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Summary record of the 641st meeting

Topic:
Law of Treaties

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enabling it to enter into treaties. But such cases were mostly a thing of the past, as a result of the attainment of independence of so many countries in Asia and Africa. Remaining cases were few or in process of disappearance. There would consequently appear to be little ground for specific reference to such cases, which would raise controversial issues of a theoretical as well as a political character.

91. The CHAIRMAN proposed that the two texts should be referred to the drafting committee, which would be requested to prepare a new version in the light of the discussion.

It was so agreed.

The meeting rose at 12.45 p.m.

641st MEETING

Friday, 11 May 1962, at 10 a.m.

Chairman: Mr. GROS

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

1. The CHAIRMAN invited the special rapporteur to introduce article 4 of his draft.

ARTICLE 4. AUTHORITY TO NEGOTIATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he had brought together in one article, with some modifications and additions, the provisions discussed by the Commisson at its eleventh session and incorporated in articles 6 and 15 of its 1959 draft.[1] As he explained in the commentary, the question of authority arose not only in connexion with signature but also in connexion with ratification, and for that reason he had decided in favour of a composite article. He had introduced a reference in sub-paragraph 2 (*c*) to the important modern practice under which permanent representatives to international organizations might issue "full-powers".

3. Mr. CASTRÉN said that on the whole he found the article acceptable, but thought it might be amplified to cover not only states but also other subjects of international law possessing capacity to participate in the negotiation of a treaty.

4. It was not necessary to mention ratification in paragraph 2, for ratification was governed by internal constitutional law; only the exchange of instruments of ratification was governed by international law. Indeed, a ratification was revocable so long as it had not yet been notified to the other parties.

5. The order of sub-paragraphs 3 (*a*) and (*b*) should be reversed so as to deal with the more important organs of state first.

6. Mr. TUNKIN asked why the special rapporteur had thought it necessary to include the second sentence in sub-paragraph 2 (*c*). It seemed that the permanent representative to an international organization was considered as issuing full powers.

7. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Castrén's first question, said that chapter II of the draft had been restricted to states advisedly. Considerable drafting difficulties would arise if it were extended to cover other subjects of international law, such as the Holy See. Certain problems of applying such rules to international organizations might require special treatment.

8. Reference to ratification anywhere in the draft should be understood to mean ratification in the international sense as defined in article 1 (*i*).

9. In reply to Mr. Tunkin, he said that he had been unable to learn from the secretariat document, "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7) what was the form of full-powers issued by permanent representatives. Perhaps they were the same kind of instrument as that mentioned in the first sentence of sub-paragraph 2 (*c*), or they might be more in the nature of a letter of authority.

10. Mr. CASTRÉN, while thanking the special rapporteur for his reply, said he still maintained that the article should deal also with other subjects of international law.

11. Mr. CADIEUX said he agreed in general with the draft, on which he wished to offer some comments relating more to form than to substance. It might be inferred from sub-paragraph 3 (*a*), which stated that heads of a diplomatic mission had authority *ex officio* to negotiate but not to sign or ratify a bilateral treaty, if read in conjunction with sub-paragraph 2 (*c*), that a head of mission could give to another person by means of a letter authority to sign or ratify which he did not himself possess. Presumably the special rapporteur had in mind negotiations with an international organization or at an international conference rather than a bilateral agreement negotiated by an ambassador, but the inference gave rise to problems that ought to be faced.

12. It also seemed undesirable to suggest, as did sub-paragraph 3 (*b*), that Heads of State, Heads of Government or Foreign Ministers might need to provide some other kind of evidence of their authority to execute the acts in question. That construction could be avoided by substituting the word "additional" for the word "specific".

13. Finally, since no definition had been given of what was meant by an instrument of full-powers, it might be preferable to use the term "written authorization" instead.

14. Mr. LACHS said that the special rapporteur had been right to cover in article 4 all the possible ways by which a state could become party to a treaty.

[1] *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), pp. 98 and 105.

15. In recognition of the new practice referred to in the "Summary of the Practice of the Secretary-General", whereby the procedure was sometimes simplified so as to consist of the act of signature, acceptance or accession or possibly a combination of the first and one of the two others, the words "or acts" might be inserted before the words "in question" at the end of sub-paragraph 2 (*a*).

16. Some thought should be given to the practice of the exchange of notes by diplomatic representatives without special authority to do so, though the notes had the attributes of a treaty. Such a practice should presumably be subject to the same rules as those governing the conclusion of treaties, but might require a simplified procedure and less rigid treatment. The matter could be extremely important, as in the case of the notes on destroyers and bases exchanged between the United Kingdom and the United States in 1940.

17. Perhaps Mr. Castrén's point would be met if article 4 dealt with states but contained a general clause at the end concerning the applicability of the foregoing rules to other subjects of international law.

18. Mr. ROSENNE said that the special rapporteur's draft very appropriately combined in a single article all the elements involved; he agreed that for the time being the article should relate only to states.

19. His observations would be mainly directed to the drafting committee. It would be clearer if the different processes were more precisely described; for example, the process of evidencing the grant of full-powers was rather telescoped in sub-paragraph 2 (*c*).

20. It might be preferable to refer always to the exchange of instruments of ratification, rather than to ratification, particularly in the provision concerning bilateral treaties for which full-powers were sometimes required.

21. He agreed with Mr. Lachs that some measure of flexibility was needed in the case of the exchanges of notes which, without wishing to generalize too much, he believed mostly took the form of letters exchanged between a foreign minister and senior diplomatic representatives accredited in his country. Perhaps the latter should be placed on the same footing as the former for the purpose of such exchanges of notes.

22. With regard to signature, he pointed out that those concerned with drawing up the texts surely had general responsibility for satisfying themselves, before the texts were presented for signature, that those wishing to sign were authorized to sign.

23. Some reference should be made in the commentary to the language in which an instrument of full-powers was drawn up, because complaints had arisen in the past even when one of the official United Nations languages had been used. As a matter of principle, the language could be that of the state issuing the instrument of full-powers, but when that language was not widely known a translation was sometimes required.

24. Mr. VERDROSS said that the stipulation in sub-paragraph 2 (*b*) that full-powers should be in the form prescribed by the law and practice of the state concerned was dangerous, if it meant that the other state or states could inquire whether the instrument of full-powers fulfilled that condition. If that were not the sense, the stipulation was useless and should be deleted. Furthermore, the stitpulation that full-powers should be in the form prescribed by both the law *and* the practice of the state concerned offered no solution to the case where the practice was not in conformity with the law of the state concerned. That was another reason for deleting it.

25. The distinction drawn in sub-paragraph 3 (*a*) between authority to negotiate and authority to sign or ratify was most important and should be retained. It was entirely consistent with the provisions of the Vienna Convention on Diplomatic Relations, 1961, which authorized diplomats accredited to a state to negotiate and sign a treaty subject to ratification, but not to conclude a treaty definitively unless they held full-powers for the purpose.

26. Mr. de LUNA said he associated himself with the observations by Mr. Lachs concerning sub-paragraph 2 (*a*) and the exchange of notes.

27. Mr. BARTOŠ said he was in agreement with most of the comments made by previous speakers, and his own were more or less of a supplementary and technical character. With respect to sub-paragraph 2 (*b*), he was of the same opinion as Mr. Verdross, that the other negotiating state or states had to accept an instrument of full-powers as a matter of good faith and could not enter into the question whether it complied with the municipal law and practice of the issuing state. On the contrary, the form of such an instrument had to be checked to see that it complied with accepted international form and practice, the traditional wording used in that regard being "found in good and due form".

28. The situation was analogous in regard to the question whether or not such an instrument emanated from the competent authority in municipal law, though admittedly there might be cases where the requirements of prior parliamentary approval or consultation with other internal bodies had not been complied with and the instrument of full-powers had been issued *ultra vires*. A negotiating state was not obliged to examine the legal provisions of other states in that respect. It was sufficient if the full-powers were issued by one of the usual competent authorities — the Head of State, the Head of the Government, or the Minister for Foreign Affairs.

29. The provision in sub-paragraph 3 (*b*) took account of the practice of the General Assembly and the Security Council whereby Heads of State, Heads of Government and Foreign Ministers were not required to produce full-powers. He would have thought that, as a matter of practical convenience, it would suffice if other persons produced, as evidence of authority to negotiate, a letter from the Head of State, Head of Government or Foreign Minister, which would be regarded as equivalent to a valid instrument of full-powers. Such a person would be accepted in good faith by the other state as a duly

authorized plenipotentiary. In that case, the question whether the instrument had been issued by the competent authorities would be regarded as a domestic matter.

30. He believed that the heads of diplomatic missions and permanent representatives to an international organization should be on an equal footing as far as authority to negotiate was concerned.

31. The drafting committee would have to consider whether the authority of heads of diplomatic missions in respect of an exchange of notes could also be exercised by a chargé d'affaires *ad interim*, a point on which the Vienna Convention on Diplomatic Relations was not altogether clear. If it were found that the provisions of that Convention were not entirely satisfactory, some mention of the point would need to be made, at least in the commentary.

32. Mr. LIU, referring to sub-paragraph 2 (*c*), said that in practice a letter from the head of a diplomatic mission or from a permanent representative to an international organization was usually merely informative, stating that the full-powers would be forthcoming. He did not know of any instance in which such a letter had been accepted as full-powers, despite the statement in paragraph 29 of the "Summary of the Practice of the Secretary-General" (ST/LEG/7), cited by the special rapporteur in paragraph 5 of his commentary. The special rapporteur had rightly made it clear that such a letter might be employed only provisionally as a substitute for full-powers; that provision reflected a more general practice than the statement in the Summary that such a letter was accepted as having the same validity as full-powers.

33. Mr. AGO said that he was not entirely convinced that the structure which the special rapporteur had chosen for the article was the best possible one. To concentrate in a single article the question of full-powers in general and that of full-powers used particularly for negotiation was rather confusing. In the 1959 draft there had been a sequence of stages from the negotiation of a treaty to its ratification, and at each stage it had been specified what were the requirements of the powers of the representative of a state. The special rapporteur had now included all those stages in a single article, and at the same time all description of the negotiation of a treaty had disappeared. No doubt the omission would be easy enough to remedy, but it was somewhat strange to start by talking about the adoption of a treaty without mentioning such matters as the negotiation and drafting of the text.

34. In the article as drafted, statements were made first about powers to negotiate, then about powers in connexion with signature; then the text reverted to negotiation — by the heads of diplomatic missions — and lastly spoke of ratification, accession and acceptance. The result was rather confusing. In particular, the use of the term "ratification" might be a source of misunderstanding. It was obvious that the term could not have the same meaning when used in connexion with an ambassador as when used in connexion with a Head of State. The head of a diplomatic mission could never ratify a treaty, but could, at the most, deposit the instrument of ratification. Ratification in the true sense of the term might be performed by Heads of State, but Heads of Government did not have such powers. It would be much better to separate negotiation, signature and ratification, as there was no advantage to be gained by merging quite different matters in a single article.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that confusion would, of course, arise if ratification as a legislative process were put on a par with the execution of the international act of ratification. Legislative ratification was purely a question of domestic law, and was a problem which would have to be faced in the appropriate context.

36. He would have thought that the provisions concerning accession and acceptance could be drafted with reference to the provisions of draft article 4. If the system suggested by Mr. Ago were adopted, those provisions would have to be repeated every time. If an attempt was to be made to simplify the group of articles, a draft article on accession and acceptance might be inserted after the draft article dealing with ratification. In his opinion Mr. Ago's objection would not be well founded if draft article 4 were worded more clearly, and covered the additional points raised by Mr. Lachs. If the drafting committee could do that in a single article, that would save a great deal of trouble later.

37. Mr. ELIAS said that, in considering previous articles, the Commission had taken them paragraph by paragraph, a procedure which saved time and enabled the Commission to obtain a picture of the areas of agreement. If members criticized provisions at random, the discussion might go on indefinitely without members having any clear idea of where agreement lay. He though the Commission should consider the relevant definitions in draft article 1, especially those in sub-paragraphs (*e*), (*i*), (*j*), and (*k*). The Commission had not yet decided whether it accepted those definitions.

38. Draft article 4 as it stood should be generally accepted, since it brought together almost all the points relating to formal negotiation, signature, ratification, accession and acceptance. He had, however, some reservations about sub-paragraph 2 (*c*); the second sentence should be drafted in more explicit language.

39. With regard to the suggested elimination of the implicit reference to constitutional law in sub-paragraph 2 (*b*), the Commission might follow the precedent of its own revision of article 3, in which the reference had been restricted to general international law.

40. The CHAIRMAN said that it was rather difficult to adopt Mr. Elias' suggestion on procedure, as the article covered a number of problems which were not exactly on the same footing, and the special rapporteur's grouping of them either found support or gave rise to objections which related to the article as a whole. It was customary in the Commission, in a first general discussion, to obtain the views of members both on an article as a whole and also on certains points of detail.

41. Mr. TUNKIN said he agreed with the Chairman's remarks about the procedure to be followed. Mr. Elias had rightly observed that it had been the Commission's custom, in principle, to deal with lengthy articles paragraph by paragraph, but in the case in point, especially at that stage of the discussion, such a procedure was hardly necessary.

42. He could not agree with Mr. Ago. The special rapporteur had rightly placed all the provisions regarding authorization to perform acts on behalf of a state in a single article. The provisions on full-powers covered at least negotiation and signature; no principle was involved and, from the point of view of practice, the article was better as it stood.

43. The main objection was to the term "ratify". That term might not be ambiguous in English, but in Russian ratification meant first of all ratification by the Head of State. An easy way out would be to use the term "international act", meaning the deposit or exchange of instruments of ratification.

44. With regard to the question whether full-powers were required for the exchange or deposit of an instrument of ratification, the practice was that only in rare instances did states insist on the possession of full-powers for those purposes; the reason was probably that the exchange or deposit was performed by the official representatives of states, who might not be the heads of diplomatic missions. It might, therefore, be necessary to add a provision requiring the production of full-powers in cases where the act was not performed by the Foreign Minister, the head of a diplomatic mission or a permanent representative.

45. He thought that some misunderstanding must have crept into sub-paragraph 2 (*c*); he had never heard of full-powers being issued by a state's permanent representative to an international organization, or by an ambassador. In practice, full-powers were issued by Heads of State, Heads of Government and Foreign Ministers. The phrase should preferably be deleted.

46. Mr. Lachs had raised some very important points. The article as drafted failed to cover many treaties which came within the definition in draft article 1; one example was that of an unsigned joint declaration by Heads of State or Heads of Governments.

47. Mr. Bartoš' criticism of the phrase in sub-paragraph 2 (*b*), "emanate from the competent authority in that state", had weight. It was the state's own domestic affair to decide which organ was competent to issue full-powers. It was true that authority to negotiate could be presumed, but it was the general practice to recognize, without further inquiry, the competence of the Head of State, Head of Government or Foreign Minister to appoint plenipotentiaries. A reference to that practice might be included for the sake of completeness.

48. Mr. Castrén's question regarding other subjects of international law had already been settled. The Commission had decided to deal first with treaties between states and to leave all other treaties, and specifically treaties between states and international organizations, to a later stage. That had been the decision at the outset of the current session and the Commission should adhere to it.

49. Mr. LIANG, Secretary to the Commission, said it was doubtful whether the special rapporteur's economy of draft article 4 was an improvement on that of the corresponding provisions in the 1959 draft. Paragraph 2 raised more than a question of drafting: it raised the question whether the act of signature was on a level with the acts of ratification, accession or acceptance. Signature was effected by a representative in the name of a state, having been so authorized by the state, whereas ratification, accession, or acceptance were acts of the state itself. It was not possible to assimilate one to the other and apply the same criteria. Mr. Lachs had rightly stated that signature might take place at accession, but accession was an act of a state and signature merely an authorized act by a representative. In practice, only diplomatic representatives did not present full-powers at ratification, accession or acceptance where the act consisted merely of the deposit of the instrument. The Commission should preferably revert to the 1959 economy in order to cover the various legal systems represented.

50. With regard to the question raised by Mr. Liu and Mr. Tunkin whether there were cases of full-powers having been issued by a permanent representative to the United Nations, the special rapporteur, in paragraph 5 of his commentary, had drawn attention to a statement in paragraph 29 of the "Summary of the Practice of the Secretary-General" (ST/LEG/7). The statement was somewhat elliptical, but what was probably meant was that a letter from the head of a diplomatic mission provisionally evidenced the grant of full-powers; that was his own understanding about permanent representatives who wrote to the Secretary-General informing him that a named person had been appointed to attend a conference or to sign an instrument and that the requisite full-powers would be forthcoming. In other words, it was merely a notification that full-powers would be presented in due course.

51. Mr. BRIGGS said he supported the special rapporteur's approach to the subject. Article 4 had a unity of its own: its provisions really dealt with the evidence of the competence of the agent to bind his state.

52. Obviously, that competence was conferred in the first instance by the agent's own state in accordance with its domestic law, but the draft articles were concerned with the evidence that was required, for the purposes of international law, to show the competence of the agent to negotiate, sign, ratify or accept a treaty. That evidence was to be found in the credentials or full-powers of a duly accredited agent.

53. Strictly speaking, the Commission was not dealing with the question of validity, a question which would have to be dealt with in later articles. As far as the evidence of competence was concerned, he proposed the following formulation for article 4, paragraphs 1 and 2:

> "1. Evidence of the competence of an agent to negotiate a treaty on behalf of his state shall be

provided in the form of credentials issued by the competent authority in the state concerned.

"2. (*a*) Evidence of the competence of an agent to sign (whether finally or *ad referendum*), to ratify or to accede to or accept a treaty on behalf of his state shall be provided in the form of full-powers."

54. Paragraph 3 should state that it was for the purpose of international law that the competence envisaged in sub-paragraphs (*a*) and (*b*) was recognized. He accordingly proposed that the opening words of those two sub-paragraphs should be revised to read:

"3. (*a*) For the purposes of international law, the heads of a diplomatic mission are regarded as having competence [authority] *ex officio* to negotiate...

"(*b*) For the purposes of international law, Heads of State, Heads of Government and Foreign Ministers are regarded as having competence [authority] *ex officio* to negotiate and authenticate..."

55. The formulation which he proposed would make it clear that the article dealt not with the source of the competence but with the evidence of that competence.

56. Mr. TSURUOKA pointed out that, until the Commission had fully considered the various stages in the conclusion of a treaty, it could not deal adequately with the question of the evidence of the competence to perform the various operations of negotiation, signature, ratification and accession or acceptance.

57. There might perhaps be some advantage in dealing with the question of full-powers in relation to all the stages, which had some points in common. The element of authorization was present in all of them and the question of the evidence to be produced also arose for all of them.

58. However, for the reasons which he had indicated, he suggested that the Commission should adopt article 4 provisionally and reconsider it at a later stage, when it came to deal with the various stages of the conclusion of a treaty.

59. Mr. PESSOU said that, in article 4 more than in any other provision, the various terms used denoted concepts each of which had its specific legal function. But if several concepts were mentioned together, in order to cover the various stages of a legal operation, the result could well be juridically incongruous.

60. The problem was one of method and he wholeheartedly supported Mr. Ago's plea for a systematic approach to the issues under discussion.

61. Mr. AGO said that, while he was prepared to bow to the will of the majority, none of the arguments put forward had entirely convinced him that the special rapporteur's approach was the best.

62. Article 4 grouped together the four stages of the conclusion of a treaty simply because reference was made in its provisions to the question of full-powers. In fact, the terms "signature", "ratification", "accession" and "acceptance" used in article 4 were explained in articles subsequent to article 4. Of course, the Commission would have avoided many difficulties if it had endeavoured to reach agreement first on the definition of those various terms.

63. He would not, however, object to the provisional adoption of article 4, though the proposal by Mr. Briggs should be accepted in respect of paragraph 1.

64. His consent to the provisional adoption of the article was subject to two observations. First, a decision on the place of the article should be deferred; in his view, it should come after the provisions on the various stages of the conclusion of a treaty.

65. Secondly, while he fully agreed that the reference to ratification concerned ratification in the international sense and not ratification under internal law, he pointed out that article 4 dealt with two different things, one, the powers of the Head of State to ratify the treaty, and the other, the powers of the Minister for Foreign Affairs, or of the head of a diplomatic mission, or of some other authority, to deposit the instrument of ratification, a ratification which in any case emanated from the Head of State. A possible solution would be to eliminate the reference to ratification. The question of full-powers in connexion with ratification could be dealt with in article 11, which covered fully the procedure of ratification and the acts subsequent to ratification.

66. Mr. EL-ERIAN said that he was inclined to agree with the special rapporteur's method of dealing comprehensively in article 4 with the different categories of authorization relating to the exercise of the treaty-making power of the state.

67. He was glad to note that signature *ad referendum*, a question on which the Commission had been unable to agree in 1959,[2] had been dealt with by the special rapporteur in relation to full-powers in sub-paragraph 2 (*a*), and in relation to the legal effects in article 8, paragraph 2. In his commentaries on the two articles, the special rapporteur had supplied much valuable material and thrown fresh light on a difficult question.

68. He agreed with Mr. Tunkin that questions relating to international organizations should be deferred. The Commission had been invited by General Assembly resolution 1289 (XIII) of 5 December 1958 to give further consideration to the question of relations between states and intergovernmental international organizations after other studies had been completed.

69. On the other point raised by Mr. Tunkin, he did not believe that article 4 should deal with the question of full-powers for depositing or exchanging instruments of ratification. The proper place for a provision on that point was article 11, on the procedure of ratification.

70. The CHAIRMAN said that, in the light of the discussion, it would seem appropriate to refer article 4, with the observations made in the discussion, to the drafting committee for the formulation of a provisional

[2] *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 106.

text which the Commission could then discuss afresh. The question of the structure of article 4, which was a technical question, and that of its place in the draft, might also be considered by the drafting committee.

71. Mr. ROSENNE said that, if the drafting committee was to consider the text proposed by Mr. Briggs, he would suggest that, in sub-paragraphs 3 (*a*) and 3 (*b*), the expression "For the purposes of international law" should be replaced by "For the purposes of the present articles". Unless that change were made, the scope of the provision would be far too wide.

72. With reference to the remarks of Mr. Tunkin, he thought that, strictly *de lege lata*, for the purpose of the deposit or exchange of instruments of ratification, the other party or depositor could require the production of full-powers. But that rule should not be perpetuated and he suggested that there was an instance where the Commission might usefully develop the law by recognizing the considerable simplifications which had been introduced by current practice.

73. Mr. BARTOŠ said that, although as regards substance, he did not disagree with the views put forward by Mr. Ago and the Secretary to the Commission, he agreed with the special rapporteur, who had taken into account a practice that had become current in recent years, particularly in the United Kingdom, whereby, at the time of the exchange of instruments of ratification, it was no longer necessary to produce the formal instrument of ratification itself; it was sufficient for the ambassador of the ratifying state to make a notification that ratification had been executed.

74. With reference to the remarks of Mr. El-Erian, he said that the question of signature subject to subsequent production of full-powers was quite distinct from that of signature *ad referendum*. It was quite possible for a representative having full-powers to sign *ad referendum*.

75. There appeared to have been a misunderstanding with regard to the second sentence of sub-paragraph 2 (*c*). That sentence was not meant to say that a state's permanent representative to an international organization could issue full-powers; the permanent representative merely certified that full-powers existed and were awaited. A provision along the lines proposed by the special rapporteur was necessary in order to cover a well-established United Nations practice, which had been brought to the attention of both the Sixth Committee and the Credentials Committee of the General Assembly.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the remarks made during the discussion had not convinced him that he should change the method he had used in drafting article 4.

77. He pointed out that, in the definitions in article 1, a very clear distinction was drawn between, on the one hand, the signature of a treaty, which was an act performed by a duly authorized representative on behalf of his state, and, on the other hand, ratification and accession, which were international acts of the state itself. Article 4 should be read in the light of those definitions.

78. Any confusion that might have arisen from the manner in which the terms "ratify" and "accede" had been used in his draft could be cleared up by the drafting committee.

79. To cover the question of the deposit or exchange of instruments of ratification or accession, he suggested that sub-paragraph 2 (*a*) should be divided into two parts; the first would deal with the authority to sign a treaty and the second with the deposit or exchange of instruments of ratification, accession or acceptance.

80. He drew attention to the saving clause in sub-paragraph 3 (*b*), which recognized that the instruments relating to a treaty were nearly always executed by the Head of State, Head of Government or Foreign Minister. In that respect, the drafting could be improved, because sub-paragraph 3 (*b*) as it stood set forth as an exception what in fact constituted a rule.

81. Furthermore, sub-paragraphs 2 (*b*) and (*c*) could be made into a separate paragraph. Such a drafting change, coupled with the other adjustments he had indicated, might meet some of the objections put forward by Mr. Ago.

82. He supported the Chairman's suggestion that the drafting committee should be asked to prepare a provisional text. Although he had not changed his views as to the place of the article, he would not object to postponement of a decision on the point.

83. Mr. TUNKIN, replying to Mr. Rosenne, said that he did not favour the practice of requiring full-powers for the act of depositing or exchanging instruments of ratification, a practice which was followed by a few states. In the USSR the production of full-powers was not required in such instances, although cases had occurred where the instruments in question had been submitted by a subordinate official of a diplomatic mission and not by the head of the mission itself. As far as the draft articles were concerned, he suggested that full-powers should not be required in that connexion.

84. Mr. LACHS said he supported the special rapporteur's views as to the structure of article 4.

85. It was desirable that authority to negotiate, sign, ratify, accede to or accept a treaty should be dealt with in a single provision, as was done in the draft of article 4. Each of those operations was a separate operation. There were, however, cases where a treaty was not subject to ratification; signature then had the same effect as signature and ratification; there were also cases where accession alone was required. Consequently, the full-powers of the agent concerned should cover not only signature but also ratification or accession.

86. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no intention to introduce into the draft articles the requirement of full-powers for the mere purpose of depositing or exchanging instruments of ratification. There were cases, however, to which attention had been drawn in the "Summary of the Practice of the Secretary-General" (ST/LEG/7), when a representative himself actually executed the ratification. In such cases, full-powers would be needed.

87. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 4, with the observations made during the discussion, to the drafting committee on the terms indicated by the special rapporteur and himself; the drafting committee would formulate a text of a provisional character for the Commission's consideration at a later stage.

It was so agreed.

The meeting rose at 12.45 p.m.

642nd MEETING

Monday, 14 May 1962, at 3 p.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

1. The CHAIRMAN invited the special rapporteur to introduce article 5 of his draft.

ARTICLE 5. ADOPTION OF THE TEXT OF A TREATY

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 5 was the first of the substantive provisions of the draft to raise the question of the distinction between plurilateral treaties and multilateral treaties, as defined in article 1 (*d*). In article 6, paragraph 4, of its 1959 draft, the Commission itself had drawn a distinction between multilateral treaties and "treaties negotiated between a restricted group of states".[1] The somewhat novel term "plurilateral" seemed convenient to describe the latter type of treaties, but it was possible to conceive of a different terminology.

3. Regardless of the terminology used, however, the fundamental question for the Commission was whether such a distinction should be introduced into the draft articles. He considered the distinction justified, because some of the rules did not apply in the same manner to plurilateral and to multilateral treaties.

4. As far as article 5, paragraph 1, was concerned, the distinction applied only to sub-paragraphs (*b*) and (*c*). Under article 6 of the Commission's 1959 draft, adoption of the text of what he called "plurilateral" treaties was by unanimity unless the negotiating states decided otherwise; in the case of multilateral treaties, it was by such voting rule as the conference decided. The Commission would be out of touch with current practice if some form of majority rule were not applied in that respect.

5. Since the distinction did not really apply to sub-paragraphs (*d*) and (*e*), he proposed the addition in each of them, after the opening words "In the case of a multilateral treaty", of the words "or a plurilateral treaty".

6. With regard to article 1 (*d*), he proposed that in the definition of "plurilateral treaty" the phrase "number of parties" should be changed to "group of parties" and the final words "such parties" to "such group", while in the definition of "multilateral treaty", the words "not confined to a particular group" should be added after the words "by a considerable number of parties".

7. It was not an easy matter to define the terms "plurilateral" and "multilateral" since in the case of a large regional organization like the Organization of American States, for example, it might be that for the purposes of the member states a treaty concluded among them was a multilateral treaty, although from the point of view of general international law it would be regarded as a plurilateral treaty.

8. Mr. TABIBI said he questioned the advisability of including references to voting procedure in the article; that matter should be dealt with in the commentary. The authors of the United Nations Charter had, except in a very few instances, wisely refrained from legislating on procedure, and the experience of the United Nations had shown how procedure was apt to change from time to time.

9. He accordingly suggested that paragraph 1 should be redrafted to read simply:

> "The adoption of the text or texts, setting out the provisions of a proposed treaty, takes place, in the case of bilateral, plurilateral and multilateral treaties, by the procedures which the parties may agree."

10. That formulation would also cover the case where the procedure was prescribed in the constitution of an international organization or in a decision of the organ competent to determine the voting rule.

11. He thought that the provisions of paragraphs 2 and 3 concerned the participation of a state in treaty negotiations rather than the adoption of the text; the place for those provisions was elsewhere than in article 5.

12. Mr. LACHS said the special rapporteur had been right to omit from article 5 the contents of article 7 (Elements of the text) of the 1959 draft.

13. He was also glad to note that the special rapporteur had dealt with the important question of the distinction between plurilateral and multilateral treaties. In that distinction, there were both objective and subjective elements. As far as the objective element was concerned, plurilateral treaties purported to deal only with matters of concern to the parties; multilateral treaties purported to lay down general norms of international law or to deal with matters of general concern. From the subjective point of view, plurilateral treaties were open only to a restricted group of participants, whereas multilateral treaties were open to participation by all states, or at any rate by a considerable number of states.

14. Unfortunately, the line of demarcation between the two classes of treaty was hard to draw and a large number of treaties were difficult to classify.

[1] *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No. 59.V.1, Vol. II), p. 98.