

Document:-  
**A/CN.4/SR.666**

**Summary record of the 666th meeting**

Topic:  
**Law of Treaties**

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to the contrary, the treaty could come into force for the accepting state on any date other than that of the instrument of acceptance.

17. Mr. de LUNA said that he would be quite satisfied if article 14 stated that ratification did not operate retroactively. Though the non-retroactivity of ratifications was recognized quite generally and was consistent with the modern conception of the institution of ratification, he was uncertain whether it had acquired the force of a customary rule of international law. Such a clause would therefore constitute a mildly progressive element in the draft.

18. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like to know the Commission's views on the desirability of including a reference to the non-retroactivity of ratifications in article 14.

19. Mr. BRIGGS said he was uncertain whether an express clause to that effect was needed in article 14 itself; he suggested that, instead, the substance of the special rapporteur's original draft article 12, paragraph 4, should appear in the commentary.

20. Mr. ROSENNE supported Mr. Briggs' suggestion.

21. Mr. de LUNA said the course suggested by Mr. Briggs was acceptable to him.

*Mr. Briggs' suggestion was adopted.*

*Article 14 was approved.*

22. Mr. TSURUOKA said that he wished to revert to a point he had raised in connexion with the original article 12,<sup>5</sup> because of the uncertainty that might arise about the date of entry into force when some of the signatures appended were given *ad referendum*. Perhaps there was room for an innovation by stipulating that such signatures would not have retroactive effect.

23. Sir Humphrey WALDOCK, Special Rapporteur, observed that such an innovation would alter the character of *ad referendum* signatures which, with the speed of modern communications, had become more rare. That method of attaching, as it were, a provisional signature because of uncertainty about the precise powers of the signatory or for some other reason, could admittedly give rise to an anomaly, but the practice was that, once confirmed, such a signature took effect from the date when it had been made. It should be borne in mind that signature *ad referendum* was a different thing from signature subject to ratification.

24. Mr. TSURUOKA said that he would not press for any change in the draft to meet his point, but would like at least to see some reference to it in the commentary.

The meeting rose at 10.35 a.m.

## 666th MEETING

Friday, 22 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

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

### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

#### ARTICLE 1. — DEFINITIONS

1. The CHAIRMAN invited the Commission to consider the redrafts of a number of articles which had been referred to the Drafting Committee a second time. Article 1 should be considered paragraph by paragraph; it read:

"1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

"(a) 'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more states or other subjects of international law and governed by international law.

"(b) 'Treaty in simplified form' means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.

"(c) 'General multilateral treaty' means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to states as a whole.

"(d) 'Signature', 'Ratification', 'Accession', 'Acceptance', and 'Approval' mean in each case the act so named whereby a state establishes on the international plane its consent to be bound by a treaty. Signature, however, also means, according to the context, an act whereby a state authenticates the text of a treaty without establishing its consent to be bound.

"(e) 'Full-powers' means a formal instrument issued by the competent authority of a state authorizing a given person to represent the state either for the purpose of carrying out all the acts necessary for concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

"(f) 'Reservation' means a unilateral statement made by a state, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that state.

"(g) 'Depositary' means the state or international organization entrusted with the functions of

<sup>5</sup> 647th meeting, para. 102.

custodian of the text of the treaty and of all instruments relating to the treaty.

"2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any state."

*Paragraph 1 (a)*

2. Mr. PAREDES asked that his abstention on the definition of "treaty" given in paragraph 1 (a) should be recorded.

*Paragraph 1 (a) was adopted.*

*Paragraph 1 (b)*

*Paragraph 1 (b) was adopted.*

*Paragraph 1 (c)*

*Paragraph 1 (c) was adopted.*

*Paragraph 1 (d)*

3. Mr. BRIGGS said that "signature" seemed out of place in sub-paragraph (d) which stated not what "signature", "ratification", "accession", "acceptance" and "approval" constituted but rather the legal effect of those acts.

4. He suggested that the reference to signature should be dropped, or alternatively, that a separate paragraph should be included on the subject of signature.

5. Sir Humphrey WALDOCK, Special Rapporteur, recalled that in his original draft there had been such a separate paragraph on the subject of signature.

6. The Drafting Committee had had similar doubts to those expressed by Mr. Briggs but, on balance, had considered that sub-paragraph (d) would be incomplete without a mention of signature. Moreover, if a separate paragraph were to be included on signature, it would be necessary to enter into far too much detail, because signature was a more complicated matter than the other acts mentioned in sub-paragraph (d).

7. Mr. BRIGGS said he would not press the point.

*Paragraph 1 (d) was adopted.*

*Paragraph 1 (e)*

8. Mr. ROSENNE said that he wished to suggest certain changes to sub-paragraph (e), related to amendments which he intended to propose to article 4: first, to insert after the words "instrument issued by the competent authority of the state", the words "containing the credentials"; and secondly, to add to sub-paragraph (e) the sentence contained in paragraph 6 (a) of article 4, which was pure definition.

9. The CHAIRMAN suggested that a decision on sub-paragraph (e) be deferred until the Commission considered article 4.

*It was so agreed.*

*Paragraph 1 (f)*

*Paragraph 1 (f) was adopted.*

*Paragraph 1 (g)*

*Paragraph 1 (g) was adopted.*

*Paragraph 2*

*Paragraph 2 was adopted.*

ARTICLE 2. — SCOPE OF THE PRESENT ARTICLES

10. The CHAIRMAN said that the Drafting Committee proposed the following redraft of article 2:

"1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (a).

"2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law."

11. Mr. ROSENNE suggested that, in paragraph 1, the concluding words "article 1, paragraph 1 (a)" should be amended to read "article 1, paragraphs 1 (a) and 1 (b); the intention of the Commission had been to cover treaties in simplified form, which were defined in paragraph 1 (b).

12. Sir Humphrey WALDOCK, Special Rapporteur, said that, in that case, a reference to paragraph 1 (c) of article 1 would also have to be added, because general multilateral treaties were also covered by the draft articles.

13. Mr. ROSENNE said that perhaps a reference simply to article 1 might suffice.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that his own preference was for the retention of the reference to paragraph 1 (a), because the definition in that provision had been introduced for the express purpose of defining the scope of the draft articles.

15. Mr. ROSENNE said he would not press the point.

*Article 2 was adopted.*

ARTICLE 3. — CAPACITY TO CONCLUDE TREATIES

16. The CHAIRMAN said that the Drafting Committee proposed the following redraft of article 3:

"1. Capacity to conclude treaties under international law is possessed by states and by other subjects of international law.

"2. Capacity to conclude treaties may be limited by the provisions of a treaty relating to that capacity.

"3. In a federal state, the capacity of the federal state and its component states to conclude treaties depends on the federal constitution.

"4. In the case of international organizations capacity to conclude treaties depends on the constitution of the organization concerned."

17. Mr. BRIGGS proposed that paragraphs 2, 3 and 4 should be deleted.

18. Paragraph 3 was based on a misconception. A state with a federal form of government was a sovereign state and as such had treaty-making capacity under international law, as stated in paragraph 1.

19. Paragraph 3 was also inaccurate because it seemed to suggest that the capacity of the United States of America, for example, to conclude treaties depended on the Constitution of the United States, whereas it was based on international law; it also seemed to state that the capacity of, say, Texas to conclude treaties depended not on international law but on the Constitution of the

United States. It was therefore preferable to delete paragraph 3 altogether rather than leave in the draft articles the inaccurate statements it contained.

20. Paragraph 4 was open to the same criticism. The term "international organization" was unduly vague and seemed to suggest that even a private international organization which was not an inter-governmental organization might have the capacity to conclude treaties. If a paragraph on the treaty-making capacity of international organizations was to be included at all, he preferred the original text proposed by the special rapporteur which set out the relevant rules of international law in more precise detail.

21. Mr. CASTRÉN said that paragraph 1 was drafted in excessively general terms; not all states and "other subjects of international law" possessed the capacity to conclude treaties. However, he was not proposing any amendment to the paragraph and would be satisfied with an explanation in the commentary.

22. Mr. VERDROSS proposed that, in paragraph 3, the words "the federal state and" should be deleted and that the expression "component states" should be replaced by some such expression as "member states of a federal state". Only the member states of such a federal state were subject to any limitations in respect of treaty-making; the federal state itself was a sovereign state and as such possessed the full capacity to conclude treaties under international law, as stated in paragraph 1.

23. Mr. TUNKIN said he supported the amendments proposed by Mr. Verdross. With regard to states members of a federal state, the presumption should be that, unless they were placed under a restriction by the federal constitution, international law did not put any obstacles in the way of their concluding treaties.

24. He also supported the proposal by Mr. Briggs for deleting paragraph 4. It would not be accurate to suggest that the treaty-making capacity of an international organization depended solely on the constitution of the organization. A statement to that effect could be taken to mean that, if a small number of states set up an international organization and gave it treaty-making capacity by the constituent instrument, all other states would have to consider treaties signed by that organization as international treaties. While such a statement would be true for states members of the organization, other states would not be so bound; in fact, other states might even consider that the international organization in question was contrary to international law.

25. An additional reason for deleting paragraph 4 was that the Commission did not intend to deal in the draft articles with treaties concluded by international organizations.

26. Mr. EL-ERIAN supported the proposal by Mr. Briggs for deleting paragraph 2. If that paragraph were to be retained at all, it should at least be qualified in the same manner as article 3 of the Harvard Draft, which stated: "The capacity to enter into treaties is possessed by all states, but the capacity of states to enter into certain treaties may be limited."

27. He also supported the proposal by Mr. Briggs for the deletion of paragraph 4; he fully agreed with the reasons given both by Mr. Briggs and Mr. Tunkin in support of that proposal. It was true that, in the draft articles, the Commission would occasionally have to deal with certain problems relating to international organizations. The draft articles as a whole, however, were intended to deal essentially with treaties concluded by states. Paragraph 4 therefore, besides being inadequate, because if any attempt was to be made to deal with international organizations the provisions would have to be much more elaborate, was also unnecessary.

28. Mr. BARTOŠ said he found the provisions of paragraph 1 satisfactory; they stated the general rule; the exceptions were set out in the following paragraphs.

29. Paragraph 2 should be retained, but an explanation should be added in the commentary dealing with the points raised in the course of the discussion.

30. With regard to paragraph 3, he supported the proposal by Mr. Verdross that the reference to the federal state itself should be deleted; a federal state was a sovereign state and its treaty-making capacity depended on international law and not on its constitution. It was the capacity of the component or member states of a federal state which could be limited by the federal constitution.

31. With regard to paragraph 4, he thought like Mr. Tunkin that its provisions might be construed as suggesting that the constitution of an organization could have an effect *erga omnes*. Personally, he would be prepared to accept paragraph 4 provided it was made clear in the commentary that the constitution of an international organization would only have effect as between the parties that had accepted that constitution and not *erga omnes*. More and more international organizations were coming into being, some of them very limited in scope; some of those organizations were strongly disliked by certain states, which went so far as to deny their very existence.

32. It was not advisable to make a general pronouncement which would give the impression that all states were obliged to recognize in advance that any and every international organization had treaty-making capacity. Moreover, account should be taken of the fact that it was a general rule of international law that treaty-making capacity was limited to the extent necessary to enable the organization in question to perform its duties.

33. Mr. AGO said he was prepared to accept the proposal for deleting paragraph 4, if that was the Commission's wish. International organizations possessed the capacity to conclude treaties by virtue of paragraph 1, which stated that that capacity was "possessed—by states and other subjects of international law"; those "other subjects" included international organizations.

34. He supported the proposal by Mr. Verdross that the reference to the Federal state could be omitted from paragraph 3, so that the paragraph would refer only to the member states of a federal state.

35. Sir Humphrey WALDOCK, Special Rapporteur, referring to the remarks of Mr. El-Erian on paragraph 2,

pointed out that the words "relating to that capacity" which qualified the term "treaty", had been introduced precisely for the purpose of limiting the effects of paragraph 2 to a certain type of treaty. The reference was to a treaty which, for example, placed treaty-making under the control of an organ common to several states. The intention had been to exclude limitations derived from other treaties, limitations which would give rise to questions of state responsibility or to questions of the validity of a treaty, but not to questions of treaty-making capacity.

36. He accepted the proposal of Mr. Verdross that in paragraph 3 the reference to the federal state should be deleted and that the paragraph should speak only of the component or member states of a federal state.

37. With regard to the capacity of component states of a federal state, the point raised by Mr. Tunkin was a difficult one. If it were suggested, as a rule of general international law, that such a component state had treaty-making capacity unless the federal constitution stated otherwise, a very delicate situation would arise. Very few federal constitutions contained express provisions on that point: the absence of treaty-making capacity on the part of the component states was deduced from the general structure of the federal union.

38. With regard to the proposal for deleting paragraph 4, he thought the paragraph had its usefulness because it dealt with the limitations imposed upon the treaty-making capacity of an international organization by its constitution. The treaty-making capacity of an organization was nearly always limited to its object and purpose; the organization was not entitled to enter into any kind of treaty.

39. The expression "the constitution of the organization concerned" had been chosen because it was broader than "constituent instrument"; it covered also the rules in force in the organization. In most organizations, the treaty-making capacity had been limited by the practice instituted by those who had operated the organization under its constitution.

40. It would be possible to omit paragraph 4, but in that case it would be necessary to explain in the commentary that the Commission intended to deal separately on some future occasion with treaties concluded by international organizations. He still felt, however, that article 3 was the right context for the provisions of paragraph 4, because the article dealt with the capacity to conclude treaties in general and not only with the capacity of states to conclude treaties.

41. He was opposed to Mr. Briggs' proposal for the deletion of paragraphs 2, 3 and 4.

42. If article 3 were to consist only of paragraph 1, it would be preferable to delete the article altogether and to rely on the definition contained in article 1, paragraph 1 (a), which already spoke of "subjects of international law".

43. He would be prepared, however, to delete paragraph 4 on the condition he had already stated, and to introduce drafting changes in paragraphs 2 and 3 to meet the points raised in the course of the discussion.

44. Mr. TUNKIN said that paragraph 2 might be interpreted to mean that treaties limiting a state's capacity might be concluded without due consideration for the principles of international law. In his opinion, any limitation of capacity to conclude treaties should be compatible with international law; treaties which were sometimes imposed on weak states by various means practically constituted violations of international law.

45. He did not feel very strongly about either the retention or the deletion of paragraph 4.

46. Mr. VERDROSS pointed out that the limiting treaties referred to in paragraph 2 were presumed to be valid; the provision could in no case be held to refer to treaties imposed on states in violation of Article 2 (4) of the United Nations Charter.

47. With regard to paragraph 3, there was no distinction in international law between the various types of states which might compose a federal state. His amendment would cover all cases, from those where the states were merely internal territorial divisions to those where they had a very high degree of autonomy, as, for example, in the case of the Ukrainian and Byelorussian Soviet Socialist Republics, which were members of the United Nations.

48. Mr. YASSEEN said that an article on capacity to conclude treaties should be included in the draft convention, but he had considerable doubts concerning the advisability of retaining paragraph 4. Although the substance of the paragraph was unexceptionable, the provision seemed to be out of place in a set of articles dealing with treaty law in inter-state relations.

49. Paragraph 3 reflected a reality of international life, but he agreed with Mr. Verdross that reference should be made only to the component states; federal states, like all other states, possessed the capacity to conclude treaties by virtue of international law, and not by virtue of their constitutions.

50. Paragraph 2 presented a technical difficulty, since a limitation of capacity could not be regarded as producing incapacity; a treaty entered into by a state whose capacity was limited was not void or even voidable, though it might conflict with the limiting treaty and as such engage the state's international responsibility.

51. Mr. de LUNA said he was in favour of retaining paragraphs 2, 3 and 4 and supported Mr. Verdross's amendment to paragraph 3.

52. He thought that Mr. Briggs' objection to paragraph 4 might be met if the term "international organization" were defined in article 1. Such a definition seemed to be justified by the fact that the term was used several times in the draft articles.

53. Mr. AMADO observed that, although many speakers had criticized the article, no specific proposals had been made, except to delete certain paragraphs, especially paragraph 4.

54. He did not think that Mr. de Luna's suggestion was feasible, since the status of international organizations had not yet been defined in international law.

Moreover, it was hardly possible to ask the special rapporteur to try to prepare such a difficult definition at that late date.

55. With regard to paragraph 3, he considered that the test of the capacity of a component state of a federal state was its sovereignty.

56. He thought that the Commission should approve the article as drafted.

57. Sir Humphrey WALDOCK, Special Rapporteur, said he would like further guidance from the Commission in connexion with paragraph 2. If the majority were not enthusiastic about retaining it, he would suggest that the commission keep paragraph 1, add to it some mention of the problem of federal states, and delete the rest of the article.

58. It could be explained in the commentary that the expression "other subjects of international law" included international organizations.

59. Paragraph 2 had been included because some members had wished to cover treaties of a constitutional type, such as those concerning a customs union or a common market, which involved a state's surrender of part of its sovereignty to the common activities of a group of states. In his opinion, however, the paragraph added nothing to general knowledge and did not improve the draft.

60. Mr. TSURUOKA said that, since the article was descriptive, there was no question of introducing any innovations into it. The point of issue seemed to be whether the article should be kept as it was or limited to paragraph 1, with a detailed commentary. He had no strong feelings either way.

61. Mr. AGO said he agreed that paragraph 4, though useful, was not essential, since international organizations were already covered in paragraph 1.

62. With regard to paragraph 2, he agreed with Mr. Tunkin that all treaties had to be compatible with general international law. The question of limitations had been discussed at length, and it had emerged from the debate that in most cases treaties in fact created special obligations to refrain from concluding certain treaties rather than limitations of capacity properly so called. There were, however, cases where unions of states or special relations between states were constituted by a treaty, and the treaty-making capacity of the parties was actually limited. The article would be incomplete without some mention of those treaties and he was therefore in favour of retaining paragraph 2.

63. Mr. ROSENNE suggested that the whole article should be deleted. Paragraph 1 stated the obvious, and could not be regarded either as codification or as progressive development of international law; paragraphs 2 and 4 related basically to validity and interpretation of other treaties; while paragraph 3 was really concerned with the interpretation of national constitutions. Capacity in international law had quite a different function from capacity in the municipal law of contract. It would be enough to include some reference to capacity in the commentary to article 1, paragraph 1 (a).

64. The CHAIRMAN noted that the majority of the Commission seemed to be in favour of paragraph 1 and of Mr. Verdross's amendment to paragraph 3. On the other hand, Mr. Briggs' proposal for the deletion of paragraphs 2, 3 and 4 and Mr. Rosenne's suggestion that the whole article should be deleted had not been supported. He put to the vote the proposal for the deletion of paragraph 4.

*The proposal was rejected by 8 votes to 8, with 2 abstentions.*

65. The CHAIRMAN put to the vote the proposal for the deletion of paragraph 2.

*The proposal was adopted by 9 votes to 8, with 2 abstentions.*

*Paragraph 1 was adopted by 18 votes to none, with 1 abstention.*

*Paragraph 3, as amended by Mr. Verdross, was adopted by 9 votes to 7, with 3 abstentions.*

*Paragraph 4 was adopted by 9 votes to 8 with 2 abstentions.*

*Article 3 as a whole, as amended, was adopted by 12 votes to 1, with 5 abstentions.*

66. Mr. AGO said he could not regard the procedure of deleting or retaining clauses of the draft by one or two votes as satisfactory.

ARTICLE 4.—AUTHORITY TO NEGOTIATE, DRAW UP, AUTHENTICATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

67. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 4:

"1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate, or sign a treaty on behalf of their state.

"2. (a) Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their state and the state to which they are accredited.

"(b) The same rule applies in the case of the head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question.

"3. Any other representative of a state shall be required to furnish evidence in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his state.

"4. (a) Subject to the provisions of paragraph 1 above, a representative of a state shall be required to furnish evidence of his authority to sign (whether in full or *ad referendum*) a treaty on behalf of his state by producing an instrument of full-powers.

"(b) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full-powers, unless called for by the other negotiating state.

"5. In the event of an instrument of ratification, accession or acceptance being signed by a representative of the state other than the Head of State, Head of Government or Foreign Minister, he shall be required to furnish evidence of his authority.

"6.(a) The instrument of full-powers, where required, may either be one restricted to the performance of the particular act in question or a general grant of full-powers which covers the performance of that act.

"(b) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the state concerned or by the head of its diplomatic mission in the country where the treaty is negotiated shall be provisionally accepted, subject to the production in due course of an instrument of full-powers, executed in proper form.

"(c) The same rule applies to a letter or telegram sent by the head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2(b)."

68. Mr. BRIGGS asked whether, under paragraph 2(b), the head of a permanent mission to an international organization who was attending an international conference at which a multilateral treaty was drawn up would not be required to furnish evidence of his authority.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had not envisaged the cases to which Mr. Briggs had referred. A strict reading of paragraph 2(b) would indeed exempt heads of permanent missions from presenting their credentials at a conference such as the Geneva Conference on the Law of the Sea or the Vienna Conference on Diplomatic Relations.

70. Mr. BARTOŠ said he reserved his position on paragraph 4(b), which, while imposing binding obligations on states, exempted representatives from producing full-powers in the circumstances contemplated. In his opinion the general rule of international law whereby the representatives of states should always be furnished with full-powers was justified by the need to prevent abuse or reckless conduct by representatives not subject to any restriction in undertaking obligations on behalf of their states without the knowledge of the responsible bodies and without prior thorough examination and mature appraisal by the authorities competent to accept such obligations. He emphasized once again that it was not the form of the treaty, even though the treaty might be in simplified form, but the substance of the treaty which was the deciding factor in determining what body was competent to accept or to grant authority to accept an obligation arising out of the treaty.

71. Nor could he support paragraph 6(a), which was neither practical nor in conformity with present-day international law. He referred to the considerations which had been expressed during the general discussion against the *procura* as a general authority to perform acts in international law.

72. Mr. ROSENNE suggested, first, that the word "approve" should be included in the title of the article, and the word "approval" in paragraph 5.

73. He suggested secondly, that the words "or between their state and the organization to which they are accredited" should be added at the end of paragraph 2(b), in order to reflect the Commission's wish to place heads of a permanent mission to an international organization on an equal footing with heads of a diplomatic mission.

74. Thirdly, he reserved his position on paragraph 4(b), for the reasons he had given when the Drafting Committee's first redraft of the article had been discussed.<sup>1</sup>

75. Fourthly, he suggested that the words "that representative" should be substituted for the word "he" in paragraph 5.

76. Fifthly, he suggested that the term "written credentials" in paragraph 3 should be replaced by the term "instrument of full-powers"; however, he would not object strongly to the retention of the existing text, if a reference to credentials appeared in the definition of full-powers in article 1.

77. Finally, he considered that the right context for the provisions of paragraph 6(a) was article 1.

78. Mr. TUNKIN said that paragraph 2(b) went beyond existing practice: permanent representatives to international organizations could not negotiate or take part in any other stages in the conclusion of a treaty drawn up under the auspices of an international organization without full-powers. The point had not in fact been discussed by the Drafting Committee.

79. Mr. de LUNA said he agreed that the scope of paragraph 2(b) should be restricted in the way suggested by Mr. Rosenne.

80. He thought the reference to "a general grant" of full-powers in paragraph 6(a) might be open to misunderstanding.

81. Mr. AMADO considered that paragraph 2(b) should be deleted.

82. He supported the amendment suggested by Mr. Rosenne to paragraph 3.

83. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2(b) had been inserted at the express wish of the Commission.<sup>2</sup> In modern times, heads of permanent missions to international organizations possessed certain treaty-making functions analagous to those exercised by heads of diplomatic missions. He agreed, however, that the provision should be limited in the way proposed by Mr. Rosenne. That course was preferable to deleting paragraph 2(b) altogether, for if the provision were dropped states would not have an opportunity of commenting on it.

84. Mr. TUNKIN considered that paragraph 2(b) could only be retained if its scope were limited to treaties

<sup>1</sup> 659th meeting, para. 2.

<sup>2</sup> *ibid.*, paras. 35 and 36.

drawn up between the state represented by the head of the permanent mission and the organization to which he was accredited. It would be at variance with practice to go further and imply that heads of such missions could negotiate, draw up or sign any treaty without full-powers.

*Paragraph 2 (b) as amended by Mr. Rosenne was adopted.*

85. Mr. LACHS said that the Drafting Committee had borne in mind Mr. Bartoš' earlier observations concerning full-powers. If paragraph 6 (a) as drafted still did not give him satisfaction, perhaps the word "general" might be deleted.

86. Mr. BARTOŠ and Mr. de LUNA said that they would be satisfied with that deletion.

*It was agreed that the word "general" in paragraph 6 (a) should be deleted.*

*Article 4 as thus amended was adopted.*

ARTICLE 4 bis. — NEGOTIATION AND DRAWING UP OF A TREATY

87. The CHAIRMAN said that the Drafting Committee proposed the following redraft of article 4 bis :

"A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself."

88. Mr. CASTRÉN said that at an earlier meeting a similar provision had not gained the support of the majority but the Commission had decided to retain it provisionally pending revision by the Drafting Committee.<sup>3</sup> Even those who had favoured such an article had not been altogether satisfied with the wording. The new redraft seemed almost the same and he proposed that it be deleted.

89. Sir Humphrey WALDOCK, Special Rapporteur, acknowledged that article 4 bis was not indispensable. It had been put forward in response to Mr. Ago's plea that it was logically necessary as an introduction to the subsequent articles. No such article had been included in his original draft.

90. Mr. AMADO said that, although Mr. Ago usually had very persuasive reasons to back up his proposals, in the particular instance it was impossible to agree that such an article was really needed. He felt bound to oppose it.

91. Mr. GROS said that, in Mr. Ago's temporary absence, he wished to point out that without article 4 bis, article 5 (which dealt with the different ways of adopting a text) would be incomprehensible. In other words, article 4 bis served as an explanatory introduction to what followed.

92. Sir Humphrey WALDOCK, Special Rapporteur, thought that perhaps article 4 bis might be transferred to form the first paragraph of article 5.

93. The CHAIRMAN put to the vote Mr. Castrén's proposal for the deletion of article 4 bis.

*The proposal was rejected by 8 votes to 4, with 5 abstentions.*

94. Mr. AMADO said that, in view of Mr. Gros' explanation of the relationship between article 4 bis and article 5, instead of opposing the article, he had abstained from voting.

95. The CHAIRMAN proposed that article 4 bis should be retained as a separate article.

*The proposal was adopted by 8 votes to 4, with 5 abstentions.*

*Article 4 bis was adopted.*

ARTICLE 5. — ADOPTION OF THE TEXT OF A TREATY

96. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 5.

"The adoption of the text of a treaty takes place :

"(a) in the case of a treaty drawn up at an international conference convened by the states concerned or by an international organization, by the vote of two-thirds of the states participating in the conference, unless by the same majority they shall decide to adopt another voting rule ;

"(b) in the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question ;

"(c) in other cases, by the mutual agreement of the states participating in the negotiations."

97. Mr. CASTRÉN, observing that only the substance of paragraph 1 of the special rapporteur's original article 5 had been retained and that paragraph 3 had been transferred to article 19 bis, asked what was the intention in regard to paragraph 2 of the original text.

98. Sir Humphrey WALDOCK, Special Rapporteur, explained that the Drafting Committee had decided to deal with obligations after the adoption of the text in article 19 bis and had concluded that paragraph 2, which had originally been expressed in negative form, could be dropped as unnecessary, given the new structure of article 5.

99. Mr. CASTRÉN said that he was satisfied with that explanation.

*Article 5 was adopted.*

ARTICLE 6. — AUTHENTICATION OF THE TEXT

100. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 6 :

"1. Unless another procedure has been prescribed in the text or otherwise agreed upon by states participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways :

<sup>3</sup> 659th meeting, paras. 46 to 63.

“(a) initialling of the text by the representatives of the states concerned ;

“(b) incorporation of the text in the Final Act of the Conference in which it was adopted ;

“(c) incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

“2. In addition, signature of the text, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 of this article.

“3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.”

101. Mr. TSURUOKA, with regard to the opening phrase of paragraph 1, suggested that in the commentary mention should be made of cases where a procedure not listed in the article had been prescribed in the text of a treaty.

102. Sir Humphrey WALDOCK, Special Rapporteur, said that he was aware that Mr. Tsuruoka believed that there had been no such cases. The Drafting Committee had nevertheless inserted the proviso as a precaution since some other procedure was at least conceivable ; for example, in the case of treaties concluded within an international organization, the text might be authenticated by the signature of the president of the conference.

103. Mr. ROSENNE said that, unless he was mistaken, the convention setting up the International Civil Aviation Organization had required the depositary to prepare the text in one of the languages.

104. Mr. TSURUOKA said that, in view of the Special Rapporteur's explanation, he would not press his point.

*Article 6 was adopted.*

#### ARTICLE 7. — PARTICIPATION IN A TREATY

105. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 7 :

“1. Every state may become a party to a treaty which participated in the adoption of the text or to which the treaty is expressly made open by its terms.

“2. Unless a contrary intention is expressed in the treaty or otherwise appears from the circumstances of the negotiations, a treaty is open to the participation of any state which, though it did not take part in the adoption of the text, was invited to attend the conference at which the treaty was drawn up.”

106. Mr. LACHS said he reserved his position in regard to article 7, which as drafted conflicted with the view he had upheld both in the Commission<sup>4</sup> and in the Drafting Committee.

107. Mr. TUNKIN said that article 7 was absolutely unacceptable and wholly at variance with the fundamental principles of modern international law, for it was based on the premise that every treaty was closed unless it contained a provision to the contrary. According to present-day international law, certain treaties by their very nature could not be closed to participation by other states. The article should therefore lay down the rule that treaties dealing with matters of legitimate interest to all states should be open to participation by all states. In that way, the principle of the equality of states would be safeguarded and no state or group of states would be able to exclude any other state or group of states from negotiating and participating in a treaty dealing with matters of common concern.

108. Mr. YASSEEN said that, as he had contended on a previous occasion,<sup>5</sup> general multilateral treaties, and more particularly those dealing with matters of common concern or designed to codify rules of international law, could not be regarded as closed to any state whatsoever. He therefore reserved his position on article 7.

109. Mr. de LUNA pointed out that article 7 did not purport to put forward any rule as to the open or closed character of treaties : the participation of states in a treaty depended on the nature of the instrument. In his opinion, in the case of general multilateral treaties the residuary rule should be reversed ; such treaties should be open to general participation.

110. Sir Humphrey WALDOCK, Special Rapporteur, explained that article 7 should be read in conjunction with article 7 *bis* which dealt with the procedure for participation in terms giving the parties some say in the matter. He emphatically denied that article 7 had been inspired by a desire to close treaties to a limited circle of states. Article 7 *bis* in fact contemplated wide participation.

111. Mr. BARTOŠ proposed that a paragraph be added to article 7 stating as the residuary rule for general multilateral treaties that they were open to participation by states generally.

112. Mr. TUNKIN said that he was unable to accept the special rapporteur's argument, since article 7 *bis* did nothing to alter the rule implicit in article 7.

113. Sir Humphrey WALDOCK, Special Rapporteur, said that although article 7 *bis* did not change article 7, it did provide for wide participation. As he had explained earlier, practice showed that whereas states wished treaties to be open to wide participation, usually they stipulated that the decision on admission to general treaties should lie with, for example, the General Assembly. In the face of that fact he felt unable to agree with the proposition that a natural right of participation existed, regardless of the opinion of the states which had drafted the treaty and brought it into being.

114. Mr. TUNKIN proposed the addition of a new paragraph to article 7 to the effect that general multilateral treaties, as defined in article 1, should be open to the participation of all states.

<sup>4</sup> 660th meeting, paras. 61-63, 74, 82-84, 88.

<sup>5</sup> *ibid.*, para. 75.

115. Mr. LACHS said that he was concerned with the relationship between the rule and the exception. The Commission should defend the principle of universality, that whenever a treaty was silent on the subject of participation, the presumption should be in favour of universality. If the states concerned wished to exclude others from participating, an express provision to that effect would be necessary to defeat the presumption.

116. Mr. GROS said that Mr. Lachs' argument was not logically watertight. The definition of a general multilateral treaty contained in article 1 was designed solely "for the purposes of the present articles". The Drafting Committee had not sought to work out a theoretical definition. That being so, the distinction between an international general multilateral treaty and what he would call an ordinary multilateral treaty could not be introduced into article 7. Many multilateral treaties dealt with general rules of international law or matters of common concern but were concluded between, say, ten, fifteen or twenty states, such as fisheries conventions.

117. The system put forward in article 7 was an equitable one.

118. Mr. TSURUOKA said that the principle of the equality of states should be applied throughout the draft and he supported article 7 which should help to attenuate departures from that principle. If a provision were added to the effect that general multilateral treaties were open to the participation of all states, then a consequential provision would be needed in the articles on reservations prohibiting reservations to such treaties.

119. Mr. EL-ERIAN said that he had considerable doubts about article 7 and associated himself with those who had defended the principle of universality. Unless a provision were inserted to the effect that, as a residuary rule, treaties containing general rules of international law and on matters of common concern were open to participation by all states, he would have to reserve his position.

120. Mr. ELIAS proposed that a new paragraph 1 be inserted at the beginning of article 7 stating that general multilateral treaties were open to the participation of all sovereign states. The existing paragraph 1 would then have to be modified so as to be made applicable to other types of treaties.

121. Mr. VERDROSS agreed with Mr. de Luna that international treaties enunciating universal rules of law should be open to all states and that a provision to that effect should be added to article 7. It would be contradictory to devise universal rules of law and then to exclude states from participating in the relevant instrument.

122. Mr. AMADO, supporting article 7, said it was incontrovertible that states had special interests and that some multilateral treaties were not of general concern. However, he favoured Mr. de Luna's proposal, which was consistent with the modern trend of opening general law-making treaties to all states.

123. Sir Humphrey WALDOCK, Special Rapporteur, said that, while sympathizing with some of the views

expressed, he considered that the Commission should be guided by practice. No treaty of more general concern could be cited than the Vienna Convention on Diplomatic Relations, which was also the most recent example of a codifying treaty; yet the negotiating states had not included a provision making it open to all. The kind of rule proposed by Mr. Tunkin and those who supported his view would run directly counter to practice.

124. Mr. TUNKIN said that the special rapporteur's defence of article 7, on the ground that it reflected current practice, was untenable. The restrictions embodied in the Vienna Convention on Diplomatic Relations and the Geneva Conventions on the Law of the Sea had been inspired by a cold war policy and were intended to exclude certain states from participating in instruments designed to enunciate general rules of law. States pursuing such a policy consistently violated fundamental rules of international law, and no jurist could countenance the Commission's taking the retrograde step of consecrating a practice which was both unprogressive and contrary to international law.

125. Mr. Elias' proposal was a small step in the right direction, but did not go far enough.

126. Mr. LACHS said that, although the special rapporteur was correct in his description of practice during the past ten years, a decade could not furnish conclusive evidence of what was the law. Recent restrictions on participation in general treaties, as in the case of the Genocide Convention, were alien to the character of such treaties and contrary to the interests of the participating states themselves. The special rapporteur had drawn attention to a phenomenon which had, in fact, put a brake on the general development of international law by creating closed groups of states, one eligible and the other not eligible to participate in general treaties. He was compelled to disagree with the proposition that that practice should guide the Commission. There were examples, from the Treaty of Paris of 1928 to the Geneva Conventions of 1949, of treaties that were open to all.

127. Sir Humphrey WALDOCK, Special Rapporteur, said he had not been influenced in any way by considerations connected with the cold war. Treaty relations were a matter for states, which could not be forced into such relations against their will and which should have a say in the question of participation.

128. He would point out to Mr. Lachs that the number of open treaties was, in fact, exceedingly small. In most treaties of the kind under consideration, wide participation was provided for, but the decision rested in the hands of a collegiate body. Surely it could not be argued that a rule whereby participation was determined by a two-thirds majority of the General Assembly was retrograde.

129. Mr. TUNKIN said that the special rapporteur had shirked the issue. By what right could a group of states claim authority to exclude others from a Convention on the High Seas or a Convention on Diplomatic Relations which, by their very nature, were of interest to all states? Times had changed, and certain Powers could no longer

exclude others from the circle of those eligible to participate in treaties.

The meeting rose at 1.5 p.m.

### 667th MEETING

Monday, 25 June 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*)

#### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 7.—PARTICIPATION IN A TREATY (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Drafting Committee's redraft of article 7.

2. Mr. Elias had also submitted a redraft of the article, which read:

"1. In the case of a general multilateral treaty, participation shall be open to every sovereign state.

"2. In all other cases, participation shall be open to every state:

"(a) which took part in the adoption of the text of the treaty, or

"(b) to which the treaty is expressly made open by its terms, or

"(c) which was invited to attend the conference at which the treaty was drawn up, unless a contrary intention appears from the treaty itself or from the circumstances of the negotiations."

3. Mr. BRIGGS said that article 7 was much less important than article 7 *bis* concerning the opening of a treaty to the participation of additional states. Article 7, paragraph 1, contained an axiomatic statement, and paragraph 2 was unlikely to assume much significance. A great deal of the discussion at the previous meeting had been hardly relevant and he very much regretted the references to the cold war: the Commission was not the proper forum for that.

4. The special rapporteur, on the other hand, had clearly expounded the international law on the subject of participation in treaties, and he wholly endorsed his views.

5. There was no rule of international law which permitted every state to become a party to any treaty: indeed, the reverse was true. States could only become parties to a treaty on the terms laid down in the instrument itself or with the consent of the other parties. There was thus no justification for the assertion that certain states had been excluded from general multilateral treaties. The entities excluded from the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations were not generally regarded as states, in particular by the United Nations.

To his knowledge, the only instance of the exclusion of states from a general multilateral treaty as defined in article 1 of the draft had been the Soviet Union Government's veto of the admission of Austria, Italy and Japan to participation in the Charter of the United Nations.

6. He could not support the proposition that there was a unilateral right either to exclude states from participation or to demand participation in a treaty. He was therefore unable to accept paragraph 1 of Mr. Elias's proposal.

7. Mr. CADIEUX said that he would have to oppose Mr. Elias's proposed redraft. First, it impinged upon the complex problem of recognition, with all its political implications. Not only had that problem not been studied by the Commission, but he was uncertain whether such a study would confirm the conclusion reached in Mr. Elias's proposal.

8. If, instead of endorsing the practice of the majority of the States Members of the United Nations, the Commission allowed itself to be guided by other than purely technical considerations and, under the influence of political preconceptions, accepted the innovation proposed by Mr. Elias, advantage would be taken of that fact by states which opposed United Nations practice, and the Commission's prestige would suffer. The proposal also posed special difficulties for those members who were also legal advisers to their governments, for if they supported the proposal their attitude might be interpreted as committing their governments to a certain view concerning the problem of recognition. A legal adviser could hardly dissociate himself from his government's official policy.

9. On technical grounds, the proposal was wholly unacceptable, because it was at variance with the basic principle of the law of treaties, which was respect for the will of the parties. It was inconceivable that states which, as part of their general policy, did not recognize certain entities, would, for the purposes of certain treaties, allow them to become parties. If the Commission wished to codify rules of international law, it must recognize the practice of the majority, and if it wished to contribute to the progressive development of international law, it was unlikely to achieve that object by telling governments what policy they should follow.

10. His conclusion, therefore, was that Mr. Elias's proposal was inopportune for material reasons, unjustified for technical reasons, and objectionable for practical reasons: he would vote against it.

11. Mr. YASSEEN urged the Commission to keep the question in proper perspective. It was engaged in formulating not a general but a residuary rule. The express provisions of a treaty, either opening it to participation by certain states or excluding certain others, had to be respected. The only question was how a treaty's silence on the subject of participation should be interpreted. In his own opinion, it was legitimate to presume that the silence of a general multilateral treaty dealing with questions of common concern or codifying general rules of international law should be construed to mean that the treaty was open to all sovereign states.