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A/CN.4/SR.1721

Summary record of the 1721st 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

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.*

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)[3] (*concluded*)

1. Mr. FLITAN said that, in his view, the text of article 46 was acceptable, but several members of the Commission had rightly drawn attention to the difficulties to which the application of that article and article 45 might give rise. Although he fully supported the appeal for caution made by Mr. Ushakov (1719th meeting), it seemed to him that the difficulties to which attention had been drawn were more of a practical than a theoretical nature. In order to reconcile the interests at stake, account must also be taken of other very important aspects, such as concern to ensure the stability of international legal relations. To that end, he thought that the scope of article 46 must be viewed in the light of article 45 and that the reference to article 46 contained in article 45, paragraph 2, must be comprehensive, in that it must apply both to subparagraph (*a*) and to subparagraph (*b*) of that paragraph. Article 46, paragraph 3, did, of course, refer to a very serious and complicated situation, of which the Special Rapporteur (1720th meeting) had given a significant example. If, in violation of its rules regarding competence to conclude treaties, an international organization concluded an agreement to provide technical assistance to a developing country and the general assembly of that organization approved and made available to the beneficiary country the funds earmarked for that purpose, why insist that that organization should expressly accept the text of the agreement? The deletion in article 45, subparagraph 2 (*b*), of the reference to article 46 would lead to a problem that might be insoluble. On the one hand, the solution would not be the same as for the other serious situations referred to in article 45, paragraph 2, namely, those dealt with in articles 47 *et seq.* and, on the other, the result would be that international organizations would always have to resort to express acceptance in writing, and that might give rise to political or, in any event, practical problems.

2. It was certainly in the interest of the developing countries that international legal relations should be stable. It had rightly been stressed that the interests of international organizations must be safeguarded, but it was just as important to safeguard the interests of their treaty partners. The largest number of international agreements seemed to be concluded by developing countries and it was a fact that those countries were not in as good a position as the industrialized countries to be absolutely certain of the conduct of the international organizations with which they might conclude agreements. Stable international legal relations were thus also in their interest.

3. As to the title of article 46, he would suggest the following wording, which would be more precise than that proposed by the Special Rapporteur (*ibid.*, para. 39): "Provisions of the internal law of a State or of the rules of an international organization regarding competence to conclude treaties".

4. Mr. NI said that the absence of the words "and concerned a rule of its internal law of fundamental importance" in article 46, paragraph 3, could give the impression that, in the case of an international organization, unlike the case of a State, consent could be invalidated without reference to whether or not the rule violated was of fundamental importance. The reasons for that differentiation were not clear. It had been argued that the question of fundamental importance was a highly subjective one; yet the same question arose in paragraph 1 in connection with the violation of the internal law of States. Moreover, the difference in the wording of paragraphs 2 and 4 amounted to begging the question. The argument that, with respect to competence to conclude treaties, there was some kind of normal practice among States, but not among international organizations, was not entirely valid. International organizations had existed for many years and it was difficult to say that there was a complete absence of practice which could serve as a guide for their conduct in their relations with other entities. As had been suggested previously, "normal practice" could also mean a normal standard of conduct in dealings with other entities. Furthermore, paragraph 2 made a requirement of "good faith", which was applicable in all circumstances.

5. With regard to the title of the article, he was inclined to agree both with the suggestion made by the Special Rapporteur (*ibid.*) and with that made by Mr. Flitan. Mr. Flitan's formula was longer, but it had the advantage of being very precise, in that it covered both States and international organizations.

6. Mr. AL-QAYSI recalled that, at the preceding meeting, Mr. Jagota had raised the question of which criterion of a manifest violation applied in the case of a treaty concluded between a State and an international organization when a State invoked lack of competence to conclude treaties. Article 46, which the Commission had discussed at length in 1979, had originally been presented by the Special Rapporteur in the form of a single paragraph and two variants, variant A (paragraphs 2 and 3) and variant B (paragraphs 2, 3 and 4).[4] The Drafting Committee had adopted variant B and, then, in order to take account of the objection that "normal practice" was not an easy concept to define, had reformulated paragraph 4 and defined a violation as manifest not by reference to the normal practice of States, but in relation to the treaty partners of an organization.

7. Paragraph 2 stated that a violation was manifest "if it would be objectively evident to any State ..." and contained no reference to any international organization that raised the possibility of a lacuna in the text. It seemed to him that paragraph 2 could be read in two different ways. It could be said that, when a State invoked a violation, the standard of a manifest violation that should apply was the standard that applied to States and that, when an international organization

[3] For the text, see 1720th meeting, para. 36.

[4] *Yearbook ... 1979*, vol. I, p. 87, 1550th meeting, para. 22.

invoked a violation, as in the example given by Mr. Jagota, the standard of a manifest violation should be the one laid down in paragraph 4. At the same time, it could be argued that, since paragraph 1 mentioned international organizations and paragraph 2 defined a manifest violation within those parameters, the lacuna was more apparent than real. Even if the words "or any international organization" were added to paragraph 2 after the word "State", the standard applicable would still be the standard applicable to States. However, that change would have the advantage of removing the apparent lacuna in the text; difficulties regarding "normal practice" would not exist, since the normal practice referred to in paragraph 2 was the practice of States. Either way it was viewed, paragraph 2 contained an apparent lacuna and he believed the Government of the United Kingdom had alluded to that problem in its comments.[5] Perhaps the problem could be solved by the Drafting Committee.

8. Mr. CALERO RODRIGUES said that, in order to preserve the stability of treaty relations, the Vienna Convention provided that the fact that the consent of a State to be bound by a treaty had been expressed in violation of a provision of its internal law regarding competence to conclude treaties could not be invoked by that State unless the violation was manifest and concerned a rule of its internal law of fundamental importance. Draft article 46, paragraphs 3 and 4, provided for several differences with regard to the case of international organizations. The first difference was that the violation merely had to be manifest and did not necessarily have to concern a rule of fundamental importance. He agreed with the members of the Commission who thought that there was not much justification for that difference of treatment. If the latter requirement existed for States, it should also exist for international organizations.

9. The second difference related to the definition of a manifest violation. In his view, the Commission should follow the wording of the Vienna Convention as closely as possible and apply the same standard to international organizations as to States. Paragraph 4 should therefore be brought into line with paragraph 2 and the words "any State" should simply be replaced by the words "any international organization"; in its present form, paragraph 4 was much more difficult to understand than paragraph 2. If, however the Commission preferred to keep paragraph 4 as it now stood, he would agree with Mr. Quentin-Baxter (1720th meeting) that the word "cognizance", which had a specific technical meaning, should be replaced by the word "knowledge".

10. Mr. USHAKOV said that the reason why article 46, paragraph 1, of the Vienna Convention referred to rules of international law "of fundamental importance" was that one State's legislation might go into details of which another State could not be expected to be aware, although that other State must be aware of such basic provisions as the ones contained in the constitution or legislative texts relating specifically to competence to conclude treaties. Such a differentiation could, however, not be made with regard to international organizations. It would therefore be inappropriate to use the same terminology for States and for international organizations.

11. Mr. REUTER (Special Rapporteur), summing up the debate, said that he would not refer to purely drafting questions and, in particular, those relating to the title, which were matters to be dealt with by the Drafting Committee. In reply to a point that had been raised by Mr. Jagota and referred to by Mr. Al-Qaysi, he said that only a State or an organization which had been the victim of a violation could invoke that violation in the cases provided for in article 46, paragraph 2 of which stated that 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. If the Commission had thus spoken of something that was objectively and generally evident, it was precisely because all States followed a standard practice. In that connection, Mr. Calero-Rodrigues had pointed out that, from the constitutional point of view, that was not entirely true because constitutional rules were not all the same. In his own view, however, reference was not really being made to constitutional rules, but, rather, to practice, by which certain representatives of States had, for the purpose of communications, identical competence under international law. If it was agreed that article 7 of the draft served as a basis for article 46, paragraph 2, the wording of that paragraph was entirely correct and there was no need for it to contain a reference to international organizations. Such a reference would, however, be necessary if it was considered that that paragraph should also refer to constitutional practice in all its complexity. In his opinion, the Commission was not competent to interpret the Vienna Convention, and the slight difference between the English and French texts would not justify an amendment of article 46, paragraph 2.

12. With regard to paragraph 4, it had been pointed out that, basically, there was nothing to prevent the Commission from adopting the same solution for States and for international organizations. In that connection, he recalled that, on first reading, the Commission had found that, although, with few exceptions, there could be said to be an established practice for each organization, there was no general practice common to all international organizations.[6] Article 7 of the draft showed that there were no qualified representatives of international organizations who could be considered, under a general rule of international law, as having the authority to communicate the consent of those organizations. It was thus clear that article 46, paragraph 4, had to be different from the rule enunciated in paragraph 2. It referred not to something that was objectively evident, but rather to something subjective, namely, whether the

[5] *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.14, para. 17.

[6] *Yearbook ... 1979*, vol. II (Part Two), pp. 152-153, para. (4) of the commentary to article 46.

rule was or ought to be known, and it thus introduced an element of responsibility. It might be stated that there was nothing surprising in that since, in the countless theories relating to the circumstances in which a State could invoke the constitutional invalidity of its consent, many writers had pointed out that, even if consent was unconstitutional, a State's responsibility was engaged if it had informed another State that its ratification had been duly deposited by an organ empowered under general international law. The penalty was that that State was bound to execute the treaty even though it was constitutionally invalid.

13. Although paragraph 4 was presented in an entirely different form than paragraph 2, the idea on which it was based was, in the end, not so different. The problem at hand was to decide whether it was agreed that there was no general practice for all international organizations—in which case, article 46 was well-drafted. If it was considered that such a practice did exist or if paragraph 2 was interpreted differently, the question would then be open to further discussion. It must, however, be borne in mind that the lengthy debates on that question had resulted in the wonderfully balanced wording taken from the corresponding article of the Vienna Convention. The objections raised by some members of the Commission did, of course, show that that wording was not perfect; and, as one former member of the Commission had pointed out, the Commission must at all events avoid endless theoretical discussions on monism and dualism. In conclusion, he said he thought that article 46 should be referred to the Drafting Committee, but that its balance should not be upset because, otherwise, it would be necessary to reconsider not only article 7, but also article 47 and perhaps other articles as well.

14. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 46 to the Drafting Committee.

It was so decided.[7]

ARTICLE 47 (Specific restrictions on authority to express or communicate consent to be bound by a treaty)

15. The CHAIRMAN invited the Commission to consider article 47, which read:

Article 47. Specific restrictions on authority to express or communicate consent to be bound by a treaty

1. If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations prior to his expressing such consent.

2. If the authority of a representative to communicate the consent of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent communicated by him unless the restriction was notified to the other negotiating organizations, or to the negotiating States and other negotiating organizations, or to the negotiating States, as the case may be, prior to his communicating such consent.

16. Mr. REUTER (Special Rapporteur) said that article 47 had given rise to very few comments. One Government had, however, suggested that the two paragraphs of that article should be merged. That drafting point was, in fact, related to a substantive problem on which a decision had been taken during the consideration of article 7,[8] in which a distinction was made between the transmission of the consent of a State and the transmission of the consent of an international organization. In the case of a State, the verb "express" had been used, and in that of an organization, the verb "communicate" had been used. That distinction, which had been retained on second reading, made it necessary to divide article 47 into two paragraphs. It had been considered that the verb "express", when applied to consent, indicated that consent was deemed to be given by the person who made it public; it had been stated that that term did not apply to international organizations because the consent of an organization was given by a collective organ composed of Government representatives, and that the person who made consent public was therefore merely communicating consent which derived its legal force from that organ. There were, of course, minor agreements to which the standing executive organ of an international organization or its representative really did express that organization's consent. Those were, however, only minor cases. Thus, although the distinction was not perfect, it would not be appropriate to call it in question now, since it had been approved on second reading during the consideration of article 7.

17. Mr. USHAKOV said that he did not remember how the Commission had come to draft article 47, paragraph 2, in its present form. The starting point for that provision was that no one was empowered to bind an international organization. The organ that was competent to conclude treaties could simply authorize a person to participate in the negotiation and adoption of the text of the treaty, but that organ would always be responsible for deciding whether it intended ultimately to be bound by the treaty. It was from that point of view that paragraph 3 of article 7 had been drafted. Paragraph 4 of that article referred only to the communication of the decision of the competent organ to be bound by the treaty. In that connection, he referred to article 78 of the draft and the corresponding article of the Vienna Convention. He noted that article 47, paragraph 2, of the draft was worded in such a way that it did not refer only to the communication or transmission of the decision of the competent organ. It also provided that, if a "specific restriction" had been placed on the authority of a representative to communicate the consent of an international organization to be bound by a particular treaty, the fact that the representative had failed to observe that restriction could not be invoked as

[7] For consideration of the text proposed by the Dafting Committee, see 1740th meeting, paras. 2 and 49-51.

[8] *Yearbook ... 1975*, vol. II, p. 176, document A/10010/Rev.1, chap. V, sect. B.2, para. (11) of the commentary to article 7.

invalidating "consent". He did not see what restrictions could be placed on communications and how the fact of not communicating a decision on a specific date, for example, could be invoked as invalidating consent, when, in fact, reference was being made only to mere transmission. In the case of the representative of a State who was authorized to bind that State, restrictions on the act that ultimately bound the State were, of course, conceivable, but the situation was different in the case of an international organization, which was bound by a decision taken by its competent organ; that decision was simply communicated by the representative of the organization and, if that representative failed to observe a restriction placed on his authority, that restriction could not be invoked as invalidating consent or, in other words, as conflicting with the decision taken earlier by the organization.

18. Mr. REUTER (Special Rapporteur) said that the use of special wording was the result of the fact that Mr. Ushakov had always been opposed to the idea that a single physical person could express the consent of an international organization. However, the term "communicate", which had been used as a compromise solution, was not synonymous with the term "transmit", in the sense of something done by a messenger who was unaware of the contents of his message, as Mr. Ushakov was now implying. That term was halfway between the term "express" and the term "transmit". It was a somewhat ambiguous term that implied a slight *capitis diminutio* similar to the one involved in the use, in other articles of the draft, of the term "powers" to refer to the representative of an international organization instead of the term "full powers", which applied to the representative of a State. The use of compromise terms could be questioned, but he himself could not agree that no organ of an international organization was ever able to express the consent of the organization.

19. Under article 7 of the draft, the representative of a State could express the consent of that State, whereas the representative of an organization could only communicate such consent. In many cases, however, communication amounted to an expression of consent, because it frequently happened that a single person expressed consent. It was clear from commodity agreements, in particular the Agreement establishing the Common Fund for Commodities,[9] that a physical person would often conclude minor agreements and be requested to express consent. To deny that fact would be tantamount to claiming that no agreement was ever concluded on behalf of an international organization by a physical person unless a collective organ had been seized of the matter. Such an affirmation was not justified by past history and could not apply to the future. That was why he could agree to the word "communicate" only if it covered both expression and transmission. He referred to the case in which a collective organ of an organization adopted the text of a treaty and definitely decided to express its consent to bind the organization and in which such consent had not yet been communicated. The organ requested the secretary-general of the organization to communicate such consent, but only once the State parties to the treaty had themselves consented to the treaty. If the secretary-general failed to observe that restriction and the organization's treaty partners were so notified, the communication of consent was not valid. There was thus no doubt that article 47, paragraph 2, was useful.

20. In conclusion, he said that the Commission could either agree that the term "communicate" applied both to the frequent case of mere communication—for example, when the statute of the organization required deliberation by a collective organ—and to the special case in which an organ composed of a single person expressed consent to bind the organization, or it could decide to reconsider the definitions contained in article 2, as well as the contents of articles 7 and 47.

21. Mr. USHAKOV said that what was in fact at issue was article 7, not article 47. It had always been his interpretation that article 7, paragraph 4, referred only to the communication of consent. The situation was, moreover, the same in the case of States. If the Soviet Union ratified an agreement concluded with Switzerland, the Ambassador of the Soviet Union in Berne was, in accordance with international law, authorized to transmit that act of ratification without having to produce full powers, but any other person making such a communication would have to produce full powers. In the case of a treaty concluded by an international organization and a State, the head of the permanent mission of that State to that organization was also authorized to communicate the act of ratification without producing full powers, whereas any other person in that mission would have to produce full powers. If the Commission intended to state that a person could express the consent of an international organization to be bound by treaty, it must amend article 7 accordingly. Indeed, the term "communicate" had an entirely different meaning. In his view, it was highly unlikely that a person would be authorized to express the consent of an international organization to be bound by a treaty before a decision to that effect had beentaken by a representative organ of that organization. It was, for example, inconceivable that the Security Council or the General Assembly would authorize someone not only to negotiate and adopt the text of a treaty, but also to bind the United Nations, unless a decision had been taken specifically for that purpose by one of those organs. In the case of States, the categories of persons authorized to express such consent without producing full powers were very limited. Agreements to which a person acting as an organ of an international organization would be authorized to express the consent of that organization to be bound were really agreements of minor importance.

22. Mr. JAGOTA said that the questions raised by Mr. Ushakov in connection with the use of the terms "to express" or "to communicate" consent to be bound by a treaty in article 47 had some bearing on articles 7

[9] See 1705th meeting, footnote 5.

and 11 to 15 of the draft. Article 7 defined who was competent to express or communicate such consent, while articles 11 to 15 indicated how consent was to be expressed. The words "communicating the consent" of the international organization had been used in article 7, paragraph 4, but not in articles 11 to 15. If a distinction between the words "express" and "communicate" was maintained in article 47, articles 11 to 15 would ultimately have to be altered.

23. The real question at issue in article 47 was, however, a substantive one and, in that connection, Mr. Ushakov had asked whether specific restrictions on authority to express or communicate consent to be bound by a treaty were to be interpreted in terms of who was competent to express or communicate such consent and how such consent was to be expressed or communicated. In his own view, article 47 must be read in conjunction with article 27, and it must be decided when article 27 would apply and when article 46 would apply. It could then be determined what kind of cases would be covered by article 47.

24. One such case would be that in which the head of the permanent mission of a State was authorized, under article 7, subparagraph 2 (*e*), to sign *ad referendum* a treaty between the accrediting State and an international organization which was to come into force upon signature and forgot to make it clear that he was signing the treaty *ad referendum* only, or, in other words, that a restriction had been placed on his signature. Such a restriction could, of course, also be placed on the authority of a person who was empowered to communicate the consent of an international organization to be bound by a treaty. Failure to observe such a restriction could not, under article 47, later be invoked as invalidating the consent that had been expressed or communicated. Article 47 thus dealt only with specific restrictions on authority to express or communicate consent, not with questions relating to who was competent to express or communicate such consent or how such consent was to be expressed or communicated.

25. Mr. AL-QAYSI suggested that, in order to simplify paragraph 2, the words "to the other negotiating organizations, or to the negotiating States and other negotiating organizations, or to the negotiating States, as the case may be" should be replaced by the words "to the other negotiating States or to the other negotiating organizations, as the case may be".

26. Mr. LACLETA MUÑOZ said that he was entirely in favour of the trend towards simplification that was emerging in the Commission. A distinction between the "expressing" of consent by the representative of a State and the "communicating" of consent by the representative of an international organization had been made in article 7, paragraphs 1 and 4, but not in articles 11 to 15. Such a distinction was, however, unnecessary and, if the words "to express consent" were used both for international organizations and for States, article 47, paragraphs 1 and 2, could be merged.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 47 to the Drafting Committee.

It was so decided.[10]

ARTICLE 48 (Error)

28. The CHAIRMAN invited the Commission to consider article 48, which read:

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; [article 79] then applies.

29. Mr. REUTER (Special Rapporteur) said that article 48 had not given rise to any comments by Governments or international organizations and that he himself had no comment to make.

30. Mr. EVENSEN said that, in article 48, paragraph 3, the words "An error relating only to the wording of the text" probably meant a typing or similar error, not a substantive error. He therefore proposed that paragraph 3 should be amended to read:

> "3. An error in the text of a treaty does not affect its validity; such an error shall be corrected in accordance with the provisions of article 79."

31. Mr. AL-QAYSI said that the point made by Mr. Evensen could be covered in the commentary to article 48.

32. Mr. BALANDA said that, in his view, article 48 was explicit enough and that there was no need to try to improve it.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 48 to the Drafting Committee.

It was so decided.[11]

ARTICLE 49 (Fraud)

34. The CHAIRMAN invited the Commission to consider article 49, which read:

Article 49. Fraud

If a State or an international organization has been induced to conclude a treaty by the fraudulent conduct of another negotiating State or negotiating organization, the State or the organization may invoke the fraud as invalidating its consent to be bound by the treaty.

[10] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 52-53.

[11] *Idem*, paras. 2 and 54.

35. Mr. REUTER (Special Rapporteur) said that no Government or international organization had made any comment on article 49.

36. Mr. AL-QAYSI said that, in his view, article 49 would be clearer if the word "international" were added before the word "organization" in the third line, in keeping with the wording proposed by the Special Rapporteur at the Commission's thirty-first session in 1979.[12]

37. Mr. REUTER (Special Rapporteur) said that the general rule followed throughout the draft articles had been to use the words "international organization" the first time they appeared in a paragraph and then to use the word "organization" only.

38. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 49 to the Drafting Committee.

It was so decided.[13]

ARTICLE 50 (Corruption of a representative of a State or of an international organization)

39. The CHAIRMAN invited the Commission to consider article 50, which read:

Article 50. Corruption of a representative of a State or of an international organization

If the expression by a State or an international organization of consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State or negotiating organization, the State or organization may invoke such corruption as invalidating its consent to be bound by the treaty.

40. Mr. REUTER (Special Rapporteur) said that article 50 had not given rise to any observations either by Governments or by international organizations.

41. Mr. USHAKOV said that, if the Commission decided, in the case of international organizations, to continue to use the words "expression of consent", it should make it clear that consent could be expressed only by a person who had been given full powers for that purpose. Unlike the case of States, whose head of State, head of Government or Minister for Foreign Affairs were authorized to express consent without producing full powers, no such practice existed in the case of international organizations. The Drafting Committee would therefore have to amend article 7, paragraph 4.

42. Mr. AL-QAYSI noted that at the thirty-first session, the Special Rapporteur had said that, in view of the way the problem of terminology had been dealt with in article 7, he had had the choice of dividing article 50 into two parts or of resorting to subtlety of drafting in order to keep that provision as close as possible to the corresponding provision of the Vienna Convention.[14] In the text of article 50 as it now stood, the term "expression" applied both to the consent of international organizations and to that of States, whereas the term "communication" should be used to refer to the consent of international organizations. He therefore suggested that the beginning of article 50 should be amended to read: "If the expression by a State, or the communication by an international organization, of consent to be bound by a treaty ...".

43. Mr. NJENGA said that in his view, the question of the expression or communication by an international organization of consent to be bound by a treaty was not as important as some members of the Commission thought. Indeed, in practical terms, the expression and communication of consent amounted to much the same thing. For example, when the head of the secretariat of an international organization and an ambassador representing his country negotiated an agreement of mutual benefit to that organization and that country, they were both regarded as competent to express or communicate consent to be bound by that agreement. There was thus no need to clutter the draft with a term such as "communication", which was of no practical significance. The Secretariat might, however, provide the Commission with some guidance on the practice of the United Nations and the specialized agencies in that regard.

44. Mr. ROMANOV (Secretary of the Commission) said that the practice of the United Nations was not merely one of communicating consent that had already been expressed. For example, when the United Nations negotiated an agreement for the holding of a seminar in country X, the Legal Counsel expressed the consent of the Organization to be bound by that agreement, but when an agreement was concluded by the United Nations pursuant to Article 43 of the Charter, consent to that agreement was expressed by the Security Council and communicated by the Secretary-General or by the President of the Security Council, as the case might be, to the State or States concerned. The procedures followed by the United Nations could, however, be explained in greater detail by the Office of Legal Affairs at Headquarters. If the Commission so wished, a telegram might be sent to the Office of Legal Affairs requesting it to carry out an inquiry on the matter and to communicate the results of its inquiry as rapidly as possible.

45. Mr. REUTER (Special Rapporteur) drew attention to the fact that, just as there was no difference between the words "full powers" and the word "powers", the Commission having used the former for States and the latter for international organizations, there was no difference between the word "ratification" and the words "formal confirmation", the Commission having used the former for States and the latter for international organizations.

46. The comments by the Secretary of the Commission confirmed what he himself had already stated, namely, that there were cases in which the United Nations Secretariat itself had expressed the consent of the United Nations and cases in which it had merely transmit-

[12] *Yearbook ... 1979*, vol. I, pp. 123-124, 1557th meeting, para. 10.

[13] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 55.

[14] *Yearbook ... 1979*, vol. I, p. 126, 1557th meeting, para. 29.

ted consent that had been expressed by another organ. The entire wording was based on the deliberately ambiguous meaning of the term "communicate" agreed on as a result of a laborious compromise. The question at issue was thus one of semantics and it was therefore unnecessary to request the Secretariat to provide information. That being so, he would obviously not object if the Drafting Committee had another look at article 7, as well as all the other articles in which the words "communicate" and "express" were used to refer to consent. With regard to article 7, however, the task would be far from easy, because a basic disagreement seemed to divide the members of the Commission.

The meeting rose at 6 p.m.

1722nd MEETING

Tuesday, 8 June 1982, at 10.10 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)

[Agenda item 2]

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

ARTICLE 50 (Corruption of a representative of a State or of an international organization)[3] (*concluded*)

1. The CHAIRMAN drew the Commission's attention to the fact that the comments by the United Nations on the draft articles, in particular, on article 2, subparagraphs 1 (*c*) and (*c bis*), provided detailed information on the practice of the United Nations concerning the expression and communication of consent to be bound by a treaty.[4]

2. Mr. BALANDA said he understood from the explanations given by the Special Rapporteur (1721st meeting) that, while recognizing that the fact of consent was identical whether a State or an international organization was concerned, the Commission had wished to designate the mode of expression of consent by two different words, using the word "express" for a State and the word "communicate" for an international organization. The suggestion made by Mr. Al-Qaysi (*ibid.*, para. 42) at the previous meeting that the words "the communication by" should be added before the words "an international organization", was therefore pertinent. But in order to end the controversy that had arisen over a question of terminology, it might perhaps be advisable to simplify the text of article 50 by amending it to read: "If the consent of a State or of an international organization to be bound by a treaty has been procured through the corruption ...".

3. Mr. REUTER (Special Rapporteur) said he thought the Drafting Committee should determine, in the context of article 7, the exact scope of the words "express" and "communicate" and, in the light of its decision on that point, decide to retain unchanged or to amend article 50, and also article 47. Article 50 could therefore be referred to the Drafting Committee, since any further discussion in plenary meeting would be sterile.

4. Mr. USHAKOV said that the danger of corruption of a representative of an international organization by direct or indirect action was hardly conceivable unless the representative was authorized to bind the organization by treaty, by his signature. The word adopted to designate the mode of expression of consent by an international organization was therefore of very great importance. He reminded the Commission that he preferred the word "express", because he considered the word "communicate" to be synonymous with "transmit". The Drafting Committee would therefore have the task of finding an adequate formulation that would make it possible to overcome the difficulties which had arisen in regard to both article 50 and article 47 and which would arise in regard to other articles also.

5. The CHAIRMAN said that if there were no objections he would take it that the Commission agreed to refer article 50 to the Drafting Committee.

It was so decided.[5]

ARTICLE 51 (Coercion of a representative of a State or of an international organization)

6. The CHAIRMAN invited the Commission to consider draft article 51, which read:

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

7. Mr. REUTER (Special Rapporteur) said that no Government or organization had submitted comments on article 51 and he himself had none to make.

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

[2] The draft articles (arts. 1 to 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 1721st meeting, para. 39.

[4] See *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.1, II.

[5] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 55.