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Summary record of the 484th meeting

Topic:
Law of Treaties

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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.

10. Mr. BARTOŠ drew a distinction between the two different stages of the treaty-making process: the establishment of the text and the final acceptance of that text by the States. For the purpose of the establishment of the text, the fundamental rule was still unanimity although, in practice, States voluntarily waived the unanimity rule at international conferences either by virtue of their acceptance of the rules of the organization under whose auspices the conference was held, or by agreeing to participate under rules of procedure proposed in advance or to continue to participate after rules of procedure which they opposed were adopted. That was "consent", although the States were willing to waive the unanimity rule only in the sure knowledge that they were free not to accept the text finally drafted. Thus, in the case of the International Labour Conferences, where States were obliged to consider conventions approved by the majority as having been adopted by the Conference, Governments were required to inform the International Labour Organisation if their legislatures did not wish to accept the text that had been established. However, it was the World Health Organization which had gone furthest in the process of making decisions adopted by a majority binding on all the members of the Organization. But even in that case States could explain the reasons why they found it impossible to apply a convention adopted by majority vote, and the Organization was then bound to review the matter raised by the objecting States. Only if the decision was reaffirmed did it become absolutely binding, and, in that case, States which refused to accept it were free to withdraw from the Organization. The conclusion was therefore inescapable that, by agreeing to be a member, a State consented to the binding nature of decisions adopted by majority vote.

11. While he, personally, was in favour of the further development of international co-operation, he considered the task of the Commission was not to create ideal rules but to codify the rules that were applied in the modern world. There was no rule in practice that the acceptance of a treaty or the definition of a State's obligations was effected by any kind of majority. While it was conceded in practice that a text could be established by a majority, in the final analysis it was for each State to say whether or not it accepted the established text. That international practice had not evolved beyond that stage was well illustrated by what had happened in the recent case of the most important of treaties on European integration, the European Defence Community Treaty of 1952; the text established had been rejected by France. Obviously, States were as yet not bound to accept obligations approved by the majority.

12. Of course, there were situations in which a State was under moral pressure to conform to the decision of the majority. For example, the rules contained in Conventions of the International Civil Aviation Organization (ICAO) had in practice become the standard rules governing international civil air traffic. Whether or not a State was a member of the Organization, it had to observe the ICAO rules if it wished to participate in international aviation. However, it did so not for juridical reasons but for practical reasons. Yugoslavia was not legally a member of ICAO because its reservation to article 5 of the Convention on International Civil Aviation of 1944[1] was not accepted. However, it conformed to the rules laid down in the Convention in order to be able to enjoy the facilities of foreign airfields and other benefits of the Convention, which were not denied to it by ICAO by reason of its non-membership. While Yugoslavia did not deny that all of the rules of ICAO were approved by the majority, it was not juridically bound to accept them for that reason, because at the present stage of international law, States were sovereign as to acceptance or non-acceptance of obligations.

13. In connexion with Mr. François's concern over the danger to future international conferences, he could only say that neither the Charter nor practice had introduced international legislation by any majority whatever, in other words, legislation that could be applied to States without their consent. That was the existing reality, and the Special Rapporteur's draft article 15, paragraph 2, was simply realistic. If there was objection, the reference to the unanimity rule could be omitted but a reference to a majority rule would be in contradiction with theory and practice.

14. Mr. LIANG, Secretary to the Commission, thought that the discussion had been complicated by the introduction of the concept of the imposition or assumption of obligations. A great deal of the discussion bearing upon the importance of the integration of the international community had to do with the extent to which the majority could make the minority accept decisions of a substantive nature. However, that was certainly not a question involved in article 15 and it had certainly not been the intention of the Special Rapporteur to resolve it in connexion with that article.

15. The problem was how to describe the current practice observed in negotiations relating to the adoption of texts. The establishment and authentication of texts, mentioned in article 18, were different stages in the adoption of texts. The adoption of texts was a simpler matter than the larger issue of the imposition or assumption of obligations, and he agreed with the view that the Commission would be straying from the topic of the law of treaties if it discussed the question whether decisions by international organs or conferences had to be adopted by unanimity or by majority.

16. He recalled that the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 had been drawn up under a majority rule in accordance with the General Assembly's rules of procedure but the adoption of the text of the Convention by the General Assembly had not imposed obligations on the Member States unless they became parties to the multilateral treaty that had been negotiated in the General Assembly. It was true that there might be certain political repercussions arising from the adoption of a text and, in that connexion, he recalled the heated discussion that had taken place on certain articles during the United Nations Conference on the Law of the Sea in 1958. However, the fact that the article adopted by the majority might constitute a certain pressure on a minority to join the majority was, again, outside the scope of the law of treaties.

17. He also recalled that, when the League of Nations had tried to codify international law, one of the subjects was the procedure of international conferences. It was under such a heading that the question of the imposition of obligations by virtue of a unanimity or a majority rule might be discussed, not in connexion with the law of treaties.

18. Mr. AGO said that, so far as multilateral treaties were concerned, treaty-making involved three distinct stages: first, the establishment of the text; secondly, its

[1] United Nations, *Treaty Series*, vol. 15 (1948), No. 102.

entry into force from the general point of view, a stage which normally required a specified number of ratifications; and thirdly, its entry into force in respect of a particular State, with the resulting obligations, which could only occur upon its ratification by the State concerned. The question whether or not to apply the majority rule only affected the first. He had felt somewhat doubtful about the Special Rapporteur's text of article 15, paragraph 2, because it appeared to cover without differentiation both bilateral and multilateral treaties, while, in fact, it related only to the latter. As the Secretary had rightly pointed out, the proceedings of international organizations were already governed by precise rules, and other international conferences adopted their own. To the best of his knowledge, unanimity had never been required at a diplomatic conference, and he questioned whether it was judicious to insert a rule suggesting that it was necessary in every case where there was no previous agreement to the contrary. To demand unanimity in the establishment of the text would also be somewhat inconsistent with the fact that a conference was not normally asked to establish a text designed to be ratified by all the participants.

19. For those reasons he considered that article 15, paragraph 2, should be omitted.

20. Mr. FRANÇOIS said that many of the points he had wished to stress had already been made by the Secretary and Mr. Ago. He would point out, however, in reply to Mr. Bartoš that there was no question of the majority imposing obligations on the minority, since the formulation of texts could not in itself entail any obligation. The unanimity rule would be excessive, since it would enable one single State to frustrate the establishment of texts, which were the only means of advancing international legislation. He therefore opposed the Special Rapporteur's draft of paragraph 2. If, as would appear, the Special Rapporteur held that unanimity was indispensable, it was time to state in the interests of the progressive development of law that texts could be adopted by the majority.

21. The CHAIRMAN, speaking as Special Rapporteur, emphasized that his aim was to provide a residual rule for guidance as to how the rules of procedure themselves were to be adopted. For example, it could be stipulated that, in the absence of other provisions, they should be adopted by a simple majority: a course that would meet Mr. François's point.

22. Mr. HSU observed that it might be more in harmony with the trend of development to require only a majority vote rather than the unanimity originally proposed by the Special Rapporteur.

23. Mr. PAL said that, although his initial doubts about paragraph 2 had largely been dispelled by the discussion, he was still of the opinion that it should be deleted, as it was somewhat out of place in the present draft. The present study did not call for rules of procedure governing conferences of nations. Though the paragraph only dealt with the question of establishing the draft of the text which, when established, would amount to a final proposal for acceptance and would be binding only when accepted and only on those who would accept it, yet it seemed that even the final draft might produce some serious consequence, as could be seen from provisions like the one contained in article 18 (1) (*d*) of the draft.

24. If, however, the paragraph were retained, it would be impossible to avoid the unanimity rule. Undoubtedly, when an organization became a body empowered to act as one body, the majority rule would apply subject only to any special provision relating to the functioning of that body. The United Nations was such a body and therefore its recommendations as far as conferences were concerned would be decided upon by majority rule; but the conference of Member States convened in accordance with those recommendations would not itself be functioning as one such body and, consequently, no binding decision would be possible without the unanimity of its members. The world was perhaps in transition towards integration, but it certainly was not yet integrated.

25. Moreover, he was not agreeable to the view that the continued participation in the conference by a dissenting member, after a majority decision had been taken, should imply his consent to such a decision. He felt that any dissenting member might be inclined to withdraw from the conference, and that would jeopardize any possibility of an ultimate agreement.

26. Mr. PADILLA NERVO, observing that article 15 apparently related both to bilateral treaties (where unanimity was indispensable) and to multilateral conventions, thought that paragraph 2 was hardly necessary. In the case of multilateral conventions, the rules of procedure were always adopted as a preliminary to the discussions and had no bearing upon the ratification, or entry into force of the final instrument. Different bodies were governed by different rules of procedure, of course; he referred to Article 18 of the Charter concerning the voting in the General Assembly, and to Articles 108 and 109 concerning amendments to the Charter. In general, however, the rules of procedure governing the establishment of a text had nothing to do with its entry into force or the obligations it would involve for States ratifying it through their normal constitutional processes. Of late, a number of conventions had been adopted at conferences of the Latin American countries but had not entered into force for lack of sufficient ratifications.

27. In view of those considerations, he thought there was little point in laying down any but the most general stipulations about the procedure for the adoption of texts at international conferences.

28. The CHAIRMAN, speaking as Special Rapporteur, pointed out, in reply to the previous speaker, that nevertheless some antecedent principle was needed because any individual conference could not itself decide upon the rule governing the adoption of its own rules of procedure. He did not agree with the view that the matter could be left aside altogether.

29. Mr. BARTOŠ said that States were not obliged to participate in any international conference even of a quasi-legislative nature, but once the rules of procedure had been agreed upon the participants were bound to respect them. It was prudent for any conference to frame its rules of procedure concerning the establishment of the text and he had never denied that, although in theory the rule for adoption should be unanimity, the more usual practice was to follow the majority rule.

30. Mr. EL-KHOURI said there would be no harm in including in the code a clause providing that final drafts should be adopted by a majority vote. Such a rule would be particularly important in respect of treaties that had general application, for example, a convention concerning the law of the sea.

31. Mr. VERDROSS, pointing out that, according to the more general practice, the rules of procedure of a conference were adopted by a majority vote, said that any participating State was free not to accept them and to withdraw from the conference before the actual proceedings began. He therefore favoured Mr. Yokota's view that it should be laid down that any agreement must be unanimous unless the conference decided otherwise.

32. Mr. ALFARO observed that the Commission seemed to have two main questions before it. Should paragraph 2 be omitted altogether or should some such provision be retained and, if so, should the unanimity or the majority rule apply?

33. He considered it advisable to retain a rule laying down principles to be followed at international conferences and thought that the Commission's text should combine the principle of the simple majority with the idea suggested by Mr. Padillo Nervo. Thus, the code should provide that the text of the treaty should be established by a majority vote in a manner determined by the conference itself by a majority vote. He preferred the majority rule to unanimity because, as Mr. François pointed out, the unanimity rule would make it possible for any one State to frustrate a conference.

34. Mr. AGO thought that the main point at issue was the vote by which the rules of procedure of the conference were to be established. The international organization convening the conference might have pre-established rules; but in the contrary case, it was for the conference itself to adopt its own rules of procedure. For that adoption, in his opinion, the generally accepted rule in modern times was that of the simple majority, unless otherwise decided. The Commission might therefore state that, unless there were pre-established rules, the conference should adopt its rules of procedure by a simple majority.

35. Mr. TUNKIN considered that the principle of unanimity meant that no one State or group of States was in a position to bind other States and that the consent of each State was required for the purpose of the adoption of the rules of procedure. It meant that once a conference had begun and the rules of procedure had been adopted by a majority, a State which continued to participate in the conference, although it had voted against the rules, finally acquiesced. In practice, paragraph 2 dealt with the rules of international conferences and organizations, but did not relate to the law of treaties properly so called. It would therefore be inadvisable to include the provision in the code, since it might be regarded as an encroachment on the rules adopted by international conferences. He therefore formally proposed the omission of paragraph 2.

36. Mr. YOKOTA thought that the question raised in paragraph 2 might be solved in three ways. The first solution was that offered by the Special Rapporteur's text of the paragraph, which reflected a situation that had prevailed in the nineteenth century and the early decades of the twentieth century. The second solution, advocated by Mr. François and Mr. Scelle, was that agreement on any text must be unanimous unless a decision had been taken by a majority vote for the adoption of texts by a majority vote. He believed that that would be the situation at some time in the future, but that the solution was too advanced at the moment. While it was true that, at many recent conferences, the majority rule had been adopted by a majority vote, it could hardly be said that that practice had become established in international law. He therefore advanced a third solution, which was to leave the question open in the draft and simply to say that agreement on any text must be unanimous unless a decision was taken for the adoption of the text by a majority vote. While he did not categorically oppose the omission of the paragraph, he thought it would be better to include a provision along the lines he had described.

37. The CHAIRMAN, speaking as Special Rapporteur, did not consider that paragraph 2 should be omitted. Those who advocated its omission argued that it did not deal with a matter forming part of the law of treaties proper; if that were so, a great many essential provisions should be omitted from the draft as a whole. Certain matters relating to the conclusion of a treaty constituted a part of the law of treaties and it was practically impossible to draw a sharp line of demarcation. For example, if the argument were followed to its logical conclusion, article 15, paragraph 1, and article 18 might also be omitted. It seemed to be essential, however, to decide how a text was to be established and by what vote the rule of procedure concerned should be adopted; the point could scarcely be neglected in the code. In many cases, no difficulty would arise, but the controversy as to how the rules for the adoption of texts should be established would always remain in the background.

38. With the exception of those in favour of omitting the clause, the members of the Commission seemed to be agreed on the need to deal with multilateral negotiations at international conferences which established texts. In a certain sense, moreover, it was agreed that the rule of unanimity prevailed, for even if a conference decided by a majority vote to adopt a majority voting procedure, then, if the States which voted against the rule did not withdraw from the conference but participated in the drafting, their acquiescence, or common consent, was implied. It was undesirable, however, to leave the matter on that basis. The majority rule was so usual that it was better to set it forth explicitly, to avoid ambiguous conclusions. He therefore agreed with Mr. Alfaro that, except as otherwise decided, the adoption of a text would be governed by the simple majority rule and that the decision to observe that rule should itself be taken by a simple majority, unless the procedure was already governed by the practice or rules of an international organization. It should be borne in mind that such practice and rules did not always obtain; for example, conferences convened by the United Nations did not automatically follow the rules of procedure of the General Assembly. The United Nations Conference on the Law of the Sea, 1958, had adopted its own rules and, although they were similar to the voting procedure of the General Assembly, they might in theory have been quite different.

39. He said he would redraft paragraph 2 in the light of the discussion and asked Mr. Tunkin whether he wanted a vote to be taken on his proposal to omit the paragraph.

40. Mr. TUNKIN said he would not insist on a vote on his proposal.

41. Mr. AMADO asked whether the Commission's provision would have any importance if every conference was free to establish its own procedure. He believed that the Special Rapporteur's approach was somewhat impractical, in that his draft attempted to follow all aspects of treaty-making in all their developments. That had led him into difficulties in connexion with the hypothesis of unanimity. It was self-evident, however, that

all conferences must make their own rules, since the States which attended them were sovereign. He was therefore in favour of the omission of the paragraph.

42. Mr. FRANÇOIS said that, although it was true that conferences established their own rules, it was important to decide whether they settled their rules by unanimity or by a simple majority. It might be better to wait for a revised text before taking a decision on the omission of the paragraph.

43. Mr. SCELLE thought that paragraph 2 might be retained, provided that a specific procedure of conclusion was provided for all cases where international organizations were involved, since the practice and rules of those organizations must have an effect on the rules of procedure of the conference.

44. Mr. TUNKIN agreed that the matter should be taken up again when a revised draft was available. If any provision were retained, he would favour some such text as that suggested by Mr. Yokota.

45. Mr. BARTOŠ said that under the provisional rules of procedure usually prepared by the Secretariat for conferences convened by the United Nations it was commonly provided that texts should be adopted by a two-thirds majority unless the conference decided otherwise. In view of that customary rule, the question raised in paragraph 2 was a practical one. The two-thirds majority rule had never been abolished in United Nations practice and was followed by all United Nations conferences. Although he did not insist that the two-thirds majority should be required by the code, he felt it his duty to stress that the Commission should lay down no definite and compulsory rule on the matter; and he further categorically opposed any provision stating in absolute terms that decisions should be reached by a simple majority, since that was not an existing rule of international law. The whole question lay outside the scope of technical experts and jurists and was still subject to considerations of political balance. Accordingly, such an absolute rule might deter some States from participating in conferences, since they might hesitate to place themselves in a position in which they would have to bow to the majority rule.

The meeting rose at 6 p.m.

485th MEETING

Tuesday, 28 April 1959, at 10 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLES 1 AND 2* (*continued*)

1. The CHAIRMAN, speaking as Special Rapporteur, introduced his redraft of articles 1 and 2 which read as follows:

"*Article 1. Scope of the present Code*

"1. The present Code applies to all international agreements comprised by the definition given in article 2, irrespective of their particular form or designation or of whether they are expressed in a single instrument or in two or more related instruments.

"2. Although normally denoting an international agreement embodied in a single formal instrument, the term "treaty" is deemed for the purposes of the present Code to include any type of international agreement to which the Code applies, without prejudice however to the status or character of any particular international agreement, as being or not being a treaty for the purposes of the domestic constitutional processes of any of the Parties.

"3. By reason of the provisions of article 2, the present Code does not, as such, apply to international agreements not in written form; nor does it apply to unilateral declarations or other statements or instruments of a unilateral character, except where these form an integral part of a group of instruments which, considered as a whole, constitute an international agreement, or have otherwise been expressed or accepted in such a way as to amount to or form part of such an agreement.

"4. The mere fact that, by reason of the provisions of the preceding paragraph, the present Code does not apply to agreements not in written form, or to certain kinds of unilateral instruments, does not in any way prejudice such obligatory force as any agreement or instrument of this kind may possess according to general principles of international law.

"*Article 2. Definition of an international agreement*

"For the purposes of the present Code, an international agreement (irrespective of its name, style, or designation) means an agreement embodied either

(*a*) in a single formal instrument (treaty, convention, protocol etc.), or

(*b*) in two or more related instruments constituting an integral whole (exchange of notes, letters, memoranda, mutual declarations, etc.);

provided that the agreement is between two or more States, or other entities, subjects of international law and possessed of international personality and treaty-making capacity, and that the agreement is intended to create rights and obligations, or to establish relationships, governed by international law."

2. It had been suggested that articles 1 and 2 should be combined, but he had found it more convenient merely to transpose certain clauses from article 2 to article 1 and to change the title of article 2 to "Definition of an international agreement". The original method —that of defining the word "treaty" and then explaining that a treaty, for the purposes of the code, meant any international agreement in written form—had led to confusion and he hoped that the Commission would consider the redraft more logical.

3. The new article 1, paragraph 1, reproduced most of the first sentence of the former paragraph 1 and most of the former paragraph 2. The second sentence of the former article 1, paragraph 1, combined with the former article 2, paragraph 3, now constituted article 1, paragraph 3. The new article 1, paragraph 2, embodied the contents of the former article 2, paragraph 4. Article 2 was now substantially confined to the contents of the former article 2, paragraphs 1 and 2.

4. In article 1, paragraph 3, he had tried to take into account the argument that certain unilateral declarations might constitute part of an international agreement, either because they were related to other unilateral instruments forming part of such an agreement or through acceptance. Paragraph 4 qualified paragraph 3

* Resumed from the 480th and 481st meetings.