Document:-
A/CN.4/SR.674

Summary record of the 674th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1963, vol. I

33. Mr. TUNKIN said that the Special Rapporteur's proposal was very sound. It would indeed be difficult to discuss the general provisions of section I before the provisions contained in sections II and III.

34. The CHAIRMAN said that, if there were no further comments on that point, he would consider that the Commission agreed to begin at its next meeting the discussion of section II (articles 5 to 14).

It was so agreed.

The meeting rose at 4.15 p.m.

674th MEETING

Tuesday, 7 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)
[Item 1 of the agenda] (*continued*)

SECTION II

(*Principles governing the essential validity of treaties*)

ARTICLE 5 (CONSTITUTIONAL LIMITATIONS ON THE TREATY-MAKING POWER)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 5 in section II of his second report (A/CN.4/156).

2. Sir Humphrey WALDOCK, Special Rapporteur, recalled that at its previous meeting the Commission had agreed to begin consideration of the draft articles in his second report with section II (Principles governing the essential validity of treaties (A/CN.4/156), because it could not deal adequately with the general principles stated in section I until it knew what was going to be the substance of section II and of section III (The duration, termination and obsolescence of treaties).

3. He had also prepared a section IV, dealing with the procedural aspects of essential validity, which would be circulated shortly and consideration of which, like that of section I, would have to await the Commission's decisions on the main problems of substance dealt with in sections II and III. The Commission had therefore acted wisely in deciding to concentrate at that stage on the solution of those difficult problems of substance. Naturally, in any decision that might be taken, a member would be able to reserve his attitude regarding sections I and IV.

4. Article 5, the first article in section II, dealt with the important problem of constitutional limitations on the treaty-making power. He had set out at length in the commentary to article 5 his reasons for drafting that article in the form in which it appeared in the report.

5. He must point out that, owing to a typographical error, the three last lines of paragraph 1 of article 5 had been made to appear as the concluding portion of sub-paragraph (*b*); in fact, the words " the effect of such provisions . . . this article " constituted the concluding portion of the main clause of paragraph 1, and should therefore not have been indented.

6. Mr. VERDROSS, after congratulating the Special Rapporteur on his report, said that he himself did not accept the view which had previously prevailed and had been accepted by the first Special Rapporteur and the Commission in 1951, that in deciding a treaty's validity, all constitutional provisions which limited treaty-making capacity must be taken into consideration. On the face of it, the United Nations Charter seemed to support that view, since the phrase " in accordance with their respective constitutional processes " was used for ratification by signatory States in Article 43, paragraph 3, and Article 110, paragraph 1. It was, however, clear from international practice that even countries whose constitution made no provision for treaties in simplified form did conclude such treaties every day and that such treaties were recognized by all States as valid.

7. He accepted the Special Rapporteur's proposals in substance; the only problem was that raised by paragraph 4. Were there any cases where a treaty concluded by an organ endowed with constitutional authority to do so — head of State, government or minister — was not valid because the organ in question had acted *ultra vires* ? It might happen that a head of State visiting another country might, without the approval of his government or his parliament, sign a treaty with the State in which he was staying, embodying a provision by which the instrument became valid immediately. The validity of such a treaty was doubtful. Unless, however, the competent organs — government or parliament — expressed their dissent immediately they learned of the treaty, they implicitly endorsed it. No reference was made in paragraph 4 to that hypothetical case, which, obviously, could occur only under a parliamentary system under which the head of State could never conclude a treaty on his own authority. It would not apply in a presidential system, where the head of State was also the head of the government. A State which signed a treaty with the United States, for example, could not be expected to know whether a treaty concluded by the President was in fact a treaty or an executive agreement; that was a doubtful case, and its interpretation was a matter for the United States alone.

8. Mr. de LUNA, commending the Special Rapporteur's second report, said that in a remarkable endeavour to settle the question of the international effects of constitutional limitations he had prudently avoided the shoals of doctrinal hair-splitting and crude realism. Outlining the development of the question from Locke and Montesquieu, who had originated the confusion between the " external " power and the executive power, to the French Revolution, when an attempt had been made to put an end to the power of the absolute monarchy in matters of foreign policy, he said it had then passed on to the democratic stage, when the head

of State was still responsible for foreign policy, but under parliamentary control.

9. The Special Rapporteur had clearly explained the conflicting theories. It was best to be realistic and to examine the facts of international law in order to construct the appropriate scientific framework. The history of foreign-policy-making showed that all constitutions had been successfully breached by the holder of the " external " power by resort to some appropriate pretext in the light of the situation at the time. The case-law of the United States Supreme Court clearly showed that when article II, section 2 of the Constitution had to be applied, acts performed by government agents, far from being stigmatized as breaches of the Constitution, had been christened " executive agreements ". For instance, an international act as important as the Protocol by which Spain had promised to cede Cuba and Puerto Rico to the United States had been concluded in the form of an executive agreement, not a treaty.

10. Other States had been led to introduce that system in a more direct form — that of agreements in simplified form, which merely meant that constitutional provisions were disregarded. Ratification had been changed to acceptance and then to approval — notions politically essential to the executive, to enable it to maintain that it had confined itself to " approving " a treaty.

11. In modern times, acts of the executive power relating to external affairs were never subject to *a priori* control. He himself now believed that the most effective political control, especially with existing methods of foreign policy, was that exercised *a posteriori*. The time was past when the Weimar Constitution could envisage a system under which four months could elapse between the date when the executive contemplated declaring war and the date of the actual declaration. It might of course be asked what would happen if the head of a State A declared war on his own initiative against State B or attacked it without a declaration of war. Would the declaration be internationally valid or not ? As it had been made *ultra vires*, it would have no effect in international law, so that it was not inconceivable that State C, allied to State A, might consider State B, which was defending itself, an aggressor, since State B had known that the act performed by the head of State A had been null and void.

12. He accepted in principle the text for article 5 proposed by the Special Rapporteur. With regard to paragraph 4, however, it should be emphasized that it was the effective constitution, the established practice and not the formal constitution, which other States must take into account.

13. Mr. TUNKIN, after congratulating the Special Rapporteur on his able and instructive report, suggested that he should start by giving the Commission a general account of the structure of his proposed draft articles as a whole. It would then have a clear picture of the subject and be in a better position to plan its work on the Law of Treaties.

14. With regard to article 5, he would confine his remarks at that stage to one general observation. The text as formulated by the Special Rapporteur was generally acceptable. However, it was appropriate to recall the terms of resolution 1505 (XV) on " Future work in the field of codification and progressive development of international law ", adopted by the General Assembly on 12 December 1960, which stated that it was necessary " to reconsider the Commission's programme of work in the light of recent developments in international law ". Viewed in that light, he had some doubts as to whether article 5, in its present form, was adequate and whether it sufficiently reflected those recent developments.

15. In his commentary on article 5, the Special Rapporteur had indicated three possible approaches to the problem of constitutional limitations on the treaty-making power. In fact, whichever of those three approaches was adopted, the conclusion must be that, if the full powers were in order, or if the action were taken by the head of State or government and there were no discernible constitutional limitations, the action would be valid and the treaty would be binding on the State concerned.

16. In paragraph 16 of his commentary, the Special Rapporteur had stated that the provisions of the article were based on " the principle that a State is bound by the acts of its agents done within the scope of their *ostensible* authority under international law ". However, the question would still arise whether, in the light of contemporary international law, there should exist some international limitations on the treaty-making competence of the State organs enumerated in article 4 of Part I. Personally, he believed that such limitations did exist and that it was not sufficient to state the rule as set out in article 5.

17. An example was the principle of self-determination of peoples, which now constituted a principle of general international law, confirmed and developed in many important international instruments. In accordance with that principle, for instance, the political fate of a people should be decided by the people itself. If, therefore, a treaty dealt with the very existence of a State as a separate entity, he believed that there should be, indeed that there already were, some international limitations. For the treaty to be considered valid, it was not sufficient that the full powers should be in order or that the treaty should be signed by the head of State or head of government and that the constitution in question should not specifically refer to the matter at issue. The principle of self-determination required that there should be some expression of the will of the people concerned, because their political future was at stake in the treaty. The question was closely connected with article 5, and some solution to it must be found.

18. Mr. CASTREN said that the Special Rapporteur deserved commendation for his second report, which was even more concise and clear than the first; he had settled the question satisfactorily by relying on international case-law and the practice of States, but proposing innovations where needed.

19. Article 5 was certainly one of the most important in the draft. The Special Rapporteur's proposals seemed well balanced, and the Commission, which had already

the previous year made its choice between the two systems at issue, could accept them. If a representative of a State or of one of its organs was on the face of it authorized to bind that State by declarations or acts, the other party, if it was acting in good faith, must have the right to require that the validity of treaties resulting from such acts should not be disputed on the ground that the representative or organ in question had acted *ultra vires*. That was the main rule, which should nevertheless be mitigated along the lines indicated by the Special Rapporteur.

20. The suggestions made by Mr. Verdross and Mr. Tunkin might perhaps be considered, but he would give his views on that later.

21. Mr. CADIEUX congratulated the Special Rapporteur on his report and thanked the Secretariat for making the text available in two languages well before the beginning of the session.

22. The draft had three great virtues. First, it was extremely practical, being specifically designed to ease the Commission's work. Secondly, it was well balanced, since it avoided extremes in favour of common-sense solutions. Thirdly, although the Special Rapporteur had respected the precedents, he had had the courage to propose innovations suited to the requirements of law and contemporary society.

23. He had no objection to article 5, only a few reservations on points of detail. His own country's constitution was so complex that there were always some provisions it could invoke if it wished to elude its obligations. But the rule of law should be fostered and governments encouraged to act with prudence, to accept the responsibilities for their decisions and to refrain from trying to shift them onto their partners in international negotiations or onto the international community.

24. Mr. AGO said he was firmly convinced that only international law could lay down the conditions for the conclusion of a treaty that was valid internationally. With regard to the nature of the alleged *renvoi* of international law to internal constitutional law and the value of the limitations placed by constitutional law on the capacity of the organ designated by the constitution to express the will of the State, he accepted entirely, in principle, the view adopted by the Special Rapporteur. The Special Rapporteur had made a most conclusive analysis of the practice of States, but with regard to theoretical principles, which must come first in a question of that kind, the point of departure had to be that international law referred to constitutional law only in order to ascertain what organ was competent to express the will of the State. Everything that related to the previous process of formation of the will of the State, which was to be expressed by that organ, was of no concern to international law.

25. What were the alleged rules of municipal constitutional law which could limit the capacity to express the will of the State with which the organ designated as competent was endowed ? The rule contemplated by the Special Rapporteur in the second sentence of paragraph 1 was not a true limitation. On the contrary: the treaty had to be already validly concluded before the second stage could be reached — that of determining what rules of internal law were required for the international act to produce its effects within the State and its legal order.

26. Consequently, there was only one kind of rules which must be taken into consideration, namely, rules which imposed limitations whereby, for example, a head of State could not ratify unless authorized to do so by an act of parliament. In order to comply with those rules, the head of State must make certain that he possessed the necessary authority before ratifying, but it was not for international law to ascertain whether or not he had been granted that authority. There were both theoretical and practical reasons for that. Constitutions often drew a distinction between treaties for which the head of State needed authority and treaties for which he did not need any special authorization. How could so delicate a question of interpretation as that of deciding into which of the two categories a given treaty fell be raised at the international level ? The head of State might in some cases assume responsibility for ratifying because the matter was urgent, because he was certain of obtaining the necessary authority later, and because he considered that the interest of the State was at stake. It was for his own State to decide whether he had done right or not; it was not for the other State to judge.

27. From the point of view of drafting, the text was rather lengthy and could be simplified. With that reservation paragraphs 1 and 2 seemed more or less satisfactory. He had some doubts about paragraph 3 (*b*): a signature which did not entail the validity and entry into force of an instrument was not the final act expressing the will of the State, and its effects were of very little importance.

28. With regard to paragraph 4, an attempt to reach a compromise could very well diminish the value of the whole article. A choice must be made between the two principles: either the principle he had just expounded, or the principle that all constitutional limitations were of concern to international law. If the former principle was right, it was no longer a question of whether a State was aware or not aware of the provisions of the constitutional law of the co-contracting State or whether there had been good or bad faith in the application of that law: those questions were outside the scope of international law.

29. Mr. ROSENNE commended the Special Rapporteur for his extremely enlightening report, and especially for his commentary on the draft articles, which described the various approaches and the Special Rapporteur's own doubts and hesitations.

30. He associated himself with Mr. Tunkin's preliminary remarks: an outline of the whole subject, and particularly of section IV, would be of great value, as there must be some connexion between the substantive provisions of sections II and III and the procedures that the Special Rapporteur would suggest in section IV.

31. With regard to article 5, he was in general agreement with the Special Rapporteur's approach. He found

particularly convincing the explanations given in paragraphs 13 and 14 of the commentary. It was appropriate to stress the effect of modern methods of communication on governmental practice regarding the treaty-making process; for they affected the day-to-day handling of the problem, and that should be reflected in the Commission's conclusions.

32. At its previous session the Commission had adopted twenty-nine articles on the conclusion, entry into force and registration of treaties and he had some doubts as to whether the provisions of article 5, as now proposed, were fully integrated with those articles, which formed Part I of the draft.[1] He was not at all certain that they followed logically from those articles, and not merely from article 4 of Part I, which was expressly mentioned in paragraph 2 (*b*).

33. He would not go so far as to say, with Mr. Ago, that international law made the *renvoi* to domestic law for certain purposes. He did, however, agree that the rules on the point at issue were to be found in international law and in international law alone. The point of departure was to be found in the concept of the ostensible authority to conclude a treaty, as it was embodied in article 4 of Part I. That presumption was necessary for the practical rules of international law. The articles now being drafted could be considerably simplified if the concept appeared for the first time in article 5 instead of in article 6. Additional support for that suggestion was provided by the fact that paragraph 13 of the commentary on article 5 specifically referred to the concept of ostensible authority.

34. With regard to the actual provisions of article 5, he doubted whether paragraph 1 was necessary. The article could begin by referring to the concept of ostensible authority as fully set out in article 4 of Part I. Furthermore, paragraph 1 was possibly not consistent with paragraph 2 of article 1 of Part I, which stated that: " 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... "

35. He wondered whether the provision contained in paragraph 3 (*b*), though correct as to substance, was fully in conformity with article 11 of Part I, or necessary.

36. He had been a little surprised to find the Depositary introduced in paragraph 4 (*a*) when no mention had been made of it in paragraph 21 of the commentary, and, more important still, he doubted whether the Depositary would be capable of discharging the functions conferred upon it in that paragraph and whether they were compatible with those set out in article 29 of Part I.

37. Without attempting at that stage to offer a solution, he should perhaps draw attention to the fact that paragraph 4 raised problems which might be somewhat different for bilateral treaties and multilateral treaties.

38. Paragraph 7 of the commentary referred to certain practical aspects, but it was not exhaustive. For instance, an issue that might arise in connexion with a *casus foederis* was whether a bilateral treaty concluded under a treaty-making procedure selected by a government in the exercise of its " political judgement ", to use the Special Rapporteur's well-chosen phrase, could be implemented without some form of parliamentary consent relating, in fact, to quite different aspects of the relations between the executive and the legislative organs. The matter was certainly not of prime importance but was closely connected with contemporary diplomatic practice. It would be compatible with the general line adopted in Part I of the draft to impose upon both negotiating States some responsibility for satisfying themselves that the proposed treaty could be implemented. That was something which did not always depend on purely legal considerations or ones which could be codified.

39. Article 5 dealt with internal constitutional limitations on the treaty-making power. Mr. Tunkin had raised an important point in asking whether international law itself did not also impose certain limitations which could similarly affect the validity of a treaty. He (Mr. Rosenne) doubted if that subject was strictly relevant to article 5, but it was, he thought, properly within the scope of article 13.

40. He thanked the Secretariat for its memorandum (A/CN.4/154) on the General Assembly's resolutions concerning the law of treaties, which had been prepared in compliance with the request he had made at the previous session. The memorandum admirably fulfilled the purpose he had had in mind.

41. Mr. YASSEEN, complimenting the Special Rapporteur on a remarkable piece of work, said he had set out with exemplary objectiveness the different views that had been expressed on a question which was still the subject of controversy.

42. Article 5 was an attempt at a compromise between two principles, that of the stability of treaties and that of the conformity of international law with the democratic principles of treaty-making. The Special Rapporteur, starting from the first of those two principles, had done what he could to preserve the second.

43. It was perhaps better, however, in dealing with such a delicate problem, not to take the theory of ostensible authority as a starting-point. An organ acting on behalf of a State must genuinely possess authority to bind it by treaty, in accordance with the fundamental rules which expressed that State's sovereign will. It was therefore necessary to take account of each State's constitutional provisions concerning the treaty-making power, and to that end international law referred to each State's internal law.

44. He saw no reason to contest that practice, for it was not the only case where international law referred to municipal law. The same thing happened with regard to the law governing nationality: municipal law governed the acquisition and loss of nationality, and international law took account of the relevant decisions of municipal law. If the international community was to be sure that an organ genuinely had authority to make a declaration on behalf of a State, it must refer to that State's constitutional rules.

[1] See *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, pp. 4 ff.

45. The difficulties to which the application of that principle would give rise had been exaggerated. Since the present trend in municipal law was to require the court to take cognizance *ex officio* of the law of another State, applicable under a rule on conflict, a State could *a fortiori* take cognizance of another State's constitutional law. While it was true that constitutional law was not always set out in writing, a State could always, before concluding a treaty, call in a legal expert for information not only on the written constitution, but also on the legal practices of the other country.

46. It was not a question of incorporating constitutional rules — which remained rules of municipal law — in international law; it was enough to refer to them. To preserve the stability of treaties they must not be satisfied with apparent stability; they must be very exacting and make sure that the agent or organ acting in the name of a State really did represent that State in accordance with its laws and practices. Besides respecting the democratic principles of treaty-making, that practice would do much to ensure the real stability of treaties.

47. Mr. AMADO said he associated himself with the very pertinent observations which had already been put forward during the discussion; the points raised by previous speakers covered the questions he himself had intended to raise.

48. Relations between municipal and international law had become more flexible, and international law had developed to a noteworthy extent.

49. With regard to the authority of the negotiating organ, paragraph 4 raised considerable difficulties. It was desirable to have a general view of the whole problem before the articles were formulated, and on that point he agreed with the comments of Mr. Tunkin and Mr. Rosenne.

50. With regard to the drafting, though it was still too early to propose amendments to the text of the article, he must point out that the French text of paragraph 2 (*b*) did not render accurately the English expression " on its face ".

51. Mr. ELIAS said that in his lucid second report the Special Rapporteur had adopted a flexible and progressive approach that gave proof of his determination that the Commission should fulfil its dual role of codifying and promoting the development of international law. Clearly he had taken account of a number of comments made during the previous session and had also been bolder about admitting that there was some interaction between internal constitutional provisions and international law and practice.

52. It would certainly be helpful if he could give some information about the contents of the section to be devoted to procedural requirements in regard to the avoidance, denunciation or suspension of a treaty, since it was closely related to the section under discussion.

53. The question whether conformity with internal constitutional requirements was relevant in determining the essential validity of treaties was an extremely important one and would need careful thought. It was an issue which could arise if the International Court of Justice were required to pronounce on the validity of a particular treaty.

54. Despite the skill with which the Special Rapporteur had handled an extremely complex subject, article 5 should be recast in a simpler form more suited to an international convention.

55. With regard to paragraph 4 (*a*), he questioned whether it would be appropriate to go so far as to stipulate that a multilateral treaty would be vitiated if a representative of one of the negotiating States were aware that the representative of another lacked the constitutional authority to establish his State's consent to be bound by the treaty, but had not made that fact known to the others at the material time.

56. Mr. BARTOŠ thanked the Special Rapporteur for having presented the theoretical and practical aspects of the problem with such clarity. However, despite the care with which he had weighed his every word, the question of the precedence of international law over municipal law, and of the relations between them, still involved some confusion concerning the theory to be adopted for determining what organs were competent to represent a State and the practical consequences of that theory.

57. Was it necessary, as Mr. Ago contended, to refer to a State's constitutional law or practice merely to ascertain what organ possessed the authority to represent it? History did not seem to confirm that view. The principles on which the law of civilized nations was based raised questions such as that of the competence of organs or of individuals to represent a State. The cases to be considered were those in which one party had taken advantage of acts he knew to be beyond the competence of the other party's representative. Could it be held that certain treaties which had been imposed by psychological or other duress were truly valid — that, for example, the signature of President Benès had been valid when he signed without the constitutional authority to do so ? It seemed very difficult to say that all that was needed to settle the matter was to verify the competence of the organs concerned.

58. But the question of constitutionality involved that of the limitation of international acts; that was a very awkward question, because it involved taking account of democratic principles on the one hand and, on the other hand, of the possibility of determining the constitutional validity of an act in some other way. Various solutions of that problem had been put forward. United States law, for example, differentiated between treaties proper and what were called " executive agreements ".

59. The three theories which needed to be considered were set out in the report, and all of them were open to objection; it was the task of members of the Commission to adopt a single, definitive solution.

60. Paragraph 4 raised a number of delicate questions which lent themselves to a variety of interpretations. What criterion was to be applied, for example, to determine good or bad faith? Today, a State could easily

ascertain the provisions of another State's written constitution and even its other constitutional rules, but there could be doubt as to the facts known personaly by the negotiators. Similarly, it was difficult to rule on the validity of a treaty or the possibility of voiding it, or on the time-limit to which the right to contest the validity of an international act was subject.

61. With regard to paragraph 4 (*b*), while he approved of the principle that ratification could be voided when a representative had acted *ultra vires*, that principle was fraught with danger from the standpoint of the security of international relations, and he urged the Commission to postpone its decision for a week, in order to think the matter over while continuing a fruitful discussion.

62. He must enter a reservation regarding paragraph 2 (*a*), because the previous year he had been one of the minority who had been unable to accept the text concerning non-ratification of treaties in simplified form, and he would also have to make reservations on other articles which were closely linked with article 4 of Part I. What was at stake was not only the primacy of international law, but also the need to provide greater security in international relations and to establish the validity of international acts on a firmer basis.

The meeting rose at 12.55 p.m.

675th MEETING

Wednesday, 8 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

ARTICLE 5 (CONSTITUTIONAL LIMITATIONS ON THE TREATY-MAKING POWER) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 5 in section II of the Special Rapporteur's second report (A/CN.4/156).

2. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Tunkin's request at the previous meeting for information about the content of section IV of his second report, which would be circulated in about a week's time, said that of its four articles, the first would deal with the procedural authority to annul, denounce or terminate a treaty. The second would be concerned with the procedure in cases when there was an express or implied right to do any of those things in the treaty itself. The third, article 25, which might be more controversial, would contain his suggestions as to procedure when the right to annul, denounce or terminate a treaty arose by operation of law, as for example in the case of breach of the treaty or in application of the principle of *rebus sic stantibus*. The problem of procedure had been given great prominence by the authorities and one of the important issues to consider was whether there should be some form of procedural check on the exercise of those rights. He had deliberately dealt with the procedural aspect in a separate set of articles, and although they had an obvious bearing on some of the general problems that arose in sections II and III, he believed that the substance of the latter could be discussed in advance. The fourth, article 26, would be a short one dealing with the problem of the severance of treaty provisions.

3. Section V, which was not yet complete, would deal with the effects of the avoidance, denunciation or suspension of a treaty. It would contain some of the points covered in Sir Gerald Fitzmaurice's second report,[1] though in some respects his own draft articles differed substantially from his predecessor's. He had not yet been able to complete section V because of having to put it aside on receiving a communication from the Secretariat about the General Assembly's request, in its resolution 1766 (XVII), that the Commission study further the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. He had felt bound to give that matter some preliminary thought in case he were asked to prepare something on the subject at short notice.

4. Mr. VERDROSS said he thought that the first three paragraphs of article 5 might be accepted in substance by all members of the Comimssion if the language were simplified in some places; that could be left to the Drafting Committee. Only paragraph 4 was to some extent controversial; the proposed text might well be replaced by the following:

> "(*a*) Paragraphs 2 and 3 shall not apply if the organ of a Contracting State or the organs of the Contracting States having authority to conclude international treaties is or are aware, or ought to be aware, that the treaty cannot be concluded definitively without the consent of another organ or of other organs of the States concerned.
>
> "(*b*) Nevertheless, such a treaty shall be valid internationally if the other organ (organs) competent to give its (their) consent to an international treaty does not (do not) react immediately after a treaty concluded without its (their) consent has come to its (their) notice."

5. In both the modern theory and the modern practice of international law a clear distinction was drawn, in the concluding international treaties, between the formation of the will of the State, which was governed by municipal law, and the declaration of that will vis-à-vis other States, the determination of the organ possessing authority to make that declaration being governed by both municipal and international law. The Commission itself had stated that rule in its 1962 draft.[2]

---

[1] *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No.: 1957.V.5, vol. II), pp. 16-70.

[2] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, pp. 4 ff.