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Summary record of the 791st meeting

Topic:
Law of Treaties

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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.

receive application pending its entry into force ". Incidentally, in such a context it was somewhat incorrect as well as ambiguous to use the term " parties ", as was done in the first and last lines of the revised text proposed by the Special Rapporteur, since a State became a party only when it became bound by a treaty. That criticism applied particularly to the last line, which referred to non-ratification by a State, which was incorrectly referred to as a " party ".

4. His own feeling was that there existed an ancillary or collateral agreement on the provisional application of all or part of the clauses of the treaty, and that there were " parties " to that agreement. If the provisional application was prescribed by the treaty itself, the States concerned could be said to be parties to an informal understanding on such application. The legal nature of the operation could also be described by saying that one and the same instrument contained two transactions : the treaty itself and the agreement on provisional application pending its formal entry into force.

5. Mr. AGO said that article 24 dealt with two entirely different situations. The first, to which Mr. Reuter had referred at the previous meeting, was that where the treaty itself did not enter into force until the exchange of the instruments of ratification or approval; it was by a kind of secondary agreement, separate from the treaty, that the parties, at the time of signing, agreed to apply provisionally certain or even all of the treaty's clauses.

6. The second, and more important, situation was that which the Commission had envisaged in 1962 and which the Special Rapporteur had had in mind when proposing his redraft, the case where the treaty actually entered into force at the time of signature but was subject to subsequent ratification; the ratification did no more than confirm what had existed ever since the time of signature. It might be said that in such a case the treaty entered into force subject to a resolutory condition. If the ratification did not take place within the prescribed time, the treaty would cease to be in force; but it would have been in force and produced its effects from the time of signature up to the time when it ceased to be in force through the absence of ratification.

7. The Commission should not use such a formulation as : " pending its entry into force . . ., it shall come into force provisionally ", for entry into force could not occur twice. If entry into force took place at the time of signature, then it was merely confirmed by ratification, and in default of ratification the treaty ceased to be in force through the operation of the resolutory condition. If, on the other hand, the entry into force did not take place until the time of ratification, what happened during the interim between signature and ratification was that certain of the treaty's clauses were applied provisionally by virtue of a secondary agreement between the parties, and it was only that agreement which entered into force.

8. The article was of very great importance in view of the practice of States. He had personal knowledge of certain treaty provisions in which it was stated clearly that the treaty entered into force on signature, but would subsequently be submitted for ratification. One treaty of that kind was still in force at the moment, ten years after signature, although it had not yet been ratified.

9. Mr. TSURUOKA said that he did not consider the article as so very important.

10. If the treaty entered into force upon signature, as in the second of the situations described by Mr. Ago, then surely the case was governed by article 23, according to which a treaty entered into force in the manner specified by its provisions. Whether thereafter the entry into force was confirmed by ratification, or the treaty ceased to be in force owing to the absence of ratification, all that happened was that the treaty's own clauses concerning ratification operated. He was not sure that his interpretation was recognized by the writers, but it was possible in practice.

11. In the first of the situations mentioned by Mr. Ago, what happened was that an agreement distinct from the treaty entered into force in conformity with article 23; the treaty was then applied provisionally according to the conditions provided for in that subsidiary agreement.

12. All that should remain of article 24 would therefore be the rule that, in the absence of provisions concerning the termination of the provisional application of the treaty by virtue of the subsidiary agreement, the entry into force of the treaty would be presumed to terminate when one of the parties had given notice that it would not ratify the treaty. But omission to lay down that rule would not expose international transactions to any great risk. For that reason, he was inclined to think that article 24, or at least a good part of it, should be dropped.

13. Mr. CASTRÉN, supplementing his remarks at the preceding meeting, said that on studying more closely the commentary which the Commission had attached to article 24 in 1962, and the written comments by governments on that article, had had noticed that the French translation of paragraph (2) of the commentary[3] differed from the original English text on a point which was taken up in the Swedish Government's comments (A/CN.4/175, section I.17). According to the English text, the provisional application of the treaty terminated, among other cases, when it was clear that the treaty was not going to be ratified or approved by *one* of the parties, whereas the French translation read : lorsqu'il devient évident que le traité ne sera ratifié ou approuvé par *aucune* des parties [i.e. by *none* of the parties]. According to the view which he had expressed at the preceding meeting, however—a view which seemed to be shared by Mr. Lachs—a provision based on the latter text would in fact be preferable.

14. A third, and perhaps better, solution might be to replace the words " one of the parties ", in the Special Rapporteur's redraft by the words " a specified number or class of States whose participation in the treaty is necessary for its entry into force ".

15. He supported the observations which Mr. Lachs had made at the previous meeting on other points connected with article 24.

16. Mr. AGO, in reply to Mr. Tsuruoka, said he would not press the Commission to include in article 24 a provision covering the second of the situations of which

[3] *Yearbook of the International Law Commission, 1962*, Vol. II, English text p. 182, French text p. 202.

he had spoken, namely, the case where the treaty entered into force on signature and was to be ratified later. As Mr. Lachs and Mr. de Luna had said during the discussion on the article on signature, that situation could be dealt with in the context of provisions concerning the effects of signature, although in his own opinion what had to be determined in the particular case was at what point the treaty entered into force, rather than at what point the State gave its consent to be bound by the treaty.

17. At all events, the first of the situations of which he had spoken, that of the provisional application referred to by Mr. Reuter, should be mentioned in article 24. If the States decided that the treaty would not enter into force until it had been ratified, but agreed to apply some of its clauses forthwith, it was easy to explain the situation by saying that there was a secondary agreement, distinct from the treaty even if it was laid down in a clause of the treaty or was implied in the text. However, for that purpose one of the clauses of the treaty itself had to be so interpreted, and that clause would have to be isolated from the treaty as a whole. The question was sufficiently important for the Commission to deal with it explicitly rather than to rely on interpretation of the treaty.

18. The CHAIRMAN, speaking as a member of the Commission, said he was certain that the article was of great importance not only in practice but also from the theoretical and legal points of view. In the course of thirteen years' practice at the Ministry of Foreign Affairs, he had seen many cases where treaties had entered into force provisionally.

19. A distinction should be drawn between the two situations contemplated in article 24 and another situation for which the Commission had made no provision; the situation where, during the negotiations, the parties agreed on a provisional régime applicable until the conclusion of the negotiations. That situation had nothing in common with the provisional entry into force of a treaty.

20. Recent theory also drew a distinction between provisional entry into force and the case where the treaty took the dual form of a provisional treaty and a definitive treaty, the purposes of the two being different.

21. The question of the provisional entry into force of treaties arose not only at the international level, but also at the national level. If the treaty had truly entered into force, its provisions automatically prevailed over those of internal law in the increasingly numerous countries which acknowledged the supremacy of international law. If, on the other hand, the treaty was applied only provisionally, most legal systems would regard that situation as a practical expedient which did not introduce the rules of international law into internal law.

22. Moreover, if there were only a provisional application of rules which were not those of the treaty, would the most-favoured-nation clause operate in practice, or not?

23. After the Second World War, Yugoslavia had concluded peace treaties with several countries which provided in identical terms first, that upon signature of the treaty the state of war between the two countries ceased and, secondly, that the treaty would be ratified. Immediately upon signature, therefore, the two countries had been able to establish diplomatic, commercial and maritime relations, conclude treaties, etc., and the solemn act of ratification of the peace treaty had not taken place until later. As between those two countries, the question of the state of peace or the state of war had depended upon a complicated parliamentary procedure, but under the pressure of the requirements of daily life they had rid themselves of everything connected with the state of war, even in the technical meaning of the term. In that case, had there been a resolutory condition? And what would have happened if the peace treaty had not been ratified? In law, had the treaty been provisionally valid, and would that situation have ceased to exist if ratification had become unlikely?

24. The problems to which he had just referred showed how necessary it was to lay down a rule of the kind proposed in article 24. International relations would be made easier if States were given the possibility of putting certain treaties into force provisionally, before ratification, not as a mere practical expedient but with all the legal consequences of entry into force. He appreciated why Mr. Reuter was reluctant to create, in law, something which might subsequently be annulled without any violation of the rules. Personally, however, he was convinced that the provisional entry into force really conferred validity and a legal obligation; even if the treaty subsequently lapsed owing to lack of ratification, that dissolution of the treaty would not be retroactive and did not prevent the treaty from having been in force during a certain time. There had been a legal position which had produced its effects, and situations had been created under that régime; consequently, the question could not be said to be purely abstract.

25. He supported the basic idea of article 24, while recognizing the justice of many of the objections on points of drafting. It would be for the Drafting Committee to propose a redraft which would meet those objections.

26. Mr. TSURUOKA said that he had in no way meant to deny that, in the practice of international relations, cases occurred which came within the provisions of article 24. Nevertheless, in spite of the very scholarly explanations given by Mr. Ago and the Chairman, he was not convinced that those cases were not governed by paragraph 1 of article 23 and by the provisions concerning the application and termination of treaties. That was why he had suggested that article 24 should be deleted, or heavily amended.

27. If the Commission retained the article, it should specify very clearly what was the nature of the obligation binding the two States parties to the treaty when it was put into force provisionally. He thought that in that case there was a clear, legal obligation which was derived from a collateral agreement, very often in simplified form, or from a tacit agreement between the parties concerned.

28. Mr. TUNKIN said that he was not opposed to article 24, although its provisions were descriptive of an existing practice rather than expressive of a rule of

law. His own experience showed that it was not uncommon for a bilateral treaty to be subject to ratification but to enter into force immediately upon signature. The provisional character of entry into force was sometimes expressed, but very often merely implied.

29. He did not agree with Mr. Reuter that the case was one of provisional application of certain clauses of the treaty rather than of its entry into force. The treaty itself entered into force, but in that case there were in fact two sets of final clauses. Thus, the treaty would provide for termination after a certain lapse of time and by giving notice in a prescribed manner. So far as the provisional entry into force was concerned, however, there was a parallel possibility : non-ratification would have the effect of denunciation.

30. With regard to the revised text proposed by the Special Rapporteur, he had misgivings over the final proviso " or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it ". The Drafting Committee should formulate a more rigid rule. Some clear statement was necessary on the part of the State concerned; the matter could not be left to a mere inference. He therefore suggested some such wording as " . . . when one of the parties informs the other parties that it will not ratify or, as the case may be, will not approve the treaty ".

31. Mr. PESSOU said that in 1963 fourteen African States had signed a Convention of Association with the European Economic Community. While the whole of the Convention, and notably the provisions concerning the right of establishment of nationals of member States and of companies domiciled in their territories, had not become applicable immediately, certain other provisions had come into force at once. In the light of that and of other examples he thought that article 24 should stand.

32. Mr. ROSENNE said that there was much force in the remark by Mr. Tunkin that the State which did not propose to ratify should be required to give some indication of its decision, particularly in the case of bilateral treaties; perhaps a provision on the subject should be included elsewhere in the draft. He could quote from his own experience the case of a treaty between Israel and a European country with a bicameral legislature, in which one of the Houses of Parliament had given its approval to the ratification of the treaty but the other had not; owing to an administrative oversight, no indication of the position had been given by the Government of the country concerned and it had only been discovered several years later that the treaty was buried in the parliamentary archives. There was, in cases of that sort, at least a courtesy requirement to make some notification to the other party of what was happening.

33. He wished to repair an omission in his statement at the previous meeting, and to make it clear that he supported the remark by Mr. Jiménez de Aréchaga that article 24 should not be couched in terms that might convey the impression that it applied only to bilateral treaties. A provision on provisional entry into force might usefully be included in certain multilateral treaties, such as codification treaties of the type of the two Vienna Conventions on diplomatic and consular relations.

34. Mr. REUTER said it was not clear to him whether the Commission wished to remind States of certain possibilities open to them or whether it wished to restrict those possibilities. His personal opinion was that those possibilities should not be restricted and, if others agreed, the Commission should be careful not to draft a provision restricting them, for a great variety of such possibilities existed in practice. The wide range of solutions to be found in practice stretched from those involving the most stringent to some containing only extremely loose obligations.

35. For example, it might happen that a treaty contained certain integral obligations concerning the immediate application of certain provisions, in which case the clauses concerning entry into force and the termination of entry into force would be regarded as variants of other clauses. The latitude left to States in such a case was not great for the rules of constitutional law would necessarily be the same for all the obligations laid down in a single instrument.

36. Another case was that where the text was so drafted that it was clear that the immediate implementation of certain rules was the subject of a separate commitment, even thought incorporated in the text. Such a solution could be extremely useful because, from the point of view of constitutional law, such a commitment might be more easily acceptable than a definitive commitment.

37. A third case was conceivable : that of a less strict commitment, for example where there was no real treaty but a kind of unilateral declaration by each State affirming its intention to follow a certain line of conduct, a practice known as parallel undertakings. In that way, States could express their intention to apply certain rules for so long as they did not give notice that they ceased to apply them. That was an example of a clause depending solely upon the will of a party, and there was no reason why such a method should be ruled out if it could be useful.

38. Consequently, if the Commission could devise wording to express the wide range of possibilities open to States, he would be in favour of retaining the article, but if it failed to do so, the article should be dropped, for otherwise its effect would be not to extend the scope of a useful institution, but to hamper its operation in certain cases.

39. Mr. ELIAS said that he fully agreed with Mr. Reuter's remarks. It was precisely because he had foreseen the possibility indicated by Mr. Reuter that he had himself suggested at the previous meeting the deletion of article 24. He doubted whether it would be possible for the Commission to agree on a text for the article.

40. Mr. AGO said that he fully agreed with Mr. Reuter that the Commission should draft one or two separate articles to cover two different cases.

41. One was that where the treaty entered into force at the time of signature but was subject to ratification, with the consequence that it entered into force under a resolutive condition. The case, far from being theoretical, was a very important one.

42. The other case was that where, in order to leave the parties greater freedom of action, the treaty did not enter into force, but some of its clauses did, by virtue of a separate agreement. The treaty itself would enter into force at the time of ratification, but the parties agreed to apply certain clauses provisionally. From the point of view of theory, what happened in that case was that another agreement—one in simplified form—came into existence.

43. Mr. TSURUOKA said that the word "provisional" was not very felicitous in the context and should be replaced by another term.

44. Mr. LACHS said that there did not appear to be any very great difference between the views of a number of members and the alternative suggested by Mr. Reuter. He did not believe that any member had advocated a limitation of the freedom of States in the matter. There was every intention to leave States maximum freedom both with regard to the provisional application of treaties and with regard to the modalities of such application, while protecting the rights of others. The Special Rapporteur's approach to the draft seemed to provide the necessary balance in that respect. The article was a useful one and could now be referred to the Drafting Committee for it to work out a satisfactory text.

45. Mr. CADIEUX suggested that different designations for different types of agreements should be used to reflect the distinction drawn by Mr. Ago.

46. If the treaty was regarded as a principal treaty binding the will of the parties, all the clauses of which were to enter into force on signature—subject to late confirmation or cancellation—then it would be a conditional agreement. A secondary question would then arise: at what point would the condition operate? For the purpose of answering that question the wording "until ... it shall have become clear" in the Special Rapporteur's new text would not give States enough guidance. The Drafting Committee should consider that point with particular care.

47. The other, subsidiary treaty or agreement was indeed provisional, for it would disappear when the principal treaty definitively came into operation. It would be less objectionable to describe that agreement as "provisional", in order to distinguish it from the other and to leave States completely free to choose how many of the provisions of the principal agreement they wished to embody in the subsidiary or collateral agreement.

48. If that distinction were feasible, the next question would be whether those provisional agreements should be mentioned in the text itself. Possibly the question was related to the freedom of the parties to the negotiations; consequently, it might be enough to indicate that they had fairly wide latitude and that the preliminary arrangements might take different forms, without the need for an express provision on the matter in the text itself.

49. Mr. AMADO said that States were at liberty to prescribe anything they wished in the treaty itself and they could provide that it would enter into force pending the completion of certain other instruments. He thought the article should stand, although he disliked the word "provisional"; but that was a linguistic weakness that could be cured.

50. Mr. JIMÉNEZ de ARÉCHAGA said that it was because of the constitutional difficulties which sometimes delayed ratification that he considered article 24 particularly useful. The article would make it possible for a State to endeavour to solve its constitutional difficulties by agreeing to the provisional entry into force of the treaty. Though the provisions of the article were largely descriptive of an existing practice it was precisely for that reason that they fulfilled a very useful purpose: they would enable States which had constitutional difficulties to prove the legitimacy of the practice.

51. He also agreed with Mr. Tunkin that some requirement of notification should be laid down for a State which decided not to ratify a treaty.

52. He strongly urged that the term "provisional" should be retained to qualify "entry into force"; the Commission should not, in the interests of theoretical precision, depart from the terminology in current use in existing State practice.

53. With regard to the distinction proposed by Mr. Ago he was not convinced that there existed any practical, difference between the two situations that he had mentioned. States like the Latin-American States, if they wished to overcome their constitutional difficulties, could decide to put the whole treaty into provisional operation. The only real difference was in respect of the final clauses, which had a status of their own, as had been recognized by the International Court of Justice.

54. Mr. TUNKIN said he agreed with Mr. Ago that two possibilities existed but, on practical grounds, he did not consider that both should be covered in article 24. Provisional entry into force was of importance and article 24 should be retained to deal with it; on the other hand, where the parties agreed to put into force some of the provisions of the treaty, there was really a separate agreement. Agreements of that kind could be very varied in character and it would be impractical to cover only one type; if the case envisaged were not mentioned in article 24, that would not mean that the parties could not make an agreement to the effect that certain articles would apply prior to the final entry into force of the treaty.

55. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had not disclosed any very great divergence of views, although members might differ on what ought to be included in the article. Some of the Commission's difficulties no doubt arose from the feeling of novelty which the Commission had had when it introduced an article on provisional entry into force in 1962. There had then been a feeling that extra care should be taken because of the constitutional implications. The discussion in 1962 had accordingly shown some diffidence regarding the use of the expression "entry into force", without any qualification, because from the constitutional point of view, the treaty might well be one that could not be concluded without ratification, yet the application of the clauses of the treaty was a matter of urgency. The situation had now somewhat changed and the Commission as a whole appeared

to be firmly of the opinion that it was dealing with a common phenomenon which had become an ordinary part of existing treaty practice.

56. It was important to specify to what situations the article referred. The provisions of the article endeavoured to cover both the situation where the treaty itself provided for provisional entry into force and that in which a separate agreement was made to that effect. In dealing with those two situations in general terms, the Commission had perhaps overlooked the existence of a third situation, the one to which Mr. Reuter had drawn attention, where the intention of the parties was not to bring the treaty into force but to apply parts only of the treaty on a provisional basis. Article 24 should be drafted so as to cover the first two situations and the Drafting Committee should perhaps endeavour to cover the third as well, althought it might not be easy to draft such a provision since the article was concerned with the provisional entry into force of the treaty rather than with the application of its clauses.

57. The Drafting Committee should also consider the question whether article 24 ought to deal, as it did, not only with provisional entry into force but also with the termination of the treaty. In 1962, when the Commission adopted article 24, it had not yet drafted the provisions on termination. Perhaps it would now be necessary to re-examine the references to termination in the article in the light of those provisions.

58. From the point of view of language, it would be more correct to speak of "temporary" rather than "provisional" entry into force, since it was the time element that was involved. The position could also be described as that created by a "*condition résolutoire*" However, he agreed with Mr. Jiménez de Aréchaga that it was desirable to retain the term "provisional" because it was almost invariably used by States in the instruments they signed.

59. He accepted the suggestion that the provisions of article 24 should not be confined to bilateral treaties; that had not been his intention and the drafting would have to be improved so as to remove any risk of giving that impression. There existed a number of multilateral treaties which provided for provisional entry into force.

60. The CHAIRMAN suggested that the Special Rapporteur's proposal be referred to the Drafting Committee, which should consider it in the light of all the suggestions and objections put forward during the discussion.

It was so agreed.[4]

ARTICLE 8 (Participation in a treaty)

Article 8

Participation in a treaty

1. In the case of a general multilateral treaty, every State may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.

2. In all other cases, every State may become a party to the treaty:

(*a*) Which took part in the adoption of its text, or

(*b*) To which the treaty is expressly made open by its terms, or

(*c*) Which although it did not participate in the adoption of the text was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.

61. The CHAIRMAN invited the Commission to consider article 8. Before asking the Special Rapporteur to introduce his revised version of the article, however, he wished to draw attention to the answers prepared by the Secretariat to the questions asked by Mr. Rosenne at the 782nd meeting; the questions and answers were as follows:

Questions

A. What is the practice of the Secretary-General, as registering authority under Article 102 of the Charter, when he receives for registration or filing and recording treaties concluded (*a*) between a Member of the United Nations and a State neither a Member of the United Nations or of any of the specialized agencies; and (*b*) between two or more States none of which are Members of the United Nations or of any of the specialized agencies? If he has accepted such treaties for registration and/or filing and recording, is the Secretary-General in a position to furnish information concerning the reactions of Governments to the registration of treaties by States falling into this latter category?

B. Can the Secretary-General inform the Commission whether any other depositary authorities—Governments and Secretariats—have adopted a position similar to that of the State Department indicated in paragraph 5 of the Observations and Proposals of the Special Rapporteur on article 8 in his Fourth Report (A/CN.4/177)?

Replies

A.1. The Secretary-General has not infrequently received for registration treaties concluded by a Member of the United Nations and a non-member of either the United Nations or a specialized agency. When the treaty was submitted by a Member, the fact that one of the parties was a non-member has never precluded registration.

2. An early case (*Repertory of United Nations Practice*, vol. V, Art. 102, paras. 41-42) involved the registration by a Member of an agreement concluded with Spain, then not yet a Member of the Organization. Another Member made a communication to the Secretary-General contending that registration of such an agreement conflicted with General Assembly resolutions 23 (I) and 39 (I), and requesting deletion of the corresponding number in the Register. In reply the Secretary-General regretted that he was unable to consider deletion of the registration. The arguments are summarized in the *Repertory*.

3. Further cases (*Repertory of United Nations Practice, Supplement No. 1*, vol. II, Art. 102, paras. 12-23) related to registration in 1955 and 1956 by a Member of agreements with the Democratic People's Republic of Korea, the German Democratic Republic, and the People's Republic of China. The issues of the monthly *Statement of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat* (those for November 1955 and January 1956), which referred to those registrations, and all subsequent issues of the *Statement*, contain a prefatory note explaining the position of the Secretariat. This note states in part:

[4] For resumption of discussion, see 814th meeting, paras. 38-56.

" 5 . . . In respect of *ex officio* registration and filing and recording, where the Secretariat has responsibility for initiating action under the Regulations, it necessarily has authority for dealing with all aspects of the question.
" 6. In other cases, when treaties and international agreements are submitted by a party for the purpose of registration, or filing and recording, they are first examined by the Secretariat in order to ascertain whether they fall within the category of agreements requiring registration or are susceptible of filing and recording, and also to ascertain whether the technical requirements of the Regulations are met . . . However, since the terms ' treaty ' and ' international agreement ' have not been defined either in the Charter or in the Regulations, the Secretariat, under the Charter and the Regulations, follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement within the meaning of Article 102. Registration of an instrument submitted by a Member State, therefore, does not imply a judgement by the Secretariat on the nature of the instrument, the status of a party, or any similar question. It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status which it would not otherwise have. "

4. Following the publication of the *Statements* for November 1955 and January 1956, the representatives of the United States, the United Kingdom, the Republic of China, the USSR, and the Philippines made communications to the Secretary-General which are summarized in the passage of the *Repertory Supplement* which is cited above. They all stressed that registration of a treaty with the Secretariat had no legal effect in respect of the status of régimes which they did not recognize; several of them also declared that their silence about such registrations would not prejudice their positions on the status of such régimes.

5. As for more recent cases, only one instance is recalled. In connexion with the registration by Poland of the Hague Protocol of 28 September 1955 amending the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air, the Permanent Observer of the Federal Republic of Germany, in a *note verbale* to the Secretary-General, referring to the fact that the list of parties submitted by Poland included the German Democratic Republic, stated that the latter ' cannot have become a party to that Protocol since, according to its articles 20 and 22, it constitutes an agreement among States, whereas the so-called German Democratic Republic is not a State but only a part of Germany under foreign occupation '. He further requested that his communication be brought to the attention of all States parties to the Protocol.

6. The Secretary-General replied that the above-mentioned note

" . . . concerns a matter in regard to which the normal means of communication with the interested States or of registering an objection, would be through the depositary of the Protocol in question. Not being the depositary of this Protocol, the Secretary-General does not feel it appropriate to his functions under Article 102 of the Charter of the United Nations to circulate the communication of the Permanent Observer to the States parties to the Protocol. "

Subsequently, in reference to that reply, the Permanent Observer of the Federal Republic of Germany informed the Secretary-General that upon request of his Government the Government of the United States of America had forwarded to the Polish Government a statement in which it was pointed out ' that the so-called German Democratic Republic, not being a State, cannot have become a party to that Protocol, and therefore cannot be included in the list of States parties to that Protocol which was registered with the Secretary-General of the United Nations '. He added that all States parties to the Protocol in question had been informed of that statement. No action was taken by the Secretary-General on that communication.

7. It will be noted that all the above cases relate to treaties submitted for registration by a Member of the United Nations. No treaty with a Member has ever been submitted for registration by a non-member.

8. As regards the second part of the question, the Secretary-General has never received for filing and recording a treaty between two or more States none of which are Members of the United Nations or of any of the specialized agencies.

B.1 The Secretary-General has no information about the practice of States when they receive instruments relating to treaties of which they are depositaries from Governments which they do not recognize.

2. A case which may be mentioned, however, is that of Switzerland, which is the High Authority of the Berne Union for the Protection of Literary and Artistic Property, and as such is responsible for making notifications concerning the conventions of the Union, even though the texts and related instruments are deposited with other Governments. After the War the Federal Republic of Germany made a declaration that the Rome Convention, to which the German Reich had become a party, was again applicable to its territory. Switzerland, as High Authority, notified the parties of this action, and a number of them, which did not recognize the Federal Republic, protested. Some months later the German Democratic Republic also made a declaration that the Rome Convention was again applicable to its territory, and the High Authority again circulated a notice to the parties. A number of them, which did not recognize the Democratic Republic, made protests. Switzerland then circulated a communication in which it stated that it had circulated the notification as High Authority, and that in doing so it had not prejudiced its own position with regard to the recognition of the Democratic Republic. The Swiss Government added that in its view the question should be settled by the Conference of the Union.

62. Written comments on article 8 had been received from Mr. Liu, whose views were very briefly that, considered from the standpoint both of theory and of State practice, the idea of universality, in other words, that any State or entity had a right to become a party to a treaty, was in fact in contradiction with the very nature of treaties, and that the correct view was the one contained in the comments of the Government of Japan, namely, that the question of participation in a treaty should always be left to the decision of the States participating in a conference.

63. Sir Humphrey WALDOCK, Special Rapporteur, said that at the fourteenth session article 8 had revealed considerable divergence of view and after a long discussion the final text had only been approved by a small majority. In his fourth report, he had briefly analysed the comments made by governments or by members of delegations to the Sixth Committee, which reflected a similar divergence of view on the subject of the article. Though himself of the minority view, he had considered it to be his duty as Special Rapporteur to act on the basis of the view of the majority in 1962 and he had accordingly offered a revised text on much the same lines as that of 1962 but shortened and slightly adjusted in order to meet what he regarded as a valid point made by the Swedish Government. The revised text read:

If it does not appear from a treaty which States may become parties to it —

(*a*) in the case of general multilateral treaties, any State may become a party;

(*b*) in other cases, any State may become a party which took part in the drawing up of the treaty or which was invited to the conference at which it was drawn up.

64. In his observations, he had drawn attention to certain practices of depositaries, about which useful information had recently been published in the *American Journal of International Law*,[5] relevant to a point that had engaged the Commission's attention at its fourteenth session, namely, the delicate position of a depositary when the treaty contained the " any State " formula concerning participation. There had been two schools of thought in the Commission, one being in favour of a rule of the kind finally included in article 8, that when the treaty was silent the " any State " formula applied, and the other considering that account ought to be taken of United Nations practice in regard to general multilateral treaties drawn up under its auspices.

65. The new material furnished by the Secretariat in response to Mr. Rosenne's request at the 782nd meeting threw further light on the points that had been discussed but it did not add very much to the information which he had given in his report. It indicated that the " any State " formula would, for obvious reasons, create greater difficulties for the Secretary-General of the United Nations acting as a depositary, or for any other secretariat of an international organization in the same position, than for a government, should the status of an entity be in doubt. Some of the material assembled by the Secretariat related to the functions of the Secretary-General as a registrar of treaties, which of course was a separate matter.

66. The Commission would also wish to take into account the comments by Mr. Liu.

67. Mr. BRIGGS said that he had prepared a new draft of article 13 (Accession) to replace the existing articles 8, 9, and 13. It read:

" 1. For the purposes of the present articles, accession is an act by which a State which has not signed, ratified or approved a treaty, accepts as binding the provisions of the treaty.

" 2. Unless otherwise provided in the treaty itself, a State may accede to a treaty

(*a*) only after the treaty has entered into force, and

(*b*) either

(*i*) with the consent of all the parties to the treaty; or

(*ii*) in conformity with any provisions opening the treaty to accession, adopted in accordance with articles 65 and 66. "

68. Nevertheless he would not comment at that time on the close relationship between articles 8 and 9—in a sense some members regarded the latter as a substitute for the former—or the connexion between articles 9 and 13, but would confine himself to article 8 as such and the principal issue it raised, namely, the definition of a general multilateral treaty.

69. The Commission had decided to deal separately with the problem of the accession of new States to old multilateral treaties which, such as those concluded under the auspices of the League of Nations, had by force of circumstances become closed, but he himself wondered whether all those League of Nations treaties could be classified as general multilateral treaties, despite the title of the Secretary-General's report on " General multilateral treaties concluded under the auspices of the League of Nations. "[6] The Special Rapporteur in paragraph 3 of his observations on article 9 had treated the problem as one of accession.

70. The second point raised by article 8 was that dealt with in paragraph 2 (c) of the original draft and in sub-paragraph (*b*) of the Special Rapporteur's new text, but neither the original text nor the 1962 commentary had been particularly enlightening as to why the Commission should have thought it important to extend special privileges to States which had participated in the drafting of a treaty but had not signed the text, or which had been invited to attend the Conference at which the treaty had been drawn up but had not in fact done so. Surely there was no need for such treatment provided that the treaty was open to accession.

71. Similarly, the exact purport of the phrase " in other cases " in the Special Rapporteur's new text of sub-paragraph (*b*) was not clear: presumably his intention was to say " in all cases ".

72. Leaving aside the political aspects, there were two legal questions to consider. The usual way in which a State which had not participated in the drafting of the text could become a party was by accession, or more rarely by an equivalent process for which some treaties made provision, namely, accession by signature. That apart, the so-called right of participation was not so much a matter of treaty law as of the right to participate in an international conference. To the extent to which the alleged right of participation was a legal question, it could be dealt with in an article dealing with accession and need not be covered in article 8 at all. The Special Rapporteur, in paragraph 3 of his observations on article 9, had indicated that the Commission's intention had been to facilitate the opening of certain categories of closed multilateral treaties to new States. But surely that could be achieved without recourse to such a

[5] *American Journal of International Law*, Vol. 58 (1964), pp. 170-175.

[6] Document A/5759.

vague general principle as that advanced in article 8, paragraph 1.

73. The second question was whether it would be possible to devise a definition of a general multilateral treaty on which to base a new rule *de lege ferenda* permitting every State to become a party, except where otherwise provided whether in the treaty itself or by the rules and practices of an international organization. At its fourteenth session, the Commission without attempting to define a multilateral treaty had tried its hand at defining a general multilateral treaty, primarily by reference to its content, and implying at least by way of a tacit assumption that such treaties must involve a large number of parties. With justification, the formula arrived at had been criticized by governments. Personally he was prompted to ask how many more than three States were needed to transform a multilateral into a general multilateral treaty: the Commission's definition gave no guidance. Attempts to make legal distinctions between different categories of treaty on the basis of content had always failed, including the effort made by Lord McNair in an interesting article that had appeared in *The British Yearbook of International Law* some years previously.

74. The definition set out in article 1 (*c*) of the 1962 draft was vague and legally imprecise. The criterion that such a treaty must deal with matters of general interest to States as a whole was unworkable because it could apply to any bilateral treaty of peace or armistice or to a regional security pact. Owing to the objections of several governments that particular criterion had been dropped by the Special Rapporteur. There was now left the other, namely, that a general multilateral treaty was one which concerned general norms of international law. But that characteristic was also to be found in a wide range of other classes, for example, bilateral treaties such as the Treaty of Washington of 1871 between the United Kingdom and the United States of America,[7] prior to the submission of the Alabama Claims to arbitration, certain regional treaties, and codification conventions such as the Vienna Conventions of 1961 and 1963. As Mr. Gros had pointed out in the Commission, there was not one but several categories of general multilateral conventions[8] so that the first criterion in article 1, paragraph 1 (*c*) could not be relied on. That proposition was further substantiated by the very heterogeneous list of treaties concluded under the auspices of the League of Nations mentioned in part II of the Secretary General's report (A/5759).

75. Another category of general multilateral treaties, namely, the United Nations Charter and the constitutions of specialized agencies, were not open to all States because of the conditions imposed concerning membership. A third category of more recent date were open to virtually universal accession; for example, the 1961 Single Convention on Narcotic Drugs or certain commodity agreements drawn up within the United Nations.

76. Probably the objections to the United Nations formula and the support for the " any State " formula were aimed less at the exclusion of States than at certain entities whose doubtful status as States was the precise point at issue, but the rule proposed in article 8, paragraph 1, of the original draft or in the Special Rapporteur's new text could not in any case authorize accession by such entities because of the provisions in the treaties themselves that used the United Nations formula, or the explicit proviso written into both versions of article 8. Even if that proviso were dropped, as some governments proposed, any inference that the " all States " formula implied universality would clearly run counter to United Nations policy of not regarding as States entities the inhabitants of which had been denied the opportunity for self-determination.

77. He therefore proposed that article 8 should be eliminated; to the extent that it dealt with any legal questions at all, they were relevant to accession and could be covered in a separate article on that matter. The Commission should also abandon its attempts to try and define general multilateral treaties because any such attempts were doomed to failure.

78. Mr. CASTRÉN said that article 8 had caused a good deal of difficulty in 1962. After long discussions, the majority of the Commission had agreed on the compromise embodied in the present text. The compromise was a modest one and the field of application of the article was obviously very narrow.

79. Personally, he would have liked the article to go farther, for he considered that, in principle, general multilateral treaties should be open to all States members of the international community. In particular, if general multilateral treaties were defined as meaning only general law-making treaties, as the Special Rapporteur had suggested in his observations on article 1 (*c*) (A/CN.4/177), there would be no reason for preventing all such States from becoming parties to such treaties.

80. The difficulties of the depositaries of treaties were very great indeed in cases where, for example, they received notifications of accession from the government of an entity whose statehood or status as a subject of international law was contested or not recognized by all members of the international community. In his observations on article 8 (A/CN.4/177, para. 5), the Special Rapporteur said that those obstacles were not insuperable and, in his (Mr. Castrén's) opinion, recognition was a separate problem not having a decisive bearing on the problem under discussion at the moment. Nor did he believe that it happened very often that entities not possessing international personality expressed the desire to become parties to international treaties.

81. The problem in article 8 was different from that dealt with in article 3 (Capacity to conclude treaties), where the Commission had had to formulate a definition, more of a theoretical kind, which would not be open to criticism. In article 8 the Commission had to settle a practical question which also involved a very important question of principle. The reason why he made that observation was that, having proposed the deletion of article 3, he would not like to be accused of being illogical.

[7] *British and Foreign State Papers*, Vol. LXI, p. 40.

[8] *Yearbook of the International Law Commission, 1962*, Vol. I, 667th meeting, para. 45.

82. In the general practice of States, and particularly in that of the United Nations, it was not admitted that all States were at liberty to accede to the treaties of others, regardless of the nature of those treaties. The Charter itself laid down specific conditions. From the comments of governments on article 8, it appeared that their views ranged from one extreme to the other. Some governments, like that of Denmark, accepted the Commission's proposal. It was difficult to satisfy everybody. The Commission could, of course, take the line of least resistance and simply submit an article which did no more than confirm the present practice.

83. In his opinion, the Commission should, by virtue of its terms of reference, propose progressive rules and take a first step towards extending the right of States to participate in important general multilateral treaties. Accordingly, he suggested that the Commission should not reverse its decision of 1962 and should accept the substance of article 8.

84. So far as the drafting was concerned, he agreed with the proposals by the Special Rapporteur and the Swedish Government, among others, for drafting the article more clearly and concisely. Subject to some drafting improvements, he was prepared to accept the revised version proposed by the Special Rapporteur, which scarcely differed from that suggested by the Swedish Government.

85. Mr. TUNKIN said that paragraph 1 of the article dealt with one of the fundamental principles of the law of treaties and the fate of the Commission's whole draft might hinge upon the way it was formulated. All members were aware of the practice resulting from the cold war whereby certain States had been debarred from participating in general multilateral treaties. From the legal point of view his categorical answer to the question whether States were free to exclude certain members of the international community in that way was in the negative.

86. The Commission's recognition of the existence of a principle that general multilateral treaties should be open to the participation of all States had been a substantial contribution to the development of contemporary international law. It was an aspect of a fundamental principle of *jus cogens*, namely, the sovereign equality of States. By virtue of the definition in article 1 (*c*), each State must have the right to participate in elaborating general norms of international law designed to be binding on all. To close general multilateral treaties to the participation of some States by whatever means, direct or indirect, would be inconsistent with the very nature of such treaties and injurious to the progress of international law. That being so, paragraph 1 of article 8 must be modified so as to consist of nothing more than the statement " In the case of a general multilateral treaty, every State may become a party to the treaty ". The rest of the paragraph should be deleted.

The meeting rose at 12.45 p.m.

792nd MEETING

Monday, 31 May 1965, at 5 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. 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 8 (Participation in a treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. LACHS said that he proposed to comment on the fundamental issues raised by article 8 and to leave drafting questions aside. The text drawn up by the Commission at its fourteenth session achieved something less than a compromise between two principles, namely, the so-called freedom of States to choose their partners in an international instrument, and the universal character of general norms of international law that were the concern of all States. His view was borne out by the observations of governments and the Special Rapporteur's commentary on them. Many governments had argued that the article did not go far enough, some, like that of Japan, had advocated its deletion, while others had criticized it on the ground that it did violence to the freedom of contracting States to determine the scope of the treaty. At the previous meeting, Mr. Briggs had presented a carefully reasoned case for dropping the article altogether.

3. In his own opinion, traditional solutions were wholly inadequate and the Commission should face the fact that the discussion in 1962 and the considerations put forward since that date had centred on the real crux of the problem, which was recognition, though that had never been explicitly avowed. The time had come to call a spade a spade and to admit that States wished to keep a free hand where the issue of recognition was concerned and were therefore reluctant to enter into treaty relations with governments they did not wish to recognize, or with entities which they refused to admit possessed the status of a State lest that implied recognition. Recognition was a political fact which the Commission should bear in mind.

4. If he were right in his diagnosis of the difficulty, the solution would be to reassure States that the draft article would not imply recognition. That would be consistent with practice before the adoption of the

[1] See 791st meeting, preceding para. 61, and para. 63.