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Summary record of the 795th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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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.

was universal, but also that the newly-independent or newly-established States had a large share of responsibility, at least in law, in the community of which they were an important component.

4. The second possible reply was that since in the modern world there were three or four examples of cases where, in consequence of the Second World War and of the conflicts which had occurred since, territories and populations found themselves in a distressing and even tragic situation, it might be thought that the Commission was endeavouring to work out a principle by which those difficulties could be removed. But that idea, which he did not attribute to anyone, was as erroneous as the first. It was noteworthy that States—and not only the States most closely concerned—had adopted an attitude of extreme caution with regard to those situations and merely endeavoured to do what they could to overcome the difficulties in each individual case. There was a lesson in that attitude, for a hundred States weighed more heavily in the balance than twenty-five legal experts. The problems were difficult in fact only. In law they were simple, and could be solved merely by using the machinery available in the international organizations.

5. Consequently, it was necessary to fall back on a third explanation. The discussion was in fact a discussion of international constitutional law. Inevitably, when preparing a draft convention on the law of treaties, problems were encountered which bore on the innermost structure of the international community. The basic principle underlying all the new ideas that had been proposed to the Commission was that a State had the right to be a party to all treaties that affected its interests. That principle found only partial expression in the definition of a general multilateral treaty and in the rule stated in article 8, paragraph 1; but it certainly embodied the new spirit in which the problem was being approached.

6. In that connexion, two opposing trends had become manifest in the Commission; first, the many problems associated with the question under study had gradually been brought to light, and secondly, and sometimes simultaneously, there had been a tendency to shy away from the far-reaching consequences of the rule contemplated. In recalling some of the difficulties which had been mentioned, he would merely attempt to assess their magnitude, not to solve them.

7. As Mr. Lachs had rightly observed, if the Commission said that every State had a right to participate in treaties, questions concerning the recognition of States would inevitably arise. Mr. Lachs had made a suggestion for eliminating that problem, by the means used by States in certain special cases. That question would, however, call for a very careful consideration, for it was not just a matter of finding an expedient which could be used in special cases; it was necessary to solve, in a general way, the whole problem of the different kinds of recognition, and to see whether States were willing to leave the whole problem in abeyance.

8. It appeared from a remark by Mr. Ago that the Commission was not discussing the enlargement of the international community but rather the possibility of excluding certain States from it. If the Commission formulated a rule applicable to " every State ", either that principle was automatic—which would be revolutionary—or it was not automatic, and then the question would necessarily arise whether the international community had the right to apply sanctions to a certain State, to expel members, and whether such acts were compatible with the dignity of the State. The Commission had not discussed that important question.

9. Several members of the Commission, sensitive to the hesitancy to which he had just referred, had tried to remove regional agreements from the operation of the proposed rule. In that respect, he was inclined to share the view of the Chairman : if a principle was good for the international community, it was also good for the region. Besides, according to the definition of a general multilateral treaty given in the draft, questions of general interest to all States might well form the subject of a regional agreement; every State would therefore have the right to become a party to such an agreement. That was not a theoretical question, but one which had arisen in practice : States had asked to accede to certain treaties of military alliance which had not contained any clause providing for the accession of other States; they had argued that peace was indivisible and could not be a regional matter.

10. The problem was the same in the case of trade agreements : was it conceded that six States, for example, had the right to conclude such agreements and, in that case, did other States, whether neighbours or far-removed, have the right to participate in those agreements? Another example was that of agreements concerning international canals; formerly, the rules governing the administration of such canals had often been drawn up by bilateral agreement between two great States, but today was it admitted that those rules could be drawn up by a single State; or must all States participate in drawing them up for the reason that a problem of general interest was involved?

11. The definition of a general multilateral treaty given in the draft was full of good intentions, but it raised the question where interests began and ended. If two very great Powers concluded a bilateral treaty on a question affecting the interests of all States, that treaty would not come within the terms of the definition. He was not opposed to such a possibility; peace was beyond price and worth making sacrifices for. But at that point a question of law arose : did the Commission admit that two very great Powers could conclude a treaty and that subsequently that treaty should simply be offered to other States? Or, as certain members wished, should the other States be allowed to participate in the drafting of such a treaty? He would not attempt to answer those questions, but he thought they at least deserved consideration.

12. There was a logical answer to those questions, but it was one that the world was not yet ready to accept. It was to create an international parliament where all treaties would be discussed by all States; those which considered that their interests were at stake would decide for or against them, and the others would abstain.

13. Obviously some adjustments were needed for certain very complicated questions. The attempt to split a

principle in two, however, might produce two principles, each just as strong as the one which was to be discarded. If he had understood the debate correctly, the Commission had tackled a very important problem, which he, at any rate, could not agree that they should pretend to settle by texts which created more problems than they solved.

14. The CHAIRMAN, speaking as a member of the Commission, said he wished to comment on one of the points Mr. Reuter had just raised. Principles, however well formulated, could not be fixed for ever, since they were continually evolving under the pressure of events. That was why even the supporters of certain principles might be persuaded, for tactical considerations, to accept a less rigid principle in order to take account of the circumstances of political life. For the time being, the link between international law and the foreign policy of States was indissoluble.

15. Any State had the right to participate in treaties of general interest. But, if it proved impossible to adopt a rule of that kind, he would go halfway and agree as a compromise that the rule should be that any State was entitled to participate in such treaties, except where the parties had excluded the other States, though such exclusion was perhaps an abuse of rights.

16. Mr. LACHS said that he wished to deal with two of the many points that had been raised during the discussion. The first was the freedom of States to select their partners. The existence of that freedom or right of selection was not disputed. Yet many examples could be given of States exercising that right and then changing their minds; open treaties had sometimes become closed and treaties meant to protect the parties against possible dangers from a given State had been later extended to that very State and thenceforth directed against another State altogether. Nor was there any legitimate reason to prevent States from thus exercising that freedom. History showed that States had first selected their partners individually; when Spain had wanted to accede to the Treaty of Aix-la-Chapelle of 1748, a special additional treaty had had to be signed in 1784. The next step had been the adoption of the method of exchange of declarations, till gradually the whole procedure had changed in favour of general formulas. Categories of treaties had been established; within them there had always been a few States which might not have been welcomed by some of the original parties. Thus the right of choice had in fact been seriously reduced. Now, as an obvious result of that trend, the whole process of treaty-making was influenced by the principle of universality of international law.

17. The question of regional treaties had been raised and the Chairman had already dealt with that question. The only point which he wished to make in that regard was that no regional treaty could monopolize world affairs; otherwise, it ceased to be a regional treaty, with all the consequences which that entailed.

18. It was within that framework that must be viewed the new notion of the general multilateral treaty, which in order to perform its task effectively was bound to be universal. The formula applied at present by the United Nations belonged to the past. Conditions had changed and that formula had now lost its usefulness and indeed its very reason for existence. The law of yesterday had been superseded by events and could not be perpetuated.

19. The provisions of Article 4 of the Charter had been invoked. But there was an obvious difference between membership of the United Nations and the binding force of the Purposes and Principles of the Charter. That was precisely the meaning of Article 2 (6) of the Charter. Moreover, the conditions in which the Charter had been drafted were exceptional; not every multilateral treaty was drafted after a devastating world war and in circumstances like those of 1945. And the present membership of the United Nations was such that the founder States were outnumbered by those which had joined it later; its composition had altered as a result of the revolutionary changes of the past twenty years.

20. The second point was that of political considerations. He had always maintained that there was a close relationship between law and politics, but it was necessary to keep a balance between the two. There were issues which went beyond the individual, and sometimes selfish, interests of States and concerned humanity as a whole. Those issues related to such fundamental problems as peace and war, and it was precisely in that field that the idea of universality had gained expression in the concept of collective security, a concept that was intended to embrace all States, even potential aggressors. Certainly, there was no wish to repeat the experience of the Treaty of Paris of 15 April 1856[3] by which three great Powers had guaranteed the independence and territorial integrity of Turkey; for when Turkey, the obvious and only beneficiary of that treaty, had invoked it, the reply had been that Turkey, not being a party to the treaty, was not entitled to avail itself of that right. Unlike that treaty of 1856, the treaties which had outlawed war, such as the Treaty of Paris of 1928[4] or the Saavedra Lamas Treaty,[5] had been made open to all. The same was true of treaties of a humanitarian nature or of such instruments as the Moscow Nuclear Test Ban Treaty. When such issues were at stake, no State could be excluded; all must have the right to take part in the treaty concerned. Mankind as a whole must be represented; anything short of that would mean that the principle of universality had been betrayed.

21. As he had already mentioned (792nd meeting, para. 9) a similar approach had been adopted in a draft international agreement on the rescue of astronauts and spaceships in the event of accident or emergency landing that had been proposed to the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, of which he was Chairman. That draft provided a classical example of the mutual relationship between rights and duties. At first sight, the beneficiaries of the agreement would be only the so-called space Powers, but the duties would apply to all States. Obviously, it would be contrary not only to logic but also to the fundamental duties owed by all to those men who ventured into space to expose them to the risks resulting from the exclusion of any areas of the world from the operation of a convention of a humanitarian character. To do so would expose astronauts to the danger of being left helpless if they landed in

[3] *British and Foreign State Papers*, Vol. XLVI, p. 25.
[4] League of Nations, *Treaty Series*, Vol. XCIV, p. 59.
[5] *Ibid.*, Vol. CLXIII, p. 405.

certain areas, merely because, for political reasons, some States happened not to recognize other States. Ultimately, the real beneficiary of an agreement on assistance to astronauts and the return of spacecraft would be man himself. The life of an astronaut, the protection of basic rules of international law and their implementation were more important than the passing interests and policies of individual States.

22. Those considerations all militated in favour of the " all States " formula, which would translate the principle of universality into everyday life.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that in view of the nature of the question under discussion, he wished to give his personal opinion on article 8 before summing up as Special Rapporteur.

24. The problem underlying article 8 was a difficult one because it touched upon a number of fundamental institutions of international law. He had always been sympathetic to the idea of opening general multilateral treaties—although the concept of such treaties was perhaps not quite clear—to as large a number of States as possible, so as to ensure the widest application of their provisions. That was precisely the issue involved in article 8. But the Commission's discussion on universality had not always been very precise with regard to the implications of that idea as far as the text of the article was concerned.

25. One important point to be borne in mind was the distinction between the right to participate in the formulation of a rule of general international law, and the right to participate in the application of that rule; there was a difference in point of time between the exercise of the first right and the exercise of the second. Also, the problem of the right of participation in a conference was bound to be more pressing than that of accession to a treaty already concluded.

26. While he fully accepted the notion of the general multilateral treaty, he was bound to point out that it was difficult to dissociate that notion from another fundamental principle of international law, namely, the contractual basis of treaty-made law, even in regard to general multilateral treaties. Reference had been made to a number of treaties which were of universal interest, such as the Convention on the Prevention and Punishment of the Crime of Genocide,[6] and the humanitarian conventions signed at Geneva in 1949. Unfortunately, every one of those Conventions contained a provision which reserved the right of individual States to denounce it. Although many writers, like himself, believed that such a denunciation would not release a country from its obligations under customary international law in respect of the matters governed by the Convention, the fact could not be ignored that that right of unilateral denunciation bore out the consensual character of those treaties, despite the fact that they were of universal concern.

27. On the question of the freedom of States to choose their partners in the conclusion of treaties, he noted that what might be called the most progressive proposal before the Commission would have the effect of laying down, as a general rule of international law, that in a general multilateral treaty, the States concerned would no longer be free to specify definitively the States with which they were prepared to contract in that treaty. But whatever the causes of the present attitude of States, it was not possible to disregard the current situation as a factor when a codifying rule was being formulated.

28. United Nations practice in the matter had certain very well-defined tendencies. For example, in the United Nations rules for the calling of international conferences of States (General Assembly resolution 366 (IV)) it was laid down that the Economic and Social Council, when convening a conference, was to decide who should be invited to attend; of course, it was always open to the Council to invite all States to attend. In a whole series of invitations to conferences the United Nations had adopted an exceedingly wide formula, but one which left to the General Assembly the last word in determining which States should be asked to participate in a conference.[7]

29. It had been suggested that the present practice had originated in the cold war, but that was only a partial view of the matter. Underlying that practice, there was the basic problem that any international organization, at any period of its history, would always have to decide whom to invite to a conference convened under its auspices. Also, the Secretariat would have to know what action to take in the matter and normally it would not be prepared to take a decision itself.

30. He hoped that the General Assembly would continue in the future to act as the major parliamentary body of the international community; however, regardless of how that community might be organized in the future, the present practice represented a rule which was neither constitutionally nor politically unreasonable. That rule retained for the General Assembly, the body which was most representative of the international community, the right to take political decisions underlying participation. The matter had recently been dealt with at a number of conferences, and also in the General Assembly in connexion with the opening to wider participation of certain League of Nations treaties, and the rule to which he referred had been maintained. It was in fact the kind of rule that it would not be easy to dispense with in any international organization. Incidentally, he found it somewhat fanciful to talk of a " closed club " in connexion with an Assembly of some 120 member States, whose votes could not be controlled.

31. The most progressive of the proposals now before the Commission would recognize to every State a right of participation, which presumably could not be taken away by any particular decision. In his view, the adoption of such a proposal would overturn the consensual basis of general multilateral treaties and was not justified by any development in international law under the United Nations.

32. As for the compromise adopted in 1962, it purported to interpret the intentions of the States parties to the general multilateral treaty in those cases where the treaty itself was silent. From the point of view of principle and

[6] United Nations *Treaty Series*, Vol. 78, p. 278.

[7] See *Yearbook of the International Law Commission, 1963*, Vol. II, p. 11 *et seq.*

from that of State practice, that compromise formula was very much less objectionable than the more extreme proposals now put forward. Also, since many treaties contained specific provisions on the subject of participation, the rule adopted in 1962 would operate only as a residuary rule. Nevertheless, he did not feel that it would be justifiable to attribute to the parties to a general multilateral treaty an intention that was at variance with the existing practice, which was to reserve to the General Assembly the decision on the subject of participation.

33. For those reasons, his own views with regard to the compromise proposal had not changed since 1962 and he would not be able to support it, even as a residuary rule implying an intention, because it did not in fact reflect the general intention of States as seen in State practice. He favoured a formulation along the lines proposed by Mr. Ago; the question of extended participation should then be covered in article 9.

34. Speaking as Special Rapporteur, he said he would like to deal with a few points which had arisen during the discussion. First, it had been suggested that the problem of recognition was at the root of the issues raised by article 8. Personally, he did not believe that the question of recognition was a matter for inclusion in article 8, even in the form of an assurance that the provisions of the article did not affect recognition. Problems of recognition were political in character and no provision that the Commission could adopt on participation would effectively dispose of those problems. He fully accepted the view advanced by Mr. Lachs that under customary international law, when a State expressed its consent to be bound by a general multilateral treaty, it was not thereby considered to have impliedly recognized an entity which had similarly given its consent to be bound but to which it had refused recognition. However, the ramifications of the principle of recognition were very considerable and the topic of recognition was one which would require separate treatment by the Commission.

35. As to the difficulties of the depositary, they had perhaps been exaggerated in 1962. Where the depositary was a State, a formula could always be found to escape embarrassment, but the matter was more delicate for the secretariat of an international organization. The device of having three depositary States, adopted for the Moscow Nuclear Test Ban Treaty, was a useful one but it applied to a very special case; it greatly complicated the task of the depositary and he himself would therefore not like to see it used with any frequency.

36. It was also appropriate to consider the Moscow Treaty from the point of view of the distinction, which he had made earlier, between participation in the conference which formulated the law, and participation in a treaty, in other words, in the endorsement and application of the law after it had been formulated. From the point of view of the formulation of the law, the Moscow Treaty had been rather old-fashioned, because it represented essentially the drawing up of the law by a very small group of States which then invited other States to subscribe to it. Accordingly, it could hardly be regarded as a model precedent for the purposes of the present discussion.

37. The discussion in the Commission had shown that there were three different views held by members. The first was the view that the existing article 8 should be retained, subject to drafting changes. The second was a more progressive view which would exclude the consensual element altogether. The third was the view, which he shared, that it was preferable to state the rule on participation in a more classical form and to cover the question of extended participation by means of the provisions of article 9. The Commission should therefore vote on the various proposals in order to give the Drafting Committee a basis for its work.

38. Whatever decision the Commission adopted on article 8 would necessarily affect the difficult question of the definition of general multilateral treaties. It was possible to adopt a very narrow definition which would confine them to law-making, codifying or fundamental treaties; on the other hand, a much wider definition could be adopted, such as that implicit in General Assembly resolution 1903 (XVIII) on participation in general multilateral treaties concluded under the auspices of the League of Nations.

39. The CHAIRMAN said that the Commission could either follow its usual practice of referring all the texts to the Drafting Committee which would then continue the discussion with a view to producing a single text, or else it could direct the Drafting Committee as to how it should proceed.

40. Mr. AMADO said that in his opinion the Commission had no choice but to take a vote. The discussion had been of a very high standard and a conciliatory spirit had been shown, but Mr. Reuter, after reviewing the problems of particular concern to individual members, had tried in vain to find a haven of compromise. Several members of the Commission, although they were progressively-minded and had the interests of international law very much at heart, could not go any further. The time had therefore come to take a vote.

41. The CHAIRMAN invited the Special Rapporteur to list the texts on which the Commission would have to vote.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission could begin by voting on Mr. Briggs's proposal,[8] which was the most radical, and then on Mr. Tunkin's [9] followed by Mr. Ago's.[10] If none gained a majority it would have to fall back on either the 1962 text or his own proposed revision of it, both the latter being of course subject to drafting changes.

43. Mr. BRIGGS said he must make it clear that his proposal involved only the deletion of paragraph 1 in article 8 (sub-paragraph (*a*) in the Special Rapporteur's revised version).

44. Mr. TUNKIN asked for a roll-call vote in each case.

45. The CHAIRMAN put Mr. Briggs's proposal to the vote by roll-call.

In favour: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock.

[8] See 791st meeting, para. 77.

[9] *Ibid.*, para. 86.

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

Against: Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Tunkin, Mr. Verdross, Mr. Yasseen.

Mr. Briggs's proposal was rejected, 10 votes being cast in favour and 10 against.

46. Mr. TUNKIN explained that his proposal was that article 8 should consist of a paragraph 1 reading " In the case of a general multilateral treaty, every State may become a party to the treaty " followed by a provision concerning recognition, on the lines suggested by Mr. Lachs, and then by a new paragraph stipulating that the article did not apply to existing treaties, in other words, that it was not retrospective.

47. The CHAIRMAN put Mr. Tunkin's proposal to the vote by roll-call.

In favour: Mr. Bartoš, Mr. El-Erian, Mr. Lachs, Mr. Pal, Mr. Tunkin.

Against: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock.

Abstaining: Mr. Verdross, Mr. Yasseen.

Mr. Tunkin's proposal was rejected by 13 votes to 5, with 2 abstentions.

48. Mr. AGO said that, in the case of his own proposal, the Commission would be voting on the principle. If his proposal were adopted, it could be amended in any way the Drafting Committee might consider necessary.

49. Mr. TUNKIN asked whether he was right in thinking that Mr. Ago's intention was to exclude altogether from his proposal the distinction between general multilateral and multilateral treaties.

50. Mr. AGO said that his proposal made no distinction between a multilateral treaty and a general multilateral treaty.

51. Mr. ROSENNE said he presumed that Mr. Ago only wished to eliminate that distinction for the purposes of article 8 and not wherever it appeared in other articles.

52. The CHAIRMAN said that Mr. Ago's proposal was solely concerned with the free choice of partners in a treaty.

53. He put Mr. Ago's proposal to the vote by roll-call.

In favour: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock.

Against: Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Tunkin, Mr. Yasseen.

Abstaining: Mr. Pessou, Mr. Verdross.

Mr. Ago's proposal was rejected, 9 votes being cast in favour and 9 against, with 2 abstentions.

54. The CHAIRMAN said that the Commission was now left with the compromise formula adopted in 1962.[11]

55. Mr. BRIGGS asked whether the intention was that the Commission should vote only on paragraph 1 or on the entire text of the article.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission need only vote on the principle contained in paragraph 1, which was the same as that in sub-paragraph (*a*) of his revised version.[12]

57. Mr. AGO suggested that the voting procedure should be interrupted to allow the Drafting Committee to concentrate on the text adopted in 1962 and try to improve it, as the result of the vote on it would depend to a great extent on the drafting. The Commission had so far been voting on texts which differed in one way or another from the compromise originally adopted and the fact that every text had been rejected showed that the Commission as a whole was in favour of a compromise; but that did not mean that it was in favour of the 1962 text.

58. Mr. TUNKIN said he thought that the Commission should continue with the voting, and so give a decision on all the proposals before it.

59. The CHAIRMAN said that the Commission had to give the Drafting Committee some guidance. He would therefore put to the vote by roll-call the principle expressed in paragraph 1 of the 1962 draft.

In favour: Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Tunkin, Mr. Verdross, Mr. Yasseen.

Against: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock.

Abstaining: Mr. Rosenne.

The principle was rejected by 10 votes to 9, with 1 abstention.

60. The CHAIRMAN said that the only proposal remaining before the Commission was Mr. Ago's proposal that the whole matter be referred to the Drafting Committee, the Commission not having decided against the inclusion of an article on the subject of article 8.

61. Mr. CASTRÉN said that several members who, during the discussion, had spoken in support of the last text on which the Commission had voted were absent; he accordingly hoped that the Drafting Committee would bear in mind the views reported in the summary records as well as the results of the voting.

62. Mr. CADIEUX said that Mr. Ago's proposal had been made before the last vote had been taken. What the Drafting Committee was normally expected to do, when an idea was referred to it, was to select the wording which would best express that idea, but the Commission no longer had anything to refer to the Drafting Committee.

63. The CHAIRMAN said it was the Commission's normal practice, when it was unable to reach a conclusion, to seek advice from the Drafting Committee.

64. Mr. LACHS said that he understood Mr. Cadieux's anxiety but the course of the voting had demonstrated, with the rejection of Mr. Briggs's proposal, that the Commission wished to retain in its draft an article on the subject dealt with in article 8. As no formula so far proposed had won majority support, it remained for the Commission to devise another. Admittedly the situation

[11] i.e. the text reproduced in the record of the 791st meeting, preceding para. 61.

[12] See 791st meeting, para. 63.

that had arisen was a difficult one but some way out must be found.

65. Mr. BRIGGS said that, although on a number of occasions, after failing to reach agreement, the Commission had referred proposals to the Drafting Committee, he could remember no precedent for it doing so after formal votes had been taken and every alternative rejected. He was against the matter being referred to the Drafting Committee with a request that it formulate a new rule for which no clear support had been manifested in the Commission itself.

66. Mr. TUNKIN asked whether Mr. Cadieux and Mr. Briggs had any suggestion to offer as to the course the Commission might now take.

67. Mr. CADIEUX said that the Commission had discussed and voted on a very important issue and should not rush into a decision without further reflection.

68. The CHAIRMAN said he thought that was a very good suggestion and that the Commission would do better to wait and reflect on the matter.

69. Mr. YASSEEN said that one thing was certain from the rejection of Mr. Briggs's proposal: the Commission did want an article on the subject. So although the Commission had discussed it at great length, it should redouble its efforts to reach a satisfactory solution. It would be prudent, therefore, to leave the question in abeyance for a time and refer it to the Drafting Committee, which would report its conclusions in one or two weeks. By then, perhaps fewer members would be absent.

70. Mr. AGO said it might be argued that in principle the Commission would like to have an article; in other words, that by its equally divided vote on Mr. Briggs's proposal, it had simply refused to accept outright the idea of not having an article. Before admitting defeat, therefore, it should ask the Drafting Committee to work out a conciliatory formula which it might perhaps be able to adopt by a certain majority.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that in general he agreed that the matter should be considered by the Drafting Committee. The Commission had indicated that it wished to have an article on the subject covered by article 8. Indeed, it could be argued that otherwise there would be a gap in its work of codification, but the question remained as to what kind of provision was wanted. The only alternative to its usual practice would be to request the Special Rapporteur to prepare a new text for consideration by the Commission but he would not relish such a task on his own and believed it would be preferable for him to submit something to the Drafting Committee for prior consideration.

72. However, if that course were adopted, the Commission must first indicate whether the Special Rapporteur and the Drafting Committee were to be given a free hand in considering alternative proposals. In other words, was the legal consequence of the votes just taken to rule out certain propositions on the score that they had been definitely rejected on grounds of principle?

73. Mr. EL-ERIAN said it was important that the Commission should not interpret the voting in an excessively formal manner. An article had already been adopted in 1962 for which the majority of governments had expressed support. Account must also be taken of the known views of certain members of the Commission who had not been present during the voting. He hoped the kind of situation which had arisen in the Commission over the controversial issue of the breadth of the territorial sea[13] would not be repeated and that the whole problem raised by article 8 could be referred to the Drafting Committee.

74. Mr. TUNKIN said he agreed that, as the Commission had decided to include an article in its draft and no text was now available, it should ask the Special Rapporteur to prepare a new version for discussion first in the Drafting Committee and then in the Commission itself.

75. Mr. ROSENNE said that he was in favour of referring the matter to the Drafting Committee without more ado, and giving it *carte blanche* to take account of all the views expressed during the discussion as well as the voting. At the fourteenth session a similar situation had arisen over a tied vote on part of an article, and the difficulty had been resolved by the Commission unanimously adopting a proposal by Mr. Amado that the whole article be referred to the Drafting Committee.[14]

76. There were several possible interpretations of the significance of the votes taken on the present occasion and he could not agree with the conclusion that the Commission had definitely decided to include in its draft an article on the subject covered by article 8. It was, however, clearly in favour of pursuing the effort to elaborate a text that might prove acceptable.

77. Mr. TSURUOKA said that, to him, a ten-to-ten vote did not mean that the Commission wanted an article on the subject in question.

78. The CHAIRMAN said that, as Mr. Castrén had pointed out, two of the absent members, Mr. Jiménez de Aréchaga and Mr. Tabibi, had spoken in support of article 8.

79. Mr. AMADO said that the Drafting Committee could hardly draft something *ex nihilo*. Logically, it should be turned into a committee to draft a new text. Mr. Tunkin's proposal that the Special Rapporteur, who knew the subject thoroughly, be asked to find some way out of the impasse and submit his solution to the Commission was a reasonable one.

80. The CHAIRMAN, speaking as a member of the Commission, said he supported that idea.

81. Mr. LACHS said that the Commission was at least approaching agreement as to how to proceed. To put it no higher, the voting had expressed some kind of decision, even though not all the members had been present. They respected one another's views and some way out of the impasse should be sought. In the circumstances, as votes had already been taken, no harm would be done by entrusting the Special Rapporteur and the Drafting Committee, which after all was sufficiently representative, with the task of thrashing out the problem.

[13] See *Yearbook of the International Law Commission, 1956*, Vol. I, p. 181.

[14] See *Yearbook of the International Law Commission, 1962*, Vol. I, p. 98.

82. Mr. CADIEUX said the Commission should realize that it was in effect asking the Drafting Committee and the Special Rapporteur to exert themselves to find some way out of the impasse. He thought, like Mr. Tsuruoka, that since the Commission was divided as it was, the vote should not be interpreted as establishing any particular position. In his opinion, the Drafting Committee and the Special Rapporteur should consider all the possibilities open to the Commission, without assuming that a new text was asked for or that the Committee was expected to guide the deliberations of the Commission in a certain direction.

83. The CHAIRMAN said he noted that a new text had been neither asked for nor refused, and further, that the Commission would be prepared to ask the Special Rapporteur, with the assistance of the Drafting Committee, to try to submit a proposal for subsequent discussion, without prejudging the lines that proposal should take. He suggested that the Commission decide to adopt that procedure.

It was so decided.

The meeting rose at 1.5 p.m.

796th MEETING

Friday, 4 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. 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 said that for the time being the discussion on article 8 should be regarded as closed, as it had been agreed that the whole matter should be referred to the Drafting Committee and that the Special Rapporteur should be asked to prepare a redraft in the light of the discussion and of the voting that had taken place at the previous meeting. However, as there had not been time then, he would give the floor to Mr. Paredes for an explanation of his vote.

2. Mr. PAREDES explained that he had been one of those who had thought that one or more articles should be drafted on the subject-matter of article 8. However difficult it might be to formulate the basic points in a codification, no effort should be spared for that purpose. Fortunately, the Commission had some members, including the Special Rapporteur, capable of doing excellent work and they would surely succeed in working out a suitable provision. In a code, the essential problems should not be disregarded. A concise code might possibly be of some use, but in the long run it would become evident that it did not fulfil its task, which was to throw light, in particular, on the difficult points to be solved.

3. Although he had been greatly impressed by some of the suggestions made at the preceding meeting, none of them could possibly cover all the questions comprised under article 8.

4. There had been much discussion about the need to safeguard, in treaties, certain fundamental rights of States, notably the right to equality, which enabled any State to take part in the discussion of problems created by treaties, and contractual freedom, which gave countries the right to decide with whom they wished to negotiate. It had become evident that those two positions were in many respects diametrically opposed, owing to the existence, recognized by most specialists in international law, of two broad groups of treaties : law-making treaties (*traités-lois*) and contract-making treaties (*traités-contrats*).

5. The law-making treaty collected and summarized the customary practice or fundamental principles of international co-existence : hence it was binding on all and should therefore be open to all. It might emanate from a small group of States which had decided to clear up a point or to settle a question of international public order by an instrument that would bind not only the signatories but the entire world, for it only defined an idea of international morality that was universally recognized. The only contractual aspect of those treaties was their drafting and the determination of their scope, matters settled by the authors. As the Chairman had said, if those treaties, which were recognized and accepted by the majority but were drawn up by a small group of States, were to bind the whole world, then all States should be allowed to take part in discussing them. A rule of conduct having the force of *jus cogens* could not be laid down unless all States had an opportunity to express their opinion concerning the scope or extent of the proposed rule.

6. Consequently, in that respect he fully approved article 8, paragraph 1, according to which any State could take part in discussing the scope or extent of a rule implementing a principle of international law.

7. The situation was not the same with respect to contract-making treaties, which concerned special interests, however many international persons concluded them and were going to carry them out. Where special interests of States were concerned, one group of States could obviously decide with whom it wished to negotiate. At the 794th meeting he had referred to the treaties concerning questions of fisheries. A majority of the countries of the world could meet to conclude instruments of that kind, but they could also say that they did not wish to negotiate with some particular country. In that case, States obviously had a right to decide which persons could take part in the discussion and to whom the treaty should apply. Firstly, the treaty would not bind those who had not subscribed to it; secondly, in the light

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