Document:-
A/CN.4/SR.492

Summary record of the 492nd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1959 , **vol. I**

code at all, since they concerned interpretation rather than validity. The Drafting Committee might be asked to look into that question. Paragraph 1 might better be placed at the end of the article, an arrangement which might perhaps meet the point raised by Mr. Verdross.

24. Mr. EL-KHOURI, referring to paragraph 3, thought that it would be desirable to mention in the treaty itself the authority by virtue of which a State claimed to be competent to conclude a treaty on behalf of a protected or semi-sovereign State or territory, such as a mandated territory; in the latter case, the international organization from which the mandate was held should be named. In the case of a protected State, it should be specified whether the representation was arbitrary or by agreement between the protecting and the protected State. In order that a treaty made by the protecting State on behalf of the protected State should be binding on the latter, it was necessary that evidence of the authority by virtue of which the protecting State claimed to be acting should be given.

25. Mr. SCELLE thought that, if paragraph 1 was retained, it might be better to say that the presence of a preamble or conclusion might or might not have juridical importance, but that that depended on the interpretation, which should be dealt with elsewhere in the code. A conclusion, if it summarized the purpose of the agreement, might have a great and precise juridical validity, whereas often a preamble might not.

26. Mr. ALFARO said that article 16 would have to be discussed in great detail. On the whole, the article was well-conceived and a good introduction to the remainder of the code. He had, however, some doubts about the reference to preambles in paragraph 1. They were not usually a juridical requirement, but there was an important precedent in the United Nations Charter, which should not be disregarded. When the original chapters 1 and 2 of the Dumbarton Oaks Proposals had been discussed, some delegations had suggested that the principle *pact sunt servanda* should be incorporated in the body of the Charter itself, but the five permanent members of the Security Council had opposed the idea, and it had been finally agreed that the principle should be incorporated in the Preamble. At the United Nations Conference on International Organization, held at San Francisco in 1945, the committee responsible for drafting Chapter I of the Charter had approved a text, later adopted in plenary session,[2] to the effect that the Preamble would have the same juridical validity as the Articles themselves.

27. Mr. AGO said that he would have several comments to make when the article was discussed in detail. In principle, it might perhaps be better to begin the article with a reference to the requirements which were really conditions of validity of a treaty, and to refer later to those elements which were frequently inserted in a treaty but were not conditions for its validity.

28. Mr. AMADO said that the contents of article 16 were not fully in keeping with its title, "Certain essentials of the text"; matters which were admittedly not essential appeared in some of the paragraphs, particularly paragraph 5. The article in general seemed somewhat premature. The provisions concerning entry into force were elaborated in article 41 and so might be unnecessary in article 16. It would probably be preferable to deal with the various questions in their proper context in the code rather than in a preliminary article.

The meeting rose at 6 p.m.

[2] *United Nations Conference on International Organization, Ninth Plenary Session*, 25 June 1945, vol. 1, p. 614.

492nd MEETING

Tuesday, 12 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 16 (*continued*)

1. The CHAIRMAN invited the Commission to continue its debate on article 16 (*Certain essentials of the text*).

2. Mr. PAL said he could not agree with the remark made by Mr. Verdross (491st meeting, para. 22) that the negative approach in article 16, paragraph 1, was relatively unnecessary. From the trend of the observations made by some members it appeared that there was some misapprehension as to the purport of the paragraph. The paragraph was not intended to assess the value of a preamble and did not in the least minimize its value should one be provided. It only stated that a preamble was not a "juridical requirement" in the sense that its absence would not be a fatal formal shortcoming. The confusion might have arisen from the difference between the French phrase *"une condition requise du point de vue juridique"* and the English "juridical requirement". He had some doubts, however, about the article as a whole; in particular, he was not sure that the term "essential" was used consistently in the same sense throughout the article. In some cases the word appeared to mean a requirement affecting validity, but in others it apparently did not have that sense. The requirement of paragraph 2, for example, would affect the very foundation of the treaty, while the requirement of a ratification clause envisaged in paragraph 6 would not mean that its absence would affect the validity of a treaty. The term "essential" might have to be modified and some provision might have to be added concerning performance and non-performance dealt with in the Special Rapporteur's fourth report (A/CN.4/120).

3. Mr. KHOMAN said that, although the content of article 16 was fairly comprehensive, if the title "Certain essentials of the text" were construed strictly, it would be seen that only paragraphs 2 and 3 referred to essential matters, whereas the remainder related to discretionary clauses (*clauses facultatives*). He found some difficulty about paragraph 1, because, while that provision stated that a preamble was not a juridical requirement, the reference in paragraph 2 to "a preambular recital" implied that it might become so, inasmuch as it might indicate the States on whose behalf a treaty was initially drawn up. The title might be reworded to conform with the essentials set out in paragraphs 2 and 3; he suggested "Essential and non-essential clauses of the text". Alternatively, paragraphs 4, 5 and 6 might be placed in a separate article under the heading of "Discretionary clauses", and paragraphs 1, 2 and 3 might bear the title "Compulsory clauses". He had no objection to paragraph 1; indeed, it might be just as well to begin with the negative form.

4. Mr. HSU thought that most of the criticism was directed against the form rather than against the substance of the article, partly because it was more in the nature of an extract from a textbook or advisory opinion than an article in a code. It would seem that the traditional way of setting out the clauses in a code was to state what was necessary rather than what was unnecessary. The substance of the article might be readily accepted and the difficulties overcome by redrafting.

5. Mr. YOKOTA agreed with the basic idea underlying article 16. Paragraphs 1 and 2 stated the essentials and paragraphs 4 and 6 what was desirable. Those four paragraphs might therefore be retained in that order, although the separation into two articles suggested by Mr. Khoman might be preferable. Paragraph 5, however, stated neither what was essential nor what was desirable. The passage concerning entry into force on signature was not concerned with the essential or the desirable, but with the legal effect of signature, which was more clearly stated in article 29, paragraph 2. The passage concerning continuance in force was likewise misplaced, for it bore in fact on the temporal validity of treaties. The substance of paragraph 5 should therefore be redistributed in more suitable contexts elsewhere in the code. Paragraph 1 had some significance as an introductory clause and was certainly harmless, but as it resembled a textbook description, it might be better placed in the commentary than in the text of the code itself.

6. Mr. LIANG, Secretary of the Commission, said that article 16 might more properly be regarded as a commentary on article 15 than as an article in its own right. The term "essential" was a difficult one, because it covered three different concepts, all of which appeared in the various paragraphs of the article. It might be construed to mean "essential for the validity of a treaty", or "essential for the discharge of the obligations involved", or "essential for the more effective operation of the treaty". For the first concept, that of formal validity, only one provision might be conceived as being essential, the statement of the rights and obligations of the parties. The question might be asked whether a statement of the identity of the parties concerned was essential, and hence whether that did not also apply to a preamble. When the term "text" had been discussed, he had expressed the view (487th meeting, para. 54) that signatures did not form part of texts, so that a statement of the names of the parties as well as a statement of the rights and obligations was an essential minimum for validity. All the other provisions in article 16 dealt with the other two constructions of the term "essential" and those clauses might be set out in their proper place when the issues to which they referred were covered. To collect all the general principles in the context of article 16 might cause congestion.

7. Mr. TUNKIN agreed with Mr. Verdross that paragraph 1 was unnecessary, since it would be quite impossible ever to enumerate in the code all the particulars which were not essentially required in the text of a treaty. Such an enumeration might perhaps be of some value in the commentary for the use of students, but everyone actually concerned with making treaties knew what juridical requirements they should or should not contain.

8. Paragraph 2 was the only one which indicated the essential parts of a text, whereas all the other paragraphs related to discretionary clauses. According to that paragraph it was essential to indicate the States on whose behalf the treaty was initially drawn up. However, some texts adopted by international organizations, notably the international labour conventions, were not signed at all; they were accepted by the International Labour Conference and the instruments of ratification were deposited with the International Labour Office. The texts of those conventions, therefore, did not bear any signatures from which the identity of the States parties could be inferred. It was open to question, therefore, whether an indication of the parties was really essential in the text of a treaty.

9. Paragraph 3 hardly came within the scope of article 16 and was not entirely acceptable in principle, as it might conceivably be interpreted as a legalization of colonial dependency, which, in his opinion, was incompatible with the spirit of the United Nations Charter.

10. He agreed with Mr. Sandström, who had said (491st meeting, para. 23) that paragraphs 5 and 6 were not relevant where they stood; their proper context was the articles dealing with entry into force, ratification, accession and so forth. It was doubtful, moreover, whether the provisions of paragraph 6 were a correct statement of prevailing practice. It was certainly not the practice to specify the ratifying authority in a treaty; it was usually stipulated that ratification should be carried out in accordance with constitutional processes. Paragraph 6 was therefore unnecessary and probably unacceptable; some of its provisions, if suitably amended, might well be placed in the commentary.

11. Mr SCELLE pointed out that the French and English texts of paragraph 4 did not correspond and that the French text was contradictory internally, inasmuch as it stated that matters described as *de rigueur* were not essential; that, however, was merely a drafting matter.

12. Paragraph 5 was rather confusing, especially if read in the light of article 17, paragraph 1. It appeared to state that a treaty might enter into force on signature. Such a notion could not be accepted, since most treaties in the strict sense of the word entered into force only when ratified, although certain agreements which were not formal treaties might enter into force on signature. Signature, as article 17 implied, was simply evidence of the will to agree and did not commit the constitutional organs, but only the plenipotentiaries. At the very least paragraph 5 would have to be redrafted.

13. Mr. AMADO said that, in keeping with prevailing practice, if a treaty was to come into force on signature an express declaration to that effect was necessary: in the absence of such a declaration, the treaty entered into force only after ratification. That being so, the process described in paragraph 5 was the precise reverse of the ordinary practice. Entry into force and ratification were correlative terms. Entry into force on signature was exceptional, save in Anglo-Saxon law. The rule was entry into force after ratification.

14. Mr. BARTOŠ said that, if paragraph 3 were adopted as it stood, it might hamper the attainment of independence by territories or countries in the class referred to in the paragraph. It seemed to imply that treaties entered into on behalf of such territories by the administering Power would continue to be binding on those territories after they attained independence. He agreed that where the administering Power indicated that it made a treaty on behalf of a particular territory, the latter would be bound so long as the power relationship remained unchanged. The General Assembly had discussed at length whether international treaties embodying concessions and international obligations which imposed burdens on colonial territories

should continue to be binding after the territories attained independence. In Latin America, at any rate, the theory had long been held that such treaties ceased to be valid at that stage. Admittedly, that was a separate question, which had not been and should not be dealt with by the Special Rapporteur; but paragraph 3 as it stood created the possibility of arriving at conclusions which conflicted with the majority opinion in the Assembly. The paragraph should at least be amended to show that such treaties might be valid, like international obligations, only for the States which concluded them.

15. With regard to paragraph 5, he said that the practice on the continent of Europe and in Latin America was that, unless otherwise expressly provided, a treaty entered into force on ratification. Paragraph 5 said precisely the reverse. Furthermore, in many European States, there was sometimes an internal struggle between the legislature and those executive organs which were eager to bring treaties into force as soon as possible. Hence, opinion in those States might hesitate to accept the proposition that a treaty entered into force on signature. On that point he agreed with Mr. Scelle.

16. With regard to paragraph 6, he entirely agreed with Mr. Tunkin. It was not for the plenipotentiary who participated in the preparation of the treaty to indicate the competent organ, which would, in fact, be indicated by the constitution. The paragraph would have to be amended.

17. Mr. FRANÇOIS observed that it was true that a treaty in the strict sense could not be deemed to enter into force on signature. Nevertheless, the only difference between an obligation which was not a treaty and a treaty in the strict sense was often the ratification clause. If the instrument contained no ratification clause, it was impossible to say whether it was a treaty or some other obligation. The formula in paragraph 5 was correct to that extent; for example, the Barcelona Declaration of 1921 recognizing the right to a flag of States having no sea-coast[1] had been regarded as a treaty by some States, and ratified by them as such, whereas others had held it to be an agreement not needing ratification. Accordingly, it was true to say that, in the absence of any indication to the contrary in an agreement or treaty, it might be deemed to be in force on signature, since it was impossible to say whether an instrument lacking a ratification clause was or was not a treaty.

18. The continuance in force of a treaty until terminated by the mutual consent of all the parties should preferably not be dealt with in paragraph 5. He was definitely opposed to the idea of treaties of indeterminate duration which could not be terminated save by mutual agreement. Such arrangements were no longer generally accepted in domestic law; it was generally recognized that, if the circumstances in which a treaty had been made changed materially, the parties had the right to free themselves from the obligation. Naturally, the great difference between domestic and international law was that no such unilateral declaration could be made in domestic contract law; a private party wishing to be released of its contractual obligations had to apply to a court of law—if the contract was not terminated by consent—whereas in international law such recourse to a judicial authority was not always possible. Nevertheless, it should not be stated that, in the absence of a denunciations clause, a treaty remained in force until all parties agreed that it had lapsed. Undoubtedly there was some risk to the principle *pacta sunt servanda,* but practice and the development of the law of nations no longer adhered strictly to the theory that termination must always be effected by consent.

19. Mr. PADILLA NERVO agreed with the speakers who had pointed out that the general structure of article 16 was hardly suitable to the subject. The essentials mentioned in the article related to formal validity only; the heading of the article was therefore incomplete. It would be wiser to refer only to all the prerequisites of a text which had to be present for the purpose of formal validity. References to matters which were merely conducive to formal validity, such as those made in paragraph 4, were unnecessary. He also agreed with Mr. Scelle's and Mr. Amado's comments on paragraph 5. Furthermore, he pointed out that some of the provisions of article 16 would more properly be discussed in connexion with the interpretation of treaties.

20. The CHAIRMAN, speaking as Special Rapporteur, summarized the debate on article 16.

21. There seemed to have been some misunderstanding with regard to the intention of paragraph 6. That paragraph was meant to relate not to the constitutional processes of ratification but only to the way in which instruments of ratification were deposited. Naturally, no treaty could specify the ratifying authority. The misunderstanding could be removed by redrafting, but it was important that a treaty should indicate the mode of depositing ratifications.

22. There seemed to be a general feeling that paragraph 5 was unnecessary, since it anticipated matters dealt with in subsequent articles of the code. If the paragraph were retained, however, it might simply refer to the parts of the code dealing with the entry into force and continuance in force of treaties. Mr. François had referred to the case of treaties containing no clause concerning duration or termination; in reply, he said that his fourth report (A/CN.4/120) dealt fully with the *clausula rebus sic stantibus*. Perhaps the pertinent passage in paragraph 5 was too terse, and it might be wise either to omit the passage ("or necessarily . . .") or to refer to other, fuller provisions in the code.

23. With regard to the question of entry into force on signature, he agreed with Mr. François and thought that Mr. Scelle and Mr. Amado had failed to take sufficiently into account how heavily paragraph 5 was qualified. The paragraph laid down a residual rule which was applicable only if there was no other way in which the contrary could be inferred. One of the Commission's greatest difficulties in dealing with the law of treaties was to draft clauses covering the many different kinds of existing treaties and international agreements. The provision had to apply, not only to formal treaties, which were subject to ratification, but also to such instruments as exchanges of notes, which entered into force on signature or on exchange. Accordingly, since ratification was not a condition applicable to all international agreements, it could not be referred to in a residual rule.

24. Some speakers had criticized the title of the article because it extended to matters not indicated in the

[1] League of Nations, *Treaty Series,* vol. VII, 1921-1922, No. 174.

text, while others had criticized the article because it did not conform to the title. It might be possible to redraft the title so that it covered all the contents; the underlying thought, however, had been that it was essential for a text to contain certain indications, and very desirable for it to contain others for the proper functioning of the treaty. If the Commission was substantially agreed on that point, it would be easy to amend the title.

25. Some members who had criticized paragraphs 1 and 3 had not apparently realized that the provisions in no way prejudged the interpretation of any special clause. There was no intention in paragraph 1 of stating how a preamble should be interpreted; it was intended to answer the question whether it was essential for a treaty to contain a preamble or any other special clauses. The purpose of the paragraph was to show that, with a few exceptions, no specific clause was absolutely essential to a treaty's validity, precisely because the parties were free to draft the treaty in any way they chose.

26. Similarly, paragraph 3 did not purport to lay down a particular form for treaties binding on dependent territories or States; the question of the continuance of treaty obligations after such territories became independent was governed by the international law relating to State succession. Nevertheless, it was desirable to indicate the international responsibility for the execution of a treaty made on behalf of a dependent territory. There was no question of the Commission indicating in the code approval or disapproval of the conclusion of treaties on behalf of dependent territories or protected or semi-sovereign States; but the fact remained that such territories and States still existed and that treaties had been and would continue to be made on their behalf. Some reference to the Commission's approval or disapproval of that type of treaty-making might perhaps be included in the commentary. He could not agree, however, with Mr. Tunkin's assertion that paragraph 3 was inconsistent with the Charter, since that document contained two chapters dealing with dependent territories. With regard to Mr. El-Khouri's observation that it might be necessary to indicate the credentials of the authority of the State negotiating a treaty on behalf of a dependent territory or State, he pointed out that as yet international law did not make any such requirement and that it was not customary for such details to be included in a treaty. Of course, it was always possible to challenge the validity of a treaty on the grounds of the capacity of the negotiators, but that point fell outside the topic of formal validity and was covered by other rules of law. He referred to the part of his third report (A/CN.4/115) relating to treaty-making capacity (article 8).

27. He agreed with the members of the Commission who thought that the article should distinguish more clearly between essentials and desiderata. The Secretary had rightly pointed out (see para. 6 above) that one of the essentials was that contracting States had certain rights and obligations, since without those no treaty could exist. He had omitted those particulars from the article because they seemed to be self-evident, as did the indication of the identity of the parties. If the Commission wished him to include those obvious particulars, he would do so. Mr. Tunkin had further drawn attention to certain exceptional treaties, such as international labour conventions, which did not contain any indication of identity; such cases might be cited as exceptions in which the practice governing identity was established *ab extra*.

28. Mr. AGO said that article 16 should consist mainly of provisions specifying the conditions considered to be necessary for the formal validity of a treaty. Inasmuch as the Special Rapporteur had drawn a distinction in article 10 between "formal validity", "essential validity" and "temporal validity", the reader should be made aware by the very title of article 16 that the article dealt with the conditions of formal validity.

29. International law was the least formal of legal systems, and that was why there was a certain difficulty in the formulation of such conditions. He thought that they were, in essence, three. The first condition was that it should clearly indicate who were the parties to the treaty. The second condition was that the "object" of the treaty, that is the matter on which the consent of the parties had formed, should appear from the context of the treaty itself. He preferred to speak of the "object" of the treaty and not of the rights and obligations created by the treaty, for as he had pointed out earlier (see 487th meeting, para. 4) there were treaties which did not create rights and obligations. Finally, the third condition was that the persons who had negotiated the treaty should have been possessed of the necessary authority. Otherwise the treaty might later be considered as not valid because it had been negotiated between persons not duly authorized.

30. In his view, those were the only conditions for the formal validity of a treaty concluded under normal circumstances, in other words, a treaty which was negotiated and concluded by the parties with the intention of producing effects among themselves. In paragraph 3, the Special Rapporteur dealt with certain exceptional cases, and he (Mr. Ago) agreed that in such cases it was indispensable to indicate the facts which from a certain point of view constituted an anomaly. However, he did not think that paragraph 3 was sufficiently broad. In addition to the cases indicated, there were some other instances of treaties concluded by States on behalf of other States, there being a relationship of representation but no status of dependency of any kind. For example, Belgium could act on behalf of Luxembourg by virtue of the Belgium-Luxembourg monetary union, and there were of course the many cases in which an independent State had to be represented by another State owing to the existence of a state of war or the severance of diplomatic relations.

31. That was all that was needed in article 16 from the point of view of conditions of formal validity. However, he would not object to an additional paragraph pointing out that there were certain provisions which were usually found in a treaty, such as a preamble, clauses relating to date of entry into force, duration, manner of participation of the parties, and so forth, but it should be made quite clear that such elements were not conditions for formal validity in the sense that the treaty would not be valid from the formal point of view if they were absent. Since they could not affect formal validity in any way, he agreed with the Special Rapporteur, who had pointed out (see 491st meeting, para. 17) that it was wrong to say, in paragraph 4, that such elements were "conducive" to formal validity.

32. As to the other matters dealt with in article 16, it seemed to him that they did not relate strictly to con-

ditions of formal validity and should be treated in the articles of the code to which they were relevant.

33. Mr. BARTOŠ said he could not agree that the question at issue in article 16 was simply that of the conditions affecting the formal, rather than the essential validity of a treaty. It was essential to indicate the parties to a treaty; but the statement that a party was bound by the treaty was a substantive statement. Even the so-called non-essential provisions in paragraph 4, such as the references to the period of duration and the date of entry into force, were matters relating to time limits and, consequently, were substantive rather than formal. With regard to identification of the parties he said that, if the States concerned were not directly indicated, it was an essential juridical requirement to refer to the plenipotentiaries of the States which concluded the treaty. If an intermediary negotiated the treaty, as in the case of a treaty between States having no diplomatic relations with each other, the clause in the treaty indicating the intermediary was not formal, but substantive. Mr. Ago had raised the question in a somewhat different manner and had distinguished between formal and essential validity; however, the very inclusion of the non-essential clauses made them a part of the consent of the parties and showed that they were necessary in order to produce certain effects. Those additional or subsidiary clauses were therefore juridical provisions properly so-called. The distinction between formal validity and juridical requirement must be made according to whether a contractual or a formal provision was involved.

34. He urged the Commission to reflect on the proposition that both the essential and the additional elements of a treaty represented questions of juridical value.

35. Mr. PAL said that, in view of the Chairman's invitation to discuss article 16 as a whole, he had not intended to deal with the merits of individual paragraphs. In spite of the limited invitation, however, the various learned participants, by penetrating analysis, had laboured to improve and refine the texts of the several paragraphs. The interesting and enlightening discussion which had taken place prompted him to make some observations on paragraph 3. There, it should be made clear whether the treaty-making party was the participating State or the State on whose behalf the treaty was made.

36. Article 2 said that the code was confined to treaties between parties having treaty-making capacity. Obviously, the dependent or semi-sovereign States referred to in article 16, paragraph 3, did not have that capacity. Municipal law dealt with a similar situation in different ways. If a person lacked capacity or had defective capacity, his capacity could be supplemented by the capacity of another person, a guardian for example, and that was how a person without capacity could become a party to an agreement. Another solution was that the person not *capax juris* did not enter into the agreement at all but another person having capacity entered into the agreement for the benefit of the person without capacity.

37. If, in paragraph 3, the position was that the State making the treaty was the party to the treaty, then the protected or semi-sovereign State figured in the treaty only as the beneficiary of the treaty. If that was the position, he thought that it should be made clear either in the commentary or in the article itself, for it might be argued from the text as it stood that the dependent or semi-sovereign State was becoming a party to the treaty and that the treaty was therefore binding on it. That, perhaps, was not the position the Commission was contemplating in paragraph 3.

38. Mr. VERDROSS agreed with Mr. Ago that a clear distinction should be drawn between the essential conditions and the desirable elements.

39. With reference to paragraph 2, he observed that not only was no mention made of the names of the parties in treaties approved by the International Labour Conference, but neither were they mentioned in a number of treaties approved by the General Assembly of the United Nations, such as the Convention on the Privileges and Immunities of the United Nations, 1946. The point might be covered by a formula that made an exception for texts adopted under the auspices of an international organization.

40. He felt that some provision along the lines of paragraph 3 would have to be retained. While he agreed with Mr. Tunkin and Mr. Bartoš that protectorate relationships were obsolete and would gradually disappear, he supported the Special Rapporteur's statement that two Chapters of the Charter dealt with non-independent territories and he pointed out that an Administering Authority could certainly conclude treaties on behalf of its Trust Territory.

41. He also supported Mr. Ago's statement (see para. 30 above) concerning treaties concluded by a State on behalf of another, non-dependent State which it could represent in international relations. For example, the Principality of Liechtenstein was not a part of Switzerland and was not dependent on Switzerland, but had a customs union with Switzerland, and Switzerland could conclude certain treaties on behalf of the Principality. He suggested that in paragraph 3, after the words "on behalf of", some such words as "another State, dependent population, population of a Trust Territory" should be used.

42. His most serious objection, however, was to the wording of the first part of paragraph 5. In his view, a treaty could not come into force on signature unless the plenipotentiaries had authority to sign with such effect. That authority might exist by virtue of special full powers not only to sign but to conclude the treaty, or by virtue of a constitutional provision. The Austrian Constitution, for example, provided that ministers had the right to conclude certain treaties, in other words, to sign treaties that entered into force upon signature. He could not agree that, in the absence either of special full powers or of a constitutional provision, a treaty which was silent as to the date of entry into force could be considered *ipso facto* as coming into force from the date of signature.

43. The CHAIRMAN, speaking as Special Rapporteur, accepted the scheme of article 16 suggested by Mr. Ago (see para. 29 above): First, the object of the treaty must be stated; secondly, the parties to the treaty must be indicated, except in cases where other means existed of ascertaining the parties; and thirdly, there must be some mention of the fact that those signing the treaty were authorized to do so. While the third point certainly applied to a signature which was final, he was not quite sure that it could be extended to the initialling of a treaty or to signature *ad referendum*. In his view such acts did not of themselves commit a Government.

44. A number of members of the Commission had referred to paragraph 3. He thought that everyone agreed that a State could by arrangement conclude a treaty on behalf of another independent State (e.g. Switzerland on behalf of Liechtenstein or France on behalf of Monaco and, in time of war, the protecting Power on behalf of a belligerent). While it would probably be sufficient for the purposes of article 16 to use a general formula that would cover all the cases in which a State acted on behalf of a dependent territory, protected or semi-sovereign State, or another independent State, it should be borne in mind that the legal effects were not the same in the different cases. It was clear that a State was responsible for seeing that a treaty it concluded on behalf of a dependent territory or protected State was carried out, but that was not necessarily true in the case of a semi-sovereign State, and was certainly not true where one State acted as the agent of another, independent State. In the last case, he did not think that the State which concluded the treaty could be held responsible if the State on whose behalf it had acted failed to carry out obligations under the treaty.

45. Accordingly, he suggested that the Drafting Committee should prepare an article on the following lines: A first paragraph which would redraft the substance of paragraph 2 in the way indicated by Mr. Ago and which would also deal with all cases of treaties signed on behalf of another State or a dependent territory; a second paragraph corresponding to paragraph 1 of the present text which would state that apart from the conditions set forth in the first paragraph there was no provision that was essential to the formal validity of a treaty; and a third paragraph which would refer to other elements that it was desirable to include in the text of a treaty (existing paragraph 4).

46. The present paragraph 5 should be redrafted and either placed in the commentary or included in the article in terms providing that if the elements referred to as desirable in paragraph 3 of the new article were not contained in the treaty, the resulting situation would have to be considered in the light of other provisions of the draft code, to which the reader could be referred. Paragraph 6 could be dealt with in the commentary.

47. Mr. SANDSTRÖM agreed with the views expressed by Mr. Ago and with the Special Rapporteur's suggestions. However, he desired clarification on one point. It had been implied during the discussion that it was not enough that a person signing a treaty should have the authority to do so but that such authority had to be indicated in the text of the treaty. He did not think that such an indication was essential.

48. Mr. YOKOTA agreed with the Special Rapporteur's suggestions regarding paragraphs 1, 2, 3 and 4. However, if it was decided to retain the provisions of paragraph 4, those of paragraph 6 should also be retained, since that paragraph too referred to elements which it was desirable to include in a treaty even if not essential.

49. As he had said before (see para. 5 above), paragraph 5 dealt with the legal effects of signature and "temporal validity" and therefore should not be included in the article. If necessary, the substance of paragraph 5 could be dealt with in the commentary to the code.

50. Mr. AGO said in reply to Mr. Sandström that while the conditions for formal validity had to be fulfilled, it was not essential that they should be fulfilled by the text of the treaty. As to the naming of the parties, he thought Mr. Tunkin had been quite correct in saying (see para. 8 above) that it would suffice if it were clear in one way or another who were the parties to a treaty. Similarly, the essential condition with regard to signature was that those who negotiated the treaty possessed authority to sign. That did not necessarily mean that the text had to contain an indication to that effect. What was essential was that the plenipotentiaries should be duly authorized, and that was a matter which often depended on circumstances. For example, in war-time, military commanders had authority to conclude certain agreements which they would not have under normal conditions.

51. That principle also applied to the ratification of the treaty. A treaty might not be formally valid because it had been ratified by an organ not competent to do so.

52. He agreed with the Chairman's suggestion that any reference to the question of responsibility for performance or non-performance should be omitted from article 16. Accordingly, in connexion with the subject-matter of paragraph 3, it should be indicated only that a party could act on behalf of another. The article should not enter into the question of responsibility for a violation of the terms of the treaty. In that connexion, he would only observe that, if a State concluded a treaty on behalf of a dependent territory, it was not always certain that that State bore such responsibility. The capacity to conclude a treaty did not necessarily coincide with what might be termed delictual capacity, which was the basis of responsibility.

53. He had one observation to make regarding the use of the word "desirable". It was not the case that certain things were always desirable in the text. An indication of the duration of a treaty was desirable in certain cases but some treaties by their nature excluded such an indication, for example, treaties concluded for the execution of a certain act or arrangement, treaties regarding the disposition of territories, and treaties of peace. Clearly, an indication of duration would, if anything, be undesirable in treaties which were conceived *sub specie aeternitatis*. It would be more prudent to refer to elements which were frequently found in treaties than to elements which were desirable.

54. Finally, he hoped that some of the important points in the latter paragraphs of article 16 would be dealt with in other articles and not simply mentioned in the commentary.

55. The CHAIRMAN, speaking as Special Rapporteur, said that those points were treated in other parts of the code and that there was no question of eliminating them entirely. His suggestion had been to include in article 16 references to the places in the code where they could be found. He fully accepted Mr. Ago's criticism concerning the word "desirable", and he was disposed to accept Mr. Yokota's view (see para. 48 above) that some of the matters mentioned in paragraph 6 should be included among the elements frequently found in the text of a treaty.

56. The only point that remained in doubt was that raised by Mr. Sandström (see para. 47 above). If a plenipotentiary was authorized to sign—and that was essential—was it necessary or not that the text of the treaty should contain a recital of that fact? That was a minor point of substance that might be examined by the Drafting Committee.

57. He suggested that article 16 should be referred to the Drafting Committee on the basis he had indicated.

It was so agreed.

The meeting rose at 1 p.m.

493rd MEETING

Wednesday, 13 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Programme of work

1. The CHAIRMAN read out Mr. Zourek's reply to the telegram which the Commission sent him on 11 May 1959 (see 491st meeting, paras. 5 and 6). Mr. Mr. Zourek indicated that he hoped to arrive in Geneva not later than 19 May.

2. He further announced that he had received a message from Mr. García Amador, Special Rapporteur on item 4 (*State responsibility*), who expected to arrive in Geneva on 18 May.

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

[Agenda item 3]

ARTICLE 17

3. The CHAIRMAN, speaking as Special Rapporteur, said that article 17 applied to the situation that existed when a text had been drawn up but had not yet been signed or initialled. Paragraph 1, which covered the point contained in the final provision of his redraft of article 15 (see 488th meeting, para. 46), referred to the obligations, if any, and paragraph 2 to the rights, arising from the drawing up of the text. He recalled that it had been agreed that if it was decided to omit paragraph 1, the subject matter of that provision would be maintained in the Drafting Committee's version of article 15 (see 491st meeting, para. 12).

4. Commenting on article 17, he said that on reflection he thought he should not have used, in paragraph 2, the example of the right to be consulted about proposed reservations. It might not be desirable at that stage to raise the question of reservations, which was fully dealt with in later articles. However, what he had had in mind was that it was frequently the practice of States which wished to make reservations to make some announcement to that effect during the negotiations, and in that sense it could be said that participation in negotiations might confer, even on States which had not yet signed a treaty, a right to be consulted about the reservations which other States might be contemplating.

5. Mr. SCELLE pointed out that in the French text of paragraph 2 the word "*inversement*" should be replaced by "*de même*".

6. Mr. YOKOTA said that he did not fully understand what was meant by the phrase "a right to be consulted about any proposed reservations" in paragraph 2. Did it mean that a State intending to make a reservation had a duty to consult, before signature or ratification, all the other States participating in the negotiations? That was not necessarily the practice. States participating in negotiations had at most the right to be informed of reservations made by other States and to comment upon or protest against such reservations, unless reservations were expressly admissible under the text of the treaty or in the light of the circumstances. In his view, the phrase in question should be amended.

7. The CHAIRMAN, speaking as Special Rapporteur, pointed out that he proposed to omit the whole of the second sentence of paragraph 2. Mr. Yokota's point could be discussed later in connexion with the articles dealing with reservations.

8. Mr. BARTOŠ asked for some clarification concerning the "ancillary or inchoate rights" mentioned in paragraph 2. He could find no reference to the subject in the commentary or in Lauterpacht's first report (A/CN.4/63), to which reference was made in paragraph 59 of the commentary. Were they rights specified in the text of the treaty or some other rights, not so specified, deriving from participation in the negotiations?

9. The CHAIRMAN, speaking as Special Rapporteur, explained that the sentence in question—which, he reiterated, he was prepared to omit—had been drafted in tentative terms; he had used the word "may". His sole purpose had been to provide for cases in which rights might result from participation in the negotiation of a treaty.

10. Mr. BARTOŠ said that he had no comment to make but only wished to justify the position he had taken during the discussion on the question of whether a treaty, once drawn up, was a text or an instrument (see 488th meeting, para. 15). Certain legal consequences flowed from provisions concerning formalities which constituted obligations for the parties that had drawn up the text and for other States that might wish to accede. That was why he had been in favour of the term "instrument". It could now be seen that there were obligations arising from the text and that the question had not been purely theoretical but practical.

11. Mr. LIANG, Secretary to the Commission, observed that there was a great difference between the technique of concluding bilateral treaties and that of concluding multilateral treaties, particularly multilateral treaties negotiated in an organ of an international organization. The inconvenience of dealing simultaneously in the code with both types of treaties had been mentioned before but, as that was the practice, he felt that it should be made clear when an article applied principally to multilateral treaties.

12. That was the case of article 17. He failed to see what legal consequences could flow from the drawing up of a bilateral treaty, for if the two parties did not sign the treaty, did not consummate the act of drawing up the treaty, the treaty was abortive and no treaty existed.

13. His second observation was of a substantive nature and related to the case of a text negotiated in an organ of an international organization. For example, a convention drawn up in the General Assembly of the United Nations was embodied in a resolution. While no one would contend that the States which voted for the resolution containing the text of the convention thereby became parties to the convention, a theoretical, a juridical problem arose in connexion with the question of the binding force of such a resolution. It could of course be argued that, under the Charter, General Assembly resolutions were recommendations and therefore not binding. However, the matter was not so