Document:-
**A/CN.4/SR.803**

# Summary record of the 803rd meeting

Topic:
**<multiple topics>**

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

## 803rd MEETING

*Wednesday, 16 June 1965 at 10 a.m.*

*Chairman:* Mr. Milan BARTOŠ

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

---

### Programme of Work

1. The CHAIRMAN invited the Secretary to make a statement on the Commission's programme of work.

2. Mr. BAGUINIAN, Secretary to the Commission, said that in connexion with a request by the Special Rapporteur on the law of treaties for guidance as to whether he should now prepare a supplement to his fourth report (A/CN.4/177 and Add.1) covering additional articles beyond article 29, or whether he should devote his time to preparing commentaries on articles 1 to 29, the Secretariat had been asked by the Chairman to indicate what might happen with regard to the discussion of the Commission's reports by the General Assembly at its next session, as that information would be helpful in enabling the Commission to reach a decision on the Special Rapporteur's report.

3. At its nineteenth session, the General Assembly had been unable to take any action on a number of reports submitted to it, including that of the Commission for 1964, but presumably it would be able to do so when the session was resumed at the beginning of September. Any reports submitted but not yet discussed would probably then be taken up at the twentieth session scheduled to open on 21 September 1965, which meant that the Sixth Committee would then have before it the Commission's reports for both its sixteenth (1964) and its seventeenth (1965) sessions.[1] It might not, however, be able to devote a great deal of time to them as it would have a heavier agenda than usual, including the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (A/5746), which was expected to give rise to lengthy discussion, and so would probably concentrate on points requiring immediate decision rather than engage in a detailed examination of the draft articles.

4. It would thus appear unnecessary for the Commission to include in its report on the seventeenth session a full commentary on the articles in part I of its draft on the law of treaties. The Commission might prefer to submit, for information only, the text of the articles adopted at that session, in which case the complete text of the draft articles, together with the complete commentary, would be published in the report on its summer session in 1966. The comments of governments on the draft as a whole would be included as an annex to that report.

5. The situation in regard to the draft articles on special missions was different because, if the Commission was to achieve its aim of completing them in 1966, the whole text of the articles provisionally adopted at the current session, together with commentaries, would have to be included in the report on the seventeenth session, not in order to meet the needs of the Sixth Committee, which might or might not discuss the draft, but in order to obtain the comments of governments; that could be done under the terms of the Commission's Statute without any action by the General Assembly.

6. Mr. TUNKIN said that the Secretariat's conclusions were reasonable and the course it had suggested should be followed. During the past decade the Commission's usual practice had been to submit to the General Assembly a complete draft, including commentaries, on any given topic. However, the commentaries on the complex subject of the law of treaties called for very careful preparation. In the past they had been drawn up in haste towards the end of the session, but it would be wiser to leave that task until either the January or the summer session of 1966, when the main work on the articles themselves would have been completed. Further changes in the articles adopted at the current session might turn out to be necessary, and that was an additional argument for not submitting commentaries to the General Assembly at the present juncture.

7. Mr. ROSENNE said he agreed with Mr. Tunkin. Any attempt to prepare commentaries at the current session was only likely to cause unnecessary confusion because, as the Special Rapporteur had indicated in his fourth report, much still remained to be done in the way of polishing the drafting, co-ordinating the text and possibly rearranging the material, and that could only be undertaken at a later stage, after the substantive discussion on the draft articles had been more or less completed.

8. Mr. AGO said that in his view the wisest course at the moment would be to adopt as many articles as possible and to prepare the commentary in 1966; the commentary should not be written in haste, as it had been at the time of the first reading, for the final commentary would be submitted to the General Assembly and to the future diplomatic conference. It would have to be uniform in style and approach, and uniformity could only be achieved when the entire draft was before the Commission. For that purpose, the current session, the January session and the 1966 summer session should be regarded as a whole.

9. Mr. BRIGGS said that, although he regretted that no commentaries would accompany the draft articles presented in the Commission's report on its seventeenth session, he had been convinced by Mr. Tunkin's argument. Perhaps, however, it would be possible for the Special Rapporteur to prepare a rather more detailed introduction to the draft articles in order to explain the nature of the changes introduced by the Commission during the second reading.

10. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the previous speakers. He would

[1] *Official Records of the General Assembly, Nineteenth Session, Supplement No. 9* (A/5809), and *Official Records of the General Assembly, Twentieth Session, Supplement No. 9* (A/6009).

rather have more time to prepare the commentaries during the interval between the end of the seventeenth session and the 1966 summer session. The Commission would be judged by posterity on its final text, and the commentaries would need careful examination.

11. He could prepare for inclusion in the introduction to the draft articles adopted at the seventeenth session an explanation of how the Commission had proceeded and the course it proposed to follow in 1966, in order to satisfy the Sixth Committee that there had been good reason for the Commission's departure from its usual practice of accompanying draft articles with commentaries. The Sixth Committee would understand that, as had occurred in the case of the draft on consular relations, the Commission would be engaged until a very late stage in rearranging the material and remedying defects; no useful purpose would be served by submitting a half-finished piece of work in 1965.

12. He assumed that the Commission would wish to take up item 3 of its agenda (Special Missions) after concluding its examination of article 29 of the draft on the law of treaties and then revert to the Drafting Committee's proposals.

13. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin. The Commission's report would be regarded as provisional, no commentaries on the articles on the law of treaties would be published in 1965, and the Commission could adopt the method suggested by the Secretariat. Some thought that the Commission would be embarking on a third reading, and making further changes, at the last minute, but his own view was that it was the Commission's duty to produce as its final text a finished and co-ordinated piece of work.

14. Mr. CASTRÉN said he supported Mr. Briggs's suggestion that the Special Rapporteur should be asked to prepare, instead of a commentary, a fuller introduction explaining that the articles adopted were provisional, and that the Commission reserved the right to amend them in 1966.

15. Mr. JIMÉNEZ de ARÉCHAGA said that there was no need for the Commission to wait until the Drafting Committee had completed its work on all the draft articles referred to it before taking up some of them.

16. The CHAIRMAN suggested that the Commission should take note of the Secretariat's suggestion and decide to follow the procedure indicated.

*It was so agreed.*

17. The CHAIRMAN said that, with regard to the immediate future, it had been agreed between himself and the Special Rapporteur on the law of treaties that the Commission, after considering article 29 of the draft on the law of treaties, should pass on to the topic of special missions, fitting in from time to time, between the meetings devoted to that topic, meetings to consider those articles on the law of treaties which it had held over as well as the texts prepared by the Drafting Committee, so that at least some sections of the draft would be completed by the end of the current session. He suggested that the Commission should proceed in the manner he had outlined.

*It was so agreed.*

## Law of Treaties

**(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107 and L.108)**

*(resumed from the previous meeting)*

[Item 2 of the agenda]

ARTICLE 28 (The depositary of multilateral treaties) *(continued)*[2]

18. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 28.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that although article 28 had not given rise to objection from governments, it had not escaped shrewd criticism from members of the Commission. Some had suggested that it was useless, others that it was possibly inaccurate. The principal argument for retaining such a provision was that the depositary was a critical part of the machinery for operating a modern multilateral treaty. Usually the depositary was designated in the treaty itself or decided upon more or less explicitly at the time of signature, but a residual rule could be useful to cover cases where that was not done.

20. As Special Rapporteur he did not attach great weight to some of the objections raised in the discussion, for example, those referring to a " competent organ " of an international organization, as there seemed to him nothing inaccurate in the expression. It must also be remembered that there was a proposal before the Commission for the insertion of an article making a general reservation of the established rules of an international organization. Nor did he think it unwise or inconvenient to take account of the very frequent practice of designating as the depositary the State in whose territory the conference for drawing up the treaty had been convened. Very often particular cities or countries were chosen as the venue for conferences because traditionally treaties on certain subjects were negotiated there, and it was common for the host government to act as the depositary.

21. The wording of paragraph 2 had been criticized and a question had arisen as to whether the English, French and Spanish texts corresponded exactly. The intention had been to make that provision mandatory in order to supply a rule in the event of disagreement between, or the inertia of, the parties. But the Commission had refrained from laying down anything too stringent, and the matter was left to be determined by the States concerned. No attempt had been made to go into more difficult problems, such as what majority would be required to reach a decision in the event of disagreement.

22. There was some truth in the charge that the content of paragraph 2 was self-evident. Nevertheless, changes of depositary occurred in practice, and paragraph 2

[2] For the text of article 28, see 802nd meeting, following para. 64.

made it clear that the original depositary had no right to transfer the functions to another by means of a bilateral arrangement; such a transfer needed the agreement of all the other States concerned.

23. The article had also been criticized for dealing only with the cases where there was no depositary. The definition contained in article 1, paragraph 1 (*g*), might, of course, be transferred and re-cast in the form of a positive rule, possibly to replace the existing article 28, but provision would still have to be made for cases where no depositary had been designated or the parties disagreed. Truth to tell, the question of the depositary was not quite so simple as it might appear on the surface. There were such cases to consider as those where a depositary was not in possession of the original text of the treaty, as was the case with the United Nations Charter, though mere custody of the instrument was a secondary matter in comparison with the discharge of depositary functions; again, there were other cases where there were two or more depositaries.

24. As for recent cases where there was more than one depositary, it could be assumed that such cases would be covered by the general definition of the term.

25. He had not yet reached any final conclusion about the fate of the article; perhaps the best course would be to refer it back to the Drafting Committee for re-examination in the light of the discussion.

26. The CHAIRMAN suggested that the Commission should follow the Special Rapporteur's advice and refer article 28 to the Drafting Committee.

*It was so agreed.*[3]

ARTICLE 29 (The functions of a depositary)

*Article 29*

*The functions of a depositary*

1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all States parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in paragraphs 3 to 8 below.

3. The depositary shall have the duty:

(*a*) To prepare any further texts in such additional language as may be required either under the terms of the treaty or the rules in force in an international organization;

(*b*) To prepare certified copies of the original text or texts and transmit such copies to the States mentioned in paragraph 1 above;

(*c*) To receive in deposit all instruments and ratifications relating to the treaty and to execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument relating to the treaty;

(*d*) To furnish to the State concerned an acknowledgement in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the other States mentioned in paragraph 1 of the receipt of such instrument or notification.

4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

5. On a reservation having been formulated, the depositary shall have the duty:

(*a*) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

(*b*) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19.

6. On receiving a request from a State desiring to accede to a treaty under the provisions of article 9, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

7. Where a treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty:

(*a*) Promptly to inform all the States mentioned in paragraph 1 above when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

(*b*) To draw up a *procès-verbal* of the entry into force of the treaty, if the provisions of the treaty so require.

8. In the event of any difference arising between a State and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the State concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

27. The CHAIRMAN invited the Special Rapporteur to introduce his revised draft of article 29.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that none of the governments submitting observations had suggested that the article was unnecessary. Some had made suggestions which he had sought to take into account, more particularly those of the Japanese and United States Governments, when trying to reduce the article in length and simplify its wording. His revision read:

1. A depositary shall exercise its functions impartially on behalf of all the parties to the treaty and States to which it is open to become a party.

2. In addition to any functions expressly laid down in the treaty, and unless the treaty otherwise provides, a depositary shall have the duty:

(*a*) To prepare any further texts in such additional languages as may be required either under the terms of the treaty or the rules in force in an international organization at the time the depositary is designated;

[3] For resumption of discussion, see 815th meeting, paras. 15-34.

(*b*) To prepare certified copies of the original text or texts and transmit such copies to all parties and signatory States and to any other of the States mentioned in paragraph 1 that so requests;

(*c*) To examine whether a signature, deposit of an instrument or formulation of a reservation is in conformity with the relevant provisions of the particular treaty and of the present articles, and, if need be, to communicate on the point with the State concerned;

(*d*) To accept any signatures to the treaty, and to receive in deposit any instruments relating to it;

(*e*) To acknowledge in writing to the State concerned the receipt of any instrument or notification relating to the treaty and to inform the other interested States of the receipt of such instrument or notification;

(*f*) To carry out the provisions of article 9, paragraph 3, on receiving a request from a State desiring to accede to the treaty in conformity with the provisions of that article;

(*g*) To carry out the provisions of article 26 in the event of the discovery of an error in a text of the treaty.

3. Where the treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, accession, acceptance or approval, or upon some uncertain event, a depositary shall have the duty to inform the States mentioned in paragraph 1 when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

4. In the event of any difference arising between a State and the depositary as to the performance of the above-mentioned functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the State concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

29. In view of the importance of the depositary in modern treaty-making practice and the lack of literature on the subject, the Commission had thought it useful to draft a provision summarizing the depositary's main functions, since such a provision would assist the operation of modern multilateral treaties and might also be of help to States which acted for the first time as a depositary. When preparing the somewhat detailed text drawn up at the fourteenth session, the Commission had benefited from the material supplied in the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements.[4] The Commission had before it some additional material in the Secretary-General's report on Depositary Practice in Relation to Reservations (A/5687), but that report dealt with only one facet of the subject.

30. Mr. ROSENNE said he had submitted a proposal (A/CN.4/L.108) for adding to article 29, or as a new article 29 *bis*, a paragraph reading:

" Unless otherwise provided in the treaty or these articles, any notice communicated by the depositary to the States mentioned in article 29, paragraph 1, becomes operative 90 days after the receipt by the depositary of the instrument to which the communication relates ".

[4] ST/LEG/7.

31. At that stage he did not wish to discuss the wording which, in any event, would be a matter for the Drafting Committee if the Commission accepted the principle. However, he wished to make a few additional remarks to supplement the commentary he had prepared.

32. At the outset he must make it quite clear that his intention was not to overrule or criticize the decision reached by the International Court in the preliminary objection phase of the *Case concerning right of passage over Indian territory*.[5] The purpose of his proposal was to prevent the accidental repetition of what had happened on that occasion and to fill what he regarded as a gap in the draft articles. His provision would constitute, as it were, a double residuary rule that would only come into play when the treaty itself was silent on the matter and none of the provisions in the draft articles applied. The proposal was strictly *de lege ferenda*, and he stressed that point because he did not wish to disturb what was considered to be the law regarding any existing treaty, whoever was exercising the depositary functions. He had indicated at the 669th meeting,[6] when reserving his position on paragraph (4) of the commentary to what had then been article 13, that he might later suggest, in the interests of progressive development, a general rule providing for a short time lag between the date of the deposit of an instrument and the date when the instrument became effective vis-à-vis other States, and that was what he was now proposing.

33. Amplifying paragraph 1 (4) of his commentary, he said that on making inquiries about the manner in which a depositary transmitted communications, he had been astonished to learn what a variety of methods was used. Sometimes depositaries, whether international organizations or States, transmitted communications to diplomatic missions accredited to them or (in the case of States) through their own missions accredited in the country of receipt. Sometimes the documents were sent by post. According to the information given to him, as far as the United Nations was concerned, the method was determined by the receiving government, but he did not know whether that was the case when the depositary was a State or any other international organization. Some depositaries, particularly the more technical specialized agencies, did not seem to be aware of the fact that in most, if not all, countries treaty information was centralized at the Ministry of Foreign Affairs, and they sent treaty communications to the technical ministries with which they were normally in contact, with the result that Foreign Ministries responsible for maintaining treaty registers were not always fully informed about treaty relations arising out of technical multilateral conventions. In several of the draft articles, mention was made of the receipt of communications by governments, but with such a variety of methods it was hardly possible to determine objectively when a communication was actually received by a government.

34. He had made an arbitrary choice of a 90-day interval between the date of the receipt of the instrument by the depositary and the date when it would become operative for the other States receiving notice of its

[5] *I.C.J. Reports 1957*, pp. 145-147.

[6] *Yearbook of the International Law Commission, 1962*, Vol. I, p. 272, paras. 90 and 91.

reception, because that period was mentioned in paragraph 33 of part II of the Secretary-General's report (A/5687) as one traditionally used for certain purposes, and it seemed adequate in the present context.

35. The term " becomes operative " derived from other articles in the draft but might need alteration in the light of the final wording to be adopted in those other articles. Its meaning was that as far as the depositing State was concerned, the instrument was absolutely final the moment it was deposited with the depositary, unless the treaty, or a provision in the draft articles (should they take the form of a convention), allowed for withdrawal of any particular instrument. The term was not intended to give any leeway for withdrawal, but only to make due allowance for the requisite administrative processes, both the transmission of notice by the depositary and its receipt in the proper quarter. By way of illustration he had added a note to his commentary, which should perhaps be amplified further by explaining that the communication in question had been received on Good Friday, when the Ministry of Foreign Affairs in his country had been working; the corresponding departments in many other countries would, however, have been closed not only on that day but over the whole Easter week-end, so that actual receipt would have been delayed by several days.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that it would simplify discussion if the Commission could deal with Mr. Rosenne's proposal separately before taking up the rest of article 29.

37. The CHAIRMAN suggested that the Commission consider first Mr. Rosenne's proposal.

*It was so agreed.*

38. Mr. CASTRÉN said that, in principle, he approved the addition proposed by Mr. Rosenne, which might form a new paragraph to be inserted between the existing paragraphs 2 and 3 of article 29.

39. Mr. JIMÉNEZ de ARÉCHAGA said that the operation of the additional paragraph proposed by Mr. Rosenne was likely to lead to difficulties. It was apparently intended to provide for constructive notice to States of the existence of certain acts such as ratification, and could have very serious effects. It would seem to involve the surprising result that, whether or not a notice had been sent by the depositary, the 90-day period would apply; in other words, there might be constructive notice without any actual notice being given by the depositary. As a result, a State might find itself in treaty relations with another without any communication having been received by it notifying it of the position. Under the provisions of article 19, paragraph 3, regarding implied acceptance of a reservation to a treaty, a State could find itself in the position of being deemed to have accepted a reservation without having received any advice on the subject. The position was similar with regard to the provisions concerning the withdrawal reservations.

40. If in fact the depositary sent a communication, there appeared to be no reason to wait 90 days; the notice should in fact take effect upon the communication being made. Postponement of the entry into force of the treaty until the 90-day period had elapsed could result in inconvenience to all States concerned.

41. The proposal embodied the kind of residuary rule which States would wish to avoid. In fact, the whole purpose of laying down a residuary rule was to state what provisions States would wish to see applied where the treaty was silent on a certain point or when the parties had overlooked that point.

42. If the Commission were to adopt the proposal it would appear to be overruling the decision of the International Court of Justice in the *Right of Passage* case.

43. Mr. ROSENNE said that perhaps Mr. Jiménez de Aréchaga had misunderstood his purpose. The Commission could not proceed on the assumption that a depositary would fail to fulfil the obligations it had assumed. Of course, any particular instance of an omission to send out a notice of communication by reason of an administrative oversight would have to be judged on its merits. Thus the issue of constructive notice did not arise.

44. The practice of providing in treaties for a lapse of a specified period after the receipt of the requisite number of ratifications before the treaty came into force was becoming increasingly frequent, and any such provision or relevant rule in the draft articles, if adopted by States, would have priority, but the kind of residual rule he was proposing might find favour with governments to cover cases when the point had been overlooked.

45. The *Case concerning Right of Passage over Indian Territory*[7] was an important example of the kind of situation his proposal was designed to prevent; there the Indian Government had found itself brought before the International Court before the depositary had communicated the instrument to it or to the Court or indeed to any other government.

46. Sir Humphrey WALDOCK, Special Rapporteur, said that after examining Mr. Rosenne's text, he feared that it did not go far enough to achieve its author's purpose. The wording would not prevent the instrument from having its effect once it had been deposited, unless the treaty itself provided that the instrument would not be binding until the other parties had received notice of it. He understood the purpose of the proposal, which was to suspend the operation of a treaty for a certain interval in respect of any party which had not yet received notice of the instrument in question, but as drafted it left some difficult questions unanswered. For example, what would be the legal position once the depositary received the last instrument of ratification necessary to bring the treaty into force?

47. Mr. ROSENNE said his reply to the Special Rapporteur's question was that, either the treaty itself would provide that it entered into force immediately on the receipt by the depositary of the required number of instruments of ratification or after a specified period thereafter, in which case his proposal would not apply at all, or else, if the treaty were silent, it would come into force, under his proposal, after 90 days. Naturally,

[7] *I.C.J. Pleadings, Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Vol. I, pp. 220-222.

if the parties desired a different time-lag they would insert the necessary clause in the treaty itself. The United Kingdom Government had made the same point about the need to allow for the necessary administrative processes to be completed in connexion with the withdrawal of reservations (A/CN.4/175, *ad* article 22).

48. Mr. PAL said that he failed to understand the purport of Mr. Rosenne's text. Did it mean that an instrument could become operative vis-à-vis the other States concerned, even if the depositary had not sent out the notice at all?

49. Mr. ROSENNE said that Mr. Pal's doubt seemed very similar to that of Mr. Jiménez de Aréchaga. It had to be assumed that the depositary would take the requisite action promptly on receiving an instrument; but experience seemed to show that it took at least twenty days to prepare and send out notices, and time must also be allowed for their receipt in the appropriate quarter.

50. Mr. PAL said that it would be most unsatisfactory for the receiving State to be made answerable if a depositary had been dilatory in sending out the notices.

51. Mr. JIMÉNEZ de ARÉCHAGA said he still maintained that Mr. Rosenne's proposal failed to provide against inaction by a depositary and introduced a time-lag, delaying entry into force, that conflicted with the provisions of article 23, paragraph 2. The utility of such a provision was highly questionable, particularly if, as Mr. Rosenne had argued, the Commission must assume that the depositary would discharge its function. A further argument against its inclusion was the speed of modern communications.

52. Mr. REUTER said that he had at first had some difficulty in grasping the purport of the provision. Now that he understood it, however, he thought that, if the intention was really to develop multilateral treaty law, especially that which might apply in relations concerning individuals, a provision of the kind was essential. A similar practice existed in the European communities, in order that States should know exactly as from what time they were required to apply a treaty. It was simply a residuary rule. It was possible to think of much more convenient arrangements, such as telegraphic notice, or immediate operative effect. At all events, the problem dealt with in Mr. Rosenne's proposal was a very real one.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the question of the date at which a notice took effect for the State receiving it involved a very real problem. Adoption of the provision proposed by Mr. Rosenne would mean that a time-limit, such as that of twelve months laid down in paragraph 3 of article 19 for the period after which consent to a reservation was assumed, would commence to run for the State concerned not from the date of the actual receipt of the formal notice but from a fixed date, namely, 90 days after the receipt by the depositary of the instrument to which the communication related. The effect could be in some cases to cut down the twelve-month period.

54. The provision did not deal with the relation between the effect of the notice and such matters as entry into force. A treaty usually provided for entry into force upon the deposit of a certain number of ratifications; the question would arise, under the provision, whether the date of entry into force would be affected by the 90-day period for the notices of ratification to become effective. As pointed out by Mr. Rosenne, there was an increasing tendency to include in large multilateral treaties a clause deferring entry into force for a short specified period, to run from the date by which the requisite number of ratifications had been received; periods of that type were often introduced for purposes of facilitating administrative adjustments.

55. He thought that the consequences of the proposed provision should be investigated further, in order to see whether it would be helpful or not in the operation of multilateral treaties. He therefore proposed that Mr. Rosenne's additional paragraph or article should be referred to the Drafting Committee for consideration.

56. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to adopt the Special Rapporteur's proposal.

*It was so agreed.*[8]

57. The CHAIRMAN invited the Commission to consider article 29.

58. Mr. VERDROSS said that the text proposed by the Special Rapporteur was an improvement on that adopted by the Commission at the first reading, more particularly on that of paragraph 1, where the second sentence, " A depositary is therefore under an obligation to act impartially in the performance of these functions ", seemed to be a consequence of the first, but was in reality quite separate.

59. It was his impression that paragraphs 2 and 3 contained a full list of functions, but it was always difficult to ensure that a list was truly complete and it could always happen that the depositary assumed some further function; it would therefore be advisable to add, in paragraph 2 of the 1962 text, after the words " a depositary has ", the word " primarily " or some similar word.

60. Mr. CASTRÉN said that article 29 was one of the longest adopted by the Commission in 1962. The Special Rapporteur's draft was, happily, shorter and more concise, but could probably be simplified even further.

61. Since the opening passage in paragraph 2 already contained a general reference to other provisions of the draft convention which regulated certain special functions and duties of the depositary, sub-paragraphs (*f*) and (*g*) could be deleted, just as paragraph 5 (*b*) of the 1962 text, concerning certain functions of the depositary in the matter of reservations, had been dropped.

62. Nor was it perhaps necessary to stipulate expressly, in paragraph 2 (*e*), that the depositary should acknowledge to the State concerned the receipt of any instrument or notification relating to the treaty; that was self-evident.

63. The Commission had provisionally decided[9] either to delete article 15, paragraph 3, or to transfer it to article 29; he thought that article 29, paragraph 2 (*e*), in fact already embodied the provision in question.

[8] For resumption of discussion, see 815th meeting, paras. 63 and 64.

[9] 787th meeting, paras. 10, 13, 15, 24, 28, 46, 53, 61, 74, 88, 91.

64. Mr. ROSENNE said that the Special Rapporteur's revised draft of article 29 represented an improvement, but as far as paragraph 1 was concerned, he preferred the original formulation; he suggested that the definition of " depositary " be deleted from article 1, paragraph 1 (*g*), since it was more than a mere definition and contained elements of a rule of law.

65. He proposed that in the Special Rapporteur's paragraph 2 the introductory passage should be replaced by the words: " 2. Subject to the terms of the treaty and to these articles, the depositary shall: ". The introduction of the words " and to these articles " would make it possible to drop paragraphs 2 (*f*) and 2 (*g*) and perhaps also the whole of paragraph 3.

66. He proposed that in paragraph 2 (*a*) the word " texts " be replaced by the word " versions ". In paragraph 2 (*e*), and also in paragraph 3 if the Commission decided to retain it, before the words " to inform " the word " promptly " should be introduced, which was used in the corresponding passages of paragraphs 3 (*d*) and 7 (*a*) of article 29 as adopted in 1962.

67. With reference to paragraph 8 of the Special Rapporteur's observations on article 29 (A/CN.4/177/Add.1), he said it would be desirable to include in the article a provision laying down a residuary rule to the effect that the depositary had the obligation to register the treaty, if only to prevent the point from being overlooked. Since one of the consequences of the draft articles would be to lighten considerably the drafting of the final clauses of multilateral treaties, it was advisable to include in the draft as many such rules as possible. An example of the type of difficulty which it was desirable to solve was provided by the ITU Convention which, he understood, had not been fully registered because of the absence of a clear clause laying a duty of registration upon the depositary.

68. Mr. TUNKIN said that the Special Rapporteur had considerably simplified and thereby improved article 29, and his proposed new wording was generally acceptable.

69. He had some difficulty over the reference in paragraph 1 to " States to which it is open to become a party ". He had already mentioned in connexion with other articles the difficulties to which that ambiguous phrase could give rise. In the particular instance, those difficulties could be avoided by omitting the statement that the depositary exercised its functions " on behalf of " etc.; instead, the paragraph should stress the international character of the functions of the depositary, which did not act as a State or on its own behalf. A change of that type would not affect the meaning of the provision.

70. In the opening passage of paragraph 2, a reference should be introduced to the applicable rules of an international organization; sub-paragraph (*a*) could then be dropped, since both its parts would be covered in the introductory passage, which already referred to " any functions expressly laid down in the treaty ".

71. He could accept paragraph 3, but would urge the deletion of the words " in its opinion ", which appeared to suggest that the depositary might have the power to interpret the relevant provisions of the treaty; the question whether the conditions for the entry into force of the treaty had been fulfilled could not be left to the appreciation of a depositary.

72. Lastly, he hoped that the Drafting Committee would consider his own general proposal for simplifying the preceding articles by amalgamating and incorporating into article 29 all the procedural provisions relating to treaties having a depositary; a new article would cover the case where there was no depositary.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that he himself favoured the deletion of the words " in its opinion " from paragraph 3. Those words had been introduced in the light of the information existing in 1962 on the practice of the Secretary-General as depositary; since then, the practice of the Secretary-General had been even more neutral, as the Secretariat paper on the subject showed (A/5687, pages 96-97); the Secretary-General now confined his action to a communication to the effect that what appeared to be the requisite number of ratifications had been received. The deletion of the words " in its opinion " would also be consistent with the resolutions adopted by the General Assembly on the subject of reservations, under which the Secretary-General, as depositary, was not entitled to have any opinion officially; he was merely called upon to do the best he could to see that the questions which arose were notified to those concerned to pronounce upon them.

74. He accordingly proposed that the concluding portion of his new paragraph 3 be amended to read: " . . . a depositary shall have the duty to inform the States mentioned in paragraph 1 when the specified number of signatures or instruments has been received. "

75. Mr. RUDA said that the Special Rapporteur's revised draft of article 29 represented an improvement on the 1962 formulation, both in structure and in terminology. In clear and concise terms, it dealt with a problem that was made particularly complex by the large number of procedural details involved.

76. So far as paragraph 2 was concerned, he supported Mr. Tunkin's proposal for the inclusion of a reference to the applicable rules of an international organization, and Mr. Rosenne's proposal that the word " texts " in paragraph 2 (*a*) should be replaced by the word " versions ".

77. He did not, however, support the United States suggestion, accepted by the Special Rapporteur, that the reference to the rules in force in an international organization should be qualified by adding in that same paragraph 2 (*a*), the words " at the time the depositary is designated ". The purpose of those additional words was to enable a depositary to avoid any new burden that might be placed upon it by some change in the relevant rules of the international organizations concerned. Personally, he saw no reason why the depositary should be absolved from the duty to observe some new or amended rule which might provide, for example, for an additional language version in consequence of the inclusion by the organization of that language in the list of its official languages.

78. He had no objection to the remainder of article 29 as proposed by the Special Rapporteur, except that the

Spanish version of paragraph 4 needed to be brought into line with the English and French versions, which were clearly in mandatory terms, whereas the Spanish version was in permissive terms.

79. Mr. YASSEEN said he had no difficulty in accepting the article as redrafted by the Special Rapporteur. It accurately described the functions of the depositary, on which the Commission had decided not to elaborate further. The redraft was much shorter and more acceptable than the 1962 text; no doubt its drafting might be reviewed by the Drafting Committee.

80. However, he had the same misgivings as Mr. Tunkin concerning the phrase " and States to which it is open to become a party " in paragraph 1. States to which it was open to become a party to the treaty had, of course, certain rights, but it was an overstatement to say that the depositary acted on behalf of those States. On that point he would perhaps go further than Mr. Tunkin and suggest that the paragraph, which was not essential to the scheme of the article, should be omitted altogether. In particular, it should surely be taken for granted that the depositary would " exercise its functions impartially ".

81. With regard to the opening phrase of paragraph 2, he agreed with Mr. Tunkin that the rules in force in the international organization acting as depositary should be mentioned.

82. The phrase added in paragraph 2 (*a*), in response to a suggestion by the Government of the United States of America, did not seem to be wholly justified. If the constituent instrument of the organization was amended, the depositary might at most find that it was responsible, for instance, for preparing a text in a language which had become an official language of the organization. The additional responsibilities could not be so onerous as to require that the functions of the depositary should be specified as those existing at the time when it assumed them.

83. In paragraph 3, the words " in its opinion " seemed to be indispensable, for the depositary had to decide at a given moment that the conditions for the entry into force of the treaty were fulfilled. That decision was only provisional: the depositary merely notified States that in its opinion the treaty had entered into force. The notification only took effect definitively if there was no opposition by States. Like the preceding provisions of the article, paragraph 3 was governed by the provisions of paragraph 4. If a State disagreed with the depositary, its objection had to be communicated to the other States. An international dispute could then arise, which would be settled by the existing modes of the international order.

84. Mr. REUTER said that he wished to make an observation concerning a question of principle which had been very pertinently mentioned by Mr. Verdross in connexion with the redraft proposed by the Special Rapporteur: was it the Commission's intention to enumerate all the functions of the depositary? It was true that the opening passage of paragraph 2 of the article mentioned, as another source of the depositary's duties and functions, the treaty itself. Mr. Tunkin had proposed that the passage should refer also to the rules of the international organization acting as depositary. But even then, the provision would not settle the question whether there was a general source of duties and functions for the depositary and what was that source.

85. In that connexion, he inquired what had been the meaning of a provision which had appeared in the 1962 version of article 29 and which was missing from the Special Rapporteur's redraft but which still existed in paragraph 1 (*g*) of article 1. Did that provision state a rule of law? If it did, then two conclusions had to be drawn.

86. First, some such words as " among others " (*notamment*) should be added at the end of the introductory phrase in paragraph 2 of article 29 because there was a general source of duties and functions for the depositary. That was the interpretation he would prefer. For example, the discussion at the previous meeting had shown that at least one of the depositary's duties was to return, on the termination of the depositary functions, the text which it had received in deposit.

87. Secondly, if the Commission considered that paragraph 1 (*g*) of article 1 laid down a rule of law, it would have to revise carefully the language used in that clause, the French text of which did not agree with the English text. In English, the Special Rapporteur had accepted the neologism " depositary ", which had been imposed by practice, but in order to explain it, he had introduced the terms " entrusted " and " custodian ", which had specific meanings in law. In French, the term *dépositaire* implied a contract of deposit or bailment, and the analogy was fairly close, but the word *garde* (custody) had an extremely narrow meaning in law.

88. Mr. AGO said it was obvious that the depositary's functions were laid down, in the first place, by the treaty or, where an international organization acted as depositary, by the regulations of that organization. The rule being drafted by the Commission was the general rule which should prevail, particularly if nothing was said on the subject in the treaty or in the regulations of the international organization. He nevertheless shared Mr. Reuter's concern at the omission of the reference to the essential function of the depositary, that of custodian of the instrument. It would be odd to mention that function in the article on definition rather than in the article on the functions of the depositary. If the Commission did not wish to repeat the idea, the logical place for it would be in article 29.

89. In paragraph 1 of the revised version proposed by the Special Rapporteur, the expression " exercise its functions impartially " was not entirely satisfactory; it should be stated in the article that the depositary acted not on his own account but as depositary of the instrument entrusted to him by the States. Instances had occurred in practice where depositaries had tended to forget that essential duty. In the French text, the phrase *pour le compte de* would be more precise than *au nom de*.

90. With regard to paragraph 2, he shared Mr. Tunkin's view that the opening passage should contain a general saving clause concerning the provisions of the treaty and the regulations of the international organization. If that suggestion was followed, sub-paragraph (*a*) would become redundant; the functions enumerated

would necessarily be those not expressly mentioned either in the treaty or in the regulations of the international organization.

91. In paragraph 2 (*d*), it might be better to say " to receive any signatures. . . ". If that change were made, the order of sub-paragraphs (*c*) and (*d*) could be reversed, since the depositary first received the signature and then determined whether it was valid. The initial phrase of sub-paragraph (*e*), " to acknowledge in writing to the State concerned ", really belonged in sub-paragraph (*d*), which would then deal with the correspondence between the depositary and the State which transmitted an instrument to it, and (*e*) would deal with the information to be communicated to other States.

92. In paragraph 3, the phrase " upon some uncertain event " should be replaced by " upon the fulfilment of a suspensive condition ".

93. Mr. JIMÉNEZ de ARÉCHAGA said he supported Mr. Ago. Latin American practice provided a recent example of the value of the provisions of paragraph 1. A Latin American Government, which was the depositary of an important Latin American treaty, had received a ratification from a State with different political views; it had then been subjected to pressure to reject the ratification outright. In view of paragraph 1 of article 29 of the Commission's draft articles, however, the opinion had prevailed that the depositary, because of its dual function as depositary and party, had to consult the other States parties to the treaty. In the end, the unanimous decision of the parties to the treaty was that the ratification should not be accepted, but the principle had been upheld that it was not for the depositary to decide in the light of its own national policy.

94. Mr. ELIAS said that the new formulation by the Special Rapporteur was both clearer and simpler than that adopted by the Commission in 1962.

95. He supported Mr. Tunkin's suggestion that the introductory phrase of paragraph 2 should include a reference to the applicable rules of an international organization, with the consequence that paragraph 2 (*a*) could be omitted.

96. For paragraph 3, he could accept the Special Rapporteur's new wording subject to the deletion of the words " in its opinion ", which introduced a subjective element and an implication that the depositary might have a discretionary function in the matter.

97. The enumeration of functions set out in the various sub-paragraphs of paragraph 2 could undoubtedly be shortened. It was clearly not exhaustive, since paragraphs 3 and 4 imposed additional obligations on the depositary. He was not in favour of specific references to the various articles which laid down duties for the depositary, as in sub-paragraphs (*f*) and (*g*), but would prefer a general reference.

98. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that most of the observations by members related to questions of drafting which could be left to the Drafting Committee.

99. It had been pointed out that in his revised version of article 29, neither paragraph 1 nor paragraph 2 stated the essential function of the depositary, which was to act as custodian of the text of the treaty; it was, however, mentioned in the definition of " depositary " in article 1, paragraph 1 (*g*), and the Commission's decision on that definition would affect paragraph 1 of article 29. In the course of the discussion of article 28, he had himself suggested that the negative formulation of that article should be replaced by a more positive formulation which would cover the basic function in question.[10]

100. His proposed new paragraph 1 took that basic function for granted and stated a rule to which members had attached great importance in 1962. It had been considered useful to set out the depositary duties, for the reason, in particular, that certain States would in modern practice be called upon to act as depositaries for the first time. The real substantive point in paragraph 1 was that the depositary could not act at its own discretion but should act as an international organ; paragraph 4 set out certain consequences which followed from that rule.

101. He agreed with Mr. Tunkin's remarks concerning the difficulties to which the expression " States to which it is open to become a party " could give rise. As he had mentioned during the discussion on a previous article, the Drafting Committee was considering that problem; as far as paragraph 1 of article 29 was concerned, the wording which would be adopted by the Drafting Committee would undoubtedly avoid the expression which Mr. Tunkin had criticized.

102. If the suggestion by Mr. Tunkin for introducing the idea of the international character of the functions of the depositary was adopted, it would not necessarily become possible to drop the reference to the impartiality of the depositary. The notion of impartiality seemed useful in the context, and the Drafting Committee should consider whether it was necessary to retain it.

103. He agreed that the opening passage of paragraph 2 should make it clear that the enumeration in sub-paragraphs (*a*) to (*g*) was not exhaustive and that it covered only some of the functions of a depositary.

104. With regard to Mr. Tunkin's proposal for the inclusion of a reference to the rules of an international organization in that same introductory phrase, he said it might be desirable to adopt it, even though a general article was included in the draft articles for the purpose of reserving the rules of international organizations.

105. The United States Government's proposal, which had led to the insertion of the concluding words of paragraph 2 (*a*), and which some members had criticized, involved a minor point; he now felt that the words should be omitted. A depositary could always refuse to continue to act as such if it considered that certain additional duties imposed by the amended rules of an international organization laid too heavy a burden on it.

106. He suggested that article 29 should be referred to the Drafting Committee, with the comments made during the discussion.

[10] *Vide supra*, para. 23.

107. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to adopt the Special Rapporteur's suggestion.

*It was so agreed.*[11]

The meeting rose at 1.5 p.m.

[11] For resumption of discussion, see 815th meeting, paras. 35-62.

## 804th MEETING

*Thursday, 17 June 1965, at 10 a.m.*

*Chairman:* Mr. Milan BARTOŠ

*Present:* Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

### Special Missions
(A/CN.4/179)

[Item 3 of the agenda]

PRELIMINARY QUESTIONS

1. The CHAIRMAN invited the Commission to consider the second report on special missions (A/CN. 4/179), submitted by himself as Special Rapporteur for the topic.

2. Speaking as Special Rapporteur, he asked the Commission first to decide three preliminary questions arising out of paragraphs 1 (*a*), (*c*) and (*d*) of his report.

3. So far as the first question was concerned, he suggested that his corrections to the articles adopted by the Commission at its sixteenth session[1] should not be discussed until after the Commission had received the comments of governments.

4. The second question concerned the drafting of rules relating to so-called " high-level " special missions. Although he had been instructed by the Commission to prepare rules concerning the legal status of such missions, he had had difficulty in gathering material, whether drawn from the practice or from the literature. He had only been able to produce the six rules which appeared in the last section of his second report. If the Commission so wished, he could, after the study of the articles on special missions in general and before the close of the session, submit some conclusions as to how far it was necessary to prepare more detailed rules on the subject of " high-level " special missions.

5. The third question concerned the joint proposal on the legal status of delegations to international conferences and congresses, which the Commission had requested from Mr. El-Erian, Special Rapporteur on relations between States and inter-governmental organizations, and from himself as Special Rapporteur on special missions. He had collected some material on the subject, but had not been able to confer with Mr. El-Erian with a view to preparing a joint proposal. The matter might be deferred until the January session in 1966.

6. He would like to have the Commission's opinion on the first of those three questions.

7. Mr. ROSENNE said that he fully agreed with the Chairman's suggestion regarding the first question. He suggested, however, that, once the Commission had completed its work at the current session on the next group of articles on special missions, the Drafting Committee should consider whether any language adjustments were necessary in articles 1 to 16.

8. The CHAIRMAN said that, if there were no further comments, consideration of the proposed changes in articles 1-16 (A/CN.4/179, paras. 134-148) would be deferred until a later session.

*It was so agreed.*

9. The CHAIRMAN invited the Comission to express its views on the second question.

10. Mr. BRIGGS said that it would be more appropriate to discuss the Special Rapporteur's draft provisions concerning so-called high-level special missions after the Commission had completed the draft articles on special missions.

11. The CHAIRMAN said that, in the absence of further comments, he would take it as agreed that the subject should be deferred until after the study of articles 17 to 40 had been completed.

*It was so agreed.*

12. The CHAIRMAN invited the Commission to express its views on the third question.

13. Mr. TUNKIN suggested that the question be left open, as Mr. El-Erian was absent.

*It was so agreed.*

14. The CHAIRMAN asked whether the Commission wished to have a general debate on articles 17 to 40.

15. Mr. TUNKIN proposed that the Commission should proceed immediately to discuss the articles one by one.

*It was so decided.*

ARTICLE 17 (General facilities) [17]

*Article 17* [17]
*General facilities*

The receiving State shall offer a special mission all the facilities necessary for the smooth and regular performance of its task, having regard to the nature of the special mission.

16. The CHAIRMAN, speaking as Special Rapporteur, said that article 17 stated a rule which was found in all works dealing with the question; it was not a rule of courtesy but an obligation *ex jure*.

[1] *Yearbook of the International Law Commission, 1964*, Vol. II, pp. 208-210.