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Summary record of the 1464th meeting

Topic:
Other topics

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35. Lastly, it might be asked whether the principle of the exhaustion of local remedies should be maintained in general international law in its existing form. That principle, which followed logically from the nature and purpose of certain international obligations, did not have only advantages. Practice showed that it sometimes also had disadvantages, particularly that of a long delay before action could be taken at the international level. Some investing States were justifiably concerned about the serious prejudice that might be suffered by those of their nationals who carried on activities in a foreign State and whose capital, skills and work benefited the economy of that State. But, in fact, means of avoiding such prejudice were available to those States, since treaty law provided for systems (global compensation, arbitration, etc.) which were designed precisely to overcome the most serious disadvantages of the application of the principle of the exhaustion of local remedies.

36. On the other hand, it would be wrong to ignore the concern of the countries invested in, which had often been subjected to excessive pressure in the past to make them transfer directly to the international level matters which should and could have been settled at the internal level. It was to the advantage of those States to settle certain questions internally if they wished to avoid having to appear before an international tribunal to be tried for a breach which they could have avoided through the action of their own domestic courts.

37. It was therefore necessary to establish a balance between points which, more than points of law, were above all points of justice. For justice required that individuals who carried on an activity in a foreign State should be protected because that activity was supposed to benefit the State in whose territory it was carried on. But justice also required that the States in which foreign individuals carried on their activities should be protected—especially if those individuals were nationals of powerful States—against attempts to transform into international cases matters which had at first been purely internal and should remain so.

38. He therefore believed that there was no reason to depart from existing international law for the sake of an alleged progressive development which would be unacceptable to a large proportion of States and which they might regard as detracting from respect for their sovereignty, independence and sovereign equality. The rule stated in article 22 should define the principle of the exhaustion of local remedies as it was in the present state of international law, formulating it flexibly enough to be adaptable to the different situations that arose in practice.

The meeting rose at 1 p.m.

1464th MEETING

Wednesday, 20 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis,

Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta

Draft report of the Commission on the work of its twenty-ninth session

1. The CHAIRMAN invited the Commission to consider the draft report on the work of its twenty-ninth session, paragraph by paragraph, beginning with chapter IV.

CHAPTER IV. Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/L.261 and Corr.1 and Add.1-2)

A. Introduction (A/CN.4/L.261)

Paragraph 1

Paragraph 1 was approved.

Paragraph 2

2. The CHAIRMAN suggested that in the first sentence, the words "at least in part", which were somewhat deprecatory, should be replaced by the words "in large measure".

It was so agreed.

Paragraph 2, as amended, was approved.

Paragraph 3

3. In reply to a question put by Mr. ŠAHOVIĆ, Mr. REUTER (Special Rapporteur) reminded the Commission that it had been decided not to change the numbering of the articles on first reading in order to keep them in line with the articles of the Vienna Convention on the Law of Treaties.

Paragraph 3 was approved.

Paragraph 4

Paragraph 4 was approved.

Paragraph 5

4. The CHAIRMAN suggested that, in the penultimate sentence of the English text, the words "at the cost of" should be replaced by the word "by".

It was so agreed.

Paragraph 5, as amended, was approved.

Paragraphs 6-14

Paragraphs 6-14 were approved

Paragraph 15

5. The CHAIRMAN suggested that, at the end of the paragraph, the words "owing to lack of time" should be replaced by the words "in the time available".

It was so agreed.

Paragraph 15, as amended, was approved.

Section A as a whole, as amended, was approved.

B. Draft articles on treaties concluded between States and international organizations or between international organizations (A/CN.4/L.261 and Corr.1 and Add.1-2)

TEXTS OF ARTICLES 19, 19bis, 19ter, 20, 20bis, 21-23, 23bis, 24, 24bis, 25, 25bis AND 26-34 AND OF ARTICLE 2, PARAGRAPH 1 (j), AND COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (A/CN.4/L.261 and Corr.1 and Add.1-2)

ARTICLES 19-26 (A/CN.4/L.261)

Commentary to article 19 (Formulation of reservations in the case of treaties between several international organizations)

The commentary to article 19 was approved.

Commentary to article 19bis (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

Paragraphs (1)-(3)

Paragraphs (1)-(3) were approved.

Paragraph (4)

6. The CHAIRMAN suggested that, in accordance with established practice, the titles of the organizations referred to in paragraph (4) should be given in full.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

7. Mr. REUTER (Special Rapporteur) proposed that the first foot-note be supplemented by a reference to paragraphs 32-45 of the legal opinion which had been prepared for the Under-Secretary-General for Inter-Agency Affairs and Co-ordination on the representation of national liberation movements in United Nations organs, and which was quoted in the United Nations *Juridical Yearbook, 1974*,¹ since that opinion was entirely in keeping with what was said in the foot-note.

It was so agreed.

8. Mr. RIPHAGEN proposed that, in the last sentence of the same foot-note, the reference to "conventions" should be in the singular.

9. The CHAIRMAN suggested that, in order to take account of the suggestion by Mr. Riphagen and of the fact that there might eventually be more than one convention on the law of the sea, the words "the conventions" should be replaced by the words "a future convention or future conventions".

It was so agreed.

10. The CHAIRMAN suggested that the last part of the first sentence of paragraph (5), following the reference to foot-note 28, should be amended to read: "it seems open to question how far the régime established by article 19bis, paragraph 3, would have practical effect". Such wording would make it clear that the Commission regarded article 19bis as being of practical value.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

11. Mr. USHAKOV said that he would like paragraph (6) to be replaced by a new paragraph explaining his

position and giving the reasons why the Commission had not accepted it. He was willing to draft that paragraph himself and to submit it to the Commission for approval.

12. He would also like paragraph 1 of his proposal for article 19 to be reproduced in the foot-note to paragraph (6).

13. The CHAIRMAN asked the Special Rapporteur whether he accepted Mr. Ushakov's requests.

14. Mr. REUTER (Special Rapporteur) pointed out that only the Commission was competent to decide on the prominence to be given to the position taken by one of its members.

15. Mr. TSURUOKA proposed that the words "which did not adopt his proposal" should be deleted from the first sentence, for the phrase "different ideas" itself showed that the Commission had not accepted the system in question.

It was so agreed.

16. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to suspend consideration of paragraph (6) and, consequently, to defer approval of the commentary to article 19bis as a whole until Mr. Ushakov had submitted his alternative text.

It was so agreed.

Commentary to article 19ter (Objection to reservations)

The commentary to article 19ter was approved.

Commentary to article 20 (Acceptance of reservations in the case of treaties between several international organizations)

The commentary to article 20 was approved.

Commentary to article 20bis (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

Paragraph (1)

17. The CHAIRMAN suggested that, at the beginning of the English text, the words "reason of" should be inserted after the word "by".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

The commentary to article 20bis as amended, was approved.

Commentary to article 21 (Legal effects of reservations and of objections to reservations)

The commentary to article 21 was approved.

Commentary to article 22 (Withdrawal of reservations and of objections to reservations)

The commentary to article 22 was approved.

Commentary to article 23 (Procedure regarding reservations in treaties between several international organizations)

The commentary to article 23 was approved.

Commentary to article 23bis (Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States)

The commentary to article 23bis was approved.

¹ United Nations, *Juridical Yearbook, 1974* (United Nations publication, Sales No. E.76.V.I), pp. 154-156.

Commentary to article 24 (Entry into force of treaties between international organizations)

The commentary to article 24 was approved.

Commentary to article 24bis (Entry into force of treaties between one or more States and one or more international organizations)

The commentary to article 24bis was approved.

Commentary to article 25 (Provisional application of treaties between international organizations)

The commentary to article 25 was approved.

Commentary to article 25bis (Provisional application of treaties between one or more States and one or more international organizations)

The commentary to article 25bis was approved.

Commentary to article 26 (Pacta sunt servanda)

18. The CHAIRMAN suggested that it might be advisable to delete the word "minor" at the end of the paragraph because the differences in question might in future be greater than the Commission had anticipated.

It was so agreed.

The commentary to article 26, as amended, was approved.

ARTICLE 2, PARAGRAPH 1 (j), AND ARTICLE 27 (A/CN.4/L.261/Add.1)

Commentary to article 2, paragraph 1 (j) (Use of terms)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

19. Mr. JAGOTA said that it appeared from the proposals which had emerged from the sixth session of the Third United Nations Conference on the Law of the Sea that the operations of the possible international sea-bed authority would be governed not only by the convention on the law of the sea, which would be the authority's "constituent instrument" proper, but also, as in the case of other international organizations, by annexes to that instrument and rules and regulations, applicable to agreements concluded between the authority and the producers of sea-bed minerals. It seemed to him, therefore, that the present reference to the "constituent instruments, relevant decisions and resolutions ..." was too restrictive and should be amended to read "the constituent instruments and annexes thereto, rules and regulations, relevant decisions and resolutions ...".

20. The CHAIRMAN explained that it was because the Commission had very much had in mind the possible consequences of a future convention on the law of the sea and similar questions that it had decided to adopt only provisionally the definition of the expression "rules of the organization" which it currently proposed. That definition would be reviewed when all the uses to which the term was to be put in the Commission's draft articles were clear.

21. Mr. USHAKOV said that he had some difficulty in accepting the second sentence of paragraph (3), which implied the questioning of a definition already adopted in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

22. In the third sentence of the paragraph, reference should be made not merely to article 27 but to the draft

articles as a whole, for the comment cited also applied to article 6.

23. Mr. REUTER (Special Rapporteur) proposed that, in order to meet Mr. Ushakov's point, the second sentence of the paragraph be reworded to read: "The transposition of this definition to the draft articles as a whole already raises certain questions which will have to be clarified at a later stage."

24. In his view, it would be sufficient to refer, in the third sentence, to the commentary to article 27. The sentence would then read:

Some members of the Commission pointed out, in particular, that in the context of the present draft articles it was not perhaps quite correct to place the constituent instrument and other rules of an organization on the same footing, as appears from paragraph (5) of the commentary to article 27 below.

25. Mr. RIPHAGEN suggested that the last sentence of the paragraph should be made clearer by a reference to the commentary to article 27 or an explanation of why some members of the Commission had felt it necessary to refer to that article.

26. Mr. CALLE Y CALLE agreed with Mr. Ushakov that the Commission must be careful in referring to a definition adopted by the United Nations Conference on the Representation of States in their Relations with International Organizations. The convention adopted by that Conference was a codifying instrument, and the Conference had felt it necessary to define the expression "rules of the organization" because it had gone into questions such as the treaty-making power of an organization and the constitutionality of the treaties which an organization concluded. The Commission therefore should add to the commentary what the Special Rapporteur had said in paragraph (4) of the commentary to article 27 proposed in his fourth report² and, when recommending its present definition to the General Assembly, it should indicate the context in which that paragraph had been drafted.

27. The CHAIRMAN suggested that the second sentence of the paragraph should be amended as proposed by Mr. Reuter and that the third sentence should read:

"Some members of the Commission pointed out, in particular, that in the context of the present draft articles it was not perhaps quite correct to place the constituent instrument and other rules of an organization on the same footing, as appears from the commentary to article 27 below."

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 2, paragraph 1 (j), as amended was approved.

Commentary to article 27 (Internal law of a State, rules of an international organization and observance of treaties)

Paragraph (1)

Paragraph (1) was approved.

² Yearbook ... 1975, vol. II, p. 40, document A/CN.4/285.

Paragraph (2)

28. Mr. SCHWEBEL proposed the addition, at the end of the paragraph, of a sentence reading:

“Another member did not accept the foregoing line of argument, but maintained that international organizations are no less bound by their treaties than are States and that, consequently, international organizations are not free to amend their resolutions or take other measures which absolve them of their international obligations without engaging their responsibility under international law.”

29. Mr. AGO questioned whether the amendment of a resolution really constituted a breach of an international obligation of an organization.

30. Mr. SCHWEBEL explained that he had made his proposal not because he did not agree that international organizations should be able to amend their resolutions but because it would be unacceptable for them to have the right to repudiate their treaties by making such amendments.

31. The CHAIRMAN said, that if there was no objection, he would take it that the Commission approved the amendment proposed by Mr. Schwebel.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraph (5)

32. Mr. REUTER (Special Rapporteur) pointed out that the penultimate word of the penultimate sentence should be amended to read “potestative”.

33. The CHAIRMAN suggested that the Secretariat be asked to find a more appropriate English translation of the term *clause potestative* than the one given.

34. Mr. SCHWEBEL proposed that, in the sixth sentence, the word “some” be replaced by the word “the”.

It was so agreed.

35. Mr. USHAKOV suggested that the word “constitutional” should be deleted from the fourth sentence for the limits to the treaties which an international organization might conclude were not necessarily constitutional.

36. The CHAIRMAN suggested that, if there was no objection, the words “constitutional limits” could be replaced by the words “certain limits”.

It was so agreed.

37. Mr. USHAKOV also proposed that the fifth sentence should be deleted since it prejudged the Commission’s decision on the validity of treaties, a matter it had not yet taken up.

38. Mr. AGO said that, if an international organization concluded a treaty which exceeded the organization’s appointed limits, that treaty might be void. That did not mean, however, that a treaty was void whenever an international organization exceeded certain limits, for the constitutional limits applicable to an international organization were not always very precise. Nor could it be said that a treaty was valid if those limits were not

transgressed for it might be void for other reasons. In his opinion, therefore, the second part of the fifth sentence might be deleted.

39. Mr. REUTER (Special Rapporteur) agreed that the fact that certain limits had been exceeded did not necessarily entail the invalidity of a treaty; yet, the question of the invalidity of the treaty did none the less arise. He saw no problem in deleting the second part of the fifth sentence, as suggested by Mr. Ago.

40. Mr. AGO proposed that the first part of the fifth sentence should be replaced by a sentence reading: “If those limits are overstepped, the question of the validity of the treaties will arise”. It should be stated in a foot-note that the Commission would study the matter at a later stage.

It was so agreed.

41. The CHAIRMAN suggested that a reference to a new foot-note be added at the end of the fifth sentence and that the foot-note read: “This is a matter for future study by the International Law Commission”.

It was so agreed.

Paragraph (5), as amended, was approved.

The meeting rose at 1 p.m.

1465th MEETING

Wednesday, 20 July 1977, at 4 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Draft report of the Commission on the work of its twenty-ninth session (*continued*)

CHAPTER IV. Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

B. Draft articles on treaties concluded between States and international organizations or between international organizations (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

TEXTS OF ARTICLES 19, 19*bis*, 19*ter*, 20, 20*bis*, 21-23, 23*bis*, 24, 24*bis*, 25, 25*bis*, 26-34, AND OF ARTICLE 2, PARAGRAPH 1 (j), AND COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

ARTICLE 2, PARAGRAPH 1 (j), AND ARTICLE 27 (*concluded*) (A/CN.4/L.261/Add.1)

Commentary to article 27 (Internal law of a State, rules of an international organization and observance of treaties) (*concluded*)

Paragraph (6)

Paragraph (6) was approved.