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Summary record of the 794th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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been touched upon by the Swedish Government in its comments.

80. On the question whether articles 8 and 9 could be jettisoned altogether, as proposed by the Japanese Government, the difficulty was that, in law, the distinction between the original parties and subsequent parties, by whatever process they became parties, was a fundamental one, especially from the point of view of interpretation, and clearly most of the articles in the draft had been drawn up with that distinction in mind. If those two articles were dropped, nearly all the remaining ones would call for some structural modification, a difficult though not impossible task.

81. The controversy really arose over the question of participation in general multilateral treaties. He reserved his position regarding the change in the definition of such treaties proposed by the Special Rapporteur, not having been very convinced by some of the objections to the original definition arrived at in 1962. If article 8 were retained, it must be made plain that participation in multilateral treaties of whatever kind had nothing whatever to do with the entirely different process of admission to international organizations, whether small or large, regional or universal. Illuminating material on that process was to be found in the dissenting opinion of 1948 of Judges Basdevant, Winiarski, McNair and Read on the conditions of admission of a State to membership in the United Nations [26] and in Morelli's book "*Nozioni di diritto internazionale*".[27] The comments of certain governments revealed some confusion on that cardinal issue which ought to be clarified in the commentary.

82. The significance of the problems connected with general multilateral conventions should not be exaggerated now that the Commission had formulated article 62, which went a long way towards preventing the dangers of the dualism mentioned by Mr. Lachs at the previous meeting.

83. To conclude, the material concerning participation in a treaty ought to be rearranged. One provision should be devoted to original participation, even though that might later be found redundant. A second provision should deal with additional participation under the terms of the treaty, and might be drafted on the lines of the text now being proposed by the Special Rapporteur but with greater emphasis on the supremacy of the text of the treaty. A third provision should deal with extended participation, the subject covered in article 9, but in simplified form. Such a rearrangement would avoid the present distortion of certain essential elements in the law of treaties as a whole, and would place a controversial matter in its right perspective. The mechanics of participation could be dealt with in subsequent articles, and even accession ought to be handled separately from the subject-matter of articles 8 and 9.

84. As any "all States" formula was unlikely to be acceptable because there was insufficient justification for it either *de lege lata* or *de lege ferenda*, the Commission ought to reach a clear decision on that point at an early stage, by vote if necessary, in order to avoid a repetition of what had happened over its provision concerning the breadth of the territorial sea.

The meeting rose at 12.55 p.m.

[26] *I.C.J. Reports 1948*, p. 84.

[27] G. Morelli, *Nozioni di diritto internationale*, 6th ed. (1963), p. 313.

794th MEETING

Wednesday, 2 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, 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 8 (Participation in a treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. PAREDES said that during the earlier discussion on other articles he had expressed the opinion that, in a codification, each article should contain only a single precept relating to a single question. If an article dealt with several questions, the formula adopted, however flexible it might be, could not cover all the aspects of the problems considered.

3. The expression "general multilateral treaty" in paragraph 1 of article 8 really covered treaties of an entirely different nature which called for different rules. First, there were treaties which recognized and stated a universally binding international practice; secondly, there were treaties relating to special interests of nations.

4. The former concerned the very foundations of the co-existence of States and established universally binding laws. Mr. Lachs had said that there were certain types of treaty which were binding on all States, even when they had not been parties to drawing them up, such as the Conventions on the abolition of slavery or the Convention on the Prevention and Punishment of the Crime of Genocide, or the Moscow Nuclear Test Ban Treaty. He (Mr. Paredes) thought that those treaties were legislative and required the observance of a certain

[1] See 791st meeting, preceding para. 61, and para. 63.

kind of conduct, not only on the part of the States which had participated in drawing them up but on the part of all States. Moreover, those treaties did not even formulate any new rules and obligations: they did no more than recognize, define and delimit the international practice. In that sense, they could be accepted and recognized by all peoples, but were they universally binding? They related, perforce, not to the special interests of any one State but to the general interests of mankind; an example was the Convention on the Prevention and Punishment of the Crime of Genocide. Consequently, they could and should be opened to accession by all the countries in the world, whether States possessing all the characteristics of a State or mere groups performing political functions and governed by the same kind of laws.

5. If the States making those treaties created nothing and simply recognized and proclaimed what those international obligations consisted of, was a declaration of that kind binding on all States which did not participate and did not want to participate in the treaties? In his opinion, the principles involved were so fundamental to the life of nations that nobody could deviate from them without creating great dangers for the international public order. Consequently, every State, every international entity, could and should accede to those treaties. The question remaining to be answered was who possessed the authority or right to lay down laws which were binding on the whole world. The question was easy to answer if the norms were adopted by a great international body like the United Nations.

6. The same was not true of the other treaties covered by the expression "general multilateral treaties". There were treaties which related to special interests, but since life imposed the same needs on all human beings, those treaties concerned the whole world. Examples were the conventions concerning the regulation of fisheries, the limits of the territorial sea and consular privileges and immunities. Those were matters of special general interest; but since each State had its own interests, those general treaties were not universally binding and were subject to the autonomy of the will of the parties.

7. Treaties of the first group laid down a rule which might be described as obligatory: they were prohibitory law-making treaties, the prohibition involving a sanction against anyone not conforming to it. If a State, in spite of the international conventions, continued to engage in the white slave traffic, for example, it could be proceeded against by all other States. In the case of treaties in the second group, on the other hand, if a State which was not a member of an international organization and had not participated in the adoption of the conventions on fisheries or consular immunities refused to accept the rules laid down in those instruments, who was going to enforce those rules? Nobody had the power to do so, for such enforcement would be contrary to the principle of the equality of States and of freedom of conduct. The States which had joined in formulating treaties in that second category could, in keeping with the principle of free will, choose those with whom they wished to negotiate in the matter and those with whom they did not wish to negotiate.

8. There was an appreciable difference between the two categories of treaties which he had just distinguished; for that reason, objections which might be valid for the second category did not apply to the first. The subject-matter of paragraph 1 of article 8 should be dealt with in two articles, each of which would cover one of those two completely different questions.

9. Mr. JIMÉNEZ de ARÉCHAGA said that article 8, paragraph 1 had not been discussed and adopted till towards the end of the fourteenth session and he himself had been unable to take part in its elaboration. He could therefore comment on it as an uncommitted member of the Commission, having followed the illuminating debate during the past few days with an open mind.

10. The Commission should not be swayed in reaching a decision on an important question by contemporary difficulties of a political nature. It had to take a longer view, knowing that its work of codification must be based on more permanent considerations, though that did not mean that as lawyers they should disregard certain aspects of State policy which in the long run would prevail.

11. The issue of participation in multilateral treaties should not be used as a political weapon by an unrecognized régime to establish treaty relations with States unwilling to recognize it as a political entity, in an endeavour to force their hand, acquire prestige or improve its political status. Nor should it be used as a means of ostracizing unrecognized political entities and debarring them from legitimate participation in the life of the international community, to which they might be entitled merely by reason of the existence and efficacy of their governments.

12. After hearing the views of members at the present session, he had become convinced that the 1962 formula, possibly with some drafting changes of the kind suggested by the Special Rapporteur, should be maintained.

13. He was unable to agree with those who wished to transform the article into a rule of *jus cogens*. Whenever the Commission laid down a *jus cogens* principle it was tampering with a fundamental tenet of international law, *pacta sunt servanda*, that States were free to reach agreement between themselves and what they agreed upon was the law for them.

14. However, the division of opinion in the Commission must not deter it from pursuing what was its major task in codifying the law of treaties, namely, the establishment of residuary rules that ought to prevail in the event of the parties failing to reach agreement. The compromise formula arrived at in 1962 was precisely such a rule and was, moreover, restricted in scope, since it would only apply to general multilateral treaties laying down rules of international law capable of general application and quasi-legislative in character and function.

15. One of the features of international law was that fundamental principles or rules requiring universal compliance could be formulated and put into effect by means of treaties entered into by "States representing the vast majority of the members of the international community", to use the words of the International

Court of Justice, and such instruments might establish legal norms of an objective universal character that required compliance by States which had not had occasion to participate in the adoption of the text. If, as Article 38 of the Court's Statute provided, general practice could constitute customary law binding even on States which had had no chance of participating in its formulation, it could legitimately be inferred that a similar legal effect could be brought about by the treaty-making process when used by the vast majority of the international community. On the other hand, there was no legal justification, and it would also be highly inconvenient from the practical point of view, to exclude States for political reasons from participating in the elaboration of quasi-legislative agreements or to deny them the right to accede to such agreements so as to establish their express consent to rules with which they were expected to comply.

16. The Nuclear Test Ban Treaty of 1963 was a striking illustration of the proposition that, so far as certain vital rules of general international law were concerned, the advantage of universal acceptance must outweigh any short-term considerations about recognition. That treaty also demonstrated that certain procedural difficulties for the depositary could be solved, either by arranging for parallel depositaries or by means of specific instructions in the treaty itself. However, there was no escaping the fact that practical difficulties could arise over the very concepts of statehood and of general multilateral treaty. He accordingly believed that the principle embodied in article 8, paragraph 1, must remain a residuary rule and not one that could override the express will of the parties.

17. Finally, with regard to the relationship between article 8, paragraph 1 and article 3, paragraph 2, concerning the capacity of the member states of a federal union to conclude treaties, a capacity that was defined by reference to constitutional law, he wished to draw attention to the possibility of a federal State conferring such capacity upon its member states and of the latter then seeking to accede to general multilateral treaties under article 8, paragraph 1. The result might be that the federal State, without altering its substantive obligations under a particular instrument, could secure an increase in the number of parties or votes in the treaty-making process, thus acquiring a greater say, or possibly even a decisive voice, in such matters as amendment and termination that depended on the numerical strength of the parties. The potential danger was not due to any defect in article 8, paragraph 1, but to the Commission's failure to include anything in article 3, paragraph 2, about international recognition by other States, an element that was inherent in the concept of statehood and the capacity to enter into treaties.

18. Mr. RUDA said that article 8 distinguished between " the case of a general multilateral treaty " and " all other cases "; the latter description seemed to him unclear. The draft articles did not classify treaties, not even into bilateral and multilateral treaties; only in article 1 (*c*) was the meaning of " general multilateral treaty " defined. Article 8, paragraph 2, manifestly related to a " special " multilateral treaty, by contrast with a general multilateral treaty or what in article 9 was simply referred to as a " multilateral treaty ".

19. The fundamental purpose of article 8 was to attempt to define a procedure by which a particular kind of treaty, on account of the importance of its content and its universal interest, would be open to participation by all States, or at least by the largest possible number of States. He entirely agreed that the scope of application of certain rules of international treaty law should be extended to the utmost; that should be the objective in the case of important treaties, but it was a matter which transcended the sphere of law and had no place in a statement of rules.

20. Article 1 (*c*) defined " general multilateral treaty " as a multilateral treaty which " concerns general norms of international law or deals with matters of general interest to States as a whole ". If the expression " general norms of international law " was intended to mean norms valid for all States, and if treaties were, in principle, binding only on the parties, then it followed that existing general international law was customary, for there was not a single treaty to which all States had acceded —though, in theory, such treaties might come into being in the future if a convention norm were unanimously accepted.

21. In his view, the expression " deals with matters of general interest to States as a whole " had no precise meaning in law; it was a mere value judgement which might differentiate that kind of treaty on political, economic or social grounds from other multilateral treaties but could not differentiate them, in absolute terms and from the strictly legal point of view, from other multilateral treaties so far as the rules governing the process of their formation was concerned.

22. International treaty law was based on the autonomy and consent of the parties : it was a law created by the parties which bound themselves. A treaty was a legal instrument creating international rules whose characteristic formative element was the meeting of minds expressed by the competent authorities; it was the outward manifestation, the form assumed by the agreement of the wills of two or more States.

23. From the legal point of view, treaties could not lose their contractual character and become law-making, and however important for international life the rule stated by so-called general multilateral treaties might be, they were still treaties, agreements expressing the will of States.

24. In his opinion, it was reasonable to include in treaties of great political, social or economic importance a formula extending their field of application to " any State ", as in the case of the Moscow Nuclear Test Ban Treaty; but that norm should not be laid down in the treaty except by the will of the contracting parties. In such cases it was possible to use procedures for avoiding the problem of recognition or devices for facilitating the task of the depositary, as indeed had already been done; but such procedures and devices had to be in conformity with the will of the parties.

25. There were no customary international norms obliging States to accept, in the treaties they concluded or in a particular kind of treaty, those who were to

become parties to those treaties; nor was there any presumption that " any State " could become a party to such treaties. To lay down such a rule *de lege ferenda* would be to modify the contractual nature of treaties and to give them a law-making character which they did not possess : it would be necessary to modify drastically the structure of existing public international law, which was based on the equality of sovereign States.

26. Mr. AMADO said he fully agreed with Mr. Ruda's remarks. He was glad to see that, in paragraph 3 of his observations on article 8 (A/CN.4/177), the Special Rapporteur said that " if the concept of universality in the application of general multilateral treaties were to be considered as a rule of *jus cogens*, it might be necessary for the Commission to re-examine a number of other articles, such as those dealing with reservations and with the modification of treaties, in the light of this concept ". If the Commission tried to convert *jus cogens* into another natural law, it would get itself into serious difficulties both of theory and of practice.

27. In 1962 Mr. Bartoš, speaking in support of an amendment proposed by Mr. de Luna, had said that " States could not be denied the right to choose their partners in treaty relations, but they could be expected to indicate in advance an intention to exclude certain others from participating in any treaty they were drawing up ".[2] At the same meeting he (Mr. Amado) had expressed the opinion that " the general multilateral treaties described by some members of the Commission were more in the nature of international legislation than treaties. They perhaps conformed to an ideal which all truly international jurists had in mind, but if participants were not free to choose their partners, they could no longer be strictly regarded as treaties ".[3] In such cases there had been no bargaining—no one had given anything and no one had received anything. In the Convention on the Prevention and Punishment of the Crime of Genocide, for instance, the parties exchanged nothing, no services were rendered, there was simply a matter that was dealt with in the Convention.

28. International law had made progress. The institution of accession had gained wide currency. The treaty was there, it had been sighed, and was open for acceptance by any State wishing to accept it, under certain conditions. With so many opportunities for universalizing treaties, was the Commission going to adopt an article which, though inspired by generous sentiments, satisfied hardly anybody ? Article 9 pointed the way which should be followed, and like Mr. Tsuruoka, Mr. Briggs and Mr. Cadieux, he hoped that the Commission would follow it.

29. The CHAIRMAN, speaking as a member of the Commission, said that the statement he had made in 1962 had not always been correctly understood. What he had meant to convey was, first that in principle every State had the right to choose its partners in treaty relations, but that, secondly, if certain States claimed to be laying down universally binding rules in a treaty, they could surely not criticize States which they had not allowed to accede to that treaty for breaking those rules. What sanctions could be applied to States which violated multilateral rules of general interest if they had no right to invoke those rules against others ? It was impossible simultaneously to refuse to accept certain States as partners and to expect those States to comply with the rules imposed on them. To admit such conduct would mean admitting that some States had the right to make rules whereas others had no choice but to accept the rules laid down, without being given an opportunity to express their consent to those rules.

30. Those remarks applied equally to the regional law-making treaties, of which some clauses were in fact binding upon all States in the region because they stated general rules applicable to the particular region, even if they differed from universal rules.

31. He was still convinced, not only for idealistic reasons but also by reason of the necessities of international life, that the Commission should lay down as a general rule that treaties which aspired to be universal law-making treaties should be open to all States. That rule would have to be accepted by all States; it could not be imposed on them. If it should prove impossible to adopt the rule, he would accept the compromise leaving States free to choose their partners but only as an exception to the general rule which he had mentioned. In other words, in all cases where no restriction was laid down regarding the States eligible to become parties to the treaty, the rule that multilateral treaties were open to all States, without distinction, should be applied.

32. Mr. AGO said that article 8 touched one of the most delicate points in the whole of that part of the law of treaties being dealt with by the Commission at the current session. The compromise agreed upon at the 1962 session satisfied only a few governments and only a few members of the Commission, and even those who said that they were satisfied, did so for differing reasons. Sometimes, if a solution was criticized from several sides at once, that meant that it was sound. In the particular case, however, in spite of all his esteem for the General Rapporteur, Mr. Elias, who had proposed that compromise late in the 1962 session to help the Commission out of the impasse in which it had found itself, he thought that the article 8 which had been adopted in 1962 by 10 votes to 7, with 3 abstentions, was a poor solution.

33. The supporters of that solution argued that every State had an actual right to become a party to a general multilateral treaty; but he denied that such a right existed. In the field of treaty law, every State had the right to make an offer or to accept an offer, but it was not true that every State had the right to become a party to a treaty against the will of the other parties.

34. It had even been claimed that the right of every State to accede to a general multilateral treaty was a rule of *jus cogens*. He was glad that Mr. Amado had quoted the very judicious commentary of the Special Rapporteur on that point. If the Commission tried to lay down too many rules of *jus cogens*, it might destroy that notion, which was still in its infancy and not readily acceptable to the majority of States; the Commission would then lose the fruits of all its efforts to win re-

[2] *Yearbook of the International Law Commission, 1962*, Vol. I, 667th meeting, para. 16.

[3] *Ibid.*, para. 20.

cognition, as a rule of *jus cogens*, for what really deserved such recognition. As Mr. Ruda had said, the only principle on which reliance could be placed in the matter of the law of treaties was the will of States. And surely a State could not be obliged to enter into treaty relations with another State if that was not its will.

35. It was true, as Mr. Lachs had observed, that it was generally desirable to obtain the broadest participation possible in general multilateral treaties, especially in treaties stating rules of general international law. But the Commission should take care not to throw away with one hand what it would gain with the other by laying down a rule obliging States to agree, against their will, that certain entities should become their partners. As a result of such a rule, those entities would perhaps become parties to treaties, but certain States would not become parties because they would not wish to enter into treaty relations with those entities. He used the word " entities " deliberately, because the question which most frequently arose in connexion with them was whether they were or were not States from the point of view of international law.

36. It had been rightly observed by the Chairman that a State could not be criticized for breaking rules if it were denied the opportunity of subscribing to those rules. It seldom happened, however, that a State was blamed for violating treaty rules to which it had not subscribed; what it was blamed for was for violating customary rules of general international law, rules which existed independently of treaties.

37. It had also been said that the principle of universality should be the guiding principle. He was sometimes regarded as a champion of universality and so could not be charged with any hostility to that principle. But that principle could not be pleaded for the purpose of compelling States to enter into treaty relations, by means of a treaty, with certain entities which they did not consider acceptable partners.

38. Several members of the Commission, particularly Mr. Lachs, had said that the problem should be simplified by making it clear that the fact of admitting a State to participation in a general multilateral treaty did not imply recognition of that State. But the problem was not essentially one of recognition. In all the concrete cases in which the problem had arisen, it had been apparent, as Mr. Verdross had said at the previous meeting, that the difficulty was due rather to the existence of entities whose statehood, within the meaning of international law, was in dispute. Consequently, by stating as a rule that every State had the right to participate in general multilateral treaties, the Commission would only be begging the question, since it would still remain to be decided whether a given entity was a State or not.

39. Moreover, in some cases, although statehood was recognized, a certain government's capacity to represent the State was contested. Mr. Rosenne had therefore been right in pointing out that the adoption of the proposed rule would confront the depositary with serious difficulties.

40. Such a rule would give rise to other concrete difficulties. For example, it might so happen that an international organization expelled one of its members. Was it conceivable, in that case, that the State expelled from an organization had the right to become a party to a treaty concluded under the auspices or within the framework of that organization?

41. When the Commission spoke of general multilateral treaties, it was thinking mainly of those it prepared itself. But there were other kinds of multilateral treaty, for example international labour conventions; the latter were open to all States members of the International Labour Organisation, but they were not open to States not members of that Organisation, because the ILO had set up machinery to control the observance of those conventions by member States, whereas there was no such control machinery with respect to non-member States.

42. His frank opinion was that it was neither possible nor desirable to try to settle political problems—which, incidentally, he hoped were transient—by bringing them into the field of the codification of international law. Those problems would not be solved by a legal rule concerning participation in general multilateral treaties; they should rather be dealt with by the competent political organs.

43. The fundamental principle governing participation in treaties was that of the will of States to enter into treaty relations with other States; that will should not be coerced. The question of participation was generally discussed and settled at the time of the convening of the international conference called to conclude a treaty on a particular topic. The decision was then taken on the basis of political criteria which it was not for the Commission to judge. The important point was that the question was settled then and not later. In that connexion, Mr. Cadieux had put forward an irrefutable argument: the question having been settled by a two-thirds majority at a meeting called to take the decision to convene the conference, the treaty's silence on the question of participation could be achieved by the votes of only one third, plus one, of those participating in the conference. The residuary rule adopted by the Commission in 1962 would therefore have the absurd result that a minority would be capable of achieving a situation where certain States had the right to become parties to the treaty, whereas the majority had wished to exclude those States.

44. A State which had been excluded from the negotiations could not be admitted to participation in the treaty unless the majority which had excluded it decided to withdraw its opposition. Accordingly, he proposed that article 8 be drafted to read:

> " 1. Any State which took part in the drawing up of a multilateral treaty or which was invited to the conference at which it was drawn up may become a party to the treaty.
>
> 2. In addition, any other State to which the treaty was made open by its terms may become a party to a multilateral treaty. "

45. That wording differed only slightly from that originally proposed by the Special Rapporteur and from

that submitted by the Drafting Committee to the Commission in 1962.[4] It would probably not please some of the Commission's members, especially Mr. Tunkin, but he regretted to say that he, for his part, could not accept Mr. Tunkin's own proposal.

46. He could only urge the Commission, once again, to exercise the utmost caution in the formulation of so important an article.

47. Mr. TUNKIN said that article 8 was closely related to the problem of the treaty as a contemporary source of general international law. The position in that respect had materially changed in the last few decades, for whereas previously general international law was almost wholly customary, at the present time it was becoming increasingly conventional in character. The treaty was now playing a predominant role in developing, creating and amending rules of general international law. Moreover, the same norm of general international law could often be conventional for some States and customary for others.

48. The general multilateral treaty was a comparatively new phenomenon in international law and, in 1962, the Commission had taken a step forward when it had singled out that type of treaty for consideration and had furnished a definition, which stressed its specific position within the framework of general international law.

49. Another conclusion which could be drawn from contemporary international law was that that law was based on agreement to a greater extent than was the old international law. Contemporary general international law was universal or quasi-universal: it was based on the agreement of all, or nearly all, States. The present international society was composed of sovereign States, and agreement between them was the only possible way of creating norms of international law binding upon all States. The time had passed when a group of States could create and enforce norms which they claimed to be binding on all States regardless of their consent. It had been suggested, or at least implied, by some members that the majority of States could preclude a minority from participating in international affairs of interest to all States. His own view was that all those who favoured the progressive development of international law should support the " all States " formula.

50. It would be an obvious contradiction to formulate norms intended to be norms of general international law and at the same time bar some States from participating in their formulation; that was tantamount to saying in advance that those rules could not be accepted as binding by the States thus excluded.

51. The " all States " formula was consistent with the basis principles of centemporary international law, in particular with that of the sovereign equality of States. Some members had inferred that sovereign equality implied freedom of action in the conclusion of treaties. But it should be remembered that in any society, the freedom of action of a person or State could not have the effect of denying freedom of action to others. If certain States excluded certain others from participating in general multilateral treaties, they asserted their sovereignty but thereby violated the sovereignty of the States which had been excluded.

52. The definition of " general multilateral treaty " given in article 1 (*c*) was a fruitful one in that it referred to treaties which concerned general norms of international law or dealt with matters of general interest to States as a whole. The inference to be drawn from that definition was that, in the case of such treaties and their subject matter, it would be a denial of the sovereign equality of States to try to settle problems which were of concern to all States by a decision of only a group of them, however large.

53. The restrictive practices now current were an outcome of the policies of the cold war. The freedom to choose partners in the conclusion of treaties, like any other liberty, could not be absolute. That remark applied not only to general multilateral treaties, but also to other treaties: even three States could not settle a matter which also concerned a fourth State without allowing that State to participate in the settlement.

54. Since a general multilateral treaty as defined in article 1 concerned all States, then any State, even if recognized by some States and not by others, had the right to participate. As had been pointed out by Mr. Pal. what was involved was the right of a State to take part in international relations and its duty to maintain friendly relations with other States. The restrictive practices with respect to participation constituted a denial of that right and that duty.

55. The suggestion that the " all States " formula might have the effect of limiting the participation of States in a treaty was not borne out by practice. The Moscow Test Ban Treaty contained the " all States " formula, yet it had been signed by 108 States, none of which had objected to that formula. The few States which had not signed the Moscow Treaty had abstained for entirely different reasons.

56. It had been suggested that the " all States " formula would not contribute to the development of friendly relations between States and might even provoke discord. That was a most surprising suggestion. The practice of debarring some States from participation in international relations went back to the nineteenth century, when the international community was regarded as a sort of closed club, a club to which countries such as Turkey and Japan had had to be formally admitted. That concept of a closed international community had now been revived by the cold war. In those circumstances it was clear that abandonment of the present restrictive practices would materially contribute to international co-operation.

57. Much had been said about the difficulties that might be created for a depositary by the " all States " formula. In fact, many treaties contained that formula and it had not led to any difficulties for the depositary. In particular, it had been suggested that the depositary would be faced with the problem of deciding whether a particular entity constituted a State for purposes of participation in a treaty. That problem was one which arose in all branches of international law and would

[4] *Yearbook of the International Law Commission, 1962*, Vol. I, 666th meeting, para. 105.

arise whatever the formula adopted in respect of participation; it arose, for example, in respect of the Vienna Convention on Consular Relations of 1963. In point of fact, it was not for the depositary to solve that problem but for each State to decide for itself whether it regarded another signatory as a State.

58. With regard to the problem of recognition, he had little to add to the remarks of Mr. Lachs. All experts on international law agreed that participation in a multilateral treaty did not involve recognition of the States or governments signing the treaty. For example, the Nuclear Test Ban Treaty had been signed by many States, some of which did not recognize each other, and the agreements of 1954 on Viet-Nam and of 1962 on Laos had been signed by both the United States and the People's Republic of China.

59. But although he was convinced that the preoccupations of certain members with regard to recognition were totally unfounded, he would have no objection to a proviso being included in article 8 to the effect that participation in a multilateral treaty did not involve recognition; a proviso of that type would serve to dispel any remaining fears on that score.

60. It had been suggested that the issue now under discussion was a political matter and required a political decision. But international law governed relations between States and those relations were, in a very broad sense, always of a political character. Even if in international relations there were problems that were either political, economic or legal, that did not mean that political matters should be settled without regard for international law, in other words, on the basis of purely political considerations. Such an approach would be reminiscent of the so-called " political realism " philosophy which had no scientific foundation but was nonetheless very dangerous. Advocates of that philosophy, such as Professor Hans Morgenthau, approached human actions on the basis that there was a political man, a religious man or a legal man : when a man took a decision as a political man, it was considered that he should be guided by political considerations, by the so-called " national interest ". That dangerous philosophy provided an easy justification for arbitrary decisions and arbitrary actions taken in violation of international law. In fact, the only valid philosophy was that which held that all political decisions should conform with international law.

61. With regard to the legal content of the " all States " formula, he noted that the Special Rapporteur had suggested in paragraph 3 of his observations on the draft article (A/CN.4/177) that it would have the effect of abrogating all existing final clauses which were in contradiction with that rule. Personally, he would like to see those final clauses abrogated, but would be prepared to accept a formula that did not go quite so far. He could therefore accept the inclusion of a proviso to the effect that the formula in question did not apply to treaties concluded " before the entry into force of the present convention ".

62. Some members had said that the Commission would be treading on dangerous ground if it tried to introduce new rules of *jus cogens* in the matter. It was not, however, rules of *jus cogens* but ordinary rules of international law which were involved, and those rules should still be respected. No one claimed, for example, that all the provisions of the four Geneva Conventions of 1958 on the law of the sea were rules of *jus cogens*, but, as ordinary rules of international law, they should be respected.

63. In short, the problem in article 8 went right to the very foundations of contemporary international law. The " all States " formula was dictated by the requirements of contemporary international law and by the overriding necessity to develop international relations in order to consolidate world peace.

The meeting rose at 1.5 p.m.

795th MEETING

Thursday, 3 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, 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 8 (Participation in a treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. REUTER said he did not think that the points considered in connexion with article 8 had been clarified sufficiently to be embodied in a rule stated in an article. He was not able to support either the definition of a general multilateral treaty given in article 1 (*c*), or the rule proposed in article 8, paragraph 1. If the Commission had to make a choice among the several proposals which had been put forward, he would choose that submitted by Mr. Ago.[2]

3. What was the trend of the present discussion ? He had pondered that question, to which there were three possible replies. The first was that the discussion had related to the definition of the international community; in other words, there were doubts about the universality of that community. But that reply was manifestly not the right one : the Commission's debate was taking place against the background of modern times, and it was irrefutable at the present time not only that the international community

[1] See 791st meeting, preceding para. 61, and para. 63.

[2] See 794th meeting, para. 44.