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A/CN.4/SR.1550

Summary record of the 1550th meeting

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-

1979, vol. I

had enabled that amendment to be rejected, for the rule that the conduct of the State amounted to acquiescence produced the same effect as prescription.

38. With regard to international organizations, if the Commission decided that the grounds for invalidating a treaty, and in particular the reason dealt with in article 46, should remain operative even where the organization had behaved as if it had acquiesced in the validity of the treaty, it would be necessary to introduce a rule on prescription, in order to compensate for the disappearance of the rule concerning conduct which had appeared in subparagraph (*b*) of the article of the Vienna Convention.

39. It was also necessary to take account of another situation, concerning which the Commission should enter a proviso in its commentary. If the competent organ of an international organization, having become aware of a ground for invalidating a treaty, decided by a majority vote not to raise the matter and to continue to perform the treaty, and then suddenly altered its policy owing to a change of majority resulting from the admission of new member States, the question of the responsibility of the international organization would arise. The Commission should therefore reserve that question, since it could not resolve it either in the draft articles under condideration or elsewhere, given the fact that it was not at present examining any set of draft articles on the responsibility of international organizations. The same problem would arise in connexion with article 46.

40. With regard to the question of security of international relations, the Constitution of the Fifth French Republic contained a rule that France could ratify a treaty at variance with its Constitution, but only if it amended the text of the Constitution before ratifying the treaty. The treaty establishing EEC contained a similar provision, whereby the Community could conclude a treaty that was incompatible with its charter, but only on certain conditions: on the initiative of certain of its organs, the opinion of the Court of Justice could be requested and, in the case of a negative opinion, the treaty could enter into force only after the constituent instrument was amended. [10]

41. In conclusion, if the Commission decided, in choosing variant B, not to apply to international organizations the rule in subparagraph (*b*) of the article of the Vienna Convention, it would have to provide a clause relating to prescription. But it would not be able to resolve that problem until it had considered article 46.

42. Mr. USHAKOV said he was aware that some international organizations indulged in practice which conflicted with their rules. But that state of affairs could be acknowledged without there being a general rule asserting that an international organization could, by its practice, contravene its own rules.

43. Mr. REUTER (Special Rapporteur) observed that, although some international organizations had a very rigid constituent instrument, others might have more flexible rules. While recognizing, like Mr. Ushakov, that it was impossible to lay down a general rule expressing that flexibility, he nevertheless thought it possible to draft a carefully worded rule that would leave each international organization free to allow for a customary practice in its relevant rules. Custom should not be excluded for all international organizations, and the Commission should guard against adopting an excessively rigid formula that would hamper their development.

The meeting rose at 6 p.m.

[10] See Treaty establishing the European Economic Community (United Nations, *Treaty Series*, vol. 298, p. 3), article 228.

1550th MEETING

Tuesday, 12 June 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) [1] (*concluded*)

1. Mr. JAGOTA observed that at the previous meeting the Special Rapporteur had suggested the possibility of a third solution for article 45, which would consist of variant A without subparagraph (*b*). That third solution was attractive, since the deletion of subparagraph (*b*) would mean that, if States and international organizations that were parties to a treaty wished to ignore a fact that could be invoked as a ground for invalidating the treaty and to maintain the treaty in force, they must so agree expressly through an exchange of notes or letters, rather than implicitly by conduct or acquiescence. The Drafting Committee

[1] For text, see 1548th meeting, para. 6.

should endeavour to determine whether that text would provide a feasible solution.

2. The Special Rapporteur had also mentioned that, at the United Nations Conference on the Law of Treaties, a proposal to delete subparagraph (*b*) of article 42 (later article 45 of the Vienna Convention)[2] had been rejected.[3] Consequently, if the Commission decided to delete subparagraph (*b*) of variant A, it would have to give reasons for that decision. It could explain its position by stating that, whereas the Vienna Convention concerned treaties to which only States were parties, so that the conduct of States *inter se* was material to the question of the loss of a right to invoke a ground for invalidating a treaty, the draft articles before the Commission concerned treaties between States and international organizations or between international organizations only. A further justification could be that it was necessary to establish equality between the parties to a treaty. It would be improper for a State that was a party to a treaty to lose its right to invoke a ground for invalidating the treaty as a result of its conduct or acquiescence, while an international organization that was a party to the same treaty did not.

3. There was also the question how an international organization was to express its agreement to continuance of a treaty. Many international organizations did not have detailed rules on treaty-making procedure. In such cases, the governing body of the organization could determine who was to adopt or confirm a treaty on behalf of the organization. There would therefore be a fair amount of flexibility, depending on the practice followed by the various organizations. However, to say that an organization must express agreement in accordance with such practice was different from saying that its conduct would bind it or cause it to lose its right to invoke a ground for invalidating a treaty. While flexibility should be maintained, the parties should be treated equally.

4. He therefore suggested that the Drafting Committee should consider retaining the opening phrase and subparagraph (*a*) of variant A, and deleting subparagraph (*b*), which could be replaced by the following text, modelled on paragraph 7 of article 37:[4]

> "The agreement of an international organization, as provided for in the preceding clause, shall be governed by the relevant rules of that organization."

5. Mr. SUCHARITKUL supported Mr. Jagota's proposal. To his mind, the purpose of international law should be to protect the weak—a purpose that had not always been achieved in the past. But circumstances had greatly changed, and it was now possible to imagine an international society in which legal protection would be better guaranteed.

6. It seemed to him that the concept of acquiescence was obsolete, since it derived from the theory of acquisitive and extinctive prescription. It should not be forgotten that draft article 45 concerned not only international organizations but also States. Protection must therefore be provided for all weak entities, whether they were international organizations or States.

7. Mr. TABIBI said that all the arguments put forward by the Special Rapporteur, in his report and orally, in favour of variants A and B, were equally convincing. In the light of the comments made by members of the Commission, however, he supported Mr. Jagota's proposal, which he thought would meet the objections raised during the debate and would be a sound alternative text for submission to the Sixth Committee of the General Assembly. But even if the Drafting Committee finally decided in favour of the third solution, the other two should also be included in the report to the General Assembly, to enable members of the Sixth Committee to express their views.

8. Mr. FRANCIS said that his initial reaction to Mr. Jagota's proposal was one of caution, since it raised the fundamental question whether, given the existence of article 45, subparagraph (*b*), of the Vienna Convention, the deletion of the corresponding subparagraph from draft article 45 would suggest that, as between States, if questions of conduct did not bind States in a legal relationship, it was only because that relationship was affected by the presence of one or more international organizations. Furthermore, the "rules of the organization", as defined in draft article 2, paragraph 1 (*j*), included the established practice of the organization, which, in his view, included conduct. Consequently, in subparagraph (*b*) of variant B, parity of treatment of organizations and States would be maintained.

9. At the Conference on the Law of Treaties, one of the objections to deleting subparagraph (*b*) of the future article 45 had been that under that provision certain treaties could be regarded as being binding, which they would not be in the absence of the provision. But much had happened since that Conference; the Vienna Convention was on the point of entering into force, and the Convention on Succession of States in Respect of Treaties,[5] which established the "clean-slate" principle, had been negotiated. He wondered, therefore, whether, in view of the existence of the latter instrument, States which had found it difficult to accept that conduct could have effects on the validity of treaties might now see the matter in a different light. While he had no rigid objection to Mr. Jagota's proposal, he would like to be convinced that those points need not be taken into account.

10. Mr. TSURUOKA said that, subject to a few drafting changes, he was in favour of variant B. If the Commission adopted variant A, however, it would be

[2] See 1546th meeting, foot-note 1.

[3] See 1549th meeting, para. 30.

[4] See 1546th meeting, foot-note 4.

[5] *Ibid.*, foot-note 6.

advisable to add to the existing text a new paragraph, reading:

"In any case, a State or an international organization which invokes a ground for invalidating a treaty under [articles 46 to 50] or [articles 60 and 62] shall be considered as having acquiesced in the validity of the treaty if a period of twelve months has elapsed since the date on which such State or international organization first exercised rights or obtained the performance of obligations pursuant to the treaty."

That suggestion was based on the amendment to article 42 (later article 45), which Guyana and the United States of America had proposed at the Conference on the Law of Treaties.[6]

11. Mr. VEROSTA agreed that Mr. Jagota's proposal might serve as a basis for discussion by the Drafting Committee, since it maintained the distinction between States and international organizations which the Commission had made in all the important articles of the draft already adopted.

12. The wording "governed by the relevant rules of that organization", which Mr. Jagota had proposed, was acceptable. However, the Commission should bear in mind the definition given in article 2, paragraph 1 (*j*), which read:

"rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

It should also consider article 7, paragraph 3 (*b*) and paragraph 4 (*b*), according to which a person was considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty or of communicating the consent of that organization to be bound by a treaty if

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.

It seemed to him that the practice of international organizations was construed in a more restrictive sense in article 2, paragraph 1 (*j*), than in article 7, paragraphs 3 (*b*) and 4 (*b*).

13. Mr. PINTO said that his preference for variant B was based not on considerations of the relative strength or weakness of international organizations and States, or on considerations of logic or legality, but on the most important criterion of social interest in a particular case. On that basis, he favoured variant B because of the practical circumstances surrounding the structure, organization and decision-making systems of international organizations, as opposed to those of States.

14. He had no objection to the approach adopted by Mr. Jagota (para. 4 above). If it was considered unsatisfactory to place the two parties on obviously different footings, Mr. Jagota's proposal could be considered by the Drafting Committee.

15. With regard to Mr. Tsuruoka's proposal (para. 10 above), the social interest in favour of stability of treaties must be weighed against the social interest that prescribed change when circumstances so required. The proposal seemed to be based on a final and irrebuttable presumption that rights, when not exercised, would be considered to have been lost. He would be glad to consider that possibility if the presumption were not so categorical. If provision were made for the possibility of proof that the non-exercise of rights for a period of 12 months was due not to any intention on the part of a State not to exercise those rights but to unrelated reasons, that would allow for any necessary social change to take place, and the stability of treaties would not be interfered with.

16. Mr. JAGOTA wished to make clear the difference between established practice and conduct. Established practice, although it might be reflected in conduct, was a procedural matter relating to competence to express agreement on behalf of a State or an international organization. The provision concerning conduct, on the other hand, was a substantive provision concerning the loss of a right through acquiescence. But although established practice served only to indicate whether agreement had been properly expressed on behalf of a State or an international organization, it still had some element of formality, since the agreement must be stated expressly. If, on the other hand, the provision concerning conduct were retained, the agreement of the State or international organization would be considered as being implied by that conduct.

17. Mr. REUTER (Special Rapporteur) said that there appeared to be agreement among members of the Commission that draft article 45 should be sent to the Drafting Committee. The Committee would have to decide what should be put in the text of the article and what should be said only in the commentary, for some important things could be said in the commentary that need not necessarily be included in the body of the article.

18. He did not think Mr. Jagota was right in saying that, by adopting a provision that would modify the text of article 45 of the Vienna Convention in regard to the conduct of States, the Commission would not be weakening that Convention because the provision would be valid only for the special category of treaties covered by the draft articles. For it should be noted that there were treaties open to all States to which only one or two international organizations were parties. By modifying the text of the Vienna Convention in regard to the position of the States parties to such treaties, the Commission would be adopting a provision that would produce effects on relations between States.

19. The meaning of the text of the Vienna Convention depended on the way in which it was interpreted. The word "conduct" in article 45, subparagraph (*b*), was very vague and did not exclude the formation of a certain practice. It might refer to a practice, but also to conduct alone. For example, if a State or an interna-

[6] See 1549th meeting, foot-note 9.

tional organization did not invoke a ground for invalidating a treaty that was contrary to its constitution, that did not in itself constitute a practice, but a simple act. There might be reluctance to accept that a single instance of conduct could modify a treaty, but State practice had to be taken into account, and international organizations could not be denied the right to have their own practice, in the same way as States.

20. In short, he believed that the solution of the problem presented by article 45 depended on the interpretation given to the word "conduct" in the Vienna Convention. On that interpretation depended the answer to the question whether or not the text of the Vienna Convention should be modified in the case of international organizations. The Commission could therefore submit several variants to the Sixth Committee of the General Assembly.

21. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 45 to the Drafting Committee.

It was so decided. [7]

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)

22. The CHAIRMAN invited the Special Rapporteur to introduce draft article 46 (A/CN.4/319), which read:

Article 46. Violation of provisions regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

VARIANT A

2. An international organization may not invoke the fact that its consent has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of the organization of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State and any organization conducting itself in the matter in accordance with normal practice and in good faith.

VARIANT B

2. In the case referred to in the preceding paragraph, a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

3. An international organization may not invoke the fact that its consent has been expressed in violation of a provision of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned as a rule of the organization of fundamental importance.

4. In the case referred to in paragraph 3, a violation is manifest if it would be objectively evident to any State not a member of the organization concerned and any international organization conducting itself in the matter in accordance with the normal practice relating to that organization and in good faith.

23. Mr. REUTER (Special Rapporteur) proposed two minor corrections to the text of variant B, which consisted in adding the words "or any international organization" after the words "any State", in paragraphs 2 and 4.

24. He pointed out that, while the question dealt with in article 46 of the Vienna Convention had occasioned much theoretical discussion, both the Commission and the United Nations Conference on the Law of Treaties had been guided mainly by practical considerations, for they had considered it essential to ensure the stability of international relations where treaties were concerned. They had held that, when a State's consent to be bound by a treaty had been expressed in violation of a provision of its internal law regarding competence to conclude treaties, that State could invoke the fact as invalidating its consent only on two conditions: the violation must have been manifest, and it must have concerned a rule of the State's internal law that was of fundamental importance.

25. The Conference on the Law of Treaties had added to that rule a provision specifying what was meant by a "manifest violation" [8] which it had taken from the Commission's commentary to article 43 (later article 46). That provision had been adopted by 94 votes to none, with only 3 abstentions. [9]

26. Should the Vienna Convention rule simply be applied without change to international organizations, should it be set aside in their case, or should it be adapted to their situation?

27. He had decided against setting aside the rule in article 46 of the Vienna Convention in the case of international organizations, because he had thought it impossible to give them an absolutely unrestricted right to invoke, as a ground for invalidity, a breach of their own rules regarding competence to conclude treaties. After all, a violation of a relevant rule of an international organization was in most cases a breach of a treaty, since international organizations were established by treaties. Consequently a co-contracting State could not refuse to recognize the consent of an international organization because it did not accept that organization's interpretation of its internal rules, for such a State was a third State in relation to the treaty. Thus an international organization could not be permitted to invoke the violation of one of its rules without restriction, for that would allow it to withdraw from all the treaties it concluded.

[7] For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

[8] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5, p. 166, document A/CONF.39/14, para. 394 (*f*).

[9] *Ibid., Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 88, 18th plenary meeting, para. 38.

28. He had therefore submitted two proposals: the first (variant A) was purely and simply to extend to international organizations the compromise adopted for States by the Vienna Conference; the second (variant B) was to maintain the Vienna Convention rule for States and to modify it for international organizations.

29. He believed that, even if it were decided to modify the Vienna Convention rule, it would be necessary to retain the condition that the rule broken must be of "fundamental importance", for he did not think it necessary to grant international organizations protection going beyond their fundamental rules. There might of course be some doubt as to what constituted a "fundamental" rule; but perhaps the Commission could make that clear in the text of the article or in the commentary.

30. He also considered it necessary to retain the condition that the violation must be "manifest". But that condition raised several problems. When the Vienna Convention provided, in article 46, paragraph 2, that

> A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith,

it was referring to any State whatsoever, without distinction.

31. There was, however, a case peculiar to the draft articles, which was that of States members of an international organization. That was a special case, because the personality of the international organization did not completely obliterate that of its member States. It would be recalled that members of the Commission had raised objections when he had suggested, in connexion with article 36, that member States were not always third States in relation to an international organization.

32. If an international organization concluded a treaty with one of its member States, had that State a right to say that it did not know the organization's relevant rules? He thought it would be going too far to say that it had, since it was the member States which drew up the rules of an organization and which made up the organs that concluded its treaties. States members of an international organization were therefore bound to know whether a treaty was contrary to its relevant rules.

33. In his view the stability of international relations did not require, for agreements between an international organization and its member States, a rule as strict as that stated in article 46, paragraph 2, of the Vienna Convention. Hence he had excluded member States from the text of variant B, paragraph 4. He had also excluded international organizations that were members of the organization concerned, which should be assimilated to member States, for he had thought that the case of an international organization that was a member of another organization must not be left out of account.

34. As to the rules concerning the invalidity of treaties concluded between an international organization and its member States, the commentary to the article under consideration clearly showed that it was normally the relevant rules and practice of the organization that determined the conditions in which invalidity could be invoked.

35. It would be dangerous to claim that article 46 could resolve such a delicate question, since it was for each organization to determine the conditions in which the invalidity of a treaty concluded between itself and its member States could be invoked. Draft article 46 governed only the external relations of international organizations, in which there must be stability; it did not seek to regulate their internal relations with their member States, which varied from one organization to another. It should be noted that excluding member States from the test proposed in variant B, paragraph 4, for determining whether a violation was manifest, also meant excluding from the scope of article 46 all treaties concluded by international organizations with their member States, including treaties concluded between the United Nations and its specialized agencies.

36. Mr. USHAKOV said that, in general, he shared the views expressed by the Special Rapporteur in his commentary and oral introduction. For a clear understanding of how the situation of an international organization differed from that of a State under article 46 it was necessary first to refer to the corresponding article of the Vienna Convention. Under that provision, a State could not invoke the fact that its consent to be bound by a treaty had been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent, unless that violation had been manifest and concerned a rule of its internal law of fundamental importance. That article was justified by four considerations, which applied only to States, not to international organizations.

37. First, every State was master of its internal law: under article 45 of the Vienna Convention, a State could even derogate expressly or tacitly from fundamental rules of its internal law regarding the conclusion of treaties, since the international obligations of the State and the content of its internal law were established by the same will. An international organization was also master of its constituent instrument and its other relevant rules, but in a different way. For the organ of an international organization that was empowered to conclude treaties was bound by the relevant rules of the organization, which it was not competent to modify, their amendment being subject to a procedure laid down in other rules—which might, for example, require a decision by another organ and ratification by the member States.

38. Secondly, as the Special Rapporteur had pointed out in paragraph 1 of his commentary to article 46, it was "for each State to take the necessary steps to ensure that there is no violation of its internal law

regarding competence to conclude treaties". A State could take such steps because of the unity of the governmental authority: there was a hierarchy of organs of the State, and the conduct of a treaty-making organ could be supervised by a superior organ. But the situation was not the same in international organizations, the organs of which were independent of each other. Even though one organ of an organization was sometimes able to control another in some way, there was no real hierarchy of the organs of international organizations.

39. Thirdly, the provisions of the internal law of States on competence to conclude treaties were sometimes very complicated. How could one tell, for example, whether the meteorological service of the Soviet Union was empowered to conclude agreements with the meteorological service of France? That was why article 46 of the Vienna Convention referred only to rules of internal law of fundamental importance, on the assumption that a State was bound to be familiar with, for example, the constitutions of the States with which it concluded treaties. Similarly, States were bound to know within what limits the President of the United States of America could conclude agreements in simplified form, or what was the content of the law on the conclusion and denunciation of agreements promulgated in the Soviet Union in 1978. On the other hand, a State could not be expected to examine the internal law of another State to determine whether its meteorological service was competent to conclude treaties. It was precisely because knowledge of the provisions of a State's internal law on competence to conclude treaties was often difficult to acquire that article 46 expressly mentioned rules of fundamental importance. The situation in regard to an international organization was different, for it was relatively easy for a State or another international organization to ascertain the organization's relevant rules. As could be seen from the opinions that had been expressed by international organizations and examined by the Special Rapporteur in paragraph (4) of his commentary to article 46, an organization's partner was regularly informed, in particular through administrative correspondence, of the development of a situation affecting any stage in the conclusion of an agreement. There was nothing to prevent a State or an international organization from asking an international organization with which an agreement was being negotiated for particulars of its relevant rules. On the other hand, it might be considered out of place to ask a State whether a department which had proposed the conclusion of a treaty was really competent to conclude it.

40. Fourthly, article 46, paragraph 2, of the Vienna Convention specified that:

> A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

For the conclusion of treaties by States, the existing practice was centuries old, and article 7, paragraph 2 (*a*), of the Vienna Convention, according to which Heads of State, Heads of Government and Ministers for Foreign Affairs were competent to perform all acts pertaining to the conclusion of a treaty, merely confirmed an old-established situation. Similarly, it was established practice that peace treaties were never concluded by subordinate authorities. It could also be agreed that it was now accepted practice, and not merely repeated conduct, for Ministers of Civil Aviation to conclude agreements in their sphere of competence. In the case of international organizations, however, there was no normal and still less an age-old practice in regard to the conclusion of treaties. It could not be said, for example, that it was always the head of the secretariat of an international organization who concluded the organization's agreements. It would therefore be premature to refer to the "normal practice" of international organizations.

41. It was not to the organization's rules of fundamental importance that the draft article should refer, but to any of its rules regarding competence to conclude treaties. If necessary, the reference might be confined to the rules in the organization's constituent instrument and other essential relevant rules.

42. The question which the Special Rapporteur had put in paragraph (6) of his commentary, namely, whether an organization, after having "communicated" its will to its partner, itself lost the right to deprive that communication of all effect by invoking a violation of the rules of the organization regarding competence to conclude treaties, was irrelevant. Where States were concerned, article 46 did not relate to the case in which a parliament, after having ratified a treaty and communicated its ratification to the partner State, claimed that its decision was contrary to the Constitution, but to the case in which a higher organ invoked a defect in the consent of a lower organ. That was what would happen if a Government claimed that a treaty had been concluded by one of its departments which was not competent for that purpose. Similarly, a higher organ of an international organization could invoke a defect in the consent of a lower organ which had concluded a treaty. For example, the agreements referred to in Article 43 of the United Nations Charter could be concluded only by the Security Council. If the Secretary-General concluded such agreements without special authorization, the Security Council would be able to claim that he had acted in breach of the Charter and that his consent was defective. But neither the draft article under study nor the corresponding article of the Vienna Convention covered the case in which an organ found, after the event, that it had acted contrary to the rules regarding capacity to conclude treaties.

43. With regard to the drafting of the article, he doubted whether the Special Rapporteur's oral amendments to variant B, paragraphs 2 and 4, were appropriate. The proposed new wording suggested that all States must conform to the normal practice of international organizations and, *vice versa*, that all organizations must conform to the normal practice of States. In short, the previous wording was preferable.

44. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov seemed to believe that only States, in the final analysis, determined what was normal practice, but that knowledge of such practice reached international organizations, which were supposed to refer to it. He could see no objection to expressing that nuance in paragraph 2, and even in paragraph 4, of variant B.

45. Speaking as a member of the Commission, he agreed with Mr. Ushakov that there was no normal practice common to all international organizations, although there was an incipient tendency, for example, to entrust certain functions to a permanent and single representative of an organization, in the person of its secretary-general. In the case of States, however, the practice specified in article 7 of the Vienna Convention was established. While it was true that it would be dangerous to look for constitutional similarities between international organizations to identify a general practice, the fact remained that each organization could have its own normal practice. There were admittedly international organizations whose constituent instruments contained no provisions concerning competence to conclude treaties, but a practice generally developed from which a rule emerged, and it was on that basis that a normal practice could be considered to exist. A State that relied on such practice on the part of an international organization was therefore in a position requiring some degree of protection.

46. For instance, an economic organization might conclude economic assistance agreements with States, even though its constituent instrument made no provision for such agreements. If, after concluding six agreements of that kind with different States, it concluded another with a seventh State, that State would rely on that practice. Even if the preceding agreements had been concluded by a director of the organization, and the governing council noticed, at the time of conclusion of the seventh agreement, that the director was not competent for that purpose, there would already be a certain practice of the organization, especially if some time had elapsed before the governing council had become aware of the situation. That practice might be changed, but, out of consideration for the partner States, the six earlier agreements could not be held to be invalid.

47. The Commission had already recognized that the practice of an international organization was not born in a day, and it could not now deny the existence of such practice. Of course, international organizations might commit abuses; but it was also possible that an organization's normal practice might make good the shortcomings of its constitutional instrument and enable it to carry on and perform its functions. Hence to consider the agreements concluded by virtue of such practice invalid would be to strike the organization a mortal blow.

The meeting rose at 1 p.m.

1551st MEETING

Wednesday, 13 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319, A/CN.4/L.296)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)[1] (*continued*)

1. Mr. PINTO said that verification of the constitutionality of treaties was a matter for each individual State. It was not for a treaty partner to ascertain the constitutionality of a State's expression of consent. That did not mean, however, that the law did not require a basic minimum of prudence and circumspection on the part of the treaty partners. The treaty partner must behave with a normal degree of caution and care to be able to claim reliance on a State's competence to conclude a treaty. The treaty partner did not have to go beyond what normal prudent practice in such a case demanded. It might, for example, ask to see the full powers of the person expressing the State's consent, or ask that a high governmental legal official should testify that all necessary validations, consents and constitutional approvals had been given. Whatever practice was considered normal for relations between the parties concerned would be sufficient, and the treaty partner was not required to go into the details of the legal system of the co-contracting State. The other requirement was that a treaty partner should act in good faith and should not avail itself of prior knowledge of the fact of incompetence in order to accomplish some illegal purpose of its own. If the normal practice had been observed and good faith was not in question, a treaty partner was entitled to rely on a State's implied representation that its expression of consent to be bound by the treaty was valid, and a State could not deny the validity of the treaty on the ground that some aspect of its internal law had not been complied with.

2. Article 46 of the Vienna Convention[2] stated an exception to that rule, and the Special Rapporteur pro-

[1] For text, see 1550th meeting, para. 22.

[2] See 1546th meeting, foot-note 1.