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17th meeting

Tuesday, 4 March 1986, at 10.15 a.m.

Chairman: Mr. SHASH (Egypt)

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] (*continued*)

Article 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

1. Mr. WANG Houli (China), introducing his delegation's amendment to article 45 (A/CONF.129/C.1/L.46), said that the article as drafted by the International Law Commission made a distinction between States and international organizations.

2. Firstly, it placed international organizations in a more favourable position than States, since loss of a right through renunciation, as applied to international organizations, involved a positive act, while acquiescence, as applied to States, was passive and negative. That would create inequality between States and international organizations as parties to a treaty and, in the view of his delegation, was unnecessary, because while it was a fact that the structures of international organizations differed from those of States, their standing organs of authority were always in place.

3. Secondly, the Commission's commentary to its draft article 45 (see A/CONF.129/4, para. (6)) explained that the Commission had wished to avoid the passivity implied by the use of the word "acquiesces" in subparagraph 2 (*b*). However, the term "acquiesced" would have the same connotation in subparagraph 1 (*b*) when applied to States, and should also be avoided in that case.

4. Thirdly, his delegation was of the view that there might be circumstances in which the distinction between States and international organizations might not protect the latter. Where an international organization acquiesced in the validity of a treaty and subsequently changed its opinion and produced a ground for invalidating the treaty, it would have to take responsibility for any damage caused to other parties to the treaty. To avoid such a situation, his delegation believed that States and international organizations should enjoy equal treatment in the matter of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. However, to take account of the fact that international organizations differed in their structure from States, the conduct of an organization should be defined as the conduct of its competent organ. The term "competent organ" should therefore be retained in the article. In the view of his delegation, the questions he had raised could be answered by combining the two paragraphs of article 45 as proposed in his delegation's amendment.

5. Mr. BERNAL (Mexico), introducing his delegation's amendment to article 45 (A/CONF.129/C.1/L.47), said that the proposal to delete the reference in subparagraph 2 (*b*) of the article to the "competent organ" of the organization was intended simply to bring the text into line with the drafting of previous articles which had been debated and approved in principle. In the course of discussion of article 2, subparagraph 1 (*j*), it had been widely held that the word "organization" certainly included all of the entity's organs. The same view had been maintained in the discussion of article 7, subparagraph 4 (*b*). While his delegation was aware of the points made by the International Law Commission in its commentary, it believed that, for the sake of consistency with earlier articles, the words "the competent organ" should be deleted from article 45.

6. Mr. SOLTANE (Tunisia) said that his delegation had no difficulty in accepting article 45 as drafted by the International Law Commission, since it reflected the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties.[1] Nevertheless, his delegation found it difficult to understand the reasoning of the Commission in replacing "acquiesced" by "renounced" in subparagraph 2 (*b*). He could not agree that acquiescence was necessarily passive, since there could well be occasions when it expressed deliberate choice or will.

7. With regard to the term "competent organ", since the reason for its inclusion in article 45 was stated by the International Law Commission to be the same as for its inclusion in article 7 and as the term had now been deleted from article 7, he wondered whether it was logical to retain it in article 45. While his delegation was aware of the difficulties raised by paragraph 2 of article 45 and thought that the treatment of international organizations should be different from that of States, subparagraph 2 (*b*) seemed to satisfy the particular requirements of the structure of international organizations.

8. His delegation felt that the reference to "competent organs" should be deleted, as had been proposed by Mexico, in order to achieve harmony with article 7 as redrafted.

9. Mr. PISK (Czechoslovakia) said that his delegation could accept the Commission's draft article as it stood. Having two separate paragraphs relating to the conduct of States and international organizations respectively was consistent with the overall pattern of the Commission's draft.

[1] See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

10. Both the Chinese and Mexican amendments contained some interesting ideas, and they might therefore be sent to the Drafting Committee for consideration, although his delegation would prefer to see the words "the competent organ" retained.

11. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation favoured approval of article 45 as drafted by the International Law Commission. Its position on subparagraph 2 (*b*) was that there must be a reference to the "competent organ". There were unfortunately occasions when decisions which had not in fact been adopted by the competent organ of an organization were nevertheless alleged to constitute official acts of the organization concerned. The amendment calling for deletion of the reference to the "competent organ" was therefore unacceptable.

12. Mr. GAUTIER (France) said that article 45, paragraph 1, which was similar to the corresponding provision of the 1969 Vienna Convention, was a specific application of the rule of general international law under which the continuing absence of protest by a State in respect of a legal circumstance concerning it constituted acceptance on its part. His delegation had no fundamental objection to that rule as contained in article 45, paragraph 1, but wished to point out that the article seemed implicitly to exclude loss of the right to invoke violation of a rule of *jus cogens* as a ground for invalidating a treaty. His delegation therefore felt obliged to express a reservation in respect of that provision, which, in its view, would extend the application of article 53 of the draft convention, which was unacceptable to his delegation.

13. With regard to the two subparagraphs of paragraph 2, he felt that the distinction made by the International Law Commission between acquiescence and renunciation was a wise one and should be maintained. The silence of an international organization might, because of the complexity of the organization's structure, be due to factors quite other than the competent organ's implicit assent. For that reason, his delegation would at present have great difficulty in supporting an amendment such as that proposed by Mexico which sought to delete the term "competent".

14. The Chinese amendment, by combining the two subparagraphs of paragraph 2, simplified the draft convention. His delegation could accept such an amendment if necessary. However, it would prefer to keep to the text proposed by the International Law Commission.

15. Mr. MIMOUNI (Algeria) said that article 45 covered two forms of renunciation of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. One was explicit acceptance, the other acquiescence. Those grounds should apply equally to States and international organizations, and that was the aim of the amendment proposed by Mexico.

16. With regard to the use of the term "competent organ", that term had been included by the International Law Commission only in second reading, in connection with article 7, paragraph 4. As the term did not appear in article 7, it would be logical to exclude it also from article 45, subparagraph 2 (*b*). His delegation believed that the words "*ou ce motif*" should perhaps be added at the end of the French version of the Mexican amendment.

17. Mr. ROMAN (Romania) said that his delegation found the International Law Commission's draft satisfactory. The Commission had rightly noted that there were fundamental structural differences between States and international organizations which required the establishment of special rules in respect of the latter. That was why paragraph 2 should exclude the case, referred to in article 46, of invalidation of the consent of an international organization to be bound by a treaty because of violation of a rule of the organization concerning its competence to conclude treaties. An organization which, in its conduct, was governed by its relevant rules must be considered as having renounced the right to invoke a manifest violation of a rule concerning its competence. In his delegation's view, the differences between States and international organizations fully justified the formulation in subparagraph 2 (*b*) using the terms "competent organ" and "renounced".

18. While his delegation would have no particular difficulty in accepting the amendments that had been proposed, it nevertheless preferred the draft prepared by the Commission.

19. Mr. ULLRICH (German Democratic Republic) said that his delegation supported the International Law Commission's draft of article 45. The amendment proposed by China involved, in his view, simply a matter of drafting. His delegation would prefer to see the two separate paragraphs of the article retained.

20. Mr. ECONOMIDES (Greece) said that his delegation supported article 45 as drafted by the Commission. However it would not object to the amendment proposed by Mexico, since that text reflected the legal position of an international organization as an entity subject to international law and obligations. The amendment proposed by China was, in the view of his delegation, a matter for the Drafting Committee.

21. Mr. DENG (Sudan) said that his delegation supported the text prepared by the International Law Commission, but would like to see the Mexican amendment adopted for the sake of consistency with article 7, as amended. With regard to the amendment proposed by China, his delegation considered that the two-paragraph form of the article was preferable.

22. Mr. BARRETO (Portugal) said that his delegation was aware of the difficulties presented by article 45, but could nevertheless accept the draft proposed by the International Law Commission. However, his delegation could also accept the amendment proposed by Mexico, for the sake of consistency with article 7. He agreed with the Algerian representative's observation concerning the omission of the words "*ou ce motif*" at the end of subparagraph 2 (*b*) in the French version of that amendment, and he wondered if the representative of Mexico could explain the reason for that omission. In his view the amendment proposed by China was a matter for the Drafting Committee.

23. Mr. NGUYEN TIEN CUC (Viet Nam) said that in the view of his delegation the agreement referred to

in subparagraphs 1 (*a*) and 2 (*a*) should be explicitly expressed by both States and international organizations, recognizing the fact that in both cases that would be done through the competent organs. His delegation therefore could not accept subparagraphs 1 (*b*) and 2 (*b*). He agreed that the amendments proposed by China and Mexico should be referred to the Drafting Committee.

24. Mr. ALMODÓVAR (Cuba) said that, although his delegation was generally in favour of the draft article proposed by the International Law Commission, it had some reservations regarding subparagraph 1 (*b*). His delegation found it unacceptable that a sovereign State, by virtue of remaining silent, should be considered to have consented to the validity of a treaty. In the view of his delegation, such consent required an express act. He felt that the amendment proposed by China was simply a matter for the Drafting Committee. While his delegation might have been inclined not to accept subparagraph 2 (*b*), it found the wording proposed in the Mexican amendment acceptable. As both versions of the paragraph had some merit, he agreed that the amendment should be sent to the Drafting Committee.

25. Mr. GÜNEY (Turkey) said that his delegation found the International Law Commission's draft of article 45 quite satisfactory. However, the amendments proposed by China and Mexico might remove ambiguities, without affecting the substance of the original draft. They should therefore be referred to the Drafting Committee together with the suggestion made by the representative of Algeria, concerning the words "*ou ce motif*".

26. Mrs. THAKORE (India) said that it was necessary to consider whether an international organization might renounce its right to invoke a ground for invalidating a treaty under the circumstances envisaged in article 45 by express agreement, as provided in subparagraph 1 (*a*), or by acquiescence by reason of conduct, as provided in subparagraph 1 (*b*), in the same way as a State. While it might be desirable, as proposed in the Chinese amendment, to avoid inequalities between States and international organizations, significant structural differences between the two suggested that, on balance, it would be preferable to maintain the distinctions envisaged in the text prepared by the International Law Commission. The Mexican amendment, the substance of which had already been agreed to in regard to article 7, could be referred to the Drafting Committee.

27. Mr. RIPHAGEN (Netherlands) said that his delegation was in sympathy with the amendment proposed by Mexico because, in respect of conduct which might be considered as constituting renunciation of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty, there was no difference between States and international organizations. For the conduct to be that of the international organization, it had to be imputable to that organization. That was not the same as the conduct of the competent organ. Indeed, there might be doubts about the area of competence of organs, for example with regard to competence to conclude a treaty, to renounce a right or to perform any other act. If the conduct was imputable, there was no reason to distinguish between international organizations and States.

28. Referring to the example given by the International Law Commission in paragraph (7) of its commentary to article 45, he pointed out that the conclusion of a treaty by the organ of an international organization competent to conclude treaties might be followed by the allocation of funds by the organ competent in financial or budgetary matters. The fact of allocating funds might be considered as conduct of a competent organ renouncing the right to invoke the ground for invalidating the treaty, despite the fact that the organ in question was not competent in the matter of concluding treaties. His delegation therefore felt that from the legal standpoint it was preferable to make no distinction between States and international organizations, and that there was a sound legal basis for the amendment proposed by Mexico.

29. Mr. RASOOL (Pakistan) said that his delegation would have favoured the amendment proposed by China if it had concerned a drafting matter only, but the use of the word "acquiesced" in relation to both States and international organizations was a substantive change.

30. His delegation could support the amendment proposed by Mexico, since it not only maintained consistency with articles previously approved but also avoided problems that might result from a reference to the "competent organ".

31. Mr. OGISO (Japan) said that his delegation supported the Chinese proposal to merge paragraphs 1 and 2 of article 45, since it would considerably simplify the text. The proposal should be sent to the Drafting Committee for further consideration. His delegation was also in favour of the amendment submitted by Mexico, since it gave consistency with the new text of article 7 approved by the Committee.

32. Mrs. OLIVEROS (Argentina) said that in the opinion of her delegation the amendments submitted by China and Mexico were not of a drafting nature. It was therefore inappropriate to leave their consideration to the Drafting Committee.

33. Her delegation supported the Mexican proposal to omit the reference to the "competent organ" from subparagraph 2 (*b*). Clearly, the conduct of an international organization could result from the act of any of its organs, and not only from those that were competent to conclude treaties.

34. As for the Chinese amendment, although it had the merit of simplifying the drafting of article 45, it had the drawback of departing from the basic philosophy of distinguishing between States and international organizations.

35. Mr. DROUSHIOTIS (Cyprus) expressed support for the Mexican amendment, which he felt would improve the text of article 45.

36. As for the amendment by China, it was of a drafting nature and could be referred to the Drafting Committee.

37. Mr. MOTSIK (Ukrainian Soviet Socialist Republic) said that the International Law Commission's text

of article 45 was acceptable to his delegation. The two amendments which had been submitted did not, in his view, constitute improvements. In particular, he urged that the reference to the "competent organ" of an international organization should be retained in subparagraph 2 (*b*).

38. Mr. CASTROVIEJO (Spain) said that his delegation could accept the Commission's text, but nevertheless found attractive the two amendments which had been proposed. The Mexican amendment had the merit of simplifying the text of subparagraph 2 (*b*), the Chinese amendment that of a more compact drafting.

39. His delegation favoured referring the two amendments to the Drafting Committee.

40. Mr. MONNIER (Switzerland) said that his delegation had been at first inclined to accept article 45 as it stood but, on reflection, it found that the Mexican amendment constituted a welcome improvement. That was not only because of the Committee of the Whole's decision to eliminate the reference to "the competent organ" of an international organization in article 7, subparagraph 4 (*b*), but because that reference was an interference in the internal distribution of powers within the organization concerned. The reference to "the competent organ" of the organization, if retained, might therefore give rise to difficulties, particularly since the conduct in question might well not be that of the organ of the organization which was competent to conclude treaties. For those reasons, his delegation supported the Mexican amendment.

41. Mr. SIEV (Ireland) said that his delegation favoured the International Law Commission's text but had no objection to the Chinese amendment being referred to the Drafting Committee for consideration, since it had the merit of simplifying the wording.

42. His delegation also favoured referring to the Drafting Committee the Mexican amendment, which called for elimination of the reference to the "competent organ", since the decision had already been taken to omit those words in article 7, subparagraph 4 (*b*).

43. Mr. DALTON (United States of America) urged that the amendment by China be referred to the Drafting Committee; it had the merit of bringing draft article 45 closer to the corresponding provision of the 1969 Vienna Convention on the Law of Treaties.

44. The Mexican amendment also improved the draft article, especially in view of the decision already taken not to mention the "competent organ" in article 7, subparagraph 4 (*b*). That amendment, too, should be referred to the Drafting Committee.

45. Mr. LUKASIK (Poland) said that his first impression had been that the Chinese and Mexican amendments were simply drafting proposals, and that they could therefore easily be referred to the Drafting Committee. The discussion which had taken place, however, had made it perfectly clear that those amendments were not simply matters of drafting. Both amendments, if adopted, could destroy the delicate balance achieved by the International Law Commission after its long consideration of the article. The text adopted by the Commission was based on the existence of structural differences between States and international organizations. It was because of those differences that different conditions were specified in paragraphs 1 and 2 respectively of article 45. His delegation believed that the distinction drawn by the Commission in that article was fully justified, and accordingly urged that the text of the article should be left unchanged.

46. Mr. SANYAOLU (Nigeria) said that his delegation favoured adoption of the Mexican amendment, which was consistent with the decision already taken to include no reference to the "competent organ" in subparagraph 4 (*b*) of article 7.

47. The amendment submitted by China, which included such a reference, should not, he felt, be adopted in its present form.

48. Mr. NGUAYILA (Zaire) said that his delegation supported the International Law Commission's text. As for the amendments submitted by China and Mexico, they had certain merits and could be referred to the Drafting Committee if the majority so desired.

49. Mr. EIRIKSSON (Iceland) said that his delegation supported the Chinese amendment, subject to deletion of the reference to the "competent organ" as proposed in the Mexican amendment.

50. Mr. SANG HOON CHO (Republic of Korea) said that his delegation found the Commission's draft acceptable in principle. He agreed with those speakers who considered the two amendments to have merit. Regarding the Chinese amendment, he had some doubts as to the advisability of combining in one paragraph the two separate provisions relating to States and to international organizations. He could, however, support the Mexican amendment.

51. Mr. KRISAFI (Albania) considered that the two amendments were definitely not of a purely drafting nature. His delegation preferred the International Law Commission's text for article 45.

52. The CHAIRMAN noted that certain delegations were of the opinion that the two amendments contained elements of substance. Nevertheless, the general view had been in favour of referring article 45 to the Drafting Committee with those two amendments. In the absence of objection, he would take it that the Committee agreed to refer draft article 45, together with the amendments contained in documents A/CONF.129/C.1/L.46 and L.47, to the Drafting Committee.

It was so decided.

Article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties)

Paragraphs 2, 3 and 4

53. Mr. TUERK (Austria), introducing on behalf of Austria and Japan an amendment to article 46 (A/CONF.129/C.1/L.48/Rev.1), said that in the corresponding article 46 of the 1969 Vienna Convention, two requirements were laid down for invoking violation of a provision of internal law regarding competence to conclude treaties. The first was that the violation should be manifest and the second was that it should concern a

rule "of fundamental importance". In the draft article 46 before the Committee, those two requirements were specified both for States and for international organizations. There was, however, a significant departure from the 1969 formula as far as international organizations were concerned.

54. The 1969 provision had been based on the objective theory, thereby departing from the subjective theories held before 1969. In the present draft article, the objective approach was retained in paragraph 2, where States were concerned, but a subjective approach was adopted for the case of violation of the rules of an international organization. In accordance with paragraph 4, a violation was stated to be manifest if "it is or ought to be within the knowledge of any contracting State or any contracting organization".

55. The objective criterion adopted in 1969—and retained for the case of States in paragraph 2 of article 46—was based on the concepts of good faith and of the "normal practice of States". The International Law Commission had departed from that criterion with regard to international organizations on the ground that the concept of "normal practice" dit not apply to organizations. His delegation was not at all convinced by that reasoning. It believed that a practice, if not a normal practice, of international organizations could well be said to exist. It was for those reasons that his delegation and that of Japan had submitted their proposal to amend paragraphs 2 and 4 of article 46 so as to bring them into line with the language and the approach of the 1969 Vienna Convention.

56. Mr. RAMADAN (Egypt), introducing his delegation's amendment (A/CONF.129/C.1/L.52), said that the International Law Commission had arrived at the conclusion that there did not exist any normal practice of international organizations regarding the person or organ competent to express its will to be bound by a treaty. In the case of States, the head of State, the head of Government and the foreign minister were, in accordance with normal State practice, recognized as competent in the matter, but where international organizations were concerned, the officials in charge of external relations differed greatly from one organization to another.

57. Relying on those considerations, the Commission had decided that it had no model on which to base the determination of who was entitled to express the consent of an international organization to be bound by a treaty. It had accordingly adopted a new approach, namely that of relying on the criterion of awareness of the violation. It should, however, be clear to all that that criterion could be based only on the essential principle of good faith, which was the basic principle of international relations.

58. The International Law Commission's commentary, and in particular its paragraph (7) (see A/CONF.129/4), was significant in that regard. It stated that if the international organization's treaty partners were "aware of the violation, the organization will be able to invoke it against them as a ground for the invalidity of its consent in accordance with the principle of good faith, which applies both to States and to organizations". He stressed the Commission's conclusion that, in such a case, the international organization would be able to invoke the violation as a ground for invalidating its consent.

59. The purpose of the Egyptian amendment was therefore precisely to introduce into paragraph 4 that basic principle of good faith, eliminating at the same time the concept of awareness embodied in the words "if it is or ought to be within the knowledge". Apart from any other consideration, language such as "ought to be within the knowledge" could only give rise to doubts and to difficulties of interpretation.

60. In conclusion, he stressed that his delegation's amendment would bring article 46 into line with the corresponding provision of the 1969 Vienna Convention and would introduce into paragraph 4 the objective criterion which was already present in paragraph 2 of the draft article.

61. Mr. ABDENNADHEUR (Tunisia) introducing his delegation's amendment (A/CONF.129/C.1/L.54), said that article 46 involved the problem of the security to which the parties to a treaty were entitled. His delegation would agree that, contrary to States, international organizations did not have a well-established practice. It therefore accepted that, with regard to the question under discussion, the treatment of international organizations should be different. His delegation could not, however, accept that for purposes of defining the manifest character of a violation of a rule of fundamental importance ambiguous criteria should be chosen, such as those set forth in paragraph 4 of article 46, for that would open the door to divergent interpretations.

62. The provisions of paragraph 4 had the further drawback of offering the international organizations a whole range of opportunities for disputing treaties concluded by them by alleging defects of consent, while States remained always bound by the objective criterion laid down in paragraphs 1 and 2. The treaty partners of international organizations would thus be placed at a disadvantage, since the organizations would be better protected by paragraphs 1 and 2 of article 46 than the States by paragraphs 3 and 4.

63. The fact that international organizations did not have a "normal practice" might perhaps justify some adjustment with regard to the defects of consent which could be invoked by them, but it should not lead to creating paradoxical situations or codifying ambiguity. The problem was that of determining how something "came to the knowledge" or "ought to be within the knowledge" of a contracting State. That formula introduced an element of subjectivity—a subjectivity which would not help to solve the problem, but would certainly undermine the security of the treaty partners.

64. For those reasons his delegation had submitted its amendment, the effect of which would be to retain the idea of a violation being considered manifest if it was within the knowledge of any contracting State or any contracting organization. The words "ought to be within the knowledge", however, would be replaced by "should normally have been within the knowledge". The issue of whether such knowledge existed had to be determined objectively by verifying whether the treaty

partners, bearing in mind their position in relation to the international organization, were in a position to know of the violation.

65. The adoption of any other criteria of a subjective nature would lead to treaty insecurity, bearing in mind in particular that the international organizations did not have a "normal practice" and did not have identical legal systems. The matter was one of importance to treaty partners of international organizations; they could not be made to bear the burden of investigating the extensive documentation of an international organization in order to ascertain its important rules.

66. Mr. SZASZ (United Nations), introducing the amendment proposed by the International Atomic Energy Agency, the International Maritime Organization, the International Monetary Fund and the United Nations (A/CONF.129/C.1/L.55), remarked that the matter concerned one of the asymmetries between States and international organizations that lay at the heart of the Conference's work.

67. It was clear that the internal law of a State, including even its most important constituent instrument, its Constitution, was truly internal—and in no sense comprised international law binding on or even necessarily known to international entities. That could not be said in the case of international organizations, whose member States were privy to all their internal rules, to their decisions and resolutions and to their practice. In particular, the constituent instruments of international organizations, which were for the most part included in international treaties of which States as parties were obviously aware, were duly registered in accordance with Article 102 of the Charter of the United Nations.

68. According to the terms of article 46, paragraph 3, as drafted by the International Law Commission, an international organization would not be able to invoke the violation even of its constituent instruments in order to vitiate its consent to be bound by a treaty; did that not imply the sanctioning of possible violation of those instruments? If a treaty were entered into in violation of a constituent instrument, that would presumably constitute a violation of that treaty.

69. The four-organization amendment sought to remedy such a potential state of affairs by excepting —solely for the purposes of paragraph 3 of article 46— the constituent instruments of an organization from its rules as defined in draft article 2, subparagraph 1 (*j*); from another point of view, it sought to indicate that any provision of a constituent instrument was, as a treaty, "a rule of fundamental importance" for the purposes of paragraph 3 of article 46.

70. It should be pointed out that the issue of Article 103 of the Charter of the United Nations, raised and discussed during the Committee's earlier deliberations on articles 27 and 30, was also of some relevance to the question now under discussion. Like any other constituent instrument, the Charter of the United Nations was, so to speak, hidden in the background of the International Law Commission's draft of paragraph 3, and at risk in the manner he had described; but the case of the Charter was special, in that Article 103 provided that the Charter should always be superior to other treaties. However, the sponsors of the four-organization amendment and the other international organizations which had been consulted had determined not to build their proposal around that particular case, but rather to seek the broadest possible formulation of their concerns, which would be those of all international organizations whose constituent instruments were treaties.

71. Mr. ULLRICH (German Democratic Republic) expressed his delegation's strong support for the basic idea underlying article 46. It also supported the four-organization amendment to paragraph 3, but it would prefer the word "including" in the final phrase to be replaced by "in particular".

72. The Commission's draft of paragraphs 2 and 4 did not entirely satisfy his delegation, which was not happy with the subjective formulation "if it is or ought to be within the knowledge". The amendment by Austria and Japan had the merit of providing identical wording for each of those paragraphs and of referring to less subjective, and thus more acceptable, criteria.

73. His delegation believed that the draft article, together with the Austrian-Japanese amendment and the Egyptian amendment, which tended in the same direction, could be transmitted to the Drafting Committee.

74. Mr. OGISO (Japan) said that as a co-sponsor of the amendment already introduced by the representative of Austria he merely wished to suggest to the Drafting Committee the possibility of combining the separate provisions in a single paragraph.

75. The Egyptian amendment, in omitting from the provisions relating to international organizations any reference to the criterion of normal practice, established a difference in the treatment of organizations and States that was unacceptable to the Japanese delegation.

76. Mrs. VLASOVA (Byelorussian Soviet Socialist Republic) said that her delegation approved the International Law Commission's draft in principle, but believed that it would be improved by the incorporation of some of the proposed amendments. In particular, the four-organization amendment very rationally sought to include a reference to constituent instruments in paragraph 3; she believed that it should appear in the text before the reference to rules of fundamental importance. The Austrian-Japanese amendment, and the similarly intentioned Egyptian amendment, also deserved support. She considered that all the proposals, together with the Commission's draft, could be referred to the Drafting Committee.

77. Mr. FISCHER (Holy See) pointed to the connection between article 46—which his delegation considered to be of the utmost importance—and article 27. Both reflected the relationship between international and municipal law; they established that the former was the prevailing system *vis-à-vis* national rules, the only exception being in regard to the conclusion of treaties; there, internal law mattered, but only if the internal rule violated was of fundamental importance and if the violation was manifest.

78. Since it would patently be a step backwards in the development of international law if an exception were

made in favour of treaty obligations entered into by international organizations, the International Law Commission had determined in article 27 that the principle of *pacta sunt servanda* should, with the reservations expressed in article 46, prevail over any conflicting internal rules of international organizations.

79. He submitted, with all due respect for the special position of those bodies, that they lived, once established, in the world of international law, which in turn was based on good faith and the security of treaty relations. Any attempt, therefore, to accord priority to their internal rules over their treaty obligations would constitute a serious threat to the security of legal relations between them and their treaty partners.

80. His delegation deplored the fact that in paragraph 4 the definition of the "manifest" character of a violation lacked any reference to an objective criterion, and that the reference to the principle of good faith envisaged during the first reading had now been omitted. The Austrian-Japanese amendment appeared to overcome those defects by replacing a purely subjective criterion with a more objective one, as well as by reintroducing the principle of good faith. A similar improvement was offered by the Egyptian amendment. His delegation could therefore support those proposals. It had reservations, however, with regard to the Tunisian amendment, which omitted any reference to the principle of good faith.

81. Mr. RIPHAGEN (Netherlands) observed that while paragraphs 1 to 3 of article 46 quite clearly harked back to the 1969 Vienna Convention on the Law of Treaties, and the Austrian-Japanese proposal concerning paragraph 4 also obviously returned to that Convention, the difference introduced in the Commission's draft of paragraph 4 was a matter of drafting only; it introduced no unacceptably subjective criterion: to refer to what "ought to be" known was to refer to some norm of knowledge that must be considered objective.

82. With respect to international organizations, on the basis of its belief that they lacked "normal practice" the Commission had evidently been concerned to depart from the formula used in the 1969 Vienna Convention with respect to States. However, its draft did not abandon the objective element; it simply introduced another factor, to be linked with normal practice and good faith where the application of paragraph 4 was concerned. He considered that the International Law Commission's text, together with the Austrian-Japanese and the Egyptian amendments, could be referred to the Drafting Committee. On the other hand, he had some difficulties with the Tunisian amendment, particularly because it omitted any reference to good faith, which was, after all, a tenet of international law in relations between States.

83. The four-organization amendment posed problems for the Netherlands delegation. While the International Law Commission, after lengthy discussion and consideration of other drafts, had decided—rightly, he believed—to deal in principle with States and international organizations in the same way when making a distinction between internal rules and internal rules "of fundamental importance", the sponsors of the amendment appeared to be suggesting that any rule contained in a constituent instrument was of fundamental importance. That was manifestly not the case, when all the organizations and rules involved were taken into account. The proposal seemed to alter considerably the substance of everything contained in the draft articles. His delegation would therefore have to oppose acceptance of that amendment.

84. Mr. STEFANINI (France) said that his delegation found the International Law Commission's draft of the article, which dealt with a particular application of the principle of good faith, to be generally satisfactory. It considered that the words "*devrait être objectivement évidente*" in the French version of paragraph 2 should—in conformity with the juridically and grammatically more correct wording of article 46, paragraph 2, of the Vienna Convention—be replaced by "*est objectivement évidente*". In paragraph 3, the term "rule of fundamental importance" lacked precision; it would doubtless be impossible, however, to find a better or clearer term.

85. In the light of those considerations, his delegation was unable to support the amendments which had been proposed.

86. Mr. RASOOL (Pakistan) said that his delegation supported the Austrian-Japanese amendment, which followed closely the formulation in the 1969 Vienna Convention, established symmetry and avoided the risk of problems resulting from conflicting interpretations. His delegation would also have fully approved the Egyptian amendment for the same reasons had it not omitted the reference to normal practice, for reasons that, if understandable, were not altogether convincing. It believed that a combination of the criteria of practice and good faith would take care of all situations. The Tunisian amendment, by introducing the qualification "normally", appeared to create a problem similar to that which it sought to solve.

87. His delegation believed that all the amendments proposed, being inspired by the same intention, might be referred to the Drafting Committee.

88. Mr. HOLDER (International Monetary Fund), making, first of all, some comments of a general nature, noted the balance struck in the draft articles between a fairly considerable amount of prescription in specific provisions, and flexibility. It was important to take account of the fact that the practice of international organizations was developing and not to inhibit its development, having regard to the diversity of the organizations themselves and the desires of the parties to international agreements, whether organizations or States. Stability of expectations—*pacta sunt servanda*—was a major general objective to which, for obvious reasons, organizations such as the International Monetary Fund and the World Bank attached the utmost importance. The integrity of the organizations and their legal and financial credibility must be maintained, in accordance with their charters and in the interest of their members.

89. A goal of the present Conference should be to produce a treaty of practical use to the international organizations. While the objective appeared to be that

the draft articles under consideration should constitute residual rules (that was what the International Law Commission had indicated in 1982), the draft articles clearly contained general prescriptions that would have considerable, even constitutional, impact on international organizations. The Fund anticipated, on the basis of the rules of procedure of the Conference and subject to the final clauses adopted, that international organizations would have the option of acceding to the new convention. It was therefore most important that the latter be compatible both with their constituent instruments and with their practice.

90. Against that background, and as a co-sponsor of the amendment to article 46 in document A/CONF.129/C.1/L.55, he endorsed the comments by the representative of the United Nations. The Commission's text contained no criterion for determining objectively what constituted a "rule of fundamental importance". That was in contrast with the treatment accorded to the concept of what was "manifest". The legal adviser of an international organization would doubtless be inclined to consider that the rules contained in its constituent instrument were indeed of fundamental importance—especially if that instrument dealt with general principles. In a sense, therefore, the four-organization amendment merely sought to elucidate that point. He believed that the proposal was in the spirit of the International Law Commission's commentary, particularly that in its 1982 report.

91. Mr. ADEDE (International Atomic Energy Agency), speaking as a sponsor of the four organizations' amendment, said that the rationale of the proposal had already been explained. Basically, the sponsors considered that, since no attempt had been made to define the term "a rule of fundamental importance", it would be useful to make it quite clear that the constituent instrument of an international organization could contain such a rule. His delegation had also sponsored the amendment because it considered it essential to give international organizations the right to invoke their constituent instruments, where appropriate, in order to achieve the purposes of article 46, paragraph 3.

92. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation supported in principle the amendment proposed by the four organizations, but would suggest that the last part of paragraph 3, as thus amended, should be reworded to read ". . . unless that violation was manifest and concerned constituent instruments or any other rule of fundamental importance". The Drafting Committee might wish to consider that suggestion. His delegation could also accept the Austrian-Japanese amendment and the Egyptian amendment.

93. Mrs. DIAGO (Cuba) said that her delegation could support the amendments proposed by Austria and Japan, Egypt and the four organizations, all of which aimed at improving and amplifying the Commission's text, although it considered that the Austrian-Japanese amendment was most in keeping with the purposes of the 1969 Vienna Convention.

94. Mr. BERNHARD (Denmark) said that his delegation could have accepted the draft article as proposed by the International Law Commission, but found merit in the attempts of Austria, Japan and Egypt to bring that text more into line with the corresponding provisions of the 1969 Vienna Convention. It therefore supported the amendments proposed by those countries and agreed that they should be referred to the Drafting Committee.

95. The four-organization amendment, however, was too far-reaching, and his delegation would therefore not recommend its adoption.

96. Mr. AL-JUMARAD (Iraq) said that his delegation approved the first three paragraphs of the text proposed by the International Law Commission. It was unable to accept the four-organization amendment, which gave rise to the problems to which the Netherlands representative had referred.

97. With regard to article 46, paragraph 4, it noted that the Tunisian amendment took account of one aspect which had been disregarded in the text submitted by the Commission, and that the Egyptian amendment provided that good faith should be the main consideration. Since those two amendments were complementary, the Committee might wish to refer them to the Drafting Committee.

98. He had certain reservations concerning the Austrian-Japanese amendment, particularly in regard to its reference to the normal practice of international organizations, since, in his delegation's view, such practice was not established and could not therefore be invoked.

99. Mr. SANYAOLU (Nigeria) said that his delegation favoured an objective test, such as had been adopted for the 1969 Vienna Convention, rather than a subjective one, such as that in the Commission's draft, and it saw no reason to introduce different criteria in the present text. It therefore supported the amendments proposed by Austria and Japan, Egypt and Tunisia, all of which aimed at substituting an objective for a subjective test. In its view, those amendments should be referred to the Drafting Committee.

100. While his delegation sympathized with the views expressed by the international organizations sponsors of their amendment, it pointed out that the definition of the term "rules of the organization" in article 2, subparagraph 1 (*j*), included constituent instruments. It would therefore have difficulty in supporting that amendment.

101. Mr. ECONOMIDES (Greece) said that his difficulty with article 46 arose from the difference in régime between paragraphs 2 and 4. Whereas the former provided that, in order to establish that a violation was manifest, the test should be an objective one based on the criteria of good faith and the normal practice of States, the latter provided for the single criterion of knowledge. That difference of approach—*in abstracto* versus *in concreto*—was not justified, in his view, and paragraph 4 should therefore be amplified and improved.

102. Referring to the amendments before the Committee, he said that he regarded the introduction of the word "normally", as proposed in the Tunisian amendment, as an improvement, since it underlined the objective nature of paragraph 4. So far as the rest of the

amendment was concerned, however, he had the same difficulties as with paragraph 4 of the Commission's draft. The Egyptian amendment was better, but was still not altogether satisfactory since it made no mention of practice. The Austrian-Japanese amendment, on the other hand, had his delegation's full support, since it provided for an identical régime in the case of both international organizations and States.

103. He was unable to support the amendment of the four organizations, which seemed both unnecessary and illogical. In his view, the expression "the rules of the organization regarding competence to include treaties" covered the rules contained in constituent instruments, and he was therefore surprised to see constituent instruments treated as though they were something different from the rules of the organization, particularly given the definition of "rules of the organization" in article 2, subparagraph 1 (*j*).

104. Mr. WANG Houli (China) said that his delegation supported the Austrian-Japanese amendment and the Egyptian amendment, and agreed that they should be referred to the Drafting Committee.

105. Mr. DENG (Sudan) said that, for the reasons already indicated by the representatives of the Holy See and the Netherlands, both the Austrian-Japanese amendment and the Egyptian proposal clarified the International Law Commission's text and removed the subjective test. Those two amendments could therefore be referred to the Drafting Committee. The amendments of Tunisia and the four organizations were, however, unacceptable to his delegation, as they did not seek to remove the element of subjectivity.

106. Mr. ABDENNADHEUR (Tunisia) observed, with reference to his delegation's amendment, that if a contracting State or a contracting organization was aware of a violation it would be able to invoke that violation in accordance with the principle of good faith, as was pointed out in the International Law Commission's commentary to article 46.

107. Mr. CASTROVIEJO (Spain) said that the main thrust of draft article 46 was acceptable to his delegation. However, the Austrian-Japanese amendment had the merit of offering homogeneous wording and of being close to the corresponding provision of the 1969 Vienna Convention. It therefore had his delegation's support. The subject of the four-organization amendment to paragraph 3 was already dealt with in article 2, subparagraph 1 (*j*).

108. Mr. MONNIER (Switzerland) said that the difference between paragraphs 2 and 4 of draft article 46, which dealt with imperfect ratifications, stemmed from the fact that while, according to the International Law Commission, there was a normal practice of States in the matter of a manifest violation of their internal laws or rules regarding competence to conclude treaties, there was no such normal practice of organizations. That statement, however, required qualification: the normal practice of States was the same for all States in its broad lines, but there were also some differences. For instance, in some countries, under their constitutions, certain treaties had to be submitted for approval not only by parliament but also by the people, which was a further obstacle to be surmounted before the authorities concerned could express the consent of the State to be bound.

109. While it could be said that in the case of international organizations there was no general practice comparable to that of States, there was the normal practice of each individual organization which must be known to the contracting parties concerned. Accordingly, although there was a difference between States and international organizations in the matter of practice, it was not as clear-cut as article 46 would suggest.

110. With that in mind, and so far as paragraph 2 of article 46 was concerned, he did not think it would be advisable to depart from the text of the corresponding provision of the 1969 Vienna Convention, and his delegation therefore supported the Austrian-Japanese amendment. The terms of paragraph 4 did not differ basically from those of paragraph 2, but there was a subjective element in the latter which could be a source of uncertainty, and hence of difficulty. The Austrian-Japanese amendment therefore constituted a welcome improvement.

111. His delegation also supported the Egyptian amendment.

The meeting rose at 1.05 p.m.

18th meeting

Tuesday, 4 March 1986, at 3.20 p.m.

Chairman: Mr. SHASH (Egypt)

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] (*continued*)

Article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties) (*concluded*)

Paragraphs 2, 3 and 4 (concluded)

1. Mr. HERRON (Australia) said that paragraph 3, modelled by the International Law Commission on paragraph 1 of article 46 of the 1969 Vienna Convention