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**Summary record of the 500th meeting**

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agreements on consular districts might, like any other international agreement, be modified for reasons other than mutual consent. The Chairman's point might be met by providing simply that a consular district could not be changed by the sending State without the consent of the State of residence. Such a wording would not affect the powers of the State of residence, but it would not be possible to infer from it that the State of residence was able to oblige the sending State to introduce changes into a consular district. He preferred that formula to the alternative of adding the Chairman's suggested reference to exceptional cases.

62. Mr. Edmonds and the Chairman had referred to the most-favoured-nation clause in connexion with article 2. That clause played a greater part in securing parity of consular privileges and immunities on the one hand and consular functions on the other hand, and it was above all for that reason that it was included in many treaties. If the majority of the Commission wished to include such a provision, it should cover all cases in which the most-favoured-nation clause was applicable, and not merely the right to establish consulates; it should be inserted *in extenso* in the appropriate place.

63. Finally, with regard to the question of premises, he said he would be prepared to draft a provision if the Commission wished him to do so. However, that would be a provision *de lege ferenda* and not a provision codifying existing law. Moreover, he was not sure whether Governments would be prepared to accept such a provision, which would impose obligations considerably exceeding those of the corresponding provisions of the draft on diplomatic intercourse and immunities.

64. Mr. BARTOŠ pointed out that the Special Rapporteur had referred to the most-favoured-nation clause in its general sense. The case of the opening of consulates was a special one and special most-favoured-nation clauses in that respect were often included in consular treaties.

65. Mr. LIANG, Secretary to the Commission, observed that the important question of consular functions had been commented on in the Special Rapporteur's introduction to his report (A/CN.4/108, part I). In paragraph 67, the Special Rapporteur pointed out that consuls were State agents whose competence was limited *ratione materiae*, and very often *ratione loci* as well. Furthermore, it was stated in paragraph 69 that the appointment of consuls was covered not by international but by municipal law. He thought that the question of the performance of consular functions by diplomatic missions went much further than that of whether those missions could or could not deal with local authorities; the functions themselves should be studied in relation to their performance by the two kinds of agents.

66. The essential point was that consuls were allowed by the State of residence to execute acts which, in the ordinary way, would amount to a derogation from the territorial sovereignty of that State. The enumeration of consular functions in article 13 showed that consuls were authorized to carry out certain sovereign acts of the sending State, particularly in respect of the nationals of that State who were engaged in trade. Those functions were not exercised *ratione materiae* by diplomatic agents, but by consular officers, either under consular conventions or by virtue of the regulations of the State of residence. They could not possibly be

exercised by diplomatic agents unless the latter assumed consular functions, with the consent of the State of residence. As examples of acts which were not, properly speaking, diplomatic functions, he cited those referred to in article 13, paragraphs 9, 10 and 11. Certain functions, such as the furthering of commercial and economic relations and issuing passports and visas, were not such acts. It could not be contended that all diplomatic and consular functions were identical. Accordingly, when diplomatic agents performed functions which were exclusively consular, they assumed the status of consular officers and had to obtain the consent of the State of residence to do so.

The meeting rose at 1.5 p.m.

## 500th MEETING

Monday, 25 May 1959, at 3.5 p.m.

Chairman: Sir Gerald FITZMAURICE

### Date and place of the twelfth session

[Agenda item 6]

1. Mr. LIANG, Secretary to the Commission, observed that, since the General Assembly had decided the place of the Commission's sessions, the only question to be settled was that of dates. According to General Assembly resolution 694 (VII) of 20 December 1952, the Commission's session should not overlap with the Economic and Social Council's summer session. The Economic and Social Council would begin its session on 5 July; accordingly, the Commission's twelfth session could be held from 25 April to 1 July.

2. The CHAIRMAN suggested that the Commission should approve the dates mentioned by the Secretary.

*It was so agreed.*

### Representation of the Commission at the Fourteenth session of the General Assembly

3. Mr. LIANG, Secretary to the Commission, said it was the Commission's practice to ask its Chairman to represent it at the sessions of the General Assembly.

4. Mr. ALFARO, Second Vice-Chairman, suggested that the Chairman should be requested to represent the Commission at the fourteenth session of the General Assembly.

*It was so agreed.*

5. Mr. GARCIA AMADOR suggested that the Chairman might informally approach the Secretariat and, perhaps, the delegations with a view to scheduling the Commission's sessions for a more convenient time of the year.

6. The CHAIRMAN said he would act on that suggestion.

### General Assembly resolution 1272 (XIII) on control and limitation of documentation

[Agenda item 8]

7. Mr. LIANG, Secretary to the Commission, observed that item 8 arose out of the General Assembly's annual review of United Nations documentation.

8. The CHAIRMAN suggested that the Commission should take note of General Assembly resolution 1272 (XIII) of 14 November 1958.

*It was so agreed.*

### Co-operation with the Inter-American Council of Jurists

9. Mr. LIANG, Secretary to the Commission, recalled that, at its tenth session, the Commission had renewed its request to the Secretary-General of the United Nations to authorize him, as Secretary to the Commission, to attend the fourth meeting of the Inter-American Council of Jurists, to be held at Santiago, Chile, in 1959.<sup>1</sup> It had now been decided to hold the meeting from 24 August to 12 September and he had received an official invitation from the Government acting as host to the meeting. The Secretary-General had authorized him to attend and to report to the Commission on matters dealt with by the Inter-American Council of Jurists which were of interest to it.

10. The CHAIRMAN suggested that the Commission should take note of the Secretary's statement.

*It was so agreed.*

### Programme of work

11. The CHAIRMAN observed that, in view of the absence of Mr. Zourek, Special Rapporteur on consular intercourse and immunities, the Commission could either examine the relatively non-controversial articles in chapter II of Mr. Zourek's draft (A/CN.4/108, part II), or else proceed with its work on the law of treaties (A/CN.4/101).

12. After a procedural debate, the CHAIRMAN called for a vote on whether the Commission should proceed with its work on the law of treaties until the Special Rapporteur on consular intercourse and immunities could again attend its meetings.

*By 10 votes to 1, with 4 abstentions, the Commission decided to resume its consideration of the draft on the law of treaties.*

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

[Agenda item 3]

#### ARTICLE 22

13. Mr. YOKOTA asked whether it had been decided to retain or to omit the passages in articles 20 and 21 relating to the personal approval or recommendation of the individual signing or initialling the text.

14. The CHAIRMAN said it was his recollection, subject to confirmation by reference to the summary records, that the majority of the Commission was against the retention of those passages.

15. Speaking as Special Rapporteur, he introduced article 22.

16. The article dealt largely with routine matters. It was self-evident that in order to be valid the signature to a treaty had to be made under adequate and specific authority. It was suggested in article 22 that the neces-

sity for authority applied only to full signature. In many cases, a text was simply initialled or signed *ad referendum*, either because the representative concerned was not in a position of authority to sign or because the Government was not ready to proceed to full signature or to issue authorization for that purpose. For the purpose of full signature, however, authority was essential and paragraph 1 specified the three possible cases in which signature could be effected. In the first case, if the representative concerned was an ordinary delegate, he clearly needed an *ad hoc* full-power to be enabled to sign a treaty. In the second case, the representative might be the ambassador or a diplomatic envoy accredited to the other country concerned in the negotiation, or the minister of foreign affairs, who had standing full-powers to sign treaties. Ministers of foreign affairs often had standing full-powers, and he believed there were cases in which ambassadors had not only diplomatic credentials, but standing full-powers to sign treaties. If that belief was incorrect, the word "Ambassador" should be deleted from paragraph 1. The third case was that of persons, such as Heads of State, prime ministers and, sometimes, ministers of foreign affairs, who had inherent power by virtue of their office to affix their signature to a treaty. That was obvious in the case of Heads of State, who were the authorities empowered to grant full-powers enabling their nationals to sign treaties; accordingly, it was illogical to expect them to issue full-powers to themselves.

17. Paragraph 2 dealt with points of detail. The first part made it clear that the person authorized to sign a treaty might not be the person who had negotiated the treaty. An obvious situation where that would be the case was that of a treaty not signed immediately, but opened for signature. The point might, if the Commission preferred, be mentioned in the commentary, but should not be ignored. The second part of the paragraph might be regarded as redundant, for it stated the obvious truth that authority to negotiate was not equivalent to authority to sign. In any case, the paragraph should be redrafted to take into account cases of standing full-powers or of inherent capacity to sign by virtue of office.

18. Paragraph 3 related to more or less mechanical points. The first sentence stated that full-powers should be communicated—to the officers of the conference in multilateral negotiation—or exhibited—to the other party in bilateral negotiation—and verified, usually by a credentials committee, in the case of an international conference. The second sentence related to the proper form of the full-powers. The answer to the question whether the powers should emanate from the Head of State or from the Government depended largely on the nature of the treaty. The last sentence applied to cases, which were becoming frequent in practice, where delegations might not be in possession of the actual full-power to sign upon the conclusion of a treaty. It had recently become usual to allow such representatives to sign on the basis of a telegram or letter of authorization from their Government, provided that the full-powers were eventually received.

19. The provision in paragraph 4 overlapped to some extent with article 16 (*Certain essentials of the text*) and the Commission might decide that it would be sufficient to embody it in only one article. Nevertheless, a statement or recital of authority to sign was a desirable ingredient of a treaty, with the exception of exchanges of notes or letters. That exception applied only to bilateral negotiations, however, and the authority to sign of the

<sup>1</sup> See *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, chap. V, sect. III.

\* Resumed from the 496th meeting.

persons concerned was implicit in the exchange. Otherwise, the normal practice was to include the statement or recital either after the preamble to the treaty or before the signatures at the end of the treaty.

20. Mr. MATINE-DAFTARY said that the Special Rapporteur's introduction had elucidated article 22 but he felt that the clarification should be introduced either into the text or into the commentary. It was not evident from paragraph 1 (*b*) that the officials mentioned derived their capacity to bind the State from the constitutional law of the State concerned. Accordingly, paragraph 1 (*b*) should refer to persons deemed to have the constitutional right to bind the State by virtue of their position or office.

21. Moreover, it seemed to him that clauses (*a*) and (*b*) overlapped to a considerable extent and it might be possible to combine them into a single, shorter provision.

22. The CHAIRMAN, speaking as Special Rapporteur, explained that the difference between the two clauses was that no full-power, in the sense of a document, existed in the case of clause (*b*), whereas there was always such a document in the case of clause (*a*), whether an *an hoc* document issued specially for a particular occasion, or a standing full-power, issued in some countries to a minister of foreign affairs when he took office, empowering him to sign treaties during his term of office. Cases in which such a standing full-power was not issued as a document, the foreign minister being empowered to sign by virtue of his office, would fall under clause (*b*).

23. Mr. AGO said that he was in general agreement with the principle set out by the Special Rapporteur in article 22, but he had some observations to make on certain details. In paragraph 1, it seemed to him that the order of (*a*) and (*b*) should be reversed. While the cases mentioned under (*a*) were more frequent, they dealt with persons not having inherent capacity, whereas clause (*b*) dealt with persons of higher rank having inherent capacity, and should logically come first. As to clause (*b*), he said that in some States the organ having inherent capacity to bind the State was, under constitutional law, not an individual person but a body. Again, in addition to the officials specified, a military commander might, under certain conditions, have such inherent capacity. He suggested that the clause should be amended to take account of those circumstances.

24. In paragraph 2, he suggested that the words "is not equivalent to" should be replaced by the words "does not include", because the authority to negotiate and the authority to sign were quite distinct and could never be conceived of as equivalent.

25. There would have to be a consequential change in the second sentence of paragraph 3, in the light of the amendment to paragraph 1.

26. He had a point of substance to make with regard to paragraph 4. The paragraph implied that, in the absence of a statement or of some other indication to the effect that the representatives of the signatory States had authority to sign the text of the treaty, the treaty might not be formally valid. That was not the case and paragraph 4 should be amended accordingly.

27. Mr. SANDSTRÖM agreed with Mr. Ago's observation concerning paragraph 4. He asked whether it was necessary in paragraph 1 (*a*) to elaborate the possible situations. He thought the provision would be simplified if Mr. Ago's observations were taken into account.

28. Mr. TUNKIN said that paragraph 2 was far too descriptive and, like other provisions in the draft code, reminiscent of the language of a textbook.

29. He agreed with Mr. Ago's observations concerning paragraph 1 and, in addition, pointed out that the words "which is the act of the State" were unnecessary, since every stage of the treaty-making process was an act of the State.

30. In paragraph 3, the first clause was a platitude: if full powers were necessary, they had to be communicated or exhibited. As to the second clause of the first sentence, he suggested making it more flexible as, in practice, full powers did not always need verification, and certainly not in bilateral negotiations, where there was no doubt about their authenticity. The second sentence of paragraph 3 was not sufficiently flexible. In many cases the signer was in possession of a document signed by the foreign minister simply testifying that full-powers had been issued. In addition, there were inter-ministry agreements signed on behalf of the ministry and not on behalf of the Government. Some agreements were signed by individuals without any specification of their authority to sign and sometimes even without any indication that the signature was affixed on behalf of the Government. He agreed with Mr. Ago that paragraph 3 would have to be changed in keeping with an amended text of paragraph 1.

31. Mr. BARTOŠ said that article 21 was closely interrelated with article 22. In his opinion, borne out by practice, even initialling by Heads of State, prime ministers or foreign ministers had not *ipso jure* the same effect as signature. On the contrary, in practice initialling by Heads of State even of the most important treaties merely signified agreement in principle, while the competent ministers were left to establish the final text. Initialling had always been considered to show prior agreement and the commitment arose only from signature. He could not accept the idea that initialling, even by Heads of State, was equivalent to signature unless a contrary intention was proved (cf. article 21, para. 1). He would go so far as to say that signature was not binding unless circumstances showed that the intention was to consider it as a final signature. On the other hand, it was true that initialling sometimes signified consent and actual signature was reserved for a solemn ceremony.

32. With regard to article 21, paragraph 2, he agreed with Mr. Tunkin that action taken by a representative on his own initiative could not be equated with negotiation by States; on occasion, a representative might act in a negotiation without the Government's specific authority; but, even then, initialling could not be regarded as signifying the formalization of the results of a negotiation. In any case, such procedures were not suited to modern diplomacy and personal initiatives could not now be regarded as on a par with official negotiations. At various stages in the history of diplomacy negotiation on personal initiative had resulted in the conclusion of a treaty, but in such negotiations the person concerned had certainly not been representing the State. If well conducted and within the general framework of international law, such negotiations might be unobjectionable, but they should find no place in a code drafted by the Commission.

33. The Special Rapporteur had called initialling a form of deferred signature. There were, however, many cases in which representatives did not wish to use their full-power to sign an agreement and left it to the Government

to object or to refuse to ratify the treaty. Governments frequently used the device of initialling to enable them to request that negotiations be reopened on certain points in the text, without prejudice to the treaty as a whole. That technique caused less political difficulty than the rejection of a text signed *ad referendum*. That was a practical point to which the Drafting Committee might give some attention.

34. He had already expressed his objection (495th meeting, para. 32) to the idea of personal recommendation embodied in article 21, paragraph 4, and the Special Rapporteur himself had now admitted that it found little favour with the majority of the Commission.

35. With regard to article 22, paragraph 1, he questioned whether an ambassador had the authority to sign international instruments committing a State generally by virtue of his office, but he fully endorsed the statement that the Head of State, prime minister or foreign minister had inherent capacity to bind the State by virtue of his position or office, as was shown by the rules of procedure of the Security Council and by the Greenland Case (1933),<sup>2</sup> in which the Permanent Court of International Justice had ruled that foreign ministers had such an inherent capacity. Clause (b) might therefore precede clause (a) and further thought might be given to the standing of ambassadors in that context.

36. He agreed that full-powers must be communicated or exhibited and must be verified by such means as were convenient, but thought that paragraph 4 should be drafted in more flexible terms in order to allow for cases in which the authority to sign was indicated in other ways.

37. It was, however, extremely dubious whether the statement by the plenipotentiary himself that authority to sign existed was equivalent to the existence of such authority. A plenipotentiary might well be in possession of full-powers, but might, deliberately or involuntarily, exceed their limits. The situation might be regularized by subsequent ratification; but the opposite situation might arise, where the full-powers might be exercised by a person, although he was a genuine plenipotentiary, in a manner contrary to the intention of his Government. A striking case in point had been that of the Yugoslav Ministers who had signed a treaty of alliance with Hitler and Mussolini, having exhibited full-powers. They had violated the constitutional prescription that any international agreement involving the passage of troops across Yugoslav territory must have the prior consent of the National Assembly. Like all treaties signed with Hitler, that treaty had come into force at the time of signature. At the end of the Second World War the Ministers had been brought to trial and severely punished. The Special Rapporteur had not meant his text to be construed in any way that might give a pretext for such conduct, but the Commission should exercise the greatest caution in that respect, even though reasonable safeguards had been embodied in article 23.

38. Mr. YOKOTA doubted whether a form of general or standing full-power (article 22, para. 1) was commonly used. Full-powers were always issued, in his experience, on a particular occasion and for a particular purpose. An ambassador might negotiate and even sign a treaty by virtue of his office, but when a full-power

was issued for the purpose of signature, it was always specially issued for the particular occasion, and not generally for empowering him to sign any and all treaties. The same was true of a foreign minister. He doubted that a standing full-power was ever issued to empower a foreign minister or an ambassador to sign any and all treaties.

39. Paragraph 3 had been described as redundant or self-evident; but surely the communication or exhibition of full-powers was part of the law of treaties. The paragraph should be retained, but the phrase "by such means as are convenient" was not very apposite, for it had little if any, significance as a text of law. Either the means should be specified or else the phrase should be omitted.

40. Mr. TUNKIN observed that an example of the position mentioned in article 21, paragraph 1, was the Memorandum agreed by the USSR and Austria in April 1955, which had initiated Austrian neutrality. That document had not been signed, but only initialled by the Ministers of Foreign Affairs.

41. Mr. AMADO recalled, in connexion with the comments on article 21, that the so-called Locarno Pact<sup>3</sup> had been initialled in October and subsequently signed in London in December 1925. Again, the Treaty of Peace with Japan had been initialled at Washington in July and signed at San Francisco in September 1951. In practice, the interval between initialling and signing rarely exceeded a period of a few weeks.

42. The clause in article 20, paragraph 2, of the draft code concerning personal approval of the treaty on the part of the person signing or initialling gave rise to difficulty when read in conjunction with the provisions of article 21, for example, paragraph 2 of which said that "In all other cases, initialling is equivalent to a signature *ad referendum* and is itself, *ipso facto*, *ad referendum* . . .". It was not correct to confuse initialling with signature *ad referendum*: they were quite different things. Again, it was difficult to conceive of the case described in article 21, paragraph 2 (a), where a representative acted on his own initiative and without specific authority from his Government.

43. As to article 22, he said he did not know of any so-called standing full-powers to sign a treaty. The officials referred to at the end of paragraph 1 (a) might have a general authority to negotiate, but for the purpose of signature—the "act of the State"—specific full-powers were necessary.

44. In connexion with paragraph 4 and with the references made by several speakers to various types of agreements, he said that he could not conceive of any international agreement in which signature was not given on behalf of the State.

45. The CHAIRMAN said that evidently there was a desire for further discussion on article 21. He suggested that the article should be reopened for discussion when the Commission had completed its consideration of article 25, the last article of section B.

*It was so agreed.*

*The meeting rose at 6 p.m.*

<sup>2</sup> Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 53.

<sup>3</sup> Treaty of Mutual Guarantee, signed at Locarno on 16 October 1925. See League of Nations, *Treaty Series*, vol. LIV, 1926-1927, No. 1292.