United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.8

8th meeting of the Committee of the Whole

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

affiliate, the International Development Association (IDA), were parties to over 700 international agreements and were therefore vitally concerned with the retention of the essence of article 3, which would be seriously affected, if not destroyed, by some of the proposed amendments. Thus, the Swiss and Gabonese amendments (A/CONF.39/C.1/L.26 and L.41), though very differently worded, were similar in that they eliminated the essential qualifying phrase at the end of the article. If those amendments were adopted, the article might be paraphrased as follows: " the fact that the convention does not apply to the agreements in question shall not affect their legal force or the application to them of the rules of the convention. " Such a text would be internally inconsistent, since it was hard to see how the fact that the convention did not apply to certain agreements could fail to affect the application to those agreements of its rules. Moreover, the proposed formulations would be inconsistent with article 1 as it stood and would appear to accomplish indirectly what the Committee had refused to do directly when it declined to extend the scope of the proposed convention to the agreements concluded by international organizations. Some of the rules expressed in the convention might well be applicable to those agreements, but only because they were rules of customary law. It was therefore essential to retain the qualifying words at the end of the text, otherwise the scope of the convention would be indirectly extended to treaties concluded by international organizations.

75. The International Bank therefore strongly urged the Committee to retain the International Law Commission's text, which had been formulated with great precision.

76. The CHAIRMAN said that the majority of the Committee seemed to be against the Chinese and Iranian amendments (A/CONF.39/C.1/L.14 and L.63) and substantially in favour of retaining the article in its original form. He suggested that article 3 be referred to the Drafting Committee, together with the Swiss, Spanish, Gabonese, Ethiopian and Mexican amendments (A/CONF.39/C.1/L.26, L.34, L.41, L.57 and L.65).

It was so agreed.[6]

The meeting rose at 6.10 p.m.

[6] For resumption of the discussion of article 3, see 28th meeting.

EIGHTH MEETING

Tuesday, 2 April 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 4 (Treaties which are constituent instruments of international organizations or which are adopted within international organizations) [1]

1. Mr. SAINT-POL (Observer for the Food and Agriculture Organization of the United Nations), speaking at the invitation of the Chairman, said that a large number of agreements had been concluded within the framework of FAO,which had drawn up rules governing the preparation of agreements and conventions adopted within that organization. Those rules applied to agreements concluded between States within FAO and to agreements concluded between a group of States and FAO.

2. The Food and Agriculture Organization had always tried to follow the principles of international law and comply with the decisions of the United Nations General Assembly, but it had sometimes had to depart from them owing to the highly technical nature of its work, which was evident from the titles alone of most of its agreements: for example, the Constitution of the European Commission for the Control of Foot-and-Mouth Disease and the International Plant Protection Convention.

3. The rules relating to treaties concluded within FAO were to be found in the basic texts of the organization; some of them were even included in its Constitution.

4. Naturally, there were differences between those rules and the provisions of the draft articles before the Committee. For example, the procedure followed by FAO in negotiations differed slightly from the rules laid down in the draft articles. It was important to note in that respect that the FAO Committee responsible for preparing draft agreements did not necessarily include the member States which might become parties to the agreements.

5. The main rules laid down in the FAO Constitution concerned the entry into force of agreements, the authentication of the text, the functions of the organization as a depositary, the registration of treaties and the full powers of representatives signing agreements. The rules applied by FAO to treaties met the requirements of both developed and developing countries.

6. The provisions of the draft convention could be applied without difficulty both to treaties concluded between States independently and to treaties concluded between States under the auspices of FAO. With regard to treaties concluded between States within the general framework of FAO in accordance with article XIV of its Constitution and treaties concluded between a group of States on the one hand and FAO on the other, with a view to the establishment of a commission or an institution, in accordance with article XV of the Constitution, the rules of the organization which were already in force should apply. In addition, the rules applicable to technical assistance treaties concluded between FAO and States and to treaties concluded between FAO and other international organizations could be codified in the near future.

7. He pointed out that the application of any provision of the draft articles which conflicted with the rules adopted by FAO on treaty law would entail an amendment

[1] The following amendments had been submitted: Ukrainian Soviet Socialist Republic, A/CONF.39/C.1/L.12; United States of America, A/CONF.39/C.1/L.21; Spain, A/CONF.39/C.1/L.35/Rev.1; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.39; Gabon, A/CONF.39/C.1/L.42; Sweden and the Philippines, A/CONF.39/C.1/L.52 and Add.1; Ceylon, A/CONF.39/C.1/L.53; France, A/CONF.39/C.1/L.55; Peru, A/CONF.39/C.1/L.58; Zambia, A/CONF.39/C.1/L.73; Jamaica and Trinidad and Tobago, A/CONF.39/C.1/L.75; Congo (Brazzaville), A/CONF.39/C.1/L.76.

to the organization's Constitution, adopted with the assent of two-thirds of its members.

8. Finally, he considered that the proviso contained in article 4 should be retained. He would even suggest an addition, to the effect that the application of the convention to treaties which were constituent intruments of an international organization or were adopted within an international organization should be subject not only to any relevant rules of the organization but also to the practice of the organization.

9. The CHAIRMAN invited the sponsors of amendments to state, when submitting them, whether they wished to have their proposals put to the vote or referred to the Drafting Committee. He announced that the Zambian representative had withdrawn his delegation's amendment (A/CONF.39/C.1/L.73).

10. Mr. KORCHAK (Ukrainian Soviet Socialist Republic), introducing his delegation's amendment (A/CONF.39/C.1/L.12), said he thought there was no need to stress the importance of article 4. At its eighteenth session, the International Law Commission had altered the wording of the article to take account of the comments of a number of Governments. That improvement had not been sufficient, however, as was shown by the many amendments submitted. In particular, the phrase " shall be subject " was unsatisfactory.

11. By virtue of article 4, any international organization could avoid the obligation to apply the provisions of the convention. The number of treaties concluded by international organizations was continually increasing, however, and if the article was adopted the scope of the convention would be severely restricted.

12. The Ukrainian delegation was opposed to any amendment whose purpose was to limit the scope of the convention.

13. He noted that the Peruvian amendment (A/CONF. 39/C.1/L.58) was very similar to the Ukrainian amendment. It provided a realistic solution to the problem of the relationship between the convention and treaties concluded within international organizations. The Peruvian and Ukrainian delegations should therefore consult each other with a view to putting the amendment to article 4 in final form.

14. In conclusion, he said that the adoption of his country's amendment would extend the scope of the convention without affecting treaties concluded within the framework of international organizations.

15. Mr. McDOUGAL (United States of America), introducing his delegation's amendment (A/CONF. 39/C.1/L.21), said that if the convention was to achieve what was expected of it, the treaties which could escape its provisions should be as few as possible. He feared, however, that article 4, as it stood, conferred upon States a comprehensive, automatic and unquestionable exemption from the fundamental principles of the convention, if they chose to create an international organization or conclude agreements within the structure of such an organization. The intervention of the observer for the International Labour Organisation at the previous meeting could only enhance that fear.

16. The United States delegation thought that the exclusion of two such important types of treaty from the scope of the convention would greatly undermine its authority and reduce its significance. It the fundamental principles of the convention were considered appropriate to govern international agreements concluded between States independently of international organizations, it was difficult to see why they should be otherwise when States established an organization or operated within its structure. In these circumstances, it might well be asked how fundamental the principles really were.

17. The United States delegation did not wish to deprive international organizations of the necessary flexibility in procedural matters, but it did seek to make a sharp distinction between procedural matters involving considerations of convenience or economy and the substantive rules of the law of treaties, which should apply to all treaties without exception. Otherwise, States desiring to evade the convention's basic provisions would only need to establish an international organization to meet their requirements.

18. The reasons given in the International Law Commission's commentary in support of the latest version of article 4 were none too persuasive. The United States delegation thought that the convention could safeguard the flexibility and security needed by international organizations if it included suitable exceptions to articles 6, 8, 9, 13, 16, 17, 37 and 72. The addition of such exceptions was a simple matter.

19. It was necessary to proceed on the express principle that the treaties referred to in article 4 were subject to the substantive rules of the convention. If the representatives of international organizations considered that some of those rules should not apply to agreements concluded within their organizations, it was for them to justify the need for such immunity article by article.

20. The arguments so far advanced did not distinguish between the internal affairs of an organization, such as the procedure for the formation of agreements, which should be subject to its own rule-making, and treaty relations between States, which involved matters such as the principles relating to invalidity and were beyond the rule-making competence of international organizations. Nor had a proper distinction been made between participation in the framing of a constituent instrument of an international organization and admission to membership of an organization, or between withdrawal from membership and the termination of the constituent instrument. The importance of the functions of a depositary had also been exaggerated. The observer for the International Labour Organisation and other speakers had emphasized the need for flexibility in the law of treaties to take future problems into account. But that was true of all agreements concluded by States.

21. The general terms and automatic nature of the immunity conferred by article 4 would only arouse the suspicion of national legislators, particularly when commentators tended to interpret the phrase " adopted within an international organization " as applying to agreements concluded under the auspices of, or deposited with, an international organization. Consequently, the United States delegation urged the deletion of article 4.

22. Mr. DE CASTRO (Spain), introducing his amendment (A/CONF.39/C.1/L.35/Rev.1), reminded the Com-

mittee that the present article 4 corresponded to article 48 of the 1963 draft, in which it had appeared in Part II, relating to the invalidity and termination of treaties.[2] The commentary to article 48 had stated that the principles embodied in section II appeared not to require modification for the purposes of being applied to the treaties in question. Those principles should apply to all treaties, of whatever kind, since they were of a fundamental nature.

23. In proposing its amendment, the Spanish delegation had been actuated by two basic considerations. First, to make it sufficiently clear in the future convention that its provisions were applicable to all treaties connected with international organizations; the convention would thus apply to the widest possible extent to treaties of that kind, in accordance with the wishes expressed by many Governments in the comments they had made in 1966 and 1967. Secondly, a balance should be maintained between *lex generalis* of which the future convention would partake, and the *lex specialis* of each international organization. He had studied the comments in document A/6827/Add.1 and those made at the previous meeting by the observers for the International Labour Organisation and the International Bank for Reconstruction and Development, and he had also taken into account the suggestions put forward by the United Nations in the same document for safeguarding the Secretary-General's functions as depositary of treaties.

24. The text submitted by the International Law Commission did not make a clear enough distinction between the different kinds of treaty in which an international organization was involved, apart from the case dealt with in article 3 of the draft.

25. With respect to the constituent instruments of international organizations, the text did not bring out clearly enough the two quite separate moments in the life of such treaties: first, the adoption of the text, the expression of consent by States, the formulation of reservations and the entry into force of the treaty, all of which preceded the establishment of the organization; and secondly, the operation of the organization after its establishment. At that stage, the treaty might already be largely governed by the rules formulated by the organization or by the provisions of the treaty itself, for example in the matter of amendment or withdrawal. The text of article 4 ignored that fact and introduced a danger of confusion and obscurity into a particularly difficult subject.

26. The phrase " shall be subject " used in article 4 was infelicitous, as the representative of the Ukrainian SSR had observed. In the case of constituent instruments of organizations, subjection to the rules of an organization which had not yet come into existence was meaningless with respect to certain of the rules. Furthermore, in the case of such treaties, as of others, the very principle of such subjection was open to question and raised the problem of the balance between *lex generalis* and *lex specialis*, which should be solved in such a way as to make the convention as widely applicable as possible.

[2] *Yearbook of the International Law Commission, 1963*, vol. II, p. 213.

27. The Spanish delegation was therefore proposing the application to constituent instruments of international organizations of articles 5 to 15, on the conclusion of treaties, since the subject matter of those articles could not be subject to the rules of an organization which had not yet been established, and of articles 23, 39 to 50 and 58 to 61, because those articles should apply to all treaties and could not possibly be made subject to such rules. He would not mention other rules set out in Part V, since those rules themselves stated that they were subject to the provisions of the treaty, and it was therefore unnecessary to repeat it.

28. With regard to treaties adopted within an organ of an international organization or under the auspices of an international organization, the application of the convention should be the rule and the application of the rules of the organization the exception. If that class of treaties was examined closely, it would be found that at certain stages in their preparation the rules of an organization could apply: that was true of rules dealing with the capacity of its members to conclude treaties, conclusion and entry into force. Conclusion and entry in force were the natural sphere of the *jus specialis* of organizations.

29. Lastly, with regard to treaties deposited with international organizations, he shared the proper concern of the Secretary-General of the United Nations, who hoped that the convention would not modify the rules governing his functions as depositary at present in force in the United Nations. In that respect, only the subject matter of article 71 to 75 justified a limitation of the application of the rules of the convention.

30. In conclusion, he emphasized that he had tried to respect the spirit of the draft and that the provisions which the International Law Commission itself had considered mandatory would remain so if the amendment were adopted. On the other hand, the other provisions would be made subject to the rules of the international organizations as their nature required. His delegation's amendment should be regarded as both of substance and of drafting.

31. Sir Francis VALLAT (United Kingdom) said that in substance article 4 was one of the most important before the Committee. Perhaps the most striking development in the international field in the twentieth century had been the growth of international organizations and the part they played in relations between States. Each organization had a constitution, rules and practices designed to meet its own needs. It was vital that, in the codification of the law concerning treaties between States, the texture which had been and would in future be, created by international organizations should not be inadvertently destroyed or damaged. The representative of the ILO had stressed the importance of the established practices of his organization, and no doubt other organizations were in a similar position. However, the Conference would not have time to ensure that all the established practices of international organizations were catered for and that was why the United Kingdom delegation had submitted an amendment (A/CONF.39/C.1/L.39) adding the words "and established practices". It might be that the words " rules " was sufficient, but there was a tendency to interpret it in a limited sense referring to

the written rules or possibly regulations, but not including practices established by usage, etc. The United Kingdom amendment would put the matter beyond doubt and his delegation was willing that it should be referred to the Drafting Committee.

32. Mr. AUGÉ (Gabon) explained that by its amendment to article 4 (A/CONF.39/C.1/L.42) his delegation had tried to simplify the wording of the article and its title. The amendment could be referred to the Drafting Committee.

33. Mr. BLIX (Sweden) explained that his delegation had submitted an amendment (A/CONF.39/C.1/L.52) to delete article 4, not because it was dissatisfied with the idea expressed in that article, but because it thought that the principle did not need to be stated. The various amendments submitted showed that the idea was hard to express in precise terms. It would therefore be better to delete the article, which seemed unnecessary. As States were free not to apply the articles of the convention if the treaty to which they were parties so provided, it was hard to see why States acting within an international organization should not be entitled to stipulate in a treaty that they would conform to the rules of the organization and derogate from the provisions of the convention.

34. Most of the articles were of a residuary character. For example, article 20 began: " Unless the treaty otherwise provides ". Even without that introductory phrase, States would certainly have been able to depart from the rule by agreement among themselves. It was not a peremptory norm. As the International Law Commission had said in paragraph (2) of its commentary to article 50, the majority of the general rules of international law did not have the character of *jus cogens*. The wording of many of the articles could probably have been simplified if that basic principle had been stated at the beginning of the draft. Provisos similar to that in article 50 were, in fact, to be found in articles 13, 21, 24, 25 and 33. The absence of such clauses did not mean that States could not derogate from the rules of the convention. It was only where articles contained peremptory norms that no derogation was permitted. The norms stated in articles 48 and 49 appeared to be of that kind.

35. Consequently, if States could derogate from the rules of the draft convention by agreement between themselves, they should also be able to do so by adopting certain rules or practices within an international organization, and it did not seem necessary to say so. On the other hand, if the draft contained mandatory rules, States could not derogate from them either by agreement among themselves or by adopting certain rules within an international organization. That limitation, incidentally, was not clear from the present wording of article 4.

36. In some comments on that article, the fear had been expressed that international organizations might too lightly deviate from the rules of the convention. The Swedish delegation did not share that fear. If some of the residuary rules of the convention did not satisfy the needs of an organization, there was nothing to prevent States members of that organization from adopting special rules or practices enabling them to depart from the rules of the convention. Moreover, experience had shown that international organizations tended to have a consolidating influence. Hence it would not seem dangerous tacitly to grant States acting within an international organization the right to establish a *lex specialis*, with the sole restriction that they could not derogate from peremptory norms. As it seemed difficult to formulate such a right, which derived from the very nature of the draft convention, the Swedish delegation thought it would be better not to mention it and to delete article 4.

37. Sir Lalita RAJAPAKSE (Ceylon), introducing his delegation's amendment (A/CONF.39/C.1/L.53), said that the present wording of article 4 would permit some latitude in the application of the convention to two types of treaty: first, treaties which were the constituent instruments of international organizations and, secondly, treaties adopted within international organizations. In the Ceylonese delegation's opinion, an international organization created by treaty needed a certain freedom to enable it to develop and to perform with maximum efficiency the functions for which it had been established. Thus the application of the convention to a treaty which was the constituent intrument of an international organization should be subject to any relevant rules of that organization. The Ceylonese delegation had added the words " or decisions " so as to take into account the established practice of the organization.

38. Article 4, however, appeared to go too far in according the same latitude with respect to treaties " adopted within an international organization ". An organization which had adopted a treaty should not be permitted to determine the extent to which the articles of the convention would apply to that treaty. There was no reason to fear that organizations such as those represented by observers in the Committee would abuse the latitude given them; but it would be preferable to make it quite clear that treaties adopted within an organization should be on quite a different footing from treaties which were the constituent instrument of an organization and should be subject to the articles of the convention. That was why the words " or are adopted within an international organization " had been omitted from the amendment. The representative of the ILO had advanced some very interesting arguments for the retention of article 4. He himself, however, was still convinced that the rationale of his delegation's amendment remained valid.

39. Since the adoption of a treaty within an organization was a relatively new technique, some of the articles in the draft would have to be slightly modified in order to cover it. The Ceylonese delegation had already submitted an appropriate amendment to article 8 (A/CONF. 39/C.1/L.43), but the role of the organizations in question would also have to be taken into account in articles 6, 9, 16, 17 and 72.

40. Mr. VIRALLY (France) thought that in view of the increasingly important role of international organizations in contemporary life and in the formation of international law, article 4 was one of the most significant articles in the draft convention. It raised various problems which should be carefully differentiated.

41. A treaty which was the constituent instrument of an organization could be identified by its object. At the conclusion stage it was comparable to any other treaty,

but the position changed when it entered into force. Ordinary treaties were applied by the States parties to them through their executive, legislative and judicial organs. A treaty which was the constituent instrument of an organization was applied both by the parties as members of the organization and by the organs of the organization. That produced a whole series of consequences which the draft convention could not cover. The inclusion of constituent instruments of international organizations in article 4 was therefore justified.

42. Treaties concluded within an organization did not have the same unity. Some treaties were adopted merely for reasons of convenience, and there would be no justification for trying to infer legal consequences from that fact. When the Convention on Diplomatic Relations had been drawn up, for instance, it had been agreed to deal with special missions separately from permanent missions. The General Assembly had decided not to convene a conference to deal with the draft articles on special missions, but to pursue the topic itself. If article 4 of the draft convention on the law of treaties had been in force at that time, the Convention on Diplomatic Relations would have been subject to it, whereas the draft articles on special missions might have escaped its provisions. Such a difference in treatment was unjustifiable.

43. The question therefore arose in what cases the application of a special legal régime was justified. The French delegation thought it was justified for treaties whose adoption constituted the actual function of the organization—treaties which were inseparable from its constituent instrument and from its very existence. The observer for the ILO had explained the part played in that connexion by the international labour conventions in achieving the aims of that organization. Treaties of that kind should be governed by special rules as to their interpretation, validity and application. The purpose of the French amendment (A/CONF.39/C.1/L.55) was to restrict the application of article 4 to agreements concluded under a treaty which was the constituent instrument of an international organization. The amendment stressed the need for a direct link between the treaty adopted by the organization and the constituent instrument of the organization, because it was that link which justified the special régime.

44. The French delegation also considered that the present wording of article 4, which stated that the application of the draft articles " shall be subject to any relevant rules of the organization", was too vague, since it was difficult to decide what was to be understood by " relevant rules ". In a convention as important as the one being drawn up, it was necessary to be more precise, so the French amendment read " any relevant rules resulting from the treaty ".

45. The amendment in document A/CONF.39/C.1/L.55 was a drafting amendment, but it also contained substantive changes. The French delegation wished it to be referred to the Drafting Committee for Consideration in the light of the comments made by delegations in the Committee of the Whole.

The meeting rose at 1.5 p.m.

NINTH MEETING

Tuesday, 2 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 4 (Treaties which are constituent instruments of international organizations or which are adopted within international organizations *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 4. [1]

2. Mr. CALLE Y CALLE (Peru), introducing his amendment (A/CONF.39/C.1/L.58), said that the purpose of article 4 was to make a general reservation to the application of the draft articles in the case of treaties which were constituent instruments of international organizations or had been adopted within international organizations. His delegation did not support the proposals to delete that article since there were sound practical reasons for making those two categories of treaties subject to special rules. However, the provisions of article 4 went too far since they would have the effect of establishing two separate bodies of treaty law, one for States concluding treaties among themselves in the ordinary way and another for States concluding treaties among themselves, but within the framework of international organizations.

3. The purpose of the Peruvian amendment was to introduce a less radical formula which would make the draft articles applicable in principle to the two categories of treaties in question but subject to the proviso " without prejudice to any relevant special provisions laid down in such constituent instruments or adopted by virtue of them " (A/CONF.39/C.1/L.58). That language made it clear that the special provisions adopted by an international organization in accordance with its constitution prevailed as *lex specialis* over the *lex generalis* embodied in the draft articles. In the Peruvian amendment the expression " within an international organization " had been modified to " within the competence of an international organization ". That more precise language placed the emphasis on the legal aspects of the matter and on the constitutional validity of the treaty-making procedure, instead of on the mere fact that a treaty had been concluded " within an international organization ".

4. He noted that the Ukrainian amendment (A/CONF.39/C.1/L.12) was intended to serve a somewhat similar purpose, so, while he insisted on the substance of his proposal, he would be content to leave the drafting to the Drafting Committee.

5. Mr. FRANCIS (Jamaica), introducing the joint amendment by his delegation and that of Trinidad and Tobago (A/CONF.39/C.1/L.75), said that its main purpose was to confine the application of article 4 to the constituent instruments of international organizations; treaties concluded within international organizations would thus be subject to the general law of treaties. While there were good reasons for extending special

[1] For the list of the amendments submitted, see 8th meeting, footnote 1.