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Summary record of the 885th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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83. Mr. AGO said that the imprecision was partly due to the fact that in paragraph 1, as in article 72 which the Commission had just adopted, reference was made, first to an agreement between the parties expressed by a provision of the treaty and, secondly, to an agreement concluded by the parties in some other way. The Special Rapporteur had said that it would be necessary to review all the articles in which those ideas appeared and make them uniform.

84. The CHAIRMAN, speaking as a member of the Commission, pointed out that the words " any such provision " in paragraph 2 referred to the expression " in such manner and upon such date as it may provide " in paragraph 1, while the word " agreement " in paragraph 2 referred to the concluding words of paragraph 1 " or as the States which adopted its text may agree ". The relationship might be brought out more clearly.

85. Mr. AMADO said he agreed that the link between the two paragraphs of the article should be made clearer by expanding the expression " Failing any such provision or agreement " in paragraph 2. Furthermore, the word " *modalités* " in paragraph 1 of the French text was too sophisticated in comparison with the English word " manner ".

86. Sir Humphrey WALDOCK, Special Rapporteur, said he doubted whether the English text of paragraph 1 could be made any clearer. The parallel between paragraphs 1 and 2 had been rendered with precision and the insertion of the word " otherwise " would not serve any purpose. The word " or " was clearly being used as a disjunctive and could lead to no misunderstanding. Similar wording had been approved by the Commission on no less than three occasions without provoking any criticism.

87. Mr. AGO said that the problem of the parallel between the two paragraphs arose only in the French text. In paragraph 1 of that text, the words " *ou convenues par les Etats* " should be replaced by the words " *ou par un accord des Etats* ". Paragraph 2 should begin with the words " *A défaut de telles dispositions ou d'un tel accord* ".

88. The CHAIRMAN put article 23 to the vote with the amendments to the French text proposed by Mr. Reuter and Mr. Ago.

Article 23, with those amendments to the French text, was adopted by 17 votes to none.[21]

The meeting rose at 1 p.m.

[21] For later amendments to the title and text of article 23, see 887th meeting, para. 68, and 892nd meeting, para. 109.

885th MEETING

Wednesday, 6 July 1966, at 11 a.m.

Chairman: Mr. Herbert W. BRIGGS

later, Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107, L.115)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of articles submitted by the Drafting Committee.

ARTICLE 29 (*bis*) (Notifications and communications)[73][1]

2. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the following new text was proposed for article 29 (*bis*):

" *Notifications and communications* "

" Unless the treaty or the present articles otherwise provide, any notification or communication to be made by any State under the terms of the treaty or of the present articles:

(*a*) Shall be transmitted

(*i*) if there is no depositary, directly to the States for which it is intended;

(*ii*) if there is a depositary, to the latter;

(*b*) Shall be considered as having been made by the State in question upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary. "

3. The Drafting Committee had decided not to incorporate a rule stating when a notification would be regarded as operative for the recipient State, as had been proposed during the discussion.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that some members had favoured a provision that would allow for a short interval between the time a notification or communication was made and the time it came into effect for the other State or States. The Drafting Committee had considered the possibility of introducing say, a thirty-day rule, in order to meet that point, but after careful examination it had concluded that the eventuality, if it had to be covered at all, was more likely to arise under article 23, dealing with the entry into force of treaties. The general view in the Drafting Committee had been that the existing practice was for instruments of, for example, ratification, accession, acceptance or approval to come into force at the moment they were deposited or notified. In view of the decision taken at the previous meeting not to introduce a specified time-limit in article 23, the new article 29 (*bis*) was designed simply to cover the question of when a notification or communication was to be regarded as having been made or received. The article was of a procedural character and ought to be placed among the provisions dealing with the functions of a depositary.

5. Mr. AGO drew attention to a drafting error in the French text of the introductory sentence which had

[1] For earlier discussion, see 862nd meeting, paras. 2-74.

survived from an earlier version. The words "*par un Etat*" should be substituted for the words "*à un Etat*".

6. Mr. TSURUOKA said that two points needed clarifying. First, he did not understand why the phrase "under the terms of the treaty or of the present articles" had been used instead of the phrase "under the terms of the present articles". Only certain types of notification affecting the existence of a treaty, such as modification, reservations, withdrawal or denunciation, were contemplated: the Commission had not intended to deal with all the different kinds of notification which the parties might have to make in applying a treaty. Thus the words "of the treaty" might unduly extend the scope of the article.

7. For instance, article 13 of the Montreux Convention regarding the Régime of the Straits[2] laid down that "The transit of vessels of war through the Straits shall be preceded by a notification given to the Turkish Government 'through the diplomatic channel'", despite the fact that there was a depositary, the French Government. Thus the Turkish Government could be notified directly without using the depositary as an intermediary. If that Convention had not contained the clause "through the diplomatic channel", would it be necessary, under the terms of article 29 (*bis*), to transmit the notification through the French Government as the depositary rather than directly to the Turkish Government?

8. His second question related to the words "or, as the case may be, upon its receipt by the depositary" in sub-paragraph (*b*) of the Drafting Committee's new text. The purpose was, of course, to indicate that the obligation to notify was discharged once the notification had been received by the depositary and there was no question of any legal effect. A reading of the text, however, inevitably suggested that a notification might have a legal effect in that it might be invoked against other States. His doubts had arisen after comparing that text with the text of article 19, paragraph 5 (A/CN.4/L.115), according to which "... a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later". From which date would the twelve-month period run? Did a State for which notification of a reservation was intended have to reply within twelve months reckoned from the date of the receipt of the notification by the depositary and not from the date of receipt by that State?

9. Sir Humphrey WALDOCK, Special Rapporteur, said that many treaties contained provisions fixing time limits for the submission of various kinds of instruments. During the discussion of the kind of difficulty mentioned by Mr. Tsuruoka, some members had expressed concern about the possibility of a depositary, whether a State or an international organization, neglecting its duties and failing to transmit a communication as soon as it had been received. Mr. Tsuruoka was, of course, right in saying that a difficulty might arise when the treaty itself imposed a time-limit for registering an objection to a reservation made by another State. But that very real point of substance was surely adequately covered by the provisions of article 15, as approved by the Commission at the previous meeting. Admittedly, certain legal effects might flow from the new article 29 (*bis*), but it was believed to reflect existing practice and it would be hard to devise a sufficiently detailed text to cover all the possible situations that might occur. Furthermore, the practice of States themselves when acting as depositaries varied widely. The possibility of serious failures in the exercise of depositary functions should not be exaggerated and, if they took place, the matter would have to be settled in the light of the circumstances.

10. The practical problems to which Mr. Tsuruoka had drawn attention had certainly not been overlooked by the Drafting Committee, but the proviso "Unless the treaty or the present articles otherwise provide" should be a sufficient safeguard against abuse. If a treaty expressly provided for a depositary, but a State nevertheless despatched a notification simultaneously to the depositary and to another State, any dispute over the time when the notification actually look effect with respect to that other State could be settled under the provisions of the new article 29 (*bis*).

11. Mr. AGO said that, in the particular case of an objection to a reservation, the rule to be applied was that set forth in article 19, paragraph 5, which clearly specified that a reservation was considered to have been accepted by a State if it had raised no objection by the end of a period of twelve months after it had been notified of the reservation. The operative date was therefore not that on which the notification of the reservation had reached the depositary but the date on which notification had been received by the State entitled to make objection.

12. Mr. TSURUOKA said he found Mr. Ago's interpretation very ingenious but did not feel sure that it could really be justified within the ordinary meaning of the terms of article 29 (*bis*). When there was a depositary, a notification was considered as having been made by the notifying State upon its receipt by the depositary. Since the notification was thus deemed to have been made, how could it be said that the State for which it was intended had not been notified?

13. Mr. BARTOŠ pointed out that he had raised that very question on a number of occasions. But as the replies he had received failed to resolve the very real difficulties which were constantly arising, or to cover all eventualities, he would have to abstain in the vote on article 29 (*bis*).

14. Sir Humphrey WALDOCK, Special Rapporteur, said that he agreed with Mr. Ago that under article 19, paragraph 5, the notification would take effect for the State that would be bound by its terms as soon as it had been received by that State. Many multilateral treaties contained time limits and the problems to which Mr. Tsuruoka had drawn attention could arise in other circumstances, for example, over a notice of termination. However, careful examination of practice had not revealed much evidence of such provisions causing difficulty.

15. Mr. AGO said that, in order to meet the legitimate concern over notification of an objection to a reservation —the only concrete practical problem which arose—the

[2] League of Nations, *Treaty Series*, vol. CLXXIII, p. 223.

Commission might consider making article 19, paragraph 5, even more explicit by stating that the period specified in that paragraph would run from the date on which a State was notified of the reservation either by the State making the reservation or by the depositary.

16. Mr. TSURUOKA said that, while Mr. Ago's suggestion solved the problem as far as that particular case was concerned, other cases might arise, particularly if the words " under the terms of the treaty " were retained in article 29 (*bis*). The simplest course would be to delete the last part of sub-paragraph (*b*). The specific issue involved in the preliminary objections in connexion with the *Case concerning right of passage over Indian Territory*[3] was that of acceptance of the compulsory jurisdiction of the International Court of Justice, and, in that instance, a mere notification to the depositary had been able to produce legal effects without any injury to the interests of the other party. It was, however, dangerous to derive a general rule from that particular case.

17. Mr. PESSOU said that it was hard to see what serious difficulties could arise in connexion with article 29 (*bis*). In private law there were two conflicting principles, one that a communication took effect from the date of its despatch, and the other that it took effect from the date of its receipt. If the problem which had arisen with regard to article 29 (*bis*) related to the application *mutatis mutandis* of one of those two principles and the question was that of determining at what point a notification became legally effective, he thought the solution presented no difficulty. The practice of States was to consider an instrument as legally effective from the date on which it was despatched, but, as a general rule, it was agreed to adopt, instead, the date of receipt by the State for which it was intended. The wording as amended by Mr. Ago might therefore meet the situation.

18. Mr. BARTOŠ said that, if the last part of sub-paragraph (*b*) were retained, there was no guarantee that the State for which the modification was intended would be aware that it had been made.

19. Statistics showed that even in the United Nations several months at least elapsed between a notification made to the Secretary-General and its transmission to the other parties. And yet United Nations procedure was in fact the most satisfactory—the practice of some depositary States was much less so. In the interval between the conclusion of a treaty and the receipt of notifications, the attitude of the depositary towards the treaty might change, leading it to disregard its obligations as depositary.

20. He would be in favour of the text of the article if a practice existed whereby a notification received by a depositary was automatically transmitted on the date it was received. As matters now stood, the Commission appeared to be creating the legal fiction that the States concerned were aware of the notification, whereas in fact they remained unaware of it for a certain period of time, a period which might sometimes be extended deliberately. In the United Nations, delays were not deliberate: the Secretariat received some thirty notifications daily and had not sufficient staff to retransmit them immediately. In that respect, the Secretary-General's obligation to draw up every two or three days a list of the letters received by him acted as a palliative, because it enabled permanent missions to find out from the Office of Legal Affairs what notifications had been received. But that indirect method of information was no substitute for notification. In the case of some depositary States, however, delays in transmission were deliberate and were due to an unwillingness to give effect to the notification.

21. He feared that the use of the words " upon its receipt by the depositary " might be taken to mean that the State concerned was deemed to have received the notification upon its receipt by the depositary. Since he was not prepared to vote for a legal fiction, he proposed to abstain.

22. Mr. ROSENNE said that the difficulties to which article 29 (*bis*) had given rise were not primarily legal in character, but were mainly due to the great diversity in the administrative practices of States and depositaries. As he had indicated at the previous meeting, he was satisfied that it was not feasible at that stage to frame a general rule governing the receipt of notifications and communications as distinct from a rule about the making of notifications and communications and the time when they became operative in relation to the other State.

23. After long reflection on the problems involved, he had come to the conclusion that, in the introductory part of its report on the law of treaties, the Commission ought to draw the attention of the international community to the need for a much greater degree of administrative co-ordination in the exercise of depositary functions. There had been a very marked improvement in the depositary practice of the Secretary-General of the United Nations during the past five or six years, but the same could not be said of all the specialized agencies, some of which could even be charged with administering depositary services without regard for the general law of treaties and the usual practices of Ministries of Foreign Affairs.

24. It would be most useful if the General Assembly could take some action in the matter. It would certainly be necessary for it to review its regulations on the registration and publication of treaties and international agreements as well as its resolutions on reservations to general multilateral treaties, as the codification of the law of treaties progressed. In the meantime, he would vote in favour of the Drafting Committee's text of article 29 (*bis*) in the belief that the Commission could not achieve more at that stage.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that it was by no means easy to resolve the problem that had arisen over sub-paragraph (*b*). Whichever approach was adopted, an entirely symmetrical formula was probably impossible. Even if an explicit rule regarding the time at which a notification or communication was to be regarded as having been received was inserted in article 29 (*bis*), the problem of a depositary's failure to transmit the notification or communication promptly would still not have been overcome. Such a failure, if complete, might need to be dealt with in an entirely different context, that of responsibility, jurisdiction or rights and obligations. Indeed, just as much difficulty might be caused by introducing a rule that was generous

[3] *I.C.J. Reports 1957*, p. 125.

to the recipient State as by the kind of rule being proposed by the Drafting Committee in its new text.

26. Another alternative might be to abandon hope of dealing with the point at all and to delete sub-paragraph (*b*) altogether. It would, however, be a pity to jettison what must be regarded at least as a useful element in the article, since it reflected existing practice and was not unduly stringent.

27. Article 29 (*bis*) could be rendered a little more strict if Mr. Bartoš' idea were followed, but the practical difficulties were inherent in the nature of things and could not be avoided. Personally he could vote for the Drafting Committee's text as it stood, but the Commission might wish the Drafting Committee to consider it once again in order to see whether sub-paragraph (*b*) could be satisfactorily modified.

Mr. Yasseen took the Chair.

28. Mr. AGO said that he was concerned at the misunderstanding which seemed to persist with regard to article 29 (*bis*), as shown by the remarks of Mr. Tsuruoka and Mr. Bartoš, although it had been made perfectly clear that the article dealt exclusively with the rights and obligations of the notifying State and not with those which might arise as a result of the notification for the State for which the notification was intended. The sole purpose of sub-paragraph (*b*) was to indicate that a State which had an obligation to make a notification was not relieved of its obligation as soon as that notification had been sent; in point of time, it could be considered as having discharged that obligation when the notification was received by the addressee, whether that addressee was a State or the depositary.

29. He would be opposed to article 29 (*bis*), if sub-paragraph (*b*) were to be interpreted in the sense in which Mr. Bartoš understood it, namely that as soon as a notification was received by the depositary, that notification became effective vis-à-vis the State for which it was intended. It would be preferable to delete sub-paragraph (*b*) rather than run the risk of its being misinterpreted in that manner.

30. Mr. PESSOU pointed out that in practice, a Ministry of Foreign Affairs which received an important communication invariably acknowledged its receipt in terms which reproduced and confirmed the contents of the communication. That practice might provide a means of overcoming the difficulty.

31. Mr. BARTOŠ said that article 29 (*bis*) should be considered from two different angles. As Mr. Ago had rightly pointed out, that article specified the moment at which the obligation to make a notification was discharged. If the article had merely stated that the moment in question was that of the receipt of the notification either by the State for which it was intended, if made directly to that State, or by the depositary on behalf of that State, he would have had no objection since, in general international law, the depositary might be regarded as an address for service designated by the parties.

32. But, like Mr. Tsuruoka, he considered that article 29 (*bis*) should also specify at what moment a State entitled to receive a notification was deemed to have received it. It was necessary, in that connexion, to consider two possibilities. The first was that of a notification made directly to the State concerned; in that case, the moment at which the notifying State was considered as having made the notification and the moment at which the State for which it was intended was deemed to have received it would coincide and would be the moment when the notification was received. The second case was that of a notification made to a depositary. In that case the two moments would not coincide: as soon as the notification had been received by the depositary, the notifying State was considered as having discharged its obligation, but the State for which the notification was intended could not be considered as having received it, since it had not yet come to its knowledge. In such a case, the provisions of article 29 (*bis*) were unsatisfactory.

33. He would not vote against article 29 (*bis*), because its provisions dealt adequately with the first aspect of the question, relating to the obligation to make a notification, but would have to abstain, because the second aspect had not been taken into consideration.

34. Mr. TUNKIN said that the point raised by Mr. Tsuruoka and Mr. Bartoš had not escaped the attention of the Drafting Committee, but it had not been possible to find an adequate formulation to cover it. The question dealt with in sub-paragraph (*b*), of course, had two aspects, the first relating to the State making the communication and the second to the State to which the communication was made. Only the first aspect was covered by the Drafting Committee's text. The other aspect raised a general problem of international law of wider scope than the law of treaties, that of determining when a communication would be deemed to have been received by a State. A possible solution might be to delete sub-paragraph (*b*) altogether and confine article 29 (*bis*) to procedural provisions.

35. Mr. BARTOŠ said that he agreed that a solution would be to delete sub-paragraph (*b*) and to incorporate the words " shall be transmitted " in the opening sentence. A gap would then be left in the provisions of the article but that would be preferable to creating a dangerous legal fiction.

36. The CHAIRMAN, speaking as a member of the Commission, stressed the importance of the article. Provision for notification was made in a number of articles of the draft and it was therefore necessary to determine to whom and in what manner notifications should be made. The prevailing view in the Commission was that article 29 (*bis*) did not deal with any detrimental effects that the notification might have on the State for which it was intended.

37. Sub-paragraph (*a*) was useful and clear. Sub-paragraph (*b*) dealt with the important question of determining the moment at which the notification would be considered as having been effected by the State whose duty it was to make it; that sub-paragraph had the merit of stressing that a notification was deemed to have been made not when it was sent but when it was received by the State for which it was intended.

38. A slight risk was, however, involved: as Mr. Tsuruoka, Mr. Bartoš and Mr. Tunkin had pointed out, sub-paragraph (*b*) could be taken to mean that a notification could be invoked against the State for which it

was intended as soon as it had been received by the depositary. He had already expressed his opposition to that idea at the 862nd meeting[4] when the article had been previously discussed. Although the new version was better, sub-paragraph (*b*) could still give rise to doubts and thereby jeopardize the results which all the members of the Commission were hoping to achieve.

39. If the concluding words " or, as the case may be, upon its receipt by the depositary " were deleted, the result would be to reduce the role of the depositary, an important and valuable institution.

40. An alternative solution would be to lay down the rule that a notification made to a depositary took effect vis-à-vis the State for which it was intended upon the expiry of a specified period after the receipt of the communication by the depositary. Such a time-limit would introduce a legal fiction but would, to some extent, reflect what actually happened.

41. He urged that the Commission, instead of deleting sub-paragraph (*b*), should make an effort to amend it, since it was important to retain a provision specifying that a notification was considered as having been made not when it was sent but when it was received.

42. Mr. AMADO said that he too was anxious that a solution should be found. Perhaps some of the difficulties which had arisen could be overcome by rewording sub-paragraph (*b*) to read " Shall be considered as having been made by the State in question *only* upon its receipt . . . ".

43. Mr. ROSENNE said that no real objection had been raised to the rule set forth in sub-paragraph (*b*). Concern had merely been expressed at the possibility of its contents being interpreted in a certain way. In the circumstances, he strongly supported the suggestion by the Chairman and by Mr. Amado that an effort should be made to retain that sub-paragraph in some form.

44. Mr. TSURUOKA suggested that a reservation reflecting the explanation given by Mr. Ago should be expressly included in the text of the article, perhaps by inserting at the beginning of sub-paragraph (*b*) a proviso on the following lines: " Without prejudice to the legal effects of the notification or the communication for the State for which it is intended ". The text would then be much clearer, although rather cumbersome.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that any attempt to produce a new draft of sub-paragraph (*b*) would require great care.

46. Under the provisions of article 15 which the Commission had adopted at the previous meeting and which dealt with the exchange or deposit of instruments of ratification, accession, acceptance or approval, the deposit with the depositary of an instrument of ratification, accession, acceptance or approval established the consent of a State to be bound by the treaty. That solution having been adopted in respect of consent to be bound, it would be difficult to lay down a slightly different rule in article 29 (*bis*) with regard to other matters, such as a notice of termination.

47. It seemed to him that the choice before the Commission was either to drop sub-paragraph (*b*) or to entrust the Drafting Committee with the task of rewording that sub-paragraph in such a way as to meet the difficulty to which Mr. Tsuruoka had drawn attention. He himself had at one time considered the possibility of adding a proviso to the effect that its provisions were without prejudice to any question that might arise if it were established that the communication had not been transmitted to the State concerned.

48. Mr. AGO said that, if such was the Commission's wish, the Drafting Committee could not but make a further effort to modify sub-paragraph (*b*) so as to take account of the comments made. If the Drafting Committee was unsuccessful, sub-paragraph (*b*) would have to be dropped, leaving a gap in the provisions of article 29 (*bis*). He proposed that sub-paragraph (*b*) should be referred back to the Drafting Committee.

49. The CHAIRMAN, speaking as a member of the Commission, supported that proposal.

50. Mr. BARTOŠ also supported that proposal and asked the Drafting Committee to consider, among other possible solutions, the advisability of replacing the concluding words " by the depositary " by " through the depositary ".

51. Mr. TSURUOKA said that he hoped that the Drafting Committee would also consider the advisability of deleting from the opening sentence the words " of the treaty or " preceding the words " of the present articles ".

52. Sir Humphrey WALDOCK, Special Rapporteur, said it was essential to retain the reference to the terms of the treaty.

53. With regard to the question of referring article 29 (*bis*) back to the Drafting Committee, he thought that it would be sufficient to note that, in the course of the discussion, there had been no serious criticism of any part of the article other than sub-paragraph (*b*).

54. Mr. TUNKIN proposed that article 29 (*bis*) should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

It was so decided.[5]

The meeting rose at 1 p.m.

[4] Para. 29.

[5] For resumption of discussion, see 887th meeting, paras. 9-43.

886th MEETING

Friday, 8 July 1966, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS
later, Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.