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Summary record of the 482nd meeting

Topic:
Law of Treaties

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54. Article 7 was accurate in a sense, but it should be specified that from a certain point of view all questions relating to treaty-making were also governed to some extent by constitutional law, because the delegation of international law to national representatives meant that treaties must be made in accordance with the constitutional law of the contracting State. Thus, the last phrase of the article, stating that all questions relating to the conclusion, application and execution of a treaty were governed by international law, might lead to some confusion. It would be wise to be more explicit and to state that, although representatives acted under international law, the rules of that law delegated to the constitution of a State competence to instruct certain organs and representatives to conclude and execute treaties.

55. Mr. BARTOŠ pointed out that, under international law, no rule of municipal law should prevent the execution of a treaty. Mr. Scelle had apparently raised the question of the capacity of the representatives to conclude treaties and, hence, the consequent validity of the treaty. But even after the treaty had been concluded under valid conditions, from the point of view of the capacity of the State representatives, there still might be cases where international law would have regard to situations existing under municipal law. He agreed with the Special Rapporteur's interpretation and thought that such cases would be covered by the words "will be governed by international law". Thus, the question that Mr. Scelle had raised, which seemed to apply to the capacity of State representatives to make treaties, was no longer involved once the treaty had been concluded under valid conditions. If limited to the acceptance of obligations, the argument was sound, but it could not be applied to changing obligations, including cases where constitutional law ran counter to international law.

56. Mr. TUNKIN said he was in favour of the Special Rapporteur's alternative suggestion. The article seemed to be redundant, since it was self-evident that problems relating to treaties between States were governed by international law.

57. Moreover, the wording of the article was not quite accurate, since some questions on the domestic plane were governed by the municipal law of States.

58. The code should not lay down the monistic or any other point of view as valid; it would be enough to state the undeniable fact that treaties between States were governed by international law. The Commission should not complicate an already very complicated task; it should not include in the code any provisions which were not absolutely indispensable and should lay down rules of conduct, although some definitions might be required.

59. Mr. SCELLE said that, in principle, a treaty was applicable in a given country in accordance with the law of that country, unless specific provisions were made to the contrary. The point to be borne in mind, however, was that, if it proved impossible to apply the provisions of the treaty in accordance with municipal law, the treaty took precedence and the law had to be modified. That was the hierarchy between the rules of international law and those of municipal law. Accordingly, the list of questions relating to treaty-making in article 7 was too broad; when necessary, those functions were governed by international law, but when States were capable of executing treaties in

accordance with their municipal law, there was no need to allude to international law.

60. Mr. MATINE-DAFTARY considered that a distinction should be made between constitutional and ordinary law, under the general heading of municipal law, especially in the case of States with new constitutions. A treaty had priority over municipal law, but the national constitution was the basis of all treaty-making capacity. Accordingly, it might be advisable to state that international law must take into account the constitutions of contracting States, especially in the matter of concluding treaties.

61. Mr. SCELLE said that he could not agree with that thesis. A treaty, when constitutionally concluded, could oblige a State to change its constitution.

62. Mr. BARTOŠ fully agreed with Mr. Scelle. For example, some States failed to execute their international obligations, invoking separation of powers and asserting that their courts were bound by their constitution, and not by international treaties. Municipal law could never be invoked to prevent the application of international law.

The meeting rose at 1.5 p.m.

482nd MEETING

Thursday, 23 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (continued)

[Agenda item 3]

ARTICLE 7 (continued)

1. Mr. MATINE-DAFTARY pointed out, with reference to the debate at the end of the previous meeting, that there had been some misunderstanding concerning his position. He had merely wished to make it clear that all treaties must conform with the provisions of the constitutions of the contracting States in force at the time of their conclusion.

2. Mr. PAL agreed with Mr. Tunkin—though for different reasons—that the article as it now stood should be omitted. All the questions relating to treaty-making enumerated in article 7 were already dealt with in the Special Rapporteur's reports. Thus, conclusion was dealt with in the first report (A/CN.4/101), validity in the second (A/CN.4/107) and the third (A/CN.4/115), force in the first report, effect in the fourth report (A/CN.4/120), application, execution and interpretation in the third and fourth reports and termination in the second and fourth reports. The provision in article 7 was to the effect that those questions would be governed by international law. But the relevant provisions of the said international law should be embodied in whatever final draft the Commission prepared concerning the law of treaties; the article as it stood might convey the mistaken impression that the international law governing those questions might be found elsewhere. The proper way of expressing the intent of that article perhaps would be to refer to those subsequent provisions of the draft as the governing rules.

3. Furthermore, the "unless" clause at the beginning of article 7 was not strictly accurate, for at least some of the provisions to be prepared by the Commission would certainly be applicable in all circumstances. Accordingly,

he considered that the article should be omitted for the time being; the Commission would be in a position to decide only after it had considered all the relevant articles, what questions would be subject to agreement between the parties.

4. Mr. AMADO considered that the article was far too broad. He agreed with previous speakers that neither the monistic nor dualistic doctrine of international law should be reflected in the code. The constitutions of some countries required legislation to give a treaty the force of law while in others ratification was sufficient.

5. Furthermore, with regard to constitutions which required that the international rules expressed in treaties should be transformed into international law in order to be put into force under internal law, it should be noted that non-compliance with that requirement did not release the State concerned from its international obligation and that the enactment of a national law contrary to the international obligation did not annul the latter and might entail international consequences for that State. The view that international law formed part of the law of the land had been affirmed by the English courts; it found express recognition in the Constitution of the United States of America and in the French Constitution of 1946; and it had been upheld by learned bodies of jurists. The monist-dualist controversy had become much less acute in recent years.

6. In his opinion, the terms of article 7 were too sweeping. Certain of the questions it enumerated might well not be governed by international but by municipal law; for example, if funds had to be appropriated for the purpose of giving effect to a treaty, the application would, to that extent, be governed by municipal law.

7. If a vote were taken on article 7, he would either vote for its omission, or for a much more concise and accurate text.

8. Mr. YOKOTA considered that the principle underlying article 7 was both self-evident and sound and that some provision along those lines should be included in the code, although not necessarily in that wording. Cases in which States disputed the validity of a treaty on the pretext of incompatibility with constitutional or other domestic law had occurred and would occur in the future; it was therefore desirable to maintain the provision. It had been objected that the wording of the article was too categorical and in particular that the words "all questions" were open to misinterpretation. However, the real intention was to specify that "all questions" meant all questions between States which might affect the legal relationship between them. The objection would disappear if the passage were amended to read "... all questions between States relating to its conclusion..." or "... all questions relating to... will be governed by international law so far as the legal relationship between States is concerned". If that idea were acceptable, the Special Rapporteur could no doubt find more suitable wording.

9. Mr. ALFARO said he was in favour of establishing the principle that all questions relating to treaty-making were governed by international law. He believed, however, that the first ("unless") clause might give rise to some confusion and that the article should begin with the words "all questions relating to its conclusion...". In that way, considerations relating to ratification, which clearly fell under domestic law, would be excluded. A paragraph might be added to define the extent to which domestic law was applicable.

10. It should be borne in mind that declarations by national authorities concerning the effect of international law as part of the law of the land fell exclusively under internal law. Some constitutions included such provisions, while others did not, but the Commission must consecrate the principle that international law was supreme and that internal law could not be invoked as a pretext for the non-observance of a treaty.

11. Mr. HSU considered that it would be desirable to provide expressly that a State could not evade its international obligations merely by invoking its internal legislation.

12. Mr. TUNKIN, stating his position of principle, said it was undeniable that States should fulfill their obligations under international law and that no reference to internal law could release them from those obligations. Nevertheless, the manner in which a State fulfilled its international obligations was a question to be decided by that State alone.

13. Everyone would agree that on the international plane all questions relating to treaties between States were governed by international law, but it was obvious that on the domestic plane internal legislation had to play some role. It would therefore be inaccurate to state that "all questions" relating to treaty-making and application of treaties would be governed by international law. It would be wrong for the code to accept even by implication the so-called monistic conception of the supremacy of international law.

14. While he agreed with Mr. Pal's suggestion that it might be better to deal with article 7 at a later stage, after the various aspects of treaty-making had been discussed more thoroughly, he believed that it might be possible, as a matter of convenience, to try now to find wording to reflect the real state of affairs more accurately.

15. Mr. PAL observed that all the questions relating to the topics enumerated might not have been dealt with exhaustively and that there would probably still be some residual questions which would be governed by international law. It was impossible to decide at that stage to what extent the Commission's draft would be imperative and to what extent certain questions might be subject to the intention of the parties. He therefore did not consider it advisable to retain the article in its present form.

16. The CHAIRMAN, speaking as Special Rapporteur, said that the discussion had raised issues which he had not expected to emerge at that stage. His inclination, in the light of the statements made by Mr. Pal, Mr. Tunkin and Mr. Amado, was to omit the article for the time being.

17. When he had drafted the text, he had not known exactly how he would deal with later reports, in which, as Mr. Pal had pointed out, practically all the issues referred to in the article were commented on in detail. A further report would deal in greater detail with the question of interpretation, and the matter raised by Mr. Hsu was dealt with in the fourth report, as an important aspect of operation and effect. As Mr. Amado and Mr. Pal had pointed out, it would be difficult to approve article 7 so long as the later reports had not been discussed.

18. With regard to Mr. Yokota's remarks, he said that, in drafting article 7, he had indeed had in mind throughout all questions between States. Furthermore, he agreed with Mr. Amado that much of the heat had gone out of the monist-dualist controversy; in any case, that divergence of views had always seemed unreal to him, since two different planes, the international and the domestic, were involved. On the international plane, such questions

must be regulated by international law, but it had been argued that, under the rules of international law, certain questions were regulated by domestic law; it seemed unnecessary to go further into that question.

19. Mr. EL-KHOURI said that such an important provision as article 7 should not be omitted altogether. The fact remained that treaties fell within the scope of international law. Nevertheless, they were not governed by international law only, but by other branches, such as commercial law, and in the case of commercial treaties, it would be necessary to resort to other practice for interpretation. The Commission should therefore include a clause stressing the important relationship between international law and treaties.

20. The CHAIRMAN pointed out that, in suggesting the omission of the article, members had not implied that the matter should not be dealt with, but only that other more detailed provisions should be included at later stages. That course would be wiser, since a very elaborate article would be inappropriate in that part of the code.

21. Mr. SCALLE could not agree that article 7 or article 4 should be omitted from the preliminary articles. Rules of international law always affected provisions of internal law, either ordinary or constitutional; it might therefore be appropriate to include the word "ultimately" before "be governed by international law" at the end of article 7. The hierarchical rule of the supremacy of international law over all types of internal law would thus be stated. Article 4 set forth the basic principle that no treaty obligation could exist without consent, and article 7 stated that no principle of internal law could supersede a validly concluded treaty. He urged that those two fundamental provisions should be retained in the preliminary articles.

22. The CHAIRMAN, speaking as Special Rapporteur, suggested that articles 4 and 7 might be omitted at the present stage and after the Commission had examined the specific aspects of the law it might consider whether there were some general principles which should be introduced in an early part of the code.

It was so agreed.

ARTICLE 8

23. The CHAIRMAN, speaking as Special Rapporteur, said that, when he had drafted article 8, he had believed it to be substantially correct, but had encountered some difficulties in connexion with two aspects of the subject, termination and operation. Distinctions between the various types of treaties were given in textbooks, but a clear legal distinction between them was seldom made. It had struck him then that distinctions were somewhat unreal; whether a treaty was multilateral, contractual or "normative", the main point was the agreement of the parties entering into the treaty. When he had come to deal with the termination and effect of treaties, however, he had observed a real distinction between the contractual type of multilateral treaty and certain "normative" treaties. The latter were the modern "sociological" treaties, such as conventions on human rights, labour conditions and safety measures, whereby the contracting parties acquired no rights, but only assumed obligations and undertook to conduct themselves in a manner which would benefit mankind in general. Accordingly, the beneficiaries of such treaties were individuals, rather than States. The real distinction between the "normative" and the contractual treaty lay in the fact that certain consequences of termination or non-observance would not materialize in the case of the former. In the case of ordinary multilateral treaties

which provided for mutual benefits, if one party failed to extend the benefit to others, the consequence was to relieve the other parties of the duty to accord benefits to the delinquent State, in keeping with the principle of reciprocity. That principle, however, did not apply to sociological or humanitarian conventions.

24. There was yet another, slightly different distinction in the consequences of the non-observance of a multilateral convention. In ordinary contractual conventions, the obligations of each party were not necessarily dependent upon the observance of the treaty by the other parties. In respect of commercial benefits, for example, one State might violate the convention and the other parties would reciprocally withdraw their benefits, but their obligations to non-delinquent States would remain unaffected. In the case of e.g. a disarmament convention, however, the same would not be true, for, if only one party failed to carry out its obligations, all the other parties might well automatically be released from their undertakings; in order to reciprocate non-observance, the States concerned would have to rearm, and it was impossible to rearm *vis-à-vis* one contracting State and not all the others.

25. He had tried to provide for the distinction in respect of termination in his second report and for distinctions in respect of effect in the fourth report. Accordingly, the desirability of retaining article 8 was doubtful. In the light of the distinctions he had cited, it might be somewhat misleading to suggest that there was no substantial juridical difference between any of the classes of treaties mentioned.

26. Mr. SCALLE observed that article 8 was merely an enumeration, which, moreover, did not conform with certain other traditional classifications. It was very difficult to state the exact difference between plurilateral and multilateral treaties, for example, and the whole subject was so vague that the article might well be omitted.

27. Mr. LIANG, Secretary to the Commission, observed that articles 4 to 8 presented, as it were, the quintessence of principles and practice and did not lend themselves as much to detailed analysis as the subsequent articles which dealt with the specific aspects of treaty law. Indeed, as the Special Rapporteur had indicated, the introductory articles were not absolutely necessary. While the comments of the members were very useful, the precise reformulation of those articles should be left to their author because they were in the nature of a treatise, and a treatise, though susceptible of analysis and comment, was not susceptible of being rewritten by another. The most practical procedure would be for members to make their comments and the Special Rapporteur could then rewrite the section in his own way in the light of those comments.

28. With reference to article 8, he wished to draw attention to a type similar to what the Chairman termed the humanitarian or sociological treaty; he had in mind treaties of an institutional nature. For example, there was the Convention on Privileges and Immunities concluded under the auspices of the United Nations in pursuance of Article 105 of the Charter.¹ Nevertheless, there were States Members of the United Nations which were not parties to the Convention. If a United Nations body held a session in the territory of a State party to the Convention, that State could not deny the right of another State, Member of the United Nations but not party to the Convention, to send its representatives to the session being held in its territory. Ac-

¹ United Nations, *Treaty Series*, Vol. I (1946-1947), No. 4.

cordingly, the second State, while not a party, nevertheless enjoyed the benefits of the Convention.

29. That kind of treaty was not in the nature of a *traité-contrat* and should be taken into account in any classification included in the code.

30. Mr. PAL agreed with the Special Rapporteur that a general article on the classification of treaties should not appear in the introductory part of the code. Article 1 said in effect that the code related to treaties and other international agreements in general. It did not say that the code would apply to one class of treaties and not to another, and therefore an article on classification was not needed in the introduction.

31. In his subsequent reports, the Special Rapporteur had referred to classification where it was relevant to the particular topics dealt with. That, it seemed to him, was all that was required.

32. Mr. EL-KHOURI also supported the omission of article 8. He drew an analogy with civil codes. A civil code dealt with the different kinds of contracts but did not contain an introductory article on the classification of contracts.

33. The CHAIRMAN, speaking as Special Rapporteur, said with reference to the Secretary's observations, that he had always conceived the codification of the law of treaties as taking the form not so much of a convention, but of a code dealing with a particular subject. In the countries where formulation of the law rested to a considerable extent on codes, the codes would be found to contain statements of principle as well as more specific guides to conduct.

34. Mr. YOKOTA said, with reference to the principle of article 8, that he was not sure that he could agree with the categorical formulation of the second sentence. Article 103 of the Charter of the United Nations appeared to differentiate between international instruments in the matter of their effect. He was not sure that that Article conflicted with the terms of article 8, but wished to point out that care had to be exercised in the use of such general language.

It was agreed that article 8 could be omitted.

35. Mr. MATINE-DAFTARY observed that one solution for dealing with the provisions under discussion, which related primarily to doctrine, would be to omit them from the code itself and to refer to them in the commentary.

ARTICLE 9

36. The CHAIRMAN, speaking as Special Rapporteur, observed that article 9 could likewise be omitted for the reasons the Commission had already considered. When writing the report, he had included the article because there sometimes appeared to be confusion between the respective roles of the executive authority and the legislative authority. On the international plane, it was the executive authority that exercised the treaty-making power. Even in the case of the United States of America, a treaty ratified by the Senate was still not ratified in the international sense until the President deposited the instrument of ratification with the depository Government or the international organization. The ratification by the Senate was a domestic process which required completion by some international act, and, on the international plane, that act had to be carried out by the executive authority, which was really the

only authority having the capacity to represent the State internationally.

37. However, that question came up again in connexion with treaty-making capacity, which was dealt with in this third report, and therefore he did not consider the article essential in the introduction.

38. Finally, he pointed out that in paragraph 1 the word "they", appearing near the end of the second sentence, referred to "executive acts".

39. Mr. EDMONDS asked for clarification of the meaning of that sentence.

40. Mr. TUNKIN said that he was under the impression that the Commission had decided to postpone discussion of article 9. If he was mistaken, he invited the Special Rapporteur to explain the purpose of the article, for, surely, every State had the undisputed right to determine for itself what authority was empowered to represent it in such matters as the conclusion of treaties, the depositing of certain instruments and so forth.

41. Mr. MATINE-DAFTARY said that he too had some difficulty with the second sentence of paragraph 1. He asked whether the word "authentic" was used in the sense of "valid" or in that of "genuine". Articles like article 9 were of particular importance from the point of view of countries in which constitutional government was as yet not firmly established. In those countries a minister would sometimes exceed his constitutional powers and commit his country by signing a treaty which neither parliament nor public opinion accepted favourably.

42. Mr. PAL said that it was his recollection that the Commission had decided that article 9 should be omitted. He too desired some clarification concerning the second sentence of paragraph 1. The example of the United States of America had been cited. Did the sentence in question mean that, if the President ratified without the consent of the Senate, the ratification would nevertheless be valid or authentic on the international plane?

43. Mr. ALFARO said that he was about to raise the same question. Although the President of the United States signed the instrument of ratification, in his proclamation he specified that he did so with the consent and advice of the Senate. He suggested that paragraph 2 (a) should indicate that the object of the constitutional processes was to give effect to the treaty both on the domestic and on the international plane.

44. Mr. SCALLE considered that article 9 should be deferred to a later stage of the Commission's work. As to the question of the process of ratification, he said that many writers held that, when the executive authority deposited an instrument of ratification, the other parties to the treaty had to accept it even if they were convinced that the constitutional requirements had not been observed. He did not share that view at all. The other signatories were by no means bound to accept as gospel what the executive authority said and if any question of a treaty's validity arose, they should have the right to bring it before a competent jurisdiction.

45. He had no doubt that it was the Special Rapporteur's intention not to deal with that aspect of the problem in article 9—it would certainly be fully dealt with in the code at a later stage—but merely to say that the executive authority was the formal treaty-making authority. However, the drafting was quite

ambiguous and if any article was to be omitted, it should certainly be article 9 in its present wording. 46. Mr. EL-KHOURI hoped that the Commission would find some way of dealing fully with the treaty-making power, since it was a question over which there was much controversy and even bloodshed. In the Middle East, the people of certain districts revolted against local chiefs who had granted concessions to the Great Powers in the form of treaties. The right to conclude treaties had to be carefully defined and the question of the exercise of the treaty-making power was the more important as the Commission had decided not to define a State.

47. The CHAIRMAN, speaking as Special Rapporteur, reiterated that the question of treaty-making capacity was dealt with very fully in his third report. With respect to the questions concerning the meaning of the second sentence of paragraph 1, he pointed out that, in article 9, he had not attempted to prejudge the question of what would happen if the president of a country ratified a treaty without having gone through the prescribed domestic processes. That was a question which concerned the validity of the treaty and, as he had said, was fully discussed in his third report. All he had wished to say in article 9—and admittedly the drafting was not very good—was that whatever domestic processes might be necessary, they were not enough in themselves; they had to be completed by some action on the part of the authority entitled to represent the State internationally, the executive authority. In that sense, only the acts of the executive authority were “authentic” on the international plane.

48. He was not sure whether the Commission had actually decided to omit article 9, but he agreed that it was not necessary and would be content to omit it.

It was agreed to omit article 9.

The meeting was suspended at 11.30 a.m. and resumed at 12 noon.

ARTICLES 10 TO 12

49. The CHAIRMAN, speaking as Special Rapporteur, said that he would appreciate the Commission's views on the general scheme on which he had based all his reports so far. There were two possible ways of envisaging the law of treaties. One was to take a treaty through the process in time: its conclusion, its entry into force, its effects and operation, its interpretation and, finally its termination. The second way, and the one he had chosen, was to deal with the three broad aspects: validity, effect and interpretation. The validity of treaties might be broken down into formal validity, which was another name for the conclusion of treaties and covered such matters as authenticity and ratification; essential validity, which was largely concerned with the reality of consent, since a formally valid treaty might be vitiated by failure of constitutional process, fraud, error or lack of capacity; and temporal validity.

50. That scheme would necessitate a first section on validity, a second section, with which he had dealt in his fourth report (A/CN.4/120), on operation and effect, first, as between parties and, second, as relating to non-parties and dealing with circumstances in which third States might acquire rights or even certain obligations under treaties between other States, and a third section on interpretation. Some authors held that inter-

pretation was a part of the topic of effect, but he thought that it covered wider ground, because interpretation was required in order to judge a treaty's validity.

51. If the subject was envisaged as a process in time, the sections would be: conclusion, interpretation, operation as between the parties, the position of third States and termination.

52. The Commission might well decide to continue to discuss the specific articles and settle their order later. A decision on the method should be taken at that stage because article 10 (*Definition of validity*) and article 11 (*General conditions of the operative effect of a treaty considered in itself*) had been based on the scheme which he had adopted. If a different scheme was agreed upon, those articles might have to be redrafted.

53. Mr. EDMONDS and Mr. SCALLE proposed that the Special Rapporteur should continue with the method he had chosen; if rearrangement was subsequently required, little redrafting would probably be needed.

It was so agreed.

54. The CHAIRMAN, speaking as Special Rapporteur, explained that article 10 was largely an attempt to set out formally what was covered by the idea of the validity of a treaty. Paragraph 2 would apply especially to a multilateral treaty, in a case where the treaty itself might remain valid but might not be valid for some particular party, because that party might have failed to deposit its ratification in due form. Paragraph 3 divided the general term into its component parts, and paragraph 4 defined the terms. The double aspect again emerged. A treaty might remain in force in itself, but not for a particular party, which might have exercised a right of denunciation. He did not think that there was anything controversial in substance in article 10, which was merely an introduction of the subject, although there might be differences of opinion as to the wording.

55. Mr. TUNKIN asked for an explanation of the term “contractual jurisprudence” in paragraph 4.

56. The CHAIRMAN, speaking as Special Rapporteur, explained that he had been trying to find some general phrase to describe the type of condition which governed the substantive validity of any contract under private law, namely, the factors which must be present; that, for example, the parties must have contractual capacity. A contract, even if formally correct, might be vitiated by certain errors. He had dealt with the subject more fully in his third report (A/CN.4/115). Admittedly, the term might be obscure, but it would be difficult to find anything to convey the idea briefly. It would, of course, be possible to delete the phrase “having regard to the requirements of contractual jurisprudence”.

57. Mr. BARTOŠ agreed with Mr. Tunkin on the difficulty caused by the phrase. It was certainly out of place in a code of the law of treaties. There was no such thing as a general contractual jurisprudence. It was not clear whether it might mean the jurisprudence on contracts or jurisprudence created by contracts. The term was not intelligible to continental lawyers. A term might be found valid in international law, but the Statute of the International Court of Justice implied that jurisprudence had no general validity in international law.

58. Mr. PAL observed that formal, essential and temporal validity would be dealt with fully in subsequent articles of the code. It might, therefore, be better to abandon the definitions in article 10, paragraph 4 and simply to refer to the requirements set forth in the articles dealing with the conditions of validity.

59. Mr. MATINE-DAFTARY pointed out that the term "jurisprudence" did not have the same connotation on the Continent as it did in the Anglo-Saxon countries. It might be better to use the term "*le droit matériel*", which covered the treaty-making capacity.

60. The CHAIRMAN, speaking as Special Rapporteur, replied that it would be hard to find an exact English equivalent for the term suggested by Mr. Matine-Daftary. Mr. Pal's suggestion was greatly preferable. The terms in paragraph 4 might be qualified by some such phrase as "as provided in article . . . to article . . . of the present code".

61. Mr. TUNKIN and Mr. ALFARO supported that suggestion.

62. The CHAIRMAN, speaking as Special Rapporteur, said that he would submit a redraft of article 10, paragraph 4.

63. Turning to article 11 (*General conditions of the operative effect of a treaty considered in itself*) and article 12 (*General conditions of the operative effect of a treaty for any particular State*), he explained that he had attempted to break up and deal individually with the conditions for the validity of a treaty considered in itself and its validity not in itself, but *vis-à-vis* States parties to it, a question which arose mainly with multilateral instruments. The articles were mainly analytical and might not be absolutely essential at that place. He would be perfectly prepared to draft a much briefer treatment of the subject, but he did believe that it would be useful to draw the distinction and to include a clause to the effect that a treaty must be valid in itself and also for the particular party whose participation was in question.

64. Mr. BARTOŠ, referring to article 12, paragraph 2, pointed out that there was a third alternative; a State's capacity might be limited by a general rule recognized in international law or its competence to enter into specific types of treaty might be limited by contractual obligations assumed by the State in question towards other States. A State might be limited by a peace treaty, for example, to concluding only certain types of treaty with certain States. In such a case, the treaty-making capacity was, in his opinion, not limited by a general rule of international law but by a specific limitation. The question of the limitation by certain treaties of the treaty-making capacity in relations between certain States might, however, be left in abeyance for the time being.

65. He had some doubts about article 12, paragraph 3 (a). The practice in Nazi Germany had been to specify that a treaty came into force, without ratification and without formalities under national constitutional law, immediately upon signature. If the phrase "as may be prescribed by the treaty itself" was accepted, that would mean acceptance on behalf of a State would be valid in such cases, whereas the intention was to state that the capacity for conclusion, or the representation of the will of the State on its behalf, derived from the constitutional order and the capacity of agents of the State to act in accordance with constitu-

tional competence. That would exclude every other question, including the capacity of agents acting on behalf of a State. He was sure that the Special Rapporteur had not intended that conclusion.

66. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Bartoš to some extent. The case in which a State not lacking inherent treaty-making capacity had undertaken by treaty not to enter into certain types of engagement was dealt with in article 8 of the third report (A/CN.4/115) and in the commentary. He agreed with Mr. Bartoš that the question might be left in abeyance until the Commission discussed that report. In reply to Mr. Bartoš' second remark, he explained that, if a treaty prescribed a particular mode of acceptance, the terms of the treaty would certainly prevail, but there were many cases in which an agreement failed to specify when and how it was to come into force. Rules of international law, however, existed to remedy such defects, as was made clear in later articles of the code.

67. Mr. BARTOŠ replied that he was sure that he and the Special Rapporteur agreed on the substance and that the difference merely lay in the manner of expressing it. A reference might be inserted in the commentary to show the difference between the treaty-making capacity and the communication of final acceptance in accordance with the rules embodied in the treaty itself.

68. The CHAIRMAN, speaking as Special Rapporteur, said that he would submit to the Commission revised versions of articles 1 and 2 and a shortened and simplified version of articles 11 and 12. It had been agreed that the further consideration of articles 3 to 9 be deferred. He would redraft article 10, paragraph 4, the remainder of the article having been accepted by the Commission.

It was so agreed.

The meeting rose at 1 p.m.

483rd MEETING

Friday, 24 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (continued)

[Agenda item 3]

ARTICLE 13

1. The CHAIRMAN, speaking as Special Rapporteur, explained that article 13 (*Definitions*) embodied definitions of terms constantly used in connexion with the conclusion of treaties. It was a moot point how far definitions were necessary or desirable, and certain of the definitions in article 13 might appear to be tautologous. The definitions might be considered after the substantive articles, but his own view was that the meaning of a number of technical terms should preferably be established at the outset in order to avoid defining them or repeating the definitions in later articles.

2. Mr. TUNKIN observed that definitions were usually placed at the beginning of a code, but for the