularly where article 16 was concerned. Should that article disappear, the Drafting Committee would have to see that the various stages in the process of establishing consent to be bound remained distinct. If the Commission adopted Mr. Rosenne's suggestion that the articles on entry into force should follow directly after those dealing with the conclusion of treaties,[1] so as to emphasize the close links between the two groups, it would have gone a long way towards meeting the point made by the Government of Luxembourg.

10. Finally, he had suggested omitting paragraph 3, because its substance was already covered in article 29, paragraph 3 (*d*), which dealt with one of the duties of a depositary. The latter provision might have to be modified in order to take account of the point made by the United States Government concerning article 15, paragraph 3, but that was a matter which should be left for discussion at a later stage.

11. Mr. YASSEEN said that article 15 was useful in that it showed when the instruments of ratification, accession, acceptance and approval took effect—assuming that they were all mentioned in the draft. However, he shared the opinion expressed by the Japanese Government that some of the details did not merit special provisions; that applied particularly to paragraph 1 (*b*), and even to paragraph 1 (*c*).

12. As to the form the instrument should take, it must obviously be a written instrument, but as the United States Government had suggested he thought it might also be required to be signed.

13. He supported the Special Rapporteur's proposal that paragraph 3 be deleted and its substance incorporated in the article on the functions of a depositary.

14. The comment by the Government of Luxembourg on paragraph 2 did not seem well-founded, for it was clear from the wording of the article that it related to the effect of the instrument of ratification, accession, acceptance or approval, not to the entry into force of the treaty.

15. Mr. CASTRÉN said he shared the view expressed by the Government of Sweden that while some of the provisions of article 15 contained important legal rules, others were exclusively procedural. In that respect the deletion of paragraph 3, proposed by the Special Rapporteur, would be an improvement.

16. Paragraph 2 was rather long and set out rules which were mostly self-evident, except, perhaps, that in subparagraph (*b*); the solution proposed in that subparagraph was correct, but others were possible. Mr. Rosenne had submitted a draft article 29 *bis* (A/CN.4/L.108) in which he proposed a different rule.

17. With regard to paragraph 1, he accepted the Special Rapporteur's suggestions concerning sub-paragraphs (*a*) and (*c*), though he wondered whether it had, in fact, ever happened that a State ratifying a treaty which offered a choice between two alternative texts had failed to indicate which text its ratification referred to.

18. The CHAIRMAN said he could confirm that the question what a State had intended to bind itself to had arisen where its instrument of ratification had not specified which text it had chosen.

19. Mr. RUDA said that the first problem concerning article 15 was the general one raised by the Government of Japan in proposing the article's deletion. He not only agreed with Mr. Yasseen that the article was useful, but he considered it to be necessary, because the draft would be incomplete without an article on the procedure of ratification, accession, acceptance and approval. Apart from that, however, article 15 raised several specific problems.

20. With regard to paragraph 1 (*a*), he shared the opinion expressed in paragraph (1) of the commentary adopted by the Commission in 1962, that " The actual form of the instrument is . . . a matter which is governed by the internal law and practice of each State ".[2] It would therefore suffice to retain the requirement of a " written instrument ". The United States proposal taken up by the Special Rapporteur would probably make for greater certainty in international relations; but from the point of view of theory the Commission should say whether the form of the instrument was a matter governed by international law or by the internal law and practice of each State; if it adopted the second solution, it would be for the State to choose the form of the instrument, and he was opposed to that.

[1] See 786th meeting, para. 36.

[2] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 174.

21. The situation contemplated in paragraph 1 (*b*) was quite common, so the provision should stand, with the addition of the qualifying phrase " subject to article 18 " proposed by the Special Rapporteur. The purport of paragraph 1 (*b*) was that if a treaty did not specify that States were free to elect to become bound by certain parts of the treaty only, a State which deposited an instrument of ratification not specifying whether it elected to become bound by the whole of the treaty or by only part of it, would be deemed to be bound by the whole treaty. The Commission might, however, also state what was the effect of a ratification which did not specify the scope of the undertaking, in cases where the treaty itself allowed partial ratification.

22. For paragraph 1 (*c*), he accepted the new text proposed by the Special Rapporteur in view of the comments made by the Governments of Luxembourg and Sweden.

23. Paragraph 2 dealt with the important problem of the date on which the instrument became operative; that date should be the date of deposit of the instrument, not the date when notice of the deposit was given, as the Commission had made clear in 1962, in paragraph (4) of its commentary.[3] Furthermore, for the reasons given by the Special Rapporteur, he did not think it would be advisable to make the distinctions suggested by the Government of Luxembourg.

24. With regard to paragraph 3, he supported the Special Rapporteur's proposal that the substance of the paragraph should be transferred to article 29, paragraph 3 (*d*).

25. Mr. ROSENNE said he held no particularly strong views on article 15, but perhaps its various elements could be combined with other provisions. Subject to certain modifications, the United States Government's proposal requiring the instrument of ratification to be signed should be incorporated in the draft, possibly combined with article 1, paragraph 1 (*d*) and article 16. The problem of establishing the necessary link with article 4 might then be solved.

26. The Drafting Committee should be wary of using the word " text " in paragraph 1 (*b*) and (*c*) as it could lead to ambiguity, particularly if those sub-paragraphs were read in conjunction with the provisions dealing with authentication of the text and those distinguishing between the authentic and other texts, such as articles 72 and 73. His view, which he believed was shared by Mr. Briggs and others, was that there could only be one text of a treaty.

27. If the suggestion made by the Government of Luxembourg concerning paragraph 1 (*c*) were adopted, the word " alternative " need not be qualified by the word " two ".

28. There seemed to be general agreement that paragraph 3, which expressed a legal rule, could be transferred to article 29, together with the provision in paragraph 2(*b*).

29. Mr. AGO said that the article did not raise any very serious problems of substance, but some drafting points and the interrelation between the paragraphs would have to be considered.

30. It was open to question whether the title should indicate that the article concerned procedure. In fact, apart from paragraph 1, it dealt with the effect produced by the instruments, which was something other than procedure. Moreover, paragraph 1 could perhaps be omitted if it was specified, either in the definitions or in one of the other articles preceding article 15, that the instrument must be in writing.

31. He suggested that in paragraph 1 (*b*) and (*c*) the passages " the instrument must apply . . . " and " the instrument of ratification must indicate. . . " should be amended to read " the instrument becomes operative only if it applies to the treaty as a whole " and " the instrument becomes operative only if it indicates to which text it refers "; for what mattered was the effect of the instrument.

32. In paragraph 2 (*a*), the phrase " by means of an exchange of the instrument " should perhaps be amended to show clearly that the important element was not the means or the procedure, but the time when the instrument became operative.

33. Mr. REUTER said that Mr. Ago had raised a very important question regarding paragraph 1 (*b*) and (*c*). Considered from the point of view of their effects, the situations contemplated in those provisions raised questions which should either be ignored entirely or dealt with more fully, if not in that article, then elsewhere.

34. Paragraph 1 (*b*) raised the question of the separability or unity of the obligations laid down in the treaty, and paragraph 1 (*c*) raised a question of principle which, as the draft then stood, was entirely disregarded, namely, whether an obligation could exist without any indication of its object. The Commission had eliminated that case from the provisions on the grounds for invalidity of treaties. In practice, however, the question did arise. There had, at least, been the case of States undertaking to apply the rules contained in the General Act of 1928 [4]— they had not become parties to it—without choosing between the various combinations of obligations proposed in the Act. In such a case, the validity of the obligation might be open to question.

35. The Commission might do well to delete paragraph 1 (*b*) and (*c*) of article 15, but to keep those two problems in mind and deal with them elsewhere.

36. Mr. de LUNA said he agreed with the Special Rapporteur that paragraph 1 (*a*) should be amended on the lines he had suggested in order to take account of the United States Government's comment.

37. He subscribed to what Mr. Reuter had said concerning paragraph 1 (*b*), but he had not altogether understood the purport of Mr. Ago's remarks about the instrument of ratification only taking effect if it related to the whole treaty.

38. He endorsed the comment of the Government of Luxembourg concerning paragraph 1 (*c*) and the Special Rapporteur's suggestion for covering that point.

39. In conclusion, he wished to point out that the Spanish translation of paragraphs 1 (*b*) and (*c*) was not accurate.

[3] *Ibid.*, p. 175.

[4] League of Nations *Treaty Series*, Vol. XCIII, p. 345.

40. Mr. AGO, replying to Mr. de Luna, said he understood paragraph 1 (*b*), as it stood, to mean that if the treaty itself did not specify that States could elect to become bound by only some of its provisions, a State depositing an instrument of ratification must indicate therein that it was bound by the treaty as a whole. He considered such a clause unnecessary.

41. On the other hand, it was necessary to consider what would happen if a State indicated that its ratification applied to only part of the treaty. It would hardly be possible to coerce the will of the State by treating the ratification as applying to the whole treaty. What could be said, however, was that the ratification did not become operative because it did not fulfil a necessary condition. The State could then deposit a new instrument if it wished its ratification to be valid.

42. Mr. TUNKIN said he had some difficulty in accepting article 15. An examination of existing practice showed wide variations in the procedures followed by States for ratification, accession, etc. Paragraph 1 (*a*) surely referred to instruments as distinct from acts of ratification. The procedure might be determined in the treaty itself. The exchange of instruments of ratification and their deposit with the depositary might be regarded as the classical procedures, but there were others of more recent date, such as simple notification, sometimes by a *note verbale*, that a State had ratified or approved an international instrument; that procedure could be used, for example, for the recommendations and conventions of the International Labour Organisation.

43. He questioned the necessity, or the wisdom, of attempting to formulate a rigid rule in paragraph 1; such a rule was unlikely to be acceptable to States because it might hamper recourse to more flexible modern procedures, which were certainly beneficial to international relations. The Commission should do no more than state a residuary rule to the effect that, if no procedure was laid down in the treaty itself, or if none was prescribed by the applicable rules of an international organization, ratification, accession, acceptance or approval should be carried out by means of a written instrument.

44. The provision in sub-paragraph (*b*) might form a separate paragraph if the Commission felt that the matter was not adequately covered in a general provision of the kind he had suggested.

45. Sub-paragraph (*c*) ought to be dropped, as instances of alternative texts were rare and the practice should certainly not be encouraged. That being so, the best course was to keep silent.

46. He agreed with the Special Rapporteur and certain governments that paragraph 3 was superfluous, its content being covered by article 29.

47. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin that States were making less and less use of formal instruments of ratification, accession, acceptance and approval. Sometimes the text of a treaty itself provided that States which ratified, acceded, accepted or approved must declare in a written communication that that condition had been fulfilled. The Scandinavian States did not generally deposit a formal instrument, but merely addressed a *note verbale* to the other parties. Some States did not produce the original of the document, which remained in the national archives, but only a certified copy. The United States of America, on the other hand, followed a very solemn procedure and always required the submission of a formal instrument.

48. Thus the question arose whether the Commission should or should not favour the simplified form. For his part, he was inclined to think it would be sufficient to say that the instrument must be in writing—which would cover *notes verbales*—for if it were added that it must be signed, it would be necessary to say by whom.

49. Mr. Ago's proposal for paragraph 1 (*b*) was too rigid. There were many cases in which States were willing to be bound by only some of the provisions of a treaty and that situation was accepted. If the Commission laid down that in such cases the instrument of ratification was invalid, it would no doubt be providing a clear and correct solution, but he was not sure that it was necessary to be so strict. Even where the treaty did not contain a clause expressly authorizing States to become bound by some of its provisions only, it might be better to leave that possibility open to them if the other parties agreed. He would not give any opinion on that point for the time being.

50. The same question arose in regard to reservations. In its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice had held that reservations which were compatible with the object and purpose of the Convention were permissible.[5]

51. The case referred to in paragraph 1 (*c*) was perhaps comparatively rare, but not so rare as Mr. Tunkin maintained. The new text proposed by the Special Rapporteur for that sub-paragraph was acceptable, because the second sentence left it open to a State to indicate its position in a subsequent explanation; it would, however, be better to speak of " a choice between alternative texts ", for sometimes there were more than two.

52. Paragraph 2 was an important substantive provision He would not repeat Mr. de Luna's arguments on the point; he took the word "normally" in sub-paragraph (*a*) to mean that the procedure mentioned was not the only one possible. The essential element of the sub-paragraph was the phrase " upon the formal communication of the instrument to the other party or parties ".

53. Paragraph 3 also dealt with a most important legal question. The position of that provision in the draft was of no great importance; what mattered was that it should be included.

54. Reverting to what he regarded as the most important problem raised by the article, he urged the Commission not to include a nullity clause unless it was absolutely necessary, for once an instrument had been declared null and void, there was no further remedy. It would be better to allow some flexibility, even if the security of the parties might suffer.

55. Mr. AGO thought that the matter raised by the Chairman concerned substance, not drafting. The question was whether a ratification which related to part of a

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

treaty only could be accepted as valid if such ratifications had not been provided for at the time of the treaty's conclusion.

56. His proposal for that case did not include nullity of the treaty, only nullity of the act of ratification. There were many ways of remedying such a situation : the other parties would tell the State in question that it was not possible to ratify only a part of the treaty; the State in question would reply; there would be a discussion and then possibly an agreement would be reached. But it would be a serious matter to provide for the possibility of partial ratification even where the treaty did not contemplate it, for that would offer a means of circumventing the clauses concerning reservations. A State wishing to make reservations should make them known at the time of ratification, and it could not evade the reservations clauses and their consequences by declaring that it ratified only part of the treaty. Moreover, a State which ratified subject to reservations was ratifying the treaty as a whole, with the exception of certain articles; that was quite different from ratifying only part of the treaty—assuming that it was separable into various parts and that the Contracting States were free to decide that it could be ratified in parts.

57. The CHAIRMAN observed that the United States had ratified only certain parts of the Treaty of Versailles —with serious political consequences.

58. Mr. BRIGGS said he was in general agreement with Special Rapporteur's suggestions for improving the text of article 15; he urged the Drafting Committee also to give full weight to the drafting changes proposed by Mr. Ago.

59. He believed that the United States Government would be satisfied if the concluding words of paragraph 1 (*a*) were amended to read " by means of a signed instrument ", as its objection had been prompted by the fact that the original text seemed to condone what was an admittedly infrequent practice, but one that nevertheless occurred : that of submitting a written instrument bearing only a stamped seal. There was no need for the further condition suggested by the Special Rapporteur that the signature should be that of " a representative possessing or furnished with the necessary authority under the provisions of article 4 ".

60. The reference to " texts " in the Special Rapporteur's suggested revision of paragraph 1 (*c*) was not correct, since the choice was not between texts, or even versions, but between alternative provisions of the treaty. As Mr. Reuter had pointed out, there were treaties, such as the General Act for the Pacific Settlement of International Disputes, from which the parties could select certain portions for ratification.

61. Paragraph 3 ought to be deleted entirely.

62. Mr. AMADO thought it hardly conceivable that an " instrument " should not be in writing.

63. The CHAIRMAN said that he regarded the expression " written instrument " as a pleonasm, but the text had been adopted by the whole Commission.

64. Mr. REUTER said he understood the purport of Mr. Tunkin's arguments : used with reference to a treaty, the word " instrument " was rather heavy and full of substance, since it meant " authentic act ". It might almost be better to say " an instrument or written communication ".

65. Mr. AMADO observed that there were expressions which gradually gained acceptance through mere repetition. Mr. Reuter's comment had clarified the question.

66. The CHAIRMAN, speaking as a member of the Commission, said he could accept the formula proposed by Mr. Reuter, which accorded with the spirit of Mr. Tunkin's remarks.

67. Mr. YASSEEN thought that signature, at least, should be required. True, the treaty-making process should not be rendered unduly cumbersome, but signature did not constitute an intolerable burden for States, and in such a serious matter it was not excessive to require that the instrument be signed.

68. With regard to paragraph 2 (*b*), he would prefer the words " In other cases " to be replaced by the words " In the contrary case " or " Otherwise ", for since paragraph 2 (*a*) related to the case in which there was no depositary, there could only be one other case.

69. Mr. TUNKIN, replying to Mr. Yasseen, said that to require communications concerning ratification to be signed by a person with the necessary authority might hamper certain modern simplified procedures. There was no reason why the Commission should cling too closely to the traditional procedure of ratification. The only possibility was a residuary rule, because States must be left complete freedom to determine what procedure they wished to follow in any particular case.

70. He was also opposed to any rigid rule being inserted in paragraph 1 (*b*) on the lines suggested by Mr. Ago, because the possibility of States ratifying part of a treaty only and not the whole instrument, in the sense ascribed to the term " treaty " by the Commission, must not be prejudiced. For example, the Soviet Union had not ratified the Radio Regulations annexed to the International Telecommunication Convention, though the Convention provided for that possibility.

71. The CHAIRMAN, speaking as a member of the Commission, said that as a general rule *notes verbales* were initialled by States; they were very rarely signed. A noteworthy exception was the British Foreign Office, all of whose *notes verbales* bore the signature of the Principal Secretary of State for Foreign Affairs.

72. Mr. JIMÉNEZ de ARÉCHAGA said that, with respect to paragraph 1 (*a*), two views had emerged : one favoured giving States greater freedom in order to facilitate their entering into agreements, while the other favoured a stricter rule, with the requirement that the instrument must be signed. The latter view was based on the argument that if a signature was required, States would be better protected against the possibility of ratification by mistake. For his part, he believed that it was the function of national law, not international law, to protect States against such dangers. He therefore supported Mr. Ruda's remarks and proposed that the concluding words of the paragraph be amended to read " must be made in writing, pursuant to the legislation of the State ". Those words had been taken from the corresponding provision of the Havana Convention of

1928;[6] they would leave it to each State to determine the method of drawing up the instrument. The provision should then be sufficiently flexible to meet the purpose expressed by Mr. Tunkin.

73. Paragraph 1 (*b*) contained a useful and necessary rule, which he preferred to that included in the corresponding article of the Havana Convention, which stated that ratification must embrace the treaty in its entirety.

74. Mr. ELIAS said there was no place in article 15 for the contents of paragraph 3. Perhaps when the Commission came to examine article 29, it could consider whether any element from that paragraph could be included in it.

75. As to paragraph 1 (*a*), he was not in favour of including the requirement that the instrument must be signed by an appropriate authority. He suggested that the words " written instrument " should be replaced by the words " written communication ". The commentary would explain that the written communication must come from a person having authority to make it.

76. He also suggested that the concluding portion of paragraph 1 (*b*) should be reworded to read : " . . . part or parts only of the treaty, the written communication shall be considered as applying to the treaty as a whole. "

77. He agreed with Mr. Rosenne and Mr. Briggs that paragraph 1 (*c*) should refer to two alternatives, not to two differing texts. He suggested that the provision should be reworded to read : " If a treaty offers to the participating States a choice between two alternative sets of provisions, the written communication regarding ratification must indicate to which alternative it refers ".

78. He did not think there was much force in the argument that paragraph 2 (*b*) could be omitted. He agreed with Mr. Yasseen that the words " In other cases " should be replaced by the word " Otherwise ".

79. Subject to the amendments he had suggested, he found article 15 both necessary and useful.

80. Mr. AGO said he wished to clear up the misunderstanding which seemed to have arisen between Mr. Tunkin and himself. He had not proposed that ratification must always apply to the treaty as a whole, thus ruling out the possibility that the treaty itself might provide that only one part of it should be ratified. His proposal had related to the end of paragraph 1 (*b*), the remainder of which would remain unchanged.

81. Mr. ROSENNE said it was necessary to draw a distinction between the question of treaties in simplified form and the subject matter of article 15, which related to treaties in solemn form. There was much force in the suggestion that, even in the case of solemn treaties, it was not desirable to freeze the present practices regarding ratification, and that there should be some flexibility in admitting newer procedures.

82. At the same time, it was not desirable to go too far in the direction of informality. The United States Government, in its comments, had gone no further than saying that the communication should be signed. The Commission itself should avoid delving into the niceties of diplomatic protocol regarding the manner of drawing up, signing and sealing communications, which often involved political nuances.

83. The consent given by a State to a treaty comprised four stages. First came the formation of consent, which was an internal matter and not one of international law. Second came the expression of consent, which was basically governed by article 4, although certain other provisions of the draft articles were also relevant; in addition, the 1961 Vienna Convention on Diplomatic Relations contained provisions on the powers of an ambassador and the legal effects of acts performed by him. Third came the communication of the expression of consent to other States, and fourth, the legal consequences of that communication. Article 15 dealt with the communication of consent and article 16 with its legal effects. He was not convinced that article 15 was really necessary, but he would not oppose its retention if other members wished to retain it.

84. Mr. YASSEEN said that, while it was not the function of international law to protect States, neither should it diminish the constitutional protection they sometimes established, for themselves, particularly in view of the preference the Commission had given, in principle, to the internationalist theory.

85. For that reason, he was not opposed to the suggestion made by Mr. Jiménez de Aréchaga, which really gave effective protection to States. The addition of the proposed wording from article 6 of the Havana Convention on Treaties would make it superfluous to say whether the instrument should be signed or not, since the provision would refer back to internal law, which was intended to protect States from disagreeable surprises.

86. Mr. de LUNA said that, with the wording proposed by Mr. Jiménez de Aréchaga, the State whose legislation was referred to would indeed be protected, but that result would be achieved at the price of loss of security for the other party or parties to the treaty. From his experience of the negotiation of treaties, and from the experience of Spain as the depositary of certain treaties, he could safely say that it would be placing an unduly heavy burden upon the other parties to a treaty, particularly a multilateral treaty, to require them to ascertain what new practices might exist in the State concerned with regard to the form of instruments. Such practices tended to change frequently, often merely on the decision of an Under-Secretary of State. In Spain the practice had long been for *notes verbales* to be merely stamped with an embossed seal; during the Second World War, however, it had been decided that all such notes should thenceforth be initialled.

87. What was of overriding importance was the need for clarity and security in international relations. When a representative participated in negotiations on behalf of his State, or exercised the functions of depositary, it was essential that he should not be in any uncertainty regarding the other parties with which he was dealing; he should not be required to make an investigation of the internal practices of States in order to be satisfied that their instruments were in order.

88. Mr. TSURUOKA said he did not always support the draft submitted by the Japanese Government (A/CN.4/175, section I.11), but there were sound reasons

[6] Hudson, *International Legislation*, Vol. IV, p. 2381, article 6.

for deleting almost all of article 15 and transferring the remainder elsewhere.

89. The discussions which had taken place showed the need to safeguard the security of international relations, but also the need to facilitate diplomatic activity and to promote progress in international intercourse. Where security was involved, signature or any other solemn form was the best guarantee; but it would still be necessary to inquire into current practice, which depended on many factors.

90. He doubted whether it was really necessary to lay down rules; it might be better to leave some freedom of action to States, which would certainly look after their own interests and would consequently give immediate attention to the security of their relations and the most progressive way to facilitate diplomatic activity. He urged the Commission to give careful consideration to the Japanese Government's proposals concerning article 15.

91. Sir Humphrey WALDOCK, Special Rapporteur, said there appeared to be general agreement that paragraph 3 should be dropped; its contents would be covered by the provisions which the Commission would adopt for article 29.

92. The contents of paragraph 1 (*b*) should constitute a separate article. He did not believe it would be appropriate to drop that provision; the Commission had devoted no less than five articles to the question of reservations, and it would be surprising if it were to omit all reference to the ratification of part of a treaty, a situation which was very close to that created by the formulation of reservations. It was not uncommon for a ratification or acceptance to refer only to part of a convention, especially in the case of conventions dealing with technical matters. He was in favour of retaining the provision, but thought the formulation suggested by Mr. Ago was an improvement.

93. With regard to Mr. Tunkin's suggestion that a more flexible rule should be introduced, it would not be advisable to encourage the idea that it was possible, in the absence of a provision of the treaty permitting it, for a State to become a party only to part of the treaty otherwise than through the operation of reservations.

94. Paragraph 1 (*c*) should be redrafted on the lines suggested by Mr. Ago and should form a separate article, also covering the question of signature.

95. It remained to decide the fate of paragraphs 1 (*a*) and 2, in the light of the Commission's decision to rearrange all the articles on signature, accession, ratification, acceptance and approval. Those paragraphs would deal with the manner in which the act of ratification was completed. The Drafting Committee would have to consider, in particular, whether it was desirable to prescribe that the instrument must be signed. Without going into the niceties of protocol, it would be necessary to decide whether the instrument should not have some clear authentication in the form of a signature. A rule on the lines of paragraph 1 (*a*) would be useful, but it should be formulated as a residuary rule, prefaced by a proviso to the effect that it applied unless the parties agreed on another procedure.

96. With regard to paragraph 2, the suggestion had been made that the residuary character of the rule in sub-paragraph (*a*) should be further stressed. Very great flexibility had been introduced into the rule by the last sentence in the opening section of paragraph 2: " If no procedure has been specified in the treaty or otherwise agreed by the signatory States . . . "

97. Towards the end of the debate, the suggestion had been made that a reference to the legislation of individual States should be included in paragraph 1 (*a*). He was strongly opposed to any such reference, which would dangerously weaken the security of the treaty-making process: it would make it possible to claim that a treaty was null and void because of non-compliance with some local provision. He would urge that, as in the discussion on article 4,[7] that matter should be omitted from the discussion on article 15, and left to be fully debated when the Commission came to consider article 31.

98. He proposed that article 15 be referred to the Drafting Committee with the suggestions made during the discussion.

It was so agreed.[8]

ARTICLE 16 (Legal effects of ratification, accession, acceptance and approval)

Article 16

Legal effects of ratification, accession, acceptance and approval

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 17, paragraph 2.

99. The CHAIRMAN invited the Commission to consider article 16.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that the most substantial effect of ratification, accession, acceptance and approval, which was to establish the consent of the State concerned to be bound by the treaty—the idea expressed in sub-paragraph (*a*) of article 16—would be covered in the provisions on ratification, accession, acceptance and approval in articles 12-14 when those articles had been redrafted. The contents of sub-paragraph (*b*) merely anticipated the provisions of article 17, paragraph 2. Hence article 16 would no longer be necessary in the new formulation of the draft articles.

101. Mr. RUDA said that sub-paragraph (*b*) could well be dropped, because it merely referred to the rule in article 17 and therefore constituted an unnecessary repetition. Sub-paragraph (*a*) set out the essential rule in the matter, which was that the communication or deposit of an instrument of ratification, accession, acceptance or approval established the consent of the State concerned to be bound by the treaty. That rule must be stated somewhere in the draft articles and he would only be

[7] 780th and 781st meetings.

[8] For resumption of discussion, see 812th meeting, paras. 65-77.

prepared to accept the complete deletion of article 16 if the rule were included in another article.

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

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

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

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

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

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

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

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

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

It was so agreed.[9]

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

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

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

114. Mr. BRIGGS supported that proposal.

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

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

The meeting rose at 1 p.m.

788th MEETING

Friday, 21 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

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

(continued)

[Item 2 of the agenda]

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

Article 17

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

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

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