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Summary record of the 704th meeting

Topic:

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Extract from the Yearbook of the International Law Commission:-

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parties to the later treaty were aware of the existence of the earlier treaty and of the conflict between the two.

72. Other difficulties had been pointed out by Mr. Rosenne, who had pertinently asked how the nullity would be invoked. The provisions of article 25 on procedure would not be applicable and perhaps an additional paragraph would have to be introduced into that article to cover the situation.

73. Another question which arose was whether the party injured by the later treaty was entitled to object to its registration with the United Nations or to demand the cancellation of that registration if it had been effected.

74. He agreed with Mr. Ago regarding such cases as neutralization, which might give rise to a problem of capacity.

75. Generally speaking, the law of state responsibility covered the main requirements of the situation under discussion. Personally, he found the idea of nullity attractive from the academic point of view, but it did not reflect the present position in international law. The situation contemplated undoubtedly involved the international responsibility of the State. If that responsibility were made good, it could lead to cancellation of the treaty, but cancellation would be only one of the remedies applicable. In fact, cancellation might well prove impossible, because there were other parties involved whose acts might be necessary to dissolve the later treaty. The whole matter could really be best handled through the law of state responsibility and not by means of nullity.

76. It had been suggested that the joint amendment reflected the views of the two previous special rapporteurs. It was true that, in his first report, Sir Hersch Lauterpacht had adopted that approach, but in his second report he had narrowed his proposals considerably because he had realized that his original suggestion could have been a cause of serious embarrassment to the development of international legislation. Sir Gerald Fitzmaurice had started from the point of view embodied in article 14, suggesting that the sanction of nullity should apply only in special cases, and had drawn a distinction between different types of obligations. His position had in fact been much narrower than had perhaps been suggested during the present discussion.

77. In view of the desire expressed by a number of members, he would not object to postponement of the discussion of article 14 until the following session. There would be some advantage in that course, because certain matters needed further investigation. For example, even the provisions of paragraph 1, which did not appear to have given rise to any serious differences, raised the question of the effect of the cancellation on parties who were beneficiaries under the earlier treaty, but were not parties to the later one.

78. Mr. de LUNA said he wished to set the minds of certain members at rest with regard to the postponement.

79. The *pacta sunt servanda* rule had been mentioned, but that rule applied both to the earlier and to the later treaty, so that the problem was only one of chronology.

80. The argument of *jus cogens* had been used, and the Special Rapporteur had himself said that it was difficult to distinguish between clauses of a treaty which had the character of *jus cogens* and clauses which had not. There was no need to mention *jus cogens* in article 14, as it was amply covered in article 13. If a later treaty infringed a *jus cogens* obligation under an earlier treaty, the question of what rule would apply would be simple: if it was really a matter of *jus cogens*, article 13 would apply and article 14 was redundant.

81. To retain article 14 in the section on validity would be to build a veritable bastion of ultra-conservatism or even reaction in international law.

82. History showed that States imitated the national legislator who, in enacting new laws, amended or repealed earlier laws. That raised the thorny problem of the severability of articles.

83. In order to avoid resorting to revision or to the *rebus sic stantibus* clause, States often concluded treaties which conflicted with prior treaty obligations. If all the parties to the earlier treaty acceded to the later one, there was no problem; but when only some of them did so, it was found that in practice the States not parties to the later treaty were generally tolerant.

84. He therefore supported the Chairman's view.

85. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to postpone consideration of article 14 until the next session, without prejudice to the positions of members.

It was so agreed.

The meeting rose at 12.40 p.m.

704th MEETING

Thursday, 20 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Statement of the observer for the Asian-African Legal Consultative Committee

1. The CHAIRMAN, welcoming the observer for the Asian-African Legal Consultative Committee, Mr. Justice Thambiah, of the Supreme Court of Ceylon, said that his presence was evidence of the Committee's interest in the work of the International Law Commission; the fact that the Commission had been represented by an observer at the fourth and fifth sessions of the Asian-African Committee showed that the interest was mutual.

2. Mr. THAMBIAH, observer for the Asian-African Legal Consultative Committee, said he was pleased to extend, on behalf of the Committee, an invitation to the International Law Commission to be represented at the Committee's next session, to be held at Cairo for a period of two weeks starting on 15 February 1964.

3. The Commission's work was highly esteemed in the Asian and African countries. As a first step towards strengthening international law, it was necessary to

ensure that the rules of conduct to be observed by nations were such as to command universal respect. International law had often suffered from the fact that many of its rules were nebulous. There had also been a feeling in some of the Asian and African countries that international law was a product of the West and that many of its concepts needed re-examination in the light of the emergence of new nations. In order to strengthen international law, the existing rules should be re-examined and given shape by codification and progressive development, taking into account the views of the whole world community; it was precisely in that task that the International Law Commission was engaged. The Asian-African Legal Consultative Committee, which had been constituted as a regional organization with objectives similar to the International Law Commission, was most anxious to co-operate with the Commission and to present to it the considered views of the countries of Asia and Africa.

4. The Committee had been set up in 1956 as the " Asian Legal Consultative Committee ", but its statutes and title had been amended in 1958 to provide for the participation of countries on the African continent; it now had nine members. Sessions of the Committee were usually held annually, the participating countries acting as host in rotation, while its day-to-day work was carried on by a secretariat at New Delhi, where each member government maintained a liaison officer.

5. A number of important questions of international law had been referred by various member governments to the Committee, which had been able to complete its work on a number of them, including the question of the functions, privileges and immunities of diplomatic agents. The Committee had also made considerable progress on a number of other questions, including that of the legality of nuclear tests. Among the subjects awaiting consideration were the Law of Treaties and state succession.

6. The United Nations had invited the Committee to be represented at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities and its recommendations on the subject of diplomatic immunities had been one of the basic documents before that Conference. The Committee had also been invited to be represented at the 1963 Vienna Conference on Consular Relations. It was asked from time to time by the United Nations to comment on United Nations resolutions relating to legal matters; it also maintained relations with the Arab League and with the International Institute for the Unification of Private Law.

7. The progressive development of international law, on which the Commission was engaged, could best be achieved through co-operation with regional organizations. Individual governments could certainly assist, but a regional organization could do so more effectively, because it had a secretariat which was engaged in that work exclusively. Regional organizations also provided a forum for discussion and enabled governments to formulate their views. Non-governmental organizations had played a useful role in the past in the elucidation and development of international law, and their recommendations would always command respect as coming from independent expert bodies; but those recommendations tended to suffer from a lack of realism, since they did not necessarily reflect the views of governments, and in matters of international law it was the views of governments that were of paramount importance, since it was through the practice and usage of nations that international law was developed.

8. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee and said that the Commission would consider the invitation to send an observer to the Committee's next session when it came to deal with item 7 of its agenda: Co-operation with other bodies.

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

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

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

9. The CHAIRMAN invited the Commission to consider the text of the articles proposed by the Drafting Committee for chapter II of Part II.

CHAPTER II (PRINCIPLES GOVERNING THE ESSENTIAL VALIDITY OF TREATIES)

ARTICLE 5 (PROVISIONS OF INTERNAL LAW REGARDING THE PROCEDURES FOR ENTERING INTO TREATIES)

10. Sir Humphrey WALDOCK, Special Rapporteur, said that before introducing article 5, as re-drafted by the Drafting Committee, he wished to draw attention to the decision taken by the Committee at its fifth meeting to replace the heading " Section " by " Chapter ". Personally, he though it would be both more practical and more elegant to retain the word " Section ", because it had already been used in Part I, which the Commission had adopted at its previous session. Later, when the Commission came to consider the draft on the Law of Treaties as a whole, it could make a final choice between the two terms.

11. The title of chapter II had not been discussed by the Drafting Committee and remained the same as it had appeared in his report (A/CN.4/156). During the discussion, however, certain members had criticized the term " essential validity ", and the title might perhaps be altered to " The validity of treaties ", or if that seemed too broad, to something like " Grounds on which treaties may be invalidated ".

12. Article 5 as proposed by the Drafting Committee read:

" *Provisions of internal law regarding the procedures for entering into treaties*

" 1. When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding the procedures

for entering into treaties has not been complied with shall not affect the consent expressed by its representative, unless the violation of its internal law was absolutely manifest.

" 2. Except in the case of such a manifest violation of its internal law, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree."

13. During the discussion on article 5, which was one of the most important provisions of the whole draft, there had been a division of opinion, some members considering the rule to be that the authority in international law to give consent to a treaty should in principle prevail, others that consideration should also be given to the possibility that the organ which entered into the treaty might be completely lacking in competence under the constitution of the State concerned.

14. It had proved difficult to reconcile those two points of view and the Drafting Committee had finally adopted a formula stating the general proposition that, where the consent had been given by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the State concerned was bound, unless the violation of its internal law was absolutely manifest. That proposition was based on the authority of a number of distinguished jurists, including Lord McNair.

15. Paragraph 2 stated the consequences of the rule laid down in paragraph 1.

16. A number of provisions of the original article 5 had been dropped, following criticism during the discussion; paragraph 1 had been dropped as unnecessary, while paragraph 3 (*b*) had been deleted because its provisions were not easy to reconcile with the general principle on which the draft was based.

17. The CHAIRMAN said that the Commission had to take a decision not only on article 5, but also on the wording of the general title of the group of articles 5 to 14, and on the choice between the terms " chapter " and " section ". On the latter point, the Special Rapporteur had in effect appealed to the Commission from the decision of the Drafting Committee; he invited the Commission to vote on that point.

It was decided, by 19 votes to none with 1 abstention, to revert to the term " section " in place of " chapter ".

18. Mr. PAL said that, from the point of view of drafting, the references in article 5 to consent being " expressed " by a representative were open to criticism. Article 5 referred to article 4 of Part I, but the provisions of that article should be construed by reference to articles 11 and 16 of Part I, which spoke not of consent being " expressed " but of acts the effect of which was to " establish the consent " of the State concerned. To be consistent, therefore, the Commission should avoid using such expressions as " consent expressed ", " consent has been expressed " and " to express the consent ".

19. Mr. CASTREN said he would confine his remarks to article 5 and leave it to the Drafting Committee to decide on the title of the section.

20. The new, shortened version of the article contained all the essential elements of the original text and was thus a real improvement; similarly, the new, more neutral title was preferable to the original one.

21. He had only two comments to make on the form. First, the reference in the last line of paragraph 1 to a violation that was " absolutely " manifest seemed unnecessary. Secondly, paragraph 2 did nothing more than state an obvious consequence of paragraph 1, and could therefore be omitted. If it was thought preferable to retain the substance, the two paragraphs might be combined by omitting paragraph 2 and inserting after the word " representative ", in the penultimate line of paragraph 1, either the words " which may not be withdrawn unilaterally " or the words " which may not be withdrawn without the consent of the other parties to the treaty ".

22. Mr. CADIEUX said that he accepted the Special Rapporteur's proposal for the title of the article.

23. For the title of the section, he proposed that instead of " Principles Governing the Essential Validity of Treaties ", the title " Nullity of Treaties " should be adopted.

24. With regard to the text of the article, he wondered whether the Drafting Committee had special reasons for using the expression " shall not affect the consent " in the fifth line of paragraph 1, whereas the subsequent articles referred to invalidation of consent. If not, it might be advisable to say: " the fact that a provision of the internal law of the State regarding the procedures for entering into treaties has not been complied with shall not *invalidate* the consent . . ."

25. He had some doubts about the use of the word " absolutely " before " manifest " at the end of paragraph 1. The adverb was hardly appropriate, for it introduced an element of uncertainty into the text and gave it, in some respects, a subjective character.

26. Mr. YASSEEN said that his views on the article were well known, so he need not repeat what he had already said in defence of the principle of constitutionality. So far as form was concerned, the text submitted by the Drafting Committee was an advance, but the concession it made to the principle of constitutionality was not sufficient to safeguard democratic principles and the interests of peoples.

27. From that point of view the Special Rapporteur's text seemed preferable, though he had not found it satisfactory.

28. With regard to the wording of the article, he supported Mr. Castrén's proposal that the word " absolutely " should be deleted; even the requirement that a violation should be " manifest " seemed to him to go too far.

29. The CHAIRMAN, speaking as a member of the Commission, said that although, on the whole, he considered that the Drafting Committee had produced a set of excellently worded articles in compact form, he had his doubts about article 5. He did not believe that the division of opinion in the Committee had been

such as to require the compromise solution which the Drafting Committee had put forward. There was no justification for the concession implied by the inclusion of the proviso " unless the violation of its internal law was absolutely manifest ", and that concession would be extended still further if the suggestion to delete the word " absolutely " were adopted. The majority of the Commission had been in favour of the internationalist approach and of the Special Rapporteur's original proposal taking the concept of ostensible authority into account.

30. He accordingly suggested that the final proviso of paragraph 1 be deleted, and also the initial proviso of paragraph 2. The two paragraphs could then be combined to read:

> " When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the international law of the State regarding the procedures for entering into treaties has not been complied with shall not allow that State to withdraw the consent expressed by its representative unless the other parties to the treaty so agree."

31. The title of section II was acceptable, subject to the deletion of the adjective " essential."

32. Mr. de LUNA said the Drafting Committee had succeeded in eliminating almost all the controversial elements in the previous text. He was not entirely satisfied, however, with the compromise between the two opposing schools of thought, the one holding that constitutional limitations on the treaty-making power had no effect in international law, the other that any such constitutional limitation produced international effects. The Drafting Committee's position was reflected in the last two lines of paragraph 1, where it was stated that the internal law governing the formation of the will of a State with respect to its external acts " shall not affect the consent expressed by its representative, unless the violation of its internal law was absolutely manifest ". Personally, he would have preferred a provision under which limitations imposed by internal constitutionnal law would produce no effects internationally.

33. If really necessary, he would be prepared to accept the solution proposed by the Drafting Committee, but not as drafted. For instance, what was the situation if a country's internal law was silent on the subject of the treaty-making power ? A new State might not yet have a written constitution and not yet have evolved any customary constitutional law. Similarly, a coup d'état would be a breach of the earlier constitution. The expression " internal law " was used in the Drafting Committee's text; but what internal law was meant ?

34. He agreed with Mr. Castrén and Mr. Cadieux that the word " absolutely " should be deleted. Either the Chairman's amendment should be adopted or the words " in force " should be inserted after the words " internal law ".

35. Mr. TUNKIN said the Drafting Committee had adopted a compromise text for article 5, in the hope that it would find unanimous acceptance; it had believed that to steer a middle course was the only way of taking into account the realities of international life. International law did not solve the problem of representation and of the powers of representatives; that problem was solved by internal law, and international law must accept internal law as a fact.

36. It had been suggested by Mr. de Luna that the Drafting Committee should have chosen between the internationalist approach and the constitutionalist approach. In fact, the discussion in the Drafting Committee had confirmed its members in the belief that article 5 would be unacceptable to States unless some intermediate solution were found. The solution adopted had been to take account of internal law only with respect to " the procedures for entering into treaties ".

37. Thus not all limitations contained in internal law would be covered. For example, the authorities of a State could be expected to know of every condition that might be made by the parliament of a foreign State limiting the power of its president to enter into certain types of treaty. If such a requirement were to be imposed, it would involve studying the whole of the municipal law of the foreign State concerned.

38. Another important restriction was that the limitations imposed by internal law must be absolutely manifest. Unless disregard of such manifest limitations of internal law involved invalidity of a treaty in international law, the door would remain open for undesirable machinations.

39. Accordingly, for both theoretical and practical reasons, he urged the Commission to adopt the Drafting Committee's text.

40. Mr. BARTOŠ said that he wished to enter a reservation on the text of article 5, but he would not propose alternative wording. He would vote in favour of article 5 subject to that reservation.

41. He was still opposed to the reference to article 4 of Part I, for he remained opposed, as he had been the previous year, to any rule exempting so-called treaties in simplified form from the requirement of ratification. In his opinion, every treaty, whatever its form, should be ratified, for it was important to introduce an element of democracy into the practice and not to grant full freedom to diplomatic bureaucracy, which should be subject to political supervision.

42. He also wished to make a comment in his capacity as Chairman of the Drafting Committee. The Commission could not discuss suggestions made to the Drafting Committee, which was responsible for giving effect to the Commission's decisions of principle or specific decisions. He therefore urged members of the Commission to make specific observations which the Drafting Committee could take into consideration after the Commission had taken its decision.

43. Article 5 did not cover all the points, because the Drafting Committee had tried to find a formula acceptable to all its members; but the text should not be regarded as final, and the Commission was asked to express an opinion on it.

44. Mr. PAREDES said that he supported the text prepared by the Drafting Committee because it successfully reconciled two equally important principles: the security of international relations and observance of the main constitutional provisions of each country.

45. He thought it right that not every violation of the letter or the spirit of internal law should nullify the act of the negotiator, but only violations of provisions which were manifest and easily known, for they were undoubted rules which the most elementary prudence would require the negotiators to ascertain. In the daily life of nations and in their internal law, anyone making a contract with an agent made sure that he had proper powers to conclude it; in international life, in which much more important business was transacted, it was natural that negotiators should be required to verify each other's powers.

46. He thought it would be sufficient, however, to use the word " manifest " without the qualification " absolutely ", which could be deleted.

47. He approved of the Drafting Committee's approach to the case in which both States agreed to cancel the treaty.

48. Mr. AMADO said that when he had spoken on the article earlier he had related the problem to the context of modern international life with its predominance of multilateral treaties and had pointed out that representatives to an international conference could hardly be searched to find out whether or not they were provided with full powers in due form.

49. Everything ultimately depended on an estimate of risks inherent in a treaty; but the really formidable difficulties to be feared were disposed of in paragraph 2, which provided that " a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree ". He could not see any other solution. Practice showed that States agreed to the withdrawal of consent only in the event of a manifest violation. For those reasons, he approved of the text proposed.

50. Mr. BRIGGS said that in the Drafting Committee he had reserved the right to oppose the formulation of article 5.

51. He was opposed to the final proviso of paragraph 1 for two reasons. First, it would be extremely difficult to apply. He was certainly not prepared to say what constitutional provisions were " absolutely manifest " in the law of the United States and he questioned whether a foreign State could decide whether certain constitutional provisions had been applied.

52. His second reason was connected with the democratic processes in treaty-making. Those processes were concerned with the formulation of the will of the State. Where notification of the will of the State abroad and the expression of the consent of the State by its representative were concerned, it was a question of good faith in international relations.

53. For those reasons, he supported the amendment proposed by the Chairman in his capacity as a member of the Commission.

54. Mr. ROSENNE said that broadly speaking he shared the views put forward by Mr. Tunkin. He had been greatly impressed by the Special Rapporteur's summing-up of the discussion on the first reading (676th meeting, paras. 73-78), when he had said that although the preponderant weight of opinion in the Commission was clearly in favour of the international rather than the constitutional approach, accommodation must nevertheless be found for the minimum requirements of those who formed the constitutional approach. On that basis, the Drafting Committee had attempted to produce a reasonable compromise text. The question was whether it was workable, and in his opinion, it was. It contained adequate safeguards in respect both of the international requirement of reasonable stability and of the need to maintain proper domestic procedures in treaty-making.

55. He did not favour the deletion of the adverb " absolutely " before the word " manifest "; that adverb, or some other similar qualification, was necessary, if only for the reason that otherwise the legal adviser to a Foreign Ministry would be placed in the impossible position of having to set up something in the nature of a research institute on comparative constitutional law. Unless the operation of the final proviso of paragraph 1 were confined to cases in which the violation of internal law was absolutely manifest, a legal adviser would have to make a thorough investigation of foreign constitutional law before negotiating a bilateral or multilateral treaty.

56. Lastly, he supported the comments of Mr. Pal on the use of the word " expressed " and those of Mr. Cadieux on the words " shall not affect ". However, those were drafting points and did not involve issues of principle.

57. Mr. CADIEUX said he would be glad if someone would explain the difference between " manifest " and " absolutely manifest ".

58. Mr. AMADO said that he, too, did not share Mr. Rosenne's view on that point. The adjective " manifest " already expressed something positive, so that the word " absolutely " added nothing.

59. Mr. ELIAS said that the discussion had confirmed his apprehensions of the danger of referring articles to the Drafting Committee before the points at issue had been properly thrashed out and clarified in the Commission itself. The Drafting Committee's text seemed to represent the best compromise possible, however, and members must be prepared to make some sacrifice of individual opinion if general agreement was to be reached.

60. Perhaps Mr. Pal's point could be met by substituting the word " signified " for the word " expressed ". If the full powers contained written authority for giving consent, then the agent of a State would not need to do so orally.

61. The phrase " by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority " seemed somewhat unwieldy; he would have thought it sufficient to refer to a competent or duly authorized representative.

62. The qualification " absolutely " was wholly unnecessary, because the word " manifest " could only mean " absolutely clear ".

63. Mr. ROSENNE said the word " absolutely " was necessary and not tautologous because, as Mr. de Luna had pointed out, apart from the situation of States which had no written constitutions, some constitutions might either be silent, or only contain some very general provisions, concerning treaty-making procedures, in which case detailed regulations might only be found in jurisprudence or in legislative or administrative decisions and might not be easily accessible. In the interests of the stability of treaties and of international negotiations, any limitations on the treaty-making power must be easily ascertainable and a matter of common knowledge if they were to be effective on the international plane.

64. Mr. AGO said that the Drafting Committee had had to spend a great deal of time on article 5, concerning which opinion in the Commission had been divided between two diametrically opposed views. The Committee's text was not perfect, and he himself could only accept it provisionally, on the firm understanding that the Commission would be able to consider it further before the second reading. Apart from the fact that the search for a compromise did not permit of really satisfying either of the two conflicting opinions, the text contained a reference to article 4 of Part I intended to avoid the use of the words " possessing ostensible authority ", originally used by the Special Rapporteur, which he (Mr. Ago) considered distinctly preferable. The purpose of article 4 was not to indicate the extent of the " ostensible " authority. But as that article would probably also have to be re-drafted, it would be useless to devote more time to the question at that stage.

65. He had considered the words " unless the violation of its internal law was absolutely manifest " to be superfluous, but as the text now referred to article 4 of Part I, it was important to attenuate the total disregard of internal law which would ensue.

66. The best course for the moment would be to make do with the Drafting Committee's text provisionally and reconsider it in 1964.

67. In his opinion the word " absolutely " did serve some purpose.

68. Mr. de LUNA said that in his earlier remarks he had been speaking not of States which had no constitution, but of States whose constitution contained no express provisions concerning the treaty-making power and whose government had nevertheless concluded a treaty.

69. He was not asking that his proposal should be put to the vote; he would be satisfied if the idea was mentioned in the commentary.

70. The CHAIRMAN said he would not press for a vote on his own proposal. It seemed that the only amendment on which opinion might be divided was the deletion of the word " absolutely " in paragraph 1.

71. Sir Humphrey WALDOCK, Special Rapporteur, said he sympathized with Mr. Pal's objections to the phrase " the consent expressed "; the Drafting Committee might be asked to consider substituting the word " signified " for the word " expressed ", as suggested by Mr. Elias. He also saw some advantage in substituting the word " invalidate " for the word " affect ", as advocated by some members, because it would make for greater precision.

72. The word " absolutely " had been inserted because he had been informed by French-speaking members of the Commission that neither the word " *manifeste* " nor the word " *évidente* " would be quite strong enough to render the sense of the English term " manifest ". Another reason was to emphasize the exceptional character of the circumstances referred to in the final clause of paragraph 1. Personally, he saw no strong objection to retaining the word " absolutely ".

73. Mr. CASTREN said that he would not insist on its deletion.

74. The CHAIRMAN put article 5 to the vote, subject to the drafting changes which the Special Rapporteur had accepted.

Article 5 was adopted by 18 votes to none with 3 abstentions

ARTICLE 6 (LACK OF AUTHORITY TO BIND THE STATE)

75. The CHAIRMAN said that the title of article 6, as proposed by the Drafting Committee, had been changed and the article now read:

" *Lack of authority to bind the State*

" 1. If the representative of a State, who cannot be considered under the provisions of article 4 of Part I as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

" 2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not affect the consent to the treaty expressed by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States."

76. Sir Humphrey WALDOCK, Special Rapporteur, said that apart from the omission of the provision in paragraph 1 (*b*) of the original text, the changes made in article 6 were essentially drafting changes. The Drafting Committee had been instructed to formulate the article in terms of validity, rather than of the authority of representatives, and not to refer to ostensible authority or to the repudiation of unauthorized acts.

77. Mr. LIU said that the provision contained in the new article would contribute little to the security of treaties and seemed hardly necessary. The contingency envisaged in paragraph 2 was hardly likely to arise in the modern world, where methods of communication between States and their representatives abroad were so rapid as to allow of day-to-day contact. It was difficult to go behind the full powers of a negotiator and he thought that their submission to a credentials committee, in the case of treaties negotiated at an international conference, would be tantamount to notifying the other States of the restrictions upon his authority.

78. Ample safeguards against a representative exceeding his powers already existed in other provisions of the draft and a further safeguard was provided by the process of ratification.

79. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Liu, said that the considerations he had put forward had been discussed by the Commission during the first reading (677th meeting), when it had been recognized that the case which article 6 was designed to cover, though likely to be rare, should nevertheless be provided for, especially in view of the emergence of many new States and the significant increase in the number of treaties of various types being drawn up.

80. Mr. CADIEUX said that, if the word " affect " was to be replaced by some other word in article 5, a corresponding change should be made in paragraph 2 of article 6.

It was so agreed.

Subject to that amendment, article 6 was adopted by 20 votes to none with one abstention.

ARTICLE 7 (FRAUD)

81. The CHAIRMAN said that the title of article 7, as proposed by the Drafting Committee, had been changed and the article now read:

" *Fraud*

" If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty."

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had examined the proposals to combine all the original provisions concerning fraud and error in a single article, but had come to the conclusion, on grounds of logic and of substance, that fraud and error were so different in character that they ought to be kept separate.

83. In the original article 7 he had sought to provide a definition of fraud, and members would note how drastically the article had now been shortened, the Drafting Committee having decided that it was preferable to state the broad general rule without going into detail. It was generally recognized that instances of fraud were likely to be rare.

84. Mr. AMADO said he was prepared to accept the Drafting Committee's text of article 7, although he did not like the expression " *conduite frauduleuse* " (fraudulent conduct); he would prefer it to be replaced by the word " *dol* " (fraud).

85. Mr. de LUNA suggested that, to meet Mr. Amado's objection, the expression " *conduite frauduleuse* " should be replaced by the word " *fraude* ", since the word " *dol* " was already used in the title.

86. Mr. YASSEEN said that the word " *dol* " should be retained in the text of the article, because the titles would eventually disappear. The meaning of that word was generally known.

87. Sir Humphrey WALDOCK, Special Rapporteur, explained that the Drafting Committee had been faced with a language difficulty in that the expression " *manœuvre frauduleuse* " could only be translated by " fraudulent conduct ".

88. Mr. GROS pointed out that the concept of " *dol* " was taken from private law. To delete the expression " *conduite frauduleuse* " would be to delete the only definition given in the article. If the word " *dol* " was used by itself, the question of definition would always arise. But the original text had contained a definition and had specified that " *dol* " was to be understood to mean the making of false statements or representations of fact, or any other fraudulent action. The Drafting Committee had tried to simplify the language. The expression " *conduite frauduleuse* " (fraudulent conduct), used to describe the conduct of a State, covered all its bad intentions, false statements and any other fraudulent proceedings, whereas if the word " *fraude* " (fraud) had been used by itself it would have been necessary to specify what kind of " *fraude* " was meant.

89. Mr. YASSEEN said that either the word " *dol* " (fraud) should be retained, or a full definition should be given, covering every aspect of " *dol* ". The expression " *conduite frauduleuse* " was not satisfactory in that respect. Even if article 7 could be accepted in its abridged form because, as the Special Rapporteur had explained, instances of fraud were rare, an incomplete definition could not be accepted.

90. Mr. GROS said that there had never been any question of dropping the word " *dol* ", and the expression " *invoquer le dol* " (invoke the fraud) remained. The question was whether a definition of " *dol* " was or was not needed in the article. Several members had explained their views on the theory of " *dol* " at some length. The Drafting Committee's text was a compromise, and he hoped that the agreement reached would not be upset.

91. Mr. YASSEEN said that a definition of fraud should be given, but it should be a complete definition. The definition in article 7 was not complete and he would rather it were deleted.

92. Mr. de LUNA said he entirely agreed with Mr. Gros. The Drafting Committee's text should satisfy all the members of the Commission as it contained both the definition " *conduite frauduleuse* " (fraudulent conduct) and the word " *dol* " (fraud).

93. Mr. BARTOŠ said he was not wholly satisfied with the condensed formula which the Drafting Committee had had to adopt in order to secure the approval of its members. That formula was not practical, because it was too vague and did not define anything. He thought it should be accepted provisionally, however, as it was the only possible solution at present. The Commission could revert to it, if necessary, at later sessions, taking the comments of governments into account.

94. Mr. CASTREN said he agreed with Mr. Yasseen that there was no true definition in the text. Mr. Amado's proposal would be preferable. He suggested the wording " If a State has been induced to enter into a treaty by the " *conduite dolosive* " (fraudulent conduct) of another contracting State, it may invoke that fact as invalidating its consent to be bound by the treaty."

95. Mr. ELIAS said that article 7 was acceptable, but he saw no reason for referring to " fraudulent conduct " instead of " fraud " which, as indicated by the title, was the subject of the article. If there were any need to define what was meant by fraud, that could be done in the commentary.

96. Mr. CADIEUX said he thought he could discern a difference in form and perhaps even in substance between the English and the French texts. The English seemed more consistent, whereas the French used first the term " *conduite frauduleuse* " and then the term " *dol* ". With regard to the substance, the article's title in English was " Fraud " and that word was repeated in the body of the article, whereas the grounds that might be invoked as invalidating consent were given in the French text, not as " *conduite frauduleuse* " but as " *dol* ", which had a wider connotation.

97. Mr. AGO said that the French translation of the Special Rapporteur's original draft had contained the expression " *manœuvres dolosives* ", but the Commission had preferred the adjective " *frauduleuses* " and the Drafting Committee had decided to retain it.

98. Some speakers had criticized the expression " *conduite frauduleuse* " and had maintained that it should be replaced by the expression " *conduite dolosive* ". But a careful examination of the text showed that it contained a sort of implicit definition of *dol* as fraudulent conduct designed to induce the other party to consent and without which its consent would not have been obtained. He urged the Commission to accept that the French text was the best that could be devised. To amend it might destroy the meaning, which it expressed satisfactorily.

99. Mr. ROSENNE said that in the Drafting Committee he had understood that the two texts were consistent, and he therefore feared that Mr. Castrén's amendment would throw them out of harmony. He had understood from the discussions in the Commission and the Drafting Committee that the connotation of the term " *dol* " by itself could be wider than " fraud ", and that the necessary precision was provided by the expression " *conduite frauduleuse* ".

100. Mr. GROS said he had already had occasion to state that he was against transferring concepts of private law into international law, because relations between States were quite different from relations between private persons. Article 7 was concerned with the conduct of the State, and for purely linguistic reasons he preferred the expression " *conduite frauduleuse* " to " *conduite dolosive* " in a context relating to States.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been assured by French-speaking members of the Commission that the texts prepared by the Drafting Committee in the two languages corresponded exactly.

102. On the general problem of terminology, he agreed with Mr. Gros that it would be unwise to assume that concepts applicable in private law would necessarily be relevant to international relations, though they would provide some broad indications of what was understood by " fraudulent conduct " and to that extent could be helpful. He did not see how the succinct text submitted by the Drafting Committee could be improved.

103. He did not share Mr. Elias' doubts about using the expression " fraudulent conduct " while referring elsewhere to " fraud ".

104. Mr. PESSOU said that it might perhaps be wiser to defer the vote and to try to find a formula which would both respect the spirit of the proposed text and satisfy all members.

105. Mr. GROS said it was regrettable that some members of the Commission appeared to cast doubt on the conscientiousness of the Drafting Committee's examination of the text. The Drafting Committee's formulation was the result of much hard work, and he doubted whether it could be improved.

106. Mr. AMADO explained that he had not made a formal proposal and was willing to accept the text prepared by the Drafting Committee, whose ability and good faith could not, of course, be questioned.

Article 7 was adopted by 19 votes to none with 2 abstentions.

The meeting rose at 12.45 p.m.

705th MEETING

Friday, 21 June 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*)

1. The CHAIRMAN invited the Commission to continue consideration of the articles proposed by the Drafting Committee for section II.