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Summary record of the 487th meeting

Topic:
Law of Treaties

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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.

16. Mr. PADILLA NERVO said that what characterized all international agreements was that they were intended to regulate the conduct of the parties in respect of the subject-matter of the agreement. A formula along those lines might solve the difficulty.

17. The CHAIRMAN suggested that article 2 should be referred to the drafting committee for redrafting in the light of the comments and suggestions that had been made.

It was so agreed.

ARTICLES 10 TO 12*

18. The CHAIRMAN, speaking as Special Rapporteur, recalled that the Commission had decided, at its 482nd meeting, to defer articles 3 to 9 for the time being. He had redrafted articles 10 to 12 in the light of the discussion at that meeting. Article 10 would now appear as the new article 3. The alterations in paragraphs 1 and 2 of the article affected only the English text. The words "operative force" were replaced by the words "obligatory force", and in the English text of paragraph 2 the word "being" was inserted before the words "in itself valid". Paragraph 3 remained unchanged.

19. There had been objection to the word "jurisprudence" in paragraph 4 and Mr. Pal had suggested that reference should be made where appropriate to later articles of the code. He had complied with that suggestion but at the same time had felt that it would be useful to give some indication of the meaning of the terms used. He read out the following redraft of paragraph 4:

"4. The terms mentioned in the preceding paragraph are to be understood as follows:

"(*a*) A treaty is said to possess 'formal validity' if it fulfils the conditions regarding negotiation, conclusion and entry into force, set out in part I of the present chapter (articles . . . of the Code).

"(*b*) 'Essential validity' is a term used to describe those intrinsic qualities relating to the treaty-making capacity of the parties, to the reality of the consent given by them, and to the nature of the object of the treaty, which are set out in part II of the present chapter (articles . . . of the Code), and which a treaty must possess (in addition to its formal regularity) in order to have obligatory force.

"(*c*) 'Temporal validity' denotes the requirement that the treaty, having duly entered into force, should still be in force, and should not have been lawfully terminated in one of the ways set out in part III of the present chapter (articles . . . of the Code)."

20. He then read out the following redraft of articles 11 and 12, which were combined into a single article, the new article 4:

"Article 4. General conditions of obligatory force

"1. A treaty has obligatory force only if, at the material time, it combines all the conditions of validity described in the preceding article.

"2. In the case of multilateral treaties, obligatory force for any particular State exists only if the treaty, in addition to being valid in itself, in accordance with the provisions of the preceding paragraph, has been regularly accepted by the State concerned, and if the acceptance of that State is still in force."

21. Mr. AGO pointed out that the meaning of the first two paragraphs of article 10 was obscured by the use of the word *"formalités"* in the French text for the English word "requirements" in paragraph 1, and of the word *"inversement"* for the English word "correspondingly" at the beginning of paragraph 2.

22. The CHAIRMAN, speaking as Special Rapporteur, agreed that the French text would have to be revised.

23. Mr. VERDROSS suggested that the word *"conditions"*, which appeared in paragraph 2, might be substituted for the word *"formalités"* in paragraph 1.

24. Mr. AGO, referring to the new article 3, paragraph 4 (*c*), called attention to the fact that a treaty subject to a suspensive condition was nonetheless valid.

25. Mr. SCELLE said there was no need to state that the validity of a treaty was not affected by suspension since that was self-evident.

26. The CHAIRMAN, speaking as Special Rapporteur, observed that if the text were open to the contrary interpretation it should be revised.

27. Mr. SCELLE said that the text of the original article 11, paragraph 3, was preferable since it was quite unambiguous.

28. Mr. AMADO agreed with Mr. Scelle.

29. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the new article 3 sought to define the meaning of certain terms to be used in the rest of the code.

30. He had drafted the new article 4 in response to those members who, during previous discussions, had expressed the view that articles 11 and 12 should be simplified. Personally, he would not have been averse to retaining at least certain elements from the former texts.

31. Mr. TUNKIN, pointing out that article 36 dealt with "Acceptance" and articles 34 and 35 with "Accession", presumed that the word "accepted" in the new article 4, paragraph 2, was being used in a different sense and was intended to cover all cases of a State becoming party to a treaty, by whatever process. If he were correct, there was surely some terminological inconsistency that would have to be removed.

32. The CHAIRMAN, speaking as Special Rapporteur, confirmed that he had used the word "accepted" in the new article 4 to cover the different ways in which States could become party to a treaty and agreed that there might be some inconsistency with the language of article 36. It was purely a drafting matter which could be referred to the drafting committee.

33. Mr. EDMONDS considered that a treaty was either valid or not valid and that it was only necessary to enumerate the conditions which had to be fulfilled to make it valid. The present text appeared to suggest, incorrectly in his opinion, that for certain purposes a treaty lacking some essential qualifications could be partially valid.

34. The CHAIRMAN, speaking as Special Rapporteur, said that the distinctions he had sought to bring out in the new article 3 were well known in international law and in most systems of contract law. While he agreed that all the elements enumerated were necessary for the validity of a treaty, they did fall into different categories. For instance, the test of formal validity was not the same as the test of the reality of consent.

* Resumed from the 482nd meeting.

Since the various elements had to be dealt with in different sections of the draft, he had thought it useful to describe each one of them. He thought that the new article 4 fully met Mr. Edmonds's point.

35. Mr. SCELLE asked whether the phrase "at the material time" in the new article 4, paragraph 1, was intended to refer to the moment when the validity of a treaty was questioned.

36. The CHAIRMAN, speaking as Special Rapporteur, explained that the phrase referred to the time during which the treaty had obligatory force. However, he would have no objection to deleting those words if they were likely to cause difficulty.

37. Mr. BARTOŠ, without insisting on the point being covered in the draft, said that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification. He wondered what the juridical status of such agreements would be if one of the parties failed to ratify.

38. The CHAIRMAN, speaking as Special Rapporteur, said that the point was covered in article 42, paragraph 1.

39. Mr. SCELLE considered that a treaty which had not been ratified could not be regarded as having been concluded or as having effect.

40. Mr. BARTOŠ observed that there were valid practical considerations for the inclusion of a clause concerning the provisional entry into force of treaties.

41. Mr. SCELLE said that, save in some very exceptional cases (e.g. customs agreements intended essentially for the immediate protection of a country's economy), the practice of providing for the provisional entry into force of a treaty was not advisable and was even at variance with correct international law procedure.

42. The CHAIRMAN, speaking as Special Rapporteur, observed that perhaps the new article 3 did not draw a clear enough distinction between validity and obligatory force. When the drafting committee revised the new articles 3 and 4 it should deal with validity in the former and with obligatory force in the latter.

43. Some members seemed to think that the words "at the material time" might be omitted. He thought it advisable to retain the phrase, since any dispute concerning the validity of a treaty must relate to its validity or obligatory force at a particular point in time.

44. Mr. PAL thought that the phrase might be unnecessary because the paragraph in which it occurred stipulated that "all the conditions of validity", including, consequently, the conditions of temporal validity, had to be fulfilled.

45. Mr. AGO was in favour of retaining the phrase, since it embodied an essential concept.

46. The CHAIRMAN suggested that the new articles 3 and 4 should be referred to the drafting committee.

It was so agreed.

NEW ARTICLE 5 (FORMERLY ARTICLE 14)*

47. The CHAIRMAN, speaking as Special Rapporteur, invited the Commission to consider his redraft of article 14 (see 483rd meeting, para. 26), which would become the new article 5, and read as follows:

"Article 5. The treaty considered as text and as a legal act

"1. Subject to the definitions contained in article 2 of the present Code, the term treaty may be used to denote both a legal act (an international agreement) and the instrument or instruments embodying that act.

"2. In order that the treaty may exist as an instrument, it is sufficient if its text has been duly drawn up, and established or authenticated, in the manner provided in section B below.

"3. In order to be or become a legal act (an international agreement), the text, so drawn up and established or authenticated, must be concluded as an agreed text, and must be subscribed to and enter into force, in the manner provided in section C below.

"4. The treaty-making process may consequently be envisaged as involving four stages (some of which may however, in certain cases, take place concurrently), namely (*a*) the establishment and authentication of the text, as a text; (*b*) provisional acceptance of the text as a potential basis of international agreement; (*c*) final acceptance of the text as constituting an international agreement; (*d*) entry into force of the treaty as such."

48. The term "legal transaction" in the original text (A/CN.4/101) had been criticized and he had therefore replaced it by "legal act". The differences between the new and the original version were mainly formal, rather than substantive. The Commission seemed to be agreed that the word "treaty" was used ambiguously to denote two different ideas, firstly, the abstract notion of international agreement and, secondly, the treaty considered purely as an instrument. The reason why he had included the article was that both meanings were valid. There was a time when a treaty existed only as a text, while it was not yet in force; but even at that time, its articles had some effect and the document had a significance and existence of its own. That was true, of course, of the provisions of the treaty which stated what steps were necessary to transform the text into a legal act.

49. In paragraph 1 of the new article 5, he had added a reference to article 2 because some members had thought that without such a reference confusion might arise between the description of a treaty in the article and the definition of an international agreement in article 2. In paragraph 2, he had left out the words "for evidential purposes" because some members had objected to the words "the treaty evidences but does not constitute the agreement" in the original paragraph 1. The amendments to paragraph 3 were purely stylistic. In paragraph 4 (*b*) of the former article 14, the reference to "conclusion—usually by signature" had been regarded as inaccurate by some members, as had the words "sometimes by signature, more usually by ratification or other means" in paragraph 4 (*c*). He had therefore omitted those references. He had also altered the beginning of the paragraph in order to stress that the four stages of treaty-making were sometimes telescoped; the third and fourth stages, in particular, were apt to be concurrent. On the other hand, entry into force might not take place until the requisite number of countries had deposited their instruments of ratification.

50. Mr. AGO said he had some doubt concerning the use of the word "instrument", which frequently denoted a treaty which had already been concluded and had entered into force. It might be better to use the

* Resumed from the 483rd meeting.

word "text" to denote the first stage of the treaty-making process.

51. Mr. SCELLE considered that the word "instrument" was perfectly suitable in the context, since it meant a physical document signifying a commitment.

52. Mr. TUNKIN said that he wished to raise the question of the philosophical background of the article. It seemed that the Special Rapporteur was trying to separate form from substance. In article 2 it was stated that a treaty was an agreement embodied in a written instrument. An instrument not embodying an agreement was not a treaty. In his opinion the definitions under discussion did not correspond to that basic definition of a "treaty". The Special Rapporteur had referred to the situation where a text was agreed upon, but not yet signed or ratified. Except at a final stage of the treaty-making process, it was impossible to state whether or not there existed a treaty. Since treaty-making was a process involving certain stages, it was completed only when all the requirements were fulfilled and when the treaty acquired validity. Accordingly, the fact that an agreement was embodied in the text was merely a step forward in the treaty-making process, which was, as yet, incomplete. He therefore suggested that the first three paragraphs should be omitted and that the article should be limited to a description of the stages of the treaty-making process.

53. The CHAIRMAN, speaking as Special Rapporteur, agreed that a treaty was not a legal act until it had entered into force. It was inaccurate, however, to say that the term could not be used until the whole process had been completed. For example, the conventions adopted by the United Nations Conference on the Law of the Sea, in 1958, were generally referred to as conventions and were regarded as having an existence, although they were not yet in force. Such situations could not be entirely ignored. Technically, such provisions as the clause specifying the number of ratifications required for an instrument to enter into force should be embodied in a separate protocol, which would enter into force immediately; but in practice that was seldom done and those technical provisions were usually embodied in the principal instrument. Accordingly, a certain inherent force must be ascribed to such instruments.

54. Mr. LIANG, Secretary to the Commission, referring to the statements by Mr. Ago and Mr. Scelle, thought that the word "instrument" was suitable in the context of the new article 5. The word "text" was a proper term as used in subsequent articles but it should be borne in mind that, for example, signatures did not form part of texts, but of instruments. One would speak of instruments of ratification but not of texts of ratification. A text was part of an instrument but not the instrument itself.

55. With regard to the second part of paragraph 1, he said it was not strictly accurate to refer to "the instrument or instruments embodying that act". "Embodying the agreement" would be a more acceptable phrase, since an instrument was evidence or the culmination of a legal act. Or it might be said that an instrument was part of the act itself.

The meeting rose at 6 p.m.

488th MEETING

Tuesday, 5 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

NEW ARTICLE 5 (FORMERLY ARTICLE 14) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 14, now redrafted as the new article 5 (see 487th meeting, para. 47).

2. Mr. SCELLE, referring to the division between the formal and the substantive aspects of a treaty, pointed out that, upon signature, a treaty acquired something more than a purely material existence, and became to a certain extent a legal act, at least provisionally. That was not true of "provisional" signature, for in that case the State could retract; but a *final* signature created an ultimate obligation. The days when States could disavow the signatures of their plenipotentiaries had passed; those plenipotentiaries were no longer mere authorized agents. They now had special powers which committed the State to some extent, and the authorities competent to ratify the instrument were no longer free to act arbitrarily. If, acting through simple caprice or with ill intent, they delayed entry into force, a certain State responsibility was entailed. That observation applied to some extent to the special case of treaties that entered into force provisionally, to which Mr. Bartoš had referred at the preceding meeting (487th meeting, para. 37). In any case, the question would be discussed again when the Commission studied entry into force in more detail.

3. The CHAIRMAN, speaking as Special Rapporteur, said that the point was dealt with in his draft article 30. Mr. Scelle's remarks made it obvious that some provision should be made to describe as a treaty an instrument which was not yet in force.

4. Mr. AGO agreed with Mr. Scelle on the importance of the act of signature and on the need to consider its effects in different cases.

5. In expressing a preference, at the previous meeting (487th meeting, para. 50), for the word "text" rather than "instrument" in paragraph 1, of the new article 5, he had misunderstood the object of paragraph 1 as compared with that of paragraph 3. He now understood, from the explanations given by the Special Rapporteur, that the purpose of paragraph 1 was not to distinguish between the different stages of the treaty-making process, but to distinguish between the non-material fact of agreement—namely, consensus—and the material act to which that agreement gave rise. That being so, the word "instrument" was perfectly suitable in paragraph 1. He still had some doubts, however, in connexion with paragraph 2, which gave the impression that an instrument was only a provisional text, a draft treaty, whereas an instrument properly so called existed only when there was a final text, subscribed to and in force.

6. Mr. PAL agreed with Mr. Ago that there seemed to be some contradiction between paragraphs 1 and 2. The phrase "instrument or instruments embodying that act" implied a completed act, or an international agreement as defined in article 2, so that an instrument em-