Document:-
**A/CN.4/SR.488**

# Summary record of the 488th meeting

Topic:
**Law of Treaties**

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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.

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## 488th MEETING

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

*Chairman*: Sir Gerald FITZMAURICE

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**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-

bodying a completed agreement must constitute part of the legal act. In paragraph 2, however, the instrument embodied an incomplete act; it should therefore be stated more clearly that paragraph 2 referred to an earlier stage in the treaty-making process.

7. The CHAIRMAN, speaking as Special Rapporteur, thought that the difficulty might be obviated by referring to an instrument or instruments embodying or intended to embody the legal act.

8. Mr. ALFARO said that the term "legal act" meant specifically certain acts in civil law, by nature different from contracts. In any case, it seemed unnecessary to use two different terms, "legal act" and "international agreement" if they had the same meaning. At the previous meeting the Secretary to the Commission had suggested (487th meeting, para. 55) that the word "agreement" should be used instead of "act" at the end of paragraph 1; he agreed that that would be the wiser course and suggested that the paragraph should be so amended.

9. The CHAIRMAN, speaking as Special Rapporteur, accepted Mr. Alfaro's suggestion.

10. Mr. VERDROSS thought that the article might relate to two hypothetical cases. In the first case, two States might reach a verbal agreement, which might be transformed into a treaty and embodied in a text. In the second case, if a treaty were signed, but not yet ratified, agreement would exist on the text, but not on entry into force, because that would be dependent on ratification, which might never take place. He agreed with Mr. Ago that those matters should be clarified in the article under consideration.

11. The CHAIRMAN, speaking as Special Rapporteur, did not think that anything in the article conflicted with Mr. Verdross's views. Moreover, he thought that three hypothetical cases might be envisaged. Firstly, the agreement might antedate the text; secondly, agreement might be reached concurrently with the establishment of the text; and thirdly, the text might be drawn up first and entry into force would follow.

12. Mr. HSU did not think that the discussion was strictly necessary unless the theories expressed by Mr. Tunkin at the preceding meeting (487th meeting, para. 52) were accepted. There seemed to be two sets of meanings for the word "treaty", the first drawing the distinction between the generic and the specific use of the word and the second the distinction between the technical and the popular meaning. The first set of meanings had been disposed of by stating that the use of the word in the broad sense did not prejudice its use in the narrow sense. With regard to the technical and popular uses of the word, however, he thought that the article should be revised and was inclined to agree with Mr. Tunkin that the essential provisions of the article were in paragraph 4. A phrase might be added to the effect that the popular use of the term "treaty" as a text before the conclusion of the treaty-making process was not prejudiced by the enumeration.

13. The CHAIRMAN, speaking as Special Rapporteur, thought it was an over-simplification to say that the distinction between the treaty considered as a text and as an international agreement was the difference between the technical and the popular use of the word. After all, a treaty had an existence and certain juridical effects before it came into force. He drew attention to the references in paragraphs 2 and 3 to sections B and C; the fact remained that all the remaining articles of the code were based on the distinction between the treaty as a text and the treaty as an international agreement. Unless that method were to be abandoned entirely, an introductory article establishing the distinction was essential.

14. Mr. HSU felt that the article in its present form was contradictory. Even if co-ordination with subsequent articles were required, it would be better to draw the necessary distinctions in the definition in the new article 4. In any case, the questions dealt with in paragraphs 1, 2 and 3 would arise in connexion with validity and were out of place in article 5.

15. Mr. BARTOŠ agreed with Mr. Scelle and Mr. Ago. Multilateral agreements usually contained provisions concerning entry into force, which were preliminary legal acts setting forth certain conditions. Bilateral agreements likewise were often accompanied by subsidiary agreements setting forth the conditions under which the main agreement would enter into force. For example, in 1947, an agreement had been drawn up between Yugoslavia and Bulgaria with a view to establishing a kind of confederation of the two countries. That agreement had never been ratified, but a series of arrangements had been concluded for the execution of the agreement, containing all the necessary formalities and stating the intentions of each party in the preamble to each arrangement. The establishment of such binding provisions could not be neglected altogether in the case of bilateral or collective agreements.

16. Mr. AMADO said he was aware that the article under discussion constituted an introduction to sections B and C. He would have preferred a simpler definition of a treaty in the two senses proposed, for example, a provision stating that a treaty was an international agreement embodied in an instrument or instruments, but he would not make a formal proposal to that effect. He was grateful to Mr. Alfaro for at least clarifying the text to the extent that the words "international agreement" would be used instead of the term "legal act".

17. Mr. EDMONDS observed that the majority of the Commission seemed to be in favour of using the term "treaty" to mean agreements which had not yet been signed or authenticated. In an attempt to clarify the distinction between the existence of a treaty as a legal document and its existence as an international agreement he proposed that paragraphs 1, 2 and 3 should be amended to read:

> "1. Subject to the definitions contained in article 2 of the present Code, the term treaty may be used to denote either a legal document stating the terms of an international agreement or that agreement as it has been executed and delivered by parties to it.
>
> "2. In order that the treaty may exist as a legal document, 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 an international agreement, the text, which has been drawn up in the form of a proposed agreement, must be subscribed to in the manner provided in section C below."

18. Mr. YOKOTA thought that the term "treaty" had three meanings, first, an international agreement, secondly, the instrument or instruments embodying that agreement, and, thirdly, an instrument or instruments embodying an uncompleted international agreement. Paragraph 2 seemed to denote a treaty in the third

sense, but the wording was confusing and had led to misunderstandings. He therefore suggested that the first part of paragraph 2 might be amended to read: "The term 'treaty' may also be used to denote an instrument or instruments intended to embody a future international agreement. In this sense, it is sufficient . . ." In that way the ambiguity of the first phrase would be avoided. The drafting committee might consider that suggestion together with Mr. Edmonds's amendment.

19. Mr. TUNKIN thought that the provisions of paragraphs 2 and 3 were purely theoretical. Mathematically speaking, according to the definition of article 2, a treaty was an agreement between States, plus an instrument. A treaty constituted the tangible manifestation (written form) of agreement. He agreed with Mr. Amado that that was the only correct definition of the word treaty, since, as he had pointed out before, substance and form could not be separated. Agreements might exist otherwise than in written form, but treaties could only exist in writing. Thus, if under article 2 a treaty was both an agreement and an instrument, it was incorrect to say in the new article 5, paragraph 2, that an instrument was a treaty and in paragraph 3 that an agreement was a treaty.

20. The CHAIRMAN, speaking as Special Rapporteur, could not agree that paragraphs 2 and 3 were entirely theoretical. They set forth a conceptual distinction, which had certain definite and practical results. Accordingly, it was essential to qualify the original definition.

21. Mr. PADILLA NERVO observed that since the code was to be limited to international agreements in written form a distinction had to be made between "treaty" in the sense of agreement and "treaty" in the sense of a document embodying agreement. In the latter sense "treaty" might refer to various stages in the process of reaching agreement. In that case it was intended for evidential purposes and if it was to serve those purposes it had to pass through a series of formalities described in section B.

22. In comparing the Special Rapporteur's original draft and redraft of the article, he found that certain concepts had been abandoned. While paragraph 1 of the new text was adequate, it seemed to him that paragraph 2 was less clear than its predecessor. He did not know why the reference to "evidential purposes" had disappeared, but in his view paragraphs 1 and 2 of the original draft would meet many of the objections raised and would be closer to the proposal of Mr. Edmonds.

23. Mr. LIANG, Secretary to the Commission, said that he was in general agreement with the Special Rapporteur's approach and that there was great utility in making a distinction between "treaty" as a legal transaction—and he saw no objection to the use of the term "legal transaction", which was well established in legal usage, in English at least—and "treaty" as an instrument embodying the transaction. To Mr. Alfaro's objection to the use of the term "legal act", he (Mr. Liang) would add that the term was correct when applied to an act of one party, for example one State's acceptance or denunciation of a treaty, but might be inadequate to denote the consensus or joint action of two or more States in the conclusion of a treaty.

24. He had greater misgivings over the wording of paragraph 2, which Mr. Ago had criticized. He thought the word "instrument" in the normal case indicated a treaty after it had entered into effect. For example in Article 36, paragraph 2 (*a*), of the Statute of the International Court of Justice, the words "the interpretation of a treaty" certainly meant interpretation of an instrument having acquired legal force and not interpretation of an inchoate treaty. Only in a small number of cases was the word treaty used in the sense of an inchoate treaty, in other words, a treaty on the way to acquiring legal force.

25. Therefore, while paragraph 2 was impeccable in a limited sense, the reference to sufficiency might tend to obscure the normal and very general use of the term "instrument" in the sense of an instrument already possessing legal force. That might be a matter of drafting but it was an important point that should be taken into account by the drafting committee.

26. Mr. EL-KHOURI said that the more he listened to the discussion, the more he was convinced that it was not necessary in the code to enter into elaborate definitions; to do so would only complicate matters. The term "treaty" had a counterpart in every language; it was used constantly and there was never any doubt about its meaning.

27. He added, incidentally, that the term "obligatory force", which was used in the Special Rapporteur's redraft of new articles 3 and 4, was open to the objection that the word "obligatory" implied the imposition of an obligation, whereas sovereign States accepted obligations voluntarily. It would be better to use the word "binding" or "operative".

28. Of the various versions of the article before the Commission, he preferred that proposed by Mr. Edmonds.

29. The CHAIRMAN, speaking as Special Rapporteur, thought that Mr. Ago's doubts concerning the use of the word "instrument" probably related to a drafting point that might be met by using Mr. Edmonds's draft or by replacing it with a word like "project".

30. With reference to Mr. Liang's statement, he said that a treaty which had come into force was incontestably an instrument, but he had felt that it was also appropriate to speak of a treaty as an instrument even at an earlier stage. However, he agreed that there might be a stage when a treaty was still only a project and when it might be inappropriate to call it an instrument. In any case, if the word "instrument" was replaced by "text" or "draft", it seemed to him that paragraph 2 of his redraft would be perfectly accurate.

31. Mr. SCELLE said that he had been struck by Mr. Padilla Nervo's remarks regarding the absence of any reference to "evidential purposes" in the redraft. That was regrettable since such a reference would serve to distinguish "treaty" in the sense of agreement from "treaty" in the sense of instrument, for the primary purpose of an instrument was to prove the existence of agreement. He took it that the distinction would have to be made when the code dealt with the interpretation of treaties, and he wished to know why it had disappeared from the article under consideration.

32. The CHAIRMAN, speaking as Special Rapporteur, said that he too preferred his original draft. The draft represented an attempt at simplification and an effort to meet the views that had been expressed by various members.

33. Mr. LIANG, Secretary to the Commission, said that he had not suggested in his previous statement

that the new draft of paragraph 2 was erroneous. In the 1920's, there had been a famous draft treaty of mutual assistance which had never gone into effect. It could probably be said, quite correctly, to have existed as an instrument even though it had never achieved the full status of a treaty.

34. Nevertheless, in his view the wording of paragraph 2 in the Special Rapporteur's redraft was too broad owing to the use of the word "instrument" in conjunction with the clause beginning with the words "it is sufficient". The original draft had used the word "text", not "instrument", and he had no quarrel with the old wording "for evidential purposes the text alone is sufficient . . .". In that connexion he pointed out that even in the few cases in which the word "instrument" could be applied to a treaty that had not acquired legal force, such as the draft treaty he had cited, the original formula would not be inappropriate since the draft treaty constituted evidence of some preliminary agreement having been reached. Therefore, he would suggest that the original wording "for evidential purposes" should be retained and that the word "instrument" should be replaced by the word "draft" as the Special Rapporteur had just suggested.

35. Mr. TUNKIN suggested that when the Drafting Committee considered the article, it should avoid taking any sides in the theoretical discussion as to whether an instrument was only evidence of an agreement or was the agreement itself. He did not think that it was necessary to resolve that controversy for the purposes of the code.

36. The CHAIRMAN said that Mr. Tunkin's recommendation would certainly go to the Drafting Committee.

37. Speaking as Special Rapporteur, he did not agree that there was a controversy. There were two aspects of the same thing and they produced practical effects.

38. Mr. TUNKIN said that no one would contest the proposition that an instrument might be used as evidence, but if that was the only role of an instrument, the problem was limited.

39. The CHAIRMAN, speaking as Special Rapporteur, said that that was not its only role and the problem was to elucidate the two different roles.

40. Mr. YOKOTA observed with reference to paragraph 4 of the Special Rapporteur's redraft that, after the establishment and authentication of the text, the next stage of the treaty-making process could be described as either the acceptance of the text as a potential basis of international agreement or the provisional acceptance of the text as constituting an international agreement. However, sub-paragraph (*b*), which spoke of the "provisional acceptance of the text as a potential basis of international agreement" was redundant and even misleading, for it implied that the final acceptance of the text as a potential basis of international agreement was reserved. That was not the case, and he suggested that the word "provisional" should be omitted.

41. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Yokota's observation and suggested that it should be taken into account by the drafting committee.

42. Mr. AGO pointed out that the wording of paragraph 4 (*c*), "final acceptance of the text as constituting an international agreement", was liable to misinterpretation owing to the different meanings of the word "agreement". In some cases it meant the fact of *consensus;* in others, it meant an aggregate of rules established by consent; and finally it was used elsewhere in the code as equivalent to "treaty" in its wider sense. It might therefore be advisable to omit the words "as constituting an international agreement".

43. The CHAIRMAN, speaking as Special Rapporteur, said that he did not think that readers of the code would be seriously misled. However, he saw Mr. Ago's point and asked whether it might not be met by replacing the words "an international agreement" by the words "a treaty".

44. Mr. PADILLA NERVO supported Mr. Ago's objection. He felt that the best solution would be to revert to the Special Rapporteur's original draft of sub-paragraphs (*b*) and (*c*). That would also meet the point made by Mr. Yokota.

45. The CHAIRMAN suggested that the best course would be to refer both the original draft and the redraft of article 14 to the Drafting Committee together with the various proposals that had been made. When the drafting committee submitted a new text, the Commission could decide whether or not to keep the article, or at any rate its first three paragraphs.

*It was so agreed.*

NEW ARTICLE 6 (FORMERLY ARTICLE 15)*

46. The CHAIRMAN, speaking as Special Rapporteur, read the new text of article 15, which would now appear as article 6:

"B. NEGOTIATION, DRAWING UP AND ESTABLISHMENT (AUTHENTICATION) OF THE TEXT

*"Article 6. Drawing up of the text*

"1. A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other convenient administrative channel, or at meetings of delegates or representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference convened by the organization, or in some organ of the organization itself.

"2. Delegates or representatives must, subject to the provisions of articles 12 to 14 [previously articles 21 to 23] below, be duly authorized to carry out the negotiation, and, except in the cases mentioned in paragraph 3 below, must furnish or exhibit credentials to that effect. They need not, however, for the purposes of negotiation, be in possession of full powers to sign the treaty.

"3. Heads of States and Foreign Ministers having inherent authority, arising from the nature of their functions, to negotiate on behalf of their States, need not produce any specific authority to that effect. The same applies to the head of a diplomatic mission for the purpose of negotiating a bilateral treaty between his State and the State to which he is accredited.

"4. The adoption of the text takes place as follows:

"(i) In the case of bilateral treaties or treaties negotiated between a restricted group of States, by unanimity,

* Resumed from the 484th meeting.

unless the negotiating States decide by common consent to proceed in some other way.

"(ii) In the case of multilateral treaties negotiated at an international conference, and subject to sub-paragraph (iii) below, by a simple majority vote unless the conference, equally by a simple majority, decides to adopt another voting rule.

"(iii) In the case of treaties drawn up in or under the auspices of an international organization, according to such voting rule, if any, as may be specifically provided for by the constitution of the organization for the framing of treaties so drawn up.

"In no case does the mere adoption of a text by a majority vote imply of itself for any State, whether voting affirmatively or not, consent to be bound by the text as a treaty."

47. He explained that the changes he had made were primarily designed to meet the objection that his original draft had not taken sufficiently into account the different circumstances in which a text could be drawn up. The first paragraph of the redraft corresponded broadly to the first sentence of paragraph 1 of his original draft, except that he had added the reference to international organizations. The new paragraph 2 reflected part of the second sentence of the original paragraph 1, while the remainder of that sentence was redrafted as the new paragraph 3.

48. The new paragraph 4 was a redraft of the original text of paragraph 2 and took into account the different situations in the case of bilateral treaties, general multilateral treaties, and multilateral treaties drawn up in, or under the auspices of, an international organization. Sub-paragraph (ii) of the new paragraph 4 gave effect to the view expressed in the discussion that the majority voting rule prevailed at international conferences called for the purpose of negotiating treaties.

49. He pointed out, with reference to sub-paragraph (iii), that a distinction must be made between a multilateral treaty drawn up in, or under the auspices of, an international organization whose constitution provided a voting rule to be followed in the framing of the treaty, and a multilateral treaty drawn up at a conference called by an international organization which did not lay down any voting rule. Such a conference should be treated as a case coming under sub-paragraph (ii). For example, the United Nations Conference on the Law of the Sea, of 1958, had been free to adopt its own voting rule, a two-thirds majority for questions of substance, since there was no provision in the Charter which laid down a voting rule for conferences held under the auspices of the United Nations. On the other hand, there were international organizations which did have constitutional provisions concerning voting at conferences held under their auspices.

50. Finally, he had added a sentence at the end of the article which would reassure the members of the Commission who felt that a majority voting rule at a conference had some kind of binding effect. That, of course, was not the case, even for the participants who had approved the text of the treaty.

51. Mr. AGO said that the new text was an excellent one and covered almost every point raised in the discussion. His observations would mainly relate to minor matters. First, he wondered whether the expression *"voie administrative"* was an appropriate one in the French text of paragraph 1.

52. He thought that in paragraph 4, sub-paragraph (i), the hypothetical case relating to bilateral treaties should be separated from that relating to other treaties. It was incorrect to speak of unanimity in connexion with bilateral treaties. On the other hand, unanimity should of course be an essential requirement in treaty negotiations among a small number of States.

53. Referring to paragraph 4, sub-paragraph (iii), he said that there was yet another possibility: the international organization convening a conference might lay down in advance the conference's essential rules of procedure, and particularly the rules concerning the adoption of the text of treaties.

54. He had some doubts about the form of the last sentence of the article, because it might imply that the mere adoption of a text by unanimity as distinct from a majority decision would give it binding effect, which was of course not the case.

55. The CHAIRMAN, speaking as Special Rapporteur, said it was doubtful whether, for example, the United Nations, in the absence of any express provision in the Charter, was competent to lay down in advance obligatory voting rules for a conference which it convened. On the other hand it could perhaps be held with equal force that the United Nations was not bound to convene any conference and that, if it did so, it could lay down certain conditions for the conduct of the proceedings.

56. Mr. BARTOS said the Special Rapporteur had succeeded in meeting the views of the majority; he endorsed the points made by Mr. Ago.

57. Without proposing any amendment, he wished to reaffirm his strong opposition to paragraph 4, sub-paragraph (ii), for the legal and political reasons he had stated earlier (see 483rd meeting, para. 59, and 484th meeting, paras. 10-13 and 45).

58. Mr. TUNKIN said that paragraph 4, sub-paragraph (ii), represented a radical departure from the original text of article 15. If, as he thought, there was as yet no rule of international law on the subject of majority decisions at conferences, it was inadvisable to introduce one in the draft. Surely it was not fortuitous that in the past each conference had established its own voting rules, since the decision must largely be determined by the nature of the agreement to be negotiated.

59. If, however, the Commission did decide to suggest a rule, it should bear in mind that recent practice appeared to incline towards the two-thirds majority rule, which was supported by important considerations not of a legal character. Obviously, when suggesting new rules intended to regulate relations between States, the Commission must take into account political realities, and give thought to the possible influence of the rule it chose, for that rule was bound to have some persuasive authority. He feared that the simple majority rule would tend to encourage States to disregard the importance of elaborating an acceptable text; hence, if a rule must be inserted —and he would not welcome that course—the two-thirds majority was preferable.

60. Mr. VERDROSS, referring to paragraph 3, doubted whether the head of a diplomatic mission was empowered to conclude an international treaty without special authorization. Formerly, diplomatic envoys could only represent their Governments in routine matters. However, if modern practice was different he would have no objection to such a provision.

61. He shared Mr. Tunkin's views about paragraph 4, and did not consider that there was any rule of international law governing the adoption of the rules of procedure of a conference. If any such rule was to be created, he favoured that prescribing the two-thirds majority.

62. Mr. LIANG, Secretary to the Commission, suggested that the title of the new article 6 should be amended so as to indicate that it dealt with the "adoption" as well as with the "drawing up" of the text.

63. Referring to Mr. Ago's first point, he observed that the word "administrative" had a narrower meaning in French than in English: in French, it denoted more or less routine matters. As the text might convey the impression that the diplomatic channel was part of an administrative channel, the words "convenient administrative" should perhaps be deleted from paragraph 1.

64. The phrase "or under the auspices of", which was vague, might with advantage be omitted from paragraph 4, sub-paragraph (iii), and replaced by a clear indication that the provision referred to treaties negotiated within an international organization or one of its organs, or drawn up by an international conference convened by an international organization.

65. The Charter of the United Nations did not contain provisions concerning the voting rules applicable in conferences, nor did the constitutions of all the specialized agencies; accordingly, it would be advisable to stipulate in paragraph 4, sub-paragraph (iii), that in the absence of such provisions the rule in sub-paragraph (ii) above would apply. In practice the United Nations had always refrained from making rules about voting procedure and it was interesting to note that even the Council of the League of Nations, which had usually asserted more authority over its subordinate organs, had not attempted to lay down rules of procedure for The Hague Conference for the Codification of International Law of 1930. Perhaps one of the reasons for not doing so on that occasion had been that the Conference had been attended by States not Members of the League. In the United Nations General Assembly, of course, it was always open to any delegation to propose the adoption of a voting rule requiring a two-thirds majority for the adoption of the text of a particular convention, and perhaps that possibility might be covered in paragraph 4, sub-paragraph (ii).

66. Though Mr. Ago's point concerning the last sentence of the new article 6 was valid, the sentence was perhaps superfluous since only someone wholly unversed in law could associate the adoption of a text with the process of becoming a party to the treaty.

67. Mr. YOKOTA found the new article generally acceptable but had some doubts about paragraph 4, sub-paragraph (ii). Though at recent conferences the majority rule might have been adopted, he doubted whether that had yet become established practice. Accordingly, he would prefer the words "equally by a simple majority" to be omitted and the question to be left open. However, if the Special Rapporteur's intention was to bring about a progressive development of international law and if that found favour with the majority, he would not press his view provided that it was clearly stated in the commentary that the rule in question did not reflect present practice.

68. Mr. SCELLE said that the objections to the use of the word *"administrative"* in the French text could be met by the substitution of the word *"officielle"*.

69. He considered that it would be extremely difficult, if not impossible, for the United Nations or any other international organization to impose certain rules of procedure on a conference convened by it if non-member States were invited to participate. Paragraph 4, sub-paragraph (ii), was acceptable in its present form if some mention could be made of the growing popularity of the simple or two-thirds majority rule.

The meeting rose at 1 p.m.

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## 489th MEETING

*Wednesday, 6 May 1959, at 9.45 a.m.*

*Chairman*: Sir Gerald FITZMAURICE

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

[Agenda item 3]

NEW ARTICLE 6 (FORMERLY ARTICLE 15) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the redraft of article 15, which had become article 6, submitted at the previous meeting (488th meeting, para. 46).

2. Mr. FRANÇOIS was opposed to making any definite stipulation concerning the voting rule to be observed at international conferences, because that was not a matter for the Commission to decide *a priori*, once and for all, but for each conference to fix for itself. On the other hand, it was essential to specify in the code by what majority conferences were to adopt their rules of procedure; in his opinion there could be no doubt that the practice of conferences was to adopt their rules by a simple majority.

3. At the previous meeting (488th meeting, para. 66) the Secretary to the Commission had rightly argued that the last sentence in the new article was superfluous. Nevertheless, a statement along the lines of that sentence might usefully appear in the commentary to rebut in advance any such theory as that put forward at the United Nations Conference on the Law of the Sea, held in 1958, when it had been suggested that States willing, in certain circumstances, to accept an extension of the territorial sea had, by voting in that sense, implicitly abandoned the three-mile rule.

4. Mr. PAL said that the discussion had served to confirm his original view, and he saw no reason why any conference should not itself adopt the voting rule governing the adoption of its own rules of procedure. In the absence of any decision to the contrary unanimity should be required. He could see no merit in a simple majority rule in that instance. Securing continued participation by the minority was of great potential consequence; there was always the further possibility of ultimate concurrence as a result of the conference. He did not see any compensatory advantage in keeping to the simple majority rule.

5. The last sentence of the new article was not altogether redundant, for it might reassure States participating in a conference which found themselves in the minority that they were not in any way bound by the text of the convention adopted by the mere fact that they had not withdrawn from the conference.

6. Mr. YOKOTA considered that the last sentence of the new article should be discussed in conjunction with article 17, paragraph 1, since it related to the legal consequences of drawing up the text.

7. Mr. TUNKIN could not agree with Mr. François that the simple majority rule for the adoption of rules of procedure constituted existing practice. Surely, no