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

[Agenda item 4]

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Seventh 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)

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* For the preceding draft articles presented by the Special Rapporteur, see the third, fourth, fifth and sixth reports (*Yearbook ... 1974*, vol. II (Part Two), p. 135, document A/CN.4/279; *Yearbook ... 1975*, vol. II, p. 25, document A/CN.4/285; *Yearbook ... 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1; *Yearbook ... 1977*, vol. II (Part One), p. 119, document A/CN.4/298, respectively).

Draft articles with commentaries (*continued*)

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

General introduction

1. Part IV of the Vienna Convention on the Law of Treaties[1] comprises only three articles: article 39, extremely brief, which states the principle of the amendment of treaties by agreement between the parties; article 40, which concerns the amendment of multilateral treaties; and article 41, which concerns agreements to modify multilateral treaties between certain of the parties only. The last two articles are relatively complicated.

2. Articles 40 and 41 are not unrelated to other provisions of the Convention, in particular to article 30 and the articles concerning the suspension or breach of treaties. Although the sometimes subtle analyses on which they are based taxed the sagacity of the Commission, the United Nations Conference on the Law of Treaties accepted, almost unanimously, the texts prepared by the Commission, subject to only minor drafting changes.

3. Because these two articles apply only to multilateral treaties, the question arises whether they can be extended to treaties concluded between two or more international organizations or between States and international organizations. Although the case of multilateral treaties concluded between international organizations has been considered earlier, particularly in connexion with reservations, this is a fairly rare case, certainly so far as open multilateral treaties are concerned.[2] On the other hand, the case of treaties between States and international organizations suggests another doubt. It is conceivable that a multilateral treaty the parties to which are mainly States may also make provision for the admission of some international organizations as parties on the same footing as States: it was because of this eventuality that the Commission adopted draft article 9, paragraph 2.[3]

> 2. 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.

In practice, however, some very different examples have come to light of multilateral treaties between States and international organizations, namely, *closed multilateral treaties the parties to which, while theoretically equal, are yet not in a symmetrical position in relation to each other.*[4] It is a legitimate question therefore whether, where States and international organizations are concerned, account should not be taken of this situation in order to introduce further distinctions which would involve a departure from the simplicity of the provisions of the Vienna Convention.

4. It should be noted, however, that the Vienna Convention, which did not define "multilateral treaty", subordinated all multilateral treaties between States to the same rules, irrespective of the profound differences marking them by reason of their open or closed nature or of the symmetry or asymmetry of the reciprocal positions of the parties. Accordingly, if the provisions, so far as they relate to international organizations, are to depart from the rules laid down by the Vienna Convention for the commitments of States, the reason would be somewhat different, viz. that the capacities of international organizations are regarded as still being limited in nature. Allowance has been made for this view in the draft articles concerning reservations,[5] but it should nevertheless be balanced with the idea that, in a system based on consensus, as is the law of treaties and in particular the Vienna Convention of 1969, the equality of the parties in the rules governing the mechanism and process of consent is fundamental. This is why, as will be explained below, it seemed possible to follow the Vienna Convention very closely in the drafting of articles 39 and 40, whereas article 41 may present some difficulties.

Article 39. General rule regarding the amendment of treaties[6]

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Commentary

(1) The text of the Vienna Convention does not call for any change, not even a drafting change. The rule set forth here is nothing other than the rule *pacta sunt servanda* in another form.

(2) In its commentary to article 35 of its 1966 draft, which became article 39 of the Vienna Convention,[7]

[1] 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 is hereinafter referred to as the "Vienna Convention".

[2] See *Yearbook ... 1977,* vol. II (Part Two), pp. 106–107, document A/32/10, chap. IV, sect. B. 2, article 19, para. 4 of the commentary.

[3] For the text of all the articles adopted so far by the Commission, see *ibid.*, pp. 98 *et seq.*, document A/32/10, chap. IV, sect. B.1.

[4] Cf. the examples given in *ibid.*, p. 107, foot-note 454.

[5] *Ibid.*, pp. 105–116, document A/32/10, chap. IV, sect. B.2, articles 19–23*bis*.

[6] Corresponding provision of the Vienna Convention:

"*Article 39. General rule regarding the amendment of treaties*

"A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

[7] *Yearbook ... 1966,* vol. II, pp. 232–233, document A/6309/Rev.1 (Part II), chap. II, draft articles on the law of treaties with commentaries, articles 35 and 36, para. 4 of the commentary.

the Commission drew attention to the implication of the use of the term "agreement". The use of this very general term means that the principle of the *acte contraire* cannot apply to amendments: whatever the form chosen for a treaty, it may be amended by an agreement in a form other than the original treaty. The reference to Part II of the Vienna Convention merely emphasizes that the Convention has given the utmost flexibility to the various modes of concluding treaties.

(3) If as regards the present draft articles reference is made to the draft articles which have adapted Part II of the Vienna Convention to treaties concluded between States and international organizations or between two or more international organizations, it will be seen that the flexibility of the provisions of the Vienna Convention is unchallenged and is fully safeguarded in the present draft articles. It is perfectly reasonable therefore to propose for draft article 39 the language of the corresponding provision in the Vienna Convention.

Article 40. Amendment of multilateral treaties[8]

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and international organizations, each one of which shall have the right to take part in:

(*a*) the decision as to the action to be taken in regard to such proposal;

(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State and every organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (*b*), applies in relation to such State or organization.

5. Any State or organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Commentary

Except for drafting changes made necessary by its purpose, the text of draft article 40 is the same as that of article 40 of the Vienna Convention.

Article 41. Agreements to modify multilateral treaties between certain of the parties only[9]

Variant I

1. Two or more of the parties to a multilateral treaty between international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Two or more States parties to a treaty between States and one or more international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

3. One or more States and one or more international organizations parties to a treaty between States and international organizations may include

[8] Corresponding provision of the Vienna Convention:

"*Article 40. Amendment of multilateral treaties*

"1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

"2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

"(*a*) the decision as to the action to be taken in regard to such proposal;

"(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

"3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (*b*), applies in relation to such State.

"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

"(*a*) be considered as a party to the treaty as amended; and

"(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

[9] The corresponding provision of the Vienna Convention is given as variant II.

an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) it is so agreed between all parties to the treaty.

4. Unless, in the case provided for in subparagraph (*a*) of paragraphs 1, 2 and 3, the treaty stipulates otherwise, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications made in the treaty by the agreement.

Variant II

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Commentary

(1) Two variants of draft article 41 are submitted to the Commission.

(2) Variant I takes into account the idea that organizations, being different in nature from States, should in their relations *with States* be the subject of special provisions by reason of their nature. In keeping with this reasoning, it is agreed that treaties concluded between two or more international organizations should be subject to the same rules as treaties between States; this is the purpose of paragraph 1 of variant I. Consequently only a slight drafting change is made in the text of article 41, paragraph 1, of the Vienna Convention.

(3) However, when one comes to deal with the case of treaties concluded between States and international organizations, a distinction has to be drawn between two situations, which are, respectively, the subject of paragraphs 2 and 3. If the *inter se* agreement concerns only States (paragraph 2) the applicable rule, as in the case of paragraph 1, is drafted in the same terms as the corresponding provision of the Vienna Convention, subject to only one change: the paragraph applies to treaties concluded between "States and one or more international organizations". On the other hand (paragraph 3), if the *inter se* agreement is to include as a party at least one international organization (*inter se* agreement between several international organizations, *inter se* agreement between a State and one or more international organizations, *inter se* agreement between several States and one or more international organizations), a stricter rule applies than in the previous cases: in order to be lawful, such an agreement must be authorized by the treaty or receive the consent of all parties to the treaty. The reason for this stricter rule is that the participation of international organizations in a multilateral agreement must of necessity have been carefully weighed by the negotiators, who must normally, therefore, have considered the problem and, where appropriate, have authorized such *inter se* agreements. Another case to be envisaged, however, is that where the original treaty did not contemplate the eventuality of such *inter se* agreements but where, after the entry into force of the treaty, all the parties give their consent to the conclusion of such an *inter se* agreement. In such a situation, there is probably a good deal to be said in favour of admitting the possibility of such an agreement. That is the object of paragraph 3 (*b*); The wording "it is so agreed between all parties to the treaty" is very flexible and the idea is expressed in very many provisions of the Vienna Convention (articles 10 (*a*), 11, 12, para. 1(*b*), 12, para. 2(*a*), 13(*b*), etc.) It indicates that, while the consent of all parties is essential, it may be signified in any form whatsoever.

(4) Variant II reproduces textually article 41 of the Vienna Convention. It is one of those rare articles of the Convention that do not require even a drafting change.

(5) Acceptance of this provision is based on the following considerations. Already when dealing with treaties between States, the Commission was extremely cautious as regards *inter se* agreements. This article lays down three cumulative conditions [10] but, as the Commission recognized, these three conditions largely overlap. For example, a modification affecting the enjoyment by the other parties of their rights or the performance of their obligations may be said to be implicity prohibited by the treaty.[11] Similarly, such a modification may also be said to conflict with "the effective execution of the object and purpose of the treaty as a whole". These multiple precautions raise a solid barrier against modifications that endanger the implementation of the treaty; they are extended to the treaties forming the subject of the present draft article. They are obviously adequate to

[10] The three conditions were presented as such in draft article 37; paragraph 1(*b*) of that article spelt out the three conditions, listing them as (i), (ii) and (iii). Through a mere drafting change, the United Nations Conference on the Law of Treaties dropped the third condition as it had appeared in the former article 37, paragraph 1(*b*)(iii), and integrated it in subparagraph (*b*) of article 41.

[11] See *Yearbook ... 1966*, vol. II, p. 235, document A/6309/Rev.1 (part II), draft articles on the law of treaties with commentaries, commentary to article 37, para. (2).

rule out any modifications which would affect the relations of two or more organizations *inter se* or the relations of one or more international organizations and one or more States and which would give rise to the apprehension that they would upset the balance achieved by the treaty. In a case in which the treaty has laid down special rights and obligations, or even special treaty status, for one or more organizations, any modification of the situation will be at variance with the strict conditions laid down in article 41 and prevent the conclusion of the agreement.

(6) In actual fact, variants I and II differ in principle rather than in their technical rules. By adopting a circumspect approach to international organizations, variant I raises a kind of presumption which is rebuttable only by the consent of all the States parties: modifications affecting international organizations are assumed *a priori* to upset the balance established by the treaty. Variant II merely prohibits those modifications that upset the balance of the treaty.

(7) If the two variants are considered from the point of view of the distinction drawn between open multilateral treaties and restricted multilateral treaties (art. 9, art. 20, para. 2, of the Vienna Convention), it will be seen that in both cases the rules of article 41 are adequate: if international organizations are placed on the same footing as States in the context of an open treaty, there is no reason why they should be subject to rules other than those applicable to States. On the other hand, so far as more or less restricted multilateral treaties are concerned, the conditions laid down by the Vienna Convention for agreements between States are so strict that there are no sound reasons for visualizing stricter ones when international organizations are involved.