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Summary record of the 790th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1965, vol. I

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.

paragraphs 1, 3 and 4. The revised text proposed by the Special Rapporteur[5] could form the basis for the new paragraph 3, but some modification would be necessary. For example, the reference to " all the necessary ratifications, acceptances or approvals " was extremely vague, if not incomprehensible. The United Kingdom Government's suggestion (A/CN.4/175, section I.20) that the rule for treaties not covered by the original paragraphs 1 and 2 should be that they entered into force on the date of signature, or, if subject to ratification, acceptance or approval, when ratified, accepted or approved by " all the participants ", would make the meaning much clearer.

5. With regard to the Special Rapporteur's revised text of paragraph 3 and his proposal concerning entry into force on the date of signature in certain circumstances, he wondered what would be the position if no actual date or time-limit for signature had been set in the treaty. Presumably the same rule could be applied, namely, that the treaty entered into force once it had been signed by all the participants. In the other case, where a treaty did specify a time limit for signature but said nothing about entry into force, the rule might be that it entered into force on the date when the time-limit expired. The Special Rapporteur's proposal, if revised on those lines by the Drafting Committee, might be acceptable.

6. Paragraph 4 could be retained as it stood.

7. Mr. CASTRÉN said that, in principle, he supported the ideas embodied in article 23. The starting point stated in paragraph 1 was correct; the first thing to do was, of course, to consult the provisions of the treaty itself concerning its entry into force.

8. The other paragraphs contained residuary rules for application when the treaty was silent; but some of them were so obvious that they need hardly be mentioned expressly: the Commission itself had recognized, in its commentary on the 1962 draft, that the condition laid down in paragraph 2 (*c*) " must of course also have been fulfilled " and that the rule contained in paragraph 4 was " undisputed ".[6] Paragraph 2 (*c*) could therefore be deleted, especially as its content was covered by the general rule in paragraph 1.

9. Paragraph 4 was perhaps justified in that it ruled out the idea that ratification might have retroactive effect from the date of signature even where the treaty itself did not expressly so provide.

10. It would be easy to combine sub-paragraphs (*a*) and (*b*) of paragraph 2, and that would make it possible to avoid using the expression " *mutatis mutandis* ", which had already been criticized in another context.

11. The Special Rapporteur's new proposal for paragraph 3 seemed to be an improvement, but it contained the vague expression " the States *concerned* "—used, it was true, in several other articles.

12. With regard to the proposal by the Government of Luxembourg (A/CN.4/175, section I.12) that a new article should be inserted after article 23, emphasizing the obligation of the States Parties to a treaty to secure its application in full in their territories, he shared the view of the Special Rapporteur and other speakers that the proposal should not be adopted, or that consideration of it should at least be deferred until the 1966 session.

13. Mr. ROSENNE said that his views accorded closely with those of Mr. Tunkin. He suggested that the Drafting Committee should consider whether the reference to the " manner " of entry into force ought to be retained in paragraph 1, since the remainder of the article really dealt with the " date " of entry into force.

14. Paragraph 2 could be dropped if a revised paragraph 3 covered the case of treaties which contained no provision as to the time of entry into force; the new text would need to be prefaced by some such wording as " whenever a treaty does not specify . . . ". Paragraph 4 could be retained.

15. With regard to entry into force on signature, it was interesting to note from the United Nations Treaty Series the increasing practice, particularly with bilateral treaties or treaties between a small group of countries, of performing the act of signature in different places, sometimes very far apart, and on different dates. In such cases entry into force should take effect on the latest of the various dates.

16. Mr. RUDA said he found paragraphs 1 and 4 of article 23 acceptable, but paragraph 2 was unnecessary. The analysis of its provisions made by Mr. Tunkin had shown that it dealt with a number of cases in which the treaty itself specified, albeit in an indirect manner, the date on which it would enter into force. Those cases were therefore already covered by paragraph 1, so paragraph 2 could be dropped.

17. Paragraph 3 dealt with cases in which the treaty did not specify the date of entry into force, and the Commission had two proposals before it. The first was to lay down, as suggested by the Special Rapporteur, that the treaty entered into force when the necessary ratifications were received. That formulation, however, would not solve the problem, because it merely referred the matter back to the provisions of the treaty itself, which would determine the " necessary " number of ratifications. Thus the treaty would itself indirectly lay down the date of entry into force.

18. He himself preferred the second proposal, suggested by the United Kingdom Government, that paragraph 3 should specify that the treaty entered into force when it had been ratified, accepted or approved by all the participants. Caution would have to be exercised in drafting the provision, however, because it would have some bearing on the matter of reservations.

19. Mr. BRIGGS said that article 23 was an important one and ought to be retained. Paragraph 1 was acceptable and he saw no particular objection to mentioning the manner as well as the date of entry into force. It was also desirable to include detailed provisions to cover cases in which the date of entry into force had not been specified in the treaty itself.

20. It was arguable that the original text of paragraph 2 (*a*) and (*b*) was not sufficiently comprehensive and

[5] See 789th meeting, para. 62.

[6] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 182.

did not cover such a case as that of the 1894 Treaty between Nicaragua and Honduras which, to the best of his recollection, was subject to ratification, but contained no express provision as to the date of entry into force, though it did stipulate that instruments of ratification should be exchanged within sixty days of the constitutional requirements in respect of ratification having been met. There were other treaties that set no precise date for ratification, and, while subject to ratification, established no date for their entry into force or for the exchange or deposit of instruments of ratification.

21. He accordingly wished to propose an alternative text as a substitute for paragraphs 2 and 3, and the revised paragraph 3 suggested by the Special Rapporteur. The text he proposed read:

" 2. Where the treaty does *not specify* the date of its entry into force:

(*a*) If the treaty provides for ratification, acceptance or approval as a condition precedent to its entry into force, the treaty shall *not* enter into force prior to the date upon which all *necessary* instruments of ratification, acceptance, or approval shall have been exchanged or deposited;

(*b*) If the treaty is intended to enter into force upon signature, it shall *not* enter into force prior to the date upon which all the necessary signatures have been appended. "

22. He had framed the paragraph in negative form as a means of retaining the useful elements in the original paragraph 2 (*a*) and (*b*). In his new sub-paragraph (*a*) he had sought to circumvent the difficulty arising from the Special Rapporteur's new draft of paragraph 3, namely, that signature might take place on different dates thus creating uncertainty or controversy as to when entry into force actually took place.

23. Should the Commission favour the Special Rapporteur's suggestion concerning " necessary " ratifications, acceptances or approvals, it would not have to choose between the requirement that a certain proportion of the instruments had to be deposited in order to bring a treaty into force, or that all of them had to be deposited. In trying to frame a residuary rule for cases in which the treaty was silent, it would be difficult to opt for the second alternative, particularly where multilateral treaties with a large number of signatories were concerned. On that point his text was deliberately vague, as was the Special Rapporteur's formula " necessary ratifications ". The wisest course was probably to leave the matter open to interpretation.

24. In his proposed new text for paragraph 2 (*b*) he had attempted to cover the case in which the date for signature was fixed in the treaty itself, but no stipulation was made concerning the moment of entry into force, and the case in which the treaty provided merely that it should be signed.

25. As to paragraph 4 of the original text, he questioned whether it was at all relevant to the subject of entry into force, because it was really concerned with the point at which a particular State became bound by the terms of the treaty, which, in his opinion, was the moment when it became a party. That being so, he proposed that paragraph 4 be re-drafted to become the new paragraph 3, reading:

" 3. The rights and obligations stipulated by a treaty become binding on a State as from the date when that State becomes a party to the treaty. "

26. The Commission might ultimately decide to incorporate a provision of that kind in a separate article, in which case the wording could be amplified to include some reference to the manner of entry into force.

27. Mr. LACHS said that, as article 23 dealt with entry into force in a general way, the reference to " manner " in paragraph 1 could stand.

28. But the main problem was how to deal with the contents of paragraphs 2 and 3. At the previous meeting he had been tempted to agree with Mr. Elias that a closer link should be established between paragraphs 2 (*a*) and 2 (*b*) of the original text, or, better still, that the whole of paragraph 2 should be omitted. He now saw considerable merit in the Special Rapporteur's new draft of paragraph 3 and in Mr. Briggs's proposal, the sub-paragraphs of which were acceptable. Of course, if something on the lines of Mr. Briggs's text were approved, the words " in other cases " in the Special Rapporteur's new paragraph 3 would have to go.

29. In regard to the latter text, the word " necessary " qualifying the words " ratifications, acceptances or approvals " raised serious doubts, because it was imprecise. The requirements as to the date, and as to the number, or possibly even the category, of States that had to deposit instruments before a treaty could come into force differed widely. If the parties refrained from laying down any special conditions on entry into force in the treaty itself, there was, if the present text was accepted, a strong presumption that their intention was that only ratification, acceptance or approval by *all* the participants could bring the treaty into force. The point was of crucial importance.

30. The final clause " unless another date shall have been agreed by the States concerned ", in the Special Rapporteur's revised text of paragraph 3, was redundant, as the point was already covered in paragraph 1.

31. Mr. Briggs had raised some very pertinent points about the methods adopted by States to bring a treaty into force. The Commission should devise an objective rule based on the treaty itself, rather than a subjective one in terms of action by the parties; examples were to be found in article 74 of the Universal Postal Convention of 5 July 1947[7] and article 49 of the International Telecommunication Convention of 2 October 1947.[8] For sometimes States failed to fix a date for the entry into force of a treaty and additional instruments had to be signed laying down conditions for entry into force, as had been done in the case of the Pan-American Sanitary Code of 1924.[9]

32. He favoured Mr. Briggs's proposal for a revised paragraph 4 that would become the new paragraph 3, because the article was concerned with the entry into

[7] *British and Foreign State Papers*, Vol. CXLVIII, p. 556.

[8] United Nations *Treaty Series*, Vol. 193, p. 241.

[9] League of Nations *Treaty Series*, Vol. LXXXVI, p. 44 (Code). Vol. LXXXVII, p. 458 (Additional Protocol).

force of the treaty itself, not with the moment of its entry into force for individual States. Perhaps a separate article on the subject was required : the original paragraph 4 certainly had no place in article 23.

33. Mr. YASSEEN thought the article should contain three elements, corresponding to the methods by which entry into force was regulated. First, it could be the treaty itself that prescribed the date, manner and conditions of entry into force. Secondly, if the treaty was silent on the subject, there was another method : that of a special agreement between all the parties. Thirdly, if the treaty was silent and the parties had not come to any agreement on the matter, a residuary rule was needed; it was the Commission's delicate task to formulate such a rule.

34. Paragraph 1 clearly stated the first method, which applied where the treaty gave the necessary particulars. Perhaps it should refer to the " conditions " as well as the " manner " of entry into force, in so far as the second term might not cover the first, especially in the English text.

35. Paragraph 2 should be deleted, for it only added details which could easily be covered by paragraph 1. Of all those details the only case which was fairly common in modern practice was that referred to in sub-paragraph (*c*), where a treaty entered into force when it had been signed or ratified by a certain number of the parties. But if the word " manner " covered the idea of " conditions ", or if a reference to " conditions " were added, then paragraph 1 would cover all the cases contemplated in paragraph 2.

36. The second method—that of a special agreement on the entry into force of a treaty already concluded—should be clearly stated, for it might happen that the treaty was silent but the parties later agreed on certain details of the manner in which the pre-existing treaty should enter into force.

37. There remained the third case, for which a residuary rule was needed. His view was that the Commission should go back to the general principles of the law of treaties, the basic rule of which was still that of unanimity. He therefore approved of the new text of paragraph 3 proposed by the Special Rapporteur. The last phrase would be omitted and, if the Commission wished to cover the case it referred to, could be made into a separate sub-paragraph providing for the possibility of a special agreement to settle the date and manner of entry into force of a treaty that already existed.

38. With regard to paragraph 4, he shared the doubts expressed by Mr. Briggs and Mr. Lachs. True, the rule stated in that paragraph was correct and unassailable : the rights and obligations arising under a treaty became effective for each party as from the date when the treaty entered into force with respect to that party, but that was quite a different matter from the entry into force of the treaty. Paragraph 4 was therefore out of place, and its subject-matter ought perhaps to be dealt with in a separate article.

39. Mr. AMADO said that the preceding speakers had raised most of the points he had had in mind. One that remained to be cleared up, however, was whether the French expression " *suivant les modalités* " really corresponded to " in such manner " and to " *en la forma* ".

40. None of the speakers after Mr. Rosenne had commented on the possibility that a treaty might have different dates of signature. He would like some clarification on that point, although there was no lack of rules of interpretation or rules based on common sense.

41. In his opinion, too, the word " necessary " in the revised text of paragraph 3 proposed by the Special Rapporteur was superfluous and the phrase " unless another date shall have been agreed by the States concerned " was tautological. He would prefer the expression " *fixée par le traité* " to " *fixée par les dispositions du traité* ".

42. As to paragraph 4, he approved of Mr. Briggs's suggestions : for what was the use of saying that a State was bound when it was bound. He did not even think it necessary to include that paragraph elsewhere.

43. Mr. REUTER said that paragraph 1 would be clearer if the order of the references to the date and the manner, which was purely accessory to the date, was reversed. The term " *modalités* " was perhaps broader than the words used in the English and Spanish texts. What the drafters had meant to convey was that the date was closely connected with the carrying out of certain processes.

44. The CHAIRMAN, speaking as a member of the Commission and referring to the question raised by Mr. Rosenne, said he knew of cases in which there had been a difference of several years between two dates of signature of the same treaty by different States.

45. Mr. JIMÉNEZ de ARÉCHAGA said that, as the discussion had shown, there was more in article 23 than was immediately apparent. Paragraph 1 contained the fundamental rule and he was not altogether convinced that Mr. Rosenne was right in wishing to delete the reference to the manner of entry into force which the treaty itself might prescribe. In his view, by the word " manner " the draft contemplated specific provisions such as that in paragraph 2 (*c*), and it might perhaps be better to replace that word by " conditions " as Mr. Yasseen had suggested. Paragraph 2 (*c*) could then be relegated to the commentary as an illustration of the conditions which the parties might prescribe in the treaty for its entry into force, such as a specific number of ratifications, or a minimum number of a specified category of States. The point about the provisions on entry into force being agreed upon subsequently by the parties, which the Special Rapporteur had covered at the end of his new paragraph 3, should perhaps be transferred to paragraph 1.

46. In his view, it was vital for the Commission to formulate residuary rules to cover the cases dealt with in paragraphs 2 and 3, because they provided solutions which were difficult to reach after disagreement between the parties or at least a divergence of view had arisen. The original purpose of those two paragraphs had been to provide for two different cases : where the treaty was entirely silent about entry into force, and where it set some time-limit for signature or ratification, though there was no specific provision on entry into force.

47. The Commission would have to decide whether it wished to follow the line taken by Sir Gerald Fitzmaurice, the previous Special Rapporteur, and insert two different subsidiary rules; first, that when a treaty was entirely silent the parties could be presumed to have intended that signature or ratification by all the participants was needed to bring it into force, and secondly, that when a final date for signature or ratification was laid down in a treaty, the intention was presumed to be that it should enter into force on that date for the States which by that date had signed or ratified it.

48. Mr. PESSOU said he thought that all the situations described by the preceding speakers were already covered by article 23. It remained to be decided whether the difficulties arising lay in the drafting or the substance.

49. In his opinion, the merging of paragraphs 2 (*a*) and 2 (*b*) suggested by some members would not be very satisfactory, because they related to two entirely different cases: multilateral treaties and agreements in simplified form.

50. The essential paragraph was still paragraph 3, which might be amended to read: " The date of entry into force of a treaty shall be determined by agreement between the States which took part in the adoption of the text of that treaty, after the exchange or deposit of the instruments of ratification or accession ". So as to call things by their proper names and avoid confusion, paragraph 2 (*b*) would read: " The same rule applies *mutatis mutandis* when a treaty is drawn up in simplified form ". Paragraph 2 (*c*) would then read: " In cases where the entry into force of multilateral treaties depends on the number of participants, such treaties shall not enter into force until the prescribed quorum has been obtained ". Those were correct rules, covering all the situations in question.

51. Mr. ROSENNE said that the Drafting Committee would need to consider carefully Mr. Lachs's suggestion that the final proviso in the Special Rapporteur's new text of paragraph 3 could be dropped because the point was covered in paragraph 1. He himself was not at all sure that that was so, because paragraph 1 dealt exclusively with the case in which the treaty itself contained provisions concerning entry into force, whereas the proviso in question referred to the opposite case, where the treaty was silent and the parties subsequently and independently reached some form of agreement on entry into force. Possibly the latter case could be covered in paragraph 1, but careful drafting would be needed.

52. Since paragraph 1 contained the fundamental rule, it should be as precise and succinct as possible. Certainly Mr. Reuter's suggestion for reversing the order of the references to the manner and date of entry into force would make for greater clarity.

53. Mr. LACHS, replying to Mr. Rosenne, said that in his view the real subject of paragraph 1 of the draft was the manner in which the parties expressed their will as to the date of entry into force, and they did so either by means of an express provision in the treaty itself or in some other way outside the treaty. But surely the main difficulty lay in providing for the case in which the parties had made no definite stipulation and their intention was not clear.

54. He still thought that the point dealt with in the proviso at the end of the Special Rapporteur's new paragraph 3 was already covered in paragraph 1.

55. Mr. ROSENNE said that there was probably no substantial disagreement between himself and Mr. Lachs, but great care would have to be exercised in the drafting of paragraph 1.

56. Mr. RUDA said he supported Mr. Reuter's suggestion that in paragraph 1 the date of entry into force should be mentioned before the manner in which it took place. The Spanish text was defective in that the term " *forma* " did not mean " manner ". Nor was it possible to speak of " *modalidades* ", because that term could only be applied to the performance of obligations, not to the entry into force of an instrument. He therefore suggested that the Spanish text should read, approximately:

" . . . *en la fecha y cuando se cumplan las condiciones que el mismo tratado prescribiere* ".

57. Mr. AMADO said he distrusted the word " conditions " to which several members had referred. In law, that word was fraught with meaning and it should be used advisedly.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that, in the main, the discussion had centred on paragraphs 1, 2 and 3, the main problem being, as Mr. Jiménez de Aréchaga had pointed out, whether or not residuary rules should be formulated. When drafting article 23 at its fourteenth session, the Commission had made certain presumptions about the intentions that could be attributed to the parties in certain circumstances, when no provision existed in the treaty itself concerning entry into force and when there was no subsequent agreement on the matter. Perhaps on further consideration the Commission would not wish to go as far as it had done in the 1962 text.

59. The proposals he had submitted in his first report[10] had been very detailed precisely because of the many different kinds of situation in which the parties failed to give any precise indication of intention on which any presumptions could be based. He gathered from the present discussion that the majority now seemed to be in favour of reducing the scope of the article, retaining the essence of paragraph 1 and combining it with some residuary rules. Mr. Jiménez de Aréchaga had rightly emphasized that it would not be entirely satisfactory to formulate a residuary rule without making certain distinctions, at least between the situation when no indication of intention could be discerned and that when some indication did exist. In the former case, the presumption that the parties intended the treaty to come into force once all the participants had signed was justifiable. If that line of approach were adopted the main problem would be one of drafting.

60. He had no objection to changing the order in paragraph 1 so as to mention the date before the " manner " of entry into force, a term which was intended

[10] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 68 *et seq.*

to cover such details as place of signature etc. However, the Commission would need to be cautious about substituting the word " conditions " because, as Mr. Amado had said, that word had special legal connotations.

61. As to whether the reference to subsequent agreement between the parties concerning entry into force should be transferred from his new text of paragraph 3 to paragraph 1, there would be no strong objection provided that the possibility was mentioned. If there were any uncertainty on the matter owing to an omission in the treaty itself, it would be natural for the parties to consult each other at a later stage. Perhaps the point would have to be repeated in a new paragraph 3 designed to deal in general terms with the situation when the treaty was silent or when there had been disagreement between the parties. It was important to bring out the real difference between the situation when an express provision on entry into force which left no room for argument had been inserted in the treaty and the situation when a subsequent agreement had become necessary, because the latter situation could give rise to controversy as to whether an agreement had in fact been reached.

62. He assumed from the discussion that most members wished to drop paragraphs 2 (*a*) and 2 (*b*) which, although not particularly elegantly drafted, did contain some useful elements as to the presumptions which could be made when a treaty was silent. The United Kingdom comment on paragraph 3, which he regarded as justified, was based on the assumption that paragraphs 2 (*a*) and 2 (*b*) would be retained.

63. In view of the turn which the discussion had taken, it was perhaps salutary to note that the United States view was that the article was clear and reflected accepted present-day practices that were recognized as desirable.

64. Some members wished to eliminate paragraph 4, but he was not convinced that that was a good idea, because of the difference between the entry into force of a treaty for a party and the date on which a party became bound by the terms of the treaty, in other words, the moment from which the obligations imposed by the treaty began to operate. That nuance should not be lost sight of and had been carefully brought out in article 56, dealing with the application of a treaty in point of time (A/CN.4/L.107). An obvious example of the importance of that distinction was the European Convention of Human Rights.[11]

65. Article 23 as a whole, together with all the suggestions made during the discussion, could, he thought, now be referred to the Drafting Committee with the request that it seek a means of combining paragraphs 2 and 3 in some abbreviated form and retaining paragraph 4 with certain drafting changes.

66. Mr. BRIGGS said he would have no objection to article 23 being referred to the Drafting Committee, but he was not altogether convinced by the Special Rapporteur's reasons for retaining paragraph 4, as he found it difficult to accept the distinction he had drawn. There were several relevant dates such as that referred to in article 11, paragraph 3, namely, the moment when a State established its consent to be bound, but was not in fact bound by the provisions of the treaty because the treaty had not yet entered into force, and sometimes the provisions of a treaty did not become immediately operative even on its entry into force. An example of the latter case was the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,[12] the provisions of which presumably did not become operative until war broke out.

67. In article 56 the Commission had included the objectionable phrase " before the date of entry into force of the treaty with respect to that party " and he hoped such wording need not be used in article 23. He had no objection at all to the content of paragraph 4; he had only questioned whether it properly belonged to an article on entry into force. Surely the matter should be dealt with in a separate article relating to the date on which States became bound by the terms of a treaty, in which some indication would be given that the provisions might not be operative for the parties until the time stipulated in the treaty itself.

68. The CHAIRMAN, speaking as a member of the Commission, said he remembered having taught that the Conventions on the Laws of War were a typical example of positive treaty law in the latent state. An examination of the Geneva Conventions of 1949 showed that they were applicable even in peacetime, because the Parties had an obligation to make certain preparations which had to be made in peacetime and were required to inform their armed forces of the provisions of the conventions.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the point raised by Mr. Briggs might well prove to be an argument about words. It was true that the treaty entered into force as an instrument, but he could see no objection to using the expression " enter into force with respect to a party ". That was in fact what happened when a particular party gave its consent to be bound by a treaty. He was not suggesting that there was a treaty, but it was quite proper to refer to the entry into force of the treaty with respect to the party concerned. The Commission had certainly had no objection to using that phrase, either in 1962 or in 1964, and he still believed that it was appropriate.

70. The CHAIRMAN suggested that the Commission should refer article 23 to the Drafting Committee without any precise instructions, asking it to take account of all the comments and proposals made and of the conclusions stated by the Special Rapporteur.

It was so decided.[13]

ARTICLE 24 (Provisional entry into force)

Article 24

Provisional entry into force

A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force

[11] United Nations, *Treaty Series*, Vol. 213, p. 222.

[12] *Ibid.*, Vol. 75, p. 31.

[13] For resumption of discussion, see 814th meeting, paras. 31-37.

provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.

71. The CHAIRMAN invited the Commission to consider article 24.

72. Sir Humphrey WALDOCK, Special Rapporteur, said that article 24, on provisional entry into force, had been introduced in order to cover a fairly common contemporary State practice. The proposed text had attracted only three government comments (A/CN.4/175). The Japanese Government had found that the precise legal nature of provisional entry into force was not clear and had suggested that, unless it could be better defined, the article should be dropped. The United States Government, while recognizing that the article corresponded to a contemporary practice, had questioned whether there was any need to include it in a convention on the law of treaties. The Swedish Government, while making some useful comments on the formulation, had not expressed any objection to the article.

73. On the assumption that the Commission would wish to maintain an article of that kind, he had reworded it so as to take the Swedish Government's comments into account. The new text read :

A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it.

74. Mr. REUTER said he agreed with the Special Rapporteur and would have no objection to a provision on the lines of article 24.

75. Nevertheless, by making a small drafting amendment, which might also affect the substance, the Commission could propose to governments a formula that would better meet the points they had made. The expression " provisional entry into force " no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a treaty. Entry into force might depend on certain conditions, a specified term or procedure, which dissociated it from the application of the rules of the treaty. The practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty. If it used some such wording as " A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force ... its rules shall be applied provisionally for a specified period ", the Commission would not be taking a position on the legal source of such application, but would avoid using an expression which was a contradiction in terms.

76. Mr. JIMÉNEZ de ARÉCHAGA said that from a logical point of view he would agree with Mr. Reuter that there was some inconsistency in the institution of provisional entry into force. The practice was a common one, however, and provided a way out for a State whose constitutional requirements for ratification caused delay in bringing treaties into force. In cases of that sort, the State would inform the other party of the position. For example, in the case of air transit agreements, implementation was in the hands of the executive authorities, who could accept provisional entry into force pending legislative approval for ratification.

77. As to drafting, he accepted the new formulation by the Special Rapporteur, which covered the case where it became clear that one of the parties would not ratify the treaty. However, that formulation was more suited to bilateral treaties; a multilateral treaty would not necessarily lapse for the other parties concerned.

78. Mr. CASTRÉN said that, in spite of the criticism of one government, article 24 was useful and should stand as a separate article in the draft. On the whole he was in favour of the revised version proposed by the Special Rapporteur partly in order to satisfy certain governments.

79. It appeared, however, that the Special Rapporteur had gone further than the Swedish Government required; that Government, referring to the commentary which the Commission had appended to the article in 1962,[14] had merely suggested that the provisional entry into force of a treaty should also terminate if it became clear that the treaty was not going to be ratified or approved by *any* of the parties.[15] According to the Special Rapporteur's revised version, all that was needed to terminate the provisional entry into force was that it should become clear that *one* of the parties was not going to ratify or approve the treaty.

80. That formula was, in fact, much closer to the one proposed by the Netherlands Government (A/CN.4/175/Add.1). But although the Netherlands proposal was more precise in saying that provisional entry into force terminated if one of the States notified the other State or States that it had decided not to be party to the treaty, he thought that it, too, went too far.

81. Mr. VERDROSS endorsed Mr. Reuter's comments. What was involved was obviously the application of some of the provisions of the treaty, not the treaty as a whole and certainly not the final clauses.

82. He had no objection to the idea underlying article 24, but thought that the article should be drafted rather differently; it might provide, for instance, that the rules contained in the treaty could be applied provisionally until a date agreed upon by the parties.

83. The CHAIRMAN, speaking as a member of the Commission, agreed that the final clauses were affected by the arrangements for provisional application of the treaty. It sometimes happened, however, that the whole

[14] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 182.

[15] See 791st meeting, para. 13.

treaty was applied provisionally: for instance, treaties on judicial assistance. Moreover, such provisional application sometimes continued for a long time.

84. Mr. ELIAS said he could see no reason why article 24 need be retained. The issues which had been raised were not likely to be settled, either by the original formulation or by the new text proposed by the Special Rapporteur, and in any case they appeared to be covered by paragraphs 1 and 3 of article 23 in the form proposed by the Special Rapporteur during the discussion.

85. Mr. RUDA said that article 24 raised two questions of substance. The first was whether or not the article should be included in the draft. He admitted that he had at first been attracted by the Japanese Government's argument that article 24 could be dispensed because the idea it expressed was already covered by article 23, paragraph 1. For practical reasons, however, he agreed with the Special Rapporteur that it would be convenient to retain article 24.

86. The second question of substance was the time when the provisional application came to an end. First, it terminated when the treaty entered into force definitively, as a result of ratification or approval; that was stated in the Special Rapporteur's revised text. Secondly, when that condition was not fulfilled, two solutions were possible: the provisional application would terminate either when the parties agreed to terminate it, as provided in the Commission's 1962 text; or, as the Special Rapporteur now proposed in compliance with the Swedish Government's suggestion, when " it shall have become clear that one of the parties will not ratify or, as the case may be, approve it ". He definitely preferred the latter solution.

87. In his own experience he had met with the case of an agreement between Argentina and a Great Power, which had entered into force provisionally upon signature. As a result of a change of government, Argentina had wished to be released, and the question had arisen whether the agreement of both parties was needed to terminate the provisional application. From the point of view of legal theory, so long as definitive consent had not been given, each of the parties should remain free to withdraw from the treaty and, consequently, to terminate its provisional application.

88. So far as drafting was concerned, the Special Rapporteur's new text was, on the whole, satisfactory, though he would like him to explain the meaning of the word " otherwise " in the first sentence. Could the agreement of the parties take any other form than the treaty itself?

89. Finally, it should be possible, without affecting the substance, to simplify the wording for the article, which at present introduced the idea of provisional entry into force three times.

90. Sir Humphrey WALDOCK, Special Rapporteur, explained that the word " otherwise " was intended to cover the case in which there was no provision on the subject in the treaty itself, but the parties made a separate agreement, for example, by an exchange of notes. That agreement would itself constitute a treaty, but would not be the treaty whose provisional entry into force was in question. It would perhaps be necessary to improve the drafting, so as to avoid any risk of misunderstanding.

91. Mr de LUNA said he was in favour of retaining article 24, subject to drafting changes, particularly in the Spanish text. At the same time, he agreed with Mr. Reuter about the inappropriateness of the expression " provisional entry into force ".

92. From his experience of treaty-making, he could say that the method referred to in article 24 was a much more elegant means of overcoming the difficulties raised by constitutional requirements for ratification than the method of using a special terminology so as to avoid the terms " treaty " and " ratification ".

93. Four different cases were to be found in the practice of States. The first was where the treaty entered into force immediately upon signature, but was subject to ratification by the parties; in the event of a decision not to ratify it, it ceased to be in force. However, it was not all uncommon for States to leave the matter pending and not to give a decision one way or the other; some treaties signed by Spain had remained provisionally in force for over twenty years in that way. The second case was where the treaty entered into force immediately, but was subject to ratification and contained a provision to the effect that it would lapse in the event of non-ratification within a specified period of time. The third case was that contemplated by the Special Rapporteur: a treaty which entered into force immediately, but was subject to a condition or time-limit. The fourth was that of provisional entry into force of part of the treaty.

94. Mr. ROSENNE pointed out that Article 102 of the Charter laid down the requirement of registration for " every treaty and every international agreement *entered into* by any Member of the United Nations ". However, the regulations to give effect to that provision, which had been adopted by the General Assembly in 1946 and were annexed to the Commission's 1962 report,[16] laid down, in article 1, paragraph 2 that " Registration shall not take place until the treaty or international agreement has *come into force* between two or more of the parties thereto ". When the codification of the law of treaties was completed, the General Assembly would have to consider re-examining that paragraph.

95. With regard to the wording of article 24, he was prepared to accept the Special Rapporteur's proposal, which reflected the views of the Commission when it had adopted the article on provisional entry into force—then article 21—at its 668th meeting.[17] It might perhaps be possible, however, to shorten the text of the first sentence to read, approximately: " The parties may agree that, pending its definitive entry into force, the treaty shall come into force provisionally, in whole or in part ... " The reference to the agreement of the parties would also cover the case where the treaty itself provided for provisional entry into force.

96. Mr. EL-ERIAN said he maintained the view he had expressed in 1962, that article 24 should be retained. The inclusion of a clause on provisional entry into force

[16] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 194.

[17] *Op. cit.*, Vol. I, p. 259.

in a treaty served a useful purpose where the subject matter was urgent, the immediate implementation of the treaty was of great political significance, or it was psychologically important not to wait for completion of the lengthy process of compliance with constitutional requirements.

97. The question whether provisional entry into force had its source in the treaty itself or in a subsidiary agreement was a doctrinal issue, which could be left to interpretation.

98. An interesting example of the possible usefulness of provisional entry into force was provided by the work of the Committee of Experts on the Organization of African Unity, which in 1964 had worked on drafting the Protocol of the Commission of Mediation, Conciliation and Arbitration. The Charter of the Organization of African Unity provided that the Commission should be one of the principal organs of the Organization and that the Protocol should become an integral part of the Charter on its approval by the Assembly of Heads of State and Heads of Government of African States. On the basis of that text, it had been argued by some that the Protocol came into force immediately on its approval, but others maintained that in view of the importance of the subject-matter ratification was necessary. The latter view had ultimately prevailed but, in the meantime, as a member of the Committee of Experts which had drafted the Protocol, he had thought of the possibility of solving the problem by including a clause on provisional entry into force in the Protocol. A clause of that type represented a useful intermediate position between a treaty in simplified form and a treaty which entered into force only after all requirements as to ratification had been satisfied.

99. In his view, article 24 should be retained in the form in which it had been adopted in 1962, subject only to changes of drafting, not changes of substance.

100. Mr. LACHS said he agreed with Mr. Reuter regarding the wording of the first part of the article; the provision really related to application of the clauses of the treaty on a provisional basis.

101. With regard to Mr. Rosenne's suggestion for shortening the opening passage, he must point out that the passage dealt with two different cases: first, the case in which the treaty contained a provision to the effect that it would itself provisionally enter into force, and secondly, the case in which, by virtue of another or subsequent instrument, the provisions of the treaty were provisionally brought into force.

102. He agreed with Mr. de Luna that in some cases the position as to ratification or non-ratification by a State would never become clear. Where a treaty involved only one action, the position might be clarified soon, but where a number of different actions were involved, the matter might remain in abeyance for a long time. There were many cases in which treaties had remained for years on the agenda of the legislative bodies empowered to ratify them, without any action being taken. Perhaps the point could be covered by specifying that a State must clarify its position within a certain period of time.

103. In cases of that sort, the question of the right of initiative arose; in his view, it should be left to each State concerned. Some States might prefer a provisional treaty to no treaty at all, while others might prefer to terminate the provisional bonds if no ratification was forthcoming from the other party. It was a delicate matter, and nothing should be done to force States to take action one way or the other. The whole structure of treaty relations called for a most careful approach, as so many elements were involved and it was difficult to foresee the circumstances in which they might arise.

The meeting rose at 1 p.m.

791st MEETING

Wednesday, 26 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. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, 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 24 (Provisional entry into force) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 24.

2. Mr. BRIGGS said that article 24 was different from article 17, which set out certain obligations that good faith imposed, pending the entry into force of the treaty, on States which had participated in the preparation of its text. In the case envisaged in article 24, on the other hand, the participants had prescribed that certain parts of the treaty would apply pending the exchange of ratifications. Cases could be cited of treaties which provided that certain clauses, on the delimination of frontiers, for instance, would take immediate effect. The 1946 Treaty between the United States and the Philippines, which was of a different kind, specified that entry into force would take place upon the exchange of ratifications, but that articles II and III would receive immediate application.[2]

3. From the point of view of drafting, he much preferred a formulation of the kind suggested by Mr. Reuter, such as "... certain provisions of the treaty shall

[1] See 790th meeting, para. 70.

[2] United Nations *Treaty Series*, Vol. 7, p. 10.