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Summary record of the 780th meeting

Topic:
Law of Treaties

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780th MEETING

Monday, 10 May 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the Agenda]

ARTICLE 3 (Capacity to conclude treaties) *(continued)*

1. The CHAIRMAN said he understood that Mr. Lachs wished to speak again before the Special Rapporteur summed up.

2. Mr. LACHS said he wished to renew his plea for the inclusion of a provision on the capacity of States to conclude treaties. The essential point was that the principle itself, and in particular the inherent right of every State to conclude treaties, should be clearly and unequivocally stated. If the Commission did not state the principle, the question might arise whether that right could be conferred on a State ; but then, who would confer it. Such questions might lead the Commission along a dangerous road towards the notion of inequality of States.

3. In practice, of course, there were many limitations on the right to conclude treaties ; but those limitations existed as a result of their acceptance by the States concerned and before they could be accepted it was necessary to recognise the basic premise that the right existed. Freedom was not equal in all cases ; Article 2 of the Charter itself spoke of " sovereign equality ", not " equal sovereignty ". That equality implied *inter alia* the right to conclude treaties. At all events, it was most important to clarify the situation, both for politicians and for jurists.

4. It had to be realized that the treaty-making powers of States were constantly changing. The range of problems covered by treaties was continually increasing and the paradoxical consequence was that the freedom of action of States was becoming limited, because the more treaties they were bound by the less freedom they had to conclude further treaties.

5. There could be no danger in reaffirming the right of every State to conclude treaties and to enter into treaty obligations.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that opinion in the Commission was divided, although there seemed to be a small majority in favour of retaining an article on treaty-making capacity.

7. He thought it undesirable that the Commission should adopt or reject the text of such an article by a very narrow margin. Rather than proceed to a hasty vote, the Commission should ask the Drafting Committee to find a formulation that would take into account the views and doubts expressed in the debate.

8. If article 3 were retained, it would need to be substantially modified in view of the decision to confine the draft articles to treaties between States. Only the first two paragraphs of the article would be left, and he felt serious doubts about the utility of retaining them, although he appreciated the motives of those who considered it advisable to affirm inherent treaty-making capacity. But a simple affirmation that every State had the capacity to conclude treaties under international law was either pleonastic, as Mr. Amado had said, or raised a question, namely, what was a " State " for the purposes of the article? In the report on its fourteenth session, in paragraph (2) of the commentary on article 3, the Commission had somewhat disguised its difficulties by saying " Paragraph 1 lays down the general principle that treaty-making capacity is possessed by States... 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 Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations ".[1]

9. Presumably the majority wished to include a broad affirmation in some such words as " Every State has capacity under international law to conclude treaties ". That was indeed implied in the definition of a treaty. Some members wished to go further and emphazise the inherent right or say something about the extent to which that right could be limited.

10. The main problem was that there were so many varieties of relationship between States: there were unions of States, partial unions of States, and arrangements for small international organizations of States, in which the legal status of the parties was far from clear. Such arrangements were by no means always made on a basis of strict equality; the voting power might not be equal. Consequently, in speaking of equality and reciprocity, care had to be taken not to damage or nullify arrangements entered into on an entirely voluntary basis by the parties concerned. If too hasty a general affirmation were made, there would also be a danger of affecting relationships such as those between Liechtenstein and Switzerland, and between Benelux and the Economic Union of Belgium and Luxembourg.

11. Then there was the question of federal States. Some members preferred to say nothing about them; others thought that if there were a broad affirmation, it would be logical to say something about federal States and their component units, which in many instances were also called states. In 1962 the Commission had reserved its position by saying, in paragraph (3) of the commentary, that a question might arise as to whether the component state concluded the treaty as an organ of the federal State or in its own right and that the solution must be sought in the provisions of the constitution.[2]

[1] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 164.

[2] *Ibid.*

12. But the Commission should be clear in its mind whether, in considering the individual capacity of component units, it wished to say that the unit was, in international law, the party to the treaty. There were well-known instances in which treaties could be negotiated by component units; the Cantons of Switzerland were a notable instance and had the power to negotiate on local and, especially, on border questions. He was in some doubt whether in those cases Switzerland was in the last resort the party to the treaty : if there was a violation of the treaty, could Switzerland be brought before the International Court? Or was the Canton itself the sole party? Or again, did Switzerland delegate its treaty-making powers? Any opinion on that point was bound to be controversial. Although the language of paragraph 2 was to the effect that the matter would be decided by the constitution, the implication was that the Commission accepted the position that the component unit might be a party to a treaty.

13. If the component unit was accepted as a treaty-making unit, other questions arose : for instance, could it make different reservations from the federal State when both were parties to the same treaty? One suggestion was that there might be a difference between international responsibility and capacity to conclude a treaty; that was a very delicate point of doctrine on which he did not propose to enlarge. All he wished to do was to draw attention to the kind of difficulties that faced him as Special Rapporteur in proposing an article on capacity to conclude treaties.

14. His view was that the matter should not be put to the vote at once, but that the Drafting Committee should be asked to re-examine the article and produce a fresh test.

15. Mr. AGO said that the questions raised by the Special Rapporteur, interesting though they were, should not be considered in the context of article 3. The case in which a canton or member state of a federal State possessed only apparent capacity to conclude treaties, and that capacity vested in the federal State itself, which employed the local authorities as its representatives to negotiate a treaty, really came under the article concerning the authorities competent to negotiate a treaty, not the article on capacity. The question whether, in the event of breach of a treaty, it was the member state or the federal State which was responsible, was also outside the scope of the present discussion. The Special Rapporteur could rest assured that the delicate problems he had referred to would not be affected by the wording adopted by the Commission.

16. The CHAIRMAN suggested that, in accordance with the Special Rapporteur's proposal, the Commission should not vote on article 3 for the time being; that in view of its previous decisions, the words " and by other subjects of international law " in paragraph 1, and the whole of paragraph 3 should be deleted; and that the rest of the article should be referred to the Drafting Committee.

It was so agreed.[3]

[3] For resumption of discussion, see 810th meeting, paras. 28-78, and 811th meeting, paras. 2-51.

ARTICLE 3 *(bis)* (Transfer of article 48 to the " General Provisions " : proposed by the Special Rapporteur)

The application of the present articles, with the exception of articles 31-37 and article 45, to treaties which are constituent instruments of an international organization or have been drawn up within an organization shall be subject to the established rules of the organization concerned.

17. The CHAIRMAN invited the Special Rapporteur to introduce his proposed new article 3 *(bis)*.

18. Sir Humphrey WALDOCK, Special Rapporteur, said that, at the time when he had prepared his report, he had not been in possession of the comments by governments on article 48. The purpose of his proposal was to widen the scope of article 48; he wished to know whether that idea was acceptable to the Commission. Although article 48 had been adopted in the context of the invalidity and termination of treaties, the Commission had appreciated that the same problem arose in other parts of the draft, notably in Part I. It would simplify the drafting of a number of later articles if article 48 were made a general article. It might be advisable only to consider the article in a general way at that stage and to postpone examination of the text until the Commission came to deal with article 48 itself.

19. Mr. ROSENNE said he supported the Special Rapporteur's proposal, both as to the generalization of the idea expressed in article 48 and as to postponing discussion of the text. On the other hand, it might be useful if the Commission could come to a decision on the principle immediately.

20. The CHAIRMAN said that if the Commission postponed a decision on principle until it came to article 48, it would in the meantime also have to defer consideration of all the articles which touched on the same question. He thought the Commission should settle the question of principle at once and postpone the final decision until it came to article 48.

21. Mr. AGO did not think it possible to decide on the principle of general application of the article without discussing its substance. But as the question would apparently arise in connexion with other articles before article 48, the Commission would be able to discuss it when considering those articles. From the point of view of principle, however, it would be inelegant to insert, before the articles on the negotiation and adoption of treaties, a provision to the effect that the application of the present articles to any treaty which was the constituent instrument of an international organization was subject to the rules of that organization : for the organization only existed from the date on which its constituent treaty was validly concluded.

22. Mr. BRIGGS said that in his view all discussion of the article should be postponed. The Commission would then be in a position to consider the consequences of the proposal when it came to article 48.

23. Mr. ELIAS said he was in favour of postponing consideration of the whole question : the Commission should discuss neither the principle nor the text, especially as the Special Rapporteur's formulation of article 3 *(bis)* had been drafted in the belief that article 3 would be adopted.

24. Mr. TUNKIN said that he too was in favour of postponement. There were special circumstances connected with treaties that were the constituent instruments of international organizations, and the Commission would have to bear them in mind when examining the articles concerned.

25. Sir Humphrey WALDOCK, Special Rapporteur, said he had merely asked for the Commission's provisional acceptance of the idea of broadening the scope of article 48. Obviously the substance would have to be discussed in detail. From a drafting point of view it would save repetition if the application of article 48 were extended.

26. The CHAIRMAN said that since the majority of the Commission appeared to be in favour of that course, he would suggest that discussion of article 3 (*bis*) be postponed.

It was so agreed.[4]

ARTICLE 4 (Authority to negotiate, draw up, authenticate, sign ratify, accede to, approve or accept a treaty)

Article 4

Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty

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

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

(*b*) The same rule applies in the case of the Heads of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question or between their State and the organization to which they are accredited.

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

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

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

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

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

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

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

27. The CHAIRMAN invited the Special Rapporteur to introduce his revised draft of article 4, which read:

Article 4

1. A representative may be considered as possessing authority to act on behalf of his State in the conclusion of a treaty under the conditions set out in the following paragraphs, unless in any particular case his lack of authority is manifest.

2. A Head of State, Head of Government and a Foreign Minister may be considered as possessing authority to negotiate, draw up, adopt, authenticate, or sign a treaty and to sign any instrument relating to a treaty.

3. (*a*) A Head of a diplomatic mission may be considered as possessing authority to negotiate, draw up or adopt a treaty between his State and the State to which he is accredited.

(*b*) The rule in paragraph (*a*) applies also to a Head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization to which he is accredited.

(*c*) Other representatives may not be considered in virtue of their office alone as possessing authority to negotiate, draw up or adopt a treaty on behalf of their State; and any other negotiating State may, if it thinks fit, call for the production of an instrument of full powers.

4. Except as provided in paragraph 2, a representative may be considered as possessing authority to sign a treaty or an instrument relating to a treaty only if —

(*a*) he produces an instrument of full powers or

(*b*) it appears from the nature of the treaty, its terms or the circumstances of its conclusion that the intention of the States concerned was to dispense with full powers.

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

(*b*) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 3 (*b*) above.

28. Sir Humphrey WALDOCK, Special Rapporteur, said there was a close connexion between article 4 and article 31, which was concerned with cases where a treaty might have been concluded without full compliance with the provisions of internal law. In article 31 the Commission had to a large extent excluded the provisions of internal law as irrelevant, unless their violation was manifest. As article 4 was also concerned with internal

[4] For resumption of discussion, see 820th meeting, paras. 27 and 28.

law, the Commission might wish to wait until it reached article 31 and then take both articles together.

29. Mr. YASSEEN thought that the Commission should not discuss the two articles together, but that it would be difficult to discuss article 4 without some reference to article 31. It should therefore be quite in order for members of the Commission to refer to article 31 when discussing article 4.

30. Mr. ROSENNE said it would be difficult for the Commission to discuss article 4 without having heard the Special Rapporteur's views not only on article 31, but perhaps on articles 32 and 49 as well. He therefore supported the Special Rapporteur's proposal to postpone discussion of article 4.

31. Mr. AGO said he considered article 31 one of the least satisfactory articles in the draft and he would not like its provisions to be expressly linked with article 4. The two articles related to entirely different questions : article 4 dealt with the authority of the negotiator, whereas article 31 dealt with the validity of a treaty as affected by provisions of internal law regarding competence to enter into treaties. He hoped, therefore, that at that stage the Commission would confine itself to article 4.

32. Mr. AMADO said he was opposed to the idea of postponing the discussion of article 4 and taking it with article 31, which referred to internal law regarding competence to enter into treaties.

33. Mr. CASTRÉN agreed with Mr. Ago; he thought the Commission should discuss article 4 as a whole, at least to begin with, not paragraph by paragraph.

34. Mr. ELIAS said he thought that discussion should be concentrated on article 4, though the Special Rapporteur and members of the Commission should be free to refer to any other relevant article.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that article 4, like article 31, embodied a certain philosophy in its manner of dealing with the effects of internal law. Consequently discussion of article 4 might lead to alterations in article 31. He agreed, however, that article 4 could be discussed on its own merits. It would be difficult to deal with it paragraph by paragraph, because the paragraphs were closely connected.

36. The CHAIRMAN said he would call on the Special Rapporteur to give a general introduction to article 4, after which the Commission would discuss the article as a whole, and then paragraph by paragraph.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that article 4 had attracted some criticism, in the light of which he had proposed a new text.

38. As noted by the Swedish Government in its comments (A/CN.4/175, Section I.17), the article dealt essentially with the question of evidence of authority; its provisions did not purport to lay down the actual authority of State organs, which derived from municipal law. The problem was that of determining to what extent the representative of a State could rely on the claim of another to act on behalf of another State. Article 4 was concerned with determining how far there existed a duty to produce evidence of authority.

39. The somewhat absolute terms in which the provisions of the article were couched had been criticized. It had been said that paragraph 3 did not correspond with existing practice, and that authority without written credentials was sometimes accepted outside the cases envisaged in paragraphs 1 and 2.

40. The Swedish Government had suggested that the article should be formulated bearing in mind the basic problem of where the risk of proceeding without evidence would lie, and he had endeavoured to take that suggestion into account. He had also shortened the text by combining, in the new paragraph 2, the provision on Heads of State, Heads of Government and Foreign Ministers, which had formerly appeared in paragraphs 1 and 5.

41. The new paragraph 1 was purely introductory, except for the final proviso, " unless in any particular case his lack of authority is manifest ", which had been introduced with the provisions of article 31 in mind.

42. In the new paragraphs 2, 3 and 4, the expression " may be [or " may not be "] considered as possessing authority " was used, instead of the more categorical " shall be required " or " are not required " which appeared in the previous text. The intention was to soften the text, in line with the comments made by a number of governments; the new formulation would not be open to the misconstruction that the article was meant to be a statement of absolute power under international law to make treaties. The article would merely state, for example, that a Head of State, Head of Government or Foreign Minister could be considered as possessing authority in the matter without production of evidence.

43. The new text might perhaps need some adjustment to bring out more clearly that its provisions dealt only with the evidence of full powers. It might also prove possible to shorten it further.

44. Mr. CASTRÉN said the Special Rapporteur's new text seemed to be a distinct improvement on the old one, and on the whole he was prepared to accept it. There were, however, a few inaccuracies and a few passages that were unnecessary, and the French text was not always entirely consistent with the English original.

45. He approved of the deletion of paragraph 6 (*a*) of the previous text. He also approved of the redraft of paragraph 4 (*b*), which omitted the reference to treaties in simplified form, but applied to other possible cases and was therefore more complete.

46. Paragraph 5 of the previous text, which dealt with ratification, accession, approval and acceptance, could be omitted in consequence of the revision of the former paragraphs 1 and 4, but the title of the article should be similarly revised.

47. In paragraph 3 (*a*) of the new text, the Special Rapporteur had probably not intended to give the Head of a diplomatic mission a general right to adopt (in the French translation " *signer* ") treaties between his State and the State to which he was accredited. Presumably, what was meant was merely adoption of the text of a treaty, that was to say the act referred to in article 6. If that was so, it should be made clear by saying " or adopt the text of a treaty "; and the same change should be made in paragraph 2, where, incidentally, the

English verb " adopt " was rendered in French by " *adopter* ".

48. Finally, he suggested that the last part of paragraph 3 (*c*), reading : " and any other negotiating State may, if it thinks fit, call for the production of an instrument of full powers ", should be deleted as being self-evident.

49. Mr. BRIGGS said he was glad the Special Rapporteur had emphasized that article 4 dealt with the evidence of authority to conclude treaties. It had been said that it dealt with a question of municipal law; in fact, it dealt with a question of international law and in 1962 he had suggested that the article should state expressly that it was for purposes of international law that a Head of State, Head of Government or Foreign Minister was not required to produce evidence of his authority to act.[5] The question of the source of competence, on the other hand, was a matter of municipal law. He accordingly suggested that the title of the article should be amended to read " Evidence of authority to negotiate, draw up, etc ".

50. As to the article itself, of which the previous text was not unsatisfactory, he could accept the Special Rapporteur's new approach, provided that paragraph 2 was amended so as to lay more stress on the fact that it dealt with a question of evidence.

51. He would, however, have difficulty in accepting paragraph 1, in particular the concluding proviso relating to " manifest " lack of authority. In article 31 the term " manifest " referred to a violation of law, and even there it was somewhat illusory to suggest that a violation of law could be easily described as manifest. In article 4, however, the question involved was one of lack of authority, and lack of authority was not always a question of law. According to Black's Law Dictionary, the term " manifest " meant " indisputable ", " unmistakable ", " self-evident " or " requiring no proof ". It would certainly be very difficult to determine in what cases the lack of authority would require no proof at all. The new paragraph 1 was likely to create more problems than it solved and he suggested that it be deleted.

52. Paragraph 2 was equivocal; the words " may be ", especially if read in conjunction with the final proviso of paragraph 1, could be taken to mean that full powers could be demanded from a Head of State, Head of Government or Foreign Minister if any doubt existed as to his authority. The paragraph should be reworded on the following lines : " For purposes of international law, a Head of State, a Head of Government and a Foreign Minister are regarded *ex officio* as possessing authority. . . ".

53. Mr. YASSEEN said he had some difficulty in understanding the purpose of the article. As Mr. Briggs had said, the question was an international one : when was evidence required, and when was it not required, that a particular person represented his State for the purpose of performing the acts required for the conclusion of a treaty ? It was generally recognized that a Head of State, a Head of Government or a Foreign Minister were not required to produce evidence of their authority. In his view, any other person, even if not the Head of a diplomatic mission, should be considered as possessing the necessary authority if he produced an instrument of full powers.

54. Apart from the fact that the permissive formula was not satisfactory, the new text did not add much to positive international law; it contained too much detail for the expression of a simple idea; it should be simplified and abbreviated.

55. Mr. TUNKIN said that, on the whole, he agreed with the Special Rapporteur's approach and would limit himself to a few general remarks. The main difficulties in article 4 arose from the fact that it spoke of one thing, but meant another : it spoke of authority when it really meant instruments of full powers, in other words, the evidence that had to be produced, not the authority itself. That was particularly clear in the previous text, but even the Special Rapporteur's redraft still contained some reference to authority. The Drafting Committee would have to adjust the wording so as adequately to express the meaning which all the members of the Commission had in mind.

56. As to the words " may be considered ", he shared Mr. Yasseen's views; it was the general practice not to require a Head of State, Head of Government or Foreign Minister to produce full powers. The text of the new paragraph 2 therefore appeared to be a retrograde step. If there were general agreement on that point, the Drafting Committee could be instructed to amend the paragraph accordingly.

57. Lastly, the article should be considerably shortened, to retain little more than the ideas contained in paragraphs 3 (*c*) and 4.

58. Mr. AGO said he was glad to note that the members of the Commission were largely in agreement with the Special Rapporteur on the idea that ought to be expressed in article 4; but at the same time they were not fully satisfied with the manner in which it had been expressed.

59. He agreed with what Mr. Tunkin had just said. The Special Rapporteur himself had realized that article 4 was too long and too elaborate for what was, in fact, a question of secondary importance. Furthermore, the drafting was equivocal, as the comments of governments showed. The Italian delegation to the Sixth Committee of the General Assembly, for example, had understood that the article referred to the question of substance and sought to define what bodies had the necessary powers. (A/CN.4/175, Section II)

60. He did not share Mr. Brigg's opinion that it should be made clear that the article dealt with a question of international law. In fact, it did not deal with a question of substance at all, either in international law or in internal law; it dealt only with the question of the evidence required to show that the representative of a State had the necessary full powers. He therefore supported Mr. Briggs's proposed amendment to the title of the article.

61. As to the drafting, the Special Rapporteur's proposal was an improvement on the former text in some respects, but not in all. For instance, the former paragraph 1, if properly understood, showed that it was simply a matter of evidence, but the corresponding

[5] *Yearbook of the International Law Commission, 1962*, Vol. I, pp. 74-75, paras. 51-55.

paragraph of the new text, paragraph 2, increased the uncertainty by using the expression " may be considered ".

62. Mr. Tunkin's proposals were excellent. Above all, it was necessary to condense the article and to state clearly who was required to produce an instrument of full powers and who was not so required, being presumed to possess the authority in question.

63. Mr. LACHS said he must congratulate the Special Rapporteur on his proposed improvements to article 4. Unlike article 31, which dealt with the substance of the law, article 4 dealt with a question of evidence. He therefore supported Mr. Briggs' proposed amendment to the title.

64. Article 4 stated the cases in which full powers must be produced and the cases in which such powers were presumed to exist. In both situations the provisions of the article were intended to establish a minimum of security in international intercourse; a negotiator must know to what extent he could rely on another negotiator's word.

65. He shared Mr. Briggs' doubts regarding the concluding proviso of paragraph 1. In any event, that proviso could only apply to paragraphs 2 and 3; in the cases covered by paragraphs 4 and 5 of the new draft, it was difficult to see how the lack of authority could be manifest, since full powers had to be produced. However, since paragraph 1 was introductory and did not add to the substance of the article, it should be dropped altogether.

66. With regard to paragraph 2, he supported Mr. Briggs's suggestion that the words "may be considered as possessing " be replaced by the words " are regarded as possessing ". The words " may be " were equivocal and should be amended, not only in paragraph 2, but also in paragraphs 3 and 4. He agreed with Mr. Tunkin on the need to replace all references to authority by references to evidence of authority.

67. He did not understand why paragraph 2 referred only to the signing of an instrument relating to a treaty, whereas for the treaty itself the reference was to " authority to negotiate, draw up, adopt, authenticate or sign ".

68. In paragraph 3 (*c*) the words " if it thinks fit " seemed quite unnecessary and should be deleted. Paragraph 4 could be shortened, although he had no objection of principle to its provisions.

69. The new text of article 4 nevertheless provided a good working basis for the Drafting Committee.

70. Mr. PAREDES said that article 4 and article 31 dealt with two totally different problems. Article 4 referred to the powers which must be produced by a negotiator and article 31 to the constitutional authority of a State organ to conclude a treaty. It would therefore be more appropriate for article 31 to precede article 4.

71. A Head of State or Head of Government should in no case be required to produce full powers, since it was, precisely, the Head of State or Head of Government who conferred full powers upon another person to negotiate a treaty; it would be inappropriate to suggest that a Head of State or Head of Government might have to confer full powers on himself.

72. As to the meaning of " manifest " lack of authority, lack of authority would be " manifest " where an agreement was not subscribed by the Head of State or Head of Government, but by another organ which did not possess under the constitution the power to conclude treaties.

73. Bearing in mind that article 4 was concerned with evidence, it was appropriate to draw a distinction between evidence of capacity to negotiate and evidence of capacity to conclude treaties. It was not obvious that a Foreign Minister must be presumed to have the power to conclude treaties, unless he was acting as agent of the Head of State or Head of Government.

74. He agreed with those members who had pointed out that the question of authority was a matter for municipal law; it was for the constitution to specify what functions and powers were vested in each of the State organs.

75. The Special Rapporteur's proposed new text would facilitate treaty negotiations and he was therefore prepared to accept it.

76. Mr. EL-ERIAN said he agreed with most of what Mr. Briggs had said. Since article 4 dealt with the evidence and not the substance of authority, the relationship with article 31 should be kept as originally envisaged.

77. He agreed with the suggestion that the proposed new paragraph 1 should be deleted. Elimination of that paragraph, with its final proviso, would help to maintain the special position of the Head of State, Head of Government and Foreign Minister—the previous text had recognized the general practice of not requiring them to furnish any evidence of authority. He also thought that the threefold distinction between, first, negotiating, drawing up and authenticating; second, signing; and third, ratification, accession, approval or acceptance, as reflected in the old formulation of article 4, should be retained.

78. Lastly, he asked whether the basis for discussion was the previous text of article 4 or the Special Rapporteur's proposed new text. For his part, he believed that the old text could be shortened to achieve some of the objectives pursued by the Special Rapporteur in his new formulation.

79. The CHAIRMAN said that the Commission had both texts before it, but that the Special Rapporteur's proposed new text had priority. However, the Commission was not bound by either; the views it expressed would be referred to the Drafting Committee with both texts.

80. Mr. TSURUOKA said the Special Rapporteur's new proposal considerably improved article 4. He associated himself with the comments made by previous speakers, in particular those by Mr. Lachs.

81. In drafting article 4, the Commission should remember that its purpose was to state the rule of international law, so as to ensure both the security and the flexibility of international transactions. The Drafting Committee would certainly be able to reconcile those two apparently contradictory requirements.

82. When the Commission spoke of full powers as evidence that a State authorized an individual to negotiate and to perform other acts connected with the conclusion of a treaty, it should also consider what form

those full powers must take. In its previous text the Commission had specified that the full powers must be attested by written credentials, but he thought the possibility of accepting as evidence an oral declaration by, for example, a Foreign Minister, should not be ruled out.

83. Like other speakers, he thought that article 4 should be simplified by being reduced to its essentials, which meant to paragraphs 2 and 3. The Commission would then be proposing a clear formula which most States would be able to accept.

84. Mr. AMADO said that the Commission's duty was to state the rule of international law on the subject. Was the principle that a Head of State, Head of Government or Foreign Minister was authorized to negotiate, draw up, authenticate and sign a treaty on behalf of his State? Or should the Commission accept the opinion of the Austrian Government (A/CN.4/175, section I.3, para. 4) —which the Special Rapporteur had supported—that that was a mere presumption? Were those three persons agents, or were they themselves the source of the authority in question? The Commission should answer those questions.

85. In the light of the comments made by various members, paragraphs 4 and 5 of the new text and paragraph 6 of the former text could not be sustained. He proposed that the article be reduced to a single provision reading: " Representatives other than (*a*) Heads of State, Heads of Government and Foreign Ministers, and (*b*) Heads of diplomatic missions, cannot be considered, by virtue of their office alone, as possessing authority to negotiate, draw up or adopt a treaty on behalf of their State ". That, in his view, was the rule of international law.

The meeting rose at 6 p.m.

781st MEETING

Tuesday, 11 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107) *(continued)*

[Item 2 of the agenda]

ARTICLE 4 (Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the revised text of article 4 proposed by the Special Rapporteur.[1]

2. Mr. ROSENNE said that the discussion had revealed a general tendency to try to restrict the scope of article 4 to a purely formal question: when, and by whom, formal evidence of authority to act in connexion with the conclusion of a treaty was, or was not, required, and when it might be optional. He was prepared to accept that approach.

3. As Mr. Amado had pointed out, the emphasis should be placed on the question of full powers, treated exclusively as one of form. It was therefore essential to exclude such expressions as " authority to negotiate ", which had been at the root of many of the Commission's problems; the term " authority " had a number of different meanings and could therefore lead to confusion. There would be some difficulty in finding an adequate substitute, however; at first sight, a reference to the instrument of full powers might seem appropriate, but the discussions at the fourteenth session had shown that greater flexibility was necessary than would be suggested by the use of that term. Of particular interest was the statement by the present Chairman at the 641st meeting concerning cases in which the evidence that a representative was empowered to negotiate took the form of a letter.[2]

4. He suggested that the Special Rapporteur and the Drafting Committee should use some such wording as " evidence that he is empowered to negotiate ". That would make it unnecessary to deal, either in article 4 or in the commentary, with the question where the risk lay, to which the Swedish Government had referred (A/CN.4/175, section I.17). It was a question which arose directly in connexion with articles 31 and 32 and somewhat differently in connexion with article 47, and concerning which he reserved his position.

5. On that point, he could not agree with previous speakers that the material in article 4 was entirely distinct from that in articles 31 and 32; in fact, the two sets of provisions were the obverse and the reverse of the same coin. It was therefore necessary to co-ordinate the three articles not only as to their underlying philosophy, a result which the Commission was close to achieving, but also as to drafting.

6. Since Mr. Briggs had reintroduced his 1962 proposal to insert the proviso " For the purposes of international law ", he would himself reintroduce his own counter-proposal that that phrase be replaced by the words " For the purposes of the present articles ".[3] It was essential to avoid using unduly broad language.

7. He did not favour the use of the expression " adopt a treaty ", which was completely new in the draft articles and was totally inadequate, because it could have several different meanings.

8. He also had doubts about the expression " permanent mission to an international organization ", used in paragraph 3 (*b*) of the Special Rapporteur's new text; the term usually employed, in the United Nations at least, was " permanent representative to the United Nations ". Moreover, there were cases in

[1] See 780th meeting, para. 27.

[2] *Yearbook of the International Law Commission, 1962*, Vol. I, p. 72, para. 29.

[3] *Ibid.*, p. 76, para. 71.