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Summary record of the 789th meeting

Topic:
Law of Treaties

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codification with the progressive development of international law as it had done before. As he had often pointed out, those of the conventions on the law of the sea which had clearly contributed to the progressive development of international law had satisfied many States, whereas the others had given rise to many objections on the ground that they were contrary to existing law.

81. During the second reading of the draft, the Commission could certainly ask itself whether what it had laid down was logical and corresponded to the facts; it could also correct certain mistakes and fill certain gaps. In article 17, for example, it had completely disregarded change of circumstances, whereas in article 44 it had laid down a rule to the effect that a treaty already in force could lose its validity by reason of a change of circumstances. That example showed that the draft should be examined with great care and attention.

82. With regard to paragraph 2, he shared the view of Mr. Ago and Mr. Briggs on the question of the time-limit.

83. He agreed with Mr. Ago and Mr. Tunkin that the same rule should not be applied indiscriminately to bilateral and to multilateral treaties. Furthermore, he found it hard to accept that certain States should be able to release themselves from their obligations, while others continued to be bound for the sole reason that they had not given express notification of withdrawal from the treaty.

The meeting rose at 1 p.m.

789th MEETING

Monday, 24 May 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tunkin, Mr. Verdross, 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) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 17.

2. Mr. CASTRÉN said he would like first to make a few general remarks about the value and implications of the comments by governments (A/CN.4/175 and Add.1-3) and the attitude he thought the Commission should adopt concerning them.

3. No one would deny that the members of the Commission met in their personal capacities and not as representatives of their countries; they were therefore completely free to express their personal opinions on every problem that had to be solved. But the Commission must bear in mind that it was a United Nations body whose principal task was to prepare draft conventions to be placed before diplomatic conferences. Under article 22 of its Statute, the Commission was required to take comments by governments into consideration when preparing the final draft on the topic being codified. That meant that during the second reading of its drafts, the Commission was required to pay special attention to the comments made by governments.

4. It was regrettable that, generally, whatever the reasons might be, only relatively few governments submitted comments on the Commission's drafts. The Commission should express its gratitude to governments which stated opinions during a preliminary stage of codification, for as outsiders they sometimes saw things more clearly than those who had been studying the subject for a long time. Moreover, in preparing their comments, governments usually consulted distinguished experts—the Commission itself had on several occasions recognized that its work was defective in certain respects.

5. It mattered little that only a few—perhaps six out of ten—of the governments which has submitted comments had criticized the Commission's proposals; it must not be concluded that all the other Members of the United Nations—more than one hundred—approved of the draft. When the diplomatic conference was convened, a number of those who had kept silent would express dissent if the Commission had not acted on the well-founded suggestions put forward by governments which had taken an active interest from the outset.

6. True, the Commission had the right and the duty also to propose progressive rules if it thought fit, but in order to achieve practical results, it should proceed with moderation.

7. The Special Rapporteur's new text of article 17[2] marked a considerable advance in the development of international law on treaties, and was a reasonable compromise likely to be accepted by States. Why revert to the 1962 text and risk losing all that had been gained since then? He readily acknowledged that the new text, too, could be improved, both in substance and in form; for example, it might be that some obligations of good faith could also be placed on States which had done no more than participate in the negotiation of a treaty, but as Mr. Jiménez de Aréchaga had rightly said, those obligations were of a different nature from the obligations attaching to States which had already expressed their will to be bound by the treaty.

8. He agreed with Mr. Reuter that in paragraph 1 (*a*) of the new text, the words " its objects " should be replaced by the words " its object or purpose ". On the

[1] See 788th meeting, preceding para. 1.

[2] *Ibid.*, para. 1.

other hand, he thought the requirements of good faith operated in the same way for all treaties, bilateral or multilateral; for there were several kinds of treaty in each category, and it was possible that several States which were parties to the same treaty, or one State which was in a key position, might act in a manner contrary to the treaty's object or purpose. It would also be better to require clear notification by a State which renounced its right to ratify, accept or approve the treaty in order to be released from its obligation of good faith.

9. With regard to paragraph 1 (*b*), he was not opposed to the suggestion that a certain period should be fixed before the expiry of which a State having already manifested its consent to be bound by the treaty could not divest itself of its obligation. The period could be five years, or it could be prescribed in the treaty provisions on denunciation. He had no objection, either, to the rule stated in that paragraph being inserted in another article. The Government of Finland had put forward its proposal in connexion with article 16, but the Special Rapporteur had preferred to introduce it into article 17.

10. He (Mr. Castrén) was still convinced that paragraph 2, which was not open to interpretation, as the equivalent provision of the 1962 draft had been, should be adopted, since Commission was not drafting a code, but a convention embodying precise rules.

11. The CHAIRMAN, speaking as a member of the Commission, said that on a former occasion Sir Humphrey Waldock had expressed regret that more States did not submit comments. In view of that remark, more than sixty States had considered whether they ought to comment on the draft or not. Except for those whose comments were before the Commission, they had decided in the negative, fearing that otherwise they might make it difficult to adopt a text. Every government unquestionaby had the right to make comments, but if the text was greatly altered, the States attending the conference might prefer to revert to the original version.

12. In his opinion, the Commission was called upon to consider the content of the objections, not their number or which States had commented. They had all certainly studied the draft, which had been discussed at national seminars and in lectures, even before the Special Rapporteur's remark. The Commission should therefore leave statistical considerations aside and confine itself to a completely impartial examination of the legal arguments contained in the comments.

13. Mr. REUTER said he thought article 17 contained too much matter for a single article.

14. First, there was the situation referred to by Mr. Rosenne and Mr. Tunkin, where one State manifested its final will to be bound but there was no corresponding will on the part of a sufficient number of other States to make the treaty binding: that case should be dealt with in a separate article.

15. So far as time-limits were concerned, the Commission should assume that the final will of a State was accepted as being equivalent to an offer. He would be inclined to say that the State was obliged to keep that offer open for a certain, fairly short period, running not from the date of signature or ratification, but from the date on which the State gave notice of its intention to withdraw its offer. That would be simpler and fairer than making the period run from the date of signature.

16. After carefully studying the new text, he had understood its true purposes. He had believed that paragraph 1 (*a*) was intended to cover the case in which a State signed the treaty and then carried out certain acts which frustrated the other signatory States. He had thought that perhaps the Commission's intention was, in the name of good faith, to prohibit certain acts by which a State, between signature and entry into force of the treaty, would diminish the scope of the obligations it had assumed. That was why he had proposed his amendment.[3]

17. But he had seen that the other members of the Commission were thinking of a different situation—that in which a State signed a treaty and then acted in such a way that no purpose would be served by becoming a party and it would not do so. In the first case, the problem depended on interpretation of the treaty; in the second, the problem was whether any obligations had been created on a unilateral basis, and he had doubts about the proper formula to use.

18. The last and most important case was that of negotiation: the case in which a State negotiated, but acted in such a way that the negotiation became pointless and never became a party to the treaty. Should the Commission therefore lay down a rule that a State which had begun negotiations could not break them off? Yet, time and again negotiations had been interrupted by events which had resulted in a State not concluding a treaty or concluding it with a third State or with another group of States. Was it intended to condemn negotiations carried on simultaneously on the same subject with two different groups of States because the conclusion of a treaty with one group would preclude its conclusion with the other?

19. He was not opposed to including an article on obligations during negotiations, but it should appear in a different context. He recognized that in negotiations there was an obligation to act honestly which it would be well to express in the draft; that was what he had tried to convey by his formula " legitimate expectation ", which took account of the fact that when a State acted in a certain way it led its partners to entertain certain hopes. He was not opposed to the rule condemning the wrongful breaking off of negotiations, although the word " wrongful " was open to very broad interpretation; but he wondered whether the Commission should not go farther and say that, in all negotiations, the legitimate interests of the partners must be taken into account. He was prepared to agree to that, especially where an international obligation to negotiate existed prior to the negotiation.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that he, too, had been pondering over article 17 since the previous meeting. As Mr. Reuter had pointed out, there was more in it than met the eye.

21. In order to dispel any misunderstanding, he must make it clear that he had not complained that too few

[3] *Ibid.*, para. 42.

governments had submitted comments. Their comments, when pertinent, were, of course, extremely enlightening, but his task as Special Rapporteur would have been more difficult had they been very much more numerous. In his fourth report (A/CN.4/177) he had tried to analyse the comments on their merits and to reduce them to essentials, but as he had pointed out in paragraph 6 of the introduction, it was difficult to know how much weight to attach to the absence of any comment by a government. The figures given by Mr. Ago at the previous meeting were not quite correct: of the nine governments that had commented on article 17, seven had objected to extending the obligation of good faith to the negotiating phase, while the United States Government, which had favoured the original text of article 17, had pointed out that such an extension of the principle would go beyond what was generally considered to be the existing position in international law, and the United Kingdom Government had asked for an explanation of what was meant by taking part in the negotiations.

22. It had been suggested, during the discussion, that the meaning of the phrase " to refrain from acts calculated to frustrate the objects of the treaty " in paragraph 1 of the original text had not been fully understood by all governments, but he doubted whether that was really the case. Possibly the rendering in the French text was more vivid, but in English the phrase " frustrate the objects " was commonly used in the context of contract law and was well understood to mean much the same as the French phrase.

23. After examining their comments he had concluded that governments would probably be opposed to a provision on the lines of the original text, which made the obligation of good faith apply to the negotiating phase both in bilateral and multilateral treaties, and thus extended the obligation to States which subsequently did not associate themselves with the provisions of the treaty. Mr. Castrén had rightly emphasized that the Commission would run into difficulties if it sought to make a distinction between bilateral and other types of treaty, and he was far from convinced that in the present context such a distinction was justified in principle. It was enough to point out that such matters as tariff reductions, which had been mentioned as one of the examples, could just as well form the subject of a multilateral as of a bilateral treaty.

24. In his report he had touched on the point raised by Mr. Reuter concerning the real nature of the obligation. The question was whether the obligation extended to the negotiating phase from the moment the negotiations began, assuming that that moment could be determined, or whether it was an obligation that became operative when a State definitely associated itself with the text evolved during the negotiations. The difficulty lay in deciding whether an obligation existed independently and could of its own force bind the State before any steps had been taken whereby the State expressed its consent to be bound by the terms of the treaty.

25. If the Commission decided that the obligation of good faith during negotiations should be written into the draft, it would be necessary to set a limit for its duration—a point which he regarded as very important —and it might be found advisable to separate the provision from those relating to the subsequent steps of signature, ratification, etc. Some thought must also be given to the situation arising when entry into force was delayed, and to whether the State's responsibility would be involved if its actions during that period were such as to prevent it from fulfilling the obligations it had assumed once the treaty did enter into force. Perhaps the Commission had not been fully alive to the possible implications of article 17 and some further discussion was needed to clear up outstanding points before the article could usefully be referred to the Drafting Committee, or alternatively to the Special Rapporteur with the request that he prepare a revised text.

26. Mr. AGO said he thought that the discussion should be carried a little further in order to avoid placing the Drafting Committee in a difficult position. Mr. Reuter had rightly pointed out that article 17 contained all kinds of different ideas; but they were linked together by certain common elements, even though they called for separate treatment.

27. The first of those common elements was that in none of the situations contemplated was it right to regard the treaty as the source of the obligation, for the treaty was not yet in force. The second common element was the concept of good faith with which all the situations were associated.

28. There were three hypothetical situations. In the first, the State had expressed its final consent to be bound, but the treaty was not yet in force. Even in that case, it was not right to speak of an obligation deriving from the treaty, but the obligation of good faith envisaged could be regarded as very far-reaching between the time when the State expressed its consent and the time when, other States having expressed their consent also, the treaty came into force.

29. In the second—and most interesting—situation, the State had signed the treaty but had not yet expressed its final consent. There again it was wrong to speak of an obligation deriving from the treaty, and there was a problem of good faith. To take Mr. Reuter's example, a State negotiating a treaty under which it was to import certain goods from one group of States only, might import large quantities of those goods from other States in the interval between signing the treaty and giving its final consent; thus at the time it gave its consent, it would have reduced the scope of its obligation and to some extent have frustrated the legitimate expectations of its partners. Was there an obligation of good faith not to act in that way? Governments seemed to agree that there was, but the Commission should make sure that it was clear what was meant by the terms " *réduire à néant* " and " frustrate ".

30. In the third situation, the parties were still only at the negotiating stage. He did not think it was correct in that case to link the breach of good faith referred to with wrongful breaking off of negotiations. A State might perceive, after negotiations had been proceeding for some time, that if it continued to negotiate, it would be led into something to which it did not wish to agree; it could then break off the negotiations and be completely free, without having acted in breach of good

faith. The question to be decided was the very different one whether a State had the right to perform certain acts which would destroy the whole purpose of the negotiations while they were actually proceeding, in other words, while keeping its partner under the impression that the negotiations would be successful.

31. He then reverted to the example he had given at the previous meeting, that of negotiations between two States for the cession of installations owned by the first State in the territory of the second. The first State could refuse to negotiate, or it could break off negotiations after having begun them; but was it entitled to destroy its installations while the negotiations were proceeding?

32. He agreed that the Commission could refrain from formulating any rule on the subject, since the obligation contemplated derived from a general principle and not from the treaty itself. Nevertheless, he feared that if the Commission restricted the obligation of good faith to only one or two of the stages he had distinguished, wrong conclusions might be drawn from its action. For example, if the Commission decided that the obligation of good faith began at the moment of signature, it might be argued that it could not be broken during the negotiations. The problem was sufficiently serious to warrant the Commission's continuing to discuss it.

33. Mr. JIMÉNEZ de ARÉCHAGA said that the discussion had certainly thrown some light on the subject. He agreed with the view that the obligation to act in good faith during the negotiations did not arise from the treaty itself and could not be described as a strict legal duty whose dereliction would involve the responsibility of the State. Good faith required that while taking part in the negotiations of a treaty a State should abstain from acts that would nullify the essential purpose of the treaty. But that *bona fide* requirement had a limited duration, since it clearly could not outlast the existence of a duty to negotiate. States were normally free to withdraw from or suspend negotiations and that would put an end to the *bona fide* requirement. The exception would lie in those cases in which States were bound to negotiate either by virtue of a prior obligation or by reason of the action of an international organ.

34. He agreed with the Special Rapporteur that it might not be easy to define that *bona fide* requirement, but nevertheless the attempt should be made, either by the Drafting Committee or by the Special Rapporteur himself, so that the principle of good faith during negotiations could be retained in the draft. To drop it entirely after having proposed it might be interpreted as a denial of its existence by the Commission.

35. Mr. REUTER said that, in the example given by Mr. Ago, the State which owned the installations could break off the negotiations and destroy the installations the following night. That was why Mr. Ago had specified that the obligation of good faith existed so long as the negotiations continued. If the State destroyed its installations while it was negotiating, it would be deceiving its partner. The Commission could prohibit such an act by stating that the negotiations must be conducted honestly.

36. There were, however, many cases in which the situation was not so clear as in that example. It often happened that a State negotiated with another State and " reinsured " itself, as it were, by simultaneously negotiating on the same subject with a third State. When a private person wished to sell a house, he could grant an option for a certain number of days to a potential buyer; but he could also sell to the highest bidder. Should the Commission prohibit similar practices by States? He left it to those members who were diplomats to answer that question.

37. Mr. ROSENNE said that of course the principle that negotiations should be conducted in good faith was applicable to States just as it was to individuals, but he was not convinced that any such rule could be formulated for inclusion in a codification of the law of treaties. If anything were said on the subject, the proper place would be in article 5 and the obligation, if included, should be closely linked with the object and consequences of the treaty, even though, as others had pointed out, it did not derive from the text of the treaty itself.

38. Mr. LACHS said that, in principle, he agreed with the theory underlying article 17, but he saw some difficulty in reconciling the legal and other consequences of the requirements laid down in paragraph 1 of the Special Rapporteur's revised text. The obligation in paragraph 1 (*b*) was definitive, because the consent to be bound by the treaty had already been given by the State, whereas the obligation in paragraph 1 (*a*) was of an interim character, because at that stage there was no knowing whether the State would become bound, since the acts necessary to express its consent had not yet taken place. There was a clear difference between the two sub-paragraphs and their order ought to be reversed, so as to give first place to the more binding obligation.

39. An example of the kind of question that would need to be considered was the situation in which ten States signed a disarmament treaty in 1965 and entered into an obligation to reduce their armies by one third, the treaty to enter into force on 1 January 1966. Meanwhile one of the parties increased its army during the remaining months of 1965. Was it enough to say that the State had to refrain from any action calculated to frustrate the treaty? Was not the position that, if there was no specific provision on the subject, signatory States were under an obligation to maintain the *status quo*, so as not to invalidate the basic presumption of the agreement? If one State acted contrary to that presumption, certain rights would be acquired by the other States as a result of its action, provided that its consent to be bound had been definitely established.

40. Mr. AGO said that the idea which the Commission had tried to express in article 17 in 1962 was not conveyed by a vague formula such as " negotiation must be in good faith ". The Commission had meant to cover the very specific case in which, during the negotiations, and taking advantage of the position in which the other party consequently found itself, a State frustrated the very object of the negotiations. He was rather against the idea of using such a vague formula, which was intended to say everything and in fact said nothing.

41. Mr. TABIBI said he was becoming more and more convinced that the article, whether in its original form or in the new version proposed by the Special Rapporteur, would create more problems than it would solve. He still wondered whether it would prove possible to formulate a rule defining an obligation of good faith during the negotiating stage. At all events, if such an attempt were made, both the title and the position of article 17 would have to be changed. Possibly some elements from it could be transferred to article 5, as Mr. Rosenne had suggested, but it was unlikely that States would be willing to accept a provision imposing obligations in respect of a treaty that had not yet come into force. Nor could they be forced to enter into negotiations against their own interests.

42. Mr. ROSENNE said that his view should perhaps be elucidated further: it was that a provision concerning good faith at the negotiating stage had no place in a draft on the law of treaties. The example given by Mr. Lachs illustrated the kind of problem for which provision should be made, but no obligation could attach to States which had not taken part in the approval or adoption of the text of a treaty. For those which had done so, however, there was an obligation for a period of time, or at least until it became clear that entry into force was unlikely, not to act in a way that would frustrate the purposes of the treaty.

43. Mr. AMADO said that when the Commission had discussed the problem in 1962 Mr. Bartoš had stressed that good faith was the honour of international law. The rule of good faith was essential and fundamental. It should be stated with all possible clarity and force, and not be overloaded with details that would reduce its value. The absolute could not be made relative; hence the Commission should not seek perfection by trying to fit the general principle to the realities of political life. Unfortunately, States were guided solely by their own interests. They could not be prevented from resorting to certain manoeuvres, but they could be asked to observe the principle of good faith when pursuing their interests.

44. He hoped the Commission would be able to draft an article it could adopt unanimously. The Special Rapporteur had already sacrificed the period of negotiation. He was probably right, for it was unlikely that States would agree to bind themselves at that stage in the preparation of a treaty. If the Commission wished to revert to the idea of imposing certain obligations during the negotiations, it should follow Mr. Rosenne's suggestion and draft a separate article or section dealing with the period of negotiation; but that would be very difficult.

45. Mr. YASSEEN said that the debate had raised the question of the foundation of the obligation referred to in article 17. It was an important question, on which the Commission must take a position.

46. Inasmuch as the treaty had not yet entered into force, it was, *ex hypothesi*, idle to look for the foundation of that obligation in the treaty itself. It had been said that it lay in the confidence created by a certain situation, the legitimate expectation of the partner; but that was an explanation or social foundation, rather than the legal basis of the rule. It was also useless to resort to constructions of internal law to support the article—to say, for example, that a tacit contract preceded the final contract, for such constructions took little account of the facts of the international juridical order.

47. In his opinion, the legal basis of the obligation would undoubtedly be in article 17 itself. It was open to question whether the rule existed at present in positive international law, but from the point of view of progressive development of international law, it was desirable to formulate such a rule, which would be favourable to international transactions. If it was decided to include that rule in the convention, the scope of the obligation created should be defined.

48. It was noteworthy that very few of the governments which had commented, and very few members of the Commission, had questioned the basic idea of article 17. What was in dispute was the premise of the obligation which the Commission had established in 1962 for the negotiation stage. If the Commission wished to propose a rule that would be acceptable to a conference of plenipotentiaries, it should make the obligation begin with signature. It would no doubt be more progressive to lay down a more extensive obligation, but in making that suggestion he was adopting a practical point of view.

49. Mr. ELIAS said that the Commission should be careful not to carry the principle embodied in article 17 too far. Nearly all the comments by governments were against extending it to cover the period of negotiation; the United States Government itself recognized that the article went beyond what was generally considered to be the existing position and the United Kingdom Government had raised some important queries.

50. The examples given during the discussion of acts which were considered unjustified during negotiations would appear to involve questions of State responsibility.

51. He was opposed to the inclusion in article 17 of a provision imposing an obligation of good faith for the period of negotiation; it was obvious that such a provision was unlikely to attract sufficient support at a diplomatic conference. Nor did he favour dealing with the matter in article 5. If any provision on the subject was to be included it should be made a separate paragraph, which would be easier to delete if it encountered opposition at the diplomatic conference.

52. The CHAIRMAN, speaking as a member of the Commission, observed that it was a common practice to submit to diplomatic conferences not only alternative texts between which they could choose, but also texts from which certain provisions could be detached. The Commission might perhaps add to article 17 a paragraph concerning negotiation, which the conference could delete without changing the rest of the article.

53. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that States had accepted the general lines of article 17 to a surprising extent. No objection had been made to the provisions of the article in so far as they provided for an obligation of good faith from the signature of the treaty onwards. Perhaps the title of the article appeared to establish too strong a

link between its contents and the obligations of the treaty and should be simplified to read: " Good faith in the conclusion of treaties ". The Drafting Committee should also examine the question of the placing of the article, since it was not at all certain that its present position in the draft was satisfactory.

54. Mr. Ago had made a strong plea for the retention of an obligation of good faith during negotiations. He himself did not favour that course and he believed that the majority of the Commission did not do so either. However, if an attempt were made to formulate a rule covering the negotiations period, it would perhaps be necessary to distinguish, in regard to the duration of the obligation of good faith, between three situations: first, negotiations; secondly, signature subject to ratification; and thirdly, signature plus ratification or other act establishing consent to be bound. In the case of negotiations, the duration of the obligation would be very limited; if the negotiations did not lead to any result, the obligation necessarily fell. In the other two cases, the duration of the obligation would differ.

55. Perhaps the best course would be to leave it to the Drafting Committee to decide whether it was possible to formulate a text covering the period of negotiations. Such a text might state that, during the negotiations and so long as the negotiations continued, a limited obligation of good faith could exist. If the Drafting Committee found it possible to formulate a provision, the Commission would decide, by a vote, whether to include it or not.

56. As to the Finnish Government's comment regarding the right of withdrawal, although it might have some relevance to the contents of article 17, it undoubtedly raised a different substantive point. If the Commission wished to deal with it, it should be covered by a separate article, to be placed after article 15. There was certainly some force in the Finnish Government's argument, since if the treaty itself provided for the right of denunciation it would seem strange not to mention the possibility of withdrawal of the ratification. At the same time, it would be unwise to appear to encourage the idea that a ratification could lightly be withdrawn.

57. The Drafting Committee would no doubt take into account the point raised by Mr. Rosenne that it might not be sufficient, from the technical point of view, to take signature as the starting point, because in the case of certain treaties the act of signature was replaced by the adoption of the treaty in an organ of an international organization.

58. The CHAIRMAN suggested that article 17 and all the related problems be referred to the Drafting Committee with the comments made during the discussion.

It was so decided.[4]

59. The CHAIRMAN invited the Commission to consider next articles 23 and 24, as agreed at the close of its 787th meeting.

ARTICLE 23 (Entry into force of treaties)

Article 23

Entry into force of treaties

1. A treaty enters into force in such manner and on such date as the treaty itself may prescribe.

2. (*a*) Where a treaty, without specifying the date upon which it is to come into force, fixes a date by which ratification, acceptance, or approval is to take place, it shall come into force upon that date if the exchange or deposit of the instruments in question shall have taken place.

(*b*) The same rule applies *mutatis mutandis* where a treaty, which is not subject to ratification, acceptance or approval, fixes a date by which signature is to take place.

(*c*) However, where the treaty specifies that its entry into force is conditional upon a given number, or a given category, of States having signed, ratified, acceded to, accepted or approved the treaty and this has not yet occurred, the treaty shall not come into force until the condition shall have been fulfilled.

3. In other cases, where a treaty does not specify the date of its entry into force, the date shall be determined by agreement between the States which took part in the adoption of the text.

4. The rights and obligations contained in a treaty effective for each party as from the date when the treaty enters into force with respect to that party, unless the treaty expressly provides otherwise.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that article 23 had not attracted much comment from governments and new proposals had been comparatively few.

61. To take account of the Japanese Government's comment on paragraph 2 (A/CN.4/175, section I.11), he proposed that the words " without the States concerned having agreed upon another date " be added at the end of paragraph 2 (*a*). The purpose of that addition was to give recognition to the freedom of States in the matter.

62. To take account of the suggestion by the Swedish and United Kingdom Governments that it should be made clear that paragraph 3 embodied a residuary rule, he had revised that paragraph to read:

3. In other cases where a treaty does not specify the date of its entry into force, the date shall be the date of the signature of the treaty or, if the treaty is subject to ratification, acceptance or approval, the date upon which all the necessary ratifications, acceptances or approvals shall have been completed, unless another date shall have been agreed by the States concerned.

63. He suggested that the proposal for a new article made by the Government of Luxembourg (A/CN.4/175, section I.12) be left aside for the time being, since its subject-matter was more relevant to article 55.

64. Mr. TABIBI said that the comments of governments on article 23 were mostly favourable. He had the impression, however, that it should be possible to shorten the text and combine the provisions of paragraphs 1 and 2.

65. He was opposed to the insertion of the new article proposed by the Government of Luxembourg, which

[4] For resumption of discussion, see 812th meeting, paras. 97-118.

could be interpreted as a sort of colonial clause, and agreed with the Special Rapporteur that its contents were more relevant to article 55 than to article 23.

66. Mr. ELIAS said he was in favour of retaining article 23 almost in its entirety. Paragraph 2 (*c*) should be dropped, however, because it stated a self-evident fact. As to the Special Rapporteur's proposed new paragraph 3, he doubted whether it was a real improvement. He would like some slight amendment, but saw no reason to go so far to meet the views of the Swedish and United Kingdom Governments. Paragraph 4 should be retained : it stated the legal effects of entry into force.

67. He agreed that the new article proposed by the Government of Luxembourg should be discussed in connection with article 55 rather than article 23.

68. Mr. TUNKIN said he had some doubts regarding a number of points in paragraph 2, on which he would be grateful if the Special Rapporteur could give some explanations.

69. He did not believe that the situation referred to in paragraph 2 (*a*) arose at all frequently in practice. Moreover, the final proviso " if the exchange or deposit of the instruments in question shall have taken place " governed the entry into force, so that it was difficult to see what effect to attach to the previous words " it shall come into force upon that date ". If, as he believed, the operative provision was in the concluding proviso, the matter would appear to be already covered by paragraph 1, which stated that a treaty entered force " in such manner and on such date as the treaty itself may prescribe ". Similar considerations applied to paragraph 2 (*b*), which stated that the same rule applied where a treaty, which was not subject to ratification, acceptance or approval, fixed a date by which signature was to take place.

70. The situation referred to in paragraph 2 (*c*) was clearly covered by the rule in paragraph 1.

71. Paragraph 3, whether in its original form or in the new formulation proposed by the Special Rapporteur, stated a useful rule and should be retained.

72. Apart from that, much of article 23 was descriptive and went into details somewhat remote from reality.

73. Mr. AGO said that in paragraph 2 (*a*) the Commission had provided for the case in which the treaty fixed the date by which ratification was to take place; in those circumstances, if the treaty was ratified earlier, it would enter into force on the date on which ratification took place, not on the final date for ratification laid down in the treaty.

74. Without committing himself as to the drafting, he thought that the Commission should prefer the revised text of paragraph 3 proposed by the Special Rapporteur. The basic rule was certainly that if the date of entry into force was not specified in the treaty itself, the treaty would enter into force automatically when the parties gave their consent. The text adopted in 1962, appeared to make entry into force depend on a further agreement between the parties, which was wrong.

The meeting rose at 6 p.m.

790th MEETING

Tuesday, 25 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tunkin, Mr. Verdross, 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 23 (Entry into force of treaties) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 23.

2. Sir Humphrey WALDOCK, Special Rapporteur, said he could not reply in detail to the questions put to him by Mr. Tunkin at the previous meeting,[2] because he had not had time to look up examples of the types of treaty which paragraph 2 was designed to cover; he could, however, provide some explanation of how that paragraph had taken shape. In his first report, Sir Gerald Fitzmaurice, the previous Special Rapporteur on the law of treaties, had inserted more elaborate provisions in article 41, paragraph 3,[3] and had explained in his commentary[4] that it seemed necessary to try to propound a rule *de lege ferenda* for the not uncommon case where a treaty provided that the ratifications were to be exchanged or deposited by a certain date, but said no more, and when the date arrived the ratifications had not been exchanged, or not all of them had been deposited. That situation was not uncommon for treaties concluded by a small group of States, but was less frequent for multilateral treaties. When the point had been discussed at the fourteenth session the existence of such treaties had not been challenged, but the Commission had decided not to go into so much detail.

3. The real problem was whether or not the Commission wished to formulate rules *de lege ferenda* that would depend upon making certain assumptions about the intention of the parties when no provisions concerning entry into force had been written into the treaty itself. Should the Commission decide against that course, article 23 could be greatly simplified.

4. Mr. TUNKIN said that after further reflection he had some suggestions to make concerning article 23. Paragraph 1 was acceptable as it stood. Paragraph 2 could be dropped, as its content could be covered in

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[1] See 789th meeting, para. 59.

[2] *Ibid.*, paras. 68 *et seq.*

[3] *Yearbook of the International Law Commission, 1956*, Vol. II, p. 116.

[4] *Ibid.*, p. 127.