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Summary record of the 502nd meeting

Topic:
Law of Treaties

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indicated and on the further understanding, in view of the observations just made, that in paragraph 4 a clause or sentence would be inserted to the effect that the absence of a statement of authority to sign would not affect the validity of the treaty if the necessary full powers to sign had in fact existed, that the words "is implied by the act of signature, or" would be omitted, and that the paragraph would be amended to take into account the Secretary's comment on the word "Plenipotentiaries".

It was so agreed.

The meeting rose at 1 p.m.

502nd MEETING

Wednesday, 27 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 23

1. The CHAIRMAN, speaking as Special Rapporteur, introduced article 23 and said that its principal application would be to a signature or initialling executed by a representative without the authorization of, and perhaps without communication with, his Government. It might be argued that the article was not strictly necessary if the earlier provisions regarding the validation of initialling and signature were retained.

2. Mr. FRANÇOIS thought that it might be useful to specify whether *ex post facto* validation dated from confirmation or was retroactive to the date of the unauthorized act.

3. The CHAIRMAN, speaking as Special Rapporteur, said that the operative date would depend on the nature of the unauthorized act that was validated. In the case of initialling it would be the date of full signature, and in the case of unauthorized signature, in effect a signature *ad referendum*, the validation would be retroactive to the date of the unauthorized signature.

4. Mr. PAL said that subsequent validation of an unauthorized act could not produce an effect greater than that which would have resulted if the act had been authorized. In his view the article was necessary in the code.

5. Mr. SANDSTRÖM also felt that the article was necessary. He failed to see the need for specifying from what date the validation became operative, since the unauthorized acts themselves produced no effect between the parties.

6. Mr. TUNKIN questioned the utility of article 23 in view of the Commission's decision to omit from articles 20 and 21 the references to personal approval and personal recommendation of the treaty on the part of the individual person signing or initialling.

7. The CHAIRMAN, speaking as Special Rapporteur, explained that article 23 related to acts performed by a representative without the knowledge or authorization of his Government, perhaps in an emergency; the representative's personal approval or recommendation was immaterial in the context.

8. Mr. TUNKIN said the Special Rapporteur's explanation had not convinced him. It was self-evident that a Government could decide to sign an agreement negotiated by an agent without its authorization or even negotiated by an unofficial organ.

9. Mr. LIANG, Secretary to the Commission, agreed that it might be useful to include an article such as article 23. It rested on a principal of the law of agency which, he thought, had common elements in the legal systems of all civilized States.

10. He suggested, however, that the words "The provisions of articles 15 to 22 above" were too general and that the relevance of article 23 to specific aspects of the treaty-making process should be made more evident.

11. The CHAIRMAN, speaking as Special Rapporteur, saw no objection to the Secretary's suggestion and subject thereto he suggested that article 23 should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 24

12. The CHAIRMAN, speaking as Special Rapporteur, introduced article 24. There was no need for comment on paragraph 1, which might be improved through minor drafting changes.

13. The principle in paragraph 2 became more obvious, the smaller the number of States participating in the negotiations, and was most clear, of course, in the case of bilateral treaties. On the other hand, it tended to become obscured in the case of large international conferences and there it might be thought that any State could subsequently sign the treaty. In his view, unless the treaty contained a provision admitting other States to signature, signature of the treaty would be limited to the negotiating States unless they decided by another agreement to open the treaty to other States. In the case of a treaty that had been signed or where the period for signature by the negotiating States had expired, the expression "signatory States" would denote not the original negotiating States but the parties to the agreement opening the treaty to other States.

14. Mr. LIANG, Secretary to the Commission, considered article 24 a useful article that should be included in the code. He said that the discussion on the articles immediately preceding article 24 had emphasized that signature was evidence not only of authentication but also of provisional acceptance. He suggested that the second part of paragraph 1 should be deleted.

15. He had no quarrel with the principle in paragraph 2, which, in his view, was recognized in practice. However, he considered the wording insufficiently flexible. If there was a stipulation in the treaty concerning the right of signature by States other than those which had participated in the negotiations, the matter was settled satisfactorily. In the absence of such a provision, the matter was subject to agreement by the negotiating States and not the signatory States, for a negotiating State might agree that States could sign without itself being able to sign. He suggested that paragraph 2 after the word "provides" might be amended to read: "or if it is agreed by all the negotiating States that other States may sign either at the time of signature provided for in the treaty, or during the period the treaty remains open for signature".

16. The CHAIRMAN, speaking as Special Rapporteur, agreed that it might be better to omit from paragraph 1 the words "in all cases where signature is the method of authentication adopted", and he also agreed

that the words "or if this is agreed" in paragraph 2 were not quite adequate because they referred to an agreement outside the scope of the treaty. Furthermore, the words "if it so provides" should be amended because some treaties, instead of specifying the non-negotiating States eligible to sign the treaty, specified a category of States as entitled to become parties.

17. As to the Secretary's other point, he thought that it was covered by the words "or (where the treaty remains open for signature) negotiating States".

18. Mr. TUNKIN said that if the code contained an article on the right to sign, it would also have to contain articles on the right to initial, the right to ratify, the right to deposit instruments of ratification and so forth. Article 24 raised the serious problem of the right to participate in a treaty; if that could be settled, the right to participate in the various stages of treaty-making would probably not have to be dealt with separately.

19. The first question was whether one group of States had the right to exclude all other States from participating in a treaty which dealt with a problem of general interest. One of the fundamental principles of modern international law was that of the equality of States, from which it followed that all States had equal rights to participate in settling problems which were of general interest. That principle should be embodied in the code.

20. The CHAIRMAN, speaking as Special Rapporteur, said that without commenting on the merits of a general article on the right to participate, he did not think that such an article could adequately deal with the right to sign, the right to ratify and the right to accede, since each of those rights was exercised under different conditions. In that connexion, he drew attention to articles 31 and 34.

21. Mr. YOKOTA said he could accept article 24 in principle and had no objection to paragraph 1. He pointed out that whereas paragraph 1 related to signature as a method of authentication, paragraph 2 dealt with signature as a method of provisional acceptance.

22. The words "in principle" in paragraph 2 were vague. The expression might mean that the right of signature was confined to the States participating in the negotiation, subject to the exception specified in the paragraph. On the other hand, it might mean that there were some exceptions, not specified, to the rule that States participating in the negotiations had the right to sign. If the first meaning was intended, it would be better to omit the words "in principle".

23. He doubted whether all the States participating in the negotiation of a treaty had an absolute right to sign. Treaties adopted at international conferences usually provided for signature by a certain date or within a certain period, and if a negotiating State failed to sign within the time specified, it did not thereafter have the right to sign. Perhaps it might be advisable to insert the words "except where the treaty otherwise provides".

24. The CHAIRMAN, speaking as Special Rapporteur, agreed to the omission of the words "in principle". Commenting on Mr. Yokota's second point, he said that all the negotiating States had the right to sign but any of them might choose not to exercise it. The point was dealt with in article 25.

25. Mr. AGO said that he would not discuss the substance of the very interesting question raised by Mr. Tunkin. The Commission might continue with its first reading and then consider whether a separate section of the code should deal with the right of participation of States in certain types of treaties.

26. As in the case of a previous article, he suggested that the words "faculty to sign" might be better than "the right to sign" in article 24.

27. With regard to paragraph 2, he had some doubts concerning the words "or if this is agreed to by all the original signatory or . . . negotiating States", and specially concerning the word "all". If a treaty was negotiated at an international conference, surely the participants in the conference could decide, by the same majority by which the treaty had been adopted, to permit other States which had not participated in the conference to sign the treaty; similarly, in the case of a conference called by an international organization the latter could surely make a like decision by a majority.

28. Mr. FRANÇOIS thought article 24 should contain a provision on the right of new States to sign a treaty even if the treaty was silent on the question. The code should regulate the manner in which States which had not been in existence at the time of the negotiation of a treaty could participate.

29. In that connexion, he asked whether the agreement of all the original signatory or negotiating States, as the case might be, was always necessary for the admission of new signatories. He had in mind treaties of long standing such as some of the Hague Conventions, which some of the original signatory States had not ratified after many years. He understood it was the practice of the Netherlands Government, as depositary of certain of those treaties, which contained no accession clause, to ask the consent of all the *parties*, in other words of all States which had *ratified* the treaty, when new States signified a desire to accede.

30. The CHAIRMAN, speaking as Special Rapporteur, said that a problem arose only where there was no accession clause in a treaty. He agreed, however, that the word "all" in paragraph 2 was too categorical and that the paragraph should be amended in the light of the remarks of Mr. Ago and Mr. François.

31. Mr. BARTOŠ observed that a striking example of the way in which a conference in which a large number of States participated might leave it to certain States to draw up the final draft of a treaty was the meeting of Foreign Ministers in Paris and New York in 1946 to draw up the Peace Treaties. The four great Powers and not the States which had been directly concerned had taken their own decisions and had drafted the text, and the other participants had subsequently signed it. That example raised the question whether the right to sign for the purpose of authenticating a text might be confined to the States which drew up the final text or whether all participants had that right. The occasion he had mentioned had been, in a sense, a derogation from the principle of the equal sovereignty of States, but the participants had accepted it. He endorsed, however, the principle embodied in article 24, paragraph 1, and would not suggest any amendment, but he suggested that the contrary example he had given should be mentioned in the commentary.

32. While agreeing with the principle of paragraph 2, he was doubtful if States which had not participated in the negotiations were eligible to sign for the purpose of authenticating the text. A clause dealing with cases where the original signatories had the exclusive right to authenticate the text and to participate in the treaty might be inserted in section C of the code. Paragraph 2

might require some redrafting, but the principle was sound.

33. Mr. PAL pointed out that the important question to be settled was what States had a right to participate in a treaty, and by what method. The method was dealt with in article 27, but the right to participate was nowhere stated, although the right to sign was in fact simply a consequence of that right. States which had not participated in the negotiations obviously had no right to sign for the purpose of authenticating the text. A clause dealing with the right to participate in a treaty, taken in conjunction with the article on the methods of participation, would logically determine what States had the right to sign.

34. The CHAIRMAN, speaking as Special Rapporteur, replied that it would certainly be possible to include a general article on the right to participate in a treaty, although that would not dispense with the need for separate clauses concerning the right of signature, the right of participation and the right of accession, since there were only three methods of participating in a treaty—signature, signature and ratification, and accession. That was why he had dealt with the matter under separate headings.

35. The Paris Peace Treaties of 1946 referred to by Mr. Bartoš had been very exceptional and the instance was unlikely to recur. Even for them, however, article 24 was strictly correct, since the negotiating States had been only the four Powers which had drawn up the text. The other States had been convened in conference, but, under the conference rules, they had had the right only to recommend or suggest changes in the basic draft, and it had been open to the Foreign Ministers of the four Powers either to accept or to reject those changes. The final text had been opened for signature in Paris.

36. Mr. Bartoš seemed to have misunderstood paragraph 2. It was improbable that there could be any case in which a signature only authenticated the text without also signifying provisional consent to it as a potential basis of agreement. Signature would always confer the right to ratify and so to participate in the treaty. It would, therefore, be impossible to permit States other than the original States to sign solely for the purpose of authenticating a text, and, in any case, authentication was essentially an act of those States which had participated in the negotiations, since they alone knew how the text had been established.

37. Mr. BARTOŠ agreed with the Special Rapporteur's remarks concerning paragraph 1. Only States participating in the final drafting could in fact be considered as participants in the negotiations. He had simply recalled a notable exception, which, he agreed, was unlikely to recur.

38. He agreed that he had misinterpreted paragraph 2, but thought the misunderstanding was due to the drafting; and if the drafting had confused a member of the Commission, it would be even more likely to confuse a jurist outside it.

39. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Bartoš that paragraph 2 needed redrafting. It was clear too, that the reference to authentication in paragraph 1 should be omitted.

40. Mr. TUNKIN said that the discussion had shown that the real problem was that of the right to participate in the treaty. Mr. Pal had correctly stated that signature should be considered as one specific mode of exercising the right to participate.

41. Paragraph 1 as drafted dealt only with signature as a mode of authentication and was thus logically placed in section B; but if the reference to authentication was omitted, the substance would be changed and signature would be regarded as a mode of participation in the treaty. Such a provision, however, would go beyond the framework of section B and the article would have to be moved. Logically, it would be far preferable to deal with the right of participation in a single article or section.

42. The CHAIRMAN, speaking as Special Rapporteur, said that Mr. Tunkin's point would be met if—as he was proposing to do—articles 20 to 25 were removed from section B and placed either in a separate section or in section C.

43. There seemed to be general agreement on the right, or absence of right, to participate in a treaty. That could be dealt with either by an article on participation as such or separately, in connexion with signature, ratification and accession, as in the present draft.

44. He accepted Mr. François's argument that there was no unilateral right to participate and that there must be some control over participation, and agreed with his main concern with the method of exercising the control and his view that it would go too far to require the consent of all the original signatories to the admission of new signatories. That point could, however, be met simply by drafting suitable clauses.

45. Mr. Tunkin's point was far more fundamental; he contended that any State had a unilateral right to participate in a treaty of general interest, whether it had participated in the negotiations or not and regardless whether it fell into the class of States envisaged by the treaty. That point required further discussion.

46. Mr. LIANG, Secretary to the Commission, drew attention to Mr. Ago's important point that if a State which had not participated in the negotiation wished to participate in a treaty, it might not be necessary to require all the original signatories to agree to permit it to sign the instrument. A conference might decide by a majority vote to invite a State which had not participated in the negotiations to sign the text. If that was done by resolution, then patently the vote did not have to be unanimous.

47. Article 24, paragraph 2, should be supplemented to cover the practice growing up in conventions concluded under the auspices of the United Nations. For example, article 26 of the Convention on the Territorial Sea and the Contiguous Zone[1] provided that States Members of the United Nations or of any of the specialized agencies might sign, and delegated authority to the General Assembly to invite any other State to become a party, although it might not have participated in the Conference. That was not the first occasion on which a conference held under United Nations auspices had adopted such a practice. The Commission's text might take that new procedural development in the United Nations into account.

48. Mr. BARTOŠ said that, as Mr. François had pointed out, there was a distinction in international practice between original signatories and subsequent

[1] *United Nations Conference on the Law of the Sea, Official Records, Vol. II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.52, pp. 132-135.

adherents to a treaty. Nevertheless, a new practice—described by the Secretary—had been evolved by United Nations conferences whereby conventions opened for signature might be signed by States which had not participated in the negotiations; under that practice, non-member States of the United Nations might participate in the signature of authentication, thus becoming original parties to the treaty adopted by such a conference. Accordingly, the distinction between phases of participation made by the Special Rapporteur was not as clear now as it had been in traditional practice, and the points raised by Mr. François, Mr. Pal, Mr. Tunkin and Mr. Ago should be taken into account. Theoretically, the principle as drafted by the Special Rapporteur was correct, but it did not conform with modern practice. The new development in international law should be reflected, either in article 24 or in the subsequent articles on participation in section C.

49. Mr. YOKOTA considered that the right to participate in the negotiation of a treaty and in the treaty itself should be distinguished from the faculty to participate. Every State with treaty-making capacity had the faculty to participate in the negotiation of a treaty that was of a general character and so affected the interests of all members of the international community. Nevertheless, it could not be said that every State had a right to become a party to such a treaty; the right *stricto sensu* was confined to the States which participated in the negotiations or were admitted to participation in the treaty by a provision in the treaty itself or by the consent of the original signatory or ratifying States. Similarly, so far as participation in negotiations or in a treaty-making conference was concerned the States which initiated the negotiations or conference could decide what States should be invited. An analogy might be drawn with the right or faculty to establish diplomatic or consular relations. Every State had the faculty to establish such relations by mutual consent, but it could not be asserted that a right in the matter existed, since no State could demand the consent of the other State.

50. Mr. HSU did not think that the Special Rapporteur would be able to draft a satisfactory rule to meet the points raised by Mr. François and Mr. Tunkin. In any case, he did not think that the absence of such a rule would have any adverse effects. The situation envisaged by Mr. François was unlikely to last for very long and would arise in the case of very few treaties. With regard to Mr. Tunkin's point, he said that treaties dealing with questions of general interest to the community of nations were so far-reaching that the question whether or not certain countries could become parties to them would be immaterial; acceptance by a large proportion of the countries of the world would ensure that no country would be penalized by non-participation. In his opinion, the principle set forth in article 24, paragraph 2, was sound, and would ensure that in future provisions concerning the participation of non-negotiating States in treaties of a general character would be inserted in the treaties themselves.

51. Mr. SANDSTRÖM said that—if he had understood him correctly—Mr. Ago had asked whether, in the case of a request by a country to accede to a treaty after signature, the majority rule would still apply if the treaty contained no accession clause or if, in the case of a treaty containing such a clause, the time limit for accession had expired. He believed that, in that case, the negotiations should be deemed to be exhausted and the contractual relations fixed; the situation could not therefore be changed without the consent of all the parties. That was the solution provided for in the Special Rapporteur's draft, and he wholly endorsed it.

52. Mr. FRANÇOIS observed that his point could be met simply by stipulating that, in the case of treaties already in force, the consent of the States which had ratified the treaty would be required for the participation of new States, while in the case of treaties not yet in force, the consent of the signatories must be obtained.

53. While he understood Mr. Tunkin's point of view, he doubted whether it was possible to prohibit sovereign States from concluding a treaty restricted to participants in the negotiations. True, Mr. Tunkin had spoken of treaties of a general character; but it was not always clear whether a treaty was "general" or not. States must have the right to conclude regional treaties and also to restrict the circle of the participants in other cases. A rule such as that envisaged by Mr. Tunkin would be very difficult to formulate. Did Mr. Tunkin mean that restriction of participation should never be allowed? Or did he mean that, if a treaty contained no restrictive participation clause, it should be assumed that all States could accede to it? In any case, if such a rule were formulated in the code it might be applicable to future treaties, but scarcely to existing ones.

54. Mr. LIANG, Secretary to the Commission, replying to Mr. Sandström's remarks, said that he had not understood Mr. Ago to go so far as to say that new States could be invited by a majority of the negotiating States to participate in a treaty after the time limit for signature or accession had expired. He thought that Mr. Ago had referred to a situation where the negotiating States at a conference might decide by a majority to invite specific States which had not participated in the negotiations to sign the treaty. In that case, the conference voting rules would be applicable, but after the treaty had been finally concluded, the conference procedure could no longer be applied.

55. He also drew attention to the case of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. Many countries had signed the Convention at the time of its adoption, and in accordance with a provision in the Convention the General Assembly had invited States which had not participated in the negotiations to sign the Convention. That procedure was implicity covered by the words "other States may be admitted to sign the treaty if it so provides" in the Special Rapporteur's draft of article 24, paragraph 2. As he had stated, a similar provision was made in article 26 of the Convention on the Territorial Sea and the Contiguous Zone.

56. He agreed with Mr. François that in the case of existing treaties it might be necessary to consult all the parties to a treaty, with a view to obtaining their consent to new accessions.

57. The CHAIRMAN, speaking as Special Rapporteur, said that in the light of the discussions he had prepared draft provisions which, he suggested, should be inserted in article 24:

> "1. Where the treaty specifies the States or categories of States which are entitled to participate in it, then only those States or categories of States can so participate. Where the treaty specifies the method or methods whereby the participation of other

States can take place, then such participation can only take place through those methods.

"2. Where the treaty does not so specify and contains no general accession clause, then the participation of other States can take place by the consent of the parties to it, if the treaty is in force, or, if the treaty is not in force, by consent of the signatory States."

58. A possible variation of that text would be to provide for some majority in the last phrase.

59. He agreed with Mr. Sandström that, if a treaty specified the parties, the contractual relationship had become fixed and the question of the admission of additional parties could not be reopened. Fresh negotiations would be necessary concerning the admission of newly-created States. In the case of certain old treaties which contained no accession clause, the problem of admitting new parties was subject to the consent of the parties, if the treaty was in force, or of the signatories if it was not in force.

60. Mr. BARTOŠ considered the Special Rapporteur's draft clauses satisfactory, because they took into account the United Nations practice of determining the States which could sign treaties although they had not participated in the negotiations. Despite the general trend towards universal co-operation, States did not have the absolute right to participate in all treaties. The States Members of the United Nations and members of the specialized agencies had the right to participate in treaties concluded under the auspices of those organizations, but they had not yet lost the capacity to enter into treaties outside the organizations, even treaties of general interest, with whatever States they chose.

61. Mr. TUNKIN, replying to Mr .François, said that the problem he had raised for the Commission's consideration was important and very complicated; it should not therefore be over-simplified and merely reduced to the question whether or not States had an absolute right to participate in every treaty. It was obvious that that right was absent in the case of bilateral treaties. In the case of multilateral treaties, however, it was questionable whether any State or group of States had the right to settle by treaty problems which were of interest to certain other States and to exclude them from participation or negotiation. While he would not press for a decision now, he wished to draw the Special Rapporteur's attention to the question, since it would inevitably arise in connexion with subsequent articles.

62. Mr. GARCIA AMADOR thought that the question was one of fundamental rights and that it was scarcely possible to draw up an acceptable article within the context of the law of treaties. The concept of an inherent right of every State to participate in treaties of "general interest" was extremely vague. Although some interests could be regarded as undeniably general —for example the law of the sea—it was not always easy to decide at what point an interest ceased to be "general" and become particular. For example, certain American regional treaties dealt with matters of general interest to the States of the region, but others touched on matters of more than purely regional interest. In such cases, it was difficult to say categorically what States were entitled to participate.

63. Mr. EL-KHOURI agreed with Mr. Tunkin that the question referred to in article 24 was an extremely complicated one. The Special Rapporteur had found it difficult to solve the problem of the right of States to sign treaties; it would be even more difficult, however, to draft a provision which took into account the duties of States in that respect, since it would touch on State sovereignty. Yet, surely there was no right without a corresponding duty.

The meeting rose at 1 p.m.

503rd MEETING

Thursday, 28 May 1959, at 10 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 24 (*continued*)

1. Mr. ALFARO considered that the new draft provisions suggested by the Special Rapporteur at the previous meeting (502nd meeting, para. 57) provided a good solution for the problem mentioned by Mr. François, concerning accession to existing treaties. He was sure, however, that the Commission could not envisage drafting an article on the purported right to participate in certain treaties, since no right to participate in a treaty could exist. There was no right without a corresponding obligation, and in international law there was no rule making it the duty of a State or group of States to accept another State as a party to a specific treaty. If a group of States wished to conclude a treaty affecting the interest of a State that was not invited to participate, the only course open to the latter was to declare that the treaty, if concluded, would be *res inter alios acta* and hence incapable of affecting that State in any way. Mr. Yokota had drawn an analogy with the "right" to establish diplomatic relations; the Commission had agreed that no such "right" existed, since the establishment of such relations was subject to mutual consent.

2. The CHAIRMAN, speaking as Special Rapporteur, thought that the first part of article 24, paragraph 1, should be retained and that the provisions he had suggested at the preceding meeting should replace paragraph 2. The Commission might decide to send the article to the Drafting Committee.

3. The only point that remained to be settled was whether the idea of consent by a majority of the existing parties to the admission of a new party should be introduced. Theoretically, if the unanimous consent of the existing parties was required, two or three parties could exclude a new State by withholding their consent. He thought that if a majority of three-quarters or two-thirds were established, that would be enough to ensure general approval, but would prevent any one State from exercising a veto. That idea might be referred to the Drafting Committee.

4. Mr. TUNKIN thought that in paragraph 2 the passage "The right . . . but" should be omitted and that the paragraph should begin with the words "Other States may be admitted to sign . . .". It would be more progressive to lay down no specific rule concerning the right of signature but to leave the matter to the parties concerned. The problem of unanimous or majority consent raised some doubts, in cases where