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A/CN.4/SR.1720

Summary record of the 1720th 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:-

1982, vol. I

ARTICLE 42. (Validity and continuance in force of treaties)

63. The CHAIRMAN invited the Commission to consider article 42, which read:

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty between two or more international organizations or of the consent of an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

2. The validity of a treaty between one or more States and one or more international organizations or of the consent of a State or an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

3. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

64. Mr. REUTER (Special Rapporteur) said that article 42 had not been the subject of any comments by Governments or international organizations. His own view, as he had proposed in his eleventh report (A/CN.4/353, para. 35), was that it might be advisable to combine paragraphs 1 and 2 in a single paragraph, which would read:

"1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present articles."

The Commission would probably have to revert to article 42 when it came to examine article 73.

65. During the first reading, the Commission had wondered, with regard to article 42 in particular, whether it should not refer to Article 103 of the United Nations Charter.[13] That was a problem which would have to be examined at the end of the second reading of the whole draft, when the Commission might consider the addition of an article referring in a general way, in respect of the whole draft, to Article 103 of the Charter.

The meeting rose at 1.00 p.m.

[13] See *Yearbook ... 1979*, vol. II (Part Two), p. 149, para. (3) of the commentary to article 42.

1720th MEETING

Friday, 4 June 1982, at 10 a..m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING[2] (*continued*)

ARTICLE 42 (Validity and continuance in force of treaties)[3] (*concluded*)

1. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer article 42 to the Drafting Committee.

It was so decided.[4]

ARTICLE 43 (Obligations imposed by international law independently of a treaty)

2. The CHAIRMAN invited the Commission to consider article 43, which read:

Article 43. Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any international organization or, as the case may be, of any State or any international organization, to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

3. Mr. REUTER (Special Rapporteur) said that no Government or international organization had made any comments regarding article 43. He therefore proposed that the article should be referred to the Drafting Committee.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer article 43 to the Drafting Committee.

It was so decided.[5]

ARTICLE 44 (Separability of treaty provisions)

5. The CHAIRMAN invited the Commission to consider article 44, which read:

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present ar-

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

[3] For the text, see 1719th meeting, para. 63.

[4] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 45.

[5] *Idem*, paras. 2 and 46.

ticles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

6. Mr. REUTER (Special Rapporteur) said that no Government or international organization had made any comments regarding article 44. He therefore proposed that the article should be referred to the Drafting Committee.

7. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer article 44 to the Drafting Committee.

It was so decided.[6]

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

8. The CHAIRMAN invited the Commission to consider article 45, which read:

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

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty between one or more States and one or more international organizations under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and [62] if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) it must by reason of its conduct be considered as having renounced the right to invoke that ground.

3. The agreement and conduct provided for in paragraph 2 shall be governed by the relevant rules of the organization.

9. Mr. REUTER (Special Rapporteur) said article 45 had evoked from some Governments criticisms that had indeed already been made in the Commission. Unlike article 45 of the Vienna Convention on the Law of Treaties which consisted of one paragraph, draft article 45 as proposed in its present form was divided into three paragraphs, with paragraph 1 concerning States and paragraphs 2 and 3 concerning international organizations. The criticisms had been in connection with the rules relating to international organizations. With regard to States, subparagraph 1 (*b*) contained a rule which, as in the Vienna Convention, introduced the idea of acquiescence and of acquiescence by conduct. That idea played quite a large part in the Vienna Convention, for the drafters of that instrument had decided not to include in it an extinctive prescription with respect to the right to invoke a ground for invalidating or terminating a treaty.

10. However, the formulation for international organizations of a rule similar to that of subparagraph 1 (*b*) had aroused criticism. One member of the Commission had considered that it was not possible to lay down a rule providing that an international organization would, by reason of its conduct, lose the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. It had been said in support of that opinion that their very structure meant that international organizations were not unitary: each organization comprised various organs which were not necessarily strictly co-ordinated among themselves, and some of them met only at intervals. Hence, organizations had more need of protection than States, and the rule applicable to States could not simply be transposed to international organizations. That was all the more true with respect to the most important ground for invalidation, namely that provided for in article 46 of the Vienna Convention and draft article 46: failure to observe the rules of an organization regarding the conclusion of treaties.

11. The Commission had discussed the problem at length and, in elaborating article 45, had taken those objections into account only to a certain extent. If subparagraph 1(*b*) of the article, concerning States, was compared with subparagraph 2 (*b*), concerning international organizations, it could be seen that the rule was, in a way, reversed. With regard to States, it was sufficient for the conduct to indicate acquiescence—in other words, a sort of passive attitude—whereas for international organizations, the conduct must be considered as signifying renunciation, which attitude was more active than acquiescence. Those considerations went to explain paragraph 3 of the article, which contained yet another reminder that the agreement and conduct—and the reference to conduct was important—mentioned in paragraph 2, and hence the agreement and conduct of an international organization, were governed by the relevant rules of the organization. Paragraph 3 represented an attempt to stress the need to ensure, when evaluating the effects of conduct, that the conduct did not involve an extra violation, a new breach of the rules of the organization.

12. However, the compromise so reached by the Commission had been considered unsatisfactory by some Governments, which had felt that article 46 should probably not be subject to article 45, paragraph 2, and

[6] *Idem*, paras. 2 and 47.

that article 45, subparagraph 2 (*b*), should be deleted. On the whole, however, Governments did regard article 45 as a satisfactory compromise that protected the interests not only of a contracting organization, but also of its co-contractors. If no account was taken of conduct, those co-contractors would be liable indefinitely to claims of invalidity, requests for the suspension of the operation of a treaty, etc. In his view, there was no need to modify article 45, which represented quite an acceptable compromise between the interests involved.

13. Mr. USHAKOV agreed that there was no reason to modify the rule applicable to States, which was taken from article 45 of the Vienna Convention; the conduct of a State was also the conduct of each of its constituent organs, since a State was characterized by its unicity. But the case of an international organization was slightly different; its organs were in principle competent within the limits of thier powers and functions; they were not subordinated to one another, and some of them, the "administrative" organs such as the secretariat, were permanent. That being so, could an administrative organ which had begun to apply a treaty concluded in violation of the relevant rules of the organization commit the organization as such, and in particular the organ empowered to conclude treaties, which might not have met since the treaty had started to operate? It could hardly be thought so. A State was always master of its internal law, but the procedure for modifying the relevant rules of an organization was complex. For organizations to be free to take refuge behind their relevant rules in order to invoke, at any time, a ground for invalidating a treaty, all reference to article 46 should be deleted from article 45, paragraph 2. That apart, he found the wording of draft article 45 reasonably satisfactory.

14. Mr. JAGOTA remarked that it might well be more difficult to prove that an international organization had renounced its right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty than to prove that a State had acquiesced in the validity of the treaty. It would appear that a State could forfeit its right more easily than could an international organization, particularly if, as stipulated in paragraph 3, the organization's conduct was to be governed by its established practice. He was not clear as to the reasons for the differing treatment of international organizations and States, and felt that the same wording should be used in subparagraph 2 (*b*) as in subparagraph 1 (*b*).

15. Mr. CALERO RODRIGUES said he shared the views expressed by Mr. Jagota. Article 45 was intended to reflect the desirability of stability in treaty relationships. Accordingly, it would seem reasonable to make international organizations subject to the same conditions as States. Admittedly, it might be prejudicial to the member States if an international organization concluded a treaty improperly and was deprived of the right to invoke grounds for invalidating the treaty. Nevertheless, the problem was less serious when seen in the light of the provisions of paragraph 3, for if, in engaging in conduct which indicated acceptance of the treaty, the secretariat or any other organ of an international organization breached the rules of the organization, such conduct could not be regarded as a basis for loss of the right to invoke a ground for invalidating the treaty. Consequently, while his own inclination was to couch paragraphs 1 and 2 in the same terms, he was prepared to accept the wording proposed by the Special Rapporteur as corresponding more closely to the general wish of Governments.

16. Mr. McCAFFREY said that initially he had seen no reason to draw a distinction between the situation of States and that of international organizations. However, in the light of observations by international organizations and the comments made by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 37), his conclusion was that it would be desirable to afford additional protection to the States members of international organizations. That was the purpose of paragraph 2 of the article.

17. He agreed with Mr. Ushakov that the reference to article 46 should be deleted from article 45, paragraph 2, since it was questionable whether an international organization should be able, through its conduct, to assume competence to conclude a treaty when such competence had not been conferred upon it by its relevant rules. That would apply however affirmative or deliberate the conduct of the international organization concerned. Such a provision would again prejudice the interests of States members of the organization.

18. Mr. LACLETA MUÑOZ said that, at first sight, he too had thought that subparagraph 1 (*b*) and subparagraph 2 (*b*) should be couched in the same terms. However, after reflection, he had come to the conclusion that, while such a solution might be feasible in respect of bilateral treaties between a State and an international organization, it might give rise to problems in respect of multilateral treaties. Consequently, it seemed preferable to keep to the existing wording in that regard.

19. As to paragraph 1, the words "between one or more States and one or more international organizations" could be deleted, since the type of treaty to which the draft articles related was adequately defined in articles 1 and 2.

20. Mr. RIPHAGEN, referring to the proposal to delete the reference to article 46 from article 45, paragraph 2, said that paragraph 3 of article 46 was much wider in scope than paragraph 1 of that article, because it did not stipulate that the rules of the international organization concerned should be of fundamental importance, as did paragraph 1 with respect to the internal law of States. Consequently, deletion of the reference to article 46 from article 45, paragraph 2, might mean that an international organization could never lose the right to invoke a ground for invalidating a treaty as a result of its conduct. The reference to article 46 should therefore be retained.

21. Mr. FLITAN said that the reference to article 46 should be retained because the guarantees afforded, more particularly in paragraph 3, which was important, were sufficient. Deletion of the reference to article 46 would have the result of setting up, without any justification, differences between the field of application of that article and of articles 47 to 50. Moreover, limiting the reference only to articles 47 to 50 would mean that international organizations would in every case have to express, explicitly, their acceptance as valid of a treaty concluded in violation of the rules of competence. The application of such an obligation could, in his view, create serious problems, even on the political level.

22. Mr. JAGOTA said that there were many international organizations whose statutes contained no reference to the treaty-making capacity of the organization, to the individuals empowered to conclude treaties on behalf of the organization, or to the organization's competence with regard to the subject-matter of treaties which it might enter into. Nevertheless, in practice, international organizations did conclude treaties. He wondered, therefore, whether article 46 could be invoked to invalidate treaties on the grounds that they had been concluded by persons who had not been competent to do so under the relevant rules of the organization, particularly when those rules did not mention who was competent to conclude treaties. If the established practice of the international organization had been not only to allow treaties to be concluded on its behalf, but even to ratify them or act pursuant to them, then the general provision of article 45 could be invoked to answer a challenge under article 46. Consequently, it was incorrect to say that the treaty-making competence of an international organization did not derive from its conduct and established practice. It would therefore be advisable to retain the reference to article 46 in article 45, paragraph 2.

23. Mr. NJENGA said the associated himself with the views expressed by Mr. Jagota. The constituent instruments of many international organizations contained no reference to the treaty-making competence of the organization and yet it was an established practice for such organizations to conclude treaties. On the other hand, it was not possible to assimilate the consequences of the conduct of States to those of the conduct of international organizations, since States had internal mechanisms for regularizing actions which at first sight might appear invalid, whereas, in the case of international organizations, such action could be taken only by the governing bodies, which in many cases met infrequently. Hence there was good reason to lay down more stringent rules of the conduct of international organizations than for the conduct of States. The rules of international organizations must be regarded as protecting the interests of member States which might be prejudiced by the conduct of officials of the organizations.

24. In paragraph 3 of article 45, it might be advisable to refer not only to the relevant rules, but also to the practice of the organization, for the rules of many international organizations made no mention of treaty-making competence, still less of conduct, which tended rather to be a matter of established practice. Lastly, the reference to article 46 in article 45, paragraph 2, should be deleted. If an official of an international organization concluded an agreement in violation of the rules of the organization concerned, the consequences should be regarded as invalid, whether the violation was manifest or not.

25. Mr. SUCHARITKUL said that, even in the case of States, the application of the principle of acquiescence had always been difficult, because a State stood to lose, through extinctive prescription, its right to invoke a ground for invalidating a treaty. Consequently, it was very difficult to determine whether a State had acquiesced in the validity of a treaty through its conduct. Nevertheless, international law seemed to have developed in that direction. Since States were presumed to be equal, the rule of acquiescence applied equally to all. However, the application of such a rule to international organizations would be inconceivable, for such organizations could in no sense be considered equal. An understanding of the principle of acquiescence required a knowledge of international law and, although some international organizations enjoyed the services of a large number of legal experts, others, such as ESCAP, had no legal adviser.

26. Mr. Al-QAYSI said he understood that the regional economic commissions were provided with legal services by the Office of Legal Affairs of the United Nations, and consequently received excellent legal advice. Certainly that was true in the case of ECWA. Moreover, the conduct of an international organization could be assessed on the basis of its established practice, as reflected in its rules, resolutions and decisions.

27. Mr. REUTER (Special Rapporteur) said that he wished to preface his remarks with a general comment: article 45 must, of course, be read in conjunction with article 46 and also with article 2, which had the Commission's final approval and contained a definition in subpargraph 1 (*j*), of the expression "rules of the organization".

28. Replying to Mr. Jagota's question regarding the difference between subparagraph 1 (*b*) and subparagraph 2 (*b*) of article 45, he pointed out that at first sight the difference was not great, since acquiesence did, after all, lead to renunciation. But the word "acquiescence" encompassed a number of elements and could imply a purely passive attitude or, more precisely, sustained silence. In the case of States, the Vienna Convention used the word "acquiescence", which did not rule out the possibility that a State, because of its solidity and its sound organizational arrangements, could be bound by a treaty as a result of keeping silent for a certain length of time, under certain circumstances. For international organizations, the word had been discarded and "renunciation" had been preferred, the reasons being a concern for precision and a desire to rule out an ef-

fect due merely to silence. It was, after all, quite possible for an organization to maintain silence, not only silence by an administrative organ for policy reasons, but also silence by an organ made up of governmental representatives, for reasons of a political nature. Silence was a form of complete passiveness, but it was never enough in the case of an international organization.

29. As for Mr. Jagota's second question, which had also been taken up by other members of the Commission and concerned the definition of the expression "relevant rules" with respect to conduct, it should be noted that conduct, as such was not established practice: it preceded such practice, since established practice was conduct which had lasted, which had withstood the test of time.

30. He believed that paragraph 3, the importance of which had been pointed out by Mr. Flitan, should be retained. If the reference to article 46 were to be deleted, that paragraph would lose its *raison d'être*—which was not the agreement, which was subject to the relevant rules of the organization, but the conduct. When first established, many international organizations either had no written rules or had written rules that were inadequate with regard to competence to conclude treaties. To take the case of the United Nations, it might well be supposed that, during the Organization's early years, the Secretary-General had concluded a minor agreement on an administrative matter, although the Charter conferred no power upon him in that area: that was conduct of the United Nations, and when conduct was repeated, it became practice. The General Assembly, the Security Council, or any other United Nations organ could have maintained that the conduct was not in conformity with the Charter, and the United Nations would not have been bound by the agreement, for no established practice would have been involved; in such a case, it was paragraph 3 of article 45 that applied. But if established practice was involved—and, under draft article 2, such practice was part of the rules of the organization—the applicable provision was article 45, paragraph 2; otherwise, impossible situations would arise.

31. In that connection, he referred to the observations made by all the international organizations concerning the representation of States to and in international organizations: the organizations had stated that they accepted the term "established practice", on the understanding that it would not in itself be an absolute obstacle to the emergence of new practices. And in fact, when the Commission spoke of "established practice", it did not mean the practice as established at the time of the conclusion of a convention or any other instrument of that type: it did not exclude future practices. But so long as a practice was not established, it did not have the force of a rule of law, and the organization therefore kept all its rights—and had a certain amount of time available to it in that regard.

32. It was impossible for international organizations to operate if they did not have the opportunity to establish practices, which would in time become rules of law. For example, the Security Council had developed a practice that was now established, and although not written, it was confirmed by the acceptance of all States and also by the International Court of Justice. Article 45, which struck a very delicate balance, had been elaborated in that spirit. Speaking as a member of the Commission, he said that, in his view, the Commission should refrain from altering the article.

33. Mr. NI said that, in subparagraph 2 (*b*), the Special Rapporteur might be justified in requiring more than acquiescence in the case of international organizations. There were, of course, differences between the system for States and the system for international organizations, but it was difficult to say how far those differences went. While it was true that acquiescence had passive effects and that the conduct of an international organization must involve actual renunciation, as the Special Rapporteur had pointed out in his eleventh report (A/CN.4/353, para. 38), he was not sure that, if an international organization had actually renounced the right to invoke the ground referred to in paragraph 2, it was absolutely necessary to include a provision to that effect in subparagraph 2 (*b*). Indeed, if an actual renunciation had been made, the international organization would be prevented by the principle of estoppel from invoking a ground for invalidating a treaty. Since the differences between States and international organizations might not be as great as had been suggested, he thought that international organizations would be adequately protected if the concept of acquiescence embodied in subparagraph 1 (*b*) was also included in subparagraph 2 (*b*). The Commission could then simplify article 45 by merging paragraphs 1 and 2.

34. Mr. USHAKOV said that he endorsed the views of the Special Rapporteur, and added that the Commission should treat the notion of the conduct of an international organization with the greatest care. The notion had never been defined, whereas the corresponding notion of the "conduct" ("*comportement*") of a State had been clarified in part 1 of the draft articles on State responsibility for internationally wrongful acts.[7] Under article 3 of that draft, the conduct ("*comportement*") of a State consisted of an action or omission which was attributable to the State under international law, and under article 5, it could be the conduct ("*comportement*") of any State organ having that status under the internal law of that State, provided the organ was acting in that capacity in the case in question. The conduct ("*comportement*") of any organ of a State or any one of its subdivisions was considered to be the conduct of that State. That was true, for example, of a ministry for foreign affairs and any department of that ministry. On the other hand, it could not be asserted that the conduct ("*conduite*") of any organ of an international organization was attributable to that organization. In a sense, the conduct ("*conduite*") of the International Law Commission could be considered as conduct of the

[7] For the text, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

United Nations, but it was not binding on the United Nations. For that reason, it would be preferable to keep subparagraph 2 (*a*), which provided for express agreement, and to discard subparagraph 2 (*b*), which would inevitably pose difficulties in implementation even greater than those pointed out by Mr. Sucharitkul in connection with subparagraph 1 (*b*), concerning States.

35. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to refer article 45 to the Drafting Committee.

It was so decided.[8]

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

36. The CHAIRMAN invited the Commission to consider article 46, 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 between one or more States and one or more international organizations 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.

2. In the case referred to in paragraph 1, 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 to be bound by a treaty 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.

4. In the case referred to in paragraph 3, a violation is manifest if it is or ought to be within the cognizance of any contracting State or any other contracting organization.

37. Mr. REUTER (Special Rapporteur) said that article 46 had elicited a number of comments by States. Paragraphs 1 and 2, which concerned States, reproduced paragraphs 1 and 2 of article 46 of the Vienna Convention. Paragraphs 3 and 4, which concerned international organizations, were different in certain respects. In the case of States, paragraph 1 of the draft article required that the violation of a rule should be manifest and that the rule must be of fundamental importance, but the latter condition was not required for international organizations under paragraph 3. The stipulation that any manifest violation of one of the rules of an international organization regarding competence to conclude treaties could be invoked by the organization had been made in order to afford better protection for international organizations.

38. It would be remembered that paragraph 2 of article 46 of the Vienna Convention—which defined the manifest character of a violation—had been added by the United Nations Conference on the Law of Treaties, which had used a definition proposed by the Special Rapporteur on that topic. When the Commission had examined the application of that definition to the specific case of international organizations, some members had pointed out that the notion of normal practice, which had been used for States, had a very precise meaning. All States were organized in the same way in matters relating to foreign affairs, as could be seen from draft article 7 under consideration, from which it was clear that heads of States, heads of Government and Ministers for Foreign Affairs, as well as certain diplomats, had identical competence under international law, irrespective of which State they represented. The reference to the normal practice of States thus related to the practice of all States. In the case of international organizations, it was not possible to refer to normal practice, for there was no discernible practice common to all international organizations. Some of them, taken individually, might have a normal practice, but many did not have an established practice. For that reason, the Commission had preferred to speak of a violation that was or ought to be within the cognizance of a contracting State.[9] That requirement covered the common case in which an organization concluded a treaty with one or more of its member States. In that instance, it was inadmissible for a member State to claim that the rules of the organization regarding competence to conclude treaties were not within its cognizance.

39. Lastly, a suggestion had been made to modify the title of article 46, which needlessly departed from the title of the corresponding article of the Vienna Convention. Obviously, it was not possible to use the title "Provisions of internal law regarding competence to conclude treaties", as did article 46 of the Vienna Convention, and the Commission could therefore simply use the formula "Provisions regarding competence to conclude treaties", one which would apply both to States and to international organizations and would do away with the word "violation".

40. Mr. USHAKOV said that he had no comments to make on article 46 itself, but it should be reconsidered in the light of paragraphs 2 and 3 of article 45. Under article 46, paragraph 3, an international organization could invoke a manifest violation of one of its rules regarding competence to conclude treaties. Under article 45, subparagraphs 2 (*a*) and (*b*), it could no longer invoke the violation if it had expressly agreed that the treaty was valid or remained in force or continued in operation, or if, by reason of its conduct, it must be considered as having renounced the right to invoke that ground. Under article 45, paragraph 3, the agreement and conduct were governed by the relevant rules of the organization. Undoubtedly, rules regarding agreement did exist, but it was quite unlikely that there were rules on conduct. It was difficult to see how an international organization could, by its conduct, be considered as having renounced the right to invoke a manifest violation of one of its rules of competence to conclude

[8] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 48.

[9] See *Yearbook ... 1979*, vol. II (Part Two), pp. 152-153, commentary to article 46.

treaties. The conduct ("*comportement*") of any State organ was binding on that State, but the conduct ("*conduite*") of an organ of an international organization was not necessarily attributable to that organization.

41. Mr. LACLETA MUÑOZ noted that, under paragraph 2, a violation was manifest if it would be objectively evident to "any State" conducting itself in the matter in accordance with normal practice and in good faith. Hence, the paragraph seemed to overlook the case of a treaty concluded with one or more international organizations. On the other hand, under paragraph 4, a violation of a rule of an organization was manifest if it was or ought to be within the cognizance of "any contracting State or any other contracting organization". He wondered whether paragraph 2 spoke only of "any State" simply because it had been taken word for word from the corresponding provision of the Vienna Convention or whether the omission of a reference to international organizations was deliberate. The divergence between paragraphs 2 and 4 could easily be rectified by referring to the "contracting parties" in both of them.

42. Mr. QUENTIN-BAXTER drew the Drafting Committee's attention to the fact that it might be advisable to bring the English version of paragraph 4 into line with the French and Spanish versions by replacing the word "cognizance" by the word "knowledge". He wished to suggest that change because legal writings in English often drew a distinction between "cognition" and "cognizance", "cognition" being mere knowledge and "cognizance" being knowledge from which legal consequences could be drawn.

43. Mr. JAGOTA said that he could agree with the distinction drawn in article 46 between States and international organizations with regard to the violations they could invoke and he agreed with the meaning given to the term "manifest violation". Nevertheless, the wording of paragraph 2 seemed to be incomplete. In the case of a treaty between a State and an international organization, in connection with which the State invoked paragraph 1 in order to claim that the treaty had been concluded by a person who was not competent to conclude treaties, it would not be clear whether paragraph 2, which referred exclusively to States, or paragraph 4, which referred both to contracting States and to contracting international organizations, would apply as far as the meaning of the term "manifest violation" was concerned.

44. The Drafting Committee would therefore have to decide not only whether paragraph 2 should contain a reference to an international organization, but also whether such a reference would call into question the rationale for the distinction drawn in article 46 between the violations regarding competence to conclude treaties that could be invoked by States and by international organizations on the grounds that the violations vitiated their consent.

45. Mr. BALANDA said that article 46 was unquestionably useful, but its application might well give rise to problems of interpretation. In connection with paragraph 1, he wondered, for example, when a rule of internal law was to be considered as being "of fundamental importance". Did that mean a rule of constitutional law, which generally stood above all other rules of law, or did it also mean certain rules stemming from constitutional law or falling within other branches of law? Who would determine whether a rule was of fundamental importance? If that task fell to the State anxious to be released from the treaty, it was to be feared that States would regularly be tempted to attribute fundamental importance to the rule violated. Thus, paragraph 1 would not achieve its goal.

46. Again, the definition of the manifest character of a violation was not very clear. In the case of States, a violation was considered to be manifest if it was objectively evident. An objective criterion applicable to all States would thus be expected. In the case of international organizations, no objective criterion was proposed. A violation was manifest if it was or ought to be within the cognizance of any contracting State or any other contracting State or any other contracting organization. Therefore, cognizance of the right of the co-contracting party was being presumed. In internal law, such a presumption applied only to those who were governed by a certain law and who were supposed to be not unaware of it. It hardly seemed possible to transpose that presumption into international law, for quite often the co-contracting party was not in a position to know whether a treaty with an organization had been concluded in conformity with the relevant rules of that organization.

The meeting rose at 1 p.m.

1721st MEETING

Monday, 7 June 1982, at 3 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING[2] (*continued*)

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*