

Document:-
A/CN.4/290 and Add.1

Fifth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur - draft articles, with commentaries (continued)

Topic:
Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-
1976, vol. II(1)

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 5]

DOCUMENT A/CN.4/290 AND ADD.1

Fifth report on the question of treaties concluded between States and international organizations, or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur

*Draft articles, with commentaries (continued)**

[Original: French]
[10 February 1976]

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
PREFACE	1-7	138
DRAFT ARTICLES, WITH COMMENTARIES (<i>continued</i>)		
PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES		
Section 2. Reservations		
General introduction	8-26	138
Article 19. Formulation of reservations in the case of treaties concluded between several international organizations		142
<i>Commentary</i>		142
Article 20. Acceptance of an objection to reservations in the case of treaties concluded between several international organizations		143
<i>Commentary</i>		143
Article 19 bis. Formulation of reservations in the case of treaties concluded between States and international organizations		143
<i>Commentary</i>		144
Article 20 bis. Acceptance of and objection to reservations in the case of treaties concluded between States and international organizations		144
<i>Commentary</i>		145
Article 21. Legal effects of reservations and of objections to reservations		145
<i>Commentary</i>		146
Article 22. Withdrawal of reservations and of objections to reservations		146
<i>Commentary</i>		146
Article 23. Procedure regarding reservations		146
<i>Commentary</i>		146

* For draft articles 1-4 and 6-18, see the third and fourth reports (*Yearbook . . . 1974*, vol. II (Part One), p. 135, document A/CN.4/279, and *Yearbook . . . 1975*, vol. II, p. 25, document A/CN.4/285).

Preface

1. In its report on the work of its twenty-seventh session, the International Law Commission noted that the Planning Group established in the Enlarged Bureau to study the functioning of the Commission and formulate suggestions regarding its work had reached the following conclusion regarding the topic currently under consideration, which had been:

... progressing at a good rate. The Group, therefore, considered that establishment of the goal of completion of the second reading of a set of articles on this subject by or prior to 1981 was a justifiable goal.¹

2. When the report of the International Law Commission was considered by the Sixth Committee of the General Assembly, that conclusion was confirmed and valuable encouragement given for the continuation of the work.² The rate of preparation of a complete draft will, however, depend on the difficulty of the obstacles which the International Law Commission may encounter in studying certain particularly delicate articles, as well as on the time that can be devoted to this topic.

3. In his fourth report,³ the Special Rapporteur submitted 30 new draft articles. At its twenty-seventh session the Commission was able to adopt 15 of them—articles 7 to 18, together with certain definitions to be included in the preliminary articles, consideration of which had been deferred until the articles concerned were discussed. The International Law Commission also had a fairly substantial exchange of views on articles 19 and 20, and heard some observations on articles 21, 22 and 23, but it did not have time to prepare for those five articles a text which was likely to be adopted.

4. This review shows that, when the subject-matter does not involve too many difficulties the Commission can, by making an exceptional effort, adopt a series of draft articles in a very short space of time. However, the Special Rapporteur feels obliged to stress that such an effort, especially when it must be made during the last weeks of the session, imposes on the Commission working conditions which are far from ideal and places a very heavy burden on the secretariat and conference services. Thus the Commission could do no more than begin its consideration of articles 19 to 23, which make up section 2, concerning reservations. But the views expressed, however rapidly, by the members of the Commission gave the Special Rapporteur very valuable indications as to how he should resume his study of the question of reservations.

5. Resolution 3495 (XXX) adopted by the General Assembly on the recommendation of the Sixth Committee gives the International Law Commission some indications regarding the priorities to be observed in the work at its twenty-eighth session. It seems to follow from those indications that the International Law Commission will be unable in 1976 to adopt any more articles than it did in

1975 on the question of treaties concluded between States and international organizations or between international organizations.

6. The Special Rapporteur has therefore concluded that he should submit a particularly brief report this year. He feels that new light has been shed on the question of reservations to the treaties under consideration by the discussion in the Commission at its twenty-seventh session and by the observations made on the matter in the Sixth Committee of the General Assembly. He will therefore devote the present report to a reconsideration of the question of reservations and to new proposals concerning the relevant articles. However, in the case of draft articles 24 to 33, which have not yet been given any consideration by the International Law Commission, he will merely refer the reader to his fourth report.

7. The present report will therefore be devoted to part II, section 2, of the draft articles, concerning reservations, and, in addition to a general introduction, will contain new texts for articles 19 to 23, each accompanied by a commentary.

Draft articles, with commentaries (*continued*)

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 2: RESERVATIONS

General introduction

8. In his fourth report, the Special Rapporteur adopted a relatively simple position on the subject, which can be summarized as follows:

(a) At the current stage, and in view of the extreme rarity of cases of participation by international organizations in multilateral treaties between States, the Special Rapporteur considered that the question of reservations to treaties concluded by international organizations was of no immediate practical interest.

(b) He considered that, generally speaking, international organizations could be placed on the same footing as States in that respect, since their treaty commitments were subject to a régime which was broadly comparable.

(c) However, the Special Rapporteur drew attention to the serious problems which could arise in the specific case where the parties to a treaty between States and international organizations included States which were themselves members of one of the organizations in question, for account must be taken of the fact that, in practice, the respective areas of competence of the organization and its member States are not always clearly defined and their distribution is, moreover, liable to change.⁴ That being so, if

¹ *Yearbook* ... 1975, vol. II, p. 184, document A/10010/Rev.1, para. 145.

² *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 165–166.

³ *Yearbook* ... 1975, vol. II, p. 25, document A/CN.4/285.

⁴ This difficulty was mentioned by some representatives in the Sixth Committee during the consideration of the report of the Commission on the work of its twenty-seventh session; it was stressed that "the legal personality of international organizations was created, modified or terminated through a joint expression of the will of the States constituting the organization concerned" (*Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 167).

the very liberal régime established for treaties between States by the Vienna Convention on the Law of Treaties (1969)⁵ is adopted for reservations to treaties of the type at present under consideration, it is conceivable that the position of the organization with regard to the treaty could, as a result of the operation of the reservations mechanism, differ from that of some of its member States and that objections to reservations would complicate still further the confusion related to the uncertainty about the areas of competence of the States and of the organization with regard to the subjects dealt with in the treaty. However, the Special Rapporteur proposed no remedies for such a situation, considering that should there be a risk of such a situation arising, the States and organizations concerned would be careful to arrange for a *conventional* reservations régime proper to each treaty which would avoid all such confusion.

9. The Special Rapporteur therefore proposed in his fourth report five articles which followed very closely the corresponding texts of the Vienna Convention, differing from them only where drafting changes were deemed essential.⁶ However, the adoption by the Commission of draft article 9, paragraph 2, which reads:

The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate, takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

showed, even before the Commission took up article 19, that it was necessary to take into account the possibility—theoretical, perhaps, but one which could not be excluded from the future scope of the development of international relations—that some international organizations might be admitted in a greater or lesser degree to participation in treaties between States. It was precisely with regard to that possibility that the Special Rapporteur had expressed certain misgivings, without proposing any remedy.

10. As soon as the Commission began its consideration of the basic articles 19 and 20, it became clear that its members were embarking on a substantive debate, which revealed differences of opinion and uncertainties in that regard.⁷ After a very substantial but relatively short exchange of views, the whole of section 2 was referred to the Drafting Committee, which did not have time to prepare texts for submission to the Commission.

11. Apart from drafting points and secondary questions, two main problems were mentioned during the debate. The first may be summed up as follows: is it necessary to provide, in certain cases and on certain points, for a régime fundamentally different from that of the Vienna Convention? The second, which goes beyond the scope of the problem of reservations but arises very clearly in that connexion, is the following: what provisions are needed to define clearly the respective spheres of application of the

⁵ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention will be referred to hereafter as the Vienna Convention.

⁶ See *Yearbook . . . 1975*, vol. I, pp. 237 *et seq.*, 1348th meeting, paras. 38–45.

⁷ *Ibid.*, pp. 240 *et seq.*, 1349th and 1350th meetings.

draft articles and the 1969 Vienna Convention, especially when a treaty originally designed to establish treaty relations between States and international organizations loses that character wholly or partially? These two questions call for certain general observations.

12. With regard to the first question, which relates to the basic character of the reservations régime that should be established for treaties between States and international organizations or between two or more international organizations, the options centre on the idea which dominates the Vienna Convention, namely, that of freedom to formulate reservations. By and large, three solutions are possible:

(a) Freedom to formulate reservations with a number of exceptions: this is the régime of the Vienna Convention, which the Special Rapporteur proposed in his fourth report should be extended to the treaties covered by the present draft articles:

(b) The application to reservations of an express authorization régime with some exceptions—this régime is the opposite of the preceding one: freedom to formulate reservations has become the exception and the authorization régime the general rule. It was on the basis of this solution that the Special Rapporteur made a new proposal concerning articles 19 and 20 during the twenty-seventh session;⁸

(c) Freedom to formulate reservations combined with a number of exceptions for treaties between two or more international organizations, and the application to reservations of an express authorization régime with certain exceptions for treaties between States and international organizations. This formula represents a compromise between the two preceding solutions in that it allots each of them a specific sphere of application on the basis of a distinction between the two basic categories of treaty covered by the draft articles.

13. The first solution does not call for many comments. The course followed thus far by the Special Rapporteur and approved on many occasions by the Commission has consistently been to follow the solutions and the text of the Vienna Convention whenever possible, and the Sixth Committee of the General Assembly once again on the whole approved that position.⁹ If the Commission is to depart from that course, it must have specific and convincing reasons for doing so; otherwise, it will have to revert to the solution originally proposed in the fourth report and make numerous improvements in the text of articles 19 and 20, which will be mentioned below in the commentary on those articles.

14. What reasons are there to justify a departure from the Vienna Convention? Are they sufficiently compelling to commend the second solution outlined above, which runs contrary to the Vienna Convention? In fact, it can in general be stated that international organizations are not only quite different from States but also different from each other. Any participation by an international organization in any treaty whatsoever would thus pose a specific political

⁸ *Ibid.*, p. 246, 1350th meeting, para. 1.

⁹ See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 167.

problem and a specific legal problem, often unforeseeable. The parties to a treaty in which an international organization participates should therefore be urged to provide a detailed and case-by-case solution to the problem of reservations; the simplest way of obliging the parties to establish in each convention of this kind a precise reservations régime is to lay down as a suppletive general rule a restrictive rule which virtually prohibits reservations. This provides the basis for a very simple alternative: exclusion of reservations or establishment of a precise and individualized régime, adapted to each case by the parties themselves. From this viewpoint, the statement of general rules in a very liberal spirit appears to be the worst course. This second solution is therefore characterized by a spirit of great caution and even of mistrust with regard to the uncertainties covered by the protean concept of "international organization".

15. The third solution is derived from the two preceding solutions: it still reflects great mistrust of the effects which may follow from the reservations mechanism as extended to organizations parties to a treaty, but it goes further in the analysis in order to determine more accurately the risks which may be involved in organizations' reservations and for this purpose it distinguishes between treaties concluded between States and international organizations, on the one hand, and treaties concluded between two or more international organizations, on the other hand. It is a fact that the origin of the difficulties caused by the participation of one or more organizations in a treaty lies in the *simultaneous* participation of an organization and of a State in a treaty. As has been pointed out by Mr. Ushakov and Mr. Kearney,¹⁰ it often happens that the positions of States parties to a treaty and of an international organization which is a party to the same treaty are not symmetrical. Under a very liberal reservations régime, it would even be conceivable that an organization might try to formulate reservations to provisions which do not create either rights or obligations for it directly but which affect the rights and obligations of the States parties to that treaty. Moreover, in the case most frequently encountered, in which at least some of the States parties to the treaty are members of an organization which is also a party to that treaty, there would be a risk of encountering the difficulties to which the Special Rapporteur drew attention in his fourth report and which he recalled earlier.¹¹ The simplest solution would therefore be to abandon the theoretical freedom to formulate reservations. That would in no way prevent the parties from defining in the treaty in each particular case the reservations régime which they consider to be suitable in the circumstances and, where appropriate, establishing complete freedom to formulate reservations; but they will have done so *advisedly*, after having foreseen and weighed the consequences. In other words, abandonment of the *principle* of freedom to formulate reservations is designed not to abolish freedom to formulate reservations, but to oblige parties to consider the consequences of that principle before adopting it in each particular case.

¹⁰ *Yearbook . . . 1975*, vol. I, p. 239, 1348th meeting, para. 47, and p. 248, 1350th meeting, paras. 20-21.

¹¹ See above, para. 8 (c).

16. On the other hand, treaties concluded between two or more international organizations do not require the same cautious approach. The organizations which are parties to them are independent of each other. While it is true that they are still very different from States, in this regard they are all in the same situation. In the case of this type of treaty they may therefore be given the same freedom with regard to reservations as is granted to States by the Vienna Convention.

17. The third solution therefore produces a régime which differentiates between treaties between States and international organizations, on the one hand, and treaties between two or more international organizations, on the other hand. The Special Rapporteur suggests that the Commission should consider this third solution. It is slightly more complicated than the two others, although it should be noted that the other two would also require, not for substantive reasons but for drafting reasons, separate treatment for the two groups of treaties covered by this report. It has at least the advantage of being more balanced than the other solutions and perhaps more easily acceptable to the Commission as a whole. Separate articles are therefore devoted to treaties concluded between two or more international organizations, on the one hand (articles 19 and 20), and to treaties concluded between States and international organizations, on the other hand (articles 19 *bis* and 20 *bis*). The Special Rapporteur ventures to hope that it will thus be easy for the members of the Commission to have before them all the possible solutions and to choose the one which they find most suitable.

18. In addition to this first general question, another question has arisen¹² which calls for certain explanations. It may not be superfluous to recall how it emerged in the Commission's discussions. It was Mr. Ushakov who, in connexion with article 20, made a comment relating solely to treaties between States and international organizations. If, in a treaty of this type, a reservation formulated by a State were accepted by another State, or even gave rise to an objection on the part of another State, the conventional relations between those two States would be governed not by the draft articles (assuming that they were transformed into a treaty in force between those States) but by the Vienna Convention (assuming that it was in force between those two States).¹³ This is because article 3 of the Vienna Convention states:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

...

(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

19. Without expressing an opinion in favour of a special provision to cover such possibilities, the Special Rapporteur gave other examples of situations in which the same

¹² See above, para. 11.

¹³ See *Yearbook . . . 1975*, vol. I, p. 239, 1348th meeting, para. 51.

problem might arise.¹⁴ For instance, a treaty in which, before the formulation of reservations, States and two international organizations participated might create only conventional relations between States, in the event that the two international organizations formulated different reservations, that all the States objected to those reservations and each organization objected to the reservations of the other, and that each objecting State or organization declared that it did not consider itself to be bound by the treaty with the parties which formulated the reservations to which it objected. If one were to introduce a variation into the above hypothesis and to assume that the organizations accepted their reservations in their mutual relations, while the situation of the States remained unchanged, the same conventional act would be governed by the Vienna Convention for the relations between States and by the draft articles for the relations between the two organizations.¹⁵ If, in addition, one considers the possibility of the withdrawal of objections to reservations, a treaty (or rather the conventional relations deriving from it) could, after ceasing to be covered by the régime of the draft articles, once again come within its scope.

20. Sir Francis Vallat considered this problem in a more general manner, expressing concern that the provisions of article 3 (c) of the draft articles were not identical with those of article 3 (c) of the Vienna Convention. He wondered whether it was "theoretically and practically possible to limit the applicability of the Commission's provisions on reservations to the relations between international organizations and States and between international organizations themselves, leaving the relations between States to be governed by the Vienna Convention".¹⁶ According to Professor Ushakov, it is also necessary to consider the case in which a reservation formulated by a State was accepted by the other States but objected to by an international organization: the legal effects of the reservation in the relations between States would be governed by the Vienna Convention and it would be useful to include "a general saving clause applicable to the draft as a whole, to the effect that relations between States only would be governed by the Vienna Convention . . . or by the relevant rules of general international law".¹⁷ Mr. Ago, for his part, emphasized the very general nature of the problem, which went beyond the question of reservations: a treaty which, at the outset of the negotiations, was destined to become a treaty between States and international organizations might in fact become a treaty between States, if the organizations concerned did not approve it or withdrew from it,¹⁸ and Sir Francis Vallat once again stressed the need to clarify the

relationship between the draft articles and the Vienna Convention.¹⁹

21. That is a brief summary of the exchange of views which raised very interesting but extremely complicated questions for the Commission. There appears to be unanimity on two points:

(a) Firstly, these problems do not arise for treaties between two or more international organizations; this is an additional reason for preparing draft articles devoted exclusively to this category of treaty.

(b) Secondly, the difficulties mentioned go beyond the problem of reservations and have a quite general character. Assuming that the problem can be considered at this stage from the viewpoint of reservations, it will be possible to reach only a provisional conclusion and the Commission will have to indicate that it intends to reconsider the entire question when it has concluded its work. It is with this important proviso that the Special Rapporteur will revert to the questions discussed and will repeat—with any modifications made necessary in the light of the views expressed in the Commission—some of the comments which he made during the discussion.

22. In the first place, it seems to him that the International Law Commission adopted a definite position at the outset of its work on a basic question of method, and that its position in that regard can be altered only on the occasion of the second reading, at the end of its work. The Commission decided to draft articles which would be *independent of the Vienna Convention*, in the sense that the articles would contain no reference to that Convention and would be sufficient in themselves for the settling of any questions which might arise with regard to treaties falling within their sphere of application, regardless of the fate of the Vienna Convention. It is for that reason, for example, that all the rules concerning the consent of States have been set forth once again in the preceding articles, although they involve no change by comparison with the provisions of the Vienna Convention.

23. That being said, another question of substance arises, independently of article 3 (c) of the Vienna Convention, independently of any relationship between that Convention and the present draft articles; that question is whether the Commission wishes to lay down, with regard to the reservations régime in the case of treaties between States and international organizations, rules which would vary depending on whether States, or a State and an international organization, or two international organizations are involved. It would then be necessary, in theory at least, to distinguish eight cases (acceptance by a State of the reservations of a State, acceptance by a State of the reservations of an organization, acceptance by an organization of the reservations of an organization, acceptance by an organization of the reservations of a State, plus four additional symmetrical possibilities for objections). But it is possible—fortunately—that agreement may be reached on a simpler régime in which States and international organizations would be in the same situation. This will be the case if the Commission adopts the proposals of the

¹⁴ *Ibid.*, pp. 240–241, 1349th meeting, paras. 5 and 6.

¹⁵ Is it necessary to point out that it would then be the provisions of the draft articles concerning treaties between two or more international organizations which would apply, and that those provisions might be different from those concerning treaties between States and international organizations? If these considerations are relevant, they do not argue in favour of a differentiation of régime for these two groups of treaties.

¹⁶ *Yearbook . . . 1975*, vol. I, p. 243, 1349th meeting, para. 24 and, even more categorically, *ibid.*, p. 248, 1350th meeting, para. 23.

¹⁷ *Ibid.*, p. 248, 1350th meeting, paras. 25 and 26.

¹⁸ *Ibid.*, p. 249, para. 31.

¹⁹ *Ibid.*, para. 32.

Special Rapporteur. He is proposing a fairly strict general reservations régime, with exceptions; but in his approach, liberalism and severity apply in the same manner to States and to international organizations. If the Commission does not accept this assimilation, the principal effect of which is to impose on States, because they have agreed to enter into conventional relations with international organizations, a restriction on the freedom of action conferred upon them by the Vienna Convention, it will have to choose on the basis of the actual merits of the solution adopted, and not by reference to the rules established by the Vienna Convention.

24. It is not until this choice has been made that it will be possible to consider the problems which may arise from article 3 (c) of the Vienna Convention. These problems arise only in connexion with relations between two States which are both parties to the Vienna Convention and to the convention which may result from these draft articles. They can easily be solved in advance: it would suffice for the present draft articles to contain the necessary clauses to this effect. If the Commission espouses the viewpoint which the Special Rapporteur has just outlined, the problem is quite simple to solve. The draft articles will have to constitute a complete whole—in other words, as has been shown, they will have to define a reservations régime applicable in relations between two States parties to a treaty between States and international organizations. It is that régime, and not the provisions of the Vienna Convention, which will be applicable. In order to prevent any hesitation as to which of the two conventions—the 1969 Convention or the convention resulting from these draft articles—should prevail, it will suffice to insert in the final provisions of the latter a provision precluding for States parties to the two conventions the application of article 3 (c) of the Vienna Convention. Such a solution certainly reflects the intention of the representatives who, at the United Nations Conference on the Law of Treaties, agreed to the inclusion of article 3 (c): *it was to be only a transitional measure* designed partially to fill the gap created by the fact that the scope of the Convention is limited to written treaties between States. This solution is also in conformity with the general principles applicable with regard to successive treaties relating to the same subject-matter, in particular as they emerge from article 30, paragraph 4 (a), of the Vienna Convention itself.

25. After these problems have been solved, one last question would then remain to be considered. It is always possible that a treaty between States may, at certain moments of its genesis and its history, be drafted with the idea of the possible participation of one or more international organizations, that subsequently all those international organizations cease to be parties to it or refrain from becoming parties, and that at a still later stage one or other of those organizations becomes a party to the treaty for the first or the second time. This would raise the problem of what might be called “an intermittent régime”. Would the convention based on the draft articles and the Vienna Convention be applied successively? In this matter, it appears necessary to exercise a certain moderation. And the Special Rapporteur, for his part, is tempted to follow the position suggested by Mr. Ago.²⁰ A treaty in which an

²⁰ *Ibid.*, para. 31.

international organization of any kind is precluded from participating, not only for the present but also in the future, should normally fall within the scope of the Vienna Convention. On the other hand, a treaty to which even one organization retained the right to become a party or to become a party for a second time should, even for the period during which it binds only States, continue to be covered by the draft articles. The point is that States do not lightly agree to open an international convention to one or more international organizations and it is presumably agreed that this situation poses special problems. It is therefore quite natural for relations between States to remain subject to the rules of the draft articles simply because of the possibility of participation by an international organization. This reasoning is of course also based on the fundamental idea that the draft articles constitute a complete and homogeneous whole—an idea which has so far always been the basis for the Commission's work.

26. The Special Rapporteur has not, however, prepared a draft article on this last point, because the problem goes beyond the question of reservations and would have to be covered in the final clauses of the draft. In addition, it is preferable for the Commission to decide first on the questions of principle which have just been raised, before turning to that of the texts themselves, which should not in any case be particularly difficult to draft.

Article 19. Formulation of reservations in the case of treaties concluded between several international organizations²¹

In the case of a treaty between several international organizations, an international organization may, when signing, formally confirming, accepting, approving or acceding to the treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;**
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or**
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.²⁰**

Commentary

The proposed wording follows faithfully the text of article 19 of the Vienna Convention; the only change, which has been made in the light of the text of paragraph 2 of draft article 11 adopted by the Commission, has been to replace the word “ratifying” by the words “formally confirming”.

²¹ Corresponding provision of the Vienna Convention:

“Article 19: Formulation of reservations

“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- “(a) the reservation is prohibited by the treaty;*
- “(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
- “(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”*

Article 20. Acceptance of and objection to reservations in the case of treaties concluded between several international organizations²²

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting international organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating international organizations and the object and purpose of a treaty that the application of the treaty in its entirety 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.

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting international organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations;

(b) an objection by another contracting international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;

(c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting international organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end

of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Commentary

The only difference between this text and that of the Vienna Convention which calls for an explanation is the absence of any provision corresponding to article 20, paragraph 3, of that Convention. It is conceivable in theory that the membership of an international organization might consist only of international organizations, and in that case it would be reasonable to allow that a reservation to the constituent instrument of that organization requires the acceptance of the competent organ of that organization. That would, however, be a very rare situation, of which there is at present no example. The text of such a provision would give rise to very difficult problems of vocabulary. The fact is that such an organization, being composed of international organizations, would no longer correspond to the definition of the term "international organization" since it would not be "intergovernmental". A new term would therefore have to be devised and defined. It appears that no purpose would be served by going into this extra complication, in view of the rare occurrence of the case. In this connexion, it might be pointed out once again that article 20, paragraph 3, of the Vienna Convention might be useful in helping to develop and reinforce a general practice, but that it is absolutely incapable of giving a conventional basis to the rule set out therein since international organizations are third parties in relation to the 1969 Vienna Convention, and that Convention cannot confer any new competence on their organs.

Article 19 bis. Formulation of reservations in the case of treaties concluded between States and international organizations²³

1. In the case of a treaty between States and international organizations, a reservation may be formulated by:

a State, when signing, ratifying, accepting, approving or acceding to the treaty, or

an international organization, when signing, formally confirming, accepting, approving or acceding to the treaty,

only if the reservation is expressly authorized either by the treaty or in some other manner by all the contracting States and international organizations.

2. Notwithstanding the rule laid down in the preceding paragraph, in the case of a treaty concluded between States and international organizations on the conclusion of an international conference in the conditions provided for in article 9, paragraph 2, of these draft articles, in respect of which it does not appear either from the limited number of the negotiating States or from the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation may be formulated by:

a State, when signing, ratifying, accepting, approving or acceding to the treaty, or

²² Corresponding provision of the Vienna Convention:

"Article 20: Acceptance of and objection to reservations

"1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

"2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety 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.

"3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

"4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

"(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

"(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

"(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

"5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

²³ For the corresponding provision of the Vienna Convention, see foot-note 21 above.

an international organization, when signing, formally confirming, accepting, approving or acceding to the treaty, unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Commentary

(1) The purpose of article 19 *bis* is to state a general rule restricting the freedom to formulate reservations in the case of treaties between States and international organizations, for the reasons indicated above in the general commentary on section 2 as a whole. The rule stated, however, comprises two exceptions.

(2) The first exception is self-evident and does not call for a long commentary. It relates to the reservations expressly authorized by the treaty itself. As has been said, the aim of the stricter régime provided for here is to oblige those drafting treaties to draw up conventional rules, on a case-by-case basis, to govern the reservations régime. By comparison with the text of the Vienna Convention, the only change has been to expand somewhat the scope of the exception by including in it not only the case in which the reservation is expressly provided for by the text of the treaty itself, but also that in which it is authorized by all the States in some other manner, in other words by consent given outside the text of the treaty.

(3) The second exception concerns the case in which one or more international organizations become parties to a relatively open treaty in which they have a place comparable with that occupied by States. Such would be the case of a convention relating to customs nomenclature to which two customs unions, in addition to States, were parties. In that case there would be little need to adopt a reservations régime other than that of the Vienna Convention, for to impose on States a rule restricting their freedom because they had allowed the participation of one or two international organizations would obviously discourage States from expanding the circle of entities which may become parties to a treaty. In adopting article 9, paragraph 2, at its twenty-seventh session,²⁴ the International Law Commission intended to provide for exactly this eventuality, which had up to the present time remained purely theoretical.

(4) A mere reference to article 9, paragraph 2, does not, however, appear to be sufficient since, as we know, that text does not define the concept of international conference, and the hypothesis must be clarified. In the second version of article 19 which he proposed at the Commission's twenty-seventh session,²⁵ the Special Rapporteur used the

terms "treaty concluded between States on the conclusion of a general conference, in which one or more international organizations participate on the same footing as those States . . .". But several members of the Commission observed that the use of the adjective "general" or even "universal" would give rise to uncertainty.²⁶ On reflection, it seems pointless to add a clarification of this nature; the reference to the rule of the two-thirds majority in article 9, paragraph 2, necessarily implies that it applies to "conferences" for which such a reference has some meaning, in other words conferences of a certain scope, and that there is no need to seek any greater clarification than that which was sufficient for the Vienna Convention, especially since the second condition appearing in the second version of article 19 referred to above has been retained, and this makes it possible to exclude from enjoyment of the freedom to formulate reservations those treaties the application of which in their entirety is an essential condition of the consent of each party to be bound thereby—hereafter referred to as "entire" treaties—which article 19 *bis*, paragraph 1, *in fine*, places under the same strict régime as that provided in article 20 of the Vienna Convention.

(5) It appears from the preceding comment that, while the general structure of the Vienna Convention, which in article 19 deals with questions relating to *formulation* and in article 20 to questions relating to *acceptance* and *objection*, has been respected, the questions have been divided in a slightly different manner between articles 19 *bis* and 20 *bis*. In the system under the Vienna Convention, a reservation to an "entire" treaty may be *formulated* but it must be *accepted* by all the parties (article 20, para. 2); in the system proposed for treaties between States and international organizations, reservations may not be formulated to "entire" treaties unless all the contracting States and organizations give their *authorization* (article 19 *bis*, para. 1, *in fine*). But that difference is a logical consequence of the difference between the two systems: in the Vienna system, since the freedom to formulate reservations is the general rule, the question of "entire" treaties is seen from the standpoint of *acceptance*; in the system provided for under articles 19 *bis* and 20 *bis*, since the freedom to formulate reservations does not exist as a general rule, the only reservations which can be accepted are those whose *formulation* is authorized.

(6) The other drafting problems posed by article 19 *bis* relate to the distinction between "ratification", which is reserved to States, and "formal confirmation", which is reserved to international organizations; this question has already been dealt with above in connexion with article 19.

*Article 20 bis. Acceptance of and objection to reservations in the case of treaties concluded between States and international organizations*²⁷

1. A reservation expressly authorized either by a treaty or in some other manner by all the contracting States and international organizations does not require any subsequent

²⁴ This provision reads as follows:

"The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule."

²⁵ See *Yearbook . . . 1975*, vol. I, p. 246, 1350th meeting, para. 1.

²⁶ *Ibid.*, p. 247, 1350th meeting, para. 8.

²⁷ For the corresponding provision of the Vienna Convention, see footnote 22 above.

acceptance by the other contracting States or international organizations unless the treaty so provides or it is otherwise agreed.

2. In the case falling under article 19 *bis*, paragraph 2, and unless the treaty otherwise provides:

(a) acceptance by another contracting State or international organization of a reservation constitutes the reserving party a party to the treaty in relation to that other contracting party if or when the treaty is in force for those parties,

(b) an objection by another contracting State or international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving contracting parties unless a contrary intention is definitely expressed by the objecting contracting party;

(c) an act expressing the consent of a State or international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or international organization has accepted the reservation.

3. For the purposes of paragraph 2 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after notification of the reservation was received or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Commentary

(1) The wording of paragraph 1 of draft article 20 *bis* differs slightly from that of the corresponding provision of the Vienna Convention in order to take into account the end of article 19 *bis*, paragraph 1, which provides for the case where a reservation "is expressly authorized either by the treaty or in some other manner by all the contracting States and international organizations". The proposed text takes account of this provision, which makes the article more flexible.

(2) The text of draft article 20 *bis* contains no provision based on paragraphs 2 and 3 of article 20 of the Vienna Convention. The reasons for this omission with regard to paragraph 2 were given above.²⁸ With regard to paragraph 3, the case of an international organization becoming a member of an inter-State international organization is less theoretical than that envisaged earlier,²⁹ of an organization with a membership consisting exclusively of international organizations, and examples could be quoted of an international organization holding a certain place in another international organization.³⁰ However, it would be premature to say that an organization has become a member of

another organization on the same footing as States, for it is subject to a special régime. In any event, the terminological problems already mentioned would arise: an international organization whose members included another organization would no longer be strictly "intergovernmental". For all these reasons, it seemed preferable not to deal with this question in the draft articles. However, an objection could be raised to this solution: if it is desired that the draft articles should constitute an autonomous whole, it is necessary to take into account, in the case under consideration, the reservations which might be formulated by a State. A distinction must therefore be drawn between the reservations formulated by an organization and those formulated by a State; for the latter, it would be necessary to include a rule similar to that contained in article 20, paragraph 3, of the Vienna Convention. However, such a solution would not be very satisfactory, for it would introduce pointless discrimination between States and international organizations. In fact, it would be quite possible to refrain from providing for special treatment in the case of an organization originating in a treaty between States and in which one or more international organizations also participate: the rules providing protection against the abuse of the reservations contained in draft article 19 *bis* are adequate.

Article 21. Legal effects of reservations and of objections to reservations³¹

1. A reservation established with regard to another party in accordance with articles 19, 19 *bis*, 20, 20 *bis* and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When, as provided in article 20, paragraph 3 (b), and in article 20 *bis*, paragraph 2 (b), a contracting State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving contracting party, the provisions to which the reservation relates do not apply as between the two contracting parties to the extent of the reservation.

³¹ Corresponding provision of the Vienna Convention:

"Article 21: Legal effects of reservations and of objections to reservations

"1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

"(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

"(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

"2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

"3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."

²⁸ See above, article 19 *bis*, para. (5) of the commentary.

²⁹ See above, commentary to article 20.

³⁰ The question arises with regard to the European Economic Community in organizations originating in commodity agreements (see the studies published in the *Annuaire français de droit international*, 1970 (Paris), vol. XVI (1971), pp. 695 *et seq.* and in *Annuaire français de droit international*, 1975 (Paris), vol. XXI (1976). For the position of the United Nations in the International Telecommunication Union, see *Yearbook . . . 1972*, vol. II, p. 194, document A/CN.4/258, foot-note 178.

Commentary

Compared with the corresponding text of the Vienna Convention, this article contains only the drafting changes necessitated by its specific subject. Since the scope of the objections machinery is less general than in the Vienna Convention, it seemed advisable to insert in paragraph 3 a reference to the relevant provisions concerning objections.

Article 22. *Withdrawal of reservations and of objections to reservations*³²

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State or international organization only when notice of it has been received by that State or international organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the reserving party.

Commentary

This draft article contains no changes as compared with the version proposed in the fourth report.³³ If the International Law Commission, rejecting the suggestions of the Special Rapporteur, were to agree that a treaty could be subject alternatively to the régime of the Vienna Convention on the Law of Treaties and to the régime of the convention based on the draft articles, depending on the circumstances in which international organizations became parties to a treaty to which States were also parties, it would be necessary to complete article 22 and in particular to provide for wider notification when the withdrawal of an objection to a reservation results in a modification of the conventional régime to which a treaty is subject.

³² Corresponding provision of the Vienna Convention:

“Article 22: Withdrawal of reservations and of objections to reservations

“1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

“2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

“3. Unless the treaty otherwise provides, or it is otherwise agreed:

“(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

“(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.”

³³ *Yearbook . . . 1975*, vol. II, p. 38, document A/CN.4/285, article 22.

Article 23. *Procedure regarding reservations*³⁴

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and international organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty

by a State subject to ratification, acceptance or approval of the treaty,

by an international organization subject to formal confirmation, acceptance or approval of the treaty,

a reservation must be formally confirmed, as the case may be, by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Commentary

Paragraph 2 alone differs from the version of this draft article contained in the fourth report. It was necessary to take into account the notion of “formal confirmation” introduced in draft article 11, adopted by the International Law Commission at its twenty-seventh session. To that end, it was necessary not only to mention that act in connexion with the consent of international organizations but also to make the wording slightly more precise in order to avoid confusion between the formal confirmation *of the treaty* and the formal confirmation *of the reservation* mentioned in the same provision. If the International Law Commission considers that there is still a risk of confusion, it will be necessary to depart even further from the text of the Vienna Convention, to avoid referring to the formal confirmation of a reservation and to render the idea by using another expression such as “formulate” or “express for a second time”.

³⁴ Corresponding provision of the Vienna Convention:

“Article 23: Procedure regarding reservations

“1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

“2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

“3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

“4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.”