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**Summary record of the 677th meeting**

Topic:  
**Law of Treaties**

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cogent. Nevertheless, consideration ought to be given to the doubts expressed by Mr. Tunkin and others about the wisdom of omitting it altogether, and perhaps the best course, before taking a final decision in the matter, would be to request the Drafting Committee to see whether, in the light of the comments made in the Commission, a new text could be prepared reconciling the various points of view.

77. Most of the drafting suggestions seemed to be acceptable and he agreed that, once a decision on the fundamental principle had been reached, paragraph 1, which was introductory in character, could be dispensed with. Paragraphs 2 and 3 (a) could probably be amalgamated and simplified, perhaps on the lines suggested by Mr. Briggs and Mr. El-Erian. He did not attach great importance to paragraph 3 (b), but it might serve to allay the misgivings of the few members who were uneasy about taking the international standpoint too rigidly.

78. Certain important issues connected with possible international limitations on the treaty-making power, the right of self-determination and *jus cogens*, which had been touched upon during the discussion, should perhaps be taken up in connexion with later articles. He sympathized with the concern expressed by certain members about the need to protect the interests of smaller and newly independent States, but believed that the protection of their sovereignty would be best achieved by article 5 as it was taking shape.

79. The CHAIRMAN suggested that the Commission might request the Drafting Committee to prepare a new text of article 5 in the light of the discussion and the formal amendments already submitted. That would give further time for reflection and thus satisfy Mr. Bartoš, and should also be acceptable to Mr. Tabibi, who had suggested that a small working group be set up to consider the article.

80. Mr. BARTOŠ said that in that case he could agree to article 5 being referred to the Drafting Committee before the Commission had taken a position on the substance, though it was not, of course, the proper function of the Drafting Committee to do so. The Drafting Committee could not settle questions of substance. In his opinion it could, as an exception, give the plenary Commission its opinion on questions of substance if specially instructed to do so in respect of a particular article. He wished it to be understood that he was making a statement of principle.

81. Mr. TABIBI said that he had no objection to the article being referred to the Drafting Committee, but he thought that the authors of any amendments submitted during the discussion should be invited to attend its meetings.

82. Mr. CADIEUX said there seemed to be some confusion as to what the Commission intended to do. It was fairly clear that the opinions expressed during the discussion all tended in one direction and if the Drafting Committee was to be asked to word those opinions more clearly, that was one solution. On the other hand, if a negotiating committee was to be appointed to re-

open the discussion on the formula which had prevailed, that was another solution and it was important that members should know precisely what the final decision was.

83. Mr. AMADO said he fully understood Mr. Bartoš's view. The Drafting Committee should confine itself to drafting — putting into words what had been agreed. It had no right to go into the substance, or even to change a single word which might affect the substance. But if the Drafting Committee went further than that, the Commission was there to restrain it. He asked Mr. Bartoš to be satisfied with simply referring the text to the Drafting Committee.

84. Mr. AGO recalled that in previous years the Drafting Committee had, at the beginning of the session, to some extent acted as a working group, thereby enabling the Commission to resume its discussion on a simplified text.

85. If, as Mr. Tabibi proposed, the Commission decided to include in the Drafting Committee all members who had put forward proposals on a particular point, it would have to be continually changing the Committee's membership and that would have serious drawbacks. It would be wiser to keep to a practice that had given satisfaction in the past.

86. Mr. GROS said the experience of past years showed that the authors of amendments need have no fear that the Drafting Committee would not pay enough attention to their proposals if they were not present. To change the Committee's membership might make it more cumbersome to no purpose.

87. The CHAIRMAN suggested that, in the light of Mr. Gros' remarks and since the procedure followed at the previous session had proved satisfactory, article 5 should be referred to the Drafting Committee.

*It was so agreed.*

The meeting rose at 1 p.m.

## 677th MEETING

*Friday, 10 May 1963, at 10 a.m.*

*Chairman:* Mr. Eduardo JIMÉNEZ de ARÉCHAGA

### Appointment of the Drafting Committee

1. The CHAIRMAN proposed the appointment of a Drafting Committee consisting of Mr. Ago, Mr. Briggs, Mr. El-Erian, Mr. Gros, Mr. Padilla Nervo, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, the Special and General Rapporteur, and Mr. Bartoš, the First Vice-Chairman.

*The proposal was adopted.*

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

[Item 1 of the agenda]

(*resumed from the previous meeting*)

2. The CHAIRMAN invited the Special Rapporteur to introduce article 6, in section II of his second report.

### ARTICLE 6 (PARTICULAR RESTRICTIONS UPON THE AUTHORITY OF REPRESENTATIVES)

3. Sir Humphrey WALDOCK, Special Rapporteur, said that article 6, which dealt with the authority of a particular agent, was designed to cover two different cases: the first when the agent lacked the necessary authority required under article 4 of Part I or the specific authority with regard to a particular treaty, and the second when his ostensible authority was limited by specific instructions from the State he represented. There were not many instances of such cases in state practice, but they did occur, and his general reasons for submitting the article would be found in the commentary.

4. Mr. BRIGGS questioned whether article 6 was needed at all. It seemed to exemplify what Mr. Lissitzyn, in an article mentioned by Mr. El-Erian at the previous meeting, had described as the Commission's tendency to dot the i's unnecessarily. The same criticism could with justice be made against articles 5 and 10 of Part I, which had been inserted in order to complete the general structure of that portion of the draft, but in fact added little to it.

5. Stripped of the provisos in sub-paragraphs (a) and (b), paragraph 1 of article 6 stated no more than what was implicit in the entire draft, that an unauthorized agent could not bind his State. The provision contained in paragraph 2 (b) also seemed redundant. As clearly indicated in the commentary, its purpose was to stipulate that the acts of an agent disclosing a restriction on his authority were not binding on his State. But surely in such a case the other party or parties would not proceed with the negotiations.

6. As he read it, paragraph 2 (a) was concerned with restrictions on the actual, as distinct from the ostensible, authority of the agent. On that matter Mr. Amado had made some penetrating observations at the previous meeting and Mr. Verdross had usefully brought out the differences between the formation of what was called the will of the State and its expression on the international plane.

7. The formulation of the will of the State was desirably the outcome of some kind of democratic process that had nothing whatever to do with its expression internationally, which had to be accepted by other States in good faith. The presumption in favour of the authority of Heads of State, Heads of Government and Foreign Ministers implicit in paragraph 1 of article 4 of Part I, was in his view not rebuttable. Similarly, he assumed that a like presumption was being established in article 6, paragraph 2 (a), that a representative possessing ostensible authority acted in good faith in the name of his State, but that if his actual authority was limited

by secret instructions, if they remained undisclosed the State could not evade the obligations which he had assumed in its name. Perhaps some attempt should be made to distinguish between ostensible and actual authority, but he still needed to be convinced that it was really necessary.

8. Mr. TABIBI considered that in order to protect the security of international transactions and the interests of States a provision on the lines of article 6 was necessary. The Treaty Section of the United Nations Office of Legal Affairs was familiar with the kind of problems which scrutiny of full powers from numerous countries could entail.

9. He pointed out that the word "restrictions" used in the title was not adequate, as it failed to cover the lack of authority dealt with in the body of the article.

10. Mr. CASTREN thought it unnecessary to retain article 6; some parts of it, at least, could be dropped. If the Commission decided to retain the substance of the article, the expression "ostensible authority", already criticized in connexion with article 5, should be abandoned; it would be better to speak simply of "authority" and make a more precise reference to paragraphs 1 and 2 of article 4 of Part I.

11. Mr. PAREDES said that the inference to be drawn from the way in which article 6 had been drafted was that the Head of State was identified with the State itself, a wholly untenable thesis which entirely overlooked the cardinal principle, valid in both municipal and international law, that only the will of the people democratically expressed through an elected assembly was effective. Failure to recognize and uphold that principle in international law, or to subject the authority of a Head of State who assumed perhaps far-reaching international obligations on behalf of his country to proper democratic control, might jeopardize the very survival of a nation or threaten its vital interests. There could be no justification for the view that international law was concerned solely with the ostensible authority of the representative of the State and not with the effective expression of its people's will.

12. He was unable to understand why the Special Rapporteur had refrained from dealing with the capacity of States and from distinguishing between the three entities that might be involved in the treaty-making process — namely, the State, the head of the executive and the negotiator.

13. The theory of ostensible authority opened the way for the great Powers to impose their will on the weak. And the weak nations, which stood most in need of protection from the law in order to survive, found themselves deprived of the benefit of the precautions they had taken to ensure their security and protect their institutions.

14. Mr. VERDROSS suggested that the word "ostensible" should be deleted from paragraphs 1 and 2, in view of the language of article 4 of Part I.

15. Mr. ROSENNE said that, although he appreciated the reasons which had prompted the Special Rapporteur

to propose a provision of the kind contained in article 6, he shared some of Mr. Briggs' doubts as to whether it was really necessary, particularly where paragraph 1 was concerned. The content of that paragraph was to some extent already covered by article 4 of Part I and the commentary on it, and perhaps came within the scope of article 4 of Part II. He had not fully decided in his own mind whether it was either desirable or necessary to go behind the full powers duly presented in compliance with the requirements laid down in article 4 of Part I and, like Mr. Verdross, was uncertain what precise distinction could be drawn between ostensible and specific authority. That distinction, which the Special Rapporteur had sought to bring out in paragraph 1, did not seem to be altogether in harmony with the provisions of article 4 of Part I.

16. Mr. de LUNA said that Mr. Amado had been right in saying that reality prevailed over legal theory. From the theoretical point of view, Mr. Briggs and the other members who thought that article 6 should be deleted were quite right. In theory, if a representative had no ostensible authority to bind the State, or if, having such ostensible authority, he received instructions from the State which restricted his authority and the restrictions were known to the other party, then any treaty he concluded was obviously void; and that being so article 6 was redundant.

17. But in practice, the facts did not always bow to such legal logic. Mr. Cordell Hull, the former United States Secretary of State, described in volume II of his *Memoirs* how he had succeeded in persuading the Danish Minister in Washington to sign a treaty on 9 April 1941 by which Denmark had ceded military control of Greenland to the United States. Yet, the United States Government had been perfectly aware that the Danish Government had not authorized the cession. In accordance with the legal logic upon which Mr. Briggs had relied, that treaty should have been void *ab initio*. But although the Danish Government had disavowed its Minister, a lengthy dispute had ensued, of such general interest that Hackworth, in volume V of his *Digest*, and the Danish author Ross, in his textbook of international law,<sup>1</sup> had discussed all the problems involved, stressing that the United States could not have pleaded the "ostensible authority" theory or the theory of the certainty of legal transactions propounded in Prof. Max Huber's arbitral award in the *Rio Martin* case (1924)<sup>2</sup> and accepted by the International Court of Justice in the *Eastern Greenland*<sup>3</sup> and *Free Zones* cases.<sup>4</sup> In view of those precedents, the essence of article 6 should be retained, although in simplified form.

18. Mr. TSURUOKA said that article 6 should be deleted and the idea it contained should be expressed in the commentary on previous articles dealing with similar aspects of the matter.

<sup>1</sup> Ross, A., *Textbook of International Law*, London, 1947, Longmans, Green & Co., p. 204.

<sup>2</sup> *United Nations Reports of International Arbitral Awards*, vol. II, p. 724.

<sup>3</sup> *P.C.I.J.*, Series A/B, No. 53, pp. 56-71 and p. 91.

<sup>4</sup> *Ibid.*, No. 46, p. 170.

19. Referring to paragraph 1, he said that the case of a representative who, not being authorized to bind a State under article 4 of Part I, could not consequently bind that State by his mere signature, was an obvious consequence of, and therefore covered by, that article. It was, therefore, unnecessary to devote another article to that particular case. In the circumstances contemplated in paragraph 1, a State could repudiate the instrument signed by its representative only when the other contracting State, having received the full powers of that representative, was aware that he had exceeded the authority they gave him. That case should be dealt with in the commentary on article 4 of Part I.

20. Paragraph 2 was a repetition or application of the case dealt with in article 5; there again, the commentary on that article would be the right context for the idea.

21. As to the need to ensure the protection of so-called weaker countries in negotiation, he thought the distinction between stronger and weaker countries could not be so easily drawn. The strength of a country's negotiating position depended largely on the subject-matter of the negotiations.

22. Mr. AGO said that some of the provisions of article 6 seemed to him hardly necessary and, besides, the article was probably not in its correct context in Part II, which dealt with the validity of treaties, for most of the points it raised were dealt with in Part I.

23. He agreed with Mr. Verdross that the expression "ostensible authority" in paragraph 1 should be changed, as it raised difficulties. Furthermore, the paragraph referred only to cases in which a representative did not possess ostensible authority under the terms of article 4, paragraph 4, of Part I, which was very broadly drafted. Consequently, there would be very few cases to which article 6 would apply.

24. The idea expressed in paragraph 2 (a), on the other hand, should be retained, because it dealt with a case which was not covered by article 4 of Part I, and which might well arise. However, as the provision expressly referred to restrictions on authority, he thought that article 4, paragraph 4, of Part I, which dealt with full powers, should be supplemented by a reference to the possibility of subsequent restrictions even where a representative had received full powers, and by specifying that such restrictions were not binding on the other party unless they had been brought to its notice.

25. Paragraph 2 (b) provided that a State whose representative had signed an instrument in contravention of his instructions might repudiate that instrument. That conclusion was justified, but surely it would be better to require greater guarantees for the full powers than to allow acts binding States to be subsequently repudiated; such a procedure was a "disease" in international relations and should be avoided as far as possible.

26. The Drafting Committee should therefore review article 6, paragraph 2, in close connexion with article 4 of Part I.

27. Mr. YASSEEN said that the examples given by Mr. de Luna showed that the cases covered by article 6

were not purely theoretical. The article dealt not merely with the conditions governing the competence of the representative of a State, but also with the validity of the instrument he signed. It was therefore fully justified and its provisions were, on the whole, logical and not inconsistent with any basic principle of law. Within the limits of constitutional requirements, a representative might have greater or lesser authority to act in the conclusion of a treaty. He might conceivably infringe his government's instructions, although acting in conformity with the constitution. Article 6 should therefore be retained, subject to improvements in drafting.

28. Mr. EL-ERIAN said that no final decision could be taken on article 6 until the Commission had examined the Drafting Committee's new formulation of article 5. Personally, he was in favour of retaining article 6, which supplemented the more general provisions contained in article 5 and dealt with the special case in which representatives either lacked authority or acted *ultra vires*.

29. Another reason for including a provision on that subject was in order to elicit the views of governments.

30. Mr. ELIAS said that article 6 was closely related to article 5, and the substance of paragraph 2 should be retained in order to cover cases in which representatives exceeded or disregarded their authority. Admittedly the requirements as to credentials set out in article 4 of Part I did deal with the problem to some extent, but some provision was necessary to cover the possibility of secret instructions being at variance with credentials.

31. He too was uncertain about the precise distinction between ostensible and specific authority and wondered whether the content of paragraph 1 might not be embodied in the commentary on article 4.

32. Mr. CADIEUX said that article 6 raised a valid point, which the Commission should deal with. The difficulty was that the article touched on matters already dealt with in article 4 of Part I and article 5 of Part II, but that was mainly a drafting problem. The Commission should certainly concern itself with the point; depending upon the weight it wished to give to it, the Commission might deal with the point in a separate article or refer to it either in article 4 of Part I and article 5 of Part II, or in the commentary.

33. Mr. AMADO said that the situation contemplated in article 6 was too theoretical and should probably not be the subject of an article. True, the Special Rapporteur had reviewed all the aspects of the problem and all the hypotheses relating to it. In practice, however, States were manifestly very vigilant about their interests. Article 6 was therefore too explicit. In any case, it was unnecessary to cite Roman law; international law was of very recent origin.

34. The CHAIRMAN, speaking as a member of the Commission, said that the provisions contained in article 6 represented necessary safeguards and had their place in the general structure of the draft, though their purpose could perhaps be achieved in some other way, possibly by amplifying article 4 of Part I. Broadly speaking, the Commission was devising a formal system

under which the validity of a treaty would be determined by the presentation of full powers or other evidence of authority in due form, and therefore some protection against deliberate abuse by a State agent was necessary. There could be instances where one of the parties might enter into an agreement with the other while aware that its representative was not duly authorized, and that possibility was afforded by article 4, paragraph 4 (b), of Part I.

35. He agreed with Mr. Cadieux that article 6 should be examined by the Drafting Committee in conjunction with article 5, paragraph 4, with a view to deciding whether paragraph 2 need be retained in some form.

36. Mr. LIANG, Secretary to the Commission, said that he would offer a few remarks on article 6, particularly as Mr. Tabibi had drawn attention to certain treaty-making procedures under United Nations auspices.

37. He thought that the provisions of article 6 served a useful purpose; they constituted a necessary and useful application of a doctrine — the so-called "private law analogies doctrine" — which was based on "the general principles of law recognized by civilized nations" within the meaning of article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

38. The situation envisaged in article 6 was one which should be dealt with; no draft on the law of treaties would be complete without a reference to it.

39. On the question whether it was desirable to connect the contents of article 6 with the question of validity, he said that the matters dealt with in the article were connected more with the question of the binding character of the acts of agents of the State than with that of validity. By way of analogy he mentioned that, in private law, the validity of a contract depended on such matters as the legality of the object, the reality of consent and the question of capacity. Article 6 did not deal with any of those questions, which were the essence of an agreement. The matters with which it did deal were analogous to those known to private lawyers as questions of agency in the common law and *mandatum* in Roman law. The problem had to do with the effects of representation in international law — a problem on which Professor Sereni had delivered an interesting course of lectures at The Hague Academy of International Law.<sup>5</sup>

40. The situation envisaged in article 6 was connected with the conditions in which a State became a party to a treaty and the extent to which the treaty became binding on it; the article was not concerned with validity as such. In that connexion, a distinction should be drawn between the concept of validity and that of the binding effect of a treaty: the two concepts were different, although the draft articles did not appear to draw a clear distinction between them.

41. It had been suggested by some members that the provisions of article 6 would be better placed in article 4 of Part I and he had been informally asked whether

<sup>5</sup> Sereni, A. P., "La représentation en droit international", in Academy of International Law, The Hague, *Recueil des Cours*, vol. 73, 1948, II, pp. 73-166.

it was still possible for the Commission to amend Part I, which it had adopted at its previous session. In fact, it was quite possible for the Commission to take the point into consideration when it re-examined Part I at its next session in the light of comments by governments. At that stage, the Commission would consider the question of the connexion between article 4 of Part I and article 6 of Part II.

42. As to the realities of the problem, the practice had been aptly described by Mr. Amado. Personally he felt that the provisions of article 6 would be useful in a general sense. In practice, however, only one situation to which they applied could arise, namely, that in which a State became a party to a treaty by mere signature. Where ratification was necessary, there were sufficient safeguards, and not only in existing international law; those safeguards were indicated in the draft articles already adopted by the International Law Commission. The case was not a very common one, but if a head of State or a plenipotentiary signed a treaty which bound the State without any further formality, then the provisions of article 6 would be very useful.

43. To sum up, he considered that article 6 would be useful, but that it should not be connected with the question of validity.

44. Mr. BARTOŠ said that it was only about paragraph 2 that he had any doubts. He paid a tribute to the uncommon frankness always shown by the Special Rapporteur in his draft articles concerning international negotiations. In his country, as elsewhere, the representatives of the State often had two sets of instructions, open and secret, and it was the margin between the two which left the negotiator some latitude to "bargain". The instructions in fact constituted only the basis of the relationship in law between the principal and the agent. They did not concern the other party to the negotiations. If the validity of international relations were made to depend on the instructions received by the negotiator from his government, it was to be feared that some instruments, concluded by parties possibly acting in good faith, might be called in question. That solution would be dangerous for international relations.

45. While he still believed in the need to ratify all treaties — unlike the majority of the Commission, which had accepted the principle that treaties in simplified form need not be ratified — he was opposed to the idea that results achieved by the conclusion of treaties should be called in question again because the negotiator had disobeyed his instructions. If a representative possessed "ostensible authority", or rather specific authority to negotiate, he could hardly be disbelieved, even if his instructions had been communicated to the other party. States were not irrational, but it must also be presumed that their negotiators did not lack good sense, honesty and a sense of responsibility. In his opinion, therefore, paragraph 2 was not justified. He considered that the paragraph was not acceptable and that it was unnecessary for the Drafting Committee to reconsider the matter. He proposed that paragraph 2 be deleted by the Commission before the article was referred to the Drafting Committee.

46. With regard to paragraph 1 (b), he entered his usual reservation, which followed from his opposition to treaties in simplified form not subject to ratification.

47. Mr. VERDROSS said he agreed with Mr. Ago that the cases for which provision was made in paragraph 1, where a representative acted in a manner not authorized either under article 4 of Part I or under special powers, were very rare. He had, however, certain practical cases in mind. The Austrian Constitution, for example, contemplated treaties of three categories, those concluded by the President of the Republic, those concluded by the Government, and those concluded by a Minister. If a Minister concluded a treaty within the scope of his authority, the treaty was valid, but if he exceeded his authority, a case contemplated in paragraph 1 arose, and the need for paragraph 1 was thus demonstrated.

48. Mr. de LUNA, reverting to the illustration he had quoted from the memoirs of Cordell Hull, said he should mention that the Danish Minister in Washington had acted in keeping with his patriotic duty, for the Danish Government had not then been in exile in London, but captives of the Nazis in Copenhagen. It was a clear case of quasi contract of *negotiorum gestio*.

49. With regard to article 6, he endorsed Mr. Liang's remark concerning the principles of private law. The doctrine in question was the broad doctrine of *falsus procurator*, where there was not merely usurpation, but also an act *ultra vires*; it was not possible, however, to transpose all the demands of the *falsus procurator* doctrine into international law by analogy.

50. Like Mr. Bartoš, he was surprised that the idea of obliging States to disclose secret instructions should be entertained. If a State did so, it would have no negotiating margin, for the other State would know exactly how far it was prepared to go.

51. Mr. TUNKIN said that, although paragraph 1 seemed at first sight redundant, it might prove to have some use, and he was therefore inclined to agree with Mr. El-Erian that it should be retained.

52. Article 4 of Part I indicated the requirements regarding full powers, and its provisions would cover the whole matter if no additional problems arose. Life, however, was much richer than any legal rule, and the specific situations dealt with in articles 5 and 6 needed to be covered.

53. Mr. Ago had suggested that the provisions of article 6 should be placed closer to article 4 of Part I. He had not been convinced by Mr. Ago's arguments which, if accepted, would apply equally well to article 5. In fact, the situations dealt with in articles 5 and 6 were close to those covered by article 4 of Part I, but they nevertheless constituted separate problems.

54. With regard to paragraph 2 of article 6, there was a similarity between the situation envisaged there and that contemplated in article 5, paragraph 3, which provided that, where a representative had acted *ultra vires* and the treaty had not yet entered into force, the State concerned could rectify the situation. A similar approach could perhaps be adopted as in article 6, paragraph 2.

Say, for example, an ambassador who had instructions to deposit the instrument of ratification of a treaty, and at the same time to make a reservation regarding one or several of its articles, failed to make the reservation, but the treaty had not yet come into force; his government, as soon as it became aware of the omission, could remedy the situation by arranging for the ambassador to make the reservation as instructed. The situations dealt with in article 5, paragraph 3, and in article 6, paragraph 2, thus appeared to be analogous.

55. The provisions of article 6 should be considered in the light of those of article 5. Article 6 should be retained for the time being and the Drafting Committee should be instructed to make the necessary changes in the text to take account of the observations made by members of the Commission.

56. Mr. YASSEEN said that the article referred to the possible restrictions on the representative's authority and not to instructions concerning the course or trend of the negotiations. For example, the representative might have been authorized to sign an agreement definitively, and then his government, after reflection, might have judged it preferable to authorize him to sign *ad referendum* only. Or again, the negotiators might have been told to discuss two questions and the representative authorized to give his government's definitive opinion on both, and then his government might have decided that its position on one of them could be reserved.

57. He believed, therefore, that the article did not concern the instructions on the course of the negotiations which every representative received and could not divulge. The article was concerned only with the instructions relating to possible limitation of the representative's authority. To that extent it was both logical and useful.

58. Restrictions embodied in instructions should be without effect if they were not known to the other party. A State could not claim that it had instructed its representative not to sign definitively, when the powers communicated to the other party were clear and showed that the negotiator was in fact authorized to do so.

59. Mr. TSURUOKA said he still thought that article 6 should be deleted. If the Commission decided to retain it, however, its wording, which was not entirely felicitous, should be amended.

60. Paragraph 1 made no reference to one party's knowledge of the instructions given by the other party to its representative, whereas paragraph 2 made such a reference; if the provisions were construed *a contrario* the resulting situation would be confused. A State could repudiate something done by its representative on the ground that he had failed to respect the instructions restricting his authority only if that fact had been communicated to the other party. In such a case, a new instrument of full powers should be produced to the other party, to replace the original instrument.

61. Mr. AGO said that some of the terms used in the draft of article 6 had given him the impression that it dealt with a question of authority rather than validity.

62. After the explanations given by the Special Rapporteur, he was willing to consent to the retention of the article, but if the Commission wished it to refer, not to the question of authority, which was covered by article 4 of Part I, but to the question of validity, then that fact should be stated more clearly, and the reference in paragraph 1 to article 4 of Part I should be deleted. There might be cases where, in the circumstances covered by article 4 in its broad sense, a representative possessed the necessary authority in general, but was not specifically authorized to conclude a particular treaty.

63. Paragraph 2, in particular, should be slightly amended. The clause "the instructions shall only be effective to limit his authority if they are made known to the other interested States" referred to the authority of the State's representative and not to the validity of the instrument concluded in breach of the instructions. It should be made to refer to the validity, because, in fact, the instructions in question restricted the representative's authority whether the other party had notice of them or not. It was the validity of the instrument concluded contrary to those instructions which was not impaired if the instructions were not brought to the knowledge of the other State. It was paragraph 2 which had made him believe that the Special Rapporteur had been thinking mainly of the question of full powers. If in reality it was validity of the instrument that was meant, then amendment of paragraph 2 on the lines he had suggested would render the article more understandable and, above all, more appropriate.

64. Sir Humphrey WALDOCK, Special Rapporteur, noted that several members wished to delete article 6. Attention had been drawn to the argument, put forward occasionally by writers, that the Commission had a propensity to go into too much detail. He was not impressed by that argument and felt that if a point required consideration, the Commission should not omit it from its draft merely out of fear of being accused of indulging in excessive detail.

65. Some confusion had perhaps been created because the provisions of article 6 had been expressed largely in terms of authority rather than in terms of validity. In fact, those provisions touched on essential validity and he agreed that the article should be re-drafted to take that point into account and also to eliminate the notion of repudiation.

66. Paragraph 1 dealt with a total lack of authority on the part of the person who signed the treaty. Cases of that type were rare. The case mentioned by Mr. de Luna of the taking over by the United States of America of the military control of Greenland in April 1941 was a case of the total absence of authority rather than of secret authority to sign a treaty; however, the case was a very special one of a war-time government under the control of the enemy, and an exceptional case of that type would hardly justify a provision being included in the draft. The same was true of such rather rare historical incidents as that of the British Government's disavowal of an agreement between a British Political

Agent in the Persian Gulf and a Persian Minister, which the British Government afterwards said had been concluded without any authority whatsoever.<sup>6</sup>

67. There was now, however, rather more possibility of the provisions of paragraph 1 being useful, since the adoption of article 4, paragraph 4 (b), of Part I, which stated that "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." It was now not at all uncommon for a Minister for Economic Affairs, a Minister of Health or a Minister of Civil Aviation to negotiate and sign treaties; only fifty years ago such a situation would have been impossible. In view, therefore, of the large number of authorities which now concluded treaties, it was not at all unlikely that a case might occur of a treaty being signed without any authority at all.

68. With regard to paragraph 2, he agreed with the explanations given by Mr. Tunkin and Mr. Yasseen. The reference was not to secret instructions regarding the substance of the negotiations, but to limitations upon the authority to conclude a treaty. What he had had in mind was the possible omission by a representative to enter a reservation which he had been instructed to make at the time of signing a treaty. It was a feature of contemporary international practice that agreements were entered into quickly and that instructions were given, cancelled and altered by cable or airmail, with the consequent possibility of misunderstanding. It was therefore desirable to cover the situation which could arise as a result of such misunderstandings.

69. In conclusion, he concurred with the suggestion that the Drafting Committee should be invited to produce a new draft of article 6, together with a new draft of article 5, and to make the provisions of both articles consistent with article 4 of Part I.

70. The CHAIRMAN suggested that article 6 should be referred to the Drafting Committee for study, in the light of the comments of members, in connexion with other articles of the draft and of the articles of Part I.

*It was so agreed.*

The meeting rose at 12.40 p.m.

<sup>6</sup> Adamiyat, F., *Bahrain Islands*, New York, 1955, F. A. Praeger, pp. 106 ff.

## 678th MEETING

Monday, 13 May 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

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

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

1. The CHAIRMAN invited the Special Rapporteur to introduce article 7 in section II of his second report (A/CN.4/156).

### ARTICLE 7 (FRAUD INDUCING CONSENT TO A TREATY)

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 7, said that his hesitation in proposing an article on the question of fraud inducing consent to a treaty had really been far greater than appeared from the commentary. He now felt that he had attributed too much importance to the fact that an article on the subject had been included both in the Harvard draft and in the drafts prepared by his two predecessors, Sir H. Lauterpacht and Sir G. Fitzmaurice.

3. The possibility of fraud in connexion with treaties did exist, but there had been no case precisely on the question of fraud inducing consent to a treaty.

4. If the Commission felt disinclined to put an article on fraud before governments at all, the matter could be covered by the provisions on the subject of error, since the error of one of the parties could be induced by fraud on the part of the other. The argument in favour of a separate provision on fraud was, of course, that when fraud occurred it struck at the root of a treaty in a way somewhat different from error; it destroyed the whole basis of confidence between the parties.

5. The first question to be decided by the Commission, therefore, was whether it desired to have a separate article on fraud or not.

6. Mr. TSURUOKA said that, though usually in favour of simplicity, he was in favour of including a provision, if not an article, dealing with fraud, for modern international law attached great importance to the notion of good faith.

7. With regard to the formulation of an appropriate clause, previous special rapporteurs had drafted provisions leaving it to the courts to determine whether the instrument allegedly vitiated by fraud was void. That was as it should be, but in the present stage of development of international law it might not be a practical solution, for in most cases a dispute could not be brought before an international tribunal without a *compromis*; in view of that consideration it was provided in article 7 that a State could plead fraud in negotiations with the fraudulent party. Two conflicting interests were involved, however: the need to ensure the protection of the aggrieved State and the obligation to maintain the stability of the system of law, which required no less protection. If the draft was to leave invoking of the ground of fraud *prima facie* to the aggrieved party, then clearly the concept of fraud would have to be defined in a precise and restrictive manner, so as to prevent any abuse.

8. The Commission should also decide what effects were produced by an instrument vitiated by fraud — in other words, whether such an instrument was void *in toto* or only in part. The simpler solution was probably to allow the ground of fraud to have effect only if fraud vitiated such instruments *in toto*; for, especially in the case of multilateral treaties, the other solution might produce an effect not unlike that of a reservation to a multilateral treaty — a thorny and controversial matter. In such cases it would be preferable for the instrument to be regarded as wholly void.