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Which States Must be Bound Before a Multilateral Treaty Enters into Force if Nothing is Specified?

Comment to Article 21 paragraph 2 of the ILC's 1966 draft of the law of treaties [1])

Do even those states which vote against the adoption of a text or withhold their votes have to become contracting parties in order for a treaty to enter into force?

This problem arises only in the event that a multilateral treaty does not contain an entering-into-effect clause in the sense of Art. 21 para. 1 of the ILC draft[2]), *i.e.*, lacks a provision as to which states must express their definitive consent (by ratification, mere signature where ratification is not required or accession) to be bound by a treaty, so that it can come into effect at least for these states, and no agreement regarding this matter is expressed in any other way.

The draftsmen provided expressly for this kind of situation in Art. 21 para. 2:

> "Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States".

If "negotiating States" means all the states that take part in the contract negotiations, thus including those participants who, when a suggested draft for a text is voted upon, vote against its adoption or abstain from voting, the ridiculous result is reached that even these states, in spite of the positions that they took concerning the adoption of the proposed text, must give their definitive consent (by ratification, signature or accession) to be bound by

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[1]) This paper has been communicated by the managing editor of the "ZaöRV" to some participants of the United Nations Conference on the Law of Treaties in Vienna at the end of April 1969.

[2]) Art. 21 para. 1 of the ILC draft of 1966 reads: "1. A treaty enters into force in such manner and upon such date as it may provide or as the negociating States may agree" (A/6309/Rev. 1).

the treaty before the adopted text can enter into force as a treaty. In other words: those states whose votes brought about the adoption of the text (say by a two-thirds majority in accordance with Art. 8 para. 2) cannot bring the treaty into effect among themselves, although all have completed the necessary formalities of ratification, etc., as long as any of the states which did not even vote for the adoption of the text or, indeed, may have opposed it refuses to be bound by the treaty.

One could have been more frank and used the following formulation: "Failing any such provision or agreement, a treaty may never enter into force". One wonders therefore, whether the phrase "all the negotiating States" which is used in Art. 21 can be more narrowly interpreted and, more particularly, be taken to refer to only those states which voted for the adoption of the text, or whether, assuming that such a narrow interpretation is out of the question, it might be ascertained that the ILC made a mistake and expressed something in Art. 21 that it did not intend to say.

It is interesting in this connection that the corresponding formulation in the 1965 draft (then Art. 23 para. 2) read:

> "2. Failing any such provision or agreement, a treaty enters into force as soon as all the States which adopted the text have consented to be bound by the treaty" [3]).

But let us return to Art. 21 of the 1966 draft, whose first two paragraphs by the way have been left untouched during the first phase of the diplomatic conference in Vienna [4]).

The concept "negotiating State" which is used in Art. 21 is defined in Art. 2 as

> "... a State which took part in the drawing up and adoption of the text of the treaty".

This clause makes it clear enough that participation in the drawing up and participation in the adoption of the text are the defining characteristics of negotiating states. The question now becomes, what is the meaning of "taking part in the adoption"? Does it refer only to expressing approval of the text, or does it also include participation in the sense of voting against the text or even passive participation, *i.e.*, refraining from voting while attending a conference?

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[3]) Reports of the International Law Commission on its seventeenth session (3 May – 9 July 1965), General Assembly Official Records: 20th sess., Supp. No. 9 (A/6009) 1965. Para. 1 read: "1. A treaty enters into force in such manner and upon such date as it may provide or as the States which adopted its text may agree".

[4]) A/CONF. 39/11, pp. 138–140.

With regard to the concept "adoption" Art. 8 of the 1966 draft reads:

> "1. The adoption of the text of a treaty takes place by the unanimous consent of the States participating in its drawing up except as provided in paragraph 2.
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> 2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to apply a different rule".

The adoption of a text at a conference occurs, then, by vote. The words "takes place by a vote of two-thirds . . ." could tempt one to conclude that, since only the approving two-thirds majority brings about the adoption, only those who approve take part in the adoption; but the second part of the sentence, "unless by the same majority . . .", suggests that what is involved here is simply the creation of a majority rule and not a definition of the states that take part in the adoption of the text of a treaty. The words "take part in the adoption" (Art. 2 para. 1 (e)) doubtless can bear the meaning "vote against the adoption" in ordinary usage, and it is hard to see why states which are represented at a conference but refrained from voting should not be considered negotiating states—their consent would not be required before a treaty entered into force—if the states that voted against the adoption are so regarded. But the only conclusion that needs to be drawn at this point is that the foregoing phrases in Art. 8 do not limit the meaning of "negotiating States" to the states which vote for the adoption of a text. Indeed, they have nothing to do with the meaning of that concept.

The use of the expression "States participating in the conference" in Art. 8 para. 2 is also insignificant for the present purpose. The determination whether a two-thirds majority for the adoption of a text exists is made with reference to the whole number of participants.

In the commentary which the ILC issued with its 1966 draft the rationale for the selection of the concept "negotiating States" is given (Art. 2 point 12), but it too is devoid of any basis for a narrow interpretation of these words:

> " 'Negotiating States' require to be distinguished from both 'contracting States' and 'parties' in certain contexts, notably whenever an article speaks of the intention underlying the treaty. 'Contracting States' require to be distinguished both from 'negotiating States' and 'parties' in certain contexts where the relevant point is the State's expression of consent to be bound independently of whether the treaty has yet come into force. As to 'party', the Commission decided that, in principle, this term should be confined to States for which the treaty is in force" [5]).

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[5]) A/6309/Rev. 1, p. 23.

According to this statement, the circle of participants whose opinions are significant for ascertaining the intention of the treaty could possibly include all who expressed opinions at a conference with regard to the meaning of the text.

There is a passage in the record of the ILC which shows that at least a couple of members of the Commission thought of "negotiating States" in a broad sense:

> "54. Mr. R u d a said that the three definitions proposed by the Drafting Committee were satisfactory but he wished to know whether the term 'negotiating States' would cover States which ... had been among those that had voted against the adoption of a text requiring a two-thirds majority.
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> 55. Sir Humphrey W a l d o c k, Special Rapporteur, said it was a difficult point, but his answer would be in the affirmative. The definition was intended to cover the States responsible for drawing up the text and thus, as a corporate group, for producing the intention to be found in the text ...
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> 56. Mr. R u d a said that that had been his interpretation of the definition ..." [6]).

The Commission members who engaged in this exchange did not seem to be conscious of the consequences of this broad concept of "negotiating" in the context of Art. 21 para. 2. Their interpretation of the words "negotiating States" is correct, in that it corresponds to Art. 2 and the commentary to Art. 2. But the use of these words in Art. 21 para. 2 is like throwing a monkey wrench into the machinery. There are no indications anywhere else that the members of the ILC or the delegates to the first phase of the diplomatic conference in Vienna in 1968 intended the consequences of using this broad concept in Art. 21 para. 2 which were sketched at the beginning of this study or were even conscious of them.

The ILC gave no explanation at all in its comment to Art. 21 of the 1966 draft for the departure from the formulation that appeared in Art. 23 para. 2 of the 1965 draft, though it usually gives reasons for amending its drafts. It might well be assumed, therefore, that the meaning of the earlier draft was to be retained in the 1966 draft but that the formulation in the latter cropped up inadvertantly.

For the foregoing reasons either Art. 21 para. 2 should be corrected editorially, or its consequences and those of other versions should be examined and a new choice made.

It is submitted that the 1965 version should be restored with one minor change, namely the insertion of the word "adopted" before "treaty" at the beginning of para. 1, so that the statement that follows is related to Art. 8.

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[6]) YBILC 1966, vol. I, part III, p. 292.

Art. 21 paras. 1 and 2 would then read:

1. An adopted treaty enters into force in such manner and upon such date as it may provide or as the states which adopted its text may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as all the states which adopted the text have consented to be bound by the treaty.

The essential point of the 1965 version of Art. 21 para. 2 is that the only states which are significant for the coming into effect of a treaty are those that have adopted a text in accordance with Art. 8 para. 2. States which did not vote for the adoption of a text are not properly concerned with the entry into effect of the treaty. Having rejected the text or abstained from voting, they have no legitimate interest in determining whether it will come into force. Since this version ignores disinterested states and those states which through their refusal to adopt the text have declared their opposition to being bound by the treaty, it would facilitate—indeed, make possible—the entry into force of treaties. Finally, it corresponds to the basic idea of Art. 8 para. 2 which prevents a minority of dissenters or opponents of one-third or less from hindering the adoption of a treaty.

It might be argued that, although the 1966 version of Art. 21 is unsuitable insofar as it applies to treaties that are adopted at conferences in the sense of Art. 8 para. 2, it is appropriate for treaties whose adoption occurs otherwise than at a conference, *i.e.*, in the sense of Art. 8 para. 1. The reason why the coming into force of a treaty should not depend upon the consent of the "negotiating States" at conferences–it would lead to the absurd result that states which voted against the adoption of a text or withheld their votes and, therefore, do not have a legitimate interest must give their consent before a treaty can come into force—does not hold for the situations in which adoptions take place otherwise than at conferences, because in the latter situations adoptions can only occur through the unanimity of all participating states; the coming into effect of a treaty cannot be frustrated by states which showed themselves to be dissenters or indifferent when the adoptions were voted upon.

It would be argued accordingly that where the consent of all participating states is required before a treaty can be adopted, it makes good sense to make its entry into force depend upon the consent of the negotiating states (all who take part in the drawing up and adoption of a treaty). In line with these thoughts the following version of Art. 21 paras. 1 and 2, which would harmonize the 1965 and 1966 versions and take account of the significant differences between the two paragraphs in Art. 8, might be proposed:

1. An adopted treaty enters into force in such manner and upon such date as it may provide or as the negotiating states or, in the case of Art. 8 para. 2, the states which had voted in favor of its text may agree.

2. Failing any such provision or agreement, an adopted treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating states or, in the case of Art. 8 para. 2, for all the states which had voted in favor of its text.

Although this is better than the 1966 version and deserves serious consideration, it contains certain defects which make it less desirable than the 1965 version as amended above.

First: The concept "negotiating States" is ambiguous. As already indicated it could refer to the states which expressed themselves for or against the adoption of the text. It might mean all the participating states. Assuming that the meaning of negotiating states becomes clarified, the entry into force of a treaty whose adoption does not take place at a conference would depend upon the consent either of those states which expressed themselves with regard to the adoption of the text or all the participating states. If the former is to be taken as the meaning of negotiating states, the argument, which might be made, that the need for unanimity of participants to bring about the adoption of a text calls correspondingly for unanimity to bring a treaty into force becomes irrelevant. Furthermore these events seem to be insignificant in the present context where the question is, which states should be entitled to determine whether a treaty will come into force? It is not the fact that a state participates or expresses itself as to the adoption of a text, but rather the fact that it has expressed itself f o r the adoption of a text that gives it a legitimate stake in determining the destiny of a proposed treaty. Thus, the objection made here to this version is fundamentally the same as the objection that was made above regarding the coming into effect of treaties which are adopted at conferences.

Second: If negotiating states is to be identified with participating states, then Art. 21 embodies two separate rules (in each paragraph), though one rule would achieve the same practical consequences. The coming into force of a treaty would depend upon adoption plus the consent to be bound of (a) the adopting states or (b) the negotiating states. The single rule which is expressed in the 1965 version (rule (a) above) would have achieved the same practical ends and at the same time have furthered an ideal of codification, namely the creation of fewer and more general rules, thus making the system of rules easier to understand.

It should be clear that the two formulations that are being urged for consideration in this paper as substitutes to Art. 21 of the 1966 draft are

quite different from the Chilean proposal[7]) that treaties enter into force when two-thirds of the negotiating states have become bound, which was rejected at the diplomatic conference in Vienna on April 17, 1968[8]).

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[7]) A/CONF. 39/C. 1/L. 190.
[8]) A/CONF. 39/11, p. 140.