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Summary record of the 643rd meeting

Topic:
Law of Treaties

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643rd MEETING

Tuesday, 15 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 article 5 of the special rapporteur's draft.

ARTICLE 5. ADOPTION OF THE TEXT OF A TREATY (*continued*)

2. Mr. YASSEEN said that, like other members, he doubted the need for the classification of treaties into plurilateral and multilateral. The distinction might be useful in a few provisions, such as those relating to accession and reservations, but it would be hard to find criteria which would avoid all confusion, as the special rapporteur himself had admitted.

3. So far as the voting procedure for the adoption of the text of a treaty was concerned, he agreed that unanimity should remain the general principle, but, in view of recent developments in the law of treaties, a distinction should be drawn between multilateral treaties drawn up at international conferences convened by an international organization, and those drawn up in an international organization. A conference, whether convened by states or by an international organization, was master of its own procedure, whereas in the case of a treaty prepared by an international organization the rules governing adoption were laid down in or derived from the constitution of the organization concerned.

4. If paragraph 2 were retained, paragraph 3 would be needed. States should not be at liberty to rely on the terms of paragraph 2 if they committed any act which might prejudice the purposes of the treaty, or to claim that paragraph 2 relieved them of all international obligation arising out of their participation in the adoption of the text of a treaty. He therefore advocated the retention of paragraph 3. He was impressed by Mr. Ago's cogent defence of paragraph 3, but could go no further; the Commission could not take it upon itself to define the content of the obligation so incurred. Paragraph 3 was a saving clause and stressed that paragraph 2 did not release states from all obligations under other rules of international law.

5. The words "general principles of" could with advantage be deleted from paragraph 3, in order to make it quite clear that the reference was to any obligation arising from any rule of international law.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Amado had described article 5 as a "vestibule". It was rather an important vestibule, for it referred to the stage at which the content of the treaty was formulated; authentication was usually more or less automatic once the content had been accepted. Thus the voting rules governing the adoption of a treaty were very much a matter of substance.

7. His purpose in drawing the distinction between multilateral and plurilateral treaties in article 5 had been to emphasize the differing assumptions about voting rules in paragraph 1, sub-paragraphs (*b*) and (*c*), but he was fully prepared to drop the distinction if a suitable redraft could be found. The Commission would have some difficulty, however, in finding a formula that would cover both plurilateral and multilateral treaties, as it would need to do when it came to deal with signature, accession and reservations. He would be the first to welcome some method of evading the difficulty by making the distinction early in the draft. He entirely agreed that the attempted definitions did not cover every case. A change of appellation would not help, since the difficulty was substantive, nor was a solution easily found by drawing a distinction between law-making treaties and contractual treaties. As Rousseau had pointed out, treaties so often partook of the nature of both law-making treaty and contractual treaty.

8. He had divided multilateral treaties into three separate groups, dealt with in sub-paragraphs (*c*), (*d*) and (*e*), because article 8, paragraph 2, of the 1959 draft had seemed to him quite wrong in classifying treaties emerging from international conferences convened by international organizations with treaties drawn up in international organizations. The more usual practice seemed to be that the voting rule was decided by the conference itself. It had been suggested that sub-paragraph (*d*) was unnecessary and should be amalgamated with sub-paragraph (*c*). He could agree to that if the Commission was satisfied that there was no need to mention the special class of treaties dealt with in sub-paragraph (*d*).

9. In paragraph 8 of his commentary, he had referred to the special case of the International Labour Organisation, whose constitution prescribed in detail the method by which treaties concluded under its auspices should be drawn up. To cover cases of that kind, and a few similar ones where the organization itself provided the voting rule, a saving clause might be included if sub-paragraphs (*c*) and (*d*) were amalgamated, in order to avoid appearing to force a rule of international law on the constitution of an international organization. Whether in fact international organizations ever drew up a voting rule before a conference was convened he did not know. If they did not, sub-paragraphs (*c*) and (*d*) could safely be amalgamated, with the inclusion of the saving clause he had suggested.

10. With regard to the re-draft of paragraph 1 submitted by Mr. Jiménez de Aréchaga at the previous meeting, perhaps it would be simplest to mention, first, treaties drawn up at an international conference, then treaties drawn up in an international organization and then to state that in other cases the text would be adopted by the consent of all parties unless they decided to accept some other rule. Since, however, in some of his other draft articles he had mentioned bilateral treaties first, and had then gone on to refer to treaties drawn up in an international organization, it might be better, for the sake of symmetry, to maintain the sequence. The drafting committee could easily settle

that point, and Mr. Jiménez de Aréchaga's draft might be referred to it, with certain amendments which he, as special rapporteur, had prepared.

11. He could accept the deletion of the second sentence in paragraph 2 beginning *"A fortiori"*, as urged by Mr. Castrén and Mr. Verdross; it had appeared in weaker form in article 8 of the 1959 draft, but was not necessary.

12. He agreed, however, with Mr. Yasseen that if paragraph 2 were retained, paragraph 3 should be retained also, because an isolated strong negative at the beginning of paragraph 2 might create an inference that states were bound by no obligations whatsoever during the drawing up of a treaty; a necessary safeguard of the rules of international law should therefore be stated in paragraph 3.

13. It seemed to him from the previous day's discussion that some members had not appreciated the very limited character of paragraph 3 and the purpose with which it had been formulated in 1959. That was partly his own fault for not having reproduced *in extenso* the commentary of 1959. If, as he hoped, the Commission decided to retain paragraphs 2 and 3, it would have to include in its final report a passage from the 1959 commentary, say paragraphs 4 and 5 of the commentary on article 8,[1] to explain that paragraph 3 was simply a saving paragraph to avoid excluding a rule which might or might not exist, and so was intended to leave the question entirely open.

14. He would be willing to omit the words "general principles of" if they created any misunderstanding as to the source of the obligation, but would urge the retention of paragraph 3, for use in cases where a court might have to determine a specific point.

15. Mr. AMADO, drawing attention to article 9 of the draft convention prepared by the Harvard Research,[2] said he had used the word "vestibule" because no one would deny that states which disagreed with the content of a treaty were free to retire from negotiations which were still fluid. The Commission would be assuming a heavy responsibility if it suggested that mere negotiations might give rise to any obligations over and above those imposed on every state by the requirements of good faith.

16. Sir Humphrey WALDOCK, Special Rapporteur, suggested that Mr. Amado's point might be met if, in paragraph 3, the phrase "in the adoption of the text of a treaty" were substituted for "in the drawing up of a treaty". Article 8, paragraph 2, of the 1959 draft referred to "the negotiation"; paragraph 3 of his draft referred to the "drawing up of a treaty", which was the next stage, but he would be perfectly willing to refer instead to the further stage, which was the adoption of the text.

17. Mr. AMADO suggested that paragraphs 2 and 3 should be merged so as to place less emphasis on paragraph 2 and stress the principle of good faith implicit in paragraph 3; the combined paragraph would then read more or less: "Although the participation of a state in the adoption of the text of a treaty, whether in negotiation or at an international conference, does not place it under any obligation whatsoever, nevertheless nothing contained in this article shall affect any obligation it may have, under general principles of international law, to refrain for the time being from any action that might frustrate or prejudice the purposes of the proposed treaty, if and when it should come into force."

18. Mr. LIANG, Secretary to the Commission, said that the special rapporteur's clarification of the purpose of paragraph 1, sub-paragraphs (*d*) and (*e*), should go a long way towards dispelling any misapprehensions. His draft was a great improvement on article 6, sub-paragraph 4 (*d*), of the 1959 draft. The special rapporteur had suggested that if the two situations contained similar elements, the two sub-paragraphs might be assimilated and a saving clause introduced, but there was nothing to warrant assimilation.

19. In actual fact, none of the existing international organizations had any constitutional provision that governed the voting procedure where a multilateral treaty was drawn up at a conference convened by an international organization. In paragraph 8 of his commentary, the special rapporteur had given the example of the International Labour Organisation as justifying the inclusion of sub-paragraph (*d*), but the International Labour Conference was a part of the International Labour Organisation, not a conference convened by it. He could not recall any example which fitted the situation described in sub-paragraph (*d*).

20. The outstanding example of a treaty concluded in an international organization was probably the Genocide Convention of 1948, which had been drawn up by the Sixth Committee of the General Assembly, and the Assembly had applied its own rules of procedure. Although those rules contained nothing about the adoption of conventions, article 18 of the Charter had been applied and all the articles of the Genocide Convention had been adopted by a two-thirds majority.

21. For an international conference convened by an international organization, the secretariat drew up provisional rules of procedure which the conference adopted with whatever amendments it considered necessary and desirable. He had not been able to find any example where an international organization had made any decision about the voting procedure for a conference convened by it. The nearest approach was the International Atomic Energy Conference, which had not been an organ of the United Nations but had been convened by it. The Conference had been preceded by a preparatory committee which had recommended that all decisions should be taken by a two-thirds majority vote. For the purpose of preparing the Conference, the preparatory committee had performed the same functions as the Secretariat in proposing the voting rules; the adoption of the voting rules had been a matter for the Conference itself.

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[1] *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 102.

[2] *Supplement to the American Journal of International Law*, Vol. 29, No. 4, October 1935, p. 778.

22. Mr. GROS said that the Commission was discussing matters which should really be dealt with by the drafting committee. Article 5 could be referred to the drafting committee since, with one exception, which was a point of substance, the remaining points were purely drafting points. The adoption of the text of a treaty was obviously one of the essential steps in treaty making.

23. On the question of the voting procedure of an international conference being settled by the organ which convened the conference, there was one example which had not been quoted and that was the Paris Conference of 1946, where the Ministers for Foreign Affairs had settled that decisions of the Conference should be by a two-thirds majority. In organizing and preparing the general conference of states, the Council of Ministers for Foreign Affairs could be regarded as having acted as an organ of the community of states.

24. The point of substance which the Commission should discuss further before the whole draft article was referred to the drafting committee was that raised by Mr. Amado. Paragraph 2 admittedly stated the obvious, but that was sometimes inevitable in a draft convention like the one under discussion; paragraph 3 was more controversial. He would be inclined to accept what had been accepted by the Commission in its commentary on article 8, paragraph 2, of the 1959 draft. There might be some doubt as to the nature of the obligation involved, but not as to its existence. Mr. Amado had pinned his argument to the principle of good faith, but other explanations had been advanced in 1959, such as the doctrine of abuse of rights or a rule implied by the general international law of treaties. The Commission had left the question open in 1959, and was under no greater obligation to make a choice in 1962. He might prefer the suggestion of Mr. Ago and Mr. Bartoš that the Commission should merely allude to the existence of an obligation without going any further towards defining it than it had done in 1959.

25. The Commission was obviously contemplating the omission of the classification of treaties, although it would have to face that problem in connexion with subsequent articles, such as those dealing with accession and reservations. Even the classification into bilateral and plurilateral treaties was not entirely watertight, for it could not be said that the basic criteria for bilateral treaties were different from those which applied to plurilateral treaties. It would therefore be preferable to close the discussion and refer to the drafting committee the draft of paragraph 1 on the simplified lines suggested by Mr. Jiménez de Aréchaga, while retaining paragraph 2, as drafted by the special rapporteur, and paragraph 3, as simplified by Mr. Ago and Mr. Bartoš.

26. Mr. LIU said that it was not necessary to make too refined a classification of the different forms of multilateral treaties. The merit of article 5 was that it would provide definite guidance with regard to voting procedure.

27. He agreed with the views of the Secretary regarding the purpose of sub-paragraphs (*d*) and (*e*) of paragraph 1, but differed from him regarding the distinction between the instances covered by those two sub-paragraphs.

28. The wording of sub-paragraph (*d*) would, in his opinion, also cover the cases mentioned in sub-paragraph (*e*). Whether a treaty was drawn up at an international conference convened by an international organization or actually in an international organization, there was no difference in substance. The drawing up of the treaty was in both cases an act of the participating states. Even in the instances described in sub-paragraph (*e*), the act of collective drafting and adoption was not an act done within an international organization as such.

29. Since both sub-paragraphs arrived in fact at the same result, the wording of sub-paragraph (*d*) would be sufficient to cover also the cases referred to in sub-paragraph (*e*). That wording safeguarded the constitutional provisions, if any, of the organization concerned and at the same time provided the necessary flexibility for the adoption of any rules of procedure which the participating states might decide upon.

30. It seemed to him that the distinction between the cases mentioned in sub-paragraphs (*d*) and (*e*) lay in the composition of the conference rather than in the manner of drawing up the text or of convening the conference.

31. The CHAIRMAN suggested that draft article 5, paragraph 1, be referred to the drafting committee with Mr. Jiménez de Aréchaga's revised draft and the further drafting points made by Mr. Elias.

It was so agreed.

32. The CHAIRMAN said that the Commission appeared to have agreed to delete the second sentence in paragraph 2, but had not yet agreed whether to delete paragraph 3 or to retain it with drafting changes. He suggested that the point should be discussed further before paragraphs 2 and 3 were referred to the drafting committee.

33. Mr. TSURUOKA said that if paragraphs 2 and 3 were to be retained, or combined in one paragraph as suggested by Mr. Amado, a problem would arise which he would like to have clarified. For instance, if a convention were adopted by the International Labour Organisation, but neither signed nor ratified, could paragraphs 2 and 3 be construed to mean that a member state of the International Labour Organisation would be debarred from enacting legislation at variance with the terms of the convention?

34. Mr. AMADO repeated his suggestion that paragraphs 2 and 3 should be merged; Mr. Gros' remarks had strengthened the case for that suggestion. The formulation which he had suggested would make it clear that the statement contained in the first sentence of paragraph 2 was the reaffirmation of a self-evident principle.

35. With regard to the classification of treaties, the most appropriate one was that based on their legal nature. Some treaties were of a normative character and laid down objective rules of international law; they were law-making treaties. Other treaties were subjective in

character and resembled contracts in that they related to the interests of the parties to the treaty. The essential difference between the two kinds was that only in the second kind was there any *do ut des*; in law-making treaties there was no question of any consideration given by one party to the other in return for the latter's corresponding undertaking.

36. Mr. AGO said that, in Mr. Tsuruoka's example, states remained completely free to enact legislation at variance with a convention adopted by an International Labour Conference, but not ratified by them. In doing so, they would not violate any international obligation, nor would they in any way frustrate or prejudice the purpose of the convention; and if the state concerned subsequently ratified the convention, it would be perfectly possible for it to amend its internal legislation accordingly.

37. The provisions under discussion were intended to cover a totally different situation. It was possible for a state to take measures relating to a property or a territory which would make it impossible to carry out the provisions of the treaty when it came into force, and that situation ought to be avoided.

38. He supported Mr. Amado's suggestion for the amalgamation of paragraphs 2 and 3.

39. He recalled the suggestion he had made at the close of the previous meeting that the drafting committee should be asked to formulate an article on the negotiation of treaties.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that he had omitted from his draft the 1959 provisions on the negotiation of treaties because those provisions seemed to him more a statement of fact than of law; they indicated merely how things were actually done.

41. If, however, a text were desired on the subject he did not think the drafting committee would have any difficulty in formulating one on the basis of the 1959 provisions.

42. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to Mr. Ago's suggestion.

It was so agreed.

43. Mr. VERDROSS, replying to Mr. Tsuruoka, pointed out that paragraph 3 did not establish any categorical rule. It did not purport to lay down what a state could or could not do, but merely indicated that, if in the circumstances any obligations existed under the general principles of international law, those obligations were not in any way affected by the draft articles.

44. Mr. TSURUOKA said that he was second to none in his devotion to the principle of good faith, but a provision such as paragraph 3 might lend itself to arbitrary interpretation. Its vague formulation could inhibit a scrupulous country from taking legitimate action.

45. The changes which the special rapporteur had agreed to introduce into the provisions under discussion went a considerable way towards dispelling his doubts. He noted, however, that those provisions referred to "the purposes of the proposed treaty". That reference could give rise to controversy because a particular clause of a treaty might be regarded as essential by one country participating in the negotiations but not by another.

46. The CHAIRMAN said that the point raised by Mr. Tsuruoka had been the subject of considerable discussion in 1959 but that the Commission had then decided to retain a provision similar to article 5, paragraphs 2 and 3, of Sir Humphrey's draft.

47. In the circumstances, he suggested that the Commission should decide tentatively to retain paragraphs 2 and 3 and refer them to the drafting committee, together with the observations made during the discussion. The Commission could then pass on to the consideration of article 6.

It was so agreed.

ARTICLE 6. AUTHENTICATION OF THE TEXT AS DEFINITIVE

48. Sir Humphrey WALDOCK, Special Rapporteur, said that no introduction was necessary for article 6, which repeated with minor drafting changes the provisions of article 9 of the 1959 draft.

49. Mr. BRIGGS drew attention to the statement in paragraph 2 that a text might be authenticated with respect to a particular state. Surely, if a text were authenticated, it should be authenticated with respect to all states.

50. Sir Humphrey WALDOCK, Special Rapporteur, explained that what he had had in mind was the case of an exchange of notes or letters. The notes or letters would in many cases not be signed on the same date, with the result that the authentication would take place separately for each of the states concerned.

51. Mr. ELIAS suggested the deletion of the words "as definitive" from the title of article 6. In view of the definition in article 1 (*g*) of "authentication" as the act whereby the text of a treaty was "rendered definitive *ne varietur*", they were redundant.

52. He also suggested that in sub-paragraph 1 (*c*) the words "in any other manner prescribed" be replaced by the words "in the manner prescribed".

53. As he saw it, a resolution of one of the organs of an international organization was a resolution of the organization itself, since the organization would have to adopt formally the decision of its organ.

54. Mr. CASTRÉN said he supported the suggestion by Mr. Elias regarding sub-paragraph 1 (*c*), provided that it could be fitted into the language of the corresponding sub-paragraph 1 (*c*) of article 9 of the 1959 draft.

55. He preferred the 1959 formulation because it made clear that a resolution of an organ of an international organization was a resolution of the organization itself.

56. He noted that the second sentence of paragraph 3 was based on a passage in the commentary on article 9 of the 1959 draft. That sentence was not strictly neces-

sary but it would do no harm, so he would not oppose its retention.

57. Mr. LACHS said that the case of exchanges of notes or letters was a very important one. Recent statistics showed that some 40 per cent of all bilateral treaties concluded in the world now took the form of such exchanges. In addition, multilateral treaties sometimes also took the forms of exchanges of notes or letters and, although rare, examples of such a practice could be cited from the time of the League of Nations. It was therefore desirable that the Commission should consider the question of the authentication of treaties concluded by exchanges of notes or letters.

58. Another case which should be considered was that of agreements not expressed in the form of a signed document, but only in a communiqué issued at the end of the conference. Since there was neither signature nor initialling of a document, oral agreement to the publication of the communiqué would appear to amount to authentication of the text.

59. Lastly, the case should also be considered of agreements incorporated in the final act of a conference. The practice had recently developed, however, of drawing up two documents at the end of a conference: a final act, which was usually signed by all participants, and a separate treaty or convention, as with the 1959 Supplementary Convention on the Abolition of Slavery[3] and the 1958 Geneva Conference on the Law of the Sea.[4]

60. Mr. TSURUOKA said that he had the same difficulty as Mr. Briggs in relation to paragraph 2.

61. The paragraph might, however, be necessary to cover the case where one state initialled a treaty for purposes of authentication, while another actually signed it instead of initialling it. It would seem that for the latter state signature covered also authentication.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that he was working on the assumption that some sort of authentication took place in every treaty. In the case of exchanges of notes or letters, to which reference had been made by Mr. Lachs, authentication took place with the attachment of signature. In the vast majority of cases, the signature of the letter or note was also the act which authenticated the text.

63. Very occasionally, however, exchanges of notes were made subject to ratification. In that case, the signature would be the authenticating act.

64. There was nothing in the provisions of article 6 which would conflict with existing practice in the matter of exchanges of notes or letters.

65. As for a treaty which took the form of a communiqué, he assumed that the communiqué would have to be adopted in some way. The Commission would encounter great difficulties if it endeavoured to cover every possible case.

[3] *United Nations Treaty Series*, Vol. 266, p. 40.

[4] *United Nations Conference on the Law of the Sea*, Official Records, Vol. II (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 146.

66. The suggestion by Mr. Elias concerning the title of the article could be referred to the drafting committee.

67. As regards the other suggestion by Mr. Elias, relating to sub-paragraph 1 (*c*), he would be prepared to restore the 1959 text. It was sufficient to refer to a resolution of an organ of an international organization, since the organization would always have to act through one of its organs. But the reference to "any other manner prescribed by the constitution of the organization concerned" was necessary in order to cover certain special cases. For example, in the International Labour Organisation, it was the Director-General's signature which constituted the formal authentication, and not the resolution adopted by the Organization. The matter was explained in the 1959 commentary on article 9.

68. The CHAIRMAN said that if there were no objection, he would consider that the Commission approved article 6, subject to drafting changes, so that it could now be referred to the drafting committee, and the Commission could pass on to consider article 7.

It was so agreed.

ARTICLE 7. THE STATES ENTITLED TO SIGN THE TREATY

69. Sir Humphrey WALDOCK, Special Rapporteur, said that article 7 raised the general question whether the draft articles should contain some reference to the inherent right of states to sign a general multilateral treaty. The matter had been discussed by the Commission in 1959, and the 1959 commentary on the corresponding article 17 set forth the opinions then expressed by members of the Commission on that point.

70. In 1959 the Commission had arrived at the conclusion that the issue could not be divorced from the question of the procedure for the adoption of a treaty. Accordingly, it had decided to defer consideration of article 17 until it came to consider the provisions on accession. Unfortunately, the Commission had never reached the provisions on accession.

71. Perhaps the Commission should consider whether the article on the right to sign a treaty should be discussed at that stage or whether discussion should be postponed until the provisions on accession were debated.

72. Mr. BRIGGS suggested that consideration of article 7 be postponed until the Commission took up the articles concerning accession.

73. Mr. LACHS supported that suggestion.

74. Sir Humphrey WALDOCK, Special Rapporteur, said he saw no objection to that course; in the meantime the Commission could continue work on the provisions relating to the more formal clauses of a treaty.

It was so agreed.

ARTICLE 8. THE SIGNATURE OR INITIALLING OF THE TREATY

75. Sir Humphrey WALDOCK, Special Rapporteur, said that the article reproduced, with some modifications, the content of articles 10 and 16 in the 1959 draft. He considered that provisions concerning the time and place of signature should be linked with those

concerning the signature or initialling of the treaty.

76. Mr. de LUNA suggested, as a drafting amendment, that the word "conditional" be substituted for the word "provisional" in sub-paragraph 2 (*a*).

77. Mr. GROS said that, although he was aware that sub-paragraph 3 (*a*) (i) was modelled on article 10, paragraph 2, of the 1959 draft, he felt bound to point out that it would not be easy to determine the intention referred to in the provision.

78. The remainder of the special rapporteur's text was acceptable and could be referred to the drafting committee.

79. Mr. BARTOŠ said that, in the past, the initialling of a treaty by a Head of State with the intention that it should be equivalent to a full signature would have been regarded as binding on the state, since a sovereign could not go back on his word. Under modern conditions, initialling might not always connote a final commitment.

80. Mr. PAREDES said that article 8 was of great importance, but should take into account those cases where, under constitutional law, the signature of a treaty needed parliamentary approval.

81. Mr. YASSEEN said he agreed with Mr. Bartoš's observation concerning the effect of initialling in modern times.

82. The CHAIRMAN suggested that, in the absence of further comment, article 8 be referred to the drafting committee.

It was so agreed.

ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE

83. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no comparable article in the 1959 draft and that the article had not been easy to formulate because it overlapped with other articles. He believed, however, that such an article was necessary.

84. Perhaps the Commission might find it convenient to consider the article paragraph by paragraph. The first question that would arise in connexion with paragraph 1 was whether, in fact, it was needed at all. He had inserted it for the sake of completeness.

85. Mr. BARTOŠ said that the article raised a problem of drafting, inasmuch as a state should be treated as one single entity and not as two different entities, one of which signed a treaty and then submitted it for ratification to the other.

86. He welcomed the "good faith" clause in sub-paragraph 2 (*c*), in view of the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification. The Commission had not discussed that practice to any great extent when preparing the 1959 draft.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that the practice mentioned by Mr. Bartoš was covered by article 20, paragraph 6, but that that provision might require amplification.

The meeting rose at 12.30 p.m.

644th MEETING

Wednesday, 16 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 9. LEGAL EFFECTS OF A FULL SIGNATURE (*continued*)

Paragraph 1

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 9, suggested that it be discussed paragraph by paragraph; the substance of paragraph 1 had already been accepted with the approval of article 6, paragraph 2.

2. Mr. TABIBI said that the special rapporteur had prepared a useful article which, as he had himself admitted, had not been easy to draft satisfactorily. A signature, whether only for the purpose of authentication or whether constituting the signature of a treaty that did not require accession or ratification, clearly had some legal force and created certain obligations, for it was an act of the state, though in the exercise of its sovereign power the state was free to withdraw its signature. On that point he agreed with the opinion of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, quoted in the special rapporteur's commentary, that the signatory state entered into some intangible obligation, a view supported by the draft convention on the law of treaties prepared by the Harvard Research. The Permanent Court of International Justice had also recognized in the Polish Upper Silesia Case [1] that a signatory state's misuse of its rights in the interval before ratification might amount to a breach of the treaty.

3. On a point of drafting he observed that the language of paragraph 1 was not altogether clear. It did not indicate what happened in cases where signature did not amount to an act of authentication and where the text was authenticated in some other way agreed on by the parties or by persons other than those representing the parties; for example, the General Act for the Pacific Settlement of International Disputes of 1928 had been authenticated by the President of the League of Nations Assembly and the Secretary-General of the League.

4. Paragraph 1 was closely linked with paragraph 3 and so should be moved.

5. Mr. TSURUOKA suggested that the drafting committee should be asked to eliminate the overlap between article 6, paragraph 2, and article 9, paragraph 1.

6. Mr. CASTRÉN said it would suffice if article 6, paragraph 2, were simply referred to in article 9, paragraph 1.

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[1] P.C.I.J., Series A, No. 7, 1926, p. 30.