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A/CN.4/SR.1241

Summary record of the 1241st meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1973, vol. I

41. Mr. SETTE CÂMARA said that, shorn of the two provisos in square brackets, the substantive provision of article 8 amounted to very little. It simply stated a very general rule which was subject to many obvious exceptions following from the different types of succession. In a fusion of two States, of course, there was no place for the payment of compensation.

42. As to third parties, it seemed to him that the passing of State property from the predecessor State to the successor State could not possibly affect the rights of third parties, including private persons, in any way. The problems which might arise in practice should be examined in connexion with later articles of the draft.

43. Article 8 was not really necessary. If the Commission decided to retain it, however, he would support the simpler and clearer wording proposed by Mr. Reuter.

44. Mr. TSURUOKA, noting that most members of the Commission accepted the principle stated in the text proposed by Mr. Reuter for article 8, appealed to his colleagues to approve that text. At the first reading it was more important to agree on substance than on form, for it was understood that drafting changes could always be made later. Moreover, the wording proposed by Mr. Reuter ensured that provisions would be devoted to the rights of third parties. For the time being it would be better not to make any substantive changes in article 8 that might cause confusion.

45. The CHAIRMAN, speaking as a member of the Commission, said that for the opening proviso he preferred the more general formula proposed by Mr. Reuter. He shared Mr. Ustor's misgivings regarding the use of the term "compensation", which did not adequately reflect the true position. Nevertheless, he would not oppose its retention at the present stage, on the understanding that the matter would be examined with care on second reading.

46. Speaking as Chairman, he noted that there was unanimous agreement on Mr. Reuter's wording for the substantive provision of article 8: "... the passing of State property from the predecessor State to the successor State shall take place without compensation unless otherwise agreed or decided."

47. There was, however, a difference of opinion on the opening proviso. Some members preferred the Drafting Committee's formula "Without prejudice to the rights of third parties"; others preferred Mr. Reuter's more general formula "Subject to the provisions of the present articles". He therefore suggested that he should informally take the sense of the meeting on the choice between those two formulations. If there were no objections, he would take it that the Commission agreed to adopt that procedure.

It was so agreed.

48. The CHAIRMAN, having taken the sense of the meeting, noted that nine members favoured the Drafting Committee's wording and five members Mr. Reuter's wording of the opening proviso. The Drafting Committee's wording for the proviso would therefore be attached to Mr. Reuter's wording for the substantive provision, and the two together would form the text of article 8 adopted on first reading.

49. Mr. YASSEEN pointed out that it was necessary to insert the words "in accordance with the provisions of the present articles" after the words "to the successor State".

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve the text of article 8 in the form which he had indicated, with the addition suggested by Mr. Yasseen.

It was so agreed.

51. Mr. MARTÍNEZ MORENO proposed that, in order to make the title consistent with the text of the article, the word "freely" should be deleted from the title and the words "without compensation" should be added at the end.

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the title of article 8 to read: "Passing of State property without compensation".

It was so agreed.

ARTICLE 7 (Date of the passing of State property) *(resumed from the previous meeting)*

53. Sir Francis VALLAT said that, in consequence of the adoption of the new text for article 8, the opening proviso of article 7 should be reconsidered. He proposed that the words "otherwise decided" in article 7 should be replaced by the words "otherwise agreed or decided".

54. The CHAIRMAN said that, if there were no objections he would take it that the Commission agreed to make the opening proviso of article 7 consistent with the closing proviso of article 8, as proposed by Sir Francis Vallat.

It was so agreed.

The meeting rose at 1.5 p.m.

1241st MEETING

Wednesday, 4 July 1973, at 3.50 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

(resumed from the 1238th meeting)

1. Mr. PINTO congratulated the Special Rapporteur on his admirable reports. He was fully cognizant of the variety of international organizations and of their

functions, but he considered that, as stated in paragraphs 20 and 21 of the second report (A/CN.4/271), those organizations were called upon to follow common general rules and there should be no major obstacles to the establishment of a body of rules governing the agreements they concluded.

2. He thought that, in the present circumstances, the best method would be to submit a second questionnaire to certain organizations with a view to obtaining the necessary information. To allay any anxiety on their part, the Commission should assure the organizations that it had no intention of limiting their freedom of action. At the moment he had no fixed views as to the form in which the final instrument would acquire legal force for the international organizations; presumably it would take the form either of an international agreement concluded as the outcome of a diplomatic conference or of a recommendation by the General Assembly.

3. He had been impressed by the Special Rapporteur's frequent references to the practice of States, but would point out that inter-State law could also benefit from the practice of international organizations, many of which had developed rational procedures of their own that were free from parliamentary influence.

4. On the question of scope, he noted that the Special Rapporteur had first attempted to determine to what extent the Vienna Convention on the Law of Treaties[1] would be applicable to international organizations. The Special Rapporteur had also taken up the question of treaties concluded by subsidiary organs of such organizations and the question of representation of the organizations by some appropriate agent. Treaties concluded by subsidiary organs did not, in his own opinion, constitute a subject that was ripe for codification, since it was difficult to conceive of agreements by subsidiary organs which would not ultimately involve the responsibility of the organization itself. The question of representation of an international organization was also one which was perhaps not ripe for codification. To be sure, he could think of at least two organizations—the International Atomic Energy Agency and the World Bank—whose organizational procedures were fully systematized and could serve as a basis for more general provisions. It was obviously not possible, however, to permit the officials of such organizations to commit them, since, as corporate entities, they required a corporate act to form the basis for the authority of their officials.

5. As to the application of the rules of the law of treaties to international organizations, he noted that one of those rules related to capacity to conclude treaties. The Special Rapporteur had indicated that he did not wish to formulate a general provision on the capacity of international organizations to conclude international agreements, a subject which in his opinion was not ready for codification. He himself thought that it was necessary to distinguish between the capacity of international organizations to conclude treaties and their right to do so. That capacity might be limited. and it would be advisable to specify the fields in which international agreements could be concluded. It was also necessary to consider the effect of such agreements on the members of the organization. He thought that agreements concluded by international organizations would not be totally without legal effects for their member States, and he favoured the retention of a corporate distinction between membership in the organization and the organization itself.

6. The question arose whether members of international organizations were third parties within the meaning of the Vienna Convention. He did not think that they were third parties, but the consent of the organization to be bound by a treaty would undoubtedly be necessary. There were cases in which the organization assumed certain responsibilities, as the International Atomic Energy Agency had done in relation to treaties dealing with nuclear tests, and the World Bank in relation to conventions on the settlement of investment disputes.

7. Lastly, with regard to agreements concluded with a view to applying other agreements, which were referred to in paragraphs 79-82 of the Special Rapporteur's second report, it was possible to distinguish between two types of treaty: first, treaties specifically authorized by a parent treaty, and secondly treaties which, like those relating to the settlement of investment disputes, were concluded within the organization itself.

8. Mr. HAMBRO said he fully endorsed the principle stated by the Special Rapporteur in paragraph 52 of his second report. He recognized the need to exercise caution in the formulation of general rules in order not to damage the still fragile constitutions of the international organizations and not to hinder their development. But he wondered whether on some occasions such caution did not betray a somewhat pessimistic view concerning the future of the international organizations, even though the Special Rapporteur disclaimed any such view and affirmed that, on the contrary, his attitude implied a basic confidence in their natural and spontaneous development.

9. The Commission's objective was to facilitate the development of the international organizations, and it had to be recognized that they were not transitory phenomena, but an integral part of the international society of today and, above all, of tomorrow. He did not think the absolute nature of State sovereignty should be emphasized, as it was in paragraph 10 of the Special Rapporteur's first report (A/CN.4/258). It would be better to stress the need to establish inter-State links. An unqualified respect for State sovereignty would make it impossible to do what the international community was now doing in such fields as the law of the sea. It should also be remembered that it was on the basis of the principle of sovereignty that States had opposed the introduction of international passports. The Special Rapporteur was right in saying that it was difficult to lay down universal rules applicable to international organizations and that care must be taken not hamper their development. But it should be possible to apply some rules to universal organizations and other rules to organizations which were not universal. He appreciated that it would be difficult to reach a decision on the matter

[1] 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. 289.

before receiving governments' replies and without knowing the positions of the organizations themselves, which had always been very cautious; but it was not a case in which he favoured excessive caution.

10. Mr. USHAKOV said he shared nearly all the views expressed in the Special Rapporteur's second report, though he approached some questions from a slightly different angle. For the notion of a "party", he thought it would be best to use the definition given in the Vienna Convention on the Law of Treaties, since the adoption of a different definition might cause difficulties in regard to existing conventions.

11. As to the capacity of international organizations to conclude treaties, he endorsed the conclusion stated by the Special Rapporteur in paragraph 40 of his second report, albeit for slightly different reasons. His own opinion was that that question should be excluded from the draft because it was outside the scope of the topic. It must be assumed *a priori* that there were international organizations which possessed capacity to conclude treaties, just as in the case of succession of States it had been assumed that there was a lawful change of sovereignty over territory. Thus the question which international organizations could conclude treaties did not arise.

12. In his opinion the question of representation did not fall within the scope of the topic either. For the answer to the question who authorized the conclusion of a treaty was given by international law and depended on each organization. In paragraph 56 of his second report, the Special Rapporteur spoke of the "natural person" empowered to represent the organization. In many cases, however, it was not a person but an organ that represented the organization: for instance, Heads of State, Heads of Government or ministers for foreign affairs, not acting in a personal capacity.

13. The question of agreements concluded by subsidiary organs of an international organization seemed to him badly framed, for if a subsidiary organ of an organization was authorized by that organization to conclude an agreement, it was just as though the agreement were concluded by the organization itself. Similarly, the question of treaties concluded by an organization on behalf of a territory was outside the scope of the topic, for in such cases it was not a treaty of the organization as such that was concluded, but a treaty of the territory which the organization represented.

14. On the subject of agreements concluded with a view to applying other agreements he endorsed the conclusion reached by the Special Rapporteur in paragraph 82 of his second report.

15. Contrary to what the Special Rapporteur had said in paragraph 83 of his second report, he did not think that agreements concluded between an organization and its member States could be regarded as internal agreements. Agreements concluded between different organs of an organization seemed to him to be outside the scope of the topic.

16. In discussing the effects of agreements with respect to third parties, the Special Rapporteur had raised the question whether an international organization could be regarded as a third party in relation to certain treaties between States. He himself believed that it could, but he thought the question was outside the scope of the topic and rather came under the Vienna Convention on the Law of Treaties, since it concerned treaties between States and not between international organizations and States.

17. Lastly, he thought the question whether States members of an international organization were third parties in relation to agreements concluded by that organization was ill-conceived. For if an agreement was concluded by an organization with one of its members, the other member States were of necessity third parties. There could be no middle course; all States which were not parties to an agreement were third States, whether they were members of the organization or not. Treaties concluded by an international organization with a State or with another international organization might have consequences for third States, but in his opinion those consequences were the same for member States as for States not members of the organization.

18. Mr. KEARNEY said that Mr. Ushakov had raised a basic question of principle concerning the field of study entrusted to the Special Rapporteur. He seemed to think that most of the questions discussed in the Special Rapporteur's second report were outside his mandate, and that would appear to call for a decision by the Commission. The Special Rapporteur had produced an extremely searching inquiry into some of the vital questions which arose in connexion with the capacity of international organizations to conclude treaties. He himself considered that those questions fell within the area entrusted to the Special Rapporteur, but if other members should disagree with that view, then it might be necessary for the Commission to define more precisely what it expected the Special Rapporteur to accomplish.

19. On the basic issues which the Special Rapporteur had put to the Commission, it seemed to him obvious that the work should take the form of a set of draft articles, since that was the Commission's customary mode of procedure and the instrument to be prepared was a logical extension of its previous work on the law of treaties.

20. In his opinion it would be desirable for the Special Rapporteur to delineate the distinction between contracts and international agreements so far as international organizations were concerned. Such organizations were established to perform certain specific functions, which might be of a financial, commercial or scientific character, and the agreements they concluded with States or among themselves might fall to be dealt with under private or public law, depending on their object and purpose, the circumstances of their conclusion and similar factors.

21. One minor point which occurred to him was that an agreement between one international organization and another might raise a series of questions that were quite outside the scope of the articles of the Vienna Convention. On other points, he thought that the definition of an international organization given in that Convention should be retained, and that it would be a mistake to try to formulate different rules for different categories of organization, for example: universal, regional and

functional; that would lead to an extraordinarily complex set of articles and would make the characterization of individual agreements extremely difficult.

22. With regard to the capacity of international organizations to enter into treaties, on the basis of pragmatic considerations he thought it desirable to lay down some general principles. One result of including a draft article on capacity would be to induce States and international organizations to comment on that article and to make their thinking known to the Commission. That was certainly an argument in favour of including such an article; it might take the form of the one quoted in paragraph 39 of the Special Rapporteur's second report, though perhaps it would be better to omit the reference to the exercise of the organization's functions and the achievement of its objectives.

23. The most difficult problems connected with representation had been dealt with by the Special Rapporteur in paragraph 64 of his second report. Eventually, however, it would be necessary to lay down some general rule dealing with authority to bind the organization.

24. On the subject of agreements concluded by subsidiary organs, he agreed with the conclusions stated by the Special Rapporteur in paragraph 68 of his second report.

25. The problem of an international organization representing a territory seemed to him to be one which would be rather rare in practice and which might not call for any special rule. An obvious possible exception might arise as a consequence of the current negotiations concerning the sea-bed.

26. The subject of agreements concluded with a view to applying other agreements involved the important problem of the dividing-line between agreements and contracts; such agreements could very often be in the nature of contracts. In United States practice, for example, a variety of subsidiary agreements of that kind were not regarded as treaties and were not registered as such with the United Nations Secretariat.

27. On the problem of the application of article 46 of the Vienna Convention, he agreed with the conclusions reached by the Special Rapporteur in paragraph 88 of his second report. In his opinion it should be possible to apply the principle of article 46 of the Vienna Convention, without too much alteration, for the purposes of international organizations. On the question whether an international organization could be a third party in relation to certain treaties between States, he agreed with the conclusion reached by the Special Rapporteur, in paragraph 92 of his second report, that that was not possible.

28. Lastly, as to whether rules were needed to establish that an international organization had accepted responsibilities or rights under treaties to which it was not a party, he thought that a less restrictive set of rules than those of the Vienna Convention was called for.

29. Mr. HAMBRO agreed with Mr. Kearney that the Commission should accept the Special Rapporteur's wide interpretation of the scope of his task.

30. With regard to capacity to conclude treaties, he was inclined to accord as great a capacity as possible to international organizations. He did not base his argument on the purely pragmatic reasons mentioned by Mr. Kearney; in his opinion, the mere fact that the Commission was discussing the character and scope of treaties concluded by international organizations indicated that those organizations did possess the necessary capacity. In that connexion it was only necessary to cite the advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*.[2]

31. The Special Rapporteur had mentioned that the international organizations were not parties to any general treaties; that did not mean, however, that organizations were in fact precluded from adhering to such treaties. In his opinion some multilateral treaties should be open to international organizations; for example, he himself had always advocated the adherence of the United Nations to the Red Cross Conventions and considered it strange that that point of view still met with opposition.

32. Another question was whether an international organization was bound by treaties concluded under its auspices. As a member of the Appeals Board of the Council of Europe, he had opposed a decision of the Council of Ministers which had openly implied discrimination against women in violation of certain rules already accepted by the members of the Council.

33. Mr. SETTE CÂMARA said that the Special Rapporteur's second report, like his first, was a most enlightening document which would provide the Commission with excellent guidance for its future work.

34. He wished to reply briefly to the main points raised by the Special Rapporteur in his introductory statement.[3] He believed that there was only one possible method at work. The Commission should aim at producing draft articles to serve as the basis for an instrument that would supplement the Vienna Convention on the Law of Treaties and would cover the problems relating to the treaties of international organizations.

35. As to the scope of the draft, he agreed with the Special Rapporteur that the Commission should adhere as closely as possible to the Vienna Convention, since its work would form a complement to that Convention. He was therefore in favour of retaining the definition of an international organization given in the Vienna Convention. That flexible and broad definition was very suitable for the present topic, in the context of which, unlike that of privileges and immunities, no harm would be done by giving the broadest meaning to the concept of an international organization.

36. As the Special Rapporteur had stressed, it was a difficult task to codify general rules on the treaties of international organizations. If the Commission succeeded in that task, it would introduce into the régime of such treaties an element of stability and generality which the organizations themselves were not always anxious to have. The present uncertainty sometimes

[2] *I.C.J. Reports 1949*, p. 174.

[3] See 1238th meeting, para. 64 *et seq.*

suited them better than a system of specific and rigid rules, and it was significant that the Special Rapporteur had encountered some difficulty in obtaining information.

37. With regard to the form of the agreements to be studied, he considered that, as in the Vienna Convention, unwritten agreements should be excluded. That was even more justified in the case of international organizations than in the case of States. The written form ensured a clarity which was absolutely necessary. It was even more important in the practice of international organizations than in State practice to rule out ambiguity regarding consent to be bound by a treaty. In the case of a State, the whole treaty-making process included certain steps—such as parliamentary approval—which removed all doubt about consent to be bound; no similar safeguards existed in the case of international organizations.

38. He was inclined to agree with Mr. Kearney that it was desirable to include in the draft a provision to the effect that international organizations had the capacity to conclude treaties. It could be said that, following the 1949 advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*, there could be no doubt regarding the objective personality of international organizations. In his own view it was nevertheless necessary to state clearly in the draft that international organizations possessed treaty-making capacity. As to the language to be used, the Special Rapporteur, although he was not himself inclined to introduce a provision on capacity, had made a very good suggestion in his second report: "In the case of international organizations, the capacity to conclude treaties depends on any relevant rule of the organization" (A/CN.4/271, para. 49 *in fine*).

39. With regard to problems of representation he found the Special Rapporteur's conclusions absolutely correct. Where international organizations were concerned, those problems were still in a very fluid state, and he did not favour the inclusion in the present draft of an article on the lines of article 7 of the Vienna Convention. In a State, certain organs were traditionally in charge of international relations and had powers of representation in virtue of their functions; but that was not the case in international organizations. In view of the pyramidal structure of the secretariats of international organizations, however, it should be possible to settle doubts on that point. The chief executive officer of an organization —Director-General or Secretary-General as the case might be—was the unquestioned head of its secretariat.

40. With regard to agreements concluded by subsidiary organs, he fully agreed with the Special Rapporteur's conclusion that the organization itself should be considered as entering into the agreement in each case.

41. The question of representation of a territory by an international organization had been given very thorough study by the Special Rapporteur. That question had been of great importance in the past, but was likely to arise very rarely in the future.

42. On the subject of agreements concluded with a view to applying other agreements, the Special Rapporteur's conclusions were absolutely correct. In his own view, however, it was doubtful whether the Commission need go into that matter at the present stage.

43. Lastly, he had noted Mr. Kearney's remark concerning the need to draw a dividing-line between contracts and treaties. But it was difficult to see how an international organization could conclude a contract with a State, except with the host State for certain specific purposes.

The meeting rose at 6 p.m.

1242nd MEETING

Thursday, 5 July 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of item 4 of the agenda.

2. Mr. TAMMES said that, in his enlightening reports, the Special Rapporteur had opened up new horizons of international law, and the manner in which he had been able to maintain the confidence of the organizations and at the same time collect valuable information on their practice, provided a promising starting-point for the Commission's work.

3. The hierarchical relationship between international law and national law had been a subject of discussion among international lawyers for a long time. In considering the present topic, however, the problem was that of the interaction between different legal systems each belonging to international law. The Commission was examining what appeared to be a largely technical question, namely, how agreements concluded by international organizations would fit into the system of the Vienna Convention on the Law of Treaties.[1] What was really at stake, however, was the relationship between the all-embracing system of general international law, on the one hand, and various international systems of different degrees of organization, on the other.

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[1] 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. 289.