The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force

Comments on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties

*Werner Morvay**)

I

The Draft Articles on the Law of Treaties, as finally adopted by the International Law Commission (ILC) on 18 and 19 July 1966[1]), provide in art. 23 that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". Consistently with general international law and treaty practice, this article thus limits the effects of a treaty, as a rule, to the time after its entry into force, the latter being governed by arts. 21 and 22. An exception to the rule thus stated is, however, made by art. 15 which reads as follows:

> "A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:
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> (a) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;
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> (b) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear, not to become a party to the treaty;
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> (c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed".

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*) Assessor, research fellow at the Max-Planck-Institute for Comparative Public Law and International Law, Heidelberg.

1) Reports of the ILC on the second part of its seventeenth session 3–28 January 1966 and on its eighteenth session 4 May – 19 July 1966, General Assembly, Official Records, Twenty-First Session, Supplement No. 9 (A/6309/Rev. 1).

Art. 15, which corresponds to art. 17 of the 1962[2]) and 1965[3]) drafts, thus provides that a State shall, in certain cases, have the obligation not to frustrate the object of a treaty, although the treaty has not yet entered into force and, therefore, is neither binding nor has to be performed. This obligation, which means a partial extension of the effects of a treaty to the time before its entry into force, will arise whenever a State has either agreed to enter into negotiations for the conclusion of the treaty (subpara. (a)), or has signed the treaty subject to ratification, acceptance or

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[2]) Yearbook of the International Law Commission (YBILC) 1962, vol. II, p. 161 *et seq.* Art. 17 of the 1962 draft read:

"1. A State which takes part in the negotiation, drawing up or adoption of a treaty, or which has signed a treaty subject to ratification, acceptance or approval, is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

2. Pending the entry into force of a treaty and provided that such entry into force is not unduly delayed, the same obligation shall apply to the State which, by signature, ratification, accession or approval, has established its consent to be bound by the treaty".

[3]) YBILC 1965, vol. II, p. 155 *et seq.* Art. 17 read exactly like art. 15 with two exceptions: It spoke of "acts calculated to" in place of "acts tending to", and, in subpara. (a), it used the words "the negotiations" in place of the words "these negotiations". While the differences between art. 15 and the corresponding provisions of the earlier drafts thus are rather such of wording than such of substance, art. 15 differs, on the other hand, very substantially from many of the versions suggested by the Special Rapporteurs in their Reports on the Law of Treaties and discussed in the course of the sessions of the ILC. Although the legislative history of the provision thus was very eventful for a long time, its adoption by the ILC was, nevertheless, carried by sixteen votes to none with one abstention. For details of the legislative history see Second Report on the Law of Treaties: Revised Articles on the Draft Convention, by Mr. J. L. Brierly (United Kingdom), YBILC 1951, vol. II, p. 70 *et seq.*, art. 7 (p. 73); Third Report on the Law of Treaties by Mr. J. L. Brierly, YBILC 1952, vol. II, p. 50 *et seq.*, art. 7 (p. 54); Report on the Law of Treaties by Mr. H. Lauterpacht (United Kingdom), YBILC 1953, vol. II, p. 90 *et seq.*, art. 5, para. 2, subpara. (b) (p. 108 *et seq.*); Report on the Law of Treaties by Mr. G. G. Fitzmaurice (United Kingdom), YBILC 1956, vol. II, p. 104 *et seq.*, art. 30 (p. 122); First Report on the Law of Treaties by Sir Humphrey Waldock (United Kingdom), YBILC 1962, vol. II, p. 27 *et seq.*, art. 5 para. 3, art. 9, para. 2, subpara. (c), and para. 3, subpara. (b) (pp. 39 *et seq.*, 46 *et seq.*); Fourth Report on the Law of Treaties by Sir Humphrey Waldock, YBILC 1965, vol. II, p. 3 *et seq.*, art. 17 (p. 43 *et seq.*); Comments by Governments on parts I, II and III of the Draft Articles on the Law of Treaties drawn up by the International Law Commission at its fourteenth, fifteenth and sixteenth sessions, Annex to the Report of the International Law Commission on the work of its eighteenth session. See also summary records of the third session, 86th, 87th and 88th meeting, YBILC 1951, vol. I, pp. 27 *et seq.*, (34 *et seq.*), 36 *et seq.* (39 *et seq.*), 45 *et seq.* (51); summary records of the fourteenth session, 642nd, 643rd, 644th, 645th, 661st and 668th meeting, YBILC 1962, vol. I, pp. 77 *et seq.*, 83 *et seq.*, 88 *et seq.*, 96 *et seq.*, 212, 254 *et seq.* (258); summary records of the first part of the seventeenth session, 788th, 789th, 812th and 816th meeting, YBILC 1965, vol. I, pp. 87 *et seq.*, 94 *et seq.*, 256 *et seq.*, (262 *et seq.*) 280 *et seq.* (282 *et seq.*); summary records of the eighteenth session, 892nd and 894th meeting, YBILC 1966, vol. I, part. II, pp. 326, 341.

approval (subpara. (b)), or has expressed its consent to be bound by the treaty (subpara. (c))[4]. In the first case, the obligation will exist as long as the negotiations for the conclusion of the treaty are in progress; in the second case, it will last until the State shall have made its intention clear not to become a party to the treaty; in the third case, the obligation lasts till the entry into force of the treaty, unless the entry into force is unduly delayed. In all these cases, States shall be obliged "to refrain from acts tending to frustrate the object of a proposed treaty"[5] such as they would commit in the following examples:

Example one: State A negotiates with State B over a treaty by which a part of the territory of State A shall be ceded to State B. While the negotiations are still in progress, State A cedes the territory to State C.

Example two: States A and B have, subject to ratification, signed a treaty by which State A engages itself to release, in exchange for a sum of money, the property of the nationals of State B which has been seized during a state of war. Before ratification takes place, State A begins to sell the seized property.

Example three: Several States sign and ratify a treaty by which they undertake to reduce their existing custom tariffs to one half of their present level. Before the treaty enters into force, one of them redoubles its existing custom tariffs in order to retain their present level beyond the entry into force of the treaty. Or: Several States sign and ratify a treaty by which the States not possessing nuclear weapons undertake neither to accept nuclear weapons from any other State nor to produce such weapons themselves. Before the treaty enters into force, however, some of the States not possessing nuclear weapons start production in order to possess nuclear weapons when the treaty enters into force.

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[4]) Cf. art. 2, para. 1, subparas. (b) and (g), and art. 10 *et seq.*

[5]) The french text speaks of «actes tendant à reduire à néant l'objet d'un traité envisagé», the Spanish text of every «acto destinado a frustrar el objeto de un tratado propuesto». The 1962 and 1965 drafts used the words "acts calculated to" in the English and «actes de nature à» in the French text. The 1966 amendment to the French wording («actes tendant à») was, on a proposal of Mr. Ago (Italy), adopted in order to express the subjective element of intention contained in the words "acts calculated to". At the same time, the 1966 amendment to the English wording was adopted on a proposal of Sir Humphrey Waldock (United Kingdom) in order to assimilate both wordings. See summary records of the eighteenth session, 892nd meeting, YBILC 1966, vol. I, part II, p. 326. The expression of the subjective element of intention in the English text appears to have been weakened thereby. It could best be expressed by using the words "acts intended to".

II

Like the rule which limits the effects of a treaty to the time after the entry into force of a treaty, the exception made by art. 15 also has its root in general international law as well as in treaty practice. Examples of such treaty provisions which have dealt with the partial extension of the effects of a treaty to the time before its entry into force are art. 38 of the General Act of the Conference of Berlin of 26 February 1885[6]) and the Protocol to the Convention for the Control of Arms and Ammunition of Saint-Germain-en-Laye of 10 September 1919[7]). In general international law the existence of an obligation not to frustrate the object of a treaty prior to its entry into force is primarily discussed in relation to the time between the signature and the ratification of a treaty, *i. e.*, the stage when a State has already taken «la première étape dans la participation» ("the first step to participation") in the treaty and the treaty accordingly has already «un statut provisoire» ("a provisional status"), to use the words of the International Court of Justice (ICJ) in the Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[8]). *A minore ad maius*, the obligation appears to be generally recognized in relation to the time between ratification and the entry into force of the treaty. The obligation in question is usually derived from the principle of good faith as one of the "general principles of law recognized by civilized nations"[9]). The leading case in this direction is the decision of the Turkish-Greek Mixed Arbitral Tribunal in *A. A. Megalidis* v. *Turkey*[10]), where it was held:

> «... déjà avec la signature d'un traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au traité en diminuant la portée de ses clauses (voir Fauchille, Traité de droit international public, éd. 1926, t. I[er], partie III, p. 320).

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[6]) G. F. de Martens, Nouveau Recueil Général des Traités, 2nd series, vol. 10, p. 414.

[7]) League of Nations Treaty Series No. 200, vol. 7, p. 332. Cf. also J. Nisot, La force obligatoire des traités signés, non encore ratifiés, Journal de droit international, vol. 57 (1930), p. 878 *et seq.*

[8]) ICJ, Reports of Judgments, Advisory Opinions and Orders 1951, pp. 15 *et seq.*, 28.

[9]) Cf. art. 38, para. 1, subpara. (c) of the Statute of the ICJ.

[10]) *Aristoteles A. Megalidis* v. *Etat turc*, Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix, vol. 8, p. 386 *et seq.;* Annual Digest of Public International Law Cases 1927 and 1928, p. 395. In English translation: "... already with the signature of a treaty and before its entry into force, there exists for the contracting parties an obligation to do nothing which may injure the treaty by diminishing the importance of its clauses (see Fauchille, Traité de droit international public,

... il est intéressant de faire observer que ce principe – lequel en somme n'est qu'une manifestation de la bonne foi qui est à la base de toute loi et de toute convention – a reçu un certain nombre d'application dans divers traités ...».

Accordingly, the tribunal ruled that Turkey had to restore a bank safe which she had seized, in contravention to the provisions of the Peace Treaty of Lausanne, between the signature and the ratification of the said treaty. Similarly, the Permanent Court of International Justice (PCIJ), in its decision concerning the Certain German Interests in Polish Upper Silesia case[11]), appears to have recognized that certain acts of a State which has already signed but not yet ratified a treaty may amount to a misuse of rights and, thus, a violation of the obligations of the State in respect of the treaty, although the Court did not define the conditions under which acts of a State would have such an effect. In the view of the Court a violation of the obligations of the State in respect of the treaty, however, appears to presuppose, that the ratification of the treaty has subsequently taken place: in the view of the Court the violation, in other words, can only be stated *ex post facto,* when the State has already expressed its consent to be bound by the treaty and thus has done everything that it can and has to do on its behalf to make the treaty enter into force[12]).

Moreover, the problem in question has also been discussed and considered in a number of other cases[13]). Nevertheless a comparison of the judicial de-

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1926 ed., vol. I, part III, p. 320) ... it is of interest to note that this principle – which on the whole is only a manifestation of the principle of good faith which is the foundation of all law and all conventions – has received application in a number of treaties ...".

[11]) Publications of the Permanent Court of International Justice, Series A, Collection of Judgments, No. 7, p. 29 *et seq.* See also Series C, Acts and Documents relating to judgments and advisory opinions given by the Court, No. 11, vol. II, p. 631 *et seq.*

[12]) The facts of the case, as far as relevant here, were as follows: Art. 256 of the Peace Treaty of Versailles which was signed by Germany on 28 June 1919 and ratified on 20 January 1920 provided that the States to which German territories were ceded should acquire all properties and possessions of the German *Reich* and the German States. Between the signature of the treaty and the transfer of sovereignty over Upper Silesia to Poland, the German *Reich* alienated a factory, owned until then by the *Reich,* to a company formed for this purpose. The Court held that the burden of proving that this behaviour constituted a misuse of rights rested with Poland since such misuse could not be presumed.

[13]) See the Mavrommatis Jerusalem Concessions, Publications of the Permanent Court of International Justice, Series A, Collection of Judgments, No. 5, p. 39; Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, Publications of the Permanent Court of International Justice, Series A, Collection of Judgments, No. 23, p. 20 *et seq.;* Case of the Free Zones of Upper Savoy and the District of Gex, Series C, Acts and Documents relating to judgments and advisory opinions given by the Court, No. 17, vol. II, p. 217; *Ignacio Torres* v. *United States,* J. B. Moore, History and Digest of International Arbitrations to which the United

cisions, the opinions of learned authors on international law[14]) and the treatment of the problem by the Harvard Draft Convention on the Law of Treaties[15]), however, show that an exact statement of the legal position *de lege lata* is difficult. Although there is nearly general agreement on the very existence of an obligation not to frustrate the objects of a treaty prior to its entry into force, there is, on the other hand, much disagreement on the exact conditions, under which the obligation exists, and on the exact extent, to which it exists: There is no settled authority on the question whether the existence of the obligation in the time between signature and ratification presupposes that the treaty has subsequently been ratified.

States has been a party, vol. 4 (1898), p. 3798 *et seq.; José Maria Anaya* v. *United States*, Moore, *ibid.*, p. 3804 *et seq.;* Iloilo Claims, American and British Claims Arbitration, Report of F. K. Nielsen, p. 382 *et seq.*, Annual Digest of Public International Law Cases 1925–1926, p. 336; *A. Kemeny* v. *Yugoslav State*, Annual Digest 1927–1928, p. 549 *et seq.; Schrager* v. *Workmen's Accident Insurance Institute for Moravia and Silesia*, Annual Digest 1927–1928, p. 396 *et seq.* See, for a useful analysis of these cases, B. Cheng, General Principles of Law (1953), p. 109 *et seq.*, and Lord McNair, Law of Treaties (1961), p. 199 *et seq.*

[14]) Cf. also for further references, L. Oppenheim, International Law, vol. I, 8th ed. 1955 by H. Lauterpacht, p. 909: "... the principle of good faith ... probably requires States ... to refrain, prior to the legislative decision as to ratification, from acts intended substantially to impair the value of the undertaking as signed ...". D. P. O'Connell, International Law, vol. I, pp. 243 *et seq.* (244): "The obligation, in short, is to do nothing to injure the treaty by reducing the importance of its provisions". G. Dahm, Völkerrecht, vol. 3 (1961), p. 83 *et seq.:* »Aus dem Grundsatz von Treu und Glauben kann sich eine Vorwirkung des Vertrages ergeben. Solange die Ratifizierung noch in der Schwebe ist, dürfen die Parteien nicht den Vertragszweck vereiteln, vor allem dann nicht, wenn die Gegenpartei Anlaß hat, mit der Ratifizierung zu rechnen«. R. Bernhardt, Völkerrechtliche Bindungen in den Vorstadien des Vertragsschlusses, ZaöRV, vol. 18 (1957/1958), pp. 652 *et seq.* (667): »Man wird daher annehmen können, daß eine völkerrechtliche Verpflichtung der Unterzeichnerstaaten besteht, bis zu einer etwaigen endgültigen Ablehnung des Vertragsprojektes keine Maßnahmen zu ergreifen, die seine Erfüllung hindern«. F. O. Wilcox, The Ratification of International Conventions (1935), p. 27: "... it is generally agreed, that between the date of signature and the entry into force of a treaty the contracting parties are under the obligation to do nothing, which might impair the operation of its clauses". Cf. also J. M. Jones, Full Powers and Ratification (1949), p. 85 *et seq.*, where it is emphatically stressed that the application of the principle must vary according to the circumstances, and F. Dehousse, La ratification des traités (1935), p. 67, where the existence of a legal obligation in the time before ratification is denied altogether.

[15]) AJIL vol. 29 (1935), Supplement, p. 657 *et seq.* Art. 9: "Unless otherwise provided in the treaty itself a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations impossible or more difficult". According to the Comment the obligation thus laid down is, as an obligation of good faith, however, not a legal obligation.

Moreover, whereas some authors assert the existence of the obligation very generally, the Harvard Draft Convention and other authors take the view that the existence of the obligation depends on the circumstances of the case in question. Whereas the acts from which a State has to refrain are sometimes exclusively defined by subjective criteria, other definitions include a subjective element of intention. While the Harvard Draft Convention distinguishes the obligation, as an obligation of good faith, from a legal obligation, other authors assert its legal nature, although they may regard the principle of good faith as its basis. In view of so wide disagreement, Mr. J. L. Brierly (United Kingdom) was *de lege lata* probably correct, when he wrote as Special Rapporteur in his Third Report[16]) that the material concerning the provision previously suggested by him[17]) was too fragmentary and inconsistent to form the basis of a codification. Although the provision was, accordingly, deleted from the draft in 1951[18]), corresponding provisions were, however, again suggested by each of his successors. Since both the Special Rapporteurs and the Commission stressed that their task was to codify the existing rules of general international law, the legislative history of art. 15 thus shows how difficult a distinction between mere codification and progressive development of international law may be.

Nevertheless, a comparison of the draft and the legal position *de lege lata* is not wholly impossible: Art. 15 can be said to contain, at least in one point, a contribution to the progressive development of international law rather than merely a contribution to its codification. The point in question is the express extension of the obligation not to frustrate the object of a treaty even to the stage of treaty negotiations. Although Sir Humphrey Waldock (United Kingdom) once expressed the opinion that this extension was in accordance with general international law[19]), it is submitted

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[16]) YBILC 1952, vol. II, p. 54.

[17]) Second report on the law of treaties, YBILC 1951, vol. II, p. 73. Art. 7 adopted art. 9 of the Harvard Draft Convention and included it for the purposes of discussion although the Special Rapporteur regarded the obligation there stated rather as a moral than a legal obligation.

[18]) Mr. Brierly's proposal to this effect was strongly supported by Mr. Spiropoulos (Greece) who rightly said that a provision, which did not define the circumstances under which the obligation should exist, would be useless. See summary records of the third session, 86th, 87th and 89th meeting, YBILC 1951, vol. I, pp. 34 *et seq.*, 51 *et seq.*

[19]) See summary records of the fourteenth session, 661st meeting, YBILC 1962, vol. I, p. 212. The express extension of the obligation to the stage of treaty negotiations was then suggested for the first time. Previously neither the Commission nor the Special Rapporteurs had taken a position on this point. It is, however, of interest that the Special Rapporteur later shared the objections against what has become subpara. (a) of the provision. See Fourth Report on the Law of Treaties, YBILC 1966, vol. II, p. 47;

with great respect to the very learned Special Rapporteur that there is no authority which supports this view.

In nearly all other points, it can be said that art. 15, if it does not go beyond mere codification, at least codifies the obligation not to frustrate the object of a treaty prior to its entry into force according to the broadest scope it may have had in general international law: In contradistinction to the PCIJ, the provision does not make it a condition of the coming into existence of the obligation that an already signed but not yet ratified treaty is subsequently ratified[20]); in contradistinction to the Harvard Draft Convention and to various authors on international law, the coming into existence of the obligation is, likewise, not made dependent on the circumstances of the case; and, lastly, again in contradistinction to the Harvard Draft Convention, the obligation is stated as a legal obligation and not merely as an obligation of good faith[21]). On the other hand, there is only one point, where art. 15 possibly does not exhaust the broadest scope which the obligation not to frustrate the object of a treaty prior to its entry into force may have had in general international law: According to the draft as interpreted by the Commission, the obligation is violated only by acts which are intended to frustrate the object of a treaty and not also by acts which frustrate it unintentionally. Although the wording of the draft is not quite conclusive on this point, this clearly appears from the genesis of the provision[22]).

III

De lege ferenda, a critical examination of art. 15 shows that, when drafting a provision on the obligation of States not to frustrate the object of a treaty prior to its entry into force, one has to balance two conflicting interests. On the one hand, States which negotiate over the conclusion of a proposed treaty or which have signed or even expressed their consent to be

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summary records of the first part of the seventeenth session, 788th meeting, YBILC 1965, p. 87.

[20]) Only Mr. Castrén (Finland) advocated the view that later ratification actually was a condition of the coming into existence of the obligation. The correctness of this view was, however, strongly denied by such other distinguished members of the Commission as Mr. Rosenne (Israel), Mr. Ago (Italy) and Mr. Bartoš (Yugoslavia). See summary records of the fourteenth session, 644th meeting, YBILC 1962, vol. I, pp. 89, 91 *et seq.*

[21]) The reference of good faith was, on a proposal of Mr. Ago (Italy), Mr. Bartoš (Yugoslavia), Mr. Castrén (Finland), Mr. Rosenne (Israel), Mr. Reuter (France) and Mr. Yasseen (Iraq), deleted from the draft. See summary records of the first part of the seventeenth session, 812th meeting, YBILC 1965, vol. I, p. 262 *et seq.*

[22]) See *supra* note 5.

bound by a treaty, have an interest in retaining as much freedom of action as possible right up to the entry into force of the treaty. On the other hand, the partners of such States may have an interest in restricting this freedom of action, as early as possible, in favour of the object of the treaty or treaty proposal in question. Although both interests deserve the protection of international law, they cannot be fully reconciled with each other since the protection of one of them must by its nature diminish the protection which can be afforded to the other: While the first point stresses the sovereignty of States, the second emphasizes its restrictions and thus the spirit of co-operation between States and nations. Although the second interest thus basically accords with the modern tendencies of international law, it is respectfully submitted that the emphasis given to it by the draft is of too strong a nature to appear realistic and, thus, to be supported: It is an illusion to believe that the more the sovereignty of States is restricted, the better the state of international law will become. Rules which go too far in this direction would probably be disregarded or evaded by the States and thus might contribute to a deterioration of international relations rather than to their improvement.

The objections against art. 15 concern, above all, the extension of the obligation not to frustrate the object of a treaty to the stage of treaty negotiations (subpara. (a))[23]. A general provision to this effect is not desirable, since it would merely diminish the readiness of States to enter into any negotiations for the conclusion of a treaty. According to the draft the obligation would exist even if a State expressly declared its opposition to a treaty proposal and took part in the treaty negotiations only in order to prevent the conclusion of the treaty altogether. The policy of France regarding the application of the United Kingdom to become a member of the European Communities would be an example for such behaviour which is no misuse of the rights of States. It is obvious that such cases should be excluded from the scope of the provision since in such circumstances there would not be any legitimate expectations of the partners of a State which would deserve the protection of international law. The objections against subpara. (a) are, however, of a more general nature and not confined to

[23]) This is also the view of the Governments of Australia, Finland, Poland, Sweden and New Zealand. See Comments by Governments, pp. 10, 43, 106, 144, 217. Cf. also the Fourth Report on the Law of Treaties by Sir Humphrey Waldock, YBILC 1965, vol. II, p. 43 *et seq.*, where the Special Rapporteur accordingly suggested that the scope of the provision should be limited to the time after signature. The Japanese Government even doubted the wisdom of retaining the provision altogether and would prefer to leave the matter entirely to the good faith of the parties. See Comments by Governments, p. 69 *et seq.*

such special situations. Even if the object of a treaty could already be exactly defined in the stage of treaty negotiations, the States which take part in these negotiations should not be expected to declare their policy and to show their hands at so early a time when they have not yet associated themselves with the particular provisions of the treaty proposal. Accordingly it is submitted that the stage of treaty negotiations should be excluded from the scope of the provision altogether and that the obligation not to frustrate the object of a treaty should, in this stage, be left to special agreements into which the negotiating States may enter whenever they want.

There are, however, also objections against subpara. (b) according to which the obligation not to frustrate the object of a treaty exists whenever a State has signed a treaty subject to ratification, acceptance or approval[24]). Though the signature of a treaty in such cases "constitutes a first step to participation" in the treaty and thus "establishes a provisional status" of the treaty, the question under what circumstances and to what extent an obligation not to frustrate the object of the treaty exists after the signature of the treaty should be left to the provisions of the treaty, special agreements and to general international law which because of its reference to the principle of good faith is probably not as rigid as the draft. There are cases where a State which has signed a treaty should have more freedom of action without having to make the intention clear not to become a party to the treaty. This may be illustrated by the example of a treaty on the non-proliferation of nuclear weapons which has already been mentioned in part one of the present comments. Suppose that both States A and B, which are neighbouring States and are involved in serious disputes with each other, have signed the treaty subject to ratification. While State A is ready to ratify the treaty, ratification by State B becomes more and more doubtful, since State B has better chances to succeed in producing nuclear weapons than State A. It is submitted that State A should under such circumstances have full freedom of action not to delay its own production of nuclear weapons without having to make the intention clear not to become a party of the treaty, since it may still prefer ratification of the treaty by both States. A similar situation would exist if, in the case of the treaty releasing seized property in exchange for a sum of money, State A begins to sell the seized property only in order to urge State B no longer to delay its decision

[24]) According to the wording of subpara. (b) the obligation could also be violated by acts of the legislature though the legislature is usually not concerned with the conclusion of a treaty before the treaty has been signed. *Quaeritur*, whether States whose constitutional law requires the concurrence of the legislature in the conclusion of treaties would because of the wording of subpara. (b) have to modify the usual practice and to submit the treaty to the legislative assemblies at an earlier stage.

as to the ratification of the treaty. Both examples show that a provision on the obligation not to frustrate the objects of a treaty in the time between the signature and the consent to be bound by the treaty should not ignore the circumstances of the case. Since these circumstances can, however, hardly be exactly defined, subpara. (b) should likewise be removed from the draft.

Accordingly, a rigid provision on the obligation of a State not to frustrate the object of a treaty prior to its entry into force should be limited to the time when the State has already expressed its consent to be bound by the treaty and thus has done everything which it can and must do on its behalf to make the treaty enter into force. In this stage the interest of the State in retaining as much freedom of action as possible right up to the entry into force of the treaty deserves much less protection than in the earlier stages of the conclusion of the treaty. Although the treaty may not yet have entered into force, the States should here, unless the entry into force of the treaty is unduly delayed, under all circumstances, at least have the obligation not to evade the provisions of the treaty by such acts as have been described in part one of the present comments. Thus the provision contained in subpara. (c) deserves full support. It is, however, submitted that the wording of subpara. (c) could be improved by making it clear that after the entry into force of a treaty the existence of an obligation not to frustrate the objects of the treaty is a matter of course which results from the general rule laid down in art. 23 and only for this reason is not specially provided for by art. 15.

IV

On the basis of these remarks, it is submitted that art. 15 should be redrafted by taking into consideration the following suggestions:

Art. 15 should refer to "acts intended to" rather than to "acts tending to" frustrate the object of a treaty. The reference to merely "proposed" treaties and subparas. (a) and (b) should be omitted.

The wording of subpara. (c) should be altered by replacing the words "pending the entry into force of the treaty" by the words "even prior to the entry into force of the treaty".

Lastly, art. 15, as thus revised, should be amended by the addition of a paragraph which makes clear that the limitation of the article to the time after the expression of the consent to be bound by a treaty shall be without prejudice to any obligation not to frustrate the object of a treaty prior to its entry into force which may be derived from treaty provisions, special agreements or general international law.

Art. 15, as thus redrafted, could read as follows:

1. Even prior to the entry into force of a treaty, a State is obliged to refrain from acts intended to frustrate the object of the treaty when it has expressed its consent to be bound by the treaty, unless the entry into force of the treaty is unduly delayed.

2. The provision of paragraph 1 is without prejudice to any obligation not to frustrate the object of a treaty or treaty proposal prior to its entry into force which is otherwise established.