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Summary record of the 486th meeting

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its international status. Both views were undoubtedly justified, but no suggestion had been made that the position under constitutional law could affect the international status of an agreement. The danger lay rather in the other direction. The article had been framed in those particular terms in order to preserve the constitutional position, which was what was really necessary. If a treaty was defined as something that might be understood as including other forms of international agreement, it would have to be made quite clear that that did not prejudice the right of any of the Parties, for its own constitutional purposes, to regard that agreement as being a treaty or not being a treaty. That had certainly been clear in the original draft and was no less clear in Mr. Ago's amendment, which the Special Rapporteur was prepared to accept.

49. Mr. AMADO said that Mr. Ago's amendment was precisely what he himself would have suggested, and fully met the points raised by Mr. Edmonds and Mr. Alfaro.

50. Mr. YOKOTA thought that the words proposed by Mr. Ago, "whenever the term 'treaty' was employed in the code", went too far, since the term was sometimes used in the narrow sense as, for example, in article 2. That objection might be removed easily enough by inserting some such proviso as "unless the text otherwise requires".

Subject to drafting changes, Mr. Yokota's amendment was accepted.

51. The CHAIRMAN, reverting to the question of the title of the code, said that the phrase "law of treaties and other international agreements" had been proposed, but Mr. Ago had given cogent reasons for using the term "treaty" above in the text. Although the full phrase would be too cumbersome to use throughout the text, it might well be set out in the title. However, the law of treaties had become generally accepted, at any rate by international lawyers, as a term of art and would be construed as covering not only treaties, but also other international agreements.

52. Mr. MATINE-DAFTARY pointed out that, if Mr. Ago's amendment was adopted, the title might perfectly well remain "Law of Treaties", without any addition.

53. The CHAIRMAN observed that the sense of the meeting seemed to be that the title should remain unchanged, that the word "relates" should be substituted for the word "applies" in article 1, paragraph 1, of the redraft and that the word "two" should be substituted for "one" in the same paragraph; and that Mr. Ago's amendment to article 1, paragraph 2 be adopted, with Mr. Yokota's sub-amendment, subject to drafting changes. A redraft of article 1, paragraph 2, would be submitted to the Commission at a subsequent meeting.

It was so agreed.

The meeting rose at 1 p.m.

486th MEETING

Friday, 1 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 1 (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the redraft of article 1 as submitted at the previous meeting and of Mr. Ago's amendment to paragraph 2 (485th meeting, para. 45) in the following terms:

> "Unless the context otherwise requires, the term 'treaty' shall, wherever it occurs in this code, be construed to mean not only treaties proper but also any other form of international agreement to which the code relates. The foregoing provision shall be without prejudice to the definition of an international agreement for the purposes of the constitutional processes of any of the parties."

2. Speaking as Special Rapporteur, he said the first sentence of the amendment was acceptable, but doubted whether the second sentence of the amendment was as clear as the second part of paragraph 2 in the original text.

3. Mr. ALFARO said he did not regard Mr. Ago's text as an improvement and was opposed to the reference to "treaties proper", since the object of the provision was to establish the strict meaning of the term "treaty" as had been done by the Special Rapporteur in his redraft of article 2.

4. The CHAIRMAN pointed out that Mr. Ago's amendment referred solely to article 1, paragraph 2.

5. Mr. ALFARO, maintaining his objection to the amendment, said that the expression "single formal instrument" was clearer than the expression "treaties proper" and would be consistent with article 2.

6. Furthermore, he did not think that the "without prejudice" clause in Mr. Ago's amendment accurately reflected the intention of the corresponding provision in the Special Rapporteur's own redraft.

7. Mr. PAL said that as the Special Rapporteur's definition in article 1, paragraph 2, was intended to be an inclusive one, Mr. Ago's amendment might have been shortened and improved by the substitution of the words "include any type" for the words "be construed to mean . . . any other form" in the first sentence.

8. The second sentence of the amendment should refer to a treaty as well as any other international agreement because the term "treaty" was also used in national constitutions and in a different sense. The word "definition" should be avoided as the constitutions might not contain definitions of those terms.

9. Mr. MATINE-DAFTARY asked what was the reason for the addition of the somewhat confusing opening clause "Unless the context otherwise requires" in Mr. Ago's amendment.

10. The CHAIRMAN, speaking as Special Rapporteur, observed that the clause had been inserted at Mr. Yokota's suggestion (485th meting, para. 50), on the grounds that some articles in the code, as for example those concerning ratification, applied only to treaties in the strict sense.

11. Mr. TUNKIN said that the difficulties raised by the two texts were somewhat intricate and would perhaps require more time to elucidate than could be devoted to the subject.

12. He favoured Mr. Pal's suggestion concerning the first sentence in the amendment.

13. However, he preferred the Special Rapporteur's version for the second part of paragraph 2 which, in his view, was concerned not with the definition of a treaty but with the status of certain international agreements in municipal law.

14. Mr. PAL said, in reply to Mr. Matine-Daftary, that the opening proviso in Mr. Ago's amendment was perfectly appropriate and would in any case be assumed even if omitted.

15. Mr. YOKOTA said the phrase "treaties proper", which might lead to misunderstanding, should be replaced either by "single instruments" or by "instruments entitled treaty".

16. He endorsed Mr. Pal's views concerning the second sentence of Mr. Ago's amendment.

17. Mr. LIANG, Secretary to the Commission, referring to the second sentence of the amendment, agreed with Mr. Tunkin that it should be concerned with the status or character, not with the definition, of the international agreement: he therefore found the Special Rapporteur's text preferable.

18. Mr. EDMONDS pointed out that some authorities were of the opinion that there were no parties to an agreement until it had been accepted or signed. For that reason, he was not in favour of the reference to "the constitutional processes of any of the parties" and thought the second part of the Special Rapporteur's text should read: "but that title shall not fix the status or character of any particular international agreement".

19. Mr. EL-KHOURI was opposed to the expression "treaties proper", which might suggest that they were in a different category to international agreements. It should be plainly stated that paragraph 2 referred to any form of international agreement to which the code related.

20. Mr. PADILLA NERVO agreed with the previous speaker and suggested that the second sentence of the amendment should be redrafted on the lines of article 2, paragraph 4, of the Special Rapporteur's text both for greater clarity and so as to meet Mr. Edmonds' point.

21. Mr. AGO, saying that he would not attempt to reply to all the comments, some of which were contradictory, explained to Mr. Matine-Daftary that he had accepted the insertion of the opening "unless" clause in deference to the view of Mr. Bartoš and Mr. Yokota that in some cases the code would refer to treaties proper.

22. He considered Mr. El-Khouri's suggestion unacceptable, for without a reference to the proper meaning of the word "treaties" the provision might lead to confusion. Article 2, after all, specified that an international agreement could be a single instrument and mentioned treaties as one of the examples. He was unable to understand the objections to a term which had a perfectly precise meaning both in international and constitutional law.

23. He disagreed with those who held that the second sentence of the amendment dealt with the "status" of an agreement, but he would be prepared to redraft the sentence on the following lines: "This does not in any way imply that an international agreement must be characterized as a treaty for the purposes of the constitutional processes of one of the parties".

24. Mr. BARTOŠ said there was no real divergence of view on the substance of article 1, paragraph 2. He had not proposed the inclusion of the opening "unless" clause in the amendment but had simply supported Mr. Yokota's view that different situations should be taken into account. The inherent similarity of all international agreements could be reflected in the text. He agreed with Mr. Ago that the second sentence in the amendment did not refer to the status of international agreements.

25. Mr. PADILLA NERVO considered the reference to "treaties proper" unnecessary in paragraph 2. The meaning of the term "treaties" in the strict sense was defined in the broader definition in article 2, sub-paragraph (*a*), as redrafted by the Special Rapporteur.

26. With regard to the second sentence, he considered that Mr. Ago's wording reflected the real purpose of the provision, which was most clearly stated in article 2, paragraph 4, of the original text (A/CN.4/101). The question was how to express that purpose in more precise wording.

27. Mr. ALFARO considered that, in order to make a legal text as precise as it should be, it was essential that the connexion of an article with the preceding and following articles should be express, and not implicit. His objection to Mr. Ago's amendment was that it referred to "treaties proper", instead of stating clearly that the treaties contained "in a single formal instrument" mentioned in article 2, sub-paragraph (*a*), were meant. It was the vagueness of the words "treaties proper" which had provoked the discussion.

28. With regard to the second sentence of Mr. Ago's draft, he maintained his original objection, namely, that the real purpose of the sentence should be to make it absolutely clear that the provision of the first sentence should be without prejudice to the status or character of the international agreement concerned.

29. The CHAIRMAN, speaking as Special Rapporteur, summed up the debate on article 1, paragraph 2.

30. He agreed with Mr. Bartoš that there was little disagreement on the substance of the paragraph and that most of the points raised had related to style and drafting. The paragraph could be referred to the drafting committee when it was set up; alternatively, the Commission might agree on some of the points, which he would incorporate in a new redraft.

31. The main difficulty with regard to the first sentence was whether to retain Mr. Ago's reference to "treaties proper" or whether to say that the term "treaty" should be construed to mean all forms of international agreement to which the code related. A third possibility, which he gathered Mr. Alfaro preferred, was that the sentence should read: ". . . not only treaties contained in a single formal instrument but also any other form of international agreement . . .".

32. Mr. AGO agreed that the Commission was concerned with drafting details, which should be referred to the drafting committee. The main stumbling block seemed to be the word "proper"; it might be possible to say "not only treaties but also all other forms of international agreement . . .".

33. Mr. SCELLE agreed that the main difficulty related to the word "proper". It might be better to refer to "treaties *stricto sensu*", in order to indicate that the term could also be used in a wider sense as including all forms of international agreement. Mr. Alfaro's point could be met by including the words "see article 2" in parentheses after the words *"stricto sensu"*.

34. Mr. EL-KHOURI thought the best formulation would be ". . . the term 'treaty' means all forms of international agreement. . .".

35. Mr. PAL hoped that the whole question would be referred to the drafting committee. He would not object to the term "treaties *stricto sensu*", but pointed

out that article 1, paragraph 1, referred to "all international agreements", without mentioning "treaties"; it would be more logical, therefore, to keep paragraph 2 in the shortened form as already suggested and making it clear that the term "treaty" was being used to cover all types of international agreements as already defined.

36. The CHAIRMAN suggested that article 1, paragraph 2, should be referred to the drafting committee.

It was so agreed.

37. The CHAIRMAN invited the Commission to consider article 1, paragraph 3, as redrafted.

38. Mr. TUNKIN suggested that the second clause of the paragraph should be transferred to the commentary.

39. Mr. EDMONDS suggested the omission of the introductory phrase, "by reason of the provisions of article 2", which was neither strictly accurate nor necessary.

40. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Edmonds's suggestion.

41. With regard to Mr. Tunkin's suggestion, he said that the second clause could hardly be relegated to the commentary, since it referred to two types of instrument which were not covered by the code. Mr. Bartoš and Mr. Alfaro had attached importance to those substantive provisions and the clause had been inserted with a view to taking their arguments into account.

42. Mr. YOKOTA was in favour of retaining the clause, which accurately reflected the views of the majority of the Commission.

43. Mr. TUNKIN said he would not press his suggestion.

44. The CHAIRMAN suggested that paragraph 3 should be approved, subject to drafting changes.

It was so agreed.

45. The CHAIRMAN invited the Commission to consider article 1, paragraph 4.

46. Mr. PAL suggested that the drafting committee might consider inserting the word "otherwise" after the word "may" in the last line.

47. The CHAIRMAN suggested that paragraph 4 should be referred to the drafting committee, and that the Commission might adopt the article when the drafting committee submitted its revised version.

It was so agreed.

ARTICLE 2 (*continued*)

48. The CHAIRMAN, speaking as Special Rapporteur, referred to his redraft of article 2. He recalled Mr. Yokota's suggestion that the word "agreement" should be inserted before the word "protocol" in sub-paragraph (*a*) (485th meeting, para. 15), and Mr. Amado's criticism of that suggestion (485th meeting, para. 29).

49. Mr. YOKOTA said that he had two reasons for making the suggestion. In the first place, many international instruments entitled "agreement" were much more important than protocols. For example, the Anglo-Japanese Agreement of Alliance, 1905, had constituted the basis of Japanese foreign policy for over twenty years. Secondly, it should be clearly stated that the term "agreement" was used in a double sense in the code, as was the term "treaty". He had been in favour of retaining a reference to "treaties *stricto sensu*" in article 1, paragraph 2, and thought it would be logical to apply the same treatment to the term "agreement".

50. Mr. ALFARO agreed in substance with Mr. Yokota. In Spanish, the word *"convenio"* indicated an international agreement which was not quite as formal as a treaty and which corresponded roughly to the English word "agreement". It would be inconvenient, however, to repeat the word "agreement" in article 2; moreover, the enumeration in parentheses in sub-paragraph (*a*) was not exhaustive, as was shown by the use of "etc.". It might therefore be wiser to indicate in the commentary that agreements proper were included in the definition.

51. Mr. HSU thought that Mr. Yokota's suggestion raised a formal difficulty. If the word "agreement" were included in sub-paragraph (*a*), it should also be inserted in sub-paragraph (*b*), since some exchanges of notes were entitled "agreement". In any case, it seemed unnecessary to add to the enumerations.

52. Mr. SCELLE agreed that there was no reason to add to the words in parentheses. Furthermore, no reference was made to covenants or charters, whereas the Covenant of the League of Nations and the Charter of the United Nations were among the most important international instruments in existence.

53. Mr. AMADO said the term "agreement" should not be included in the enumeration of types of instruments presented in the draft.

54. Mr. YOKOTA said he would not press his suggestion, but would be satisfied if a reference to it were made in the commentary.

55. The CHAIRMAN, speaking as Special Rapporteur, observed that one solution would be to delete all the words in parentheses and to refer to them in the commentary. Personally, he would prefer to retain the words and to follow Mr. Alfaro's suggestion; other examples of instruments might also be mentioned in the commentary. The whole question should, he thought, be referred to the drafting committee.

56. No objection had been raised to the wording of sub-paragraph (*b*) but there had been contradictory suggestions concerning the concluding part of article 2, beginning with the words "provided that". However, there had been general agreement that it was essential to retain the words "possessed of treaty-making capacity". In the end, Mr. Liang had suggested the formula "provided that the agreement is between two or more States or international entities possessed of treaty-making capacity" (485th meeting, para. 40). That seemed to be the best formula since it omitted the references both to "subjects of international law" and "international personality", which themselves were difficult to define. At the same time, it excluded individuals or private corporations, even if they were international entities, by requiring the international entities to be possessed of treaty-making capacity.

57. However, a really complete definition would require the definition of the term "treaty-making capacity". As it stood, the formula was more in the nature of a description using terms whose meaning was well understood.

58. Mr. LIANG, Secretary to the Commission, said that since the previous meeting he had had an opportunity to consult the records of the San Francisco Conference. His opinion concerning the non-acceptance

of the proposal to include a reference to the international personality of the United Nations was borne out by the report of Sub-Committee A of Commission IV of Committee 2, which stated *inter alia*:

> "As regards the question of international juridical personality, the Sub-Committee has considered it superfluous to make this the subject of a text. In effect, it will be determined implicitly from the provisions of the Charter taken as a whole."[1]

59. The same technique, with respect to the international personality of the United Nations, had been used by the International Court of Justice in its Advisory Opinion of 11 April 1949 concerning Reparation for Injuries Suffered in the Service of the United Nations. The Court had enumerated the Charter provisions concerning the capacity, functions and powers of the United Nations, including its treaty-making capacity, and had then concluded from all those provisions and from the fact of the existence of the Convention on the Privileges and Immunities of the United Nations of 1946 that:

> "It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality."[2]

60. Thus, the international personality of the United Nations had been taken for granted by the process of inductive reasoning and it seemed to him that the same type of reasoning would apply in the present case, that if an entity had treaty-making power it had international personality, and it would be idle in the present context to attempt to make a distinction between the two concepts.

61. As to the Special Rapporteur's concern regarding the definition of "treaty-making capacity", he observed that in order to determine the treaty-making capacity of an international entity, it would be essential to examine the constitutional provisions of the entity concerned.

62. Mr. PAL said that after listening to the Secretary's remarks, he agreed that an international entity would necessarily have international personality but might not have treaty-making capacity. It would therefore suffice to say "international entity with treaty-making capacity".

63. The CHAIRMAN, speaking as Special Rapporteur, said that that was also his view and it had been strengthened by Mr. Liang's statement. He suggested that the word "other" should be retained in the passage under discussion, and that it should read "two or more States, or other international entities, possessed of treaty-making capacity", in order to make it clear that States too must be possessed of treaty-making capacity, for there were States which did not have that power.

64. Mr. AGO agreed with the Chairman that the word "other" was essential for the reason he had stated. However, if the words "international entities" were used, the word "other" would have the effect of describing States as international entities. Although a State was an entity in international law, he did not think that it could be termed an inter-national or inter-State entity.

65. Mr. LIANG, Secretary to the Commission, said that in a private discussion with Mr. Scelle, he had agreed that it would be better to say "international organizations" instead of "international entities", because he did not think that any international entity other than an international organization had treaty-making capacity.

66. Mr. VERDROSS pointed out that the Holy See had treaty-making capacity but was neither a State nor an international organization. He felt that the clearest and simplest solution would be his own formula as amended by Mr. Ago, namely: "provided that the agreement is between two or more States or other subjects of international law possessed of treaty-making capacity . . ." (485th meeting, para. 27.)

67. Mr. TUNKIN supported that formula.

68. Mr. SCELLE said that he had no doubt that the "other international entities" or "other subjects of international law" were essentially international organizations and it would be better to say so plainly. However, since individuals would be excluded by the reference to treaty-making capacity in the formula read out by Mr. Verdross, he was prepared to accept it.

69. Mr. PAL also supported the wording read out by Mr. Verdross. The word "other" before "international entities" would be misplaced as States, though always entities, were not international entities.

70. Mr. AMADO said he could not recall ever having encountered the word "entities" in international law literature. It had metaphysical overtones and he felt that it should be avoided.

71. Mr. AGO pointed out that the expression "States and other subjects of international law possessed of treaty-making capacity" made it clear that States too had to have treaty-making capacity in order to conclude agreements covered by the code.

72. Mr. TUNKIN recalled that the Commission had decided to limit the code for the time being to States. The present drafting problem might be avoided by omitting the whole clause beginning with the words "provided that" and amending the beginning of the article to read:

> "For the purposes of the present Code, an international agreement (irrespective of its name, style or designation) means an agreement between two or more States embodied either (*a*) . . ."

73. The CHAIRMAN, speaking as Special Rapporteur, said that he was prepared to accept the formula read out by Mr. Verdross.

74. Referring to Mr. Tunkin's formula, he pointed out that it would still be necessary to retain the clause "provided that the agreement is intended to create rights and obligations, or to establish relationships, governed by international law", for there might be agreements between States concerning commercial matters which did not create rights and obligations or establish relationships governed by international law. For example, an agreement for the purchase by one State of property in another State would probably be governed by the domestic law of the site of the property. He also recalled that what the Commission had decided was not to include international organizations for the time being. However, there were entities, such as the Holy See, which were neither States nor international organizations and which should be covered by the definitions because they had treaty-making capacity.

75. Mr. PADILLA NERVO also supported the formula read out by Mr. Verdross. He pointed out, however, that the clause beginning with the words "provided that" was the essential part of the definition and it was illogical

[1] United Nations Conference on International Organization, IV/2/A/7, vol. 13, p. 819.

[2] *I.C.J. Reports 1949*, p. 179.

to place it at the end of the definition in a qualifying clause. He would therefore ask that, when the final draft was prepared, the material passage to which he had referred should be placed in the principle clause at the beginning of the definition, which would then read: "For the purposes of the present Code, an international agreement . . . means an agreement between two or more States or other subjects. . .".

76. The CHAIRMAN said that that was a very interesting suggestion and that discussion on article 2 would continue at the next meeting.

Filling of casual vacancy in the Commission

(*article 11 of the Statute*)

[Agenda item 1]

77. The CHAIRMAN announced that, at a private meeting, the Commission had elected Mr. Nihat Erim of Turkey, by a majority of votes, to fill the casual vacancy caused by the resignation of Mr. Abdullah El-Erian.

The meeting rose at 12.55 p.m.

487th MEETING

Monday, 4 May 1959, at 3 p.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 2 (*continued*)

1. The CHAIRMAN recalled that at the previous meeting (486th meeting, para. 75) Mr. Padilla Nervo had suggested that the order of the clauses of the redraft of article 2 (485th meeting, para. 1) should be inverted, so that the passage now in the proviso at the end of the draft article would appear as an independent sentence at the beginning, and the references to the form of agreements in sub-paragraphs (*a*) and (*b*) would be recast into a second sentence.

2. Speaking as Special Rapporteur, he said that he found the recommendation attractive, since it might be more logical in an article containing a definition to place the emphasis on the substance of the definition, and then deal in a second sentence with the form which an international agreement might take. He suggested that the drafting committee should be asked to follow Mr. Padilla Nervo's recommendation.

It was so agreed.

3. The CHAIRMAN invited discussion of the passage "intended to create rights and obligations, or to establish relationships, governed by international law".

4. Mr. AGO had two observations to make. First, there was a danger of some tautology because the assumption of rights and obligations by parties meant the establishment of relationship between them. Secondly, the words "intended to create rights and obligations" might not cover all agreements. There were agreements between States which were intended to establish rules more than to create directly rights and obligations, and there were agreements which dealt with the settlement of a particular dispute, or simply with the interpretation of a previous treaty. The specification of one class of agreement might be interpreted as excluding others. It would be better to find a concise but more general formula or, if necessary, to omit the passage altogether.

5. Mr. FRANÇOIS did not consider it advisable to omit the passage, for without it the definition would be applicable to some agreements between States which were not governed by international law and which should not be covered by the code. It would be necessary to find a suitable formula.

6. Mr. ALFARO pointed out that there were agreements which amended, regulated or terminated rights and obligations created by previous agreements. It might be better to be more specific and say "intended to create, modify, regulate or terminate rights and obligations".

7. The CHAIRMAN, speaking as Special Rapporteur, agreed with the points made by the previous speakers. In preparing the draft his main idea had been to limit the definition to agreements governed by international law, and to exclude agreements between States which were governed by municipal law, such as agreements dealing with certain commercial matters, certain purchase of property, or certain matters in the sphere of private international law.

8. He had been quite aware that the words "intended to create rights and obligations" were not sufficient and he had therefore added the words "or to establish relationships" with a view to covering the other possibilities mentioned. That explained the apparent tautology.

9. He agreed that the text should be modified in order to avoid misunderstanding, either by making it more general, as suggested by Mr. Ago, or by making it more specific, as suggested by Mr. Alfaro. Perhaps the problem might be solved by the following wording: "the provisions of which are intended to be governed by international law".

10. Mr. TUNKIN said that unless a better formula could be found, he would favour Mr. Ago's suggestion that the passage should be omitted.

11. The CHAIRMAN, speaking as Special Rapporteur, suggested as an alternative the insertion of the words "or to produce effects" after the word "relationships".

12. Mr. AGO felt that it might be sufficient to replace the whole of the passage under discussion by the words "intended to produce effects governed by international law".

13. He did not think that the definition should exclude all agreements relating to matters in the sphere of private international law. An agreement between two States to regulate their private international law still created for the States the obligation to enact laws in that field, and such obligation was international and governed by international law.

14. Mr. ALFARO agreed with Mr. Ago's last observation.

15. The CHAIRMAN, speaking as Special Rapporteur, also agreed. His references to matters in the sphere of private international law applied to agreements whose interpretation and application would be wholly regulated by private international law. It was a nice point and one that the drafting committee might be asked to take into account.