Document:-

A/CN.4/SR.1646

Summary record of the 1646th 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:-

1981, vol. I

43. Consequently, it would probably be appropriate to refer article 2, subparagraph 1 (*j*) and paragraph 2, to the Drafting Committee. Moreover, even if the Drafting Committee was soon able to propose wording for those provisions, the Commission would probably not be able to adopt them before it had considered certain other articles of the draft.

44. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 2, subparagraph 1 (*j*) and paragraph 2, to the Drafting Committee.

It was so decided.[8]

The meeting rose at 12.55 p.m.

[8] For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, paras. 6–14.

1646th MEETING

Thursday, 7 May 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/339 and Add.1–5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 3 (International agreements not within the scope of the present articles),

ARTICLE 4 (Non-retroactivity of the present articles), *and*

ARTICLE 2 (Use of terms), subpara. 1 (*g*) ("party")

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 3 and 4 and article 2, subparagraph 1 (*g*), which read:

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not apply

(i) to international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties];

(ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

(iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations,

shall not affect:

(*a*) the legal force of such agreements;

(*b*) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

(*c*) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.

Article 2. Use of terms

1. For the purpose of the present articles:

...

(*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;

2. Mr. REUTER (Special Rapporteur) said that articles 3 and 4 had not attracted any substantive comments. During the first reading, in article 3 the word "parties" had been placed in square brackets pending adoption of the definition of that term. Since that definition, which appeared in article 2, subparagraph 1 (*g*), had not given rise to any comments, the Commission could adopt it on second reading and delete the square brackets around the word "parties" in article 3, subparagraphs (i), (ii) and (*c*).

3. With regard to the words "entry into force", in square brackets in article 4, there were two possible solutions. The Commission, which must not prejudge what would happen to the draft articles, could either adopt a cautious approach and leave those words in square brackets, explaining in the commentary that "entry into force" could only be referred to if the draft were to become a convention; or it could go further and replace that term by one which would be valid whatever happened to the draft. For lack of a better solution, he suggested the term "application", which would nevertheless have the disadvantage of being rather too strong if the General Assembly decided only to recommend the draft articles as a guide to practice. In that connection, it should perhaps be pointed out, in reply to a comment made at the previous meeting by Mr. Pinto, that the General Assembly did not play the role of a legislator empowered to impose a text on States by means of a resolution. The General Assem-

bly might be expected to state that the draft articles reflected an emerging practice. When writers studied the legal effect of General Assembly resolutions, they generally concluded that those resolutions established an important customary precedent; but if the draft articles were regarded as establishing a precedent, the term "application" would again not be very felicitous. In the end, the simplest solution would be to keep the term "entry into force" in square brackets and provide the necessary explanations in the commentary.

4. With a view to the second reading of the draft, he had endeavoured, wherever possible, to lighten the wording of the articles. Since the wording of article 3 had given rise to much criticism, he suggested that subparagraphs (i) and (ii) should be merged, which would in no way alter their substance.

5. Sir Francis VALLAT suggested that, if there were no speaker, the articles be referred to the Drafting Committee immediately.

6. Mr. USHAKOV said he was in favour of deleting the square brackets around the word "parties". It was, of course, not yet known how international organizations would be able to become parties to a future convention, but draft article 11[1] expressly stated how they could become parties to other treaties.

7. In article 3, for a reason that he could not remember, the Commission had decided to substitute the words "entities other than States or international organizations" for the words "subjects of international law" contained in the corresponding provision of the Vienna Convention.[2] That new wording nevertheless raised difficulties, because the word "entities" had a broader meaning than the words "subjects of international law" and could, for example, apply to entities governed by the internal law of a country.

8. He was not really in favour of merging subparagraphs (i) and (ii) of article 3, for he found a provision that was easy to apply preferable to one that was easy to read.

9. He thought the square brackets around the words "entry into force" in article 4 could be deleted. That provision concerned the non-retroactivity of the articles, which implied that they would have legal effect, so that if the articles did not enter into force article 4 would be superfluous. The Commission had drafted article 4 because it had envisaged the case in which the articles would have legal effect, which meant that they would enter into force. It could therefore delete the square brackets and provide the necessary explanations in the commentary.

10. In the light of those comments, the articles under consideration could be referred to the Drafting Committee.

11. Mr. REUTER (Special Rapporteur), speaking on a point of order, said that the Commission could decide either to refer all the draft articles to the Drafting Committee or only those that it did not immediately approve on second reading.

12. Speaking as a member of the Commission, he would prefer the Commission not to refer to the Drafting Committee the articles that it was prepared to adopt on second reading. Since it appeared that the definition in article 2, subparagraph 1 (*g*), could be adopted immediately, he did not see why it should be referred to the Drafting Committee, as Sir Francis Vallat had suggested, unless the Commission explained its reasons for doing so.

13. Referring to a comment made by Mr. Ushakov, he said that it had been as a result of a discussion that the Commission had decided to use the term "entities" instead of the term "subjects of international law",[3] which had been considered rather too doctrinal and strong. For there could be non-governmental entities which were not international organizations as defined in the draft, but which could be parties to treaties. That was the case of the Catholic Church, for example, which was referred to in United Nations conventions as the Vatican City State or the Holy See, but it would probably be going rather too far to describe the Catholic Church as a subject of international law. The same was true of the International Committee of the Red Cross, which was an association under Swiss law and thus not an international organization, but which was certainly a party to agreements governed by public international law. That was why the Commission had preferred to use a neutral term.

14. Mr. VEROSTA, referring to the Special Rapporteur's point of order, stressed the need to give the Drafting Committee precise instructions concerning the articles referred to it.

15. The term "*mise en application*" would probably be appropriate in the French text of article 4, but as it would be difficult to translate into English, it would be better to retain the term "entry into force". Moreover, from the viewpoint of Mr. Ushakov, who had drawn attention to the title of article 4, the term "*mise en application*" might not be satisfactory, because it had a temporal aspect.

16. Mr. SUCHARITKUL said he saw no objection to deleting the square brackets around the word "parties" in article 3, since the definition of that term had not raised any difficulties. Article 3 could be referred to the Drafting Committee.

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[1] See 1644th meeting, footnote 1.

[2] *Ibid.*, footnote 3.

[3] See *Yearbook ... 1974*, vol. I, pp. 132 *et seq.*, 1275th meeting, paras. 25 *et seq.*; pp. 144 *et seq.*, 1277th meeting; pp. 162 *et seq.*, 1279th meeting, paras 50 *et seq.*; pp. 233–234, 1291st meeting, paras. 31–40. See also *ibid.*, vol. II (Part One), pp. 298, document A/9610/Rev.1, chap. IV, sect. B, art. 3, para. (6) of the commentary.

17. In article 4, he thought the term "*mise en application*" would probably be preferable to the term "*entrée en vigueur*", but that it would be difficult to translate into English. At the United Nations Conference on the Law of the Sea,[4] it had been translated as "enforcement", which was hardly satisfactory.

18. Mr. ŠAHOVIĆ considered that most of the Special Rapporteur's proposals should be referred to the Drafting Committee.

19. The definition contained in article 2, subparagraph 1 (*g*), should not be difficult to adopt. The square brackets which had been placed around the word "parties" in article 3 should be deleted. In article 4, the term "entry into force" could very well be retained; it was only because he was so meticulous that the Special Rapporteur had proposed its replacement by another term. The words "entry into force" were logically appropriate in the text, and the reasons given by the Special Rapporteur for their replacement by the term "application" were not very convincing.

20. It was probably because the Commission had been too anxious to follow the model of the Vienna Convention that it had decided to use the term "entities". In article 3 of that convention, the term "subjects of international law" automatically suggested international organizations. Since the draft articles specifically applied to international organizations, it had been necessary to find another term. It should be pointed out that the term "entities" could apply to cases other than those mentioned by the Special Rapporteur. For instance, national liberation movements recognized by the international community could become parties to international treaties. In his opinion there was no objection to retaining the term "entities", especially as it had not attracted any comments by States or the international organizations.

21. Mr. QUENTIN-BAXTER supported the deletion of the square brackets from the articles concerned and the retention, in article 4, of the phrase "entry into force", which, at least in English, was far more appropriate than the word "application".

22. With regard to article 3, he was in favour of retaining the existing wording. Unlike others, that article did not seem to him to be one in which it was possible to combine precision and concision, for it was essentially a technical provision aimed at precluding all possibility of perverse interpretations of the draft as a whole.

23. As to the Special Rapporteur's point of order, he himself would be very much opposed to sending all the articles to the Drafting Committee if the only result would be to retard the Committee's work. In fact, however, difficulties were more likely to arise if the Drafting Committee did not have all the articles before it when it came to finalize a draft instrument: it would be unable, for example, immediately to ensure the consistent use of terminology throughout the text.

24. Mr. PINTO said that, of the suggestions which had been made, he favoured the removal of the square brackets from articles 3 and 4 and, in particular, the retention in article 4 of the expression "entry into force". To replace that expression by the term "application" would create more problems than it would solve, for the word would then appear twice, with two different meanings, in the same article. While it was true that, like the use in article 3 of the term "parties", which the Commission had already defined in article 2 as covering only States and international organizations, the use in article 4 of the expression "entry into force" might not be entirely accurate, there could be no doubt, in either article 3 or article 4, as to the meaning the Commission intended to convey.

25. Mr. BARBOZA said that, for the reasons given by the Special Rapporteur and the members of the Commission, the square brackets in the text of article 3 could be deleted.

26. With regard to the term "entry into force" in article 4, the Special Rapporteur was probably being too scrupulous. The Commission had already decided to draft the articles from a maximalist viewpoint, as though they would one day become a convention. That argument was supplemented by the point made by Mr. Ushakov; that the question of retroactivity arose only in connection with the effects the draft articles might have on prior legal obligations, which could be affected only by a treaty, not by a recommendation. In the last analysis, it was not the term "entry into force" that should be placed in square brackets, but the whole of article 4. He therefore preferred the term "entry into force" to the term "application".

27. As to drafting, the Commission was not dealing with a literary work, but with a legal text, which must be as clear as possible. Of course, form must not be entirely sacrificed, but clarity should take precedence if necessary, even at the cost of repetitions or heaviness.

28. Sir Francis VALLAT, referring to his earlier suggestion, said he would not wish to see the Commission adopt the practice of sending only some articles to the Drafting Committee. It was highly desirable for all articles to go before the Committee, since that would not only save time—the minor drafting points not normally discussed in the Commission often proving very difficult to resolve—but would avoid problems of the kind mentioned by Mr. Quentin-Baxter.

29. He agreed that no change should be made to article 2, subparagraph 1 (*g*), that the square brackets should be removed from articles 3 and 4, and that the words "entry into force" should be retained in the latter provision. He had originally thought that subparagraphs (i) and (ii) of article 3 could be merged, but having heard the arguments put forward by other

[4] See "Draft Convention on the Law of the Sea (Informal text)" (A/CONF.62/WP.10/Rev.3 and Corr.1 and 3), part XII, sect. 6.

speakers, he now thought that they should be left as they stood.

30. Mr. USHAKOV said that all the articles should be systematically referred to the Drafting Committee. It was, for example, quite clear that the merging of subparagraphs (i) and (ii) of article 3 would depend on the wording of other draft articles.

31. With regard to the word "entities", he observed that if it applied not only to subjects of international law but also to other entities, article 3 would be difficult to accept. That article related to international agreements to which subjects of international law other than States could be parties, but not entities other than subjects of international law. In the latter case, the agreements would not be international agreements within the meaning of international law. Article 3, subparagraph (i), applied in particular to agreements between an international organization and an entity other than a State or an international organization, in other words, to private law contracts. The use of different terms in the Vienna Convention and the draft under consideration was sure to give rise to problems of interpretation. The "other subjects of international law" referred to in article 3 of the Convention were primarily international organizations, but could be other entities. If the Commission used another term in the draft, it would have to explain why it had not thought that it could use the term contained in the Vienna Convention. The Commission had always tried to avoid the unnecessary use of terms and expressions that were synonymous. If no convincing explanations were forthcoming, he would be inclined to favour the wording of the Vienna Convention.

32. Mr. REUTER (Special Rapporteur) said that the Commission seemed ready to take a number of decisions. First, to refer all the articles systematically to the Drafting Committee, which would take account of the fact that some of them had already been approved as they stood; second, to refer to the Drafting Committee the provisions which had given rise to the current discussion; and third, to delete the square brackets around the word "parties" in article 3 and the words "entry into force" in article 4. With regard to the latter expression, it would have to be explained in the commentary that the Commission was thinking in terms of a draft that would become a convention. If that were not to be the case, the General Assembly, at the appropriate time, would either have to replace the term "entry into force" by another term or, possibly, delete article 4.

33. Speaking as a member of the Commission, he wished to point out that, if the General Assembly recommended the draft articles as a guide to practice and deleted article 4, it would be going further than it had done in the Vienna Convention; for it would be emphasizing the fact that a number of the articles already reflected practice, and the authority of its resolution might lead to the application of some of them to treaties already concluded. In that connection, it might be noted that, in the advisory opinion which the International Court of Justice had given in 1980 in connection with a headquarters agreement concluded by WHO and Egypt, it had, in its *ratio decidendi*, referred to an article drawn on the lines of a draft elaborated by the Commission,[5] which some judges had regarded as a reflection of an already existing rule. If, following the second reading, the Commission did not confine itself to recommending the adoption of a convention based on the draft articles, it would have to draw attention to the risk that some articles might be applied to treaties already concluded.

34. The expression "subjects of international law", used in the Vienna Convention, could apply only to international organizations. If the Commission now used that same expression in the draft as opposed both to States and to international organizations, it would have to be concluded that it applied to at least one entity which was not an international organization, but was a subject of international law. Personally, he was prepared to take that step and agree that, for example, national liberation movements recognized by the United Nations were subjects of international law. It should, however, be borne in mind that the Commission had originally considered it wiser not to go further than the Vienna Convention.

35. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to proceed as indicated by the Special Rapporteur concerning the various points he had mentioned.

It was so decided.[6]

ARTICLE 6 (Capacity of international organizations to conclude treaties)

36. The CHAIRMAN invited the Special Rapporteur to introduce article 6, which read:

Article 6. Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

37. Mr. REUTER (Special Rapporteur) suggested that article 6 should remain unchanged. It had been the subject of long discussion in the Commission, and very conflicting views had been expressed on it in the Sixth Committee; any change in the provision would raise considerable difficulties.

38. Even after the discussion at the 1644th and 1645th meetings on the expression "rules of the organization", it would be better not to change the

[5] See Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, *I.C.J. Reports 1980*, p. 73.

[6] For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, paras. 15–18 and *ibid.*, paras. 6–14.

words "relevant rules of the organization" in article 6—provided, of course, that the definition of the expression "rules of the organization" in article 2, subpara. 1 (*j*), was retained.

39. Mr. ŠAHOVIĆ said he shared the opinion expressed by the Special Rapporteur, but would like to know whether article 6 was to become article 5.

40. Mr. REUTER (Special Rapporteur) said that, so far, the Commission had kept the numbering of the articles of the draft and the numbering of the corresponding provisions in the Vienna Convention absolutely parallel. After it had completed the second reading and made a recommendation on what was to be done with the draft, the Commission would be obliged to renumber the articles.

41. Mr. USHAKOV said that he too was in favour of keeping article 6 as it stood, but wondered whether an equivalent of article 5 of the Vienna Convention should not be included in the draft. Under the terms of that article, the Vienna Convention applied, *inter alia*, to "any treaty adopted within an international organization". Were treaties adopted within an international organization between States and one or more international organizations or between international organizations therefore excluded from the draft? Perhaps an article 5 should be drafted to cover agreements of that kind.

42. Mr. REUTER (Special Rapporteur) drew a distinction between two cases. First, there was the case—which seemed never to have arisen—of an international organization that included another international organization as a member. Admittedly, the United Nations was a member of the International Telecommunication Union and of the Universal Postal Union, but with a special status. The Commission had already considered those two cases and reached the conclusion that it could not take account of every conceivable possibility. Besides, if it devoted a provision to that case, the inference could be drawn that it considered the United Nations to be a full member of those organizations, which it was not.

43. In the second case, a treaty was drawn up within an international organization: for instance, the Convention on Special Missions[7] had been drawn up within the United Nations. But it was difficult to see how an international organization could be associated with the drawing-up of a treaty within an international organization of which it was not a member. Since the Commission had noted that at the present time no international organization was really a member of another international organization, it was not conceivable that an organization could participate in the drawing-up of a treaty within another organization. In that respect, it should be remembered that the International Bank for Reconstruction and Development had appended its signature to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States[8] merely to lend its support to that convention; it had never become a party to the instrument.

44. The CHAIRMAN suggested that the Commission should refer the question of drafting an article 5 to the Drafting Committee.

It was so decided.[9]

45. Mr. VEROSTA said that, in his opinion, draft article 6 should be retained without any change.

46. The CHAIRMAN suggested that the Commission should refer article 6 to the Drafting Committee.

It was so decided. [10]

ARTICLE 7 (Full powers and powers) *and*

ARTICLE 2 (Use of terms), para. 1, subpara. (*c*) ("full powers") and (*c bis*) ("powers")

47. The CHAIRMAN invited the Special Rapporteur to introduce article 7 and article 2, paragraph 1, subparagraphs (*c*) and (*c bis*), which read:

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.

[7] See 1644th meeting, footnote 6.

[8] United Nations, *Treaty Series*, vol. 575, p. 159.

[9] For the decision of the Drafting Committee, see 1692nd meeting, paras. 10–12.

[10] For consideration of the text proposed by the Drafting Committee, see 1681st meeting, para. 20.

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 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.

Article 2. Use of terms

1. For the purpose of the present articles:

...

(*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.

48. Mr. REUTER (Special Rapporteur) said that, among the comments of Governments on those provisions, the most important was certainly that of the Canadian Government (A/CN.4/339), which considered the possibility of providing, by analogy with the text adopted with regard to a State, that the executive head of an organization should be considered as having general powers to represent the organization.

49. A formulation of that kind would indeed have some advantages if it were generally applicable. However, the practice of the various international organizations did not rule out the possibility of general powers of representation being conferred on a collective organ and not on the head of the Secretariat. In the light of the comments by ILO (*ibid.*), he would be more inclined to think that the practice of the organizations was the best criterion for solving the problem. Hence, he was not in favour of seeking, at all costs, a symmetry which might well prove artificial. Personally, he thought it preferable to leave room for empiricism, and he urged the Commission not to intrude on a debate that should be confined to organizations themselves.

50. With regard to a comment by the Federal Republic of Germany (*ibid.*), suggesting that the word "communicating" should be replaced by the word "declaring", in article 7, paragraph 4, he pointed out that, notwithstanding the theory supported by some German writers that a treaty was constituted by a declaration of will, the Commission had decided on first reading to retain the word "communicating", which was deliberately used to express a nuance.

51. As to drafting, he emphasized that he had purposely used the term "powers", rather than "full powers", for international organizations. That choice also conveyed a nuance deriving from the limited capacity of international organizations, and he proposed that the term should be retained.

52. In his report (A/CN.4/341 and Add.1, paras. 38 *et seq*), he had discussed various other suggestions on drafting, in particular a proposal to delete the words "between one or more States and one or more international organizations" from article 7, paragraph 1. On that point, he thought the possible saving of words would be very small, but it was for the Commission to decide what ought to be done.

53. Lastly, he recognized that the merging of paragraphs 3 and 4 of article 7 to form a single provision, with the wording set out in paragraph 39 of his report, would raise no difficulties and could make the text of the article less cumbersome.

54. Mr. BARBOZA asked whether the Special Rapporteur considered that there were good grounds for the comment by ILO (A/CN.4/339) on article 7, subparagraph 2 (*a*), which pointed out that in ILO practice the Minister of Labour of each member State was considered as representing the State in its relations with that organization.

55. Mr. REUTER (Special Rapporteur) said that subparagraph 2 (*a*) of draft article 7 exactly followed the wording of article 7 of the 1969 Vienna Convention, which listed the persons in the State hierarchy who were not required to produce full powers in order to be considered as representing their State. Nevertheless, in its own practice, an international organization was free not to require powers to be produced by persons who did not fall within the categories mentioned. That attitude was to be found both in the practice of States and in that of the organizations concerned, and was explained by the fact that, in most States, it was the technical ministries which dealt, on a very frequent and almost daily basis, with the technical specialized agencies (for example, the ILO, FAO, ITU) in all matters relating to their sphere of competence. That practice was perfectly understandable, but was nevertheless common only to the particular organization involved and to the State that accepted it. Hence it was understandable that it had not been taken into account in the text of the Vienna Convention, which was very general. For the same reason, he had not mentioned that practice in the draft articles.

56. Mr. BARBOZA asked the Commission to refer consideration of the matter to the Drafting Committee and to examine the possibility of supplementing the text of draft article 7 in that respect.

57. Mr. USHAKOV said that, in the current practice of States, the head of a permanent delegation to an international organization was entitled, without pro-

ducing powers, to transmit the instruments of ratification of treaties ratified by the State he represented. That was the only possibility not covered by the enumeration in draft article 7, and he wondered whether the article should not be supplemented in that respect by an addition to the text of the Vienna Convention. For his part, he would prefer the text to remain unchanged.

58. With regard to paragraph 4, it was obvious that no official of an international organization was entitled by virtue of his duties to bind that organization. He could only be authorized to communicate the document confirming consent. Thus it was right that the power to communicate the consent of an organization to be bound by a treaty should be mentioned in article 7.

59. As to drafting, he proposed that, for greater precision, the word "such" should be inserted before the word "treaty" in paragraph 4.

60. The CHAIRMAN suggested that the texts of article 7 and of article 2, paragraph 1, subparagraphs (*c*) and (*c bis*), should be referred to the Drafting Committee.

It was so decided.[11]

ARTICLE 8 (Subsequent confirmation of an act performed without authorization),

ARTICLE 9 (Adoption of the text),

ARTICLE 10 (Authentication of the text),

ARTICLE 11 (Means of establishing consent to be bound by a treaty), *and*

ARTICLE 2 (Use of terms), para. 1, subparas. (*b*) ("ratification"), (*b bis*) ("act of formal confirmation") and (*b ter*) ("acceptance", "approval" and "accession")

61. The CHAIRMAN invited the Special Rapporteur to introduce articles 8, 9, 10 and 11, and article 2, paragraph 1, subparagraphs (*b*), (*b bis*) and (*b ter*), which read:

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 an international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

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.

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:

(*a*) by such procedure as may be provided for in the text or agreed upon by the States and international organizations participating in its drawing-up; 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 text or agreed upon by the international organizations participating in its drawing-up; 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.

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.

Article 2. Use of terms

1. For the purpose of the present articles:

...

(*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;

(*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.

62. Mr. REUTER (Special Rapporteur) said that no substantive comments had been made on the provisions under discussion, except for criticisms in the Sixth Committee of the General Assembly of the use of the expression "act of formal confirmation" and of the parallelism created between this act of formal confirmation and ratification (see A/CN.4/341 and Add.1, para. 44).

63. Generally speaking, the word "ratification" was not used for international organizations. In that connection, he thanked the Secretariat for drawing his

[11] For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, para. 21 and *ibid*, paras. 6–14, 1682nd meeting, paras. 2–9; and 1692nd meeting, paras. 1–8.

attention to a number of agreements, mentioned in footnote 30 to his report (A/CN.4/341 and Add.1), for which the General Assembly had established a special conclusion procedure. It provided that the agreement had legal effect only with the General Assembly's "concurrence", but the word "concurrence" was in fact merely a clumsy way of designating genuine confirmation. He proposed that the expression "act of formal confirmation" should be retained, and pointed out that the Vienna Convention spoke of "confirmation", in the general sense.

64. He proposed that draft article 10 should be amended as indicated in paragraph 42 of his report, by using the expression "participants in the drawing-up", which was not new, as it was already used in article 9. Such an innovation might none the less raise a question the settlement of which had been deferred, namely, whether the concept of "participants in the drawing-up" need be defined in article 2, paragraph 1.

65. He himself was not in favour of including such a definition, which, he thought, would be justified only if it made clear that the words meant only those who could participate in the drawing-up of the treaty until the end of the process (excluding experts, for example). That restriction appeared to be self-evident, however, and it would be for the Commission to decide on the value of such a definition.

66. Mr. USHAKOV said that the concept of "participants in the drawing-up" was not defined in the Vienna Convention, and the Commission would therefore meet with difficulties if it tried to define it; for the Commission would be obliged to define a State and an international organization participating in the drawing-up of a treaty, in other words, to interpret the Vienna Convention and to supplement it on that point, which might not be desirable. The authors of that convention had refrained from defining the expression because they had considered it to be clear enough.

67. He saw that as a sufficient reason to refrain from using the expression "participants in the drawing-up". Apart from that reservation, he thought the articles could be referred to the Drafting Committee.

68. Sir Francis VALLAT, referring first to the expression "act of formal confirmation" defined in article 2, subparagraph 1 (*b bis*), said that, in his view, the use of the words "formal confirmation", as distinct from "ratification", was fully justified by the facts of the situation; it did not involve any distinction based on equality or inequality as between States and international organizations, which seemed to him quite irrelevant in the context. It might be confusing to use the word "ratification" in regard to international organizations, for in the case of States that word was often used in a dual sense, to mean both international ratification and referral to the constitutional processes. So far as he was aware, the same did not apply to international organizations, irrespective of the procedure followed to express the will of the international organization concerned to give its formal consent to be bound by a treaty. It was necessary to recognize that an international organization had internal procedures which differed from those of a State and thus justified the use of a more general term.

69. On draft article 9, he endorsed Mr. Ushakov's point. The Commission, in referring to participants within the context of a convention, was dealing with something that was not in itself very precise, although the area was one in which practice might be developing. He was thinking, for example, of the position of those persons who might be present at a conference as observers at a time when it was contemplated that the international organization in question might, or would, become a party to the treaty. Bearing that kind of situation in mind, it would be wiser to adhere to the existing text, which gave an indication of what was meant by participants without drawing too sharp a line. For that reason and the other reasons given, he would prefer not to attempt a definition of "participants".

70. Mr. ŠAHOVIĆ observed that article 2, subparagraph 1 (*e*) contained definitions of the terms "negotiating State" and "negotiating organization". It was difficult to see what difference there was between those two concepts and that of a State or an organization "participating in the drawing-up".

71. The CHAIRMAN suggested that the Commission should refer articles 8, 9, 10 and 11 and article 2, paragraph 1, subparagraphs (*b*), (*b bis*) and (*b ter*) to the Drafting Committee.

It was so decided.[12]

The meeting rose at 12.55 p.m.

[12] For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, paras. 22–23; *ibid.*, paras. 24–31, 1682nd meeting, para. 5, 1692nd meeting, paras. 1–7; 1681st meeting, paras. 32–33, and 1682nd meeting, para. 7; 1681st meeting, paras. 34–35; and *ibid.*, paras. 6–14.

1647th MEETING

Friday, 8 May 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

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