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**Summary record of the 1353rd meeting**

Topic:  
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127. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the fact that article 0 appeared in square brackets did not indicate any doubt on the part of the members of the Drafting Committee that the Commission would wish to deal with the matters to which it referred, but rather reflected a feeling arising out of the discussion within the Commission itself that the subject was one which had not been fully explored. In addition, the majority of the members of the Drafting Committee did not believe, and did not feel that the Commission as a whole believed, that article 0 could stand alone as an adequate statement of special measures in favour of developing States.

128. The Drafting Committee had based itself on the text submitted by the Special Rapporteur in document A/CN.4/L.228/Rev.1. The Committee had considered that the aim of the article should be to reproduce faithfully a situation founded in current State practice within UNCTAD and illustrated by the waivers to GATT, and that it would be consistent with the existing rules to replace the opening phrase of the Special Rapporteur's version of the article, "A developed beneficiary State", by the phrase "A beneficiary State".

129. It had also considered it unnecessary, and indeed undesirable, to retain the phrase "trade advantages", since the meaning of those words was not clear and the context of the article was, in any case, governed by the reference to a "generalized system of preferences".

130. The fact that the title of the article contained no reference to developing countries as such was linked with a feeling in the Drafting Committee that that would avoid giving the impression that the article went further than it really did. As matters stood, the article represented an attempt to include a reference to the existing state of affairs in the draft, on the assumption that the Commission would at some later stage wish the Special Rapporteur to prepare additional articles on the same or related topics.

131. Mr. HAMBRO said that the explanations given by the Chairman of the Drafting Committee were so wide in scope that they would require further discussion.

132. The CHAIRMAN speaking as a member of the Commission, said that he was afraid that to approve the article within square brackets might give the impression that the entire Commission had doubts about its value, which was not the case.

133. Mr. USHAKOV said that, for him, the fact that the article appeared in square brackets indicated only that the Commission intended to devote further attention to it at its next session, particularly since the Commission would then be taking up the article only in first, and not in second reading.<sup>17</sup>

The meeting rose at 1.15 p.m.

## 1353rd MEETING

Monday, 21 July 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/285; A/CN.4/L.240)

[Item 4 of the agenda]

(resumed from the 1350th meeting)

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

##### ARTICLE 2 (Use of terms), PARAGRAPHS 1 (b) AND 1 (b bis)<sup>1</sup>

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles proposed by the Drafting Committee (A/CN.4/L.240), starting with article 2, paragraphs 1 (b) and 1 (b bis).

2. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts for article 2, paragraphs 1 (b) and 1 (b bis):

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

3. Mr. REUTER (Special Rapporteur) said that article 2, paragraph 1 (b), did not call for any comment by him or any decision by the Commission, since it merely reproduced the corresponding provision of the Vienna Convention on the Law of Treaties. It would be seen that the expression "ratification" meant only the act of a State. The Drafting Committee had considered that it was preferable, largely for historical reasons, not to use the term "ratification" in respect of international organizations.

4. In his own approach to the concept of ratification, he had distinguished between the historical background of the practice of States in that respect and the actual mechanism of ratification, whereby an initial expression of consent, not implying a formal commitment, was followed by a second act which did represent a formal commitment. That mechanism, which comprised the provisional indication of an intention followed by a definitive decision, could be useful to international organizations, but there was at present no generally accepted term, on the international plane, to designate the act by which an international organization manifested, in two stages, its consent to be bound.

<sup>17</sup> For resumption of the discussion see next meeting, para. 101

<sup>1</sup> For previous discussion see 1347th and 1348th meetings.

5. The Drafting Committee had therefore tried to meet the needs of international organizations by describing the operation by the expression "act of formal confirmation", which appeared in paragraph 1 (*b bis*). Although it was true that that expression was more a description than a definition, it was easily understood, since the act of ratification was an act of confirmation. That expression should be taken to apply on the international plane because the Drafting Committee had not wished to limit the freedom of international organizations, which could always use the term "ratification" for internal purposes if it was recognized in their constituent instruments.

6. Mr. ŠAHOVIĆ said he thought that, in view of the meaning given to it in the Vienna Convention, the term "ratification" could also apply to the practice of international organizations. The expression proposed in paragraph 1 (*b bis*) represented a compromise between the views expressed in the general discussion. He could therefore accept it, although he regretted that the Commission had not considered it advisable to use the word "ratification" for international organizations and hoped the question might be settled in a more satisfactory manner in the future.

7. Mr. HAMBRO and Mr. KEARNEY said that they entirely agreed with the comments made by Mr. Šahović.

8. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 2, paragraphs 1 (*b*) and 1 (*b bis*) as proposed by the Drafting Committee.

*It was so agreed.*

ARTICLE 2 (Use of terms), PARAGRAPHS 1 (*b ter*),<sup>2</sup> 1 (*c*)<sup>3</sup> AND 1 (*c bis*)

9. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts for article 2, paragraphs 1 (*b ter*), 1 (*c*) and 1 (*c bis*):

(*b ter*) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(*c*) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for the purpose of negotiating, adopting or authenticating the text of a treaty between one or more States and one or more international organizations, expressing the consent of the State to be bound by such a treaty, or performing any other act with respect to such a treaty;

(*c bis*) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for the purpose of negotiating, adopting or authenticating the text of a treaty, communicating the consent of the organization to be bound by a treaty, or performing any other act with respect to a treaty;

10. Mr. REUTER (Special Rapporteur) said that the only point to which he need draw attention was the use of the term "expressing". That term, which appeared in connexion with representatives of States in many provi-

sions and even in the title of certain articles of the Vienna Convention on the Law of Treaties, had been retained in the present draft in connexion with representatives of States.

11. Serious objections had, however, been raised, both in the Commission and in the Drafting Committee, to the use of the term "expressing" in connexion with representatives of international organizations. It had been considered that it was somewhat ambiguous, particularly in the case of rather vague constituent instruments, and might imply that the representative of an international organization could replace the organization for the purpose of establishing its consent to be bound by a treaty. The Drafting Committee had therefore tried to avoid the use of the expression "expressing consent to be bound" in connexion with international organizations by using the expression "establishing consent to be bound", which was to be found in the Vienna Convention. When it had had to use a single word which could be used both for the consent of a State and for that of an organization, it had chosen the word "establish" in order to avoid any ambiguity. Thus, it had used the word "establishes" in sub-paragraph (*b ter*) to refer both to the consent of a State and to that of an international organization, whereas it had retained the word "expressing" in sub-paragraph (*c*), which related only to the consent of a State.

12. With regard to the document certifying the capacity of a natural person to represent a State or an international organization, the Drafting Committee had decided, in order to take account of certain observations, to reserve the expression "full powers" for the document emanating from a State and to use the expression "powers" to designate the document emanating from an international organization. International practice in the matter was very flexible and the Vienna Convention of 14 March 1975 on the Representation of States in their Relations with International Organizations of a Universal Character used the two expressions interchangeably for documents emanating from States. The Drafting Committee, however, had considered it more suitable to avoid using the expression "full powers" in connexion with representatives of international organizations.

13. Mr. KEARNEY said that he thought the distinction made in sub-paragraphs (*c*) and (*c bis*) between "full powers" and "powers" was unnecessary. It presumably implied some difference in the authority of the documents concerned, but since they were issued for the same purpose, he could not see why that should be so. He hoped the distinction was not part of an attempt to play down the role that an international organization could assume in becoming a party to the treaty. He had indicated his willingness to accept the distinction made earlier in article 2 between "ratification" and an "act of formal confirmation" for the sake of compromise, but it would be an excessive compromise to accept a distinction which, as in the present case, was both unnecessary and confusing.

14. Mr. HAMBRO said he agreed with Mr. Kearney that the distinction between the expressions "powers" and "full powers" was entirely artificial.

15. Mr. PINTO said that his attitude to article 2 as a whole would determine his attitude to the entire set of

<sup>2</sup> For previous discussion see 1347th and 1348th meetings.

<sup>3</sup> For previous discussion see 1344th meeting, para. 3, and 1345th meeting, para. 62.

draft articles. He had explained during the general debate the difficulties he had with any approach to the topic which started by placing States and international organizations on an equal footing. He had pointed out at that time the fundamental differences between States and international organizations.

16. In considering article 2, the Drafting Committee had had before it other views which sought to distinguish between States and international organizations in certain respects, and it would seem that it was those views which were reflected in the text now proposed. The differences illustrated in the text were essentially procedural and, in his opinion, did not adequately reflect the fundamental differences between States and international organizations which existed at present and would continue to exist for the foreseeable future. The Drafting Committee had tried to differentiate between States and international organizations by using three sets of terms, referring to "ratification", the "expression" of consent and "full powers" in the case of States, and to an "act of formal confirmation", the "establishment" of consent and "powers" in the case of international organizations, but where treaty relationships were concerned the differences went much further.

17. Mr. USHAKOV said he associated himself with Mr. Pinto's comments.

18. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 2, paragraphs 1 (b ter), 1 (c) and 1 (c bis) as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 2 (Use of terms), PARAGRAPH 1 (g)<sup>4</sup>

19. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 2, paragraph 1 (g):

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

20. Mr. REUTER (Special Rapporteur) said that subparagraph (g), which had been proposed by Mr. Kearney, was exactly the same as the corresponding subparagraph of the Vienna Convention, with the addition of the words "or an international organization".

21. In adopting that text, the Drafting Committee had left aside a problem which would come up again later and which related to the status of party of international organizations. Thus, there were international organizations which participated in the drawing up of the text of a treaty but could not become parties to the treaty and there were international organizations which could become parties to a treaty, but which would, as parties, have specific characteristics. The Drafting Committee had considered that that question should be dealt with in the commentary. The problem would arise again in article 10 in connexion with the expression "international organizations participating in its negotiation".

<sup>4</sup> For previous discussion see 1345th meeting, para. 72, and 1346th meeting, para. 1.

22. The CHAIRMAN said that, if there were no further comments he would take it that the Commission agreed to approve article 2, paragraph 1 (g) as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 7<sup>5</sup>

23. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 7:

##### Article 7

##### Full powers and powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference, for the purpose of adopting the text of a treaty between one or more States and one or more international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between one or more States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

24. The article employed the terms "full powers" and "powers" as they had been defined in article 2, para-

<sup>5</sup> For previous discussion see 1344th meeting, para. 3, and 1345th meeting, para. 62.

graphs 1 (c) and 1 (c bis) respectively. The term "treaty", when standing alone, referred to both the types of treaty defined in article 2, paragraph 1 (a). Where the term was intended to refer only to one of those types of treaty, that was expressly indicated in the text. In line with the distinction made between the "expression" of consent to be bound by a treaty in the case of a State, and the "establishment" of such consent in the case of an international organization, article 7 referred to the "expression" of consent in the case of a State and to the "communication" of consent in the case of an international organization.

25. The Drafting Committee had added a number of sub-paragraphs to paragraph 2 of the article as proposed by the Special Rapporteur, in order to take account in particular of pertinent developments at the recent Vienna Conference on the Representation of States in their Relations with International Organizations of a Universal Character. The Committee had also decided to refer only to practice in general, rather than to specify the source of the practice, in order to avoid difficulties in achieving a balance between States and international organizations.

26. Mr. CASTAÑEDA said that article 7, paragraph 1, referred to the expression, while article 2, paragraph 1 (b) referred to the establishment of the consent of a State to be bound by a treaty. He suggested that the wording of article 7 be brought into line with that of article 2, since the context of the two cases appeared to be identical.

27. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee had found that the Vienna Convention on the Law of Treaties was not always consistent in its use of terms. On occasion, the Committee had had to decide whether to follow the language of the Vienna Convention, or whether to make what seemed to be an obvious correction at the risk that greater significance would be read into the change than was warranted. Where, as in the present case, nothing of substance turned on the difference in language, the Committee had followed the text of the corresponding articles of the Vienna Convention.

28. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 7 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 8<sup>6</sup>

29. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 8:

##### *Article 8*

##### *Subsequent confirmation of an act performed without authorization*

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

<sup>6</sup> For previous discussion see 1345th meeting, para. 69.

30. The title and text proposed by the Drafting Committee were those submitted by the Special Rapporteur and should pose no problems.

31. Sir Francis VALLAT suggested the insertion of the word "an" before the words "international organization" in the English version.

32. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 8 as proposed by the Drafting Committee, with the change in the English version suggested by Sir Francis Vallat.

*It was so agreed.*

#### ARTICLE 9<sup>7</sup>

33. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 9:

##### *Article 9*

##### *Adoption of the text*

1. The adoption of the text of a treaty takes place by the consent of all the participants in the drawing up of the treaty except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate, takes place by the vote of two-thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

34. Paragraph 1 of the text proposed by the Drafting Committee corresponded to paragraphs 1 and 2 of the Special Rapporteur's text for the article. The Committee had decided that the difficulties associated with the use of the terms "parties" or "potential parties" in connexion with treaties between States and international organizations or international organizations themselves could best be avoided by the use of the phrase "participants in the drawing up of the treaty".

35. He understood that the Special Rapporteur intended to consider further the exact meaning of the word "participants" and the necessity of including a definition of that term.

36. With regard to paragraph 2, the Drafting Committee had eventually decided to maintain the two-thirds majority rule, as proposed by the Special Rapporteur. Some members of the Committee had considered that it would have been preferable to preface that rule with a statement emphasizing the right of an international conference to determine its own rules of procedure, but the Committee had eventually decided, as had the Vienna Conference on the Law of Treaties, that the two-thirds majority rule did not constitute a departure from basic principles so much as a necessary measure of discipline.

37. As could be seen from the text of paragraph 2, article 9 was intended mainly to cover the most likely situation, that in which the participants in an international conference would include a relatively large number of

<sup>7</sup> For previous discussion see 1345th meeting, para. 72, and 1346th meeting, para 1.

States and a small number of international organizations. The somewhat hypothetical case of an international conference involving only international organizations was covered by the provisions of paragraph 1.

38. The Drafting Committee had thought it advisable not to use the expression "general international conference", but to employ the term "international conference" and to indicate in the commentary that it was to be understood in the sense in which it was used in the Vienna Convention on the Law of Treaties.

39. Mr. PINTO said that, in his view, paragraph 2 of the Drafting Committee's proposed text did not take into account the autonomy of a modern international conference. The article should have contained a primary reference to the rules of procedure adopted by an international conference and a secondary reference to the application of the two-thirds majority rule in cases not covered by the conference's rules of procedure. As it stood, paragraph 2 prejudged the very important matter of decision-making. He was aware that a precedent for the two-thirds majority rule was to be found in the Vienna Convention on the Law of Treaties, but he believed that modern international life and the context to which article 9 related required a more flexible approach.

40. Mr. CASTAÑEDA said he supported the view expressed by Mr. Pinto. Since the adoption of the Vienna Convention on the Law of Treaties, there had been great changes in the ways in which decisions were taken at international conferences. The current practice was for a conference itself to decide, in the light of its subject, what its voting rules would be. Article 9 should therefore stress the primacy of the rules of procedure of the conference.

41. Mr. USTOR said he noted that the word "participants" was not used in the same way in paragraphs 1 and 2 of the article. He assumed that the reason for that difference would be explained in the commentary.

42. Mr. USHAKOV said that in his opinion, neither article 9 of the Vienna Convention on the Law of Treaties nor article 9 of the present draft placed any obligation whatever on the conference. The rule enunciated in article 9 applied only when the rules of procedure of the conference contained no provisions relating to the adoption of the text of the treaty. There was no need for a provision of that kind in article 9 because it was clear that, if the rules of procedure of the conference contained a rule different from the rule enunciated in article 9, it was the rule of procedure which would prevail.

43. Mr. HAMBRO said it might appear that, by stating that, in principle, the adoption of the text of a treaty at an international conference took place by a vote of two-thirds of the participants present and voting, article 9 required that the two-thirds majority rule should also apply to the adoption of the rules of procedure of the conference, thereby limiting the freedom of the conference.

44. Mr. REUTER (Special Rapporteur) said he agreed with Mr. Ushakov that article 9 left the participants in

an international conference perfectly free to adopt any rules of procedure they wished. The two-thirds majority rule could be useful if there were no other rule.

45. Mr. CASTAÑEDA said he agreed that, as it stood, article 9 would not prevent an international conference from choosing its own rules of procedure. It would, however, be more logical to begin by stating the general rule, namely, that a conference was free to determine its own procedure for the adoption of a text, and to follow that by the exception, in the form of a reference to the application of the two-thirds majority rule when no other solution was possible.

46. Mr. PINTO said that he shared the view expressed by Mr. Castañeda. If the rule stated in paragraph 2 was not to be binding on signatories of the convention, it was pointless. If, on the other hand, it was intended only as a residual rule, problems would arise from the fact that a two-thirds majority would be required for the introduction of a different rule. No doubt the Special Rapporteur would explain the reasons for the present proposal in the commentary.

47. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that members of the Drafting Committee had thought that caution was needed with regard to proposals such as that made by Mr. Castañeda. If that proposal were adopted, it would imply that the Commission was trying to lay down the rules of procedure of conferences, rather than the procedure of parties to an international treaty.

48. A majority of the members of the Drafting Committee had not considered either that the Vienna Convention on the Law of Treaties was wrong in putting forward the two-thirds majority rule, or that there was any substantial difference between a conference involving States alone and the type of conference to which the draft articles would most frequently be applied, namely, a conference involving States and one or two international organizations. Some members of the Drafting Committee had emphasized that the two-thirds majority rule contributed significantly to ensuring stability, and did not in practice interfere with the right of an international conference to determine its own procedure.

49. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 9 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 10<sup>8</sup>

50. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 10:

##### *Article 10*

##### *Authentication of the text*

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

<sup>8</sup> *Ibid.*

(a) by such procedure as may be provided for in the treaty or agreed upon by the States and international organizations participating in its negotiation; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and international organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the treaty or agreed upon by the international organizations participating in its negotiation; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those international organizations of the text of the treaty or of the final act of a conference incorporating the text.

51. Article 10 was in a way the corollary of article 9. Its division into two paragraphs was governed by the distinction made between two types of treaty in article 2.

52. Mr. REUTER (Special Rapporteur) said that, on reflection, he thought that it would be better to replace the word "negotiation" by the words "drawing up" in paragraphs 1 (a) and 2 (a).

53. He had thought the word "negotiation" preferable because it often happened that organizations participated in the drawing up of the text of a treaty in a purely technical or advisory capacity, without themselves becoming parties to the treaty. But it would be more logical to bring the text of article 10 into line with that of article 9, which dealt with the participants in the drawing up of the treaty, and to give the necessary explanations in the commentary, thus making it possible for the Commission to consider, at a later stage, the question whether a formal definition of the expression "participating in the drawing up of a treaty" was required. The Vienna Convention used that expression in article 10 (a) without defining it, though in article 2, paragraph 1 (e), in defining the expression "negotiating State", it referred to "a State which took part in the drawing up . . . of the text of the treaty". A formal definition of the expression "participating in the drawing up of the treaty" might be justified in the present draft provided that international organizations, unlike States, could take part in the preparatory work for a treaty to which it was obvious that they would never become parties.

54. Mr. USHAKOV said that there was an error in paragraphs 1 (a) and 2 (a) which should be corrected. The words "in the treaty" should be replaced by the words "in the text", in accordance with article 10 of the Vienna Convention. It was not possible to refer to the procedure provided for "in the treaty" because the treaty as such did not yet exist.

55. Mr. REUTER (Special Rapporteur) said he agreed with Mr. Ushakov.

56. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 10 as proposed by the Drafting Committee, with the amendments proposed by the Special Rapporteur and Mr. Ushakov.

*It was so agreed.*

## ARTICLE 11<sup>9</sup>

57. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 11:

### *Article 11*

#### *Means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty is established by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

58. In line with article 2, paragraphs 1 (b) and 1 (b bis), article 11 spoke of the "ratification" of a treaty by a State and of its "formal confirmation" by an international organization.

59. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 11 as proposed by the Drafting Committee.

*It was so agreed.*

## ARTICLE 12<sup>10</sup>

60. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 12:

### *Article 12*

#### *Signature as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

(a) the treaty provides that signature shall have that effect;

(b) the participants in the negotiation were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by the signature of the representative of that organization when:

(a) the treaty provides that signature shall have that effect; or

(b) the intention of that organization to give that effect to the signature appears from the powers of its representative or was established during the negotiation.

3. For the purposes of paragraphs 1 and 2:

(a) the initialling of a text constitutes a signature when it is established that the participants in the negotiation so agreed;

(b) the signature *ad referendum* by a representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature.

61. The first two paragraphs of the article dealt respectively with the two types of treaty to which the draft as

<sup>9</sup> For previous discussion see 1347th and 1348th meetings.

<sup>10</sup> *Ibid.*

a whole referred. Thus, paragraph 1 referred to “a treaty between one or more States and one or more international organizations” while paragraph 2, which concerned both types of treaty defined in article 2, paragraph 1 (a), spoke simply of “a treaty”. With regard to paragraph 1 (b), the Drafting Committee had considered that it would be inappropriate to adopt the language of the corresponding provision of the Vienna Convention on the Law of Treaties, partly because the word “established”, which appeared in that provision, had been reserved for use in a different connexion in the draft articles.

62. Mr. KEARNEY said that he did not understand why paragraph 2 did not contain a provision akin to that of paragraph 1 (b). Was that omission intended to suggest that, while the representative of an international organization could agree that the signature of the representative of a State would have the effect of establishing that State’s consent to be bound by a treaty, States and international organizations would be unable to agree that the signature of the representative of an international organization would have the same effect in respect of that organization?

63. Mr. REUTER (Special Rapporteur) said that the provision contained in paragraph 1 (b) of the former article 12 had not been included in paragraph 2 of the present text, which dealt with the consent of an international organization to be bound by a treaty.

64. The main objection to his former paragraph 1 (b) had related to the word “otherwise”. It could hardly be denied that, in the spirit of the Vienna Convention, the words “it is otherwise established that the . . . States . . . were agreed” could apply to an oral or even a tacit agreement, but it was to the use of such liberal wording in connexion with international organizations that objections had been raised. Sub-paragraph (b) of the Vienna Convention text had not been completely eliminated, however, since the words “or was established during the negotiation” implied that, during the negotiation, an agreement could be reached on that point. But in the case of international organizations it could not be stated that the signature was binding, because the possibility of a second stage of consideration leading to formal confirmation would thus be eliminated.

65. Mr. KEARNEY said that the reason for the omission to which he had referred was still not clear to him. From the Special Rapporteur’s explanation, it would seem that there was some concern that representatives of international organizations might exceed their powers, but it seemed to him that that was unlikely.

66. Sir Francis VALLAT said that behind all the draft articles was the feeling that international organizations could not act in precisely the same way as States. Viewed in that context, the omission to which Mr. Kearney had drawn attention was easier to understand, if not to accept.

67. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 12 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 13<sup>11</sup>

68. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 13:

##### *Article 13*

##### *An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty*

1. The consent of States and international organizations to be bound by a treaty between one or more States and one or more international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those States and those organizations were agreed that the exchange of instruments should have that effect.

2. The consent of international organizations to be bound by a treaty between international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those organizations were agreed that the exchange of instruments should have that effect.

69. The text did not call for any comments of principle. It differed in construction from the earlier articles, but only for practical reasons. The material in article 13 had been divided into two paragraphs, corresponding to the two types of treaty governed by the draft articles. The purpose of that rearrangement was to achieve clearer drafting.

70. The original text of article 13 had contemplated only the normal case of the exchange of instruments in a bilateral treaty. It had been considered desirable by the Drafting Committee to draft article 13 in such a manner that it would be applicable even if there were more than two parties involved. The practice of using the procedure of exchange of instruments was perhaps obsolescent with regard to multilateral treaties, but cases might still occur. It was therefore sensible to allow for that possibility.

71. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 13 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 14<sup>12</sup>

72. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 14:

##### *Article 14*

##### *Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*



(b) the participants in the negotiation were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by an act of formal confirmation when:

(a) the treaty provides for such consent to be established by means of an act of formal confirmation;

(b) the participants in the negotiation were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign subject to an act of formal confirmation appears from the powers of its representative or was expressed during the negotiation.

3. The consent of a State to be bound by a treaty between one or more States and one or more international organizations, or the consent of an international organization to be bound by a treaty is established by acceptance or approval under conditions similar to those which apply to ratification or to an act of formal confirmation.

73. Article 14 did not call for any comments of principle. It was somewhat lengthy because of the nature of the cases covered. It followed faithfully the rules established in the earlier articles.

74. Two corrections should be made in the text. First, the words "the treaty" should be inserted after the words "the intention of the State to sign", in paragraph 1 (d), and also after the words "the intention of the organization to sign", in paragraph 2 (d). Secondly, in paragraph 2 (d), the words "was expressed" should be replaced by the words "was established". Since the passage referred to the intention of an international organization, it was necessary to use the verb "to establish".

75. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 14 as proposed by the Drafting Committee, with the corrections indicated by the Chairman of the Drafting Committee.

*It was so agreed.*

#### ARTICLE 15<sup>13</sup>

76. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 15:

##### *Article 15*

##### *Accession as a means of establishing consent to be bound by a treaty*

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State by means of accession;

(b) the participants in the negotiation were agreed that such consent might be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

<sup>13</sup> *Ibid.*

2. The consent of an organization to be bound is established by accession when:

(a) the treaty provides that such consent may be established by that organization by means of accession;

(b) the participants in the negotiation were agreed that such consent might be given by that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be given by that organization by means of accession.

77. In preparing its definition of "party" for the purposes of paragraph 1 (g) of article 2 (Use of terms), the Drafting Committee had decided to follow the wording of the Vienna Convention on the Law of Treaties in preference to the more elaborate formula put forward by the Special Rapporteur. The possibility had been discussed of international organizations being bound by treaties in ways other than the obvious ones analogous to those used by States. It had, however, been considered advisable to maintain the definition of the 1969 Vienna Convention, but the Special Rapporteur would explain in the commentary the distinction between being bound by a treaty and being bound by the rules which it contained.

78. Two corrections needed to be made to the opening sentence of paragraph 2. First, the word "international" should be inserted before the word "organization". Secondly, the words "by a treaty" should be inserted after the words "to be bound".

79. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 15 as proposed by the Drafting Committee, with the corrections indicated by the Chairman of the Drafting Committee.

*It was so agreed.*

#### ARTICLE 16<sup>14</sup>

80. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 16:

##### *Article 16*

##### *Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession*

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one more international organizations upon:

(a) their exchange between the contracting States and the contracting international organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting international organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting international organizations;

<sup>14</sup> *Ibid.*

(b) their deposit with the depositary; or

(c) their notification to the contracting international organizations or to the depositary, if so agreed.

81. Article 16 did not raise any points of principle.

82. Sir Francis VALLAT said that paragraph 1 referred to instruments of formal confirmation. That language represented a slight departure from the expression “act of formal confirmation” which was used in paragraph 1 (b bis) of article 2 and elsewhere in the draft. The departure was deliberate, but there was no intention to change the sense.

83. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 16 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 17<sup>15</sup>

84. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 17:

##### *Article 17*

##### *Consent to be bound by part of a treaty and choice of differing provisions*

1. Without prejudice to articles [19 to 23], the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and contracting international organizations so agree.

2. Without prejudice to articles [19 to 23], the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting international organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

85. The reference to articles 19 to 23 in paragraphs 1 and 2 had been placed between square brackets because, owing to pressure of time, those articles had not yet been considered by the Drafting Committee, so that the Commission would not be examining them at the present session.

86. The article consisted of four paragraphs instead of the previous two; the purpose was to reflect the two main types which were the subject-matter of the draft articles.

87. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 17 as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 18<sup>16</sup>

88. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 18:

##### *Article 18*

##### *Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

1. A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between one or more States and one or more international organizations when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty, or

(b) that State or that organization has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2. An international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between international organizations when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to an act of formal confirmation, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

89. The former text of the article had been divided into two parts in order to state separately the rules relating to the two main types of treaty referred to in the draft articles.

90. Mr. KEARNEY said he noted that article 18 used the expression “act of formal confirmation”, whereas in article 16, the words “act of” had been dropped. He suggested that this be dropped in article 18 also and throughout the draft wherever the expression “act of formal confirmation” appeared. The fact that it had been found necessary to eliminate those words in article 16 clearly demonstrated that they were unnecessary.

91. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the expression “formal confirmation” was not a term of art or an established term of treaty terminology. The Drafting Committee had felt that it would be more convincing if the expression “act of formal confirmation” were used. The Committee had considered the use of that expression in paragraphs 1 (a) and 2 (a) of article 18 and had decided to retain the words “act of” as suitable in connexion with a treaty. In article 16 those words had been dropped because their use in connexion with “instruments” would have resulted in a tautology.

92. Mr. USHAKOV said that the expression “act of formal confirmation” had been used in order to emphasize the difference between the confirmation in question and the “subsequent confirmation” which was the subject-matter of article 8. In article 16, there was no need to use the words “act of” because an “instrument” was always an “act”.

<sup>15</sup> For previous discussion see 1348th meeting.

<sup>16</sup> *Ibid.*

93. Mr. KEARNEY said that the explanations which had just been given only served to emphasize the artificial character of the distinction which was being drawn between "formal confirmation" and "ratification".

94. He moved the deletion of the words "act of" before the words "formal confirmation" in paragraph I (b bis) of article 2, and wherever they appeared in the draft.

95. Sir Francis VALLAT said he would ask Mr. Kearney not to make a formal motion of his proposal at this present juncture. All members were conscious that there was a drafting difficulty in the text, and the formula "act of formal confirmation" had been arrived at only after delicate negotiations to overcome a problem which had arisen because of the strong feeling of many members that the term "ratification" could not be used in relation to international organizations.

96. The purpose of using the term "act" in that formula was to distinguish between the formal confirmation now under discussion and the "subsequent confirmation" referred to in article 8. The expression "act of formal confirmation" contained an extra element which made the distinction clearer. It was possible that, at a later stage, the Commission might decide that an additional definition was necessary in order to show that the words "act of formal confirmation" and "instrument of formal confirmation" were used in the same sense. That matter, however, could be left until the second reading.

97. Mr. REUTER (Special Rapporteur) said that the expression "an act of formal confirmation" was not a term of art; it was merely descriptive. It was because there was no "label" in the terminology of international law which covered both the act and the instrument of formal confirmation that it had been necessary to fall back on a descriptive paraphrase. In the title of article 14, the terms "ratification", "acceptance" and "approval" were well-known "labels", whereas the expression "act of formal confirmation" was new, and the reaction to it on the part of States and international organizations would be awaited with interest.

98. After having analysed the substance of ratification, the Commission had reached the conclusion that it was a formal confirmation. It was important to draw a distinction between the instrument of confirmation, which was a material concept, and the act of confirmation, which was a legal concept. Both Sir Humphrey Waldock, the Special Rapporteur for the topic of the law of treaties, and the Commission itself had always been careful not to define the term "instrument" and the Commission should not decide to reconsider that wise position now.

99. Mr. KEARNEY said that, in deference to the wishes of his colleagues, he was prepared to withdraw his motion but he still considered that a new label was being created, whether the formula used was "formal confirmation" or "act of formal confirmation".

100. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 18 as proposed by the Drafting Committee.

*It was so agreed.*

#### Most-favoured-nation clause

(A/CN.4/266,<sup>17</sup> A/CN.4/280,<sup>18</sup> and A/CN.4/286;  
A/CN.4/L.228/Rev.1 and A/CN.4/L.238)

[Item 3 of the agenda]

*(resumed from the previous meeting)*

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 0 [21] (Most-favoured-nation clauses in relation to treatment under a generalized system of preferences)  
*(continued)*

101. The CHAIRMAN invited the Commission to resume consideration of article 0 of the draft articles on the most-favoured-nation clause, as proposed by the Drafting Committee (A/CN.4/L.238).

102. Mr. SETTE CÂMARA proposed the deletion of the square brackets from the title and text of article 0. No other article was presented in that manner and to place a single article between square brackets might give the General Assembly a wrong impression. The article was, of course, subject to reconsideration on second reading, but that was true of all the other draft articles.

103. If the intention was to indicate that article 0 was only the first of a series of articles, that should be explained in the commentary; there was no reason to place it between square brackets for that purpose.

104. Mr. USHAKOV said that the purpose of placing the article in square brackets was to indicate that, at its next session, the Commission would re-examine article 0 on first reading.

105. Mr. PINTO said that he was in favour of retaining the square brackets. As far as the substance was concerned, the effect of article 0 would be to assist rich granting States to withhold certain preferential treatment from other rich States. It did not materially assist the developing countries at all.

106. It was his understanding that the Special Rapporteur was examining the question of including other provisions which would be of assistance to the developing countries. He accordingly wished to place on record his desire to see included in the draft some provision which would avoid the possible inequitable consequences of a rigid application of the articles in all cases and to all States at different levels of economic development. One possibility would be to include a provision on the following lines: "A State may, when expressing its consent to be bound by a clause granting most-favoured-nation treatment, declare that such treatment is granted subject to specified conditions, or that it excludes one or more categories of favours granted to a third State."

107. Mr. HAMBRO said that he supported article 0 and understood that its intention was precisely to help the developing countries. His own country, Norway, had always been in the forefront of the so-called "rich" countries in the matter of assisting the developing countries. To make the legal position clear, however, he would like to see it stated in the commentary to article 0 that certain members of the Commission, while favouring

<sup>17</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>18</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

the article, had stressed the fact that it represented progressive development and not codification.

108. The commentary should also state that the adoption of article 0 was without prejudice to the consideration of customs unions and free trade areas, subjects in respect of which progressive development had gone further than in respect of developing countries. The question of customs unions and free trade areas was, in any case, just as relevant to the developing countries as to other countries. Customs unions were likely to play an important part in assisting developing countries in the future.

109. Mr. BILGE said he shared the view of Mr. Sette Câmara that, in the present instance, the square brackets were not being used for their usual purpose. He suggested that an asterisk be placed after article 0 and a foot-note added explaining that the contents of the article represented the minimum on which the Commission had so far been able to agree, but that other supplementary provisions would be included later.

110. Mr. KEARNEY said he supported the proposal by Mr. BILGE. There had not been any great difference of opinion in the Commission with regard to the substance of article 0, but it had been considered desirable to review its provisions at the Commission's next session.

111. Mr. USHAKOV said that, in accordance with the Commission's practice, square brackets were used to indicate the intention of re-examining a text on first reading.

112. Sir Francis VALLAT said that he was prepared to support Mr. Bilge's proposal on the understanding that the asterisk would be used to indicate that article 0 was subject to further discussion on first reading.

113. Mr. USHAKOV said that he was prepared to take the same view.

114. Mr. PINTO said that the Commission should indicate in some way that article 0 was being set aside as the first of a series of articles. That result could be achieved either by means of square brackets or by means of an asterisk.

115. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 0 and the proposal by Mr. Bilge to replace the square brackets by an asterisk and an explanation.

*It was so agreed.*

The meeting rose at 6 p.m.

### 1354th MEETING

*Tuesday, 22 July 1975, at 10.15 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Draft report of the Commission on the work of its twenty-seventh session

(A/CN.4/L.232/Add.3 and 4; A/CN.4/L.235)

*(resumed from the 1351st meeting)*

#### Chapter II

#### STATE RESPONSIBILITY

*(continued)*

#### B. DRAFT ARTICLES ON STATE RESPONSIBILITY

1. The CHAIRMAN invited the Commission to continue consideration of chapter II of the draft report, paragraph by paragraph, commencing with the commentary to article 12.

#### *Commentary to article 12*

*(Conduct of organs of another State)*

*(A/CN.4/L.232/Add.3)*

*Paragraphs (1)-(3)*

*Paragraphs (1)-(3) were approved.*

*Paragraph (4)*

2. Mr. KEARNEY proposed the deletion, in the penultimate sentence of the English version, of the word "hypothetical" before the word "cases".

*Paragraph (4) was approved with that amendment.*

*Paragraph (5)*

3. Mr. KEARNEY proposed that, in the antepenultimate sentence, the words "prevail over" be replaced by a more suitable wording such as "outweigh"; also, that the words "on the grounds that" be replaced by the words "on such grounds as that".

4. Mr. AGO (Special Rapporteur) said that the first of those proposals did not involve any change in the French version.

5. Sir Francis VALLAT proposed that, in the English version of the last sentence, the words "appears diminished" be replaced by the words "appears less significant". The change would not affect the French original.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (5) with the changes proposed by Mr. Kearney and Sir Francis Vallat.

*It was so agreed.*

*Paragraph (6)*

7. Mr. USTOR said that the statement in the last sentence that the territorial State "was blamed only for a breach of its own obligations to protect third States" was not appropriate. The previous sentence made it clear that the territorial State was really being blamed for placing its territory at the disposal of others to commit wrongful acts, not for any failure "to protect third States".

8. Mr. AGO (Special Rapporteur) said that the reference was to obligations in respect of the protection of third States (*obligations de protection des Etats tiers*).