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Summary record of the 483rd meeting

Topic:
Law of Treaties

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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 constitutional 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

purposes of study, they could be established only after the substance had been settled. The discussion of the definitions should, he thought, be deferred until the substantive articles had been dealt with, a procedure which had been adopted at the previous session with regard to diplomatic intercourse and immunities.

3. Mr. MATINE-DAFTARY supported Mr. Tunkin's view.

4. Mr. PAL said that the definitions article should be placed at the beginning of the code, but the definitions themselves should be discussed at the end.

5. Mr. SCELLE did not agree with Mr. Tunkin. The Commission should have a general discussion of the definitions, because it should be aware what precisely the Special Rapporteur meant by the various terms. The definitions might, of course, require slight alterations in the light of the discussion of the substantive articles.

6. Mr. EDMONDS agreed with Mr. Scelle. The Commission could hardly deal with the substantive articles until it had defined the terms.

7. Mr. BARTOŠ said that he realized that the Commission was responsible for establishing definitions. Members certainly differed on certain concepts, since the terminology of international public law was far more controversial than that of international private law. The meanings of terms should be defined, so that States should not be able to attach to the terms any interpretation they chose. If the terminology was established, future disputes about the terms used in the code would be avoided. Obviously, to give a fixed meaning to the terms would be too conservative in the field of the development of the law, but the practical question was how to reduce the differences existing in international law, which was in fact the purpose of codification itself.

8. Mr. FRANÇOIS supported Mr. Tunkin's view. As jurists, all members of the Commission knew what the terms meant, but the meanings were very difficult to formulate precisely. To try to do so at that stage would be to waste time and there would be little prospect of success. The Special Rapporteur's definitions of "ratification" and "accession" seemed tautologous and not very useful, and the definition in article 13 (*l*) raised the whole vexed question of reservations. The discussion of the definitions should therefore be deferred.

9. Mr. EL-KHOURI thought there would be no harm in including a special article on definitions, but that would not save the Commission from repeating the same arguments when the substantive articles were studied. The terms would have to be explained in the substantive articles in any case. As they stood, the definitions seemed to be those generally accepted and not to embody special meanings for the purposes of the code.

10. Mr. AMADO agreed with Mr. François. Some of the definitions were tautologous and those which, like that of "reservations", related to substance were likely to be controversial, for it was well known that in Latin America reservations were a very vexed question. A reservation could hardly be defined in a single paragraph. The Special Rapporteur's study was analytical rather than practical. To discuss and include in the code a definitions article would be unwise.

11. Mr. HSU felt that there would be no harm in giving article 13 a preliminary examination to see whether all the members of the Commission agreed on the terms.

12. Mr. ALFARO agreed that definitions were always difficult and dangerous, but good definitions could be very useful. He could accept most of the definitions in article 13, but he agreed with Mr. Pal that it might be preferable to discuss the definitions article after the substantive articles.

13. Mr. YOKOTA said he had no objection to postponing the discussion of the definitions, but wished for an explanation of the phrase in paragraph (*i*) "in certain circumstances". In paragraph (*j*) the phrase used was "where the treaty provides for this procedure".

14. The CHAIRMAN, speaking as Special Rapporteur, explained that the definitions were not so simple as they appeared. The definition of "ratification" contained two elements. It was often stated that a State ratified a treaty, but it actually ratified the signature to a treaty and could do so only when the treaty had been signed, unless it became a party by some such procedure as accession. The definition of "accession" embodied the controversial view that accession was confined to countries which were not signatories. One school of thought held that a country might accede even though it had signed, whereas, in his view, a signatory could become a party by ratification only.

15. The question asked by Mr. Yokota was partly answered by the text of article 34, paragraph 2. Accession was possible not only by the terms of a treaty, but also by other means. In certain cases, a treaty did not provide for accession, and it might subsequently be found that countries whose participation was desirable had been excluded by their inability to sign by the date appointed for signature. In such cases, the parties made provision by a special ancillary agreement to permit accession. Acceptance was a somewhat unusual procedure which had been used in certain cases immediately after the Second World War, but appeared to have fallen into disuse. It could be employed only where the treaty provided for that procedure. That was why different phrases had been used in paragraphs (*i*) and (*j*).

16. Reservations were certainly a very controversial matter and the definition given might perhaps prejudge the substance to some extent. On the other hand, it might be useful to remove a considerable stumbling block by means of a definition. A reservation was essentially a unilateral derogation from a treaty. Governments often attached to their signature declarations and explanations of their interpretation of a particular article, which were not in fact derogations, although they might sometimes conceal reservations. Such declarations were often wrongly called reservations; they might be eliminated by establishing a definition.

17. Speaking as the Chairman, he observed that a considerable majority favoured deferring the discussion of article 13, and some members were doubtful whether a definitions article should be included in the code at all. He proposed, therefore, that the discussion be deferred, on the understanding that when the substantive articles had been discussed, the Commission would again consider whether the article on definitions was required.

18. Mr. SCELLE thanked the Special Rapporteur for his explanations. The main point was not whether the definitions were in conformity with the views of all members, but whether the members understood precisely

what the Special Rapporteur had in mind, particularly when they came to discuss the substantive articles.

The Chairman's proposal was adopted.

ARTICLE 14

19. The CHAIRMAN, speaking as Special Rapporteur, explained that article 14 (*The treaty considered as text and as legal transaction*) was mainly analytical and might not be essential to the code. In it he had tried to make clear a point which had some importance and had caused difficulties in the consideration of treaty law. Some learned authors did not deal with it at all, whereas others treated it at some length. Every treaty had two aspects: first, simply as an instrument which, as such, had an existence, even if it was not in force; and, second, when it came into force, as an international transaction. A treaty might produce effects even before it entered into force. The point might perhaps be somewhat metaphysical, but it would be helpful always to bear in mind the double aspect, as explained more fully in paragraph 24 of the commentary.

20. He would be inclined to retain an article making the distinction, but in a considerably abbreviated and simplified form. The analysis was a valid one, although somewhat complicated and although sometimes blurred because two or more of the stages might be telescoped. In the first stage, the parties drew up a text, and the only authority they needed for that purpose was the authority to negotiate; they were not committed in any way by the act of drawing up the text. The text was then authenticated in some way, as by inclusion in a final act. Even if the instrument did not receive a single signature, it was an authentic text, which could not be altered without further negotiation. The next stage was that of signature. The signatory adopted the text of the treaty as authentic, although it would not normally agree to be finally bound by it. In the third stage, the country bound itself by ratification or accession. The fourth stage was the entry into force, which might have to await a stipulated number of ratifications.

21. Mr. SCELLE thought that article 14 might be improved, but should be retained in the code, since the stages of treaty-making should be described. He did not consider, however, that the words *opération juridique* (legal transaction) conveyed the exact meaning intended. In French doctrine, *opérations de procédure* and *opérations de fond* were both juridical operations, but the term *opération juridique* was generally applied only to *opérations de fond*. Accordingly, the term *opération de procédure* should be used in the particular context.

22. Mr. ALFARO asked the Special Rapporteur to explain the term "transaction" in the title of the article and in paragraph 1. As he saw it, the essence of a treaty lay in agreement and he therefore doubted the usefulness of introducing the concept of transaction.

23. Mr. MATINE-DAFTARY asked Mr. Scelle whether, in his opinion, the word *accord* (agreement) should be regarded as an *opération de fond* or as an *opération de procédure*.

24. Mr. SCELLE replied that it would be an *opération de fond*.

25. Mr. BARTOŠ observed that, in his understanding, a transaction was a material act or the negotiation of commercial matters. Apart from that criticism, he considered that article 14 was useful and should be retained.

26. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Scelle and Mr. Alfaro. He would redraft article 14, using the term "legal agreement" (*accord juridique*).

27. Mr. TUNKIN stated, with regard to paragraph 1, that an instrument considered merely as a set of articles was not yet a treaty within the meaning of the definition in article 2. That definition of a treaty as an international agreement embodied in a formal instrument seemed to be correct in that it referred both to substance and form. He did not think, therefore, that the statement that a treaty evidenced but did not constitute the agreement was quite accurate. If the instrument merely evidenced the agreement, that agreement existed outside the instrument; but he agreed wtih Mr. Alfaro that the essence of a treaty lay in agreement. No substance could exist without form, so that agreement could exist only in some specific form. In any case, he doubted the need for entering into the well-known controversy on the subject. The Commission was not dealing with theoretical problems, but had to prepare a practical code. Since the practical purpose of paragraph 1 was questionable, it might be better to include it in the commentary.

28. With regard to paragraph 4 (*b*), he doubted whether it was accurate to say that consent was usually given by signature. Consent thus given might not be final, since a State might not ratify a treaty that had been signed by its plenipotentiaries. Alternatively, if paragraph 4 (*b*) meant that conclusion was effected by signature, he ventured to doubt that statement.

29. Mr. AMADO thought that it might be best to limit paragraph 1 to the statement that a treaty was both a legal agreement and the document which embodied it, the reference to a transaction being eliminated.

30. The CHAIRMAN, speaking as Special Rapporteur, said that he saw no difficulty in deleting the word "transaction", although it was commonly used in English legal parlance.

31. He would also not object to omitting the second sentence of paragraph 1, as Mr. Tunkin had suggested. The issue was, however, very controversial. Mr. Tunkin had argued that agreement was bound up with the treaty itself. That was correct, in the sense that any person who wished to know what was the subject of an agreement would have to refer to the treaty to find out, but the actual agreement—the intention of the parties, the signature of certain acts, and the deposit of instruments of ratification—fell outside the treaty proper, which in that sense must be regarded merely as a document. Mr. Tunkin's view was admissible, but the opposite thesis was also widely held. Nevertheless, he did not wish to insist on any theoretical doctrine and would redraft article 14 without the second sentence of paragraph 1.

32. With regard to Mr. Tunkin's second point, he thought that the difficulty lay in the fact that the four stages of treaty-making were frequently telescoped and became hard to distinguish. It might be said that signature was usually not binding, but that was not always the case. For example, exchanges of notes came into effect on signature, and the same was true of some single instruments. With regard to the ambiguity of the term "conclusion", he observed that it was always controversial whether a treaty could be said to have

been concluded at the point of signature, ratification, or entry into force. Personally, he regarded conclusion as separate from and antecedent to entry into force. The difficulty might be purely terminological. The important point, however, was to set forth the four stages, firstly, the establishment and authentication of the text, secondly, signature by a number of countries, which was a step beyond mere participation in drawing up the text and might be regarded as provisional adoption, thirdly, final assumption of binding obligations through ratification and, fourthly, entry into force, which might in some cases be simultaneous with the third stage. In redrafting the article, he would try to remedy the ambiguity in paragraph 4 (*b*) to which Mr. Tunkin had referred.

33. Mr. YOKOTA thought that paragraph 1 seemed to be open to misunderstanding. Mr. Tunkin had rightly pointed out that the definition of a treaty in article 2 was correct; agreement and the instrument were essential elements of a treaty and agreement outside the instrument could not constitute a treaty. Paragraph 1, however, semed to convey the opposite idea. The real meaning of the paragraph seemed to be that the term "treaty" might be used to signify agreement and, at the same time, the document embodying such an agreement. If it were made clear that the word was used in that double sense, Mr. Tunkin's objection would be answered.

34. The CHAIRMAN, speaking as Special Rapporteur, observed that, in referring to the treaty considered as a text, he meant an instrument which had not yet been finally agreed upon, or at a stage when its provisions were not yet binding on anyone.

35. Mr. TUNKIN said that he would prefer to adhere to the definition of a treaty in article 2. It could not be said that, for example, a convention drafted by the United Nations General Assembly was a treaty *stricto sensu* before it had been acceded to or ratified. It would be confusing to depart from the definition in article 2, which set forth everything that had to be said on the subject.

36. Mr. SCELLE thought that the divergences of opinion had arisen from the fact that the point of view of the report had shifted. It was not only being stated that the terms "treaty" and "agreement" were interchangeable, but a distinction was being drawn between the formal operation and the contents of a treaty. If it were borne in mind, however, that a treaty properly so-called and a legal agreement might be different, article 14 might remain in its present form.

The meeting was suspended at 11.25 a.m. and resumed at 12 noon.

37. Mr. BARTOŠ did not consider that there was any contradiction between article 2 and article 14. The main point was that the substance of a treaty—agreement and consent—was constituted by the material elements, while the treaty as a document constituted proof of the existence of those elements. Article 1, paragraph 1, stated that a treaty within the meaning of the code must be established in a written instrument and that the code did not apply to agreements not in written form. Accordingly, a treaty within the meaning of the code must be concluded in the form of a document; that was not the form *ad solemnitatem*, but the form *ad probandum*. Thus, there was a definite need to stress the two distinct elements which, in practice, formed an entity.

38. Mr. PAL said he was inclined to the view that the proper place for article 14 was in the commentary. If, however, the article were redrafted and retained in the code, it would be advisable to make it clear that a treaty consisted of two parts, a legal transaction and a document: those parts might sometimes be loosely called treaties; it must also be made clear that the word "treaty" was not being used in the same sense in article 14 as in articles 1 and 2. For the purposes of the code as a whole, the definition of a treaty in article 2 would stand, but in article 14 the term was being loosely used to designate the parts, namely the agreement as well as the document embodying it.

39. Mr. AMADO said that, although he agreed with Mr. Pal to some extent, the valuable enumeration in the article should be included in the code itself, and not in the commentary.

40. Mr. SCELLE agreed with Mr. Amado that, although the article might be altered, the Commission should retain in the code a description of the stages of the process of treaty-making.

ARTICLE 15

41. The CHAIRMAN, speaking as Special Rapporteur, introduced article 15. He said that the main object of the first sentence was to point out that meetings of delegates in the case of bilateral treaties, and international conferences in the case of multilateral treaties, were by no means essential for the process of negotiation. Treaty engagements could, and very often were, negotiated by correspondence or diplomatic interchanges and consultations. In paragraph 25 of his commentary he had drawn attention to the manner in which the Treaty of Peace with Japan of 1951 had been negotiated. For approximately two years the proposed texts had been circulated among the prospective parties so that the Japanese Peace Conference held at San Francisco had been a signature ceremony concerned with an agreed text.

42. The second sentence of paragraph 1 brought out that the delegates engaged in negotiating a treaty had to be duly authorized to conduct the negotiations, except in the case of Heads of States, ministers or ambassadors, who were deemed to have an inherent right to negotiate. It was necessary to distinguish between authority to negotiate and authority to conclude and sign a treaty. For signature, full powers were necessary.

43. Paragraph 2 of article 15 dealt with the manner in which agreement on the text was reached. In bilateral negotiations, of course, there had to be unanimity, and the same principle applied to multilateral negotiations unless at a conference the rule adopted by common consent provided for agreement on the text to be reached by a majority decision. There were moreover cases in which the procedure was governed by antecedent rules, as when the manner in which the provisions of a convention were to be adopted was specified by the body which convoked the conference.

44. Mr. FRANÇOIS thought that paragraph 1 did not make it clear that the inherent authority of ambassadors, and of course ministers plenipotentiary, to negotiate extended only to bilateral negotiations with the countries to which they were accredited. An Ambassador representing his country at a multilateral conference would require express authority to negotiate.

45. With reference to paragraph 2, he cautioned against the inclusion in the code of any wording which would imply that decisions regarding voting procedure at international conferences had to be adopted unanimously. Such an approach would expose every great international conference to the danger of being frustrated by the wilfulness of one State.

46. Mr. MATINE-DAFTARY agreed with Mr. François concerning the position of ambassadors and suggested that the point could be dealt with by having separate paragraphs on bilateral and multilateral negotiations at international conferences. To deal with both of them in one single paragraph would inevitably lead to confusion, as was evidenced by the text of the report before the Commission.

47. Mr. BARTOŠ observed that the reference to ambassadors in the second sentence of paragraph 1 had no doubt been intended not as a reference to the rank of ambassadors but to ambassadors *in sede*, acting in their capacity as accredited representatives. The practice was that they did not need authority to negotiate but needed full powers to sign, except when signing *ad referendum*. The final clause of paragraph 1 would therefore have to be modified.

48. Mr. AMADO pointed out that article 15 should be read in conjunction with articles 21 and 22. The problems raised by article 15 were covered by the phrase *ad referendum*, appearing in the articles he had mentioned.

49. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. François's point concerning the position of ambassadors. He had, of course, not intended to exclude ministers plenipotentiary. In redrafting the article, he could use a more general term such as "Heads of Mission" and make it clear that the reference was to heads of mission engaged in bilateral negotiations with the authorities of the country to which they were accredited.

50. Mr. LIANG, Secretary to the Commission, agreed with Mr. Matine-Daftary that separate rules would be required for different situations. In the case of bilateral negotiations, an ambassador of one party accredited to the other party usually did not require special authorization to negotiate. Ordinarily he received instructions to negotiate a treaty or agreement and, towards the end of negotiations, he was given full powers to sign the treaty.

51. A second situation, which differed from bilateral negotiations in many respects, was that of the international conference. There the representatives had to be duly authorized to negotiate.

52. A third situation was that of a convention drawn up by a United Nations organ, for example, the Convention on the Prevention and Punishment of the Crime of Genocide adopted by General Assembly resolution 260 (III) in 1948. In that case, representatives did not require special authority to discuss or negotiate the text of the convention, although, of course, they had to have full powers to sign it.

53. In that connexion, he considered the final clause of paragraph 1 ambiguous. It might be understood to mean that delegates did not require full powers for the purpose of concluding a treaty, a meaning which, as the last sentence of paragraph 26 of the Special Rapporteur's commentary clearly indicated, had not been intended.

54. Referring to paragraph 2 of article 15, he said that unanimity was the rule in bilateral negotiations and in plurilateral negotiations, which involved a relatively small number of States, and some plurilateral conferences had broken down over that question. Again, in the case of all League of Nations conferences, unanimity had been required for agreement on the text.

55. However, he did not think that unanimity had been recognized as a rule in any multilateral negotiations held since the end of the Second World War. From the United Nations Conference on International Organization, held at San Francisco in 1945, at all the conferences sponsored by the United Nations up to and including the 1958 United Nations Conference on the Law of the Sea and the United Nations Conference on the Elimination or Reduction of Future Statelessness of 1959, the majority required for agreement on the text of provisions had been determined by the rules of procedure established by each conference.

56. Mr. PAL said he took it that the final clause of paragraph 1 should read "but for the purposes of negotiation they need not be in possession of full powers to conclude the treaty".

57. The CHAIRMAN, speaking as Special Rapporteur, confirmed Mr. Pal's interpretation. He agreed that article 15 required more elaboration and said that he would redraft it, perhaps in consultation with the Secretary.

58. As to the meaning of the expression "common consent", in paragraph 2, he said he had used those words because he thought that they would cover the various situations. It had been pointed out that at a conference the rules governing agreement on provisions were made by the conference itself. But how were the rules of procedure adopted? If they were adopted by a simple majority, those who had voted against them would, by continuing to participate in the conference, have tacitly consented to the procedure that had prevailed, and that acquiescence could be considered as "common consent". However, he was not opposed to including a more detailed rule in paragraph 2 if it could be formulated.

59. Mr. BARTOŠ supported the Chairman's view. The general rule governing agreement was unanimity, except in cases in which the participants agreed expressly or tacitly to a different procedure, either by approving the procedure or by continuing to participate in the conference after the procedure was adopted. Consequently, there was, in reality, no derogation from the rule of unanimity. In the final analysis, States which did not support what had been agreed to by the conference could refuse to sign the treaty or convention and could even conclude among themselves a different convention in keeping with their views.

60. Mr. FRANÇOIS observed that it would nevertheless be very dangerous to include in the code any allusion to unanimity which might be exploited for the purpose of paralysing international conferences attempting to draft treaties or conventions.

61. Mr. LIANG, Secretary to the Commission, said that the last case he could recall in which a serious controversy had arisen regarding the need for unanimity at a multilateral conference was that concerned with the Treaty of Peace with Italy, 1947.[1] Since then, the procedure of agreement on provisions by some kind of

[1] United Nations, *Treaty Series*, vol. 49 (1950), No. 747.

majority had not been seriously challenged at international conferences, including those called under the auspices of the United Nations for which the Secretary-General prepared provisional rules of procedure.

62. He would venture to say that the rule of unanimity had been consecrated as a fiction, or at least had not been confirmed by practice, and in his personal opinion it was coming more and more to be regarded as obsolete.

63. The CHAIRMAN suggested that the discussion of article 15 should be continued at the next meeting.

It was so agreed.

The meeting rose at 1.5 p.m.

484th MEETING

Monday, 27 April 1959, at 3 p.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 15 (*continued*)

1. The CHAIRMAN welcomed Mr. Ago, Mr. Padilla Nervo and Mr. Verdross, and for their benefit reviewed the activity of the Commission during the first week of the session. At its previous meeting, the Commission had reached article 15 in its consideration of the draft code of the law of treaties.

2. Speaking as Special Rapporteur, he said that he would submit a redraft of paragraph 1 which would take into account the different situations arising in the case of bilateral, plurilateral and multilateral negotiations. However, he was still in need of guidance from the Commission with respect to paragraph 2. Under that paragraph, the unanimity rule would apply in the case of a multilateral conference unless the conference decided, by common consent, to adopt texts by a majority vote. It seemed that a certain practice had evolved at international treaty-making conferences whereby the proceedings began with the adoption of rules of procedure which almost invariably contained a rule providing for agreement on texts by some kind of majority vote. The question now was: What rule governed the adoption of that rule of procedure? It might be adopted without a formal vote being taken; for example, the president might announce that he took it the rules were adopted. Or else, the rule might be voted upon and adopted with abstentions, but without opposition. Lastly, it might be adopted with opposition being expressed in form of negative votes, but, as Mr. Bartoš and other speakers had pointed out, if the minority in opposition continued to participate after the president had announced the adoption of the rule, that participation amounted to an expression of common consent.

3. The fact remained, however, that the unanimity rule in a formal sense was no longer applied at multilateral conferences, and the question before the Commission was whether it should give expression in the code to that development.

4. Mr. YOKOTA admitted that, when a decision for the adoption of texts by a majority vote was taken by a majority vote at an international conference, it could be argued that there was tacit common consent of the participants on that point. That view was in keeping with the traditional theory of State sovereignty, under which a sovereign State was not subject to any obligation at all unless it consented thereto of its own will. Therefore, from the point of view of that theory, it was only by assuming the existence of the tacit common consent of all the participants that it was possible to explain the existing practice at some conferences of adopting by a majority vote a rule providing that texts were to be adopted by a majority vote.

5. However, it seemed to him that that assumption was not a reality but a fiction. The reality was that the decision to adopt the text of the convention by majority vote was taken by a majority vote of the participants, usually without any conscious reflexion as to whether or not that was done by common consent of the participants. Although he did not object to the use of fictions altogether in the science of law, it would be far better if recourse to fictions could be avoided. If the Commission wished to be realistic, it might omit the words "by common consent of the participants" from paragraph 2.

6. There was another reason in favour of omitting those words. The world was in a period of transition, from a world of absolutely independent and sovereign States to a world of international co-operation and integration. One of the most conspicuous proofs of that transition was the growing tendency to accept the principle of adopting by a majority vote the rule that matters should be settled by a majority vote. That tendency was conducive to the development of international co-operation, and the Commission should do nothing that might hamper that development. To lay down explicitly that a decision for the adoption of texts by majority vote must be taken "by common consent of the participants" might have an adverse effect on the development of international co-operation and friendly relations between States. In that respect he was in complete agreement with the view of Mr. François, and for the two reasons mentioned, he suggested simply to lay down "Agreement on any text or part thereof must be unanimous, unless a decision has been taken for the adoption of texts by a majority vote".

7. Mr. TUNKIN was of the opinion that the question dealt with in paragraph 2 was outside the scope of the draft code. Article 18 of the Special Rapporteur's draft described the various ways in which the establishment of the text and its authentication were effected. That was sufficient for the purposes of the code and there was no need to discuss the rules of international conferences. If paragraph 2 was omitted, no one would be able to say that anything was lacking.

8. Mr. SCELLE said that he was in complete agreement with Mr. François (483rd meeting) that it would be dangerous to say that agreement on texts must be unanimous in principle.

9. He agreed with Mr. Yokota that the world was in a process of international integration, but he was surprised at Mr. Yokota's solution. As international integration was in contradiction with absolute State sovereignty, and as it was the majority and not the unanimity rule that was now applied at multilateral conferences, he was in favour of a total revision of paragraph 2; it should provide that, except in the case of a bilateral treaty or a treaty among a very small number of parties, the majority rule was applicable. If that revision should not be acceptable to the Commission, he would be in favour of Mr. Tunkin's suggestion that paragraph 2 should be omitted.