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Summary record of the 493rd meeting

Topic:
<multiple topics>

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57. He suggested that article 16 should be referred to the Drafting Committee on the basis he had indicated.

It was so agreed.

The meeting rose at 1 p.m.

493rd MEETING

Wednesday, 13 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Programme of work

1. The CHAIRMAN read out Mr. Zourek's reply to the telegram which the Commission sent him on 11 May 1959 (see 491st meeting, paras. 5 and 6). Mr. Mr. Zourek indicated that he hoped to arrive in Geneva not later than 19 May.

2. He further announced that he had received a message from Mr. García Amador, Special Rapporteur on item 4 (*State responsibility*), who expected to arrive in Geneva on 18 May.

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

[Agenda item 3]

ARTICLE 17

3. The CHAIRMAN, speaking as Special Rapporteur, said that article 17 applied to the situation that existed when a text had been drawn up but had not yet been signed or initialled. Paragraph 1, which covered the point contained in the final provision of his redraft of article 15 (see 488th meeting, para. 46), referred to the obligations, if any, and paragraph 2 to the rights, arising from the drawing up of the text. He recalled that it had been agreed that if it was decided to omit paragraph 1, the subject matter of that provision would be maintained in the Drafting Committee's version of article 15 (see 491st meeting, para. 12).

4. Commenting on article 17, he said that on reflection he thought he should not have used, in paragraph 2, the example of the right to be consulted about proposed reservations. It might not be desirable at that stage to raise the question of reservations, which was fully dealt with in later articles. However, what he had had in mind was that it was frequently the practice of States which wished to make reservations to make some announcement to that effect during the negotiations, and in that sense it could be said that participation in negotiations might confer, even on States which had not yet signed a treaty, a right to be consulted about the reservations which other States might be contemplating.

5. Mr. SCELLE pointed out that in the French text of paragraph 2 the word "*inversement*" should be replaced by "*de même*".

6. Mr. YOKOTA said that he did not fully understand what was meant by the phrase "a right to be consulted about any proposed reservations" in paragraph 2. Did it mean that a State intending to make a reservation had a duty to consult, before signature or ratification, all the other States participating in the negotiations? That was not necessarily the practice. States participating in negotiations had at most the right to be informed of reservations made by other States and to comment upon or protest against such reservations, unless reservations were expressly admissible under the text of the treaty or in the light of the circumstances. In his view, the phrase in question should be amended.

7. The CHAIRMAN, speaking as Special Rapporteur, pointed out that he proposed to omit the whole of the second sentence of paragraph 2. Mr. Yokota's point could be discussed later in connexion with the articles dealing with reservations.

8. Mr. BARTOŠ asked for some clarification concerning the "ancillary or inchoate rights" mentioned in paragraph 2. He could find no reference to the subject in the commentary or in Lauterpacht's first report (A/CN.4/63), to which reference was made in paragraph 59 of the commentary. Were they rights specified in the text of the treaty or some other rights, not so specified, deriving from participation in the negotiations?

9. The CHAIRMAN, speaking as Special Rapporteur, explained that the sentence in question—which, he reiterated, he was prepared to omit—had been drafted in tentative terms; he had used the word "may". His sole purpose had been to provide for cases in which rights might result from participation in the negotiation of a treaty.

10. Mr. BARTOŠ said that he had no comment to make but only wished to justify the position he had taken during the discussion on the question of whether a treaty, once drawn up, was a text or an instrument (see 488th meeting, para. 15). Certain legal consequences flowed from provisions concerning formalities which constituted obligations for the parties that had drawn up the text and for other States that might wish to accede. That was why he had been in favour of the term "instrument". It could now be seen that there were obligations arising from the text and that the question had not been purely theoretical but practical.

11. Mr. LIANG, Secretary to the Commission, observed that there was a great difference between the technique of concluding bilateral treaties and that of concluding multilateral treaties, particularly multilateral treaties negotiated in an organ of an international organization. The inconvenience of dealing simultaneously in the code with both types of treaties had been mentioned before but, as that was the practice, he felt that it should be made clear when an article applied principally to multilateral treaties.

12. That was the case of article 17. He failed to see what legal consequences could flow from the drawing up of a bilateral treaty, for if the two parties did not sign the treaty, did not consummate the act of drawing up the treaty, the treaty was abortive and no treaty existed.

13. His second observation was of a substantive nature and related to the case of a text negotiated in an organ of an international organization. For example, a convention drawn up in the General Assembly of the United Nations was embodied in a resolution. While no one would contend that the States which voted for the resolution containing the text of the convention thereby became parties to the convention, a theoretical, a juridical problem arose in connexion with the question of the binding force of such a resolution. It could of course be argued that, under the Charter, General Assembly resolutions were recommendations and therefore not binding. However, the matter was not so

simple. It could be contended that a State Member of the United Nations which had voted for the text of a convention contained in a resolution had undertaken certain obligations towards that resolution, not as a party to a convention, but as a Member of the Organization.

14. In the 1920's the Assembly of the League of Nations had sponsored a number of conventions, such as the Treaty of Mutual Assistance, 1923, and the well-known Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, which had been of an abortive nature because they had never become operative. Later, after the Second World War, the Nürnberg Tribunal in its Judgment on the Major German War Criminals had cited those conventions in support of its view that aggressive war was an international crime and that that was the true interpretation of the Treaty of Paris, 1928,[1] more generally known as the Kellogg-Briand Pact. It had been argued in the Judgment that the treaties in question, although they had never become operative, had represented a consolidation of juridical opinion and had therefore become part of customary international law.

15. The question was also relevant in cases like that of the Convention on the Prevention and Punishment of the Crime of Genocide, of 1948. Certain States had not become parties to the Convention. But as the Convention was embodied in a resolution adopted by the General Assembly (resolution 260 (III)) it could be contended that the content of the Convention, while not binding, did produce certain legal consequences which a Member of the United Nations could not refrain from recognizing.

16. It was a difficult problem and he thought that the Commission might wish to examine the point in order to shed more light upon it. In any case, it was an aspect which might be taken into account in a code which tried to deal with both bilateral and multilateral treaties.

17. The CHAIRMAN, speaking as Special Rapporteur, said that while it was probably true that article 17 applied mainly to multilateral treaties, he did not think it was entirely irrelevant to bilateral treaties. Surely paragraph 1 applied to any treaty. It quite often happened that those negotiating a bilateral treaty drew up the text but did not have authority to sign at that stage; they might be required to report the text to their Governments. Clearly at that stage the text could not involve for the two States concerned any obligation. He would therefore not like to confine article 17 to the case of multilateral treaties, although a phrase such as "particularly in the case of multilateral treaties" might be inserted.

18. The second question raised by the Secretary to the Commission related more to the law, or practice, of international organizations than to the law of treaties. The mere fact that the text of a treaty was adopted by an international organization in the form of a resolution did not create obligations in respect of the treaty itself, not even on the part of the States which voted for the resolution, though the latter might, by reason of their membership in the organization, be morally bound to promote the objects or not to contravene the spirit of the treaty in question.

19. The case was different from that of the legal effects of signature, dealt with in article 30 of the code. He doubted whether those legal effects could exist at the earlier moment when a treaty had been drawn up but had not been signed, even if the treaty was embodied in a resolution of an international organization. Alternatively, if any effects were produced by its being embodied in a resolution, they were produced not by any inherent necessities of the law of treaties but solely by virtue of the constitution, or the traditions and practices of the international organization concerned.

20. Mr. AGO asked some questions in order to clarify the scope of article 17. In the case of two States engaged in negotiating a treaty regarding ownership of property, did the State which was in possession of the property have only a moral obligation not to alter or destroy the property, or was its obligation more than moral? He asked that question in view of the rather broad generalization in paragraph 1 that "participation in a negotiation . . . does not involve any obligation to . . . refrain from performing any act in relation to the subject matter of the text".

21. Commenting on paragraph 2, he said he would prefer the words "faculty to sign" to the words "right to sign", because he agreed with those who did not like to speak of rights unless there were corresponding obligations. He questioned whether the right or faculty to sign was a legal consequence of participation in the negotiations. In his view it derived from the agreement reached between the parties.

22. Finally, he observed that the title of article 17 might have to be amended in the light of the replies to his first question. If the reply to that question was that there were no legal obligations arising from the fact that negotiations were in progress, then there would not be any rights deriving from participation in the drawing up of the text either. The contrary would be true if the reply was a different one.

23. The CHAIRMAN, speaking as Special Rapporteur, agreed that the word "faculty" would be a better word than "right". However, he did not agree that signature was a part of the general right to conclude a treaty. A State had a general right to become a party to treaties, but the right to become a party to a particular treaty was always limited to the States which had negotiated the treaty or to such other States as they invited in the text of the treaty to become parties. No State could demand, as of right, the privilege of signing a treaty in the negotiation of which it had not participated or which it had not been invited to sign. That applied equally to bilateral and multilateral treaties.

24. Mr. Ago's first question, on the other hand, called for careful consideration by the Commission. Where States were negotiating the disposition of a piece of property or territory and had come as far as preparing a text which they had not yet signed, surely they had some kind of obligation, evidently not deriving from the treaty but from some other source, not to take any action which would frustrate the purpose of the treaty.

25. Mr. YOKOTA drew attention to some minor drafting points. In paragraph 1, it was clear from the context and from the discussion on article 15 that the word "decisions" referred to decisions for the adoption of the text of the treaty and not to procedural decisions. He thought that the words "for the adoption of a text" should be inserted. Again, the words "the text as finally agreed" might imply acceptance of the draft treaty. He suggested that the words in question should

[1] *General Treaty for Renunciation of War as an Instrument of National Policy*, signed at Paris on 27 August 1928. See League of Nations, *Treaty Series*, vol. XCIV, 1929, No. 2137.

be replaced by the expression "the text as finally established".

26. Mr. BARTOŠ said that Mr. Ago had brought up a very practical question, viz. whether a State, having participated in the establishment of a text and hesitating to sign or accede, might alter the situation existing at the time when the text was established. Such an act might, in the case of a cession of territory, worsen the situation for the succeeding sovereign over that territory.

27. If there was not an abuse in law, the question of whether a supervening change of circumstances not foreseen in the intention of the parties at the time of negotiation could be involved was not entirely settled in international law. Writers on the law of war had discussed after the Second World War the question of whether it might be legal to destroy certain objects the destruction of which had been prohibited by an armistice or whether the existing state of affairs must be maintained until the peace treaty came into force. The same question arose with regard to conventions proper, or law-making treaties, where a State in a more favourable position than others might make certain promises and then change the situation on the pretext, for example, of a change in the world situation. In the light of those considerations it was desirable that in any code of the law of treaties the principle of *rebus sic stantibus* should be safeguarded.

28. In civil law, a promise validly made and accepted in good faith was enforceable. In international law, a comparable rule had not yet crystallized. Nevertheless, the element of good faith in the negotiation of treaties could not be disregarded, and he felt very strongly that the Commission could not say categorically that there was no obligation "to perform or refrain from performing any act" affecting the subject matter of the text of a treaty between the establishment of the text and its entry into force. He took the view that it was an abuse to negotiate a text when one state of affairs prevailed and to present another state of affairs when the obligation became operative.

29. Mr. LIANG, Secretary to the Commission, observed that, as paragraph 1 was now drafted, there was no alternative but to conclude that texts adopted by international conferences were the only ones covered, since the word "participation" was not suitable for bilateral treaties, as they were merely negotiated. He agreed with Mr. Ago's objection to the use of the word "unanimity" in regard to bilateral negotiations. The text would be improved if separate provision were made for bilateral and multilateral treaties.

30. A decision taken by an international organization as a result of the adoption of a text gave rise to obligations which, of course, differed from those arising from the conclusion of a treaty, but that question was connected with the law of treaties. He had originally advocated the view that the majority rule in decisions on the adoption of texts was part of the law regulating international conferences (see 490th meeting, paras. 43-45), but the Commission had taken the broader view that it was also part of the law of treaties. Since the decision taken concerning the redraft of article 15 (new article 6) (490th meeting, para. 53) he had somewhat changed his view. He could not conceive that when an international organization had adopted a text, and had voted for a draft instrument, it would be normal for a State to perform some act in relation to the subject matter of the text merely on the ground that it had not yet accepted the treaty. The situation was not exactly the same as that of a bilateral treaty in which no decision of an international organization was involved.

31. Mr. VERDROSS remarked that, if Mr. Ago was right that a State was obliged, between the establishment and entry into force of a text, to refrain from changing the state of affairs, such an obligation might derive from the principle of good faith. The obligation did not, however, derive from participation in a negotiation, because it already existed before the negotiations. The wording of paragraph 1 would, therefore, appear to be correct.

32. Mr. AGO thought that Mr. Verdross and he might be referring to different things. In some cases, a general rule laid down an obligation not to change the existing state of affairs independently of any negotiation, but that was irrelevant in the context. What he (Mr. Ago) had meant was that if a State opened negotiations relating to a property and continued those negotiations, it would be committing a wrong if it destroyed that property pending the negotiations. As it stood, paragraph 1 appeared to tolerate such an act, and that provision might be repugnant to the Commission, which was concerned not only with the codification of international law but also with its progressive development. If it was recognized that, in some cases at least, such an obligation existed, a change in the text would have to be made, and that would, correspondingly, confer a right on the aggrieved State.

33. In his reply, the Special Rapporteur had been correct insofar as he (Mr. Ago) had not meant that the faculty to sign was a general right. That faculty was derived from the agreement of the parties, who themselves might extend it to other States, rather than from mere participation in a negotiation.

34. Mr. PADILLA NERVO was sure that the Secretary was correct in his view about paragraph 1. The text gave the impression that it referred to multilateral treaties and would need redrafting or the insertion of a separate paragraph if bilateral treaties were also to be covered. In the discussion on the redraft of article 15, Mr. Ago had suggested (see 489th meeting, para. 19) the deletion of the final phrase in paragraph 4, but the Commission had decided, at Mr. Yokota's suggestion (see 489th meeting, para. 6), to reconsider the idea when it discussed article 17. It might be inappropriate at that stage to discuss in detail the obligations of international conferences in the matter of the adoption of agreements and the obligation to perform or refrain from performing certain acts.

35. The principle set out in paragraph 2 was consistent with the structure of the text of the article and with article 24, paragraph 1, whereas the principle governing the admission of States other than those participating in the negotiation was set out in article 24, paragraph 2. The signatory States had a corresponding obligation not to oppose the admission of other States which did not participate in the negotiations, even if the treaty did not specify that it was open to States which had not signed it.

36. The second sentence of paragraph 2 might be regarded as covered by the reference in article 39, paragraph 1 (*b*), to the circulation of reservations. The distinction between multilateral and other treaties should be made clear in paragraph 1 of article 17; the first

sentence of paragraph 2 should be retained; the second sentence should be deleted; and references to article 24, paragraph 1, and article 39, paragraph 1 (*b*), should be inserted.

37. The CHAIRMAN, speaking as Special Rapporteur, explained that the first sentence in paragraph 2 was not intended to suggest that *only* the States which participated in a negotiation could have a right to sign, but that at least *they* had such a right and it was the only right they derived from participation. The right of other States to sign was dealt with in article 24, and Mr. Ago was correct in stating (see para. 21 above) that that right arose from agreement rather than from participation. Participation, however, implied agreement. The paragraph might be redrafted, and Mr. Padilla Nervo's suggestions for the insertion of a reference to article 24 might well be adopted.

38. Mr. FRANÇOIS said that to lay down that a State was debarred from changing the state of affairs between the establishment and entry into force of a text might be equivalent to preventing it from changing its opinion. As the publication of the text of a treaty might raise certain apprehensions or bring out matters which the negotiators had overlooked, it should be possible for a State to perform acts which were not entirely consistent with the text as signed. Good faith implied that a State concerned must notify the other participants of any change, but that did not mean that the former was legally bound never to change the situation. In such a case, a certain time limit should at least be set. He did, however, object to the view that a legal obligation arose from the mere fact of signature.

39. Mr. AMADO said he could not see the need for mentioning all the complications to which Mr. François had alluded. The article had one virtue: it stated a self-evident truth.

40. Mr. ALFARO supported the text of article 17 in substance and Mr. François' view that the parties could not be legally or morally bound to perform or not to perform any act simply by reason of signature. That view was in keeping with the realities of international life.

41. The difficulty about drawing a distinction between bilateral and multilateral treaties might be overcome quite simply by starting paragraph 1 with some such words as "Negotiation of a bilateral treaty or participation in a negotiation. . .".

42. Paragraph 2 needed more precision, especially in its reference to certain ancillary or inchoate rights, and the example given might well be replaced by a reference to the provisions on reservations in article 37.

43. Mr. YOKOTA observed that, strictly speaking, mere participation in a negotiation did not involve any legal obligation, as Mr. Verdross had pointed out (see para. 31 above). The phrase "refrain from performing" was, however, too strong. It gave the impression that a State was entirely free to perform any act in relation to the subject on which the negotiation had taken place. That was not necessary in the context. What was necessary was the statement that participation in negotiation did not involve any obligation to accept the text as finally agreed. The remainder of paragraph 1, after "finally agreed", might well be deleted.

44. Mr. TUNKIN agreed with Mr. François about paragraph 1 and with Mr. Yokota's amendment.. He had objections to the second sentence in paragraph 2, but would not go into them since the Special Rapporteur appeared to have withdrawn it.

45. Mr. SANDSTRÖM said that the notion of an abuse of law had been raised in connexion with paragraph 1 in the case of a State which had entered negotiation and had then changed the existing situation. The notion was very vague and unknown to many legislative systems. He wondered whether it could be invoked in international law. In any case, he did not think that the fact that a State had entered into negotiations could give it the right to invoke that notion. With regard to paragraph 2, signature might not be a right, but the term "right" was used in article 24 in a similar context and might very well be retained in the paragraph under discussion.

46. Mr. SCELLE agreed with Mr. François that the main ideas embodied in article 17 were acceptable. Nevertheless, if, as seemed to be the case, the article related only to multilateral treaties, certain difficulties were raised by the use of the word "treaty" in the generic sense. The point raised by the Secretary to the Commission was material: did the article cover the conventions embodied in resolutions adopted by majority decisions by international organizations? Those conventions did not have the characteristics of treaties, but were really legislative acts, though not necessarily binding on all members of the organization concerned. They were not negotiated in the proper sense of that term and the parties were not bound by moral or legal obligations. For example, international labour conventions on trade-union freedoms had been voted upon by all the participants at International Labour Conferences, but the participants had not really "negotiated". Paragraph 2 was not, therefore, applicable to such conventions. It was not possible, in consequence, to impute bad faith to a State which restricted or even abrogated trade-union rights in its own territory after the convention had been concluded.

47. In his opinion, the code should draw a clear distinction between real treaties or international agreements, on the one hand, and legislative acts adopted by a majority vote in an international organization, on the other hand. Article 17 could not apply to conventions of the latter type unless specific provisions relating to them were included.

48. Mr. HSU felt that Mr. Yokota's suggestion (see para. 43 above) was a wise one. If the majority of the Commission did not feel inclined to support it, however, the alternative might be to maintain paragraph 1 in its present form and to introduce a phrase recalling the rule of international law on the good faith of parties to a treaty.

49. Mr. KHOMAN agreed with Mr. Scelle and Mr. Padilla Nervo that it was necessary to specify whether paragraph 1 related to bilateral or multilateral treaties or to international legislative acts. If the last phrase of the paragraph was retained in its present form, the effect of the latter category of texts might be considerably prejudiced.

50. The CHAIRMAN, speaking as Special Rapporteur, thought that the Commission seemed to be agreed upon several purely drafting matters. Thus, Mr. Yokota had suggested that the words "decisions have been taken" in paragraph 1 might be replaced by "a text has been adopted" and that the word "agreed" might be replaced by "established"; he thought those suggestions were acceptable and should be referred to the Drafting Committee. The Secretary to the Commission had rightly pointed out that, although paragraph 1 was intended to apply to both bilateral and multilateral negotiations, the wording suggested that only multilateral negotiations were involved. The Drafting Committee would therefore be asked to clarify that point. The consensus seemed to be in favour of omitting the second sentence of paragraph 2. With

regard to the first sentence of that paragraph, it had been suggested that the words "faculty to sign" were more appropriate than the words "right to sign". Mr. Sandström had said that he did not object to the word "rights" because it was referred to in the same sense in article 24, while Mr. Padilla Nervo had suggested that a reference to article 24 should be included in the text. Those matters would also be referred to the Drafting Committee.

51. Turning to more substantive matters, he stated in reply to Mr. Scelle that he had intended to use the word "text" in the sense of any international agreement. He could not agree that the generic use of the word "treaty" really led to such great difficulties as Mr. Scelle supposed. Occasions might occur when it must be made clear whether the term was used in the restrictive or in the broader sense, but it was generally possible to proceed on the basis that all the articles of the code applied to international agreements in general and that the word "text" in article 17 referred to that of an international agreement.

52. He agreed, however, that article 17 did not apply to *every* text; it did not apply, for example, to resolutions of international organs which embodied the texts of international agreements but were not *per se* international agreements. But if it were assumed that participation in the negotiation of a treaty or international agreement involved no obligation, that would apply *a fortiori* to texts which were not international agreements. Accordingly, the difficulty mentioned by Mr. Scelle did not arise in connexion with article 17.

53. The Secretary to the Commission had made the point that, although a treaty *per se* might involve no rights or obligations, resolutions of international organizations embodying agreement might, under the constitutions or practice of those organizations, result in obligations produced by the resolutions. He considered that the question was too remote from the law of treaties to be dealt with in the code and that it could not be regarded in the same light as the voting rules of conferences, for the very existence of treaties depended upon such voting rules. However, the question of the absence of legal effects arising from the mere drawing up of texts was a cardinal point which should be mentioned in the code.

54. Mr. Ago had raised a real difficulty. He thought there were three questions to be answered. In the first place, when States negotiated and drew up a text, were they committed to become parties to the treaty? Secondly, did participation in the negotiation and drawing up of a text commit a State to carrying out any provision of that text? The answer to both those questions was obviously in the negative. The third and more difficult question was whether any obligation arose, by reason of mere participation in drawing up a text, to refrain from acts which might frustrate the purpose of the negotiations. So long as the parties might still sign the treaty, they should refrain from prejudicing the possibility of the treaty being carried out. He would be inclined to say that such an obligation existed, particularly during a specific period while the text was likely to result in a treaty. Even if that were so, however, the Commission should ponder whether such an obligation stemmed from the general obligation of good faith under international law, or from the fact of having drawn up the text. In his opinion, either view was tenable. If it were considered that the rule of good faith applied, a provision along those lines might be inserted, or it might be stated simply that the mere negotiation and drawing up of the text did not *per se* produce any consequences (implying, however, that consequences might result *aliunde*).

55. Mr. Yokota had suggested that the phrase after the words "finally agreed" in paragraph 1 should be omitted altogether. If the Commission wanted to evade the issue, and to leave Mr. Ago's question unanswered, that would be the best course. In that case, the question whether negotiations or drawing up a text involved any obligation not to frustrate the purposes of negotiations would not arise, but nothing in the code would imply that a State could lawfully frustrate those purposes.

56. Mr. PADILLA NERVO said that he interpreted the last phrase of paragraph 1 not as freedom to perform acts capable of frustrating the effects of negotiations but rather as meaning that participation in negotiations presupposed the obligation not to modify the position which had existed before the negotiations had been started. That was different from giving States the freedom to perform new acts that could alter the effects of the negotiations.

57. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Padilla Nervo's interpretation, but recalled Mr. Ago's observation that the phrase might be interpreted differently. Moreover, the main question was whether the phrase did not temporarily impose a negative obligation.

58. Mr. LIANG, Secretary to the Commission, agreed with Mr. Yokota's suggestion to omit the last phrase of paragraph 1. He said that he had not intended to suggest that the question relating to texts embodied in resolutions of international organizations should be formulated in a rule. But he wished to make it clear that the phrase somewhat prejudiced the question whether treaty texts embodied in resolutions of the General Assembly of the United Nations produced or did not produce certain legal consequences. The omission of the phrase would meet both his own point and Mr. Scelle's. Moreover, the questions of good faith and of an implicit obligation to maintain the *status quo* went beyond the stage of actual negotiations. The last phrase of paragraph 1 postulated the completion of negotiation and the adoption of a text. The question of the parties' obligations after the text had been adopted were sufficiently covered by the first phrase.

59. Mr. AGO did not consider that the point remaining at issue was whether any obligations were involved when a treaty had been negotiated and signed. Nor could he agree with Mr. Amado (see para. 39 above) that the question was a theoretical one; on the contrary, the answer could have very important practical implications. The Commission had to decide whether it was admissible, for example, for a State to negotiate on such a matter as the sovereignty of a territory and to conduct itself in such a manner that the entire process would be stultified.

60. Although he considered Mr. Yokota's suggestion (see para. 43 above) preferable to leaving the text in its present form, he did not regard that procedure as quite satisfactory. The records would show that the matter had been discussed and also that the Commission had gone into such details as the voting rules of conferences; the question at issue was not so unimportant that it could be left aside. There was room for further discussion and the Commission should try to agree on a generally satisfactory text.

61. Mr. VERDROSS said he was in favour of Mr. Yokota's suggestion. The problem raised by Mr. Ago and Mr. Bartoš was very important, but a decision

on it was as yet premature. Accordingly, the only alternatives were either to delete the last phrase of paragraph 1 or else to leave the matter open on the understanding that it would be considered later.

62. Mr. TUNKIN also supported Mr. Yokota's suggestion. In his opinion, the answer to Mr. Ago's question (see para. 59 above) hinged on whether or not there was a rule of international law obliging the parties negotiating a treaty not to take any step which might change the existing situation in any respect. He did not believe there was any such rule. For example, when the United Nations Conference on the Law of the Sea, 1958, had discussed the breadth of the territorial sea, it had been proposed that a resolution be adopted that, as from the beginning of the Conference, no participating State should extend the breadth of its territorial sea. There was, however, strong objection to that proposal. After the Conference a number of States had extended their territorial seas, but it could not be asserted that, even if they had done so during the Conference itself, they would have violated rules of international law. The performance of an act affecting the subject matter of a text might conflict with some other rules of international law, but States were under no specific obligation not to change the *status quo* at such time.

63. Mr. BARTOŠ thought that Mr. Yokota's suggestion was acceptable as a transitory solution, although it was not entirely satisfactory. He would not insist on any other course, however, since there was as yet no precise rule of international law on the question raised by Mr. Ago. However, even if Mr. Verdross's thesis concerning the existence of the good faith rule were accepted, participants in the negotiations were naturally aware whether or not they were acting in bad faith, particularly where law-making treaties were concerned. The Commission could not lay down any rule which was contrary to the established good faith rule.

64. He did not think that the example cited by Mr. Tunkin (see para. 62 above) was apposite, since no text on the breadth of the territorial sea had been adopted at the Conference on the Law of the Sea held in 1958. Accordingly, the subsequent actions of the States concerned merely supported his own and Mr. Ago's views.

65. Since no rule other than that of good faith existed as yet on the subject, the Commission might consider formulating a text to meet the requirements of article 17, pending further developments in international law, which might result in the establishment of a rule.

The meeting rose at 1 p.m.

494th MEETING

Thursday, 14 May 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 17 (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 17 of the draft code.

2. Mr. SANDSTRÖM said that, by simply agreeing to negotiate on a particular subject, a State was not committing itself to continue the negotiations until they produced a result. The State could withdraw from the negotiations at any time and would thereupon regain the freedom of action it had previously had. That being so, it could hardly be said that the State's responsibility would be involved if it changed the *de facto* situation during the negotiations. Of course, such action might be discourteous; it might mean the breaking off of the negotiations and provoke a reaction. But it could hardly produce legal effects by reason merely of having occurred during the negotiations and without notice of discontinuance of the negotiations. It might have such effects as an unlawful act, and it was also conceivable that the negotiations had been undertaken in pursuance of a special agreement excluding any change in the *de facto* situation during the negotiations; but that was quite a different situation and immaterial to the rule that negotiations *per se* did not create any obligation to do or not do anything with respect to the subject matter of the negotiations. Accordingly, he found paragraph 1 acceptable in its present form. The last phrase did not seem to be absolutely necessary, however, especially if it might be interpreted as encouraging undesirable action, and he would therefore agree to its omission.

3. Mr. HSU thought that both a substantive and a formal question were involved in paragraph 1. The last phrase of the paragraph would have to be amended. It had been suggested that the provision might be clarified by a reference to the principle of good faith, but some members had objected to that course on the ground that no such rule existed in international law. He considered that the principle applied to all treaty law, but that it was quite admissible to introduce it as a qualification of the situation dealt with in paragraph 1, if the Commission wished to retain the whole sentence. The analogy with the situation at the time of the United Nations Conference on the Law of the Sea, in 1958, which Mr. Tunkin had cited at the previous meeting (see 493rd meeting, para. 62), was a false one, for paragraph 1 dealt essentially with texts already established, whereas at that Conference no final texts had been drawn up concerning the breadth of the territorial sea. When States agreed upon a text, however, they were naturally bound not to alter the fundamental situation to which that agreement related.

4. With regard to the formal question before the Commission, he believed that there were two ways of formulating a code. The first, followed by Professor Brierly in his report on the law of treaties (A/CN.4/23), was to enumerate the principal questions and to leave detail aside, while the second, followed by Sir Hersch Lauterpacht (A/CN.4/63 and A/CN.4/87) and the present Special Rapporteur, was to cover as many situations as possible. He had no personal preference for either of those methods, but thought that the Commission should decide on one of them.

5. Mr. SCELLE said that he would be prepared to go even further than Mr. Ago and to state that the theory of the obligation of States participating in negotiations on specific issues not to frustrate or alter the purposes of the negotiations was founded on a legal principle, and not only on moral principles and good faith. It was important for the Commission, whose task was not only to codify international law but also to promote its progressive development, to establish as a