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Summary record of the 781st meeting

Topic:
Law of Treaties

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those full powers must take. In its previous text the Commission had specified that the full powers must be attested by written credentials, but he thought the possibility of accepting as evidence an oral declaration by, for example, a Foreign Minister, should not be ruled out.

83. Like other speakers, he thought that article 4 should be simplified by being reduced to its essentials, which meant to paragraphs 2 and 3. The Commission would then be proposing a clear formula which most States would be able to accept.

84. Mr. AMADO said that the Commission's duty was to state the rule of international law on the subject. Was the principle that a Head of State, Head of Government or Foreign Minister was authorized to negotiate, draw up, authenticate and sign a treaty on behalf of his State? Or should the Commission accept the opinion of the Austrian Government (A/CN.4/175, section I.3, para. 4) —which the Special Rapporteur had supported—that that was a mere presumption? Were those three persons agents, or were they themselves the source of the authority in question? The Commission should answer those questions.

85. In the light of the comments made by various members, paragraphs 4 and 5 of the new text and paragraph 6 of the former text could not be sustained. He proposed that the article be reduced to a single provision reading: " Representatives other than (*a*) Heads of State, Heads of Government and Foreign Ministers, and (*b*) Heads of diplomatic missions, cannot be considered, by virtue of their office alone, as possessing authority to negotiate, draw up or adopt a treaty on behalf of their State ". That, in his view, was the rule of international law.

The meeting rose at 6 p.m.

781st MEETING

Tuesday, 11 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

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

Law of Treaties

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

[Item 2 of the agenda]

ARTICLE 4 (Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the revised text of article 4 proposed by the Special Rapporteur.[1]

2. Mr. ROSENNE said that the discussion had revealed a general tendency to try to restrict the scope of article 4 to a purely formal question: when, and by whom, formal evidence of authority to act in connexion with the conclusion of a treaty was, or was not, required, and when it might be optional. He was prepared to accept that approach.

3. As Mr. Amado had pointed out, the emphasis should be placed on the question of full powers, treated exclusively as one of form. It was therefore essential to exclude such expressions as " authority to negotiate ", which had been at the root of many of the Commission's problems; the term " authority " had a number of different meanings and could therefore lead to confusion. There would be some difficulty in finding an adequate substitute, however; at first sight, a reference to the instrument of full powers might seem appropriate, but the discussions at the fourteenth session had shown that greater flexibility was necessary than would be suggested by the use of that term. Of particular interest was the statement by the present Chairman at the 641st meeting concerning cases in which the evidence that a representative was empowered to negotiate took the form of a letter.[2]

4. He suggested that the Special Rapporteur and the Drafting Committee should use some such wording as " evidence that he is empowered to negotiate ". That would make it unnecessary to deal, either in article 4 or in the commentary, with the question where the risk lay, to which the Swedish Government had referred (A/CN.4/175, section I.17). It was a question which arose directly in connexion with articles 31 and 32 and somewhat differently in connexion with article 47, and concerning which he reserved his position.

5. On that point, he could not agree with previous speakers that the material in article 4 was entirely distinct from that in articles 31 and 32; in fact, the two sets of provisions were the obverse and the reverse of the same coin. It was therefore necessary to co-ordinate the three articles not only as to their underlying philosophy, a result which the Commission was close to achieving, but also as to drafting.

6. Since Mr. Briggs had reintroduced his 1962 proposal to insert the proviso " For the purposes of international law ", he would himself reintroduce his own counter-proposal that that phrase be replaced by the words " For the purposes of the present articles ".[3] It was essential to avoid using unduly broad language.

7. He did not favour the use of the expression " adopt a treaty ", which was completely new in the draft articles and was totally inadequate, because it could have several different meanings.

8. He also had doubts about the expression " permanent mission to an international organization ", used in paragraph 3 (*b*) of the Special Rapporteur's new text; the term usually employed, in the United Nations at least, was " permanent representative to the United Nations ". Moreover, there were cases in

[1] See 780th meeting, para. 27.

[2] *Yearbook of the International Law Commission, 1962*, Vol. I, p. 72, para. 29.

[3] *Ibid.*, p. 76, para. 71.

which there was more than one permanent representative: a Member State could have a permanent representative at Headquarters in New York and another at Geneva, and perhaps yet another accredited to one of the other regional offices of the United Nations. In 1958, many delegations to the United Nations Conference on the Law of the Sea had included both the permanent representative in New York and the permanent representative at Geneva ; with a provision such as that in the new paragraph 3 (*b*), it was difficult to tell whether one or both would be dispensed from producing their full powers.

9. He assumed that the reference to " an international organization " in paragraph 3 (*b*) meant a public international organization. A more important question arose, however, regarding the kinds of treaty covered by the paragraph. During the discussions at the fourteenth session, there had been a tendency to confine the provision to treaties concluded between a State and an international organization, but that tendency had not been reflected in the text of paragraph 2 (*b*) adopted by the Commission, which referred both to those treaties and to treaties " drawn up under the auspices of the organization " : the Special Rapporteur's new text referred only to the latter type of treaty.

10. Paragraph 3 (*b*) should be the exact parallel of paragraph 3 (*a*) and should cover only treaties between a State and the organization to which the representative of that State was accredited. In the case of treaties concluded " under the auspices of the organization ", an expression which could give rise to difficulties, the question of full powers was likely to be covered by the rules of procedure, or alternatively, or cumulatively, by the Special Rapporteur's proposal for a generalization of the rule in article 48 in his new article 3 (*bis*).

11. As to the general structure of the article, he had been attracted by the simplified structure put forward by the Japanese Government (A/CN.4/175, section I. 11, annex).

12. As to paragraph 5, a good deal depended on the expression to be used for the instrument of full powers. The paragraph did fulfil a useful purpose, but if it were dropped from the article, the point could be conveniently dealt with in the commentary.

13. The CHAIRMAN said he thought the reason why the Swedish Government had laid such stress on evidence of the authority of representatives was probably its recollection of the Eastern Greenland case.[4]

14. With regard to terminology, he had enquired among the inter-governmental organizations whether the right term was " representative ", " representation ", " delegation " or " mission " and had found that there was no standard usage, even in the resolution on permanent missions adopted by the General Assembly at its third session.[5] The Carnegie Endowment was to study the position of permanent missions to international organizations; there, again, it would be necessary to decide what was meant by " permanent missions " and " permanent representatives " and whether the two terms were interchangeable. Some States even had several permanent representatives to the United Nations, who might be the head of the delegation, the head of the delegation to the Trusteeship Council and the head of the delegation to the Security Council.

15. Mr. REUTER said he agreed with the speakers who had followed Mr. Tunkin and Mr. Amado. In considering each article the Commission should always bear in mind that it had to draft rules of international law, not advice, descriptions or rules of internal law.

16. In the case of article 4, the important point was to decide on whom rights were to be conferred. It seemed to him that the persons in question were not clearly specified in the new text, and there was no reference to the production of full powers until the end of paragraph 3 (*c*). The Commission intended to give rights, not directly to Heads of State, Heads of Government or Ministers, but to States negotiating through those persons.

17. There were in fact two rights involved. First, the right of any negotiating State to consider certain persons holding a particular position as being duly authorized : if the Commission intended to grant that right to all negotiating States, it should say so in the article, which was thus not unrelated to article 31. Secondly, there was the right to call for an instrument of full powers in certain cases.

18. Mr. ELIAS said that the Special Rapporteur had performed a useful service in producing a revised draft of article 4, but even that draft would benefit from pruning, as it still contained some elements of a code. The Special Rapporteur himself had expressed the view that " there is substance in the point that the articles still contain some element of 'code' and are not yet fully cast in the form required for a convention " (A/CN.4/177, section C, para. 2). There could be no doubt that at the fourteenth session the thoughts of members had still been dominated by the idea of a code, which the Commission had previously envisaged.

19. He therefore suggested that the proposed new text should be shortened by dropping paragraphs 1 and 5 and combining the contents of paragraphs 2, 3 and 4 in two short paragraphs.

20. The first would deal with the question when evidence of full powers was or was not required, the essential point mentioned by Mr. Amado, and could read, approximately :

> " Evidence of full powers shall not be required from a Head of State, a Head of Government or a Foreign Minister, to negotiate, draw up, adopt, authenticate or sign a treaty, but may be required from a Head of mission, unless it appears from the circumstances of the conclusion that the intention of the States concerned was to dispense with full powers. "

21. The second paragraph would simply state that : " In all other cases, evidence of full powers shall be required. "

22. Mr. TABIBI said that the provisions of article 4 were necessary, because the Commission had adopted rules on the conclusion of treaties. Those provisions would help to bring uniformity into State practice on

[4] P.C.I.J. Series A/B No. 53.

[5] Resolution 257 (III), *Official Records of the Third Session of the General Assembly, Part I, Resolutions*, p. 171.

the conclusion of treaties and even into the relevant constitutional provisions. The rules adopted by the Commission would be very helpful to States engaged in drafting new constitutions, including some newly independent States.

23. With regard to the form of the article, he believed that, as suggested by Mr. Amado, it should specify that Heads of State, Heads of Government and Foreign Ministers had authority to conclude treaties. The article should also state the implied powers of a Head of mission and provide that evidence of authority was required for other representatives. A reference to the current practice of giving authority by means of a letter or telegram should be included. It must be remembered that a very large number of treaties were concluded and that authorization to conclude them more often than not took the form of a letter or telegram.

24. He disliked the use of the words " may be considered " in paragraphs 2 and 3. The persons referred to in those paragraphs definitely possessed the authority to negotiate treaties; the ambiguous expression " may be considered " should therefore be avoided.

25. Mr. CASTRÉN said that in order to facilitate the work of the Drafting Committee he had prepared a new text of article 4.

26. He agreed with those who had proposed that paragraph 1 of the Special Rapporteur's redraft should be deleted, and his own draft of paragraph 1 read :

" By reason of their general representative character, Heads of State, Heads of Government and Foreign Ministers are considered as possessing authority to act on behalf of their States in the conclusion of a treaty. "

That provision, which was drafted in general terms, was based on Mr. Amado's comment that it was generally recognized in international law that such persons possessed a general right to perform the various acts relating to the conclusion of a treaty on behalf of their States.

27. Paragraph 2 of his proposal did not differ greatly from the Special Rapporteur's revised text, except that it was a little more concise and specific. It read :

" (*a*) A Head of a diplomatic mission is considered as possessing authority to negotiate or draw up (or to adopt the text of) a treaty between his State and the State to which he is accredited.

(*b*) The same rule applies also to a Head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of that organization. "

28. Paragraph 3 of his draft combined paragraph 3 (*c*) and paragraph 4 of the Special Rapporteur's revised text. It also took account of the fact that Heads of diplomatic missions and Heads of permanent missions to international organizations did not possess a general right to sign treaties. The text read :

" In all other cases, the representative of a State is considered as empowered to negotiate, draw up or sign (or to adopt the text of) a treaty on behalf of his State only if he produces an instrument of full powers or if it appears from the nature of the treaty, its terms or the circumstances of its conclusion that the intention of the States concerned was to dispense with full powers. "

29. Paragraph 4 reproduced paragraphs 6 (*b*) and (*c*), of the 1962 text which corresponded to paragraph 5 of the Special Rapporteur's revised draft.

30. Mr. PESSOU thought that the Commission was moving away from the lucid language suggested at the previous meeting by Mr. Amado and further improved by Mr. Reuter, and continuing to use terms which gave no clear idea of the scope of the article. It should define, first, which were the subjects of international law in question and, secondly, what rights were conferred on them.

31. Mr. TSURUOKA observed that Mr. Castrén's draft also did not exclude treaties between States and international organizations ; it would be better to exclude them, because for the time being the Commission was concerned only with treaties between States.

32. The CHAIRMAN pointed out that treaties concluded between States through international organizations must also be considered. It would be for the Drafting Committee to clear up that question.

33. Sir Humphrey WALDOCK, Special Rapporteur, said he accepted the suggestion that the title be amended to show that the contents of article 4 related to evidence. He also accepted the arguments against the final proviso of his proposed paragraph 1, and since the beginning of the paragraph only served as a means of introducing that final proviso, he would drop paragraph 1 altogether.

34. It was undoubtedly the use of the expression " possessing authority " which made it difficult to disentangle the provisions of the article from the background of internal law. In the discussions at the fourteenth session,[6] there had been a clear realization that the article dealt with the ostensible qualification to represent a State in the conclusion of a treaty. The intention had been to indicate the existence of what in English law would be regarded as certain presumptions. However, the term " presumption " was not suitable in international law because of the drafting difficulties it involved and its connotation for continental lawyers.

35. The idea the Commission was trying to express was that there were cases in which a representative could be considered as empowered, not so much to conclude a treaty, as to represent his State in the negotiation and conclusion of a treaty.

36. At the same time, as suggested by the Swedish Government, it would be appropriate to refer in the article to the risk that might be taken by a State if it proceeded without asking for evidence of qualification of a representative of another State. Because of the need to formulate the provisions of article 4 with that idea in mind, he did not favour Mr. Elias's suggestion that it should merely be stated that certain persons were not required to produce evidence of their powers ; the question must be viewed from the standpoint of the other State.

[6] *Yearbook of the International Law Commission 1962*, Vol. I, 641st and 659th meetings.

37. With regard to the various categories of persons mentioned in article 4, governments had criticized the text in their comments, pointing out that it was a common practice—often the normal practice—not to call for full powers in the case of representatives other than Heads of State, Heads of Government or Foreign Ministers. There again the question must be viewed from the point of view of the State which had to decide whether to call for evidence or not, and he suggested that the Drafting Committee bear that in mind when redrafting the article.

38. The Drafting Committee would also have to deal with the various other points that had arisen during the discussion, of which he would mention only one or two. One concerned the use of the expression " to adopt the text ". Another related to Heads of diplomatic missions, with regard to whom he understood the Commission not to wish to enlarge his present limited qualification, which covered only acts short of a binding signature.

39. The Drafting Committee, and ultimately the Commission itself, would also have to re-examine the question of permanent missions. Personally, he thought the 1962 text carried generalization too far with regard to the position of permanent representatives ; much would depend on those representatives' credentials, which were sometimes limited to specific organs of the international organization concerned.

40. With regard to other representatives, he agreed with Mr. Amado and other members on the desirability of a shorter text in the form of a general residuary provision, which would make it clear that it was for the other States concerned to call for the production of full powers if they deemed it necessary. Article 32, which dealt with the lack of authority to conclude a treaty, and which had the effect of an estoppel or preclusion, would have to be considered in that connexion. If the State confronted with a representative in the circumstances envisaged were to omit to call for the production of full powers, the problem would arise whether its position might not be compromised with regard to raising the question of lack of authority.

41. He therefore proposed that article 4 be referred to the Drafting Committee with the comments made during the discussion and with instructions, first, to include in it a provision on the specific cases of the Head of State, Head of Government and Foreign Minister ; secondly, to draft the general provision on other representatives on the lines suggested by Mr. Amado and others ; and thirdly, to abridge and simplify the whole text.

The Special Rapporteur's proposal was adopted.[7]

CONCLUSION OF TREATIES BY ONE STATE ON BEHALF OF ANOTHER OR BY AN INTERNATIONAL ORGANIZATION ON BEHALF OF A MEMBER STATE

42. Mr. EL-ERIAN asked whether the Commission proposed to take a decision at that stage on the question raised after article 4 in the Special Rapporteur's report (A/CN.4/177) namely, the conclusion of treaties by one State on behalf of another or by an international organization on behalf of a Member State.

43. Sir Humphrey WALDOCK, Special Rapporteur, said that in 1964 he had been instructed to bring the matter before the Commission at the present session. In his opinion, if an article on it was to be included at all, it ought to be placed immediately after the article on capacity. It was a question of deciding how far the notion of agency in the conclusion of treaties should be taken into account. He himself was now in favour of omitting any such article, but he wished to learn the Commission's views.

44. Mr. EL-ERIAN said he agreed with the Special Rapporteur that the question should be left aside. However desirable it might be in principle to study every possible aspect of the law of treaties, the Commission should, on practical grounds, confine itself to treaties between States.

45. Mr. REUTER thought the Commission might perhaps consider the problem when it took up the article on capacity, but it would be premature to discuss it at that stage.

46. Mr. AGO agreed. When the Commission had settled the question of capacity, it would see what it should do with regard to representation in the negotiation of treaties.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that that suggestion was acceptable to him ; he shared Mr. Reuter's view that the link was with capacity. The Commission would be in a better position to decide whether the point should be dealt with when it had made up its mind on the question of capacity.

48. Mr. ROSENNE said that the connexion with capacity was not clear to him. He thought, however, that the Special Rapporteur had been right in proposing that the question should be left aside.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that there were two quite separate cases : the case in which a single diplomatic representative acted for two different States, which was a question of a representative's qualifications to represent a State ; and the case in which one State acted on behalf of another, as Belgium did for Luxembourg. In the latter case, he thought the association with capacity was sufficiently close for the point to be considered in conjunction with capacity.

50. The CHAIRMAN thought that the issue was not the capacity of one State to be the trustee of another, but solely the not necessarily related question of representation. A State might have capacity to act on its own behalf and at the same time to perform services for another State on its request. Since on several occasions States had been known to take upon themselves the authority to act on behalf of others, the question was not solely one of law : it also concerned the organization of the international community and the application of the principle of equality of States.

51. Mr. AGO said that in one sense the Chairman and Mr. Rosenne were right, for all members of the Commission were now agreed that every State had the capacity to conclude international treaties, so that

[7] For resumption of discussion, see 811th meeting, paras. 52-82.

when one State concluded a treaty on behalf of another, it could not be because of incapacity of the State represented.

52. But the question of capacity also arose in another connexion ; normally a State concluded treaties which created rights and obligations for itself, but it was also necessary to consider the possibility of a State concluding a treaty which created rights and obligations for another State. Such cases occurred, and the Commission should make provision for them ; the case of representation of one State by another could not be omitted from its draft.

53. He fully supported the view that the Commission should not settle the matter at once ; in fact, he even urged that the question where to deal with it in the draft should be held over. It would be irresponsible to decide forthwith not to devote an article to that matter.

54. Mr. AMADO said he fully agreed with Mr. Ago. The Belgo-Luxembourg Economic Union existed, and there were other similar cases ; they were facts of international life which could not be ignored. Moreover, such cases would become more and more frequent as the collective organization of States progressed. It was one of the great achievements of modern times that States were willing to curtail their sovereignty both in their own interests and in the general interest of mankind.

55. Admittedly, it might be difficult for the Commission to break off its general line in formulating the principles to be followed by States when making treaties in order to insert as it were a parenthetical provision dealing with an exceptional case. But his own attitude was not as exclusive as that of Mr. Rosenne ; it could be argued that the question has some connexion with the treaty-making capacity of States. In any event it had many links with the personality and responsibility of States.

56. Mr. ROSENNE said that the debate had shown the danger of abstractions such as capacity, which he had understood from the discussion on article 3 to refer to the capacity to conclude treaties and nothing else.

57. The main problem was that a State should know who its co-contracting parties in making a compact would be ; having settled that point, the next question was the most appropriate form in which to put the compact. It was difficult to legislate for a matter of that kind.

58. Mr. TUNKIN said that the principle was one of great importance ; the only problem was whether it should be discussed at that stage or later. His view was that the discussion should be postponed, because the problem of representation was closely linked with other articles, notably those on termination ; if a State could conclude a treaty, it could terminate it. He therefore proposed that the Commission proceed to consider article 5.

Mr. Tunkins's proposal was adopted.

ARTICLE 5 (Negotiation and drawing up of a treaty)

Article 5

Negotiation and drawing up of a treaty

A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself.

59. The CHAIRMAN invited the Special Rapporteur to introduce the new draft of article 5 suggested in his report, which read :

Article 5

The negotiation and drawing up of a treaty take place :

(*a*) Through the diplomatic or other agreed channel, at meetings of representatives or at an international conference;

(*b*) In the case of a treaty concluded under the auspices of an international organization, at an international conference convened either by the organization or by the States concerned, or in an organ of the organization in question.

60. Sir Humphrey WALDOCK, Special Rapporteur, said it would be clear from his observations that he did not have any strong views on the article. Some governments had maintained that it was expository and might well be deleted. If it were included, it should be reformulated, since the 1962 text still bore many traces of code drafting. Negotiation was a distinct phase in the treaty-making process and there might therefore be a certain logic in including such an article.

61. The fact that the article was inclined to be expository was not really a bar to its inclusion, since other conventions, notably the Vienna Conventions on diplomatic and consular relations, included such articles.

62. Mr. CASTRÉN said that he had always been opposed to including such a purely procedural and descriptive article in the draft. With the exception of the Government of Israel, all the governments which had commented on the article had questioned its usefulness. To the three countries mentioned by the Special Rapporteur in his report—Japan, Luxembourg and Sweden—there should perhaps be added the United States and the Netherlands which, to judge from their comments (A/CN.4/175 and Add.1), seemed to be of the same opinion.

63. The Special Rapporteur himself was uncertain, and in case the Commission should decide to retain the article, he had proposed a redraft which, it must be added, differed only very slightly from the formula adopted in 1962.

64. In that connexion, he would draw the attention of the Drafting Committee to the comment by the Netherlands Government, suggesting that the word " government " should be inserted before the word " representatives " in the first sentence.

65. He proposed that article 5 be deleted.

66. Mr. YASSEEN said that he, too, was in favour of deleting article 5, not because it was a procedural article—a convention could include many rules of procedure—but because it was a descriptive article which would tend to make the draft look like a code ; it imposed no obligations and established no rights. The Special Rapporteur himself was neutral and said that the article could be retained or omitted without

any great harm. Brevity was a good quality in a convention, and it was better to lighten the draft by dispensing with an article if it was not essential or really useful.

67. Mr. AGO said that to his regret he could not agree with the two previous speakers. Only three governments had suggested the deletion of the article and their response had probably been due to the form of the proposed text, which had a defect inherited from earlier versions drafted more with a view to preparing a code. The Special Rapporteur had proposed a new text which was a distinct improvement on that of 1962 and which could be further improved to give it the required character.

68. It had been said that article 5 was descriptive: that was not in itself a sufficient reason for deleting it, for descriptive articles were necessary in a convention. But article 5 was not purely descriptive; its purpose was to specify the conditions under which a treaty was negotiated and drawn up, and in that sense it went well beyond a mere description. For instance, to quote an imaginary case, he and Mr. Bartoš, having discussed the possibility of concluding a treaty between Italy and Yugoslavia on some subject such as the demarcation of the continental shelf in the Adriatic, might prepare draft articles which each of them would then submit to his government. The two governments might become interested in the draft and decide to open official negotiations. The work Mr. Bartoš and he had done would thus have been useful, but it would certainly not have constituted the negotiation of the treaty. It was therefore important to specify that negotiation began when the representatives of States were provided with full powers.

69. The rules previously drafted by the Commission concerning defects of consent and certain problems and means of interpretation were rules applicable to the actual negotiations. It would therefore be strange if, having drafted those rules and regulated, in article 4, the question of evidence of the authority of representatives, the Commission did not specify what negotiation was and when it began.

70. He would accordingly urge the Commission to retain the article and improve its drafting, in particular by adding the words "possessing full powers" after the word "representatives" in sub-paragraph (*a*).

71. Mr. LACHS said he disagreed with Mr. Ago. In his report, the Special Rapporteur had suggested that one reason for retaining the article was that the word "negotiations" was used in other articles and should therefore be explained. His reply would be that negotiations would be mentioned in article 4; and since the term was linked with the very process of giving birth to a treaty, it could best be disposed of in that article.

72. His arguments against the article were, first, that it was not a rule and, secondly, that although it clearly described the process by which States arrived at an agreement, it did so in nebulous terms, since the description was not exhaustive. The process was so varied and complex that it could hardly be put into a rule.

73. The suggestion had been made that it was a technical rule and that technical rules were to be found elsewhere in the draft. In his view, it was not a technical legal rule: it merely stated that certain persons met and was therefore redundant. If the Commission wished to meet the point made in the Special Rapporteur's report about the term "negotiations", it could do so by means of an explanatory note in the commentary.

74. Mr. AMADO said that the rules being drafted were intended to express the will of States. Consequently, the Commission could not invent anything; it could only state existing rules of law. Under the formula proposed, States would tell each other how to negotiate and draw up a treaty. There would be the diplomatic and other agreed channels, "meetings of representatives", and so on. The Yalta meeting, for example, had been a negotiation, but not "through the diplomatic channel" as understood by the Commission. In the example given by Mr. Ago, there was negotiation, but not within the meaning of article 5. Like the Special Rapporteur, he was undecided for the moment, and would not take a position until the Commission produced a sound outline.

75. Mr. REUTER said that the question whether article 5 should be deleted or retained depended on the significance attached to the article. If it was regarded as a purely procedural provision, it should probably, though not necessarily, be deleted. If it was not regarded as purely procedural, what category did it belong in? After hearing Mr. Ago's comments, he was inclined to think that the article was not solely procedural, but in fact concerned the scope of the future convention.

76. The Commission was at pains to exclude from its draft everything relating to international organizations; but while it could indeed exclude agreements concluded by such organizations, it should beware of excluding agreements which involved such organizations through not concluded by them. That point was particularly important in the proposed new text of article 5, the last sub-paragraph of which referred to "a treaty concluded ... in an organ of the organization in question". If that change had been made deliberately, it might have very important consequences. By saying "in an organ", and not "at a meeting of an organ", the Commission would bring within the scope of the future convention certain deliberations or decisions that were not unilateral acts attributable to the organization, but true international agreements in writing. States often deliberately allowed some doubt to subsist on that point; in order to avoid meeting requirements of constitutional law they presented as decisions of the organ of an organization, acts which later came to be regarded as treaties.

77. At that stage in the discussion, he was inclined to favour the retention of article 5.

78. Mr. TUNKIN said that, while no harm would be done by retaining the article, its omission would not create any difficulties. States would surely not be in doubt as to how they should act, even without the Special Rapporteur's sub-paragraphs (*a*) and (*b*).

79. The article was a remnant of a draft intended as a code and was, in his view, descriptive. It had been argued that it should be retained because negotiations were an important phase in the conclusion of a treaty; but that was self-evident and there was no need to say it.

80. The persons referred to in Mr. Ago's example had no full powers and the work they had done could not be described as negotiations for the conclusion of a treaty ; they had merely had private talks. The case seemed to be covered by article 4.

81. Even if it were admitted that article 5 contained some kind of legal rule, he still doubted whether it was necessary. It would be better to leave States free to act ; as Mr. Lachs had said, the channels of negotiation varied so much that it was inadvisable to restrict them. The substance of the matter should be included in the commentary.

82. Mr. ROSENNE said that, as in 1962, he considered that an article of that kind should be incorporated in the draft. The rule was not exclusively descriptive, but was one of quite profound legal significance for all the subsequent phases of the treaty. The fact that the term " negotiations " did not often appear in later articles did not mean that the concept of negotiation did not have some bearing on them. Negotiation was not merely a phase ; it was the process which distinguished a treaty from other kinds of international transaction, including unilateral assumptions of obligations which did not fall within the scope of the law of treaties.

83. He was not sure, however, that the Special Rapporteur's draft article met the requirements. The important element that had to be given expression was the fact that a treaty was the product of negotiations by the duly authorized representatives of States. It could be done either in an independent article—the method he favoured—or by asking the Drafting Committee to include the concept in the new article 1, which was to define the scope of all the articles. Negotiation was an essential attribute of a treaty and was therefore an important element of the material dealt with by the articles. The suggestion that the subject should be referred to in the commentary showed that it was not merely descriptive.

84. Mr. BRIGGS said that, after listening to the discussion, he was still opposed to the inclusion of such an article. The point made by Mr. Ago was covered by article 4. Any legal value the proposed article might have would be very slight, although he agreed that the subject could perhaps be referred to in the commentary.

85. Mr. EL-ERIAN said he was in favour of retaining the article. When the Commission had discussed the question whether the draft articles should take the form of a convention or of a code,[8] it had come to the conclusion that, in order to meet the objections of governments which were opposed to a convention, purely expository articles should be revised, not deleted. The article served a useful purpose ; it described an integral phase of the treaty-making process and formed an essential link between articles 4 and 6.

86. Mr. TSURUOKA said that the arguments in favour of retaining article 5—though very interesting—had not fully conviced him. In particular, he found it difficult to accept Mr. El-Erian's argument that article 5 formed a link between articles 4 and 6, for he was in favour of deleting not only article 5, but article 6 as well.

87. The CHAIRMAN, speaking as a member of the Commission, said he subscribed to everything Mr. Ago had said. The article was necessary, especially because of its last clause. The Commission had decided that its draft would not relate to international organizations ; but modern international relations had reached a point where the drafting and conclusion of treaties were very often closely connected with international conferences, whether specially convened by intergovernmental organizations or held within their organs.

88. Thus the article was not purely technical. As drafted, it showed that the Commission took account of the evolution of international relations. It stated a substantive rule of law, under which the adoption of a particular procedure—the meeting of representatives of States authorized to negotiate and conclude a treaty—could have legal consequences in the form of an act giving effect to the negotiations.

89. Mr. TABIBI said he was opposed to the inclusion of the article. Negotiations were, of course, very important for the interpretation of a treaty ; but he feared that if a rule on the lines proposed by the Special Rapporteur were included, it might interfere with the preliminary process of sounding out through the diplomatic channel.

90. Sir Humphrey WALDOCK, Special Rapporteur, said he had not been convinced by the arguments on either side. Most of the objections to the article could be answered, while the arguments in favour of its retention could be met by saying that the notion was implied in any reasonable reading of the other articles.

91. The article might be regarded as important if it really contained a definition of the scope of negotiations ; it could then be said to be required for the interpretation of treaties. In discussing the subject, one naturally turned to the article referring to preparatory work (article 70), though the phraseology of that article had not been specifically linked to negotiations. He wondered whether Mr. Ago was taking a clear position on where preparatory work began and ended because, in his example, that work, though unofficial, might have inspired the attitude of governments and even been given official endorsement by them. Was such preparatory work to be totally excluded because it did not form part of the official negotiations ? The point could be argued.

92. If it were contended that the article was important because it was not merely technical but contained elements of substance, then it would be necessary to make sure that it would really have a useful effect on subsequent articles. But the great majority of the subsequent articles referred to negotiations only by implication. Hence he was still not convinced that the article would affect the substantive aspects of later articles. It was important that the newer processes of negotiation, such as negotiation in international organizations, should receive recognition. If those processes were so new that they needed stating, then there was a case for article 5 ; but they might by now be so well established that there was no need for them to be specifically recognized in a text.

93. In view of the difference of opinion, the Commission should decide either to delete the article or to find the

[8] *Yearbook of the International Law Commission, 1961*, Vol. I, 620th and 621st meetings.

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

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

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

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

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

The meeting rose at 1.5 p.m.

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

782nd MEETING

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

Chairman: Mr. Milan BARTOŠ

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

Law of Treaties

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

(continued)

[Item 2 of the agenda]

ARTICLE 6 (Adoption of the text of a treaty)

Article 6

Adoption of the text of a treaty

The adoption of the text of a treaty takes place:

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

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

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

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

Article 6

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

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

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

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

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

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

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

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

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

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

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

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