Document:-
A/CN.4/SR.811

Summary record of the 811th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1965, vol. I

union ". There would also be a great advantage in introducing, as suggested by Mr. Ago, a reference to the limits of capacity; such a reference would help to make it clear that the Commission was not working on the assumption that the capacity of the entities in question to conclude treaties existed in all cases.

78. Mr. AGO said he agreed with the Special Rapporteur that the text proposed might create the impression that the Commission was inclined to recognize the existence of the treaty-making capacity in the case of member States of a federal union. To avoid that impression paragraph 2 might perhaps be drafted to read: " The existence of the capacity of member States of a federal union to conclude treaties and the limits of this capacity depend on the federal consitution ". But he suggested that the matter should receive further thought in order that the most satisfactory formula could be worked out.

The meeting rose at 1 p.m.

811th MEETING

Friday, 25 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen

---

Composition of the Drafting Committee

1. The CHAIRMAN suggested that, in order to relieve Sir Humphrey Waldock, whose time would be entirely absorbed during the rest of the session by work on the topic of the law of treaties, Mr. Rosenne should be appointed to serve on the Drafting Committee to assist in preparing the draft on special missions. If there was no objection, he would consider that the Commission agreed to that suggestion.

It was so agreed.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(resumed from the previons meeting)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 3 (Capacity of States to conclude treaties) *(continued)*[1]

2. The CHAIRMAN invited the Commission to continue its consideration of article 3 as proposed by the Drafting Committee.

3. Mr. PAL said that the article should be confined to paragraph 1; paragraph 2 should be deleted. The draft articles dealt with treaties between States, and article 3 dealt with the treaty-making capacity of States as such; the Commission had nowhere attempted to define " State " or to lay down, in general terms, the requisites for an entity to be regarded as a State.

4. If a number of States entered into a federation but still retained their statehood, paragraph 1 would apply. If, on the other hand, the federated entities did not amount to States, they would be beyond the scope of the draft convention, unless paragraph 2 was intended to provide that, notwithstanding federation, the federated entities would retain statehood if the federal constitution so allowed. He was opposed to paragraph 2, because the Commission was not dealing with the question of what constituted a State. The provisions of paragraph 1 dealt with all the matters with which the Commission was concerned in that context.

5. Mr. VERDROSS proposed as a compromise that paragraph 2 should be deleted and the following sentence added to paragraph 1: " This capacity may be limited by an international convention or by the constitution of a federal State ". That formula took into account the problem of federalism to which several speakers, notably Mr. Yasseen, had referred. It made it clear, furthermore, that international capacity flowed not from domestic law as such but only from international law. Moreover, it indicated that the capacity recognized by international law might also be limited by international law, either by an international convention or by the fact that a State became part of a federal State, a case likewise governed by international law.

6. It was a formula which applied just as much to historic federalism—the Swiss cantons, or Bavaria from the establishment of the Empire until the fall of the German monarchy—as to modern federalism—the League of Arab States or the European Economic Community, where the capacity to conclude commercial treaties would one day be vested not in the member States but in the Community. It also covered the case of member States of a federation whose international capacity had been recognized by the Covenant of the League of Nations or by the Charter of the United Nations.

7. On the other hand, it excluded member States of a federation whose capacity was based solely on internal law, and which were in fact organs of the federal State, in cases where the treaty-making capacity had simply been decentralized, a situation with which the Commission should not concern itself.

8. If the Commission adopted that formula, it might indicate in the commentary that the problem dealt with in paragraph 2 of the Drafting Committee's text was a problem of internal law, and that any State could decentralise the treaty-making capacity, but that in that case the subject which concluded the treaties was the federal State, for a new subject of international law could not be brought into existence by means of internal law.

9. Sir Humphrey WALDOCK, Special Rapporteur, said he feared that Mr. Verdross's proposed text would

[1] For text see 810th meeting, para. 28.

give rise to considerable difficulties. The reference to the possible limitation of a State's treaty-making capacity by the clauses of an international convention raised the complex issue of the compatibility of treaties. There might be cases, such as a treaty setting up an economic union, where the matter would go beyond compatibility of treaties because the States entering into the union surrendered some of their powers to a central authority. The Commission had already discussed at length the problem of possible limitations on treaty-making capacity arising from the terms of a treaty,[2] and had taken the view that cases of that kind did not give rise to international incapacity but only to international responsibility.

10. Nor was he altogether satisfied with the second part of Mr. Verdross's text, which referred to limitations arising from the constitution of a federal State. He saw no reason to confine such a provision to the constitutions of federal States; there might be constitutions other than federal constitutions which purported to limit the treaty-making capacity. Another difficulty was that the text suggested a presumption that a component State of a federation had an international capacity to conclude treaties.

11. Although he had no great enthusiasm for the Drafting Committee's proposed text for paragraph 2, he would be prepared to accept it with the addition proposed by Mr. Ago at the previous meeting.[3]

12. Mr. TUNKIN suggested that, after the exhaustive discussion which had taken place, the Drafting Committee should be asked to reconsider article 3, together with the various proposals which had been put forward.

13. Mr. JIMÉNEZ de ARÉCHAGA pointed out that there had been a strong current of opinion in the Commission in favour of the deletion of paragraph 2; if article 3 was simply referred back to the Drafting Committee, the implication would be that paragraph 2 was to be retained in some form or another. The Commission should first therefore take a decision on the proposal to delete paragraph 2; if that proposal was rejected, the various texts proposed for paragraph 2 could then be referred to the Drafting Committee.

14. Mr. PESSOU said he noted with regret that all the efforts which had been made to reach a compromise had not proved acceptable to all the members of the Commission. Some who had originally supported the article seemed to have changed their position. Even if the article was deleted, the problem would remain, and States would settle it; in fact they were already settling it without waiting for the Commission. If the matter came to a vote, he would vote for the deletion of the article.

15. Mr. CASTRÉN said he thought that the Commission could safely adopt the first part of the additional sentence proposed by Mr. Verdross, consisting of the phrase: " The capacity may be limited by an international convention ". The objections to the second part of the sentence might be met by replacing it by the words " or by the constituent act of a union of States ". That wording would have the advantage of covering cases other than federation.

16. Mr. BRIGGS said that, like the Special Rapporteur, he thought that the text proposed by Mr. Verdross would raise more problems than it solved. Since the capacity of a State to conclude treaties was derived from international law, it was questionable whether a State could contract out of capacity and still remain a State. All that could be done by treaty would perhaps be to impose some limitation on the exercise of the capacity to conclude treaties.

17. With regard to the constituent members of a federal State, he could not agree that the capacity to conclude treaties derived from the federal constitution; if such capacity were possessed by any such entity it would be derived from international law. He accordingly supported the proposal that paragraph 2, as it stood, should be deleted for it was inaccurate, inadequate and unnecessary. Article 3, should be retained, but should consist only of the provisions of paragraph 1.

18. Mr. TUNKIN said that, in view of the proposal to delete paragraph 2, he was compelled to add to his previous comments on the article.

19. As far as paragraph 1 was concerned, the Commission deserved credit for its statement of what amounted to a new principle of international law which had not existed 50 years earlier. An examination of textbooks written some 50 years previously might show that at that time there had been no support for the proposition that all States had the capacity to conclude treaties. That proposition, which was in keeping with the principle of the equality of States, constituted a new development of international law and a denial of all forms of protectorate or of colonial dependency. Paragraph 1 therefore represented a valuable contribution by the Commission to the codification of international law.

20. With regard to paragraph 2, he appreciated the intention behind Mr. Verdross's proposal but, like the Special Rapporteur, he could not accept it. It raised a number of theoretical issues which were best avoided. The first was whether an international treaty limited the capacity of a State to enter into a treaty or only the exercise of such capacity. The question also arose whether capacity was derived from international law or whether international law derived from the sovereignty of States. All those were controversial theoretical issues, and the Commission should not become involved in them.

21. The dangers which Mr. Jiménez de Aréchaga feared were purely imaginary; they had no existence in real international life. The fact that certain member States of federal unions entered into treaties constituted a real phenomenon, which involved problems that would be present, regardless of whether the Commission dealt with them or not. It would therefore be a dereliction on the part of the Commission not to deal with an important situation in international law which arose from the fact that States were free to enter into any kind of union.

[2] See *inter alia* 639th and 640th meetings in *Yearbook of the International Law Commission, 1962*, Vol. I.

[3] 810th meeting, para. 78.

22. Of course, there were States which were styled " federal " but were really unitary States; the so-called " member States " were really provinces. But there were also genuine federations, the member States of which constituted real States and had capacity to enter into treaties. It was important to state the rule that such capacity depended on the provisions of the federal constitution; the statement of that rule was important both to the federal State and to the member States, but it was equally important that other States wishing to enter into treaty relationships with a member State of the federal union should be aware of the situation. Where the federal constitution did not permit a member State to conclude treaties, the treaty would not be valid; that point should be brought out.

23. He could accept the addition proposed by Mr. Ago;[4] it would make it clear that the federal constitution covered not only the question of the existence of capacity, but also that of the limits of that capacity.

24. Mr. LACHS said that paragraph 1 stated a very important principle; it might be declaratory of the existing law, but, since it reflected a rule of modern international law which departed from the conceptions prevalent some decades previously, it was desirable to state the rule.

25. As far as paragraph 2 was concerned, he said it would be extremely helpful if the Drafting Committee would make another effort to formulate a text in the light of the various suggestions put forward during the discussion.

26. Mr. ROSENNE appealed to Mr. Jiménez de Aréchaga to withdraw his opposition to the referral of article 3 to the Drafting Committee. It would be extremely difficult for the Commission to vote on the retention or deletion of paragraph 2 until it had before it a final text prepared by the Drafting Committee.

27. Mr. YASSEEN said that paragraph 1 reflected recent developments in international law and the progress achieved. No member of the Commission seemed to oppose it.

28. Even if paragraph 2 was deleted, the problem it dealt with would not cease to exist. There were member States of a federal union which concluded treaties. The Commission should inquire into the origins of the phenomenon and work out a rule concerning it. The Commission's draft would be incomplete, and its technical value would be much diminished, if it contained no reference to the treaty-making capacity of member States of a federal union.

29. The rule proposed was a very wise one; it made the capacity dependent on the federal constitution. It had been objected that international capacity could not flow from internal law. But surely the real source of the capacity was not in internal but in international law, in the proposed rule itself, which in turn made the capacity to conclude treaties dependent on the federal constitution. It was an instance—but not the only one — of *renvoi* to internal law.

30. He regretted that he could not accept Mr. Verdross's proposal, because it raised afresh a problem which the Commission had settled in taking the view that a State could not be deprived by an international convention of the capacity to conclude treaties.

31. Mr. AGO said he considered, like Mr. Rosenne, that it would be a mistake to settle the question by a vote before the Drafting Committee had made a fresh effort to find a formula which satisfied at least the majority.

32. The principal difficulty appeared to be the question of the source of the treaty-making capacity in the case of member States of a federation, even if one accepted Mr. Yasseen's view that the source of that capacity was to be found in international law which relied, for that purpose, on internal law. In lieu of the provision that the capacity to conclude treaties " depends on the federal constitution " he proposed that paragraph 2 be redrafted to read: " States members of a federal union may have a capacity to conclude treaties within the limits indicated by the federal constitution ". Such a provision would make it clear that capacity to conclude treaties depended on the proposed rule of international law and the federal constitution merely indicated the limits of that capacity.

33. Mr. VERDROSS said he could accept Mr. Ago's proposal, which was very close to his own and to Mr. Castren's proposal.

34. Mr. JIMÉNEZ de ARÉCHAGA said that, although it had been said that his fears were imaginary, it had been recognized by several members that the difficulties to which he had referred at the previous meeting could arise.

35. Paragraph 2 embodied a very novel thesis. It had always been recognized that international law determined who were its subjects. It was now being suggested that a federal State, merely by adopting some constitutional provision, was free to impose on the international community an unlimited number of subjects. There were indeed some real federations of States, but there were also some paper federations, and international law could not accept at their face value the terms of a federal constitution.

36. It had been suggested that there was a *renvoi* by international law to constitutional law, in so far as the treaty-making capacity of the component States of a federal union was concerned. There might well be such a *renvoi*, but it was not and could not be absolute. International law could not abdicate its authority in the matter and would always retain some control over such situations; international law would retain the function of determining whether the member State really enjoyed independence and whether the federation did not constitute a purely paper federation.

37. The introduction of a reference to the limits which might be set by the federal constitution to the treaty-making capacity would make the situation worse, by stressing even more the power of the constitution to create new subjects of international law.

38. In response to Mr. Rosenne's appeal, he would withdraw his objection to the idea that the article should be referred to the Drafting Committee, but only

[4] *Ibid., loc. cit.*

on the understanding that the position of members on the proposals to delete paragraph 2 was in no way prejudiced thereby.

39. Mr. ELIAS considered that article 3 should be referred back to the Drafting Committee; when the article had been redrafted, the Commission should quickly take a vote on the redrafted text.

40. Mr. REUTER said that the Commission was hardly likely to reach agreement if it continued to discuss not reality but terms which everyone interpreted in a different way. As the text stood, article 3 contained an anti-colonialist paragraph and a pro-federalist paragraph. He did not object to the article being worded in that way, but it would still be necessary to explain what was meant by colonialism and by federalism, by making it clear at least that federalism was characterized by reciprocity. If there was no such explanatory passage, he would vote against the article.

41. Mr. TSURUOKA said that he approved the proposal to refer the article back to the Drafting Committee, and hoped the Committee would find a formula for deciding by what criterion international law recognized the treaty-making capacity of some political entities and denied that of others. In his opinion that was the crux of the problem. If it was impossible to find such a formula, the Commission might agree to formulate simply a descriptive rule indicating that some member States of a federation had the capacity to conclude treaties. Without being adamant on the point, he would prefer that there should be no reference to the federal constitution; very few of the draft articles mentioned internal law.

42. The CHAIRMAN, speaking as a member of the Commission, said he thought that the article should be referred back to the Drafting Committee, with full freedom to consider all the suggestions and observations which had been made.

43. He could accept Mr. Ago's proposal; the wording was moderate and might satisfy everyone. He could not, however, accept Mr. Verdross's proposal, for the possibility of limiting the attributes of the sovereignty of States by agreement had been ruled out by the General Assembly.

44. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that he naturally accepted the proposition embodied in paragraph 1, although the paragraph did not say very much. The real question was what constituted a State for the purposes of the rule that all States had the capacity to enter into treaties. In 1962, the Commission had declared in paragraph (2) of its commentary to article 3: "The term 'State' is used here with the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Relations; i.e. it means a State for the purposes of international law". Subject to that explanation, paragraph 1 was acceptable to him; it would express the thought that all States had the capacity to make treaties and, presumably, that a State could not lose that capacity by a subsequent agreement.

45. The provisions of paragraph 2 involved some very serious dangers. There were federal States in which the problem of the possible treaty-making capacity of component units had given rise to controversy. Any pronouncement by the Commission on that question could involve the risk of such a component unit invoking a right under article 3, with risks to the continuance of the federation. Both with respect to that question and to the one mentioned by Mr. Jiménez de Aréchaga, he thought that the Commission was faced with deep-seated political problems which were bound to arise, regardless of any decision the Commission might take on paragraph 2.

46. He was not in favour of retaining paragraph 2 as it stood, mainly because it did not deal with most of the really interesting questions which arose with regard to treaties concluded by member States of a federal union. One of those questions was whether the member State acted as an organ of the federal State and with its authority, or whether it exercised an independent treaty-making capacity under international law.

47. He was, however, prepared to agree that the paragraph should be re-examined by the Drafting Committee, together with Mr. Ago's proposal, which would serve to stress that not only the limits but also the actual existence of treaty-making capacity depended on the provisions of the federal constitution.

48. Mr. PESSOU said he endorsed Mr. Reuter's remarks. It was necessary to define exactly what was meant by federalism, and it would be useless for the Drafting Committee to draft still another text based on an ambiguity.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Pessou's concern would be largely allayed by the use of the general term "federal union" and the addition proposed by Mr. Ago. Regardless of whether a federation was loose or tight, the rule would be stated that both the existence and the limits of the treaty-making capcity of the member State of a federation depended on the provisions of the federal constitution.

50. The CHAIRMAN said he noted that for some members of the Commission the term "federation" indicated the political constitution of a State, while for other members, like Mr. Reuter and Mr. Pessou, federalism suggested a community of States, such as the European Economic Community or the former French-African Community. But it was better not to deal with that question. The Drafting Committee would endeavour to find a compromise formula, and when the redraft came before it, the Commission could decide whether it accepted it or not.

51. He accordingly proposed that the Commission should refer article 3 back to the Drafting Committee, requesting it to take into account all the points made during the discussion.

It was so agreed.[5]

[5] For resumption of discussion, see 816th meeting, paras. 3-9.

ARTICLE 4 (Full powers to represent the State in the negotiation and conclusion of treaties)[6]

52. The CHAIRMAN invited the Commission to consider the new text of article 4 proposed by the Drafting Committee, which read:

" 1. Except as provided in paragraph 2, an agent of a State is considered as representing his State for the purpose of the negotiation and adoption of the text of a treaty or for the purpose of expressing the consent of his State to be bound by a treaty only if:

(*a*) He produces the appropriate instrument of full powers; or

(*b*) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

" 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Foreign Ministers, for the purpose of concluding treaties;

(*b*) Heads of diplomatic missions, for the purpose of the negotiation and adoption of the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) Representatives accredited by a State to an organ of an international organization or to an international conference, for the purpose of the negotiation and adoption of the text of a treaty by such organ or conference. "

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the order in which the contents of article 4 appeared in the redraft represented a reversal of the one adopted in 1962. Instead of stating in paragraph 1 the rule relating to Heads of State, Heads of Government and Foreign Ministers, the article now began with a statement of the general rule on the requirement of full powers.

54. The substance of the article had been left unchanged, except for the new formulation in paragraph 2 (*c*), which embodied a different rule more limited than that appearing in paragraph 2 (*b*) of the 1962 formulation.

55. His attention had been drawn by Mr. Rosenne to a possible difficulty in the use of the term " an agent of a State " in the opening sentence of paragraph 1; he would be prepared to agree that the expression should be replaced by " a person ".

56. Mr. ROSENNE said that, since the term " agent " had other technical meanings in international law, it was preferable to speak of " a person " or " an individual "; article 4 was the only one of the draft articles which connected the treaty with the actions of the human beings concerned.

57. Article 4 was acceptable, except for paragraph 2 (*c*), which he strongly opposed. The provisions of that sub-paragraph were extraneous to the law of treaties and closely related to the topic of relations between States and inter-governmental organizations. They were also incompatible with the rules of most of the international organizations with which he was familiar; for example, the words " Representatives accredited by a State to an organ of an international organization ", if applied to the General Assembly of the United Nations, would give rise to ambiguity since under Article 9 of the Charter each Member could appoint up to five representatives in the General Assembly. Furthermore, they did not accord with his experience of the practice of the Secretariat with regard to conventions concluded either in an organ of the United Nations or in a conference convened under the auspices of the United Nations.

58. For those reasons, he would have to oppose paragraph 2 (*c*).

59. Mr. CASTRÉN said that the new text was a great improvement. He accepted it in substance, including paragraph 2 (*c*), which Mr. Rosenne opposed. He wished to comment only on the drafting.

60. Paragraph 1 (*b*) referred only to the " circumstances ", which was rather a vague term. The corresponding provision in the version submitted by the Special Rapporteur earlier in the session[7] had mentioned also the nature and the terms of the treaty, and perhaps the new text should also mention them.

61. In paragraph 2 (*a*), the word " concluding " might give the impression that the passage related only to the signature or final adoption of a treaty. In order to reflect the distinction between paragraph 2 (*a*) and paragraph 2 (*b*), where the powers referred to were more restricted, paragraph 2 (*a*) should read: " . . . for all acts relating to the conclusion of treaties ".

62. He inquired why the Drafting Committee had added the mention of " an organ " of an international organization in paragraph 2 (*c*); there had been no such mention in the previous text.

63. He noted that the Drafting Committee had dropped the original paragraph 5 of the text proposed by the Special Rapporteur, under which a letter or telegram might be provisionally accepted subject to the production in due course of an instrument of full powers. Some members had proposed that that provision be deleted. Perhaps the intention was to deal with that point in the commentary. While he would not oppose that course, he thought that the matter was important enough to deserve a provision in the article itself.

64. Mr. LACHS said that the new text of article 4 was a great improvement, but it was clumsy to start the article with a proviso, instead of just stating the general rule. He shared Mr. Rosenne's doubts about the phrase " an agent of a State ", but did not favour as an alternative the word " person ". The point had been discussed earlier and possibly it would be best to revert to the Special Rapporteur's original term, " a representative ".

65. He agreed with what had been said by Mr. Castrén concerning paragraph 2 (*a*). The discussion had confirmed his opinion that, if no precise definition was included of what was meant by the " conclusion " of a treaty, the powers of Heads of State, Heads of government and

[6] For earlier discussion, see 780th meeting, paras. 27-85 and 781st meeting, paras. 1-41.

[7] 780th meeting, para. 27.

Foreign Ministers should be regarded as wider than those of heads of diplomatic missions.

66. Provision should be made for the (admittedly rare) case of delay in the transmission of the instrument of full powers.

67. Mr. Rosenne's objection to paragraph 2 (*c*) was only partly justified and could be met by deleting the words " an organ of ". The sub-paragraph was important and should be retained, for a person accredited to an international organization as a representative of his State was on an equal footing with the head of a permanent mission.

68. For the sake of precision, the final words of the sub-paragraph should be amended to read : " . . . text of a treaty at such a conference ".

69. Mr. RUDA said he approved of article 4 as a whole, with the exception of paragraph 2 (*c*).

70. As far as paragraph 1 was concerned, he thought, like Mr. Lachs, that it was not very logical to start with an exception in a clause intended to lay down a rule. He also thought it might be dangerous to introduce the notion of a person or individual; if the term " agent " was not satisfactory, it was still preferable to any other term. The words " is considered as " and the word " only " should be deleted so that the paragraph would then open thus : " An agent of a State represents his State for the purpose of the negotiation and adoption of the text of a treaty ".

71. In paragraph 2 the expression " In virtue of their functions and " should be deleted; that passage not only stated the obvious but also constituted a piece of reasoning for which the more appropriate context was the commentary. He shared the views of Mr. Castrén and Mr. Lachs concerning paragraph 2 (*a*) and (*b*).

72. With regard to paragraph 2 (*c*), he said that the use of the term " organ " posed a problem. It would be preferable to delete it, since, for the purpose of the negotiation and adoption of treaties by an organization or an international conference, it was not necessary to draw a distinction between the heads of diplomatic missions and permanent representatives accredited to organizations. Heads of mission as well as accredited representatives should have competence to negotiate and adopt such treaties. The deletion of the word " organ " would put sub-paragraph (*c*) on an equal footing with sub-paragraph (*b*) and so would dispose of Mr. Rosenne's objections.

73. Mr. ELIAS said that there was not much force in Mr. Lachs's criticism of the drafting of paragraph 1. Article 38 of the Vienna Convention on Diplomatic Relations, 1961, Article 80 of the Charter and Article 64 of the Statute of the International Court, to mention only a few examples, all opened with a proviso in similar form.

74. The CHAIRMAN said there were two distinct types of question : questions of substance and drafting questions. The questions of substance had been considered by the Drafting Committee without specific instructions from the Commission. Every member of the Commission had, of course, the right to submit proposals, but since most of the articles would be referred back to the Drafting Committee, it should be sufficient to make suggestions.

75. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the scope of paragraph 2 (*c*) was limited, as it dealt only with accreditation for the purposes of negotiating and adopting the text; it did not even extend to authority to sign. The Drafting Committee had been informed that such a rule conformed to the general practice in international organizations and at international conferences.

76. He was firmly against the idea of dropping the reference to an organ of an international organization, since to do so would radically alter the provision and would be at variance with practice. He understood that representatives were accredited to a specific organ or organs of an international organization—in the case of the United Nations, for example, to the General Assembly, the Security Council or the Economic and Social Council—and were not necessarily empowered thereby to act in any other.

77. Mr. TSURUOKA said he approved of article 4 as a whole as redrafted. In his opinion, the " except " clause at the beginning of paragraph 1 was not awkward. The rule laid down in that paragraph seemed to him more important than, and should therefore precede, that set out in paragraph 2.

78. As for paragraph 2 (*c*), he was satisfied with it in the light of the explanation given by the Special Rapporteur.

79. The CHAIRMAN, referring to paragraph 2 (*c*), said that all permanent representatives to the United Nations would have difficulty in relying on that provision, for they were accredited to the Secretary-General. With the exception of the Security Council, they represented their State in all the organs of the United Nations, unless otherwise prescribed, as was the case with the Economic and Social Council and the Trusteeship Council. Accordingly, while agreeing on the substance, he feared that, owing to the use of the word " organ ", permanent representatives might be unable to rely on the provision in question.

80. Mr. ROSENNE said that he had not been convinced by the Special Rapporteur's defence of paragraph 2 (*c*). The matter called for detailed study because the techniques of accreditation varied greatly from organ to organ, organization to organization and conference to conference. In large measure they depended on the relevant rules of procedure or the constituent instruments of organizations. The subject did not really belong to the law of treaties at all, but rather to the topic of relations between States and inter-governmental organizations, or possibly to that of special missions, should the question of conferences be included within the scope of that topic. He realized that he was in a minority and, as his dissent had been recorded, he would be content if the Commission reached a decision forthwith on article 4 as a whole.

81. He would not insist on a separate vote on paragraph 2 (*c*). If it was retained the reference to an organ of an international organization should certainly be kept.

82. The CHAIRMAN suggested that article 4 should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[8]

ARTICLE 5 (Negotiation and drawing up of a treaty)[9]
[Deleted by the Drafting Committee]

83. The CHAIRMAN invited the Commission to take a decision on the Drafting Committee's proposal that article 5 be deleted.

84. Mr. ROSENNE said he was opposed to the Drafting Committee's proposal because the negotiation and drawing up of a treaty were essential features of the whole process. In view of what had been said by the Special Rapporteur at the 781st meeting, when summing up the discussion on article 5, about the difficulties of either retaining or deleting the article, it would be preferable to postpone a decision until the Commission came to review the draft as a whole and had before it the articles on interpretation.

85. Mr. LACHS said that one way out of the difficulty would be to incorporate the content of article 5 in the commentary to article 6 (concerning the adoption of the text of a treaty).

86. Sir Humphrey WALDOCK, Special Rapporteur, said that that possibility had not been considered by the Drafting Committee. Article 5 had given a great deal of trouble, and the Drafting Committee had not succeeded in formulating a legal rule and getting away from a text that was purely descriptive. Mr. Ago, who had strongly advocated the inclusion of an article on negotiation, had finally admitted defeat.

87. Mr. TUNKIN said that it was self-evident that negotiation was an important phase of the treaty-making process, but as a legal rule could not be worked out, the Drafting Committee had rightly decided not to include a purely descriptive provision. No purpose would be served by deferring a decision on the matter.

88. Mr. LACHS formally proposed that the points dealt with in the original text of article 5 be covered in the commentary to article 6.

89. Sir Humphrey WALDOCK, Special Rapporteur, said that the proposal was acceptable to him and would not exclude the possibility of any member submitting a text for an article on negotiation at some later stage.

90. Mr. ROSENNE said that he would have no objection to that course.

Mr. Lachs's proposal was adopted by 17 votes to none.

ARTICLE 6 (Adoption of the text)[10]

91. The CHAIRMAN invited the Commission to consider the new text of article 6 proposed by the Drafting Committee, which read:

" 1. The adoption of the text of a treaty takes place by the unanimous agreement of the States participating in its drawing up except as provided in paragraphs 2 and 3.

" 2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference unless:

(*a*) By the same majority they shall decide to apply a different rule; or

(*b*) The established rules of an international organization apply to the proceedings of the conference and prescribe a different voting procedure.

3. The adoption of the text of a treaty by an organ of an international organization takes place in accordance with the voting procedure prescribed by the established rules of the organization in question. "

92. Sir Humphrey WALDOCK, Special Rapporteur, said that no changes of substance had been introduced, but the Drafting Committee, in accordance with suggestions made in the Commission, had decided to alter the order of the provisions in the article, which in the revised version first stated the unanimity rule and then the exceptions set out in paragraphs 2 and 3.

93. Mr. ROSENNE asked whether the Drafting Committee had considered transposing article 6 to follow article 7.

94. The CHAIRMAN suggested that questions about the order of the articles should be left over until the text of all the draft articles was reviewed. He then put article 6 to the vote.

Paragraph 1 was adopted by 17 votes to none.

Paragraph 2 was adopted by 16 votes to 1.

Paragraph 3 was adopted by 17 votes to none.

Article 6, as a whole, was adopted by 16 votes to 1.

ARTICLE 7 (Authentication of the text)[11]

95. The CHAIRMAN invited the Commission to consider the new text of article 7 proposed by the Drafting Committee, which read:

" The text of a treaty is established as authentic and definitive by such procedure as may be provided for in the text or agreed upon by the States concerned and failing any such procedure by:

(*a*) The signature, signature *ad referendum* or initialling by the representatives of the States concerned of the text of the treaty or of the Final Act of a conference incorporating the text; or

(*b*) Such procedure as the established rules of an international organization may prescribe for the authentication of the text of a treaty adopted by one of its organs. "

96. Sir Humphrey WALDOCK, Special Rapporteur, explained that the new text was shorter but comprised the substantive rules covered in the previous article 7.

97. Mr. AMADO said he objected to the use of the term *arrêté* (" established ") in place of *adopté* (" adopted "). He could agree to the use of the term " authentication " in order to cover all forms of procedure

[8] For resumption of discussion, see 816th meeting, paras. 10-13.

[9] For earlier discussion, see 781st meeting, paras. 59-96.

[10] For earlier discussion, see 782nd meeting, paras. 1-63.

[11] For earlier discussion, see 782nd meeting, paras. 71-95 and 783rd meeting, paras. 1-81.

—signature, signature *ad referendum* and initialling—but he could not agree to an innovation which was at variance with the terminology in use in legal texts.

98. Mr. ROSENNE said that, as the draft articles were being confined to treaties between States, the word " in " should be substituted for the word " by " after the words " treaty adopted " in sub-paragraph (*b*).

99. The CHAIRMAN, speaking as a member of the Commission, said that he accepted the notion of authentication, for he believed that a distinction should be drawn between the establishment and the adoption of the text of a treaty. But he was opposed to the idea of the signature of a final act, for often a final act was not signed : the president of the conference certified that the text had been adopted. He did not, however, feel so strongly in the matter that he would vote against the article; on the other hand, the drafting was not good enough for him to vote for it. He would abstain.

100. He agreed with Mr. Rosenne that it would be better to say " adopted in one of its organs " than " by one of its organs " in sub-paragraph (*b*).

101. The text should be referred back to the Drafting Committee.

102. Sir Humphrey WALDOCK, Special Rapporteur, said he hoped that the Chairman would not feel compelled to abstain in the vote on article 7 which, he would see, was formulated as a residual rule.

103. The CHAIRMAN, speaking as a member of the Commission, said that the residual rule applied where there was no express decision by the parties, and it might well happen that there was none. In that case, it would be necessary to follow the rule. Though he did not much like the introductory paragraph to article 7, he would not vote against it.

Article 7 was adopted by 16 votes to none, with 1 abstention.

104. The CHAIRMAN invited the Commission to take a formal vote on the new first article and article 1, paragraph 1, which had been adopted without a vote at the previous meeting.[12]

The new first article was adopted by 17 votes to none.

Article 1, paragraph 1 (a) *was adopted by 17 votes to none.*

The meeting rose at 1 p.m.

[12] 810th meeting, paras. 10 and 11.

812th MEETING

Monday, 28 June 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 11 (Consent to be bound expressed by signature), incorporating Article 10 (Initialling and signature *ad referendum* as forms of signature)[1]

1. The CHAIRMAN invited the Commission to consider the new text of article 11, incorporating in its paragraph 2 the substance of article 10, which had been prepared by the Drafting Committee and which read :

" 1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when :

(*a*) The treaty provides that signature shall have that effect;

(*b*) It appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that signature should have that effect;

(*c*) The intention of the State in question to give that effect to its signature appears from the full powers of its representative or from statements made by him during the negotiations.

" 2. (*a*) The initialling of a text is considered as a signature of the treaty when it appears from the circumstances that the contracting States so agreed;

(*b*) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, is considered as the equivalent of a full signature of the treaty ".

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had incorporated in paragraph 1 the rules relating to those cases where, either expressly or by implication in the light of the circumstances, the States had shown their intention that signature should express consent to be bound.

3. Paragraph 2 dealt with two subsidiary questions. The first, covered by sub-paragraph (*a*), expressed in general terms the rule in cases where the initialling of the text amounted to signature; the Drafting Committee had dropped the distinction between initialling by the Head of State, Head of Government or Foreign Minister, on the one hand, and initialling by other representatives on the other.

4. In paragraph 2 (*b*), relating to signature *ad referendum*, the text adopted by the Drafting Committee did not state any rule respecting the date at which confirmation would be taken as operative. Government comments, especially those by the Government of the United States, had shown that a certain practice had emerged of using signature *ad referendum* as equivalent to signature subject to ratification. The Drafting Committee had adopted a text which was intended not to encourage that practice, although it actually contained the implication

[1] For earlier discussion, see 782nd meeting, at which it was agreed (paras. 74-95) that articles 7, 10 and 11 would be discussed together, and 783rd meeting, paras. 1-81.