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Summary record of the 782nd meeting

Topic:
Law of Treaties

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best possible formulation and then leave it to States to call for its deletion if they did not think it worth including.

94. Mr. AGO proposed that the Commission should refer article 5 to the Drafting Committee. In so doing it would not be committing itself either way, since it would still be free to delete or retain the Drafting Committee's revised text.

95. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Ago's proposal.

96. Replying to the Special Rapporteur, he said that although, in connexion with article 70, he had opposed the idea that the preparatory work must necessarily be taken into account in interpreting treaties, he had never denied that it might be of some value for their interpretation. Moreover, " talks " should not be confused with " negotiations ".

Article 5 was referred to the Drafting Committee.[9]

The meeting rose at 1.5 p.m.

[9] For resumption of discussion, see 811th meeting, paras. 83-90.

782nd MEETING

Wednesday, 12 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 6 (Adoption of the text of a treaty)

Article 6

Adoption of the text of a treaty

The adoption of the text of a treaty takes place:

(*a*) In the case of a treaty drawn up at an international conference convened by the States concerned or by an international organization, by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to adopt another voting rule;

(*b*) In the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question;

(*c*) In other cases, by the mutual agreement of the States participating in the negotiations.

1. The CHAIRMAN invited the Commission to consider article 6, for which the Special Rapporteur had prepared a revised text reading:

Article 6

1. The adoption of the text of a treaty takes place by the mutual agreement of the States participating in its drawing up, subject to paragraphs 2 and 3.

2. In the case of a treaty drawn up at an international conference, adoption of the text takes place by the vote of two-thirds of the States participating in the conference, unless

(*a*) By the same majority they shall decide to adopt a different voting rule;

(*b*) In the case of a conference convened by an international organization a different rule is prescribed by the established rules of the organization.

3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place in accordance with the voting rule applicable in the competent organ.

2. Sir Humphrey WALDOCK, Special Rapporteur, said he had little to add to his report (A/CN.4/177). At its fourteenth session, the Commission had considered that the article served a useful purpose.

3. One of the main points of substance was the voting rule at international conferences where the negotiating States had not agreed to establish rules of their own. The Commission had considered that, in case any difficulties arose, it would be advisable to have a residuary rule on which a conference could proceed.

4. The Government of Luxembourg had raised the point that in small conferences it would be natural to follow the rule of unanimity (A/CN.4/175, section I.12). The article provided that States could adopt whatever rule they wished, so the possibility of recourse to that rule was not jeopardized. He had nevertheless endeavoured to place more emphasis on the unanimity rule by redrafting the article in such a way as to refer to it in the first paragraph instead of the last.

5. Mr. YASSEEN said that the rule proposed in article 6 was useful because it took account of the observable trend in positive international law and provided a starting point for regulating the procedure for the adoption of treaties.

6. The Special Rapporteur had been right to place first, in his revised text, the provision which appeared at the end of the draft article adopted by the Commission in 1962. It was logical to state the principle of unanimity first, since it was still the general rule in international law.

7. The revised text then stated a rule which was in conformity with practice, for at most conferences the majority required for adoption of the text of a treaty was two-thirds. However, the two-thirds majority rule applied only to general multilateral treaties ; he did not think it could be applied at a regional conference or a conference of a small group of States. He therefore suggested that in paragraph 2 the words " at an international conference " be amended to read " at a general international conference ".

8. Paragraph 2 (*b*) of the revised text introduced a change of substance. It dealt with the case of a conference convened by an international organization. The text adopted by the Commission in 1962 laid down the two-thirds majority rule for such conferences, and did not

mention the possibility that a different voting rule might be prescribed by the established rules of the organization. He would like the Special Rapporteur to clarify that point.

9. Sir Humphrey WALDOCK, Special Rapporteur, said he had wished to take into account the view expressed by the Government of Luxembourg regarding small organizations having a rule requiring unanimity. A specific provision reserving the established rules of international organizations was included in a number of articles, and the same question had arisen in connexion with his proposal to widen the scope of article 48 on treaties which were constituent instruments of international organizations. It was only logical that, if it was the established practice of an organization to draw up treaties within the organization and to employ settled voting rules, the Commission should include a reservation to cover that practice.

10. Mr. YASSEEN said he understood why the Special Rapporteur had taken that view, but thought it lessened the value of the article because most international conferences were now convened by international organizations.

11. Sir Humphrey WALDOCK, Special Rapporteur, said his present view was that reservations of that kind should be limited to treaties drawn up within organizations. The phrase " a conference convened by an international organization " was too wide.

12. Mr. CASTRÉN said he approved of the revised text proposed by the Special Rapporteur. The changes were only drafting amendments except for paragraph 2 (*b*), as Mr. Yasseen had just pointed out.

13. He was unable to support the suggestion made by some governments that the article, or some of its provisions, should be deleted. In his view, their criticisms were not pertinent, and the Special Rapporteur had convincingly refuted them in his report.

14. Article 6 contained a very useful residual rule which the Commission had thought it advisable to adopt in 1962.

15. Mr. LACHS said he was in favour of retaining the article ; it served a useful purpose and indicated the current trend of development, while leaving States freedom of action whenever they wished to act otherwise. The new draft was in many ways superior to the previous one, especially as the Special Rapporteur had taken into account a number of comments by governments.

16. He had been right to disregard comments referring specifically to regional conferences. Such conferences came within the ambit of specific arrangements concluded by the States concerned, whereas the Commission was dealing with general conferences.

17. He considered the order of presentation correct, but, like Mr. Yasseen, he thought the relationship between paragraphs 2 (*b*) and 3 should be made clearer, since they overlapped. In using the words " convened by ", paragraph 2 (*b*) covered both conferences convened within an organization and conferences convened under the auspices of an organization. Such conferences might take place within the existing machinery of the organization or outside that machinery. If they took place within the existing machinery, then paragraph 3 applied, because within that machinery there must always be " a competent organ " and the rules applying to particular organs did not apply to the organization as a whole. In the case of conferences held outside the machinery of the organization, it was impossible to speak of the established rules of the organization, because the conference itself decided the rules.

18. Subject to drafting changes in paragraphs 2 (*b*) and 3, he supported the Special Rapporteur's new text.

19. Mr. EL-ERIAN said he supported the new formulation, which was an improvement in that it placed the general rule at the beginning of the article and made it subject to whatever might be agreed upon by the participating States or whatever might be the established rule in an international organization. The article should be general because, as the United States Government had commented, it served a useful purpose by stating general rules for application in the absence of agreement upon some other procedure (A/CN.4/175, section I.21). For that reason, the Commission should not lay down detailed rules as had been suggested by the Brazilian and Mexican Governments.

20. It was useful to codify the two-thirds majority rule, to the consolidation of which the United Nations Conference on the Law of the Sea had made a significant contribution. A committee of experts had met in New York to prepare a working paper on rules of procedure for that Conference, and the provisional rules it had drafted had been accepted by the Conference[1] and subsequently by the Second Conference on the Law of the Sea and the Vienna Conferences of 1961 and 1963.

21. Like Mr. Lachs, he had doubts about paragraph 2 (*b*). A conference convened by an international organization was a conference of sovereign States, and as such could adopt its own rules of procedure ; it was not a conference within an organization. Practice supported that view ; for instance, the Conference on the Law of the Sea, although convened by the United Nations, had adopted its own rules of procedure. It was true that in fact it had adopted the rules suggested by the Committee of Experts, but it could have adopted others.

22. Mr. REUTER said that he was opposed to the article, precisely for the reasons cited by most of the other members of the Commission in support of it.

23. First, the two-thirds majority rule was certainly in keeping with present practice and thus raised no difficulty for the international community at the moment, but no one knew that, in the future, the rights accorded to the minority would not have to be restricted or enlarged, or that the required majority would not have to be reduced to three-fifths or increased to three-quarters. Practice would have to decide. If a group of States representing a strong political force invariably found itself in the minority at universal international meetings, it was obvious that it would eventually refuse to participate. He would not labour the point, as he thought that very few members of the Commission would share his view.

[1] *United Nations Conference on the Law of the Sea, Official Records*, Vol. II, pp. xxxi *et seq.* and 3-6.

24. Secondly, with regard to conferences convened by international organizations, the question which conferences were governed by the rules of an organization was not a question of general international law, so the Commission was not required to state a rule on it. It was for each organization to determine which conferences were held within its own framework and which were convened by it, but held outside it. It was the law of each organization that fixed the scope of its rules. Consequently, some formula should be found to except from the rule laid down in paragraph 2 conferences which, according to the law of an organization, were governed by its own rules.

25. His third remark, which also applied to other articles, concerned what had been described as general international conferences. It was difficult to say what was general and what was particular in international law. For example, for Africans, what was African could be described as general. He would prefer the Commission to use the expression " universal international conference " or " world international conference ", for he thought it would be possible to lay down rules for conferences that were intended to be universal or world-wide.

26. Mr. PESSOU said he completely agreed with Mr. Reuter. The Commission should be grateful to the Government of Luxembourg for the quality of its comments in general and for its suggestion regarding article 6 in particular.

27. The wording of the articles should be both rigorous and flexible. The dominant quality of the texts proposed by the Special Rapporteur was their flexibility ; but in view of the particular subject dealt with in article 6, perhaps rigour should prevail there. He urged that if the Commission decided to retain article 6, it should follow the strict language suggested by Luxembourg.

28. Mr. ROSENNE said he was in favour of retaining the article.

29. He agreed, on the whole, with the comments made on paragraph 2 (*b*), but there was a further point to which he wished to draw attention. Although the article did not entirely consolidate the two-thirds rule, since the general principle of unanimity was now correctly placed at the beginning, it nevertheless gave increased status to that rule, which was already embodied in the Charter. He hoped that the two-thirds rule would not be applied in such a way as to obstruct the practice of attempting to reach international decisions by general agreement—sometimes called consensus—a procedure used at many recent international meetings and which he regarded as more desirable.

30. Mr. TABIBI said that he too was in favour of retaining the article, especially as the Special Rapporteur had revised it in the light of the comments by governments.

31. Nevertheless, as the Government of Luxembourg had observed, it was difficult to draw the line between regional conferences and general conferences ; sometimes the scope and effect of a regional conference might be wider than those of a general conference. Hence it was useful to have an article couched in flexible terms.

32. Mr. El-Erian had referred to the Conference on the Law of the Sea ; another example was provided by the 1964 Conference on Trade and Development, which might well be regarded as a universal conference. It had been proposed that all decisions at that conference should be taken by a two-thirds majority vote ; but a group of industrialized countries had declined to support that rule and it had been clear that, without the co-operation of that minority group, it would be impossible to obtain a decision even on the basis of a two-thirds majority. A committee of experts had been convened in New York and had decided that prior consultation should take place between all parties before the two-thirds majority rule was applied to any decision affecting the industrialized countries. The rule had been accepted in that form and had been applied at the recent meeting of the Trade and Development Board. That example showed that the area was one in which development was still taking place and that a flexible rule was necessary.

33. Mr. TUNKIN said he thought the article should be retained, although he did not attach much importance to it. It stated a rule that was actually being followed in the practice of States and might be of some importance for conferences when difficulties arose, although that might happen only rarely.

34. He had some doubts about the wording of paragraph 1 when taken in conjunction with paragraphs 2 and 3, to which it referred. Paragraph 1 stated that the adoption of the text of a treaty took place by mutual agreement, while paragraph 2 said that it took place by a majority vote unless States otherwise agreed or unless the organization had a different rule. What, in that case, was intended in paragraph 1 ?

35. With regard to paragraph 2 (*b*), it was true that a conference of sovereign States was master of its own rules of procedure. Still, if there were regional organizations which prescribed certain specific rules for conferences they convened, it might be advisable to leave room for such arrangements, so paragraph 2 (*b*) could be retained as it stood.

36. Attention had already been drawn to the fact that there was no clear-cut distinction between paragraph 3 and paragraph 2 (*b*). It might be possible to re-word the relevant passage in paragraph 3 to read " In the case of a treaty drawn up by an organ of an international organization ", thereby making it clear that the rule applied only to cases where a treaty was drawn up within the existing machinery of an international organization.

37. Mr. AGO considered that article 6 should be retained, for much the same reasons as he had put forward when speaking in favour of retaining article 5. It was useful to lay down the essential conditions under which the negotiation and adoption of treaties took place.

38. As to the wording, the revised text proposed by the Special Rapporteur was preferable to that adopted by the Commission in 1962, principally because the general rule stated in paragraph 1 was the one that should take precedence over the rules that followed, which applied to the special cases of treaties adopted

at international conferences or within an organ of an international organization. For paragraph 1, he was still inclined to prefer the formula suggested by the Government of Luxembourg, for it might perhaps be better to be quite unequivocal and not to shrink from using the word " unanimity ". The Drafting Committee would certainly study that question and Mr. Tunkin's remarks. He himself would not take any definitive position on the matter.

39. With regard to paragraph 2, he understood some of Mr. Reuter's misgivings ; the rule related rather to the functioning of international conferences. Nevertheless, he thought it would ultimately be useful. What mattered most was not that the text of the treaty should be adopted by a two-thirds majority, but that a two-thirds majority should be required for establishing the voting rule applicable to the adoption of the text ; for that would prevent the conference from wasting valuable time discussing the point. Thus the value of the proposed rule was mainly practical.

40. Some members were opposed to paragraph 2 (*b*), but although it did not seem essential it would be better to retain it. Mr. Tunkin had implied that the Commission should inquire whether certain organizations had, in fact, established rules concerning the conferences they convened. At all events, it would be preferable to allow organizations to establish such rules in the future. That would render the Commission's text more flexible.

41. Paragraph 3 did not call for long discussion ; the Drafting Committee would be able to put it into final form.

42. Mr. BRIGGS said he did not hold any strong views on the article, apart from a general objection to the tendency to clutter up the draft with too much detail. The article did perform a useful function.

43. Like Mr. Tunkin, he had been bothered by the drafting of paragraph 1, but took it to mean that the adoption of the text of a treaty took place under the unanimity rule. What would happen in the case of a conference of only three States? Would the two-thirds rule apply or would reliance be placed on a consensus of opinion? The most valuable part of the article was the rule that adoption of the text took place by the vote of two-thirds of the States participating unless two-thirds decided to adopt a different rule.

44. He too had doubts about paragraph 2 (*b*) and agreed with Mr. Lachs that there was a difference between the voting rule in a organ and the established rules of an organization, but he understood that the Special Rapporteur would take up that point.

45. He would support the article subject to adequate drafting changes.

46. Mr. TSURUOKA regretted that he was not convinced by the arguments of those who wished to retain article 6.

47. Paragraphs 1 and 3 of the revised text did not give rise to any difficulties, but they did not add anything either. Thus the only useful part of the article was paragraph 2. But practice in that matter was not altogether uniform. Conferences differed widely in nature, size and object ; they could be regional or universal, or in an intermediate category ; they could be political, technical, economic, and so on. Hence it was essential for the Commission to keep its draft as flexible as possible. Conferences should be entirely free to settle their own voting rules ; moreover, that was the present practice.

48. With regard to the general structure of the draft, some speakers had said that all the stages leading to the conclusion of a treaty should be described. He might be able to accept that argument, but he found it difficult to understand those who were against retaining article 5, yet in favour of article 6, thus acknowledging the value of article 6, while denying that of article 5. The practice showed that the value of such a provision was negligible. Article 6 did not state a rule but, at the most, a recommendation—as was clear from the revised wording proposed by the Special Rapporteur.

49. As to the functioning of conferences, it was probably pessimistic to fear that a conference would not be able to fix its own rule for adopting the text of a treaty.

50. He proposed that the substance of article 6 be put in the commentary on one of the articles dealing with the adoption of treaties.

51. Mr. AMADO said that, taking the point of view of States, as he always did, he was not enthusiastic about the article but would not oppose it.

52. Mr. El-Erian's comment on paragraph 2(*b*) deserved the closest attention ; for when a conference had been convened by an international organization, the States participating were not in any way obliged to follow the established voting rule of the organization. States were completely free to adopt whatever rule they wished. That was what had been done at the Conferences on the Law of the Sea. The Special Rapporteur and the Drafting Committee should study the question carefully.

53. The CHAIRMAN, speaking as a member of the Commission, said that his opinion concerning the need for the article had changed since 1962. He had thought it was a formal rule, but on reflection, and in the light of the experience of the United Nations Conference on Trade and Development, he had come to the conclusion that a rule of substance was involved. Even if the adoption of an authenticated text did not impose direct obligations on States, it imposed a choice on them : once the text had been authenticated, they had only the choice between acceding and not acceding.

54. He had formerly been convinced that the unanimity rule was a thing of the past, but he now believed that it had proved its value at the Conference on Trade and Development, where the main objective had been collaboration between the developing countries and the rest, and that it was still the fundamental rule. He was therefore in favour of retaining the article in the form proposed by the Special Rapporteur.

55. Mr. TSURUOKA said he had no objection to the question being studied by the Drafting Committee.

56. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Tunkin, said that paragraph 1 meant that the adoption of the text of a treaty took place by unanimous agreement except as provided in paragraphs 2 and 3. He had used the expression " mutual agreement "

in his draft because the Commission had preferred it in 1962, but it might be better to replace it by a reference to unanimity.

57. With regard to the distinction between paragraphs 2 (*b*) and 3, he had already referred to the need for careful reconsideration of that point, since it arose in other articles. In drafting those paragraphs, he had had in mind the well-founded concern of the Government of Luxembourg. He was not fully informed of the practice in certain organizations and was not sure whether there were cases in which treaties were drawn up not within the organization itself, but at a conference held under its auspices at which an established rule was automatically applied. He had introduced paragraph 2 (*b*) to cover the possibility that there might be established rules for conferences convened by organizations. Even if there were no such cases at present, it was impossible to be sure that the practice would not develop in the future.

58. In any event, it was essential that the Commission should be more precise in defining what was meant by a treaty concluded " within " an organization—an expression which some governments regarded as vague when used in article 48. It would be easier to deal with the point in a general way, rather than in connexion with article 6.

59. He agreed that the article should be referred to the Drafting Committee.

60. Mr. ROSENNE said he wished to draw attention to another practice. Recently, a convention for the establishment of a centre for the settlement of international investment disputes had been prepared by the International Bank for Reconstruction and Development. It had been drawn up within a small organ of the Bank, not even an organ that was fully representative of the general membership of the Bank. The draft had been considered by an advisory committee of jurists, but it had subsequently been adopted and submitted to governments by the Board of Directors of the Bank. That procedure for adopting a text was quite different from any of those contemplated by the Commission. He would not express a value judgement on it, but it was clear that the article should not prejudice the existence of that type of practice if it were found desirable in other cases.

61. Mr. AGO, referring to the Special Rapporteur's last statement, said he thought the Commission should adopt a clearer and more precise formula than that contemplated so far : the expression " within an international organization " was very vague. The Commission was thinking of cases in which a conference of States was itself an organ of an international organization, like the International Labour Conference. But where a conference was not an organ of an organization, even though all the participants were members of the organization, the case did not come under paragraph 3, but under paragraph 2 (*b*).

62. The CHAIRMAN said that, so far as the United Nations was concerned, there were three different practices : some conventions were drawn up by the General Assembly itself, like the Convention on the Prevention and Punishment of the Crime of Genocide ; others were prepared by the Economic and Social Council ; and others were drawn up only at conferences convened by the organization.

63. The Drafting Committee should remember that the General Assembly had drawn up model rules of procedure for such conferences, but that there was a contradiction between the concept of model rules and the notice convening a conference. The conference was said to be convened in the name of the participating States and to have sovereign powers, but the convening notice stated that provisional rules of procedure would be placed at the disposal of the conference by the United Nations and could only be amended by a two-thirds majority. If the conference had sovereign powers, it could do whatever it wished ; on the other hand, it was bound by the terms of the convening notice. The Drafting Committee should clarify the position.

Article 6 was referred to the Drafting Committee.[2]

64. The CHAIRMAN said that before passing on to article 7 he would ask members from the continents of Africa and America to assist the Secretariat in obtaining information on the practice of the Organization of African Unity and the Organization of American States in the matter of drawing up texts. The Drafting Committee would require that information for article 6.

65. Furthermore, Mr. Rosenne had asked the Secretariat to obtain certain information at once, before the Commission took up article 8 ; he asked Mr. Rosenne to explain exactly what it was he wanted.

66. Mr. ROSENNE said that, particularly in connexion with article 8, he wished to ask the representative of the Secretary-General to be good enough to supply, at his earliest convenience, certain information relating to questions of fact.

67. First, he would ask him to arrange for circulation of the full texts of the interventions of the Secretariat representative in the Sixth Committee, and of the Secretary-General himself at the 1258th plenary meeting of the General Assembly, referred to in paragraph 2 of the Special Rapporteur's Observations and Proposals on article 8 (A/CN.4/177), and the full text of the opinion of the Legal Adviser of the State Department, referred to in paragraph 5 of those same Observations.

68. Secondly, he wished to know what was the practice of the Secretary-General, as registering authority under Article 102 of the Charter, when he received for registration treaties concluded (*a*) between a Member of the United Nations and a State which was not a Member of the United Nations or of any of the specialized agencies and (*b*) between two or more States, none of which were Members of the United Nations or of any of the specialized agencies. If the Secretary-General had accepted such treaties for registration, or for filing and recording, was he in a position to furnish information concerning the views of governments on the registration of treaties by States in the latter category ?

69. Thirdly, he wished to know whether any other depositary authorities—governments or secretariats—had adopted a position similar to that of the State

[2] For resumption of discussion, see 811th meeting, paras. 91-94.

Department referred to in paragraph 5 of the Special Rapporteur's Observations and Proposals.

70. The CHAIRMAN said that the Secretariat would try to meet Mr. Rosenne's request.

ARTICLE 7 (Authentication of the text)

Article 7

Authentication of the text

1. Unless another procedure has been prescribed in the text or otherwise agreed upon by States participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways:

(*a*) Initialling of the text by the representatives of the States concerned;

(*b*) Incorporation of the text in the final act of the Conference in which it was adopted;

(*c*) Incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

2. In addition, signature of the text, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 above.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.

71. The CHAIRMAN invited the Special Rapporteur to introduce his revised text of article 7, which read:

Article 7

1. Unless the text itself prescribes otherwise or the States participating in the adoption of the text otherwise agree, a text shall be considered to be authenticated as the definitive text by —

(*a*) Its incorporation in the final act of the conference in which it was adopted;

(*b*) Its incorporation in a resolution of an international organization in which it was adopted or any other procedure employed specifically for that purpose by such organization;

(*c*) In other cases, the initialling, signature or signature *ad referendum* of the text by the representatives of the States concerned.

72. Sir Humphrey WALDOCK, Special Rapporteur, said that the three governments which had commented on article 7 had questioned its utility. The article raised the question whether authentication of the text was to be recognized as a separate element in the treaty-making process, distinct from adoption of the text on the one hand and from signature and initialling on the other. In 1959, Sir Gerald Fitzmaurice had been very insistent that authentication should be acknowledged as an important element in treaty-making and that view had been accepted by the Commission. In 1962, the Commission had once more decided to mark the stages of authentication in treaty-making, but the text then adopted had been perhaps too cumbersome. In his revision he had tried to lighten it.

73. He had, of course, worked on the assumption that the Commission would wish to retain an article on authentication. It was for the Commission now to decide the preliminary question whether provision should be made in the draft articles for the process of authentication, as distinct from signature.

74. Mr. AGO thought that with article 7 the Commission was taking up a rather controversial part of the 1962 draft in which important changes should be made. Article 7 was followed by a series of articles whose provisions were repeated and intermingled, and ranged from the description of acts to that of legal effects. Articles 8 and 9, for example, which dealt with participation, should be placed elsewhere in order to avoid a break in the logical train of thought. The Commission should not proceed article by article ; it would be better to discuss articles 7, 10, and 11 together and then redraft them ; he therefore made a formal proposal to that effect.

75. The CHAIRMAN noted that Mr. Ago was formally proposing that articles 7, 10 and 11, which he considered to be closely interrelated, be discussed together ; he invited the Commission to take a decision on that proposal.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the question of the logical order of the articles was not an easy one. Treaties were no longer concluded in the same way as in the past, when they had been authenticated and signed by the representatives of the governments concerned. It was necessary, for example, to take into consideration cases in which the text of a treaty was adopted in an international organization and the Director-General or another official of the organization was called on to authenticate it. Clearly cases of that kind could not come under the heading of signature, which was the subject of article 10 ; for no State could claim to be a signatory of a treaty by reason of the signature of the official authenticating the text.

77. With regard to articles 8 and 9, he agreed that the provisions of those articles were interposed between the provisions relating to the three stages of the treaty-making process. That arrangement undoubtedly resulted in an inconvenient interruption of the train of thought, but there were logical and legal grounds for placing the two articles where they were. They established the right of participation, and some of the rights set out in the subsequent articles could only be exercised by virtue of what was provided in articles 8 and 9. However, he fully agreed that articles 8 and 9 should be dealt with separately from articles 7, 10 and 11, so as to avoid confusion, and that, for the purposes of the present discussion, articles 7, 10 and 11 could be taken in conjunction.

78. Mr. BRIGGS said he agreed with Mr. Ago that articles 8 and 9 related to a completely different matter from articles 7 and 10. He would prefer to see the contents of articles 7 and 10 brought together, but for the purposes of the present discussion, he thought the Commission should examine article 7, on the understanding that members could make any necessary references to articles 10 and 11.

79. Mr. LACHS said he supported Mr. Ago's proposal and agreed with his comments on articles 8 and 9. Article 9, at least, was logically linked with the article on accession and ought to precede it.

80. He agreed that articles 7, 10 and 11 should be discussed together, but suggested that it might be useful to take the provisions of article 10 as the starting point, because they related to the main functions. Any material left out of article 10 could then, if necessary, be introduced into article 7.

81. Mr. TSURUOKA said that he too agreed with Mr. Ago. Article 7 should not be omitted, but should, if necessary, be combined with articles 10 and 11.

82. As to discussion procedure, he supported Mr. Lachs's suggestion : members should be free to speak on all three articles.

83. Mr. AMADO said that after talks and negotiations, and after adoption of the text of a treaty, authentication was clearly superfluous before signature, which was an act of the greatest importance.

84. What was meant by the statement that a text could be authenticated by its incorporation in a resolution of an international organization in which it was adopted? Was it conceivable that an organization would adopt a draft and not incorporate it in a resolution?

85. The CHAIRMAN, speaking as a member of the Commission, said he accepted Mr. Ago's proposal that articles 7, 10 and 11 should be treated as a single whole. He also accepted Mr. Lachs's proposal that the discussion should begin with article 10.

86. He did not, however, subscribe to Mr. Amado's objections to article 7. The development of international law had brought into being an objective procedure for establishing texts, from which authentication had sprung. International organs drafted certain texts, which did not bind any State directly, but were at the disposal of States to adopt or not to adopt. Authentication took place in international organizations by means of a resolution. The legal phenomenon, which was different from the classic example referred to in article 10, was that there was authentication of a text as something separate from the process of signature or direct adoption.

87. Sir Humphrey WALDOCK, Special Rapporteur, said he was prepared to discuss article 10 jointly with article 7. He wished to draw attention, however, to the difficulty that arose where the text of the treaty was adopted by a resolution of an international organization and the resolution directed an official of the organization to sign the text for purposes of authentication. In such cases authentication would precede signature, since the treaty would be opened for signature after it had been authenticated by the official concerned.

88. Mr. AMADO thought that the Commission would have to reach agreement on the meaning of the word " adopt ". If a treaty adopted by States still had to go through an authentication ceremony, adoption became an act entirely devoid of meaning and without effect.

89. The CHAIRMAN, speaking as a member of the Commission, said that a case in point was the Convention on the International Transmission of News and the Right of Correction, which had been authenticated by an absolute majority of the General Assembly, but to which only France and Yugoslavia had acceded from the first day. The text had been authenticated by its incorporation in a resolution [3] and was to become a convention as a result of the accession, signature and ratification of the States which followed the General Assembly's recommendation.

90. Leading writers on international law also thought that such authenticated instruments, even if not accepted, represented world legal opinion according to the number of States which had participated in their authentication, even though they imposed no direct obligation on States. International case-law often relied on such instruments which had been authenticated but had not entered into force.

91. Mr. AGO said he agreed with Mr. Lachs that the discussion should begin with article 10, but wide freedom should be allowed, for the text of that article itself was very involved ; it could be pruned and supplemented with ideas taken from article 7.

92. It was necessary to choose a starting point : the Commission could begin with acts, such as initialling, signature and final act, but if it was to produce clear and fairly short articles, it would be more logical and useful to begin with legal effects. Several important questions arose. First, by what means did the text of a treaty become final? It could be by initialling, signature *ad referendum* or mere signature, or by incorporation in the final act of the conference or in a resolution of the conference. Secondly, were there any legal effects of signature which went beyond authentication in cases where signature did not establish the consent of the State to be bound by the treaty? Thirdly, by what acts did the State express that consent? Lastly, for that purpose, what were the respective positions of signature, ratification, approval, acceptance, etc. ?

93. Mr. ROSENNE said he could give a recent example in which the different stages of treaty-making were clearly identifiable, but in which none of the rules had been very precisely observed. He was referring to resolution 1991 (XVIII)[4] by which the General Assembly had adopted certain amendments to the Charter and submitted them for ratification by the States Members of the United Nations. First, he doubted whether many delegations to the General Assembly had been furnished with full powers to negotiate and conclude the treaty, except some permanent representatives who had those powers included in their general credentials. Secondly, the text had not been signed. Thirdly, in the practice of the General Assembly, the Secretariat had a general standing power to edit the text of every resolution after it had been adopted and the final authenticated text only came out in the printed volumes of the official records several months after the conclusion of the session. Nevertheless, the resolution provided for ratification, it had been submitted to States for ratification, and it had actually been ratified by a large number of them.

94. He supported the idea of taking article 10 first and hoped a liberal approach could be adopted to the residuary part of authentication. Personally, he was not certain what was the real difference between the

[3] *Official Records of the Third Session of the General Assembly, Part II, Resolutions*, p. 22.

[4] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 15*, p. 21.

adoption of the text of a treaty and authentication as a residuary step. Perhaps the concept of authentication could be incorporated in article 6.

95. The CHAIRMAN said that, if there were no objection, he would, consider that the Commission accepted Mr. Ago's proposal, together with Mr. Lachs's suggestion as to the order of discussion of articles 7-11.

It was so agreed.

The meeting rose at 12.50 p.m.

783rd MEETING

Thursday, 13 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLES 7 (Authentication of the text) (*continued*),[1] 10 (Signature and initialling of the treaty) and 11 (Legal effects of a signature)

Article 10

Signature and initialling of the treaty

1. Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the treaty itself or in a separate agreement:

(*a*) That signature shall take place on a subsequent occasion; or

(*b*) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (*a*) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the State concerned, in which case the signature is subject to confirmation.

(*b*) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

(*c*) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

3. (*a*) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the treaty.

(*b*) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the treaty.

Article 11

Legal effects of a signature

1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 7, paragraph 2, the signature of a treaty shall have the effects stated in the following paragraphs.

2. Where the treaty is subject to ratification, acceptance or approval, signature does not establish the consent of the signatory State to be bound by the treaty. However, the signature:

(*a*) Shall qualify the signatory State to proceed to the ratification, acceptance or approval of the treaty in conformity with its provisons; and

(*b*) Shall confirm or, as the case may be, bring into operation the obligation in article 17, paragraph 1.

3. Where the treaty is not subject to ratification, acceptance or approval, signature shall:

(*a*) Establish the consent of the signatory State to be bound by the treaty; and

(*b*) If the treaty is not yet in force, shall bring into operation the obligation in article 17, paragraph 2.

1. The CHAIRMAN invited the Commission to consider the group of articles 7, 10 and 11 together, as agreed at the previous meeting. The Special Rapporteur had already introduced article 7; he would now ask him to introduce his revised text of article 10, which read:

Article 10

Signature and initialling of the text

1. Signature of the text takes place in accordance with the procedure prescribed in the text or in a related instrument or otherwise decided by the States participating in the adoption of the text.

2. Subject to articles 12 and 14.

(*a*) Signature of the text shall be considered unconditional unless the contrary is indicated at the time of signature;

(*b*) Signature *ad referendum*, if and when confirmed, shall be considered as an unconditional signature of the text dating from the moment when signature *ad referendum* was affixed to the treaty, unless the State concerned specifies a later date when confirming its signature.

3. (*a*) If the text is initialled, instead of being signed, the initialling shall

(i) in the case of a Head of State, Head of Government or Foreign Minister, be considered as the equivalent of signature of the text;

(ii) in other cases operate only as an authentication of the text, unless it appears that the representatives concerned intended the initialling to be equivalent to signature of the text.

(*b*) When initialling is followed by the subsequent signature of the text, the date of the signature, not of the initialling, is the date on which the State concerned shall be considered as becoming a signatory of the treaty.

[1] See 782nd meeting, paras. 70-71.