United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations

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11th meeting of the Committee of the Whole

Extract from Volume I of the *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

11th meeting

Thursday, 27 February 1986, at 11.25 a.m.

Chairman: Mr. SHASH (Egypt)

In the absence of the Chairman, Mr. Nascimento e Silva (Brazil), Vice-Chairman, took the Chair.

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Item 11] (*continued*)

Article 11 (Means of expressing consent to be bound by a treaty) (*continued*)

Paragraph 2 (*continued*)

1. Mr. ULLRICH (German Democratic Republic) said that, as several points of substance had been raised with regard to the amendment introduced by his delegation at the previous meeting (A/CONF.129/C.1/L.12), he would propose, with a view to expediting matters, that further discussion on it should be deferred until the Committee took up articles 27 or 46.

It was so decided.

Article 19 (Formulation of reservations)

2. Mr. JESUS (Cape Verde), introducing the amendment proposed by his delegation (A/CONF.129/C.1/L.34), said that if a reservation was to be prohibited, that should be done in express terms and in the treaty itself. The first part of his proposal, therefore, was that subparagraph 2 (*a*) should be reworded to read simply "the reservation is prohibited by the treaty", the remainder of the subparagraph being deleted. That would be in line with article 19 (*a*) of the 1969 Vienna Convention on the Law of Treaties.[1] He noted, in that connection, that the Commission's commentary to the article (see A/CONF.129/4) gave no explanation of the reason for the additions to subparagraphs 1 (*a*) and 2 (*a*).

3. The new subparagraph 2 (*d*) proposed in the second part of the amendment covered the case of treaties between States in which international organizations could participate but only to the extent of the competence conferred upon them. The Convention on the Law of the Sea was a case in point. An international organization could be a party to a treaty without having competence for all matters dealt with in it. Obviously, in such cases it should not be able to enter a reservation concerning a provision in respect of which it lacked competence.

4. Mr. ABED (Tunisia) said that his delegation had joined Austria, Italy and Japan in sponsoring the amendment in A/CONF.129/C.1/L.36 and had withdrawn its own amendment (A/CONF.129/C.1/L.14).

5. Stressing the importance of reservations in the application of a treaty, he said that it was essential that the wording of article 19 should not give rise to differences of interpretation capable of delaying the entry into force of treaties. The sponsors wished to have a clear, precise and unequivocal text.

6. Draft article 19, which repeated the terms of article 19 of the 1969 Vienna Convention, incorporated a number of new provisions. Under the latter, reservations could not be formulated if it was established that the negotiating States and organizations were agreed that the reservation was prohibited. It might be asked what purpose was served by a provision on those lines if the reservation could be expressly prohibited in the treaty itself. Moreover, vague expressions like "is otherwise established" and "the States and organizations or the organizations were agreed" could lead to differences between the parties if it was necessary to prove it had been established they "were agreed" that the reservation was prohibited. These differences essentially had to do with determining the body empowered to prove that such an agreement had been reached. The question would arise as to whether the matter should be determined by a body empowered for the purpose or by the parties to the treaty.

7. There were so many questions that in his delegation's view the terms used in subparagraph (*a*) of paragraphs 1 and 2 might depart from the goal sought, which was to codify precisely and efficiently the law of treaties between States and international organizations or between international organizations. These new provisions should be deleted from subparagraph (*a*), as they were unnecessary and were not even mentioned in the International Law Commission's commentary. That was the object of amendment A/CONF.129/C.1/L.36, which sought to retain the prohibition of the reservation only if it was provided for in the treaty, and of course in the instances described in subparagraphs (*b*) and (*c*) of paragraphs 1 and 2 of the article, similarly to what was retained at the 1969 Vienna Conference.

8. Mr. TALALAEV (Union of Soviet Socialist Republics), introducing his delegation's amendment (A/CONF.129/C.1/L.38), said that his delegation supported the amendments submitted which removed obscurities in the article and were closer to the text of the 1969 Vienna Convention.

9. His delegation considered that sovereign States had a broad right to enter reservations or object to reservations. International organizations in contrast

[1] See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

did not have sovereign rights and their right to enter reservations depended on the scope of their functions and the purpose of the treaty in question. His delegation's amendment was intended to establish that a reservation formulated by an international organization could be effective only if it was compatible with the purposes of the treaty and the constituent instruments of the organization.

10. Mr. ULLRICH (German Democratic Republic), introducing his delegation's amendment to paragraph 2 of the article (A/CONF.129/C.1/L.40), agreed that international organizations should have the right to formulate reservations to treaties, but said that the right could only extend to parts or provisions of a treaty which were of direct concern to the international organization and within its competence as defined by its constituent instrument and rules. The amendment sought to make it clear that an international organization could not enter reservations to treaties with States unless the provisions affected its competence. As the other amendments submitted appeared to have the same or similar aims, it might be useful to invite the sponsors to try to work out an agreed amendment.

11. Mr. LUKASIK (Poland) said that the formulation of reservations raised complex and difficult problems which the 1969 Vienna Convention had not fully resolved, particularly in relation to reservations to treaties which were the constituent instruments of international organizations. In the present draft the difficulties were increased, because the formulation of reservations by international organizations raised many issues.

12. His delegation agreed that the deletions proposed in the Cape Verde and four-Power amendments were necessary. He also agreed with the Soviet Union representative that the right of international organizations to enter reservations depended on the powers and functions of the international organization and the purposes and objectives of the treaty. There could be no right to enter a reservation on an unrelated matter. In limiting the rights of international organizations in that respect, the guidelines would be their constituent instruments. Those points were covered in the Soviet Union amendment and the German Democratic Republic's amendment.

13. His delegation believed that the amendments submitted should be transmitted to the Drafting Committee to be combined in an appropriate manner.

14. Mr. PISK (Czechoslovakia) said that the question of reservations to international treaties by international organizations was complex, because there was little practice to provide guidance. The question was whether international organizations should be able to formulate reservations subject only to the same restrictions as States. There was a need to strike a balance between the sovereignty of States and the restricted capacities of international organizations, which could only function in accordance with their constituent instruments, on the one hand, and on the other, the contractual nature of the relationship between the parties to a treaty. Where the parties to a treaty did not have identical status, as in the case of States and international organizations, a complex system of relationships came into being.

15. His delegation believed that an international organization could not make a reservation incompatible with its constituent instrument or its functions, and accordingly supported the amendments proposed by the Soviet Union, the German Democratic Republic and Cape Verde, as well as the four-Power amendment. All should be referred to the Drafting Committee.

16. Mr. BERMAN (United Kingdom) said that all but one of the proposals put forward would further complicate the difficult question of reservations and were therefore unacceptable to his delegation. His delegation could support the first part of the Cape Verde amendment and the four-Power amendment.

17. His delegation could not support the second part of the Cape Verde amendment, which appeared to be attempting to derive a general rule from the particular case where an international organization was a party to a treaty but its competence related only to certain provisions. He believed that if an international organization was competent in regard to certain provisions only, it would not in practice enter reservations to other provisions. He noted that the definition of "reservation" in article 2 spoke of the exclusion or modification of the legal effects of treaty provisions "in their application" to the State or organization concerned. The Cape Verde representative might perhaps consider it unnecessary to pursue that aspect.

18. Turning to the Soviet Union amendment, he wondered whether a reservation by an international organization incompatible with its constituent instruments was likely to arise in practice. In a situation where an international organization wished to be a party to a treaty and its capacity was valid in every respect, it was unlikely that it would enter a reservation incompatible with its constituent instruments. In his view, the Committee should adopt a working understanding that there was an expectation that international organizations would, as a matter of course, operate in accordance with their constituent instruments. Otherwise, to avoid difficulties of interpretation it would be necesary to include a reference to compatibility with the constituent instruments of international organizations throughout the text of the Convention. If that were done, the text would become unnecessarily heavy and impractical. In his view, the German Democratic Republic's amendment seemed to differ from the aim expressed by the German Democratic Republic representative in his introductory statement.

19. It was important to bear in mind the principle that reservations affected the external relations between contracting parties, not the internal relations between international organizations and their own member States. The proposed amendments seemed to assume the latter and were therefore unacceptable to his delegation. They should not, he believed, be referred to the Drafting Committee.

20. Mr. TUERK (Austria) said that the four-Power amendment, of which his delegation was a sponsor, had been ably introduced by the Tunisian representative.

21. The draft article differed from the corresponding text of the 1969 Vienna Convention in that a further restriction to reservations had been introduced, embodied in the formula "or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" at the end of subparagraph 1 (*a*) and the somewhat similar language at the end of subparagraph 2 (*a*). The introduction of that second criterion made for ambiguity and legal uncertainty. The fact of the matter was that, if any agreement existed between the negotiating parties to the effect that a reservation was prohibited, that agreement would become a part of the treaty itself. For those reasons, the four-Power amendment called for the deletion of the two passages in question so that subparagraphs 1 (*a*) and 2 (*a*) would read (thus reverting to the language of the 1969 Vienna Convention): "the reservation is prohibited by the treaty".

22. In that connection, he referred to his oral suggestion at the 2nd meeting to combine subparagraphs 1 (*b*) and 1 (*b bis*) of article 2, on "ratification" and "act of formal confirmation", respectively. Adoption of that suggestion would make it possible to simplify article 19 and reduce it to a single paragraph.

23. Mr. ALBANESE (Council of Europe) said that his delegation could not support the second point in the Cape Verde amendment or the Soviet Union and German Democratic Republic amendments, because they purported to restrict the power of international organizations to formulate reservations.

24. His first objection was general. He could accept the view that there were important differences between States and international organizations, but he observed that, in the area currently under consideration, which was the contractual field, if one wished to respect the spirit of the matter dealt with one must affirm the principle of the contractual equality of the parties, which should be fully recognized and respected at all stages of the life of a treaty: its negotiation, the adoption of its text, the expression of the will to be bound by the treaty and the formulation of reservations.

25. Any attempt to create a distinction in the matter between the rights and powers of various parties constituted a contradiction in terms and a denial of the synallagmatic character of treaties.

26. Furthermore, his delegation opposed the amendments for another reason, which was more specific to the Council of Europe but which might perhaps apply to other organizations as well. In the Council of Europe, the adoption of the text of a treaty and, where appropriate, the formulation of reservations were decided by the Committee of Ministers, in which all the member States were represented. It was for them to ensure that the treaty, and, on occasion, the reservation, did not conflict with the rules of the organization.

27. His delegation accordingly feared that adoption of the amendments in question might open the door to States not members of the Council of Europe to take a position on the conformity or otherwise of a reservation with the constituent instrument of the organization or on the question whether a provision which was the subject of a reservation affected or did not affect the interests of the organization. The result would be unacceptable interference in the internal constitutional affairs of the organization. His delegation thus could not support the amendments mentioned, and supported the adoption of the draft article.

28. Mr. SANYAOLU (Nigeria) asked the Expert Consultant for an explanation of the formulation of subparagraphs 1 (*a*) and 2 (*a*). The International Law Commission's commentary was silent on that point.

29. Mr. REUTER (Expert Consultant) said it was true that the Commission's commentary did not explain the reason for departing from the 1969 Vienna Convention text and inserting the formula "or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" in subparagraph 1 (*a*) and a similar formula in subparagraph 2 (*a*).

30. At the 1968/1969 Vienna Conference, conflicting views had been expressed with regard to the freedom to make reservations. The view which had prevailed, and which was embodied in article 19 of the 1969 Vienna Convention, had been in favour of the freedom to make reservations. Since 1969, that position had been accepted in a number of judicial decisions, some of them relating to treaties to which the 1969 Vienna Convention was not applicable.

31. The passages inserted in subparagraphs 1 (*a*) and 2 (*a*) of the article embodied a slight limitation to that freedom to make reservations. The reason was that the treaties of international organizations were considered as having a somewhat delicate character. Because of their particular nature, it was felt desirable to avoid opening the door too widely to reservations.

32. That being said, it was his feeling that deletion of the two passages would do no harm. The rule they embodied went without saying, since there was nothing to prevent the parties to a treaty from agreeing among themselves subsequent to the adoption of a treaty that a particular reservation would be prohibited.

33. Lastly, he recalled that at the 1968 session of the Law of Treaties Conference the question had arisen of adopting provisions governing the treaties of international organizations. Some delegations had been in favour of drafting rules in the matter at that Conference, and one type of treaty which had attracted particular attention in that connection had been the safeguards treaties of the International Atomic Energy Agency (IAEA). Those important treaties were of a tripartite character, in that the international organization concerned was involved at the request of the two interested States. He drew attention to that situation because the solution which would be adopted must not have the effect of preventing an organization like the IAEA from exercising its control functions.

34. Mr. NEUMANN (United Nations Industrial Development Organization), referring to the first part of the Cape Verde amendment, said that it was undesirable to introduce a distinction between the States and the organizations which negotiated a multilateral treaty and to state that certain reservations would be permitted to one category of negotiating parties but not to the other. The second part of the amendment related

to a problem which could only arise at a later stage. It could not be dealt with appropriately in the present context.

35. His delegation could not accept the Soviet Union amendment, which would create a special category of prohibited reservations applicable only to international organizations. It had a similar difficulty with regard to the German Democratic Republic's amendment, which would have the effect of allowing an international organization to make reservations only with regard to provisions that affected its competence. It was undesirable to introduce that restriction into the organization's right to make reservations.

36. Mr. REIMANN (Switzerland) said that the Soviet Union and German Democratic Republic amendments called for three observations. First, article 19 should reflect the principle of the equality of parties to a treaty. Secondly, and in view of that equality, any reference to the rules of an international organization was uncalled for. Thirdly, care should be taken with the terms employed in the draft. The reference in the German Democratic Republic's amendment to an organization's "competence" seemed inadvisable. On the basis of those considerations, his delegation believed that the amendments should not be transmitted to the Drafting Committee.

37. The same remarks applied to the second part of the Cape Verde amendment. His delegation would wish to consider the text of any subsequent variant before agreeing that it should go to the Drafting Committee.

38. With regard to the four-Power amendment, he noted that a consensus seemed to be emerging in favour of its acceptance and transmission to the Drafting Committee. His delegation would not oppose that step, but regretted that the member of the sentence in subparagraph (*a*) of paragraphs 1 and 2 following "treaty" would vanish, because it had its raison d'être, as borne out by the examples given by the Expert Consultant as well as, in another context, by article 60, paragraph 5, of the 1969 Vienna Convention.

39. He had noted with interest the example of agreements of a certain type cited by the Expert Consultant.

40. Mr. HARDY (European Economic Community) considered that it was up to the international organization to decide whether to make reservations, within the same limits as States. It was not for others to attempt via the proposed convention to determine whether it was entitled under its own powers and procedures to do so. If an organization made a reservation, the other party, whether a State or an organization, might accept or object in accordance with article 20.

41. Some of the amendments submitted would lead to confusion. The German Democratic Republic's amendment, for example, apparently envisaged a further stage distinct from the article 20 procedure.

42. The basic principle of the Commission's draft was that treaties were concluded on a contractual basis, and in his view it was not possible to distinguish between the rights of the parties. Suppose, for example, there was an agreement to which States and the Community were parties in the commercial field. It would not be possible for a State party to be able to make more extensive reservations than the Community, or to raise questions regarding its right to make reservations on the same basis. As the United Kingdom representative had said, the assumption must be that international organizations did indeed act within the scope of their powers.

43. The International Law Commission's text was basically acceptable because it reflected the equality of the parties, a principle that would be undermined by some of the amendments. The four-Power amendment and the first part of the Cape Verde amendment were acceptable. The Soviet Union and German Democratic Republic amendments and the second part of the Cape Verde amendment were unacceptable to the Community for the reasons he had indicated. Sufficient safeguards for the interests of other parties were, he believed, contained in other provisions of the draft articles.

44. Mr. SANG HOON CHO (Republic of Korea) shared the view that the provision in the second part of subparagraph 1 (*a*) should be deleted. Having heard the Expert Consultant and the Austrian representative, he believed that the type of situation envisaged by that provision could be reflected, as required, in specific treaties.

45. His delegation could not accept the various amendments seeking differential treatment of international organizations in the matter of reservations through the provisions of paragraph 2. The safeguard provided in subparagraph 2 (*c*) appeared to be adequate.

46. MR. ROMAN (Romania) said that his delegation had no difficulty with the draft article. It had doubts about those proposals which seemed to amend the two paragraphs in a way that enlarged the scope for the formulation of reservations by States. He agreed with the argument that whenever negotiating States and negotiating organizations were agreed, not in the treaty but elsewhere, that reservations were prohibited, the possibility of formulating reservations should be excluded.

47. His delegation supported the Cape Verde, Soviet Union and German Democratic Republic amendments. International organizations should only be able to make reservations on matters, within their fields of activity. They should not be able to make reservations whose consequences would affect contracting States. He hoped the three amendments could be combined and incorporated in the article.

48. Mr. ECONOMIDES (Greece) said that his delegation was in favour of the provision which the four-Power amendment and the first part of the Cape Verde amendment sought to delete. It saw virtue in a provision that would have the effect of making the tacit formulation of reservations impossible. He believed that, as far as States were concerned, there were gaps in the 1969 Convention. He would not, however, oppose transmission of the amendments to the Drafting Committee if the great majority of the Committee so wished.

49. The Soviet Union amendment proposed to insert a clause providing that an international organization

should not formulate a reservation incompatible with its constituent instrument. But that surely was self-evident. International organizations must in all cases act in conformity with their own constituent instruments and rules. Moreover, application of such a provision would prove difficult, indeed impossible, because no constituent instrument determined expressly or implicitly what possible reservations would be incompatible with an organization's constitution. It was up to the organization itself to ensure that reservations were in conformity with its law. In any case, article 6 already implicitly contained the notion embodied in the proposed amendment, the adoption of which, as the United Kingdom representative had remarked, could result in further complications.

50. The second part of the Cape Verde amendment and the German Democratic Republic amendment seemed to address themselves to the same concern, that an international organization should not enter reservations concerning provisions that were not applicable to it. Again, that seemed to go without saying: Why should an organization enter a reservation to exclude the application of a provision not applicable to itself? But if the question proved to be more than academic, and a reservation of the type envisaged was made, what would be the legal consequences? The effect would merely be to double the inapplicability of the provisions in question to the organization concerned.

51. The CHAIRMAN suggested that the Cape Verde, German Democratic Republic and Soviet Union representatives should consult together with a view to merging their proposals for paragraph 2, which could not be referred to the Drafting Committee since they involved matters of substance, in a single text for further consideration by the Committee of the Whole.

The meeting rose at 1.05 p.m.

12th meeting

Thursday, 27 February 1986, at 3.25 p.m.

Chairman: Mr. SHASH (Egypt)

In the absence of the Chairman, Mr. Nascimento e Silva (Brazil), Vice-Chairman, took the Chair.

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] (*continued*)

Article 19 (Formulation of reservations) (*continued*)

1. Mr. NAGY (Hungary) said that his delegation shared the views of the sponsors of the amendments concerning the special limitations to which the capacity of international organizations to formulate reservations was subject proposed by Cape Verde (A/CONF.129/C.1/L.34), the Union of Soviet Socialist Republics (A/CONF.129/C.1/L.38) and the German Democratic Republic (A/CONF.129/C.1/L.40). It was clear from the discussions in the International Law Commission on the whole process of treaty-making that the capacity of international organizations to formulate reservations to a treaty could not be greater than their capacity to conclude the treaty itself. The amendments reinforced that well-established principle by defining the capacity of international organizations to formulate reservations. His delegation would, however, prefer a more general expression to cover the sources of that capacity than that used in the Soviet Union amendment. Accordingly, it suggested that "constituent instrument of the international organization" should be replaced by "rules of the organization", an expression defined in article 2, subparagraph 1 (*j*).

2. Mr. VAN TONDER (Lesotho) said that his delegation considered the International Law Commission's draft of article 19 satisfactory, since it allowed for investigation of the intention of the negotiators of a treaty, through reference to considerations such as the preparatory documents, in the absence of any clear provision in the treaty itself. The latter parts of subparagraphs 1 (*a*) and 2 (*a*) provided that essential flexibility which existed in the general rules concerning the interpretation of treaties. Paragraph 2 of the Cape Verde amendment was difficult to understand, since international organizations would obviously not formulate reservations to treaty provisions that did not affect them. Even if an organization were to do so, the action would be without legal significance, since the organization would remain unaffected.

3. Regarding the amendments put forward by the Soviet Union and the German Democratic Republic, his delegation believed that it was absurd to provide that international organizations should have the capacity to negotiate a treaty but no right or capacity to formulate a reservation in regard to certain parts of that treaty, if the treaty permitted reservations. Any restrictions on the formulation of reservations should be those imposed by the treaty itself. If an international organization agreed to a treaty which forbade it to formulate reservations, it would of course be bound by it. On the other hand, if a treaty provided for reservations, an international organization, as a negotiator of equal status, should have the same right as the other parties to formulate reservations if it so desired. As the repre-