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Summary record of the 490th meeting

Topic:
Law of Treaties

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could not agree with those members who had suggested that the code should be wholly silent on the matter. The Commission had to express a judgment and not leave the question in the air.

65. He recalled that he favoured a wording based on the two-thirds majority rule. In that connexion he pointed out, with reference to Mr. Pal's statement, that he had cited the provisions of Article 18 of the Charter and the General Assembly's rules of procedure as an example and not for the purpose of showing that a conference would necessarily be bound by those provisions.

66. Mr. EL-KHOURI asked why it was necessary to debate the question of voting at international conferences at such length. The fact that a text had been adopted by a simple majority or a qualified majority or unanimously would not affect the right of any State to refuse to ratify or accede to the treaty. He would prefer to leave sub-paragraph (ii) as it stood.

The meeting rose at 1 p.m.

490th MEETING

Friday, 8 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (*continued*)

[Agenda item 3]

NEW ARTICLE 6 (FORMERLY ARTICLE 15) (*continued*)

1. The CHAIRMAN, speaking as Special Rapporteur, reviewed the Commission's discussion of article 15, which had been redrafted and would appear as the new article 6 (see 488th meeting, para. 46).

2. While most of the discussion had related to the drawing up of the text of a treaty at international conferences, he would first dispose of certain other points that had been made. The Secretary to the Commission had suggested (488th meeting, para. 62) that the title of the article should be amended to read "Drawing up and adoption of the text". He agreed with the suggestion, which should be referred to the Drafting Committee. There had been criticism of the word "administrative", in paragraph 1. He agreed that it was not the best word but explained that he had used it in order to indicate that the process of negotiation was a function of the executive, and not of the legislative, branch of government. He could accept Mr. Scelle's suggestion (488th meeting, para. 68) that the word *"officielle"* should be used in the French text.

3. There had been no special observations with reference to paragraph 2. As to paragraph 3, Mr. Verdross had questioned whether the head of a diplomatic mission possessed inherent authority to negotiate a bilateral treaty between his State and the State to which he was accredited (488th meeting, para. 60). Actually, the head of mission surely had such authority under his diplomatic credentials, which gave him the power to "treat" with the Government of the State to which he was accredited, though admittedly not inherent authority to sign the treaty or to represent his country at a multilateral conference which happened to be held in the territory of that State.

4. In paragraph 4, some members of the Commission had suggested the omission of the final sentence, as self-evident. Others had considered the sentence important as a safeguard against any possible misunderstanding concerning the legal effects of the adoption of a text. Mr. Yokota had called attention to the fact that that point was covered by article 17, paragraph 1 (see 489th meeting, para. 6). He (the Special Rapporteur) was in favour of retaining such a provision in the code, because even international jurists sometimes became confused about the legal consequences of the adoption of a text. If the Commission should decide not to keep it in article 17, the provision should at least appear in the article under discussion.

5. With regard to paragraph 4, sub-paragraph (i), some members had thought it unnecessary to mention that texts of bilateral treaties were adopted by unanimity, and Mr. Ago had suggested (488th meeting, para. 52) that sub-paragraph (i) should be limited to the case of treaties "negotiated between a restricted group of States". He agreed with that suggestion in principle but thought that the drafting committee might mention the case of bilateral treaties parenthetically, so to speak, by a phrase such as "in addition to the case of bilateral treaties".

6. The remaining and major part of the discussion, and most of the suggestions, had dealt with sub-paragraphs (ii) and (iii). He would not review every suggestion but would attempt to group them into categories. One suggestion—he was not sure whether it was still maintained—had been to the effect that it was not necessary to deal with the voting rule at international conferences at all, because that was a question of conference procedure and not strictly part of the law of treaties. In his opinion, to accept that view would be to say that nothing was part of the law of treaties unless it had reference to a completed treaty actually in force. He did not believe that anyone wished to go so far, and all members of the Commission would probably agree that the question of the method whereby the text of a treaty was adopted was certainly a part of the law of treaties and a very important part. If that was agreed to, he could not see how the question could be excluded from the code.

7. In connexion with that question various suggestions had been made. It had been proposed that it should be provided simply that it was for each conference to decide on the method by which it would adopt the text of a convention. While he did not consider that proposal incorrect, he thought that it was inadequate, for it left open the very important question how a conference was to proceed to take that decision, a decision without which it could not adopt any text at all. It was therefore essential for the Commission to go a step further.

8. There again different suggestions had been made. While everyone had agreed that the international conferences referred to in sub-paragraph (ii) would always have the right to adopt whatever voting rule they preferred, many members of the Commission had expressed themselves in favour of mentioning a voting rule, and most of those had suggested a two-thirds-majority rule. After that, there had been a division of opinion as to whether the article should specify the manner in which a different rule would be adopted, some favouring the use of a vague formula, such as "unless the conference decides otherwise", while others

urged that the code should be specific about the majority by which the decision on a different rule was to be adopted. The issue had been clearly stated in the exchange between Mr. François and Mr. Tunkin (see 489th meeting, paras. 2-3 and 7-8).

9. Mr. Tunkin had argued that it was not necessary to say how a conference was to adopt its voting rule because the question was a matter of conference organization and in any case it was always solved in practice. He did not agree with Mr. Tunkin that it was not necessary to be specific. While it was true that very few conferences had dispersed because they had been unable to adopt a voting rule, there had been many conferences at which that question had caused considerable difficulty and delay. That fact alone would appear to indicate that it was desirable to include some provision regarding the adoption of substantive voting rules.

10. If such a provision was favoured by the majority of the Commission, the question would then arise whether or not a substantive voting rule should be included; in other words, one solution would be to add at the end of sub-paragraph (ii) a provision such as "by a two-thirds majority vote unless, acting by a simple majority, the conference decides otherwise", while the other solution would be to indicate that the voting rule at the conference would be such as the conference, acting by a simple majority, decided. In the second case, it might be desirable to point out in the commentary to the code that although the Commission had not included any proposal for a substantive voting rule in the article, it felt that the best rule to adopt was that of the two-thirds majority. The commentary might then give some reasons for that view: for example, that it was not very useful for conferences to adopt conventions unless those conventions commanded a considerable measure of agreement; that otherwise, the adopted convention was ratified only by a comparatively small number of States and remained more or less a dead letter; and that it was better to have conventions adopted by such a majority as they would then have a better chance of being eventually ratified by most of the participants, even if as a consequence of the two-thirds majority rule fewer conventions would be drafted. It seemed to him that such a statement could be included in the commentary whether or not it was decided to indicate a substantive voting rule in the article itself.

11. He agreed with Mr. Padilla Nervo (see 489th meeting, para. 64) that the manner in which an international conference adopted the text of a convention was a matter with which the Commission had to deal in one way or another. There would be a serious defect in the Commission's work if, on such an important matter, it put forward no view at all either in the code itself or in the commentary. Even if nothing were said about a substantive voting rule, it was indispensable to say how the conference would proceed to adopt its own rule for the adoption of the text.

12. He had formed the conclusion, after listening to the discussion, that for the purpose of adopting that rule of procedure a simple majority vote was the only practical solution. It might, theoretically, be provided that the conference should settle the substantive voting rule by a two-thirds majority. However, it was by no means easy to adopt a decision by a two-thirds majority. Indeed, one of the chief reasons for applying the two-thirds majority voting rule to the adoption of the text of conventions was to make it rather difficult to adopt the text, for the corollary was that the texts adopted by that majority had a wide measure of support. However, while the two-thirds majority rule might be justified for the substantive work of a conference, it could not be defended in the case of procedural matters, which were in practice always dealt with by a simple majority vote. If the Commission suggested a two-thirds majority rule for the adoption of rules of procedure, a conference, instead of being able to adopt them easily and quickly, might have to spend quite a long time in arriving at acceptable rules.

13. With regard to sub-paragraph (iii), he agreed with the point made by the Secretary to the Commission concerning the vagueness of the words "or under the auspices of" (see 488th meeting, para. 64). Perhaps the beginning of sub-paragraph (iii) might be revised to read "In the case of treaties drawn up in an international organization or at an international conference convened by an international organization . . .". Otherwise, there had been no objection to sub-paragraph (iii). The constitutional instruments of some international organizations—the United Nations, for example—specified no voting rule for conferences convened by them. Other international organizations, like the International Labour Organisation, had constitutional provisions on the subject.

14. Mr. Ago had referred (488th meeting, para. 53) to the possibility that an international organization—whose constitution did not contain such a provision—might convene a particular conference on the understanding that the text of the convention would be adopted by a certain voting rule. The Secretary to the Commission had pointed out (489th meeting, para. 14), on the basis of a discussion by the General Assembly of United Nations practice in connexion with Article 62 of the Charter, that so far as the United Nations was concerned, whether or not it had the power to lay down an *a priori* rule for conferences convened by it, it had deliberately chosen, so to speak, not to exercise that power and, in the light of the discussion held in the Sixth Committee in 1949,[1] the invariable practice had been to leave the matter to the decision of the conference itself. Of course, provisional rules of procedure were drawn up by the Secretariat, but it was for each conference to decide whether to adopt them as they stood or to modify them.

15. However, in Mr. Ago's view, the existence of United Nations practice in the matter did not rule out the possibility that some other international organization might convene a conference, of a technical nature perhaps, for which it specified a particular voting rule. He (the Special Rapporteur) agreed that such a situation was conceivable and suggested that it might be provided for by adding a fourth sub-paragraph to the effect that in those cases in which an international organization possessed the power to convene a conference and to prescribe the voting rule for the conference, and exercised that power in any given case, the voting rule would be the rule so prescribed. Such a flexible formula would not prejudice the position of organizations like the United Nations which did not exercise its power to prescribe a voting rule.

[1] See *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 187th to 199th meetings.

16. He had not dealt with the specific formulae that had been put forward. They could conveniently be examined by the Drafting Committee, provided that the Commission first took a decision on the questions of principle. He invited suggestions concerning the procedure the Commission should follow in arriving at that decision.

17. Mr. AGO said he had been giving careful thought to the problem raised by sub-paragraph (ii) and had come to the conclusion that the Commission might find it easier to reach agreement if it adopted the suggestion first put forward in specific terms by Mr. Sandström (489th meeting, para. 47) and did not mention any majority in the text of the code with regard to the adoption of the text of treaties but dealt with the matter in the commentary. It should be remembered that not all international conferences were convened by the United Nations, and that conferences were held for the purpose of adopting conventions that dealt with the most diverse matters. While a certain tendency might be noticeable in the case of certain conferences, that did not mean that it should be reflected in all conferences. Even in the case of United Nations conferences, different rules had been applied. For example, the two-thirds majority rule had been adopted by the Conference on the Law of the Sea, in 1958, whereas the simple majority rule had been followed by the United Nations Conference on the Elimination or Reduction of Future Statelessness, held in March and April 1959. He had no doubt that the subject-matter of those conferences had had a lot to do with their decisions concerning the substantive voting rule, and it was not inconceivable that at a future conference on another question, the best rule might be that of a three-fourths majority or even the unanimity rule. Accordingly, the problem in sub-paragraph (ii) might best be dealt with by using the words "by the rules established by the conference".

18. The commentary could certainly explain that there was a tendency, in the case of subjects, to adopt the two-thirds majority rule, and might cite examples. However, he did not think it would be wise to indicate any general rule as having preference.

19. As to the question how the voting rules were established by a conference, he considered it a general principle of law that such rules were adopted by a simple majority. He would prefer the text of the code to say so expressly, but there too he was prepared to accept the solution of stating in the commentary that the tendency was to adopt rules of procedure by a simple majority of the conference.

20. With reference to the last point dealt with by the Special Rapporteur, he reiterated that the Commission should not be governed exclusively by United Nations practice and should bear in mind that a technical international organization such as the International Telecommunication Union might call an international conference on the basis of a pre-established voting rule, although the constitution of the organization was silent on the matter. He did not object to the Special Rapporteur's suggestion, but a simpler solution would be to add at the end of sub-paragraph (iii) the words "or in a decision taken by its competent organs".

21. Mr. TUNKIN pointed out that the most far-reaching proposal before the Commission was that the text of a treaty was to be adopted by the voting rule decided upon by the conference. That proposal—and he accepted Mr. Ago's formulation—excluded all others and, if the Commission was to vote on the various proposals, it should be voted upon first.

22. He did not agree with Mr. Ago that the article should be silent on the substantive voting rule while providing a rule for the adoption of that rule. If the Commission mentioned any rule at all in the code, it should be the rule governing the adoption of the text of the treaty and not the adoption of the rules of procedure. A rule of procedure came within the scope of the organization of international conferences, and that was a subject that the Commission had not studied. He still did not think that the code should, almost incidentally, touch on one isolated aspect of that subject.

23. If in its first vote the Commission decided that some substantive voting rule should be laid down in the code, he suggested that it should vote next on the proposal that the code should provide for the adoption of texts by a two-thirds majority unless the conference decided to adopt another voting rule.

24. Mr. ALFARO suggested that the Commission should decide the questions before it in the following order: it should settle first the question whether or not the code should mention in sub-paragraph (ii) and (iii) the manner in which a conference adopted the text of a treaty. If that question was decided in the affirmative, it would then have to settle the question whether the text was adopted by a two-thirds majority, a simple majority or by a rule decided upon by the conference itself. Finally, the Commission should decide whether the code should mention the majority by which a conference adopted its substantive voting rule. Once the Commission had decided those questions of principle, it would be easy to discuss the various formulae that had been put forward.

25. Mr. YOKOTA said that the decisions the Commission was about to take were of very great importance. He suggested that it might be better first to ask the drafting committee to draw up a single text of sub-paragraph (ii) if possible, or carefully worded alternative texts embodying the different solutions that had been proposed. It seemed to him that the Commission would then be in a better position to take its decisions.

26. Mr. PAL considered that it would be meaningless to stipulate a two-thirds majority for the adoption of a text without at the same time stipulating that that rule could not be amended except by at least the same majority.

27. Mr. BARTOŠ supported Mr. Alfaro's proposal in the belief that the issue was of great importance and must be settled by the Commission itself.

28. The CHAIRMAN, speaking as Special Rapporteur, said that although the Commission sometimes referred points which were not strictly drafting points to its Drafting Committee, he doubted whether Mr. Yokota's suggestion should be adopted: in the case in point it was clear that the Commission must first take a decision of principle.

29. Mr. FRANÇOIS said Mr. Yokota's suggestion might be helpful; the drafting committee might well be asked to formulate alternative clauses.

30. Mr. ALFARO said that in the absence of real agreement in the Commission itself the procedure suggested by Mr. Yokota would be a waste of time.

31. Mr. KHOMAN agreed with Mr. Alfaro and suggested that the Commission should decide forthwith whether or not to insert a provision concerning the adoption of the text of a treaty. If that were decided in the affirmative, some mention should be made in

the commentary of the growing practice of applying the two-thirds majority rule.

32. Mr. EDMONDS said the Commission would not escape its difficulties by referring paragraph 4 to the drafting committee; it should come to a decision now on the substantive issues raised in the discussion. He did not agree with the view that the code should not contain a provision concerning the procedure to be followed at international conferences.

33. Mr. AMADO said that a suggestion he had made earlier had now been taken up by Mr. Alfaro and seemed to have been supported by Mr. Sandström and Mr. Ago.

34. He did not share the view that the Commission could not impose a rule. The Assembly of the League of Nations had applied the unanimity rule, except in so far as the Covenant expressly provided others (e.g. rules observable in the election of non-permanent members of the Council and the judges of the Permanent Court of International Justice). In the committees however decisions had always been taken by simple majority by virtue of a practice which had been followed from the outset and which in 1924 the Netherlands delegation had sought to incorporate in the rules of procedure. Delegations finding themselves in the minority had usually abstained from voting in plenary meeting so that the budget, for example, had always been adopted unanimously.

35. Since there was no consensus in the Commission he believed that the question of the voting rule should be left for each conference to decide.

36. Mr. PADILLA NERVO thought it should be possible for the Commission to agree whether or not the code should lay down the rule governing the majority required for the adoption of the text of a treaty by a conference. If such a provision was inserted in the code, it could either state that the conference itself decided the majority, or else specify the majority, or, lastly, lay down a rule subject to the proviso that the conference could decide otherwise. In his opinion, the code should either lay down the two-thirds majority rule or else it should leave each conference to settle its own rule.

37. He saw no objection to the unanimity rule in paragraph 4, sub-paragraph (i).

38. Once the Commission had reached a decision, the Drafting Committee could prepare the text and the various points of view put forward in the discussion could be enumerated in the commentary.

39. Mr. AGO formally proposed that the words "by a simple majority vote unless the conference, equally by a simple majority, decides to adopt another voting rule" in paragraph 4, sub-paragraph (ii), should be replaced by the words "according to the rules adopted by the conference itself". He also proposed that a statement should be inserted in the commentary to the effect that there was a definite trend at conferences towards the two-thirds majority rule for the adoption of texts and towards the simple majority rule for the adoption of rules of procedure.

40. Mr. TUNKIN supported Mr. Ago's proposal.

41. The CHAIRMAN said that Mr. Ago's proposal represented an excellent solution if a decision in that sense were adopted by the Commission, but the preliminary stages for reaching agreement could still not be avoided. As he saw it, the Commission must settle the following questions: first, whether a definite voting rule should be laid down and, if not, whether it should be stated that the conference adopted its own rules; secondly, if the first question were decided in the affirmative, what majority should be required; thirdly, whether any provision should be included concerning the voting rule for the adoption of the rules of procedure themselves, and if so, by what majority the conference would adopt its rules of procedure.

42. Mr. TUNKIN, while agreeing with the Chairman as to the issues that had to be decided, asked that the Commission should first decide whether the code should contain a provision concerning the adoption of the rules of procedure, since that decision would influence the others.

43. Mr. LIANG, Secretary to the Commission, referring to the contention that *a priori* the two-thirds-majority rule was the only logical one, said that many recent conferences convened to conclude international conventions had adopted the simple-majority rule. They included: the United Nations Maritime Conference, 1948; the United Nations Conference on Freedom of Information, 1948; the United Nations Conference on Road and Motor Transport, 1949; the United Nations Conference on Declaration of Death of Missing Persons, 1950; the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951; the United Nations Conference on Status of Stateless Persons, 1954; the International Conference on Conservation of Living Resources of the Sea, 1955; the United Nations Conference on Maintenance Obligations, 1956; and the United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, 1956. Nor had it been specifically suggested that the two-thirds majority rule should apply when the General Assembly itself had prepared the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, and the Convention on the Nationality of Married Women, 1957.

44. At the conference which had drafted the Statute of the International Atomic Energy Agency, decisions to amend the provisions of an existing draft had been taken by a two-thirds majority and, unless otherwise provided for, all others by simple majority.

45. He did not share the view that the code should not mention the subject; some provision to the effect that the text of a treaty was adopted by a simple majority or a two-thirds majority, as decided by the conference, might be inserted in paragraph 4, sub-paragraph (ii).

46. Mr. PAL said that clearly any conference could decide to follow the majority rule but the problem was by what procedure it adopted that decision. He asked whether it was necessary to deal with that question on the present occasion.

47. Mr. VERDROSS thought it self-evident that no one State could prevent a conference from adopting the rules of procedure by a simple majority. The States in the minority had the choice between accepting the majority decision and withdrawing from the conference. That view did not conflict with the general principle of unanimity to which he had referred at the preceding meeting (489th meeting, para. 32), since any of the minority States which continued to participate in the conference would tacitly accept the rules of procedure adopted by the majority. In no case was the minority bound by the majority in such matters.

48. Mr. YOKOTA considered that, if any provision on the procedure of adopting a text was to be included in the code, that provision must have some meaning. But it was meaningless to say that, in the case of multilateral treaties negotiated at an international conference, the text should be adopted by whatever procedure the conference approved. The Commission should at least indicate a voting rule that ought to be followed unless the conference decided otherwise. The Secretary's remarks (see paras. 43-45 above) led him to support a provision indicating that the simple majority rule would apply unless the conference decided to adopt some other voting rule.

49. Mr. HSU said that, subject to certain exceptions, any conference was, of course, free to adopt a two-thirds majority rule, or even a unanimity rule. He believed, however, that in the code the only proper course was to provide the simple majority rule for the adoption of the text; the rule would, naturally, itself be capable of being modified by a simple majority.

50. Mr. TUNKIN pointed out that the conferences enumerated by the Secretary to the Commission differed considerably *inter se* in composition and character. For example, between thirty and forty States had participated in the United Nations Conference on the Elimination or Reduction of Future Statelessness, 1959, while the United Nations Conference on the Law of the Sea, 1958, had been attended by representatives of eighty-six States.

51. Mr. LIANG, Secretary to the Commission, said that the purpose of his previous intervention had not been to impress upon the Commission the merits of the simple majority rule, but to demonstrate that there were precedents for both voting rules. It went without saying that the Secretary-General, in preparing provisional rules of procedure for any conference, always took into account the nature of the subject and the number of participating States. In the case of the Conference on the Law of the Sea, for example, he had had no hesitation in suggesting the two-thirds majority rule, and his suggestion had been accepted by the consultative group of experts who had helped the Secretary-General to plan the preparatory work of the Conference.

52. No difficulty had been encountered at any recent conference over the adoption of the rules of procedure.

53. The CHAIRMAN called for a vote on the question whether the code should contain an indication of a substantive voting rule for the adoption of texts by international conferences.

It was decided by 8 votes to 6, with 1 abstention, not to include in the code any indication of a substantive voting rule.

54. The CHAIRMAN observed that in view of the decision just taken it was unnecessary to vote on the content of such a substantive voting rule.

55. He invited the Commission to vote on the question whether a voting rule for the adoption of rules of procedure should be indicated in the code.

It was decided by 9 votes to 3, with 2 abstentions, to include in the code an indication of a voting rule for the adoption of rules of procedure.

56. Mr. EL-KHOURI thought the only rule that the code should indicate was the simple majority rule.

57. Mr. AGO observed that there had been no proposal for a qualified procedural voting rule; in any case, such a rule would be most impracticable, for it might even keep the conference from beginning its work. Accordingly, the only possible course was to indicate the simple majority rule for the purpose of adopting the procedure.

58. Mr. PADILLA NERVO pointed out that, under Article 18 of the United Nations Charter, the General Assembly's decision as to whether a question was important or not was made by a simple majority. He thought the provision in the Charter left the Commission with no choice and therefore a vote on that particular point could be dispensed with.

59. Mr. KHOMAN was not convinced that the Commission had no choice. He asked whether there were any precedents in League of Nations or United Nations practice for the adoption of rules of procedure by a two-thirds majority.

60. Mr. LIANG, Secretary to the Commission, said that he had no knowledge of recent experience of the application of the two-thirds majority rule in procedural matters. However, the provisions of a procedural nature contained in the Covenant of the League of Nations had, by implication, been adopted unanimously because the Covenant constituted a network of the 1919 Peace Treaties, the voting rules of which were based on unanimity. Of course, that was an exceptional case.

61. Mr. TUNKIN also doubted whether the only course open to the Commission was to recommend the simple majority rule for the adoption of the rules of procedure of a conference; an alternative was indicated in article 15, paragraph 2, of the Special Rapporteur's original draft (A/CN.4/101).

62. The CHAIRMAN, speaking as Special Rapporteur, pointed out that his original text had been generally regarded as impracticable and that a new proposal was before the Commission. If most members felt that the application of the simple majority rule was self-evident for the purpose of the adoption of rules of procedure, there was no need to vote on the question.

63. Mr. ALFARO agreed with the members of the Commission who had pointed out that the simple majority rule was the only one that could be applied. That point might not, however, be quite so obvious to the lay reader; he therefore suggested that an express provision should be inserted in the code.

64. The CHAIRMAN thought the consensus was that the simple majority rule was the only practicable one. Unless a vote was requested, the Drafting Committee would be asked to draft the provision.

65. Mr. TUNKIN said that, although he could not agree with the majority view, he would not ask for a vote.

66. Mr. YOKOTA said he had no objection to the procedure outlined by the Chairman, but recalled his statement (488th meeting, para. 67) that the simple majority rule was not yet established in international law, and to enunciate it would constitute progressive development of international law. He hoped that his views would be fully reflected in the commentary.

67. The CHAIRMAN said that the Drafting Committee would be requested to take Mr. Yokota's views into account. The commentary should also sum up the debate on the relative merits of the two-thirds and the simple majority, and summarize the information given by the Secretary.

The meeting rose at 12.50 p.m.