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Report on the tenth session of the Asian-African Legal Consultative Committee by Mr. Abdul Hakim Tabibi, Observer for the Commission

Topic:
Cooperation with other bodies

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CO-OPERATION WITH OTHER BODIES

[Agenda item 5]

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[Original text: English]

[9 June 1969]

In accordance with the decision taken by the International Law Commission at its twentieth session,[1] I was asked by the Chairman of the Commission, Ambassador José María Ruda, to attend as an Observer for the Commission the Karachi meeting of the Asian-African Legal Consultative Committee during the last part of January 1969.

The Asian-African Legal Consultative Committee met for its tenth regular session at Karachi, Pakistan, from 21 to 30 January 1969. A special feature of the session was its utilization as a forum for consultation among Asian and African States on the law of treaties, in preparation for the second session of the United Nations Conference on the Law of Treaties. Two other subjects were considered at the session of the Committee: first, the rights of refugees and, secondly, the law of international rivers.

Eleven member States of the Committee were represented by high-level delegations. These were Ceylon, Ghana, India, Indonesia, Iraq, Japan, Jordan, Pakistan, Sierra Leone, Thailand and the United Arab Republic. Burma was the only member State not represented.

Thirteen non-member Asian and African States were represented by observers. These were Afghanistan, Cambodia, Cyprus, the Democratic Republic of the Congo, Iran, Kenya, Mongolia, Morocco, Nigeria, Philippines, Republic of Korea, Singapore and Turkey. These observers were given full right of participation in the consideration of the law of treaties, on the same basis as representatives of member States.

In addition, the Office of the United Nations High Commissioner for Refugees was represented by two officials, who assisted in the deliberations of the Committee on the subject of refugees. Representatives of the American Society of International Law, the Federal Republic of Germany's Section of the International Law Association and the International Law Association of the Union of Soviet Socialist Republics also attended as observers.

The full list of delegates and observers who attended the session is annexed to this report (annex I).

The proceedings were conducted in English, which is the working language of the Committee, but facilities for simultaneous interpretation were provided for French-speaking observers.

Mr. Sharifuddin Pirzada, Attorney General of Pakistan, was elected President of the session and Mr. Shukri Al Muhtadi of Jordan was elected Vice-President.

The session was inaugurated by the Minister for Law and Parliamentary Affairs, Government of Pakistan, in his capacity as the personal representative of the Pre-

[1] See *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 225, para. 109.

sident of Pakistan. At the inaugural meeting the heads of delegation of the member States of the Committee made general statements. The only observer invited to address the inaugural session was the representative of the International Law Commission. The text of the statement which I made is annexed to this report (annex II).

I was also invited to attend the private meeting of the heads of delegation. It was at this private meeting that I was asked to explain my personal views about the steps to be taken by the Asian-African Legal Consultative Committee regarding the second session of the United Nations Conference on the Law of Treaties. I am happy to say that the suggestions which I made at that meeting were received with favour and materialized later on at Vienna in article 62 *bis* as a famous compromise formula.

Law of treaties

The Committee began the discussion on the subject of the law of treaties at its very first business meeting held on 21 January 1969. The Committee had been considering this subject since its seventh session held at Baghdad in 1965, as a matter arising out of the work done by the International Law Commission, in conformity with the provisions of article 3 (*a*) of the Committee's Statutes. This provision makes it obligatory for the Committee to consider the reports of the Commission and make its recommendations thereon to its member Governments. The special importance given to this subject at the Karachi session was a consequence of requests made by certain Asian and African Governments for an opportunity to discuss important issues in preparation for the second session of the United Nations Conference on the Law of Treaties. After two plenary meetings were devoted to a general consideration of the subject, two sub-committees were constituted for a detailed discussion of certain important articles, namely, articles 2, 5 *bis*, 12 *bis*, 16, 17, 62 *bis*, 69 *bis*, and 76. The reports made by the sub-committees were adopted by the Committee at its tenth plenary meeting held on 30 January 1969. Copies of the reports are annexed (annex III).

Rights of refugees

The subject of refugees was brought up before the Committee at the request of the Government of Pakistan for reconsideration of the report of the Committee on the subject, adopted at its eighth session held in Bangkok in 1966. The delegation of Jordan also brought forward certain special problems of a legal nature concerning the Palestinian refugees. The questions which the Committee considered at this session were (*a*) the question of extension of the definition of refugees as contained in the Bangkok principles adopted by the Committee; (*b*) the question of repatriation or return of refugees; (*c*) the question of payment of compensation to refugees and constitution of compensation tribunals; (*d*) the standard of treatment of refugees; (*e*) travel documents and visas, and (*f*) territorial asylum. The Committee was not in a position to finalize its recommendations on the questions discussed, and decided to continue its discussions on the subject at its next session. The Committee, however, adopted a special resolution on the subject of Palestinian refugees. A copy of the resolution is annexed (annex IV).

Law of international rivers

The third subject on the agenda of the session was the law relating to international rivers. This subject came before the Committee at the request of the Governments of Iraq and Pakistan. The Committee could not devote sufficient time to this subject. After some general discussion in the plenary meeting it was decided that an inter-sessional sub-committee should be constituted for the detailed consideration of this subject. A copy of the resolution is annexed (annex IV).

Other decisions

The Committee decided to hold its eleventh session at Accra (Ghana) in the early part of 1970, and to invite the International Law Commission to send an observer to that session.

The Committee also decided to nominate its President, Mr. Sharifuddin Pirzada, to attend the twenty-first session of the Commission in the capacity of an observer.

The Committee also unanimously adopted a resolution thanking the Commission for sending its observer to the Karachi meeting.

Expression of thanks

In conclusion, I take particular pleasure in expressing my warmest thanks to the secretariat of the Asian-African Legal Consultative Committee and particularly to its able Secretary, Mr. B. Sen, and for the warm reception and kindness of the officials of the Government of Pakistan and the warm welcome accorded to me by the President of the Committee, Mr. Pirzada, the Attorney General of Pakistan.

ANNEXES

ANNEX I

List of delegates and observers at the tenth session of the Asian-African Legal Consultative Committee

[not reproduced] *

ANNEX II

Statement by Mr. Abdul Hakim Tabibi, Observer for the International Law Commission, at the Tenth Session of the Asian-African Legal Consultative Committee

It is a source of great pleasure, indeed, to speak here on behalf of the International Law Commission which rightly attaches great importance to its relations with your Committee, an institution of brotherhood in legal understanding between the great Asian and African countries.

I feel particularly happy to participate here, in this beautiful city of Karachi, at a time when your Committee is completing and observing its first decade of fruitful endeavours, representing as I do the International Law Commission which is itself marking its twentieth anniversary.

As an Asian jurist interested in the progress of international law, I have followed with close attention the work of your Committee. Its impact on the progressive development of international law and its codification in various organs of the United Nations has been felt. I have every hope that the close contacts and co-operation which exist happily between this Committee and the Commission will serve for the further progress of international law, in order to govern, in a more positive manner, the behaviour of nations.

Before introducing the report of the International Law Commission on the work of its twentieth session,[a] I should like to say a few words about the achievements of the Commission as stated before the twenty-third session of the General Assembly by Mr. Ruda, our Chairman this year. Among the various achievements of the Commission, we can cite only those works which are now universally accepted or are near universal acceptance, such as the four Conventions on the Law of the Sea, the Convention on the Reduction of Statelessness, the Model Rules on Arbitral Procedure, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, the draft Convention on the Law of Treaties; and, finally, the draft Convention on Special Missions. In addition to these works, on the basis of decisions of the General Assembly, other important topics were also dealt with by the Commission such as the draft Declaration on Rights and Duties of States; ways and means for making the evidence of customary international law more readily available; principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal; international criminal jurisdiction; reservations to the Convention on the Prevention and Punishment of the Crime of Genocide; the question of defining aggression; and finally the draft Code of Offences against the Peace and Security of Mankind. This is a clear balance-sheet in favour of the Commission, in whose work in the last twenty years sixty-four elected jurists from forty-three countries have participated.

It was with this background that the International Law Commission met in Geneva from 27 May to 2 August 1968 and discussed various topics of which the following were the most important: succession of States and Governments in respect of treaties and also in respect of matters other than treaties; relations between States and international organizations; the most-favoured-nation clause and, finally, the review of the Commission's programme and methods of work.

As regards the topic of succession of States and Governments, which has already been on the agenda of the Commission for some years, both the Special Rapporteurs, namely Sir Humphrey Waldock and Mr. M. Bedjaoui, have submitted their first reports. On the report of Mr. Bedjaoui, entitled "First report on succession of states in respect of rights and duties resulting from sources other than treaties" [b] because of the breadth and complexity of the question, the Commission favoured the idea of giving priority to one or two aspects for immediate study. After careful consideration the Commission decided to ask the Special Rapporteur to prepare a report on the topic "Succession of States in economic and financial matters" for the next session. [c]

On the report of Sir Humphrey Waldock, entitled "First report on succession of States and Governments in respect of treaties",[d] the Commission noted the view of the Special Rapporteur, that he was casting his work in the form of draft articles on the model of a Convention "in order to provide the Commission with specific texts on which to focus the discussion and in order to clarify the issues",[e] but the Rapporteur stressed that he had not intended in any way to anticipate the ultimate decision of the Commission on this point. Finally, the Commission deemed it desirable to continue in 1969 its study on succession in respect of treaties. [f] With regard to the topic entrusted to Mr. Bedjaoui, the Commission will give priority to its consideration in 1970. The Commission also made a great deal of progress on the topic of relations between States and inter-governmental organisations, on which the Special Rapporteur, Mr. Abdullah El-Erian, presented his third report entitled "Third report on relations between States and inter-governmental organisations",[g] containing a full set of draft articles, with commentaries. On 31 July 1968, the Commission adopted a provisional draft of twenty-one articles.[h] The Commission decided to transmit the provisional draft of these articles through the Secretary-General to Governments for their observations.

The Special Rapporteur, Mr. Endre Ustor, submitted a working paper giving an account of the work undertaken by him on the topic of the most-favoured-nation clause entitled "The most-favoured-nation clause in the law of treaties".[i] The Commission, after considering this working paper and a questionnaire, and recognising the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur to explore the major fields of application of the clause.[j]

As regards the review of the Commission's programme and methods of work, the Commission, on the basis of twenty years of experience and a study prepared by the Secretariat, made a careful review of the question. This question has been described fully in chapter V of the report of the Commission presented to the General Assembly this year. [k] Your study of this issue and your views on the Commission's future work will be greatly appreciated.

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* For the list, see the mimeographed version of the present document, annex A.

[a] *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 191.

[b] *Ibid.*, document A/CN.4/204, p. 94.

[c] *Ibid.*, document A/7209/Rev.1, p. 221, para. 79.

[d] *Ibid.*, document A/CN.4/202, p. 87.

[e] *Ibid.*, document A/7209/Rev.1, p. 221, para. 84.

[f] *Ibid.*, document A/7209/Rev.1, p. 224, paras. 103 and 104.

[g] *Ibid.*, document A/CN.4/203 and Add.1-5, p. 119.

[h] *Ibid.*, document A/7209/Rev.1, p. 194, para. 21.

[i] *Ibid.*, document A/CN.4/L.127, p. 165.

[j] *Ibid.*, document A/7209/Rev.1, p. 223, para. 93.

[k] *Ibid.*, p. 223.

Finally, I wish to mention that this year [1969] is the most important year for all of us, because the second session of the Vienna Conference will adopt the Convention on the Law of Treaties. The adoption of this historical document will be another legal milestone, which will solve international discord and enhance friendship between nations.

I hope that the participants in the Asian-African Legal Consultative Committee will do their utmost to make the second session of the Vienna Conference a success, because it is in the interest of us all.

ANNEX III

1. Report of the First Sub-Committee on the Law of Treaties

PART I

1. The First Sub-Committee on the Law of Treaties at its first meeting considered the question of the admission of observers to its meetings and agreed to allow the observers from the Asian-African countries attending the tenth session to participate fully in its deliberations.

2. At its first, second, third and fourth meetings the Sub-Committee considered the question of article 62 *bis*, proposed by thirteen Powers at the first session of the United Nations Conference on the Law of Treaties [a] for inclusion in the Convention after article 62.

3. The Sub-Committee first took up the question whether it was sufficient to have just article 62, or whether it was necessary to go beyond the said article. Opinion was evenly divided between those who regarded article 62 as sufficient and those who were prepared or considered it necessary to go beyond it.

4. The Sub-Committee then considered the possibility that circumstances at the second session of the Vienna Conference might make it necessary to go beyond article 62, and what the position of the States should be if circumstances so required. It was the unanimous opinion of the Sub-Committee that under such circumstances all States should be prepared to go beyond article 62.

5. Thereupon, the Sub-Committee considered the question to what extent, and in what form, a provision beyond article 62 would be acceptable:

(*a*) A majority of the delegates and observers were of the opinion that a machinery for settlement of disputes arising under part V of the Convention on the Law of Treaties should be provided in an optional protocol.

(*b*) Some delegates and observers took the view that there should be an obligation to choose at least one compulsory method of settlement.

(*c*) Some delegates and observers were of the view that a formula could be sought along the lines of the proposed article 62 *bis*, with the possibility of entering reservations, opting out or contracting out.

(*d*) A few others found article 62 *bis* acceptable as it was, and

(*e*) A few expressed the view that the jurisdiction of the International Court of Justice should also be included.

6. Various proposals and views were then put forward and discussed in the Sub-Committee in order to bring together the different viewpoints. The proposals that were submitted are annexed hereto and may be summed up as follows:

(*a*) There should be an optional protocol providing for compulsory settlement of disputes (conciliation, arbitration and adjudication by the International Court of Justice), together with an optional or a reservation clause enabling the parties to the Convention to specify, or to exclude, any particular compulsory mode of settlement.

(*b*) An article should be included in the Convention imposing an obligation on the parties to settle any disputes arising from the application of part V of the Convention on the Law of Treaties by choosing any one method of compulsory third-party settlement, namely, conciliation, arbitration or adjudication, to cover those cases where the parties had been unable to agree, as provided in article 62, upon any means of reaching a solution. The choice should be specified in the relevant treaty.

(*c*) Article 62 *bis* should be included in the Convention on the Law of Treaties subject to the following provisions:

(i) Parties may *opt out* of its provisions, in full or in part, by making a declaration at the time of signing, ratifying or acceding to the Convention on the Law of Treaties to that effect, or at the time of concluding a treaty.

(ii) Parties may *contract out* of its provisions, in whole or in part, with respect to a particular treaty. (The parties would thus be bound by article 62 *bis* if they were not able to agree to any modification thereof.)

All the aforesaid formulae referred to future treaties only and sought to exclude existing treaties.

7. The Sub-Committee then agreed that these formulae should be submitted to the Governments of member States to be considered by them in their efforts to find a compromise formula on the matter at the coming second session of the Vienna Conference.

New Article 76 [b]

8. At its fifth meeting the Sub-Committee took up the question of the proposed new article 76 dealing with the settlement of disputes relating to interpretation and application of the provisions of the Convention. With a few exceptions, it was the opinion of the Sub-Committee that the proposed article, in its present form, was unacceptable.

9. Some delegates and observers were in favour of distinguishing between disputes, covered by part V, and those relating to interpretation and application of other provisions of the Convention. Others were of the view that both categories of disputes could be settled in an identical manner.

10. A large majority was of the opinion that machinery for settlement of disputes relating to the interpretation and application of the provisions of the Convention other than those arising from part V, should be provided in an optional protocol providing for a single machinery or one consisting of two parts providing for different machinery depending upon whether or not a distinction was to be made between disputes covered by part V and those relating to interpretation and application of other provisions of the Convention. Some delegates and observers also referred to the need to exclude adjudication by the International Court of Justice from such a protocol, or to include in it a reservation clause or an opting out clause.

11. A few delegates and observers emphasised the necessity for compulsory settlement of disputes relating to interpretation and application and considered inclusion of compulsory adjudication by the International Court of Justice necessary.

12. Three delegates reserved their respective Government's position on the proposed article 76.

13. All the delegates and observers, however, recognized the interdependence of solutions in regard to articles 62 *bis* and 76, and the influence of either of them upon the other.

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[a] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/14, para. 583 (*b*).

[b] *Ibid.*, paras. 690-692.

PART II

Article 5 bis [c]

14. The Sub-Committee discussed the proposed article 5 *bis* at its sixth and seventh meetings.

15. Virtually all delegates and observers supported the principle of universality. A majority of the delegates and observers supported the inclusion of the principle only of present article 5 *bis*, while some could accept article 5 *bis* as at present drafted. Some delegates and observers were not in favour of article 5 *bis* or a variant thereof, on the ground that it would create practical difficulties.

16. A large majority of delegates and observers were willing to accept the term "general multilateral treaty". Some of these delegates and observers would like to see a clearer definition of the term, while some others made it a condition of acceptance that a clearer definition be arrived at.

17. A majority of the delegates and observers, while recognising the existence of restricted multilateral treaties had reservations regarding the inclusion of a provision in the Convention on the subject. Some delegates and observers were opposed to the definition of this term on the ground that it was redundant.

18. The views referred to above may be summed up as follows:

(*a*) The Convention should include a provision in regard to universal participation in general multilateral treaties, with or without definition of a general multilateral treaty.

(*b*) The Convention should include such a provision, without a definition of a "restricted multilateral treaty".

(*c*) The Convention should include such a provision together with a definition of "general multilateral treaty". A few of the delegates and observers in this category found the definition proposed by eight Powers at the first session of the Vienna Conference [d] to be acceptable, while others preferred to have a clearer definition.

(*d*) There should be only a clearer definition of "restricted multilateral treaty". One observer reserved the position of his Government in the matter of definition of "restricted multilateral treaty".

(*e*) The Conference should adopt a declaration on the principle of universality and in each specific treaty, a solution could be provided in the relevant final clauses, depending on the intention of the parties.

(*f*) The Convention should neither include a provision in regard to universal participation in general multilateral treaties, nor a provision regarding restricted multilateral treaties.

19. Without prejudice to their respective positions on article 5 *bis*, all delegates and observers reached the consensus that no definitions of "general multilateral treaty" and "restricted multilateral treaty" should be included in article 2 of the Convention.

PART III

Final clauses including the question of applicability of the Convention

20. The Sub-Committee first discussed the question whether it should be open to all States to become parties to the Convention on the Law of Treaties, which was a question apart from that of including in the Convention a provision on the lines of present article 5 *bis*.

21. With a few exceptions all delegates and observers were in favour of including a provision in the final clauses whereby it would be open to all States to become parties to the Convention on the Law of Treaties. In this context, two suggestions were made for avoiding any practical difficulties that might arise from the inclusion of such a provision. One suggestion was to have a system of multiple depositaries. The other was that, while providing for only one depositary—the United Nations Secretary-General—the Convention should also include a declaration or proviso to the effect that recognition of one State by another would not be implied solely from the fact that both were parties to the Convention. Most of the delegates who supported the inclusion of an all-States formula in the Convention had an open mind on the two suggestions, with several delegates tending to favour the multiple depositaries system. Some delegates expressed the view that a provision regarding non-recognition (contained in the second suggestion) was superfluous since under the existing international law, recognition could not be implied from common participation in a multilateral treaty of this character.

22. One delegation supported a multiple depositaries system linked with a non-recognition provision. Two delegations formally reserved their positions. Another delegation indicated that it had had no time to consider the question and thus could not express its view at the present time.

23. One delegation favoured the incorporation of the "Vienna formula" in the Convention (i.e. leaving the Convention open only to States Members of the United Nations, members of the specialized agencies and the International Atomic Energy Authority, States parties to the Statute of the International Court of Justice and those States invited by the United Nations General Assembly to become parties thereto).

24. The question whether all the provisions of the Convention would be prospective in application was raised. Without prejudice to the application of other provisions of the Convention it was the general opinion that articles 62 *bis* and 76, if adopted, would be prospective in application.

25. The number of ratifications required for the entry into force of the Convention was also discussed briefly and there was general agreement that in that regard the customary practice with regard to multilateral conventions concluded under the auspices of the United Nations should be followed.

Proposals submitted to the First Sub-Committee on the question of article 62 and the proposed article 62 bis

1. There should be an optional protocol on the question of settlement of disputes under part V of the Convention drawn up along the lines of the proposed article 62 *bis* as set out in the thirteen-Power proposal,[e] and also providing for compulsory adjudication by the International Court of Justice. The said optional protocol should provide for an option enabling the States to specify any of the three modes of settlement (compulsory conciliation, compulsory arbitration and compulsory adjudication) at the time of signing the protocol.

2. There should be an optional protocol on the question of settlement of disputes under part V of the Convention. The contents of the protocol should be exactly along the lines of article 62 *bis* as proposed by the thirteen Powers.

3. 62 bis *as contained in the thirteen-Power amendment, together with the following proviso:*

"Provided that in any treaty any contracting party may expressly indicate its unwillingness to be bound by article 62 *bis* or any part thereof, or with the agreement of the other party or parties, agree on any of the methods specified therein for compulsory settlement of disputes."

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[c] *Ibid.*, paras. 67-69.

[d] *Ibid.*, para. 35 (*ii*) (*b*).

[e] *Ibid.*, para. 583 (*b*).

4. Article 62 *bis* should be included in the Convention on the Law of Treaties subject, if necessary, to the following provisions:

(*a*) Parties may *opt out* of its provisions, in full or in part, by making a declaration at the time of signing, ratifying or acceding to the Convention on the Law of Treaties to that effect.

(*b*) Parties may *contract out* of its provisions, in full or in part, while concluding a treaty. (This would imply that parties will be bound by article 62 *bis* if they are not able to agree to any modification thereof.)

5. An article providing for compulsory conciliation should be included in the Convention. In addition, there should be an optional protocol providing for compulsory arbitration and adjudication.

6. (*a*) (i) If the parties have been unable to agree, as provided in article 62, upon any means of reaching a solution to their dispute within four months following the date on which the objection was raised, they shall solve the dispute by any one of the following methods: conciliation, arbitration and adjudication by the International Court of Justice.

(ii) The parties shall choose one of the above methods by mutual consent. This method shall be specified by the parties in their treaty at the time of concluding such treaty, though they may have recourse to any of the remaining two methods at any time subsequently if the parties so wish.

(iii) The parties or any of them may then request the Secretary-General of the United Nations to set in motion the relevant procedure specified in the thirteen-Power proposal on article 62 *bis*.

(*b*) If no choice is specified in the treaty, the parties shall be bound to settle their dispute by reference to compulsory conciliation. By agreement, however, they may refer their dispute to compulsory arbitration or adjudication. Alternatively, on failure of a choice by the parties the provisions of of the annex [f] to the proposed article 62 *bis* shall apply.

The procedure regarding compulsory conciliation or arbitration shall be on the lines of the annex to article 62 *bis* or any acceptable variant thereof. In the case of compulsory adjudication the dispute shall be referred to the International Court of Justice on the application of any of the parties within *four* months of the date on which objection was raised.

7. *Paragraph 6 to be added to article 62* bis *as proposed in the thirteen-Power proposal:*

Notwithstanding the provisions of previous paragraphs where in any treaty, it is expressly provided that any dispute arising therefrom shall be settled by any one of the means of compulsory settlement specified in this article, the contracting parties shall settle their disputes in the manner so specified in the treaty.

8. The Convention on the Law of Treaties should include an article along the lines of the thirteen-Power draft of article 62 *bis* providing for the automatic conciliation and arbitration of disputes arising under part V of the Convention, and for the payment by the United Nations of the expenses of conciliation commissions and arbitral tribunals.

The aforesaid article could, in addition, contain two other provisions:

(*a*) The settlement mechanism would apply only to treaties that enter into force after the entry into force of the Convention on the Law of Treaties, subject, however to the right of parties to a treaty concluded prior to the entry into force of the Convention, to apply the mechanism to disputes in relation to that treaty, by unanimous agreement. [*May be omitted if the principle is covered in a more general provision of the Convention.*]

(*b*) The parties to any treaty may by unanimous agreement decide:

(i) to exclude from operation of the settlement mechanism, all or any specified disputes arising out of a particular treaty, and to subject them to some other specified mode of settlement; and

(ii) to vary, in relation to that particular treaty, the mode of constitution of the commission or tribunal provided for under the article.

[f] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF. 39/14, para. 583 (*b*).

2. Report of the Second Sub-Committee on the Law of Treaties

The Second Sub-Committee on the Law of Treaties was set up by the Committee at its second plenary meeting to consider the question of the law on treaties. It consisted of the delegates of Ceylon, Ghana, India, Indonesia, Japan, Pakistan and the United Arab Republic. The delegate of the United Arab Republic acted as its Chairman. The Second Sub-Committee's terms of reference comprised consideration of articles 2, 12 *bis*, 16, 17, 69 *bis* and the question of a provision for contracting out of the Convention. It held four meetings and arrived at the following conclusions:

I. *Article 2* [g]

The Sub-Committee had extensive discussions on article 2. The principal points of agreement which emerged may be stated as follows:

(*a*) The definition of the term "Treaty" in sub-paragraph (*a*) of paragraph 1 of article 2, as drafted by the International Law Commission should be maintained. The amendment tabled by Ecuador [h] seems unnecessary because the conditions of validity are fully covered by other articles of a substantive nature providing that the Treaty must be "freely consented to", "concluded in good faith", and that its object is "licit". While agreeing that the amendment by Ecuador was unnecessary, the delegates of Japan and the United Arab Republic stressed that they did not favour the introduction into a definition of the term "Treaty" of substantive elements which were to be covered in part V of the draft Convention. The delegate of Pakistan, while agreeing that the amendment in question was unnecessary, emphasised the importance of the amendment in case articles 49 and 50 of the draft Convention were not finally adopted. In his opinion, the inclusion of the words "freely consented to", "concluded in good faith" and "licit object" were essential elements for the existence of a valid treaty in accordance with the general principles of law. As regards the amendment by Malaysia and Mexico, [i] the delegate of the United Arab Republic pointed out that his delegation was in favour of the amendment because in his opinion it would be more precise to define the term "Treaty" as an international agreement "which establishes a legal relationship between the parties" in order to exclude explicitly the category of "gentleman's agreement" which was not binding legally even though concluded between States. But the majority of the members of the Second Sub-Committee considered that the Malaysian and Mexican amendment added nothing new to the text, and that consequently there was no need to include in the text an explicit reference to the intention of creating a legal relationship.

(*b*) The definition of the term "general multilateral treaty" in a new sub-paragraph to be inserted between sub-paragraphs (*a*) and (*b*) of paragraph 1 of article 2 was proposed at Vienna by an amendment [j] moved jointly by eight States including three Asian and African States (Democratic Republic of the

[g] *Ibid.*, para. 33.

[h] *Ibid.*, para. 35 (i) (*c*).

[i] *Ibid.*, para. 35 (i) (*e*).

[j] *Ibid.*, para. 35 (ii) (*b*).

Congo, United Arab Republic and the United Republic of Tanzania). In the view of the sponsors of the amendment, the inclusion of a definition of the term "general multilateral treaty" was necessary in order to take into account the increasingly important role played by those treaties which were constantly increasing in number and importance and related to matters of concern to the whole community of States.

Most of the delegates emphasized that they were not yet convinced whether any useful purpose would be served by including in the draft Convention a definition of the term "general multilateral treaty". First of all, such a definition might raise the question of distinguishing it from a "restricted multilateral treaty" which might not be so easy to do. Secondly, if the purpose was to emphasize that the conclusion of certain treaties might be open to all States, that was an independent subject and could be taken care of by adopting article 5 *bis*. The Indonesian delegate expressed the view that his delegation had no objection to the definition of the term "general multilateral treaty". The majority of members of the Second Sub-Committee took the view that although there was no doubt about the existence of such treaties relative to the world public order, it would be preferable not to include in article 2 a definition of the term "general multilateral treaty". Even if the principle of universality embodied in article 5 *bis* was adopted, it did not necessarily imply that the category of treaties to which it referred must be previously defined in article 2. Such a definition could hardly be formulated precisely in the draft Convention, as there was no accepted criterion to distinguish between the three categories of treaties, viz., general multilateral treaties, multilateral treaties, and restricted multilateral treaties. The concept of "restricted multilateral treaty" had been introduced by the French delegation at Vienna,[k] as a particular concept in contradistinction to the concept of "general multilateral treaty". The distinction was mainly of a doctrinal nature, and it would be more appropriate to improve the drafting of article 5 *bis* (if the First Sub-Committee agreed that it should be adopted) without defining in article 2 the category of treaties in which all States had the right to participate. (This question should be considered along with the report of the First Sub-Committee on article 5 *bis*.)

(*c*) The definition of the term "restricted multilateral treaty" to be inserted in a new sub-paragraph between sub-paragraphs (*d*) and (*e*) of paragraph 1 of article 2 was proposed at Vienna by the delegate of France and was supported by some Asian and African States e.g. Syria, Kenya, Central African Republic and Mali. During the discussion on this question in the Second Sub-Committee the delegates noted that the proposed French amendment to article 2 and to other subsequent articles, tended to generalize a concept which had been implicitly adopted by the International Law Commission in paragraph 2 of article 17.[l] This paragraph stipulates: "When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirely between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties." The derogation from the general rule as formulated in article 17 was justified on the ground that the treaties in question constituted a particular category which by their very nature were restricted to a limited number of States and regulated matters of special interest to those States only. The importance of this category of treaties in the emerging new patterns of regional co-operation and integration was self-evident, and the French amendment could be regarded from that point of view as useful in adapting international law to the realities of the changing world community. However, the French delegate at Vienna went too far in his attempt to create within the general frame of the draft Convention a special legal régime applicable only to the so-called new category of "restricted multilateral treaties". Consequently, the French delegate wanted to exclude systematically the general rules laid down in articles 8, 12, 26, 36, 37, 55 and 66. The implications of the French conception were not clear beyond doubt and it would detract from the uniformity of the draft Convention. The necessary flexibility could be achieved by introducing in those articles a phrase "unless the treaty otherwise provides". In view of the foregoing reasons, the Second Sub-Committee unanimously concluded that it would be unwise to introduce in article 2 a new sub-paragraph defining the term "restricted multilateral treaty". The adoption of article 17, paragraph 2, did not necessarily require the insertion of a generalized definition, which might create further difficulties.

(*d*) The definition of the term "reservation" in sub-paragraph (*d*) of paragraph 1 of article 2 might be maintained as drafted by the International Law Commission.[m] The amendment moved by Hungary at Vienna [n] was unacceptable, as it was intended to include under the concept of "reservation" a totally different category of legal acts which were mere "declarations". The delegate of the United Arab Republic pointed out that declarations did not exclude or vary the legal effect of certain provisions of a treaty and that interpretative statements clarifying a State's position could not be considered as "reservations" within the meaning of the original text. The other delegates raised no objection to the Hungarian amendment.

II. *Article 12* bis

After a careful study of the new article 12 *bis* proposed by Belgium [o] the purpose of which was similar to the new article 9 *bis* proposed by Poland and the United States of America in a joint amendment.[p] namely, to take into account methods other than those specified in articles 10, 11 and 12 by which States expressed their consent to be bound, the Sub-Committee was unanimously of the view that the article as adopted by the Committee of the Whole at the first session of the Vienna Conference, should be adopted without any change. The said article reads as follows:

"The consent of a State to be bound by a treaty may be expressed by a signature, exchange of instruments constituting a treaty, ratification, approval, acceptance or accession, or by any other means if so agreed." [q]

III. *Articles 16 and 17*

Considering the important and complex questions raised by articles 16 and 17 and keeping in view the necessity of maintaining a balance between the principle of integrity of treaties and the principle of freedom of States to make reservations, the Sub-Committee agreed as follows:

(*a*) Article 16, as unanimously approved by the Committee of the Whole at Vienna,[r] was acceptable. The Second Sub-Committee considered the amendment submitted by Japan, Philippines and the Republic of Korea [s] proposing a collegiate

[k] *Ibid.*, para. 35 (vii).

[l] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 179.

[m] *Ibid.*, p. 118.

[n] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/14, para. 35 (vi) (*e*).

[o] *Ibid.*, para. 104 (*b*).

[p] *Ibid.*, para. 104 (*a*).

[q] *Ibid.*, para. 108.

[r] *Ibid.*, para. 188.

[s] *Ibid.*, para. 177 (i) (*a*).

system for determining the compatibility of a reservation with the object and purpose of a treaty, as containing a useful innovation in the law of treaties. The majority supported this amendment in principle. The delegate of India was, however, not clear as to how it would function in view of the provisions of article 17 (4) (*a*).

(*b*) With regard to article 17, the Second Sub-Committee supported the deletion of the words "or impliedly" from paragraph 1 as they introduced a subjective element and could give rise to uncertainties.

(*c*) The majority of the members opposed the amendment moved at Vienna by Czechoslovakia,[t] seeking to replace the words "the treaty" where it first occured, by the words "a general multilateral treaty or other multilateral treaty, with the exception of cases provided for in paragraphs 2 and 3" on the ground that such formulation would reintroduce the doctrinal and unnecessary distinction between "general multilateral treaties" and "restricted multilateral treaties".

(*d*) The Second Sub-Committee was not in favour of the joint amendment tabled at Vienna by France and Tunisia [u] seeking to replace the original text of Article 17, paragraph 2 by another formulation referring explicitly to the concept of "restricted multilateral treaty" which required, as in the case of reservations to a bilateral Treaty, acceptance by all the contracting States. The non-acceptance of the joint French-Tunisian amendment was a logical consequence of the aforementioned attitude of the Sub-Committee regarding the inadvisability of introducing a definition of the term "restricted multilateral treaty" in article 2.

(*e*) The majority of the members of the Second Sub-Committee was not in favour of the amendment moved at Vienna by Switzerland [v] and by France and Tunisia [w] to delete paragraph 3 of article 17 dealing with reservations to treaties which were constituent instruments of international organizations. The provisional text of paragraph 3 as suggested by the Drafting Committee and as amended by the Committee of the Whole, was acceptable.

(*f*) The majority of the Second Sub-Committee was not in favour of the proposed amendment to paragraph 4 of article 17 submitted by Czechoslovakia,[x] Syria [y] and the Soviet Union [z] and embodying the principle that a treaty enters into force between a reserving State and an objecting State, unless the objecting State expressly declares to the contrary. The original text of paragraph 4 (*b*) avoided the creation of a complex situation with regard to the application of treaties by assuming that the objection to a reservation precluded, in principle, the entry into force of the treaty between the objecting and reserving States.

(*g*) The Second Sub-Committee unanimously approved the amendment submitted by the delegate of the United States of America [aa] at Vienna to insert the words "unless the Treaty otherwise provides" in paragraph 5 of article 17. This Amendment introduces a certain flexibility missing in the International Law Commission's text, as it gave to the negotiating States the power of stipulating in the treaty itself a period shorter or longer than twelve months.

IV. *Article 69* bis

The delegates of Ghana, India and Indonesia approved the adoption of the proposed new article 69 *bis* stipulating that "the severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States..." [bb] According to them, the article confirmed the exising international practice and reaffirmed the principle adopted in article 60 by extending it to cover not only pre-existing treaties but also agreements to be concluded in spite of severance or absence of diplomatic or consular relations.

The delegates of Ceylon, Japan, Pakistan and the United Arab Republic expressed the opinion that there was no need for the inclusion of article 69 *bis* because its substance was irrelevant to the law of treaties. The delegate of the United Arab Republic further expressed the view that the rule stated in article 69 *bis* concerned mainly the questions of diplomatic relations and the legal effect of non-recognition, which could better be left to the State practice.

The observer for Cambodia pointed out that in spite of the fact that his country used to conclude international agreements with non-recognised States or Governments, he would be more favourable to the deletion of article 69 *bis* for the reasons mentioned by the majority of members of the Second Sub-Committee.

V. *The question of a provision for contracting out of the Convention*

After a lengthy discussion in which observers from Cambodia, the American Society of International Law and the Federal Republic of Germany branch of the International Law Association participated, the Second Sub-Committee expressed the following views:

(*a*) The Convention on the Law of Treaties was to be considered as a law-making treaty which was intended to govern future treaties to be concluded between the States parties to the Convention.

(*b*) It would be desirable to emphasise that treaties concluded between States parties to the Convention might derogate from the rules laid down therein only in so far as such derogation was expressly or implicitly permitted in the respective articles of the Convention.

The delegates of Ghana and Japan emphasized that the word "impliedly" should be interpreted to cover the cases where derogation was permitted in the light of the nature or the object and purpose of the particular provisions of the Convention.

The delegate of India pointed out that the Convention on the Law of Treaties embodied two types of provisions viz., fundamental provisions and provisions of a procedural nature. The question of contracting out in regard to fundamental provisions should normally not arise. Such provisions should be mentioned in a separate article. The provisions might include, for example, article 23 and part V of the draft Convention. The obligations in regard to the fundamental provisions of the Convention could be enlarged by agreement but they could not be restricted, unless the Convention allowed it expressly or impliedly, such as in an article on reservations. The Convention should also contain a review clause providing for review of the Convention after ten years at the request of a specified number of States.

[t] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF. 39/14, para. 179 (ii) (*a*).

[u] *Ibid.*, para. 179 (iii) (*a*).

[v] *Ibid.*, para. 179 (iv) (*b*).

[w] *Ibid.*, para. 179 (iv) (*c*).

[x] *Ibid.*, para. 179 (v) (*a*).

[y] *Ibid.*, para. 179 (v) (*b*).

[z] *Ibid.*, para. 175 (*a*).

[aa] *Ibid.*, para. 179 (vi) (*a*)

ANNEX IV

Resolutions adopted by the Asian-African Legal Consultative Committee

Resolution No. X (8)

The Committee,

Considering that the Government of the United Arab Republic by a reference made under article 3 (*b*) of the Statutes, had requested

[bb] *Ibid.*, para. 558.

the Committee to consider certain questions relating to the rights of refugees,

And considering that the Government of Pakistan had requested the Committee to reconsider its report on some of the aspects, which request had been supported by the Governments of Iraq, Jordan, and the United Arab Republic,

Considering further the recent developments in the field of international refugee law referred to by the delegations of Ghana, Sierra Leone and others ... and explained in the Note prepared by the Office of the United Nations High Commissioner for Refugees at the request of the secretariat,

Referring specifically to the Protocol relating to the Status of Refugees of 31 January 1967 (General Assembly resolution 2198 (XXI) (and to the United Nations Declaration on Territorial Asylum of 14 December 1967 (General Assembly resolution 2312 (XXII)),

Referring further to the recommendations made by the Addis Ababa Refugee Conference of October 1967 and the Organization of African Unity draft instrument concerning refugees,

Considering also that it was not possible for the Committee, at its tenth session, to give detailed consideration to the above-mentioned instruments and recommendations on account of the limited time at its disposal,

Takes note with satisfaction of the entry into force of the above-mentioned Protocol, thus making the provisions of the 1951 Refugee Convention universally applicable;

Requests the secretariat to put the item concerning "Rights of Refugees" on the agenda of its eleventh session, including all the proposals made at the tenth session by the delegations of Pakistan and Jordan and, in the meantime, in order to facilitate the work of the Committee, to prepare, in co-operation with the Office of the United Nations High Commissioner for Refugees, a detailed analysis of the above-mentioned instruments and recommendations. The records of the Committee's debate on this item shall also be made available to the Governments.

Resolution No. X (6)

Considering that the Governments of Iraq and Pakistan, by references made under article 3 (*b*) of the Statutes, have requested the Committee to consider the law relating to international rivers,

Recalling resolution IX (16) in which the Committee decided to consider the subject of international rivers and directed the secretariat to collect relevant material on the issues indicated in the course of statements made by the delegations and to prepare a brief for consideration of the Committee,

Taking note of the statements made by the delegations present at the tenth session and the views expressed by the observer for Nigeria.

Also noting the work done by the International Law Association and other organizations and bodies, both governmental and non-governmental, concerning the law of international rivers,

Considering that the development and codification of the principles governing the law of international rivers are of vital significance to the emerging countries of Asia and Africa, particularly in the context of their food and agricultural development programmes,

The Committee decides that a Sub-Committee be formed to give detailed consideration to the aforesaid subject;

The Committee further decides that the Sub-Committee consist of the representatives of member Governments and meet at New Delhi, with a quorum of representatives of five member Governments, prior to the holding of the eleventh session of the Committee. The President and the Secretary may attend the meetings of the Sub-Committee. The Sub-Committee may also co-opt any person having expert knowledge of the subject to assist it in its deliberations;

The Committee directs the Sub-Committee to prepare a draft of articles on the law of international rivers particularly in the light of the experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilizations and legal systems, for consideration at the Committee's eleventh session;

The Committee further directs the secretariat to assist the Sub-Committee and collect relevant background data in the light of the discussions in the Committee at its tenth session and requests the Governments of participating States to indicate points on which they desire data to be collected;

The Committee further requests the Governments concerned to assist the secretariat in the collection of the material whenever required.