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Summary record of the 638th meeting

Topic:
Law of Treaties

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without first considering the most important of the definitions.

68. Referring to the point raised by Mr. Verdross, he said that it could happen that negotiations between two or more states resulted in a text which took the form of one or more apparently unilateral declarations; such declarations should not be excluded from the scope of the draft. The matter was of some importance because the Secretary-General of the United Nations, following the practice of the Secretariat of the League of Nations and in accordance with decisions of the General Assembly, did accept certain unilateral texts for registration in accordance with article 102 of the Charter.

69. The element of negotiation was fundamental for all treaties, including those expressed in the form of a unilateral declaration, and that should be stressed, and was indeed implied in the word "concluded" in article 1 (a). Nor did the definition of an international agreement as being one in "written form" exclude a unilateral act if the circumstances in which it was made brought it within the concept of a treaty.

70. Mr. BARTOŠ said he was not surprised at the divergence of views provoked by Mr. Verdross's remark, which, like that of Mr. Yasseen, had been prompted by considerations of formal logic with a view to keeping the text clear at any price of any notion of municipal law. His own view, based rather on state practice, was that unilateral declarations to which other states attributed a contractual character fell into at least four groups: declarations *urbi et orbi* such as the Balfour Declaration; declarations required and made under a treaty; declarations such as those on the breadth of the territorial sea, which were notified to but not expressly accepted by third states; and declarations followed by the conclusion of a treaty.

71. The special rapporteur had been right in referring to unilateral declarations as acts which were not treaties in the technical sense and to which the draft articles could not be applied in a formal manner. The international consequences of such unilateral acts would have to be determined by judicial decisions or by other means, and not regulated by the conventions they were preparing.

72. Mr. TABIBI said that the Commission was indebted to the special rapporteur for his report and for following its instructions so closely.

73. He agreed with Mr. Bartoš that certain unilateral declarations affected relations between states and should come within the scope of the law of treaties. Some of them, such as those relating to the right of self-determination, were of vital importance to the cause of the protection of human rights. The point was certainly not of a drafting character.

74. Like other speakers, he considered that it would have been preferable to discuss article 1 before article 2.

75. Mr. TUNKIN congratulated the special rapporteur on his report. Whatever procedure the Commission adopted, once it came to article 5 it would certainly have to take up the question of definitions.

76. There was much force in the objection raised by Mr. Verdross to article 2, paragraph 2, but perhaps it could be retained for the time being, pending receipt of the comments of governments.

77. He would be interested to know for what reason the special rapporteur had added the words "or otherwise" in article 2, paragraph 3; those words did not appear in article 1, paragraph 2, of the 1959 draft and might so broaden the clause as to make it unacceptable.

78. Mr. CASTRÉN, after congratulating the special rapporteur on his report, suggested that the Commission should follow the example of the Vienna Conference of 1961 and consider the definitions before discussing the other articles. At the conclusion of the first reading, it could then go back to article 1 to see whether it required revision.

79. He saw no objection to combining paragraphs (a) and (b) of article 1, but the definition should proceed from the general to the particular.

80. He agreed with Mr. de Luna that the words "possessing international personality" were superfluous.

81. Article 2, paragraph 1, might with advantage be condensed by substituting the words "treaty as defined" for the words "international agreement which under the definitions laid down".

82. Sir Humphrey WALDOCK, Special Rapporteur, replying to comments on the order of the articles, explained that he had deliberately chosen the method of laying down definitions in article 1 and defining the scope of the draft in article 2, which referred back to article 1. He had contemplated the alternative possibility of including the definitions of "international agreement" and "treaty" in article 2, but had decided that his own choice was neater and more consonant with the general structure of the draft. The same problem of method was likely to arise again in connexion with the articles dealing with ratification and accession.

83. He believed that the Commission should maintain the distinction between international agreements and treaties.

84. Mr. AMADO considered that each term should be defined in the substantive provision in which it was first used.

The meeting rose at 6 p.m.

638th MEETING

Thursday, 8 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of item 1 of its agenda; he suggested that it might be preferable to try and reach agreement on

paragraphs (a) and (b) of article 1 before proceeding with article 2.

It was so agreed.

ARTICLE 1. DEFINITIONS

Paragraphs (a) and (b)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, in the light of the discussion at the previous meeting, he had concluded that it should be possible to combine paragraphs (a) and (b) to form a single definition, even though in the past the Commission had seemed inclined to keep the definition of "international agreement" separate from that of its form and attributes which conferred upon it the character of a treaty.

3. He accordingly suggested that the Commission should refer to the drafting committee a text which would read:

"'Treaty' means any international agreement in any written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol . . . or any other appellation) which is intended to be governed by international law and is concluded between two or more states or other subjects of international law having capacity to enter into treaties under the rules set out in article 3."

4. That redraft took account of the objections to the phrase "possessing international personality" which, though admittedly not essential, he had inserted because subordinate units of a state might have some constitutional rights to enter into treaties directly. In such cases the question arose whether it was the subordinate unit or the parent state that was the party to the treaty. The problem was a real one, but it might perhaps be considered in connexion with article 3.

5. Mr. TSURUOKA asked why the special rapporteur had introduced the phrase "intended to be" in his definition. The phrase did not appear in article 2 of the 1959 draft. He thought it was not necessary to inquire into the intentions of the parties.

6. With regard to the phrase "possessing international personality", which the special rapporteur had agreed to omit, it was not clear from the provision as originally drafted whether the phrase applied only to "other subjects of international law"; if that was the case, it was redundant. Some authorities held that even an individual could be a subject of international law, and that view had been admitted in certain reparation cases.

7. Mr. CADIEUX, after congratulating the special rapporteur on his report, said that, while he had no objection to the procedure being followed in the discussion, the Commission should answer the questions posed by the special rapporteur in his introduction, in particular, whether the articles should form a single convention or several conventions, and whether the proposals concerning the scope of the articles were acceptable. Personally, he would reserve judgement on the question whether the treaties of international organizations should be covered, until he had studied the special rapporteur's chapter on that subject.

8. Referring to the comments made at the previous meeting on article 2, he welcomed Mr. Castrén's suggestion for condensing paragraph 1. He also agreed with Mr. Bartoš that in paragraph 2 reference should be made to unilateral declarations which could have a contractual character and some of the attributes of a treaty, and might affect third states which had had no part in the preceding negotiations. An example was the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947,¹ which imposed obligations for the maintenance of peace and security in the American continent, but in the drawing up of which Canada had not participated. The status of unilateral declarations was not clear, and the Commission should not give the impression that its decision that they would not be covered by the draft implied any legal judgement as to their nature. Perhaps the matter could be dealt with in the commentary.

9. He would be grateful if the special rapporteur would explain why article 2, paragraph 2, referred to "or any other form of international act" and why the words "or otherwise" had been added at the end of paragraph 3.

10. Mr. JIMÉNEZ de ARÉCHAGA, after congratulating the special rapporteur on his report, said that apart from the divergence of view on the point raised by Mr. Verdross concerning article 2, paragraph 2, the suggestions made during the discussion were not incompatible; indeed, the comments indicated a general consensus of opinion on the main issues. It was agreed that treaties were written agreements between two or more states or other subjects of international law and were governed by international law, and that the draft should not apply to all types of international agreements or unilateral declarations. It should not be difficult for the drafting committee to prepare a text in the light of the discussion, and of the decisions reached at the eleventh session.

11. Mr. GROS said he did not think that the Commission could turn itself into a drafting committee. The discussion had now reached the stage where the new combined text for paragraphs (a) and (b) proposed by the special rapporteur could be referred to the drafting committee.

12. Mr. Tsuruoka had asked whether the intention that it should be governed by international law had to be present for an agreement to be an international agreement. The answer to that question depended on the content of the treaty concerned. Whatever wording was adopted in the Commission's draft, the intention of the parties would always have to be sought in order to ascertain whether any given treaty was "intended to be governed" by international law. In the 1959 draft, article 2 expressly stated that an international agreement meant. The answer to that question depended on the substance was discussed in paragraph 2 of the commentary on article 1 of the draft now before the Commission (p. 15).

13. Technically, any agreement between states, of

¹ *United Nations Treaty Series*, Vol. 21, p. 77.

however minor a character, could be made into an international agreement or formal treaty by the will of the states, if they wished to create international obligations. An example was the agreement between France and Switzerland to enable the runway of the Geneva airport to be extended; it was in the form of a treaty, although the specific purpose of the agreement was comparatively trivial and scarcely involved the rules of international law.

14. It was not always easy to determine the line of demarcation between an international obligation entered into by states by virtue of an undertaking governed by international law—in other words by a treaty—and an obligation arising out of an undertaking which was not a treaty, drawn up by states which had not chosen to employ the treaty procedure, though they intended to enter into an undertaking which could at least in part be governed by international law, such as, for example, a contract or a loan agreement involving arbitration subject to the rules of international law. The Commission should state explicitly that its draft would not cover cases where contractual obligations between states, not in the form of treaties, were nevertheless to some extent subject to some of the rules of international law. For example, loan agreements with an international organization or between two states frequently provided that the law applicable was either international law or the law of a third state and that the competent jurisdiction was a court of a third state or an arbitral tribunal whose competence was defined by reference to general principles and to the rules of international law.

15. The commentary on paragraphs (a) and (b) should state clearly that the Commission had adopted a formal distinction to the effect that the law of treaties was solely the law of international obligations deriving from international agreements governed by international law. The fact that the Commission's draft did not deal with other instruments creating international obligations between states and did not affect the binding force or the obligatory character of such instruments should perhaps be stated in the body of the articles.

16. Mr. TUNKIN said that the special rapporteur's suggested redraft of paragraphs (a) and (b) should be broadly acceptable and might be referred to the drafting committee. The reference to "other subjects of international law", which presumably meant almost exclusively international organizations, might be retained in the definition, even if the draft did not cover that particular subject.

17. He had some doubt as to the wisdom of including the phrase "intended to be", and would welcome an explanation on that point from the special rapporteur.

18. Mr. AGO said that the special rapporteur's redraft of paragraphs (a) and (b) was a great improvement and wholly acceptable. The Commission should not be too theoretical in its definitions; its draft on the law of treaties should certainly open with a definition of "treaty", but should avoid defining the notion of "international agreement".

19. He did not think the phrase "intended to be" should be retained, for it would imply—erroneously—

that the parties would be free to decide whether the treaty made between them would or would not be governed by international law. For example, an arrangement for an exchange of territory inevitably affected territorial sovereignty and thus had to be regarded as an international agreement, different in nature from an agreement for the acquisition of premises for a diplomatic mission—an example mentioned in paragraph 2 of the commentary on article 1 of the special rapporteur's draft—and that independently of the will of the parties.

20. He considered that paragraph 3 of article 2 should be transferred to the definitions article to follow the redraft suggested by the special rapporteur for the existing paragraphs (a) and (b).

21. Mr. PAREDES agreed with Mr. Amado that the draft should not contain too many definitions and that the first two in article 1 should be combined.

22. In his view, not only states and international organizations, but also individuals could be subjects of international law; that view should be reflected in the definition.

23. The Commission should throw some light on the thorny problem of what types of agreement, though possessing the formal aspects of a treaty, could not be regarded as such by reason of their scope and subject matter and would therefore remain outside the application of the present articles.

24. Mr. YASSEEN said he could not agree that only a drafting point was raised by Mr. Tsuruoka's question concerning the words "intended to be". They seemed to imply that it would depend on the will of the parties whether an agreement was or was not governed by international law. That was certainly not always the case; the character of the agreement was surely one of the decisive elements. For instance, it was inconceivable that a treaty concerning the territorial sea should not be subject to international law, whatever might be the will—even the expressly declared will—of the parties.

25. Mr. VERDROSS said he did not believe there was any substance in the special rapporteur's argument that the qualifying phrase "possessing international personality" was necessary to cover the case of subsidiary units of a state which could conclude treaties; it was self-evident that, if they could do so in their own name, they were subjects of international law and hence *ex hypothesi* possessed international personality, even though to a limited extent. He therefore urged the deletion of that tautologous phrase.

26. Mr. ELIAS pointed out that the phrase in question had been dropped in the special rapporteur's suggested redraft of paragraphs (a) and (b) which should be generally acceptable, if agreement could be reached on the deletion of the words "intended to be". So far as those words were concerned, he said there was a close analogy between municipal and international law. Under English law the parties to a contract, defined as an agreement between two or more parties which was enforceable at law, could still provide in particular cases that it was a gentleman's agreement and therefore not intended to be subject to law. It could hardly be

contended that such an issue might be left to the will of the parties and that a dispute submitted to the International Court of Justice could not be considered by that body because the parties had stipulated that the agreement in question would not be governed by international law. In such a case, provided that the parties had accepted in advance the Court's compulsory jurisdiction, it would be proper for the Court to determine whether an agreement was an international agreement in the commonly accepted sense.

27. The word "governed" should not be construed to mean that an international agreement, to be subject to interpretation by the International Court of Justice, had to comply in every respect with the legal concept of a treaty under international law.

28. Mr. TUNKIN said that he had some doubts about the phrase "or other subjects of international law", which might create confusion in the application of the convention. He wished merely to bring the point to the attention of the drafting committee, which would undoubtedly have to discuss it when it came to article 3. He would prefer that the words "intended to be" should be omitted.

29. Mr. LIANG, Secretary to the Committee, said that there had been some confusion in the meaning attributed to the expression "intended to be governed by international law". It was clear that, in a sense, all treaties had to be governed by international law, although the provisions of a particular treaty might, by agreement of the parties, be regulated by specific rules. That was perfectly permissible under international law and did not mean that such an agreement was not, in fact, governed by international law. In that case, the problem was that of the application of rules under special law, which might differ from the general law. He agreed with Mr. Tunkin that the phrase "intended to be" was unnecessary and might give rise to complications.

30. Mr. ROSENNE said that the drafting committee might consider whether the words between brackets in paragraph (b), as well as article 2, paragraph 3, should not be removed from the definition and placed in the commentary. The appellation would not matter greatly so long as the instrument came within the scope of the definition of "treaty", and the list might be confusing as it was not exhaustive. The question whether the phrase "intended to be governed" or simply the word "governed" was preferable might ultimately be a matter of drafting; he personally would prefer the 1959 text, and it should be made clear that the expression "international law" meant "general international law". Furthermore, an agreement between the parties to the effect that some other system of law should be applied to a treaty entered into between them would itself be governed in the first instance by international law; the International Court of Justice would undoubtedly apply the basic rules of international law before going on to examine the other system of law agreed upon by the parties as applicable to the treaty.

31. With regard to the remarks of Mr. Paredes, he said that a written agreement between an individual and an

international organization would not necessarily be governed by general international law. The International Court of Justice, in its Advisory Opinion on the Effect of Awards of Compensation made by the United Nations Administrative Tribunal of 13 July 1954,² had stated that those contracts of service were governed by the internal law of the United Nations, which was different from general international law.

32. Sir Humphrey WALDOCK, Special Rapporteur, said that he had included the words "intended to be" because transactions between states were of various kinds and included transactions in the nature of commercial contracts. Sometimes those transactions were expressed to be governed by a particular system of private law—in other words, by the rules applicable to contracts in that system. Even if the hypothesis were to be accepted that it was international law which determined that such a transaction was governed by private law, still it seemed clear that the transaction was outside the concept of a treaty. It seemed to be analogous to "choice of law" in conflicts of law. However, the point would still be covered, even without the words "intended to be" and he was ready to omit those words, since they might give rise to misunderstanding. The other points, he thought, could be referred to the drafting committee.

33. Mr. EL-ERIAN said that suggestions for the deletion of the phrase "possessing international personality", and that it was identical in meaning with "subjects of international law", raised some doubts. He was not sure that a subject of international law necessarily possessed international personality. The position of the individual in international law, for example, had been changed by the inclusion of the provisions on fundamental human rights in the United Nations Charter and by the Convention on Genocide. The individual might be recognized as a subject of international law, but he did not possess international personality, for all purposes, as appeared from the International Court of Justice's exposition of the concept of limited international personality in the case of Reparation for Injuries suffered in the Service of the United Nations.³

34. Mr. de LUNA, commenting on the phrase "intended to be governed by international law", said that in the case of a treaty between states or between a state and an international organization, the status of the instrument in international law would not depend entirely on its nature but also partly on the will of the parties. He did not think that a general principle could be laid down by reference to which one could divide interstate contracts into "*jure imperii*" contracts which were governed by international law, and contracts which by their nature were "*jure gestionis*" contracts and were not governed by international law. Each case would have to be considered in the light of the circumstances.

35. The CHAIRMAN observed that the special rapporteur had defended but abandoned the words "intended to be governed". There were many points

² *I.C.J. Reports*, 1954, p. 47.

³ *I.C.J. Reports*, 1949, p. 182.

which were mainly matters of drafting. The drafting committee would take the discussion into account and submit a revised draft to the Commission.

36. He suggested that paragraphs (a) and (b), as amended, should be referred to the drafting committee and that the Commission should proceed to consider article 2.

It was so agreed.

ARTICLE 2. SCOPE OF THE PRESENT ARTICLES

37. Sir Humphrey WALDOCK, Special Rapporteur, said that if article 2, paragraph 1, was read in the light of the decision taken on article 1, paragraphs (a) and (b), it would be possible to accept Mr. Castrén's suggestion for simplifying it to read, in part: "The present articles shall apply to every treaty as defined in article 1, paragraph (a)."

38. Paragraph 2 raised more complications, because Mr. Verdross had criticized the reference to unilateral declarations and the phrase "or any other form of international act". He (Sir Humphrey) could accept the omission of the latter phrase, which had been inserted *ex abundante cautela*, but a more substantive problem arose in connexion with the passage concerning unilateral declarations. It had been suggested by some members that a provision concerning such declarations should appear elsewhere in the draft; others had said that the passage should stand. He had not reached any final conclusion. One course might be to deal with the matter in the commentary, but it might be possible to find a form of words if the reference were placed in a different context.

39. Mr. TSURUOKA said he was somewhat uneasy about the drafting of paragraph 2, which at first sight gave the impression that an international agreement not in written form was being placed on the same footing as a unilateral declaration. The obscurity could probably be removed by redrafting. The paragraph should refer to international agreements not in written form which were excluded because they were not treaties within the meaning of the definition, and state that the provisions would not apply to unilateral declarations to the extent that they were not treaties.

40. Mr. TUNKIN said that article 1 stated that, for the purposes of the draft convention, a treaty meant an international agreement in written form, and article 2, paragraph 1, said in essence that the convention would apply only to such treaties. Logically, therefore, paragraph 2 should state simply that the convention would not apply to agreements not in written form; the words "or a unilateral declaration or any other form of international act" could be omitted. It would probably be better to retain the language of article 1, paragraph 3, of the 1959 draft. The phrase "is excluded" was not a very happy one; the phrase "does not relate" used in the 1959 draft was preferable.

41. Mr. LIU said that, since Mr. Verdross had raised the question of unilateral declarations, many members had spoken about the importance of a provision concerning such declarations. He was inclined to think that the

passage was not really necessary; but if so many members considered that it was, he would have no strong objection.

42. Mr. LIANG, Secretary to the Commission, agreed that it would be undesirable to place international agreements not in written form and unilateral declarations on the same footing. He was somewhat perturbed about the classification as a "unilateral declaration" of the declaration under article 36(2) of the Statute of the International Court of Justice, as the special rapporteur did in paragraph 2 of the commentary on the article under discussion. As a matter of theory that was perhaps possible, but such declarations could not be regarded as anything other than agreements or treaties within the meaning of the definition in article 1, paragraph (a), of the draft. He held the view that those declarations constituted treaties themselves, though contained in separate instruments, and he thought that was also the view of many states. In fact those declarations were in practice required to be submitted to the legislature for action in accordance with the ratification process provided for in the laws and constitutions of the states.

43. Sir Humphrey WALDOCK, Special Rapporteur, said that his own view was that declarations under article 36(2) of the Court's Statute were similar in nature to instruments of accession. The answer to the question would depend on whether the Commission wished to speak of treaties in the absolute sense, or of treaties for the purpose of the draft articles. The 1959 draft, which had taken the form of a code, contained an express provision, in article 1, paragraph 3, which stated: "nor does it [the code] relate to unilateral declarations or other instruments of a unilateral character, except where these form an integral part of a group of instruments which, considered as a whole, constitute an international agreement, or have otherwise been expressed or accepted in such a way as to amount to or form part of such an agreement." He had assumed that, by including a definition of "treaty", his draft would cover all forms of transactions between states. Admittedly, the draft did not show clearly enough whether unilateral declarations were to be covered by the definition of "treaty". The International Court of Justice in the *Anglo-Iranian Oil Company Case*⁴ had adopted a somewhat different attitude towards the interpretation of a text which was in the nature of a unilateral declaration.

44. Mr. BRIGGS said that paragraph 2 seemed to say not only that nothing in the draft articles would affect the legal force of unilateral declarations but also that nothing in those draft articles related to such declarations. Such a statement might be appropriate in a draft on the conclusion of treaties, but was questionable in a draft on the interpretation or the termination of international agreements; it would be undesirable to exclude by implication the possibility of applying by analogy, to unilateral declarations, such as those accepting the compulsory jurisdiction of the International Court of Justice, the rules relating to the interpretation and termination of treaty obligations.

⁴ *I.C.J. Reports*, 1952, p. 93.

45. In the same paragraph, he was unable to see the purpose of the words "or any other form of international act". It was clear from the context that "other form" meant neither written international agreements, nor unwritten international agreements, nor unilateral declarations. What then did it mean?

46. He strongly supported the proposal by Mr. Tunkin that paragraph 2 should deal only with the position of international agreements not in written form; also, the paragraph should be in the same terms as the 1959 text, which stated that the draft articles did not relate to such agreements, instead of stating that those agreements were excluded.

47. Mr. AGO said he approved the special rapporteur's amended text for paragraph 1.

48. Paragraph 2 raised a question of substance. The proposed text was very different from that accepted in 1959; in a sense it said almost the opposite. Article 1, paragraph 3, of the 1959 text, after stating that the draft code did not relate to unilateral declarations, added: "except where these form an integral part of a group of instruments which, considered as a whole, constitute an international agreement, or have otherwise been expressed or accepted in such a way as to amount to or form part of such an agreement". That language made it clear that, for example, declarations under article 36 (2) of the Statute of the International Court of Justice were intended to be covered by the code. The provision before the Commission, on the contrary, stated only that unilateral declarations were not covered by the draft articles, adding that that fact did not affect such legal force as those declarations might possess.

49. He was, therefore, inclined to agree with Mr. Tunkin that the reference to unilateral declarations should be dropped from paragraph 2. That question of substance once decided, the drafting would be greatly simplified. It was even possible to say nothing on the subject; since the Commission was concerned with the codification of the law of treaties, there was no reason why anyone should infer from its draft articles that the legal force of acts other than treaties was in any way affected by those draft articles. Perhaps an indication in the commentary to that effect would be sufficient.

50. If it were desired to go even further in the direction of safeguarding the validity of international obligations created by unilateral declaration, a provision might be added to the effect that there existed acts other than treaties which were capable of giving rise to international obligations; he did not himself favour the inclusion of such a provision, although he might accept it if there was a strong feeling in its favour.

51. Mr. ELIAS suggested as a compromise solution to the difficulty the deletion of paragraph 2 and its replacement by a redrafted paragraph 3 reading:

"2. Nothing contained in the present articles shall affect in any way the enforceability of an unwritten international agreement which is otherwise valid or the characterization or classification of particular international agreements under the internal law of any state in accordance with its domestic constitutional processes."

52. That text would be much shorter and would contain the essence of the provisions in the existing paragraphs 2 and 3. An explanation could be provided in the commentary on the subject of unilateral declarations.

53. Mr. AMADO said he agreed with the statements by Mr. Tunkin, Mr. Ago and the special rapporteur. The Commission had been invited to study the subject of treaties, not that of unilateral declarations. He commended the special rapporteur for his sense of proportion which had led him to avoid many issues with which earlier rapporteurs had endeavoured to grapple, as the result of a somewhat perfectionist approach. The more modest and practical aims set for himself by the special rapporteur would ensure the approval of his report by the Commission.

54. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Tunkin's view that the question of international agreements not in written form and that of unilateral declarations should not be mentioned in the same clause. He could not agree, however, that they should be placed on different levels and that article 2 should refer to the former, but that the draft should not mention the latter. The two questions should be treated separately but in the same manner, and he suggested that the Commission should agree on provisions to cover them both. Those provisions would be based on the 1950 text and on the special rapporteur's report. After the Commission had agreed on a formulation, it could decide whether the two questions should be treated in the text or in the commentary. He would prefer that both should be dealt with in the commentary.

55. A reference to the question of the validity of unilateral declarations was necessary in order to cover the practice of joint unilateral declarations.

56. Mr. TSURUOKA pointed out that the decision on the retention of the provision on unilateral declarations depended on the answer to a question which the Commission had not as yet settled. If, as the special rapporteur proposed, there was to be a separate convention on the subject of the conclusion of treaties, there would be no objection to dropping the reference to unilateral declarations. There was little or nothing in the rules on the conclusion of treaties which could apply to such declarations. When, however, the Commission undertook the codification of the rules governing the law of treaties as a whole, including in particular those relating to the validity of treaties, it would perhaps be necessary to refer to unilateral declarations; some of the rules on the validity of treaties could be pertinent in relation to such declarations.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that, apart from the question of joint unilateral declarations, there was another problem for the Commission in connexion with unilateral declarations. He would be prepared to adjust the language of article 2, paragraph 2, so as to bring it closer to that of article 1, paragraph 4, of the 1959 text: the net effect of both texts was the same.

58. If paragraph 2 were confined to the question of international agreements not in written form, the ques-

tion would arise whether a further paragraph dealing with unilateral declarations should be added.

59. As far as the question of unilateral declarations of the pure kind was concerned, he would prefer it to be dealt with in the commentary. Because of the very nature of the draft articles on the law of treaties, such declarations were outside the scope of the draft.

60. He was, however, concerned at the question of unilateral declarations which were closely interconnected. Some forms of treaties appeared as joint unilateral declarations, and such declarations were covered by the very comprehensive language of article 1, paragraph 3, of the 1959 text. There occurred in international practice exchanges of declarations so similar to exchanges of letters that it was not easy to see the difference between the two; some formula should be found to cover that class of instrument and to distinguish between pure unilateral declarations and unilateral declarations which were so closely related that they constituted nothing more than a technique for the conclusion of an agreement.

61. Mr. AGO asked whether the question of closely related unilateral declarations was not already covered by the definition of a treaty in article 1, paragraph (b): "any international agreement... whether embodied in a single instrument or in two or more related instruments"; in fact, the definition went on to add "whatever its particular designation", mentioning parenthetically a number of examples of such designations, one of which was "declarations".

62. Sir Humphrey WALDOCK, Special Rapporteur, said that that was his own interpretation of the definition. However, in view of the discussion which had taken place in the Commission, it was perhaps desirable to make the matter clear in the commentary.

63. Mr. EL-ERIAN said that Mr. Amado had rightly pointed out that the Commission was dealing with the law of treaties proper; the main point, therefore, was to make that fact clear either in the text or in the commentary, so as not to prejudice the validity which other acts might possess in international law. In that connexion, he recalled the teaching of Anzilotti on the doctrine of juridical acts [*théorie des actes juridiques*]; that doctrine started from a study of unilateral acts and then went on to consider treaties.

64. The whole question of unilateral acts was therefore important and he asked the special rapporteur and the Secretary to the Commission whether a later study of unilateral acts was envisaged.

65. Mr. YASSEEN said he agreed with the special rapporteur and Mr. Ago. However, since it was possible to conclude a treaty by an exchange of notes, he could not see why it was not possible to conclude a treaty by an exchange of written declarations. As intimated by the special rapporteur himself, such an exchange would be only one special technique among others for concluding a treaty; that technique should not be excluded from the scope of the rules formulated in the draft articles.

66. Mr. TUNKIN pointed out that his suggestion

regarding article 2, paragraph 2, had been made on the understanding, expressed by Mr. Ago, that the definition in article 1 covered all written forms of international agreements. Even if, as suggested by Mr. Rosenne, the enumeration of possible designations were transferred to the commentary, the definition in the text would still be broad enough to cover any international agreement in written form, howsoever designated. It would therefore cover an exchange of unilateral declarations which was considered as a treaty.

67. He would not be opposed to such an explanatory paragraph, but it would not add anything to the rules of the law of treaties.

68. Mr. ROSENNE thought that the explanations given by previous speakers showed that the problem was beginning to resolve itself. There was no doubt that an actual exchange of declarations constituted an international agreement. That, however, did not solve the problem of unilateral declarations which were not so exchanged. In certain cases, there was some element of agreement in the negotiations preceding declarations which were ostensibly unilateral. That element of agreement could have the effect of turning such declarations into a treaty.

69. Mr. CADIEUX said that if there were two concurrent unilateral declarations the case was covered by the definition. However, there were cases where a unilateral offer might be made otherwise than in writing, but the acceptance be given in writing. Some writers considered that the acceptance created treaty relations; others held the contrary view. It was important for the Commission to say that nothing in the draft articles prejudiced the validity which such exchanges of declarations might have.

70. Mr. LIANG, Secretary to the Commission, said that the special rapporteur, by introducing the term "unilateral declaration of a pure kind", had clarified the question under discussion and taken the Commission a step further in its exploration of the subject.

71. A declaration made by a state under article 36(2) of the Statute of the International Court of Justice was a declaration in name only. In nature, it was no different from a declaration under the Optional Protocol concerning the Compulsory Settlement of Disputes signed at Vienna in 1961⁵ in connexion with the Convention on Diplomatic Relations. There was no reason to treat declarations under article 36(2) of the Statute differently from declarations under the Vienna Protocol.

72. A declaration under article 36(2) of the Statute of the Court, although labelled a unilateral declaration, constituted an instrument ancillary to and an implementation of article 36. It was important to make it clear that the rules relating to such matters as the interpretation and the termination of treaties applied to declarations under article 36(2) of the Statute; otherwise much of the value of the draft articles would be lost.

73. Mr. AMADO urged Mr. El-Erian and Mr. Yasseen not to press for the consideration of exchanges of

⁵ United Nations Conference on Diplomatic Intercourse and Immunities (A/CONF.20/12).

unilateral declarations. An exchange of declarations would merely duplicate an exchange of letters or an exchange of notes. The procedure of exchange of notes was part of established state practice; he did not think that states would accept provisions of the draft articles which referred to unilateral declarations.

74. As he had pointed out earlier, the whole of article 2 was superfluous. There was an infinite variety of unwritten agreements, and there could be no doubt that the Commission's codification would not affect such validity as those agreements might possess.

75. Of course, unilateral declarations could constitute an international agreement or amount to or form part of such an agreement, as set forth in article 1, paragraph 3, of the 1959 text.

76. Mr. YASSEEN, replying to Mr. Amado, said that it was the expression of the will of the parties which was the important characteristic of treaties; the form which it took was immaterial. There was therefore no heresy in suggesting that it was possible to conclude a treaty by means of an exchange of unilateral declarations. If those declarations were made in writing, there was no reason why that technique should not come within the scope of the draft article under discussion.

77. Mr. EL-ERIAN, also replying to Mr. Amado, said that there had been no intention on his part to confuse the question of unilateral declarations with that of an exchange of notes, which was clearly a case of a treaty proper. As an instance, just before he left for the session of the General Assembly last autumn, a treaty on cultural matters had been concluded by his country with the United Kingdom. The Under-Secretary of the Ministry of Education of the United Arab Republic had been anxious to leave for London for the purpose of implementing the agreement, but as the British Ambassador had not at that time received full powers to sign the treaty, the possibility had been considered of adopting the form of an exchange of notes, for which the British Ambassador did not require full powers of signature.

78. His remarks had been made in a different context. He had merely wished to learn from the special rapporteur and the secretariat whether, as a matter of long-term planning, a study of the question of unilateral declarations was proposed and he looked forward to receiving a reply on that point.

79. Mr. AGO said that there was no disagreement with regard to substance. Declarations under article 36 (2) of the Statute of the International Court of Justice were certainly covered by the draft articles; in that respect, he fully agreed with the view put forward by the Secretary to the Commission.

80. It was also agreed that, for the purposes of the article, an exchange of related declarations by two states constituted a treaty. That was made clear by the definition of "treaty" in article 1. The relation between the two declarations would result from their subject matter.

81. A different case had been mentioned by Mr. Cadieux, that where one of the declarations was in

writing and the other was not; in fact, there might also be only one declaration, followed by the silence of the other party, where silence could be construed as consent. Those forms of tacit agreement were not covered by the draft articles.

82. For those reasons, he supported Mr. Tunkin's proposal that the draft articles should contain a provision reserving the validity of tacit agreements.

83. He proposed that article 2 should be referred to the drafting committee.

84. Sir Humphrey WALDOCK, Special Rapporteur, supported Mr. Ago's proposal; the views of all members had now been made clear and he would have no difficulty in accepting a draft prepared by the drafting committee in the light of the discussion.

85. Mr. BARTOŠ also supported Mr. Ago's proposal. Mr. Cadieux had aptly illustrated the problem of substance arising from the claim made on occasion that certain circumstances could give rise to a treaty. As he had pointed out earlier, the draft articles would not aspire to judge the question whether the rules relating to treaties applied to certain unilateral declarations; the question whether there was any contractual element in such declarations and the applicability of the law of treaties to them were questions for the competent international court or arbitral tribunal in each case.

86. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 2 to the drafting committee, together with the comments made by members during the discussion.

It was so agreed.

The meeting rose at 1 p.m.

639th MEETING

Wednesday, 9 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

ARTICLE 3. CAPACITY TO BECOME A PARTY TO TREATIES

1. The CHAIRMAN invited the special rapporteur to introduce article 3 of his draft.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like first to make some general remarks on the article, which dealt with the international capacity of the parties to the treaty, their treaty-making power from the purely international point of view; he realized that it was a complex and controversial matter but thought that some such provision was necessary. The question of the authority of the representatives to conclude a treaty was dealt with in article 4.

3. Article 3 did not touch on the question of the internal processes of constitutional law relating to the conclusion of treaties; that question belonged to the subject of the