Document:-

A/CN.4/SR.1348

Summary record of the 1348th 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:-

1975, vol. I

conferences, or subsequently to become parties to the conventions resulting from such conferences. Such a possibility should not, however, be ruled out for the future. The draft the Commission was considering contained rules which were intended to apply both to States and to international organizations, and it was possible that international organizations might be invited to take part in the conference of plenipotentiaries which would embody those articles in a convention and to become parties to that convention. Such a decision would be logical and it was therefore important not to adopt too absolute a position on that point.

41. It was not easy to study seven articles at once, and if the Commission decided to refer those articles to the Drafting Committee without thorough examination, the Committee's work would be much more difficult. He did not propose to make any observations of a drafting nature.

42. With regard to the concept of ratification, he fully shared the point of view expressed by Mr. Ramangasoavina and by Sir Francis Vallat. Ratification was an act governed by internal law and the combination of a number of ratifications enabled the treaty to enter into force. When international organizations were involved, the situation became more complicated because the rules governing the conduct of the negotiation and the acceptance of the treaty by an international organization were rules of international law, although rules of a special kind since they were peculiar to each organization. Consequently, it was important to find a term to characterize the decision by which the highest organ of an international organization approved the conduct of a lower organ which had taken part in the negotiation of a treaty.

43. Personally, he feared that the term "ratification" was not suitable for such a decision of approval, since that term was usually applied to a specific act of certain organs of the State. It might cause difficulties if it were used, for example, in connexion with the decision by which the Security Council approved a trusteeship agreement. Moreover, even States did not always use the term "ratification", and it was precisely for that reason that the Vienna Convention defined the terms "ratification", "acceptance", "approval" and "accession" all at the same time. The Special Rapporteur had therefore been right not to use the term "ratification" in connexion with international organizations. Moreover, the meaning of that term in State practice had changed. Originally, it had applied to the approval of the conduct of an inferior organ by a Head of State but, gradually, the process of negotiating a treaty had come to involve a legislative organ which, normally, did not ratify the treaty, but authorized the Head of State to ratify it. It was sometimes wrongly stated that parliament ratified a treaty, whereas, in fact, it merely authorized the ratification. In those circumstances, it would be better to reserve the term "ratification" for States and not to extend it to international organizations.

44. Some solution of that kind seemed to have prompted the Special Rapporteur to refer, in article 14, to acceptance, approval and ratification in that order, while, in the Vienna Convention, the means of expressing consent to be bound by a treaty were listed in the following order: ratification, acceptance and approval. It would seem more logical to do the same in article 16.

The meeting rose at 1.5 p.m.

1348th MEETING

Thursday, 10 July 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

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

(A/CN.4/285)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 11 (Means of expressing consent to be bound by a treaty)

ARTICLE 2 (Use of terms), PARAGRAPH 1 (*b*)

ARTICLE 12 (Consent to be bound by a treaty expressed by signature)

ARTICLE 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty)

ARTICLE 14 (Consent to be bound by a treaty expressed by acceptance, approval or ratification)

ARTICLE 15 (Consent to be bound by a treaty expressed by accession) and

ARTICLE 16 (Exchange, deposit or notification of instruments of ratification, acceptance, approval or accession) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 11 to 16 and the related provision in paragraph 1 (*b*) of article 2 (Use of terms).

2. Mr. CASTAÑEDA said he fully supported the Special Rapporteur's formulation of the articles under consideration. Those articles, as pointed out by Mr. Ushakov, related exclusively to treaties to which international organizations became actual parties and not to treaties between States concluded merely under the auspices of an international organization.

3. Most of the treaties in question would be bilateral in character and would be concluded between a State and an International organization. Others would take the form of a treaty concluded by an organization with a group of States and would resemble what Basdevant had

called "semi-collective treaties". The possibility should also not be ruled out of an international organization actually becoming a party to a collective or multilateral treaty in the ordinary way; Mr. Ago had given a good example when he had referred to the convention which would result from the set of draft articles now under consideration.

4. He agreed with the Special Rapporteur that the term "ratification" should not be used to describe the final consent of an international organization to be bound by a treaty. Historically, the institution of ratification had developed as a result of the particular circumstances surrounding negotiations between States, and those circumstances did not exist in the case of international organizations. Where a State was concerned, the essential point was that the negotiator of a treaty was not the same authority as the one empowered to express the final consent of the State to be bound by the treaty. That authority was normally the Head of State and he required time to examine carefully the work performed by the negotiator. It was true that, as Sir Francis Vallat had pointed out, the draft articles were not concerned with determining who were the competent domestic authorities in the treaty-making process. The term "ratification", as used in the draft articles, referred exclusively to the act on the international plane whereby the consent of the State to be bound by the treaty was expressed. It was precisely in that connexion, however, that the two-stage process—signature followed by ratification—had developed in State practice.

5. That two-stage process could not be applied by an international organization. It was difficult to see how a treaty could be examined twice by the same organ of an international organization. In any case, if one took the example of the United Nations, the treaty-making process laid down in the Charter did not correspond at all to the idea of a signature followed by subsequent ratification or confirmation by a higher authority. Thus, the trusteeship agreements made under Articles 83 and 85 of the Charter had not been negotiated by the Secretary-General and subsequently confirmed or ratified by the Security Council in the case of the strategic areas covered by Article 83, or by the General Assembly in the case of the other trust territories covered by Article 85. What had actually happened in each case was that the administering authority had submitted a draft agreement to the Security Council or the General Assembly, as the case might be; upon the draft being adopted by the Security Council or the General Assembly, it had become effective. The Security Council or the General Assembly of course entrusted the Secretary-General with the task of signing the agreement on behalf of the United Nations, but that operation was essentially of a formal character.

6. Again, the two-stage process of signature and ratification had not been envisaged in the Charter for the important agreements mentioned in Article 43, relating to the armed forces to be made available to the Security Council. The intention was that those agreements should be negotiated and concluded directly between the Security Council and the Member States concerned; no mention was made in Article 43, any more than in Articles 83 and 85, of the Secretary-General. Of course, no agreements had actually been entered into under Article 43 of the Charter.

7. Those examples made it clear that the two-stage process of expression of consent which was characteristic of ratification of a treaty by a State did not apply to international organizations. The Special Rapporteur had therefore been right in not using the term "ratification" in connexion with international organizations.

8. Another important consideration was that the consent of an international organization was given by a collective decision. It would therefore be hazardous to introduce the concept of a two-stage process of examination; it would involve the danger of a reversal of the decision to conclude a treaty. The possibility, mentioned during the discussion, that a procedure bearing some resemblance to signature and ratification might in the future be used by an international organization was likely to occur only as a rare exception. In any case, it was amply covered by the concluding words of paragraph 2 of article 11, "or by any other means if so agreed". That proviso made it possible for the parties to a treaty to make the procedure of ratification available to an international organization, if they so desired.

9. Mr. PINTO said that the term "ratification" was used in the articles under discussion in the sense of the endorsement or confirmation of an act of an envoy with respect to a treaty. It was the confirmation by the principal of the act of an agent. Other terms, such "approval", could have been used in that same sense, but none had that precise connotation which placed it in a special category as a peculiarly sovereign act. The issue was not simply one of semantics but of the special meaning of the word "ratification" as a term of art in the context of treaties. He fully agreed with those speakers who had placed the act of ratification in its proper perspective as the act of the sovereign. Ratification was a type of act which was peculiar to sovereignty, whether that sovereignty resided in a monarch or in the representatives of the people. It was the last act in a long series leading up to the conclusion of a treaty and the commencement of the binding obligation for the ratifying State. It was necessary that that last act of ratification should be associated with the highest expression of sovereignty, which in the case of a democracy was the will of the people. The relationship to sovereignty was neither mystical nor obsolete; on the contrary, it was necessary in any modern democratic State. The multiplicity of tasks, commitments and preoccupations competing for attention and decision made it necessary that important foreign commitments should receive final confirmation after re-examination at the highest level, in order to minimize the possibility that an envoy might undertake obligations unacceptable to the people. In many countries the long treaty-making process was accompanied by varying degrees of publicity, until the final act of ratification took place and the people, through their representative, had their final say. Thus the act of ratification was closely associated in the minds of some with the concept of sovereignty, not in the ancient sense of the sovereignty of the monarchy but in the modern sense of the sovereignty of the people.

10. However attractive or forward-looking it might be, the idea that international organizations should be placed on the same level as States was unlikely to prove acceptable in the foreseeable future. Indeed, it would mean ignoring the nature of the modern international organization, the way in which decisions were made in such an organization, the facets of political and bureaucratic influence which culminated in over-all control, and the fact that an organization's sphere of activities was usually very limited.

11. It was true that the Commission had discussed article 9 (Adoption of the text) in a form which admitted that international organizations could have the same rights as States at a conference. He had not himself favoured that approach, but while it could perhaps be allowed in relation to the specific question of the adoption of the text of a treaty, it was altogether unsuitable in the case of ratification. Consequently, he supported the text proposed by the Special Rapporteur for article 11.

12. There was no inconsistency in having two non-exhaustive lists of terms—one for State action in paragraph 1 and one for action by an international organization in paragraph 2, the word "ratification" being used only for States. That simply implied that a State had the right to use the ratification procedure and that, if an international organization in a particular case was to be allowed to use that procedure it could do so by special agreement.

13. He agreed broadly with the Special Rapporteur's proposed paragraph 1 (*b*) in article 2. Nevertheless, since paragraph 2 of article 11 provided for the possibility that international organizations might resort to ratification in a particular case by agreement, the provisions of paragraph 1 (*b*) of article 2 might go too far, in that they restricted the application of the term "ratification" rigidly to States.

14. With regard to article 16, he noted that the clause "or it is otherwise agreed" and the concluding words of sub-paragraph (*c*), "if so agreed", provided a double possibility of agreement—one for opting out and another for opting in. He would welcome some clarification regarding the combined working of those two provisions.

15. Lastly, there arose a general question regarding the formulas "unless otherwise agreed" and "if so agreed", which were used in a number of places in the draft. It was possible to interpret that type of clause in different ways, when trying to determine where the agreement would be concluded. One was that the agreement should be consigned in the treaty itself; another that it should be consigned in the constituent instrument of the international organization which was a party to the treaty and of which the State party was a member. It was also possible to envisage the agreement being made in a separate instrument.

16. Mr. QUENTIN-BAXTER said that the Special Rapporteur had been right to point out that the choice between using and not using the term "ratification" in relation to international organizations did not depend on any overwhelming historical consideration but rather on a scruple.

17. The importance of the historical aspect of the question should not be exaggerated. In many treaties concluded between States over the past 25 years the terms "ratification", "acceptance" and "approval" had been used somewhat indiscriminately as a matter of habit or even of fashion, without any implication of a difference of substance. Even in modern practice, the term "ratification" was often used without any thought of solemnity in connexion with treaties which were concluded at governmental level and which were not in any sense subject to confirmation by the Head of State. Another important consideration was the tendency to use the term "acceptance" instead of "ratification" to describe the operation of confirmation which followed the signature of a convention. It appeared to reflect the idea that ratification was a more formal and more symbolic act than acceptance.

18. If the Commission adopted article 11 in the form submitted by the Special Rapporteur, thus deferring to the deeply felt view regarding the difference in character between international organizations and States, it would not thereby deprive international organizations of the possibility of using the device of ratification by agreement of the parties, since that could be done under the concluding proviso "or by any other means if so agreed" in article 11, paragraph 2.

19. For those reasons, he preferred that the Special Rapporteur's proposed text for article 11 should stand. The Special Rapporteur had been right to refrain from using the term "ratification" in connexion with international organizations.

20. Mr. BILGE said that he would confine his remarks to the question of the possibility for an international organization of expressing its consent to be bound by a treaty by means of ratification. He shared the Special Rapporteur's view that, for an international organization, ratification was not a suitable means of expressing its consent. The Charter of the United Nations did not contain any provision which either required or justified that means of expressing consent for an international organization. It was true that the Commission should not have exclusively in mind the organizations of the United Nations system, but there could be no doubt that neither the structure nor the functioning of any international organization called for a procedure of that kind. In general, neither the secretariat nor the secretary-general of an organization exercised any powers distinct from those of the other organs of the organization; they administered rather than governed. Within an international organization, all organs co-operated and there was no genuine hierarchy. In the circumstances, the ratification procedure could only serve for purposes of verification. Even Article 43 (3) of the Charter only made provision for ratification by States. Moreover, the term "ratification" was rather ambiguous in State practice.

21. Article 11, as the Special Rapporteur had pointed out, was a descriptive provision, and the proviso "or by any other means if so agreed" left a great deal of latitude to international organizations. It was thus possible to choose, in each case, from among the various means of expressing consent to be bound by a treaty, including ratification, the means best suited to the international organization concerned.

22. Mr. TSURUOKA said that he would confine his remarks to stating that he had no objection to article 14, provided that an international organization could, in accordance with article 12, express by means of ratification its consent to be bound by a treaty on the international plane, when permitted to do so by its constituent instrument or practice or when, during the negotiation of the treaty, the representative of the organization had either expressly or impliedly indicated that the organization was prepared to give its consent to be bound by the treaty by means of ratification. If article 14 were to deprive international organizations of that possibility, he would be obliged to reserve his position.

23. The CHAIRMAN invited the Special Rapporteur to reply to the comments made during the discussion.

24. Mr. REUTER (Special Rapporteur), referring to a remark by Mr. Ago concerning the Commission's method of work, said that it was in the hope that the Commission might be able to adopt a large number of articles at the present session that he (the Special Rapporteur) had suggested that several articles should be considered together. That method, which seemed to him appropriate in the circumstances, did not however, prevent any member of the Commission from dewelling upon, or reverting to, any provision which seemed obscure to him. There could be no doubt that a great effort would be required from the Drafting Committee, but he had already redrafted for the Committee the articles which the Commission had considered.

25. In reply to the comments by Mr. Ushakov, he explained that the first two paragraphs of article 9 embodied the rule of unanimous consent, but paragraph 3 incorporated the rule laid down in paragraph 2 of article 9 of the Vienna Convention. That provision related to the adoption of the text of a treaty at an international conference of States, but did not specify that it was a general conference. It was possible to arrive at that conclusion on the basis of paragraph 2 of article 20 of the Vienna Convention, where a distinction was drawn between treaties of a general character and treaties which had a special object and purpose and only a limited number of negotiating States, and to infer that the two-thirds majority rule did not apply to the second category. In the redraft of article 9 which he had prepared for the Drafting Committee, he had referred to a "general conference" of States. If one or several international organizations were invited to participate in that conference, the rule in paragraph 3 would apply. It would be inappropriate and illusory to imagine a general conference of international organizations. A conference of the organizations of the United Nations system was conceivable, but such a conference would not have a general character and would not involve the application of the two-thirds majority rule.

26. It had been pointed out by Sir Francis Vallat that article 13 mentioned only an exchange of instruments between two partners, either a State and an international organization, or two international organizations. There were two possible objections to that limitation. The corresponding provision of the Vienna Convention, which applied only to States, concerned both bilateral and multilateral treaties. Moreover, there was no reason to confine the present draft to bilateral treaties. In the redraft of article 13 which he had prepared for the Drafting Committee, he had taken those objections into account, particularly since they had a historical basis. Until the middle of the nineteenth century, agreements between three or more States were concluded by means of bilateral exchanges of instruments. That was a very cumbersome procedure and, with the growing number of States parties to conventions of a universal character, could lead to absurd situations. Mathematically, the number of instruments to be prepared for "n" contracting parties would be $n(n-1)$. Thus if there were three contracting parties, six instruments would be needed, but if the nine States members of the European Community concluded an agreement with the Community itself, under the bilateral exchange procedure, ninety instruments would be needed. If the Drafting Committee considered his redraft of article 13 unacceptable he could simply indicate in the commentary to that article that the system of bilateral exchanges of instruments could be broadened if necessary.

27. With regard to article 16, Sir Francis Vallat had commented that the phrase "or it is otherwise agreed", which appeared in the opening clause of the article, was not necessary. Then Mr. Pinto had pointed out that the words "if so agreed" in sub-paragraph (*c*) of article 16 duplicated the phrase mentioned by Sir Francis Vallat. He would have no objection to dropping the concluding words of sub-paragraph (*c*).

28. The question where the rule governing the conclusion of a treaty was to be found if it did not appear from the treaty itself had been raised by both Mr. Pinto and Mr. Ushakov. If it was to be found in the constituent instrument of the international organization concerned, in its rules, or in its general conditions, it would obviously form part of the law of that organization and would be binding upon it. It might then be asked, however, whether the rule could not be embodied in an agreement separate from the treaty itself. In the case of treaties between States, it was obvious that a rule of that kind could be contained in an agreement distinct from the treaty, whether the agreement was written or oral. In their present form, the articles under consideration were based, on that point, on the provisions applicable to treaties between States. Realistic considerations might be an argument for refusing to assimilate international organizations to States. Thus Mr. Ushakov had considered it dangerous to keep the formula "it is otherwise established", because it would open the door to verbal agreements which not everyone was prepared to accept in the case of international organizations. In order to take those views into account, he proposed that the formula in question should be supplemented by the addition of the words "by an agreement between properly accredited organs", in order to stress that any agreement other than the treaty itself had also to be properly concluded.

29. Another reason for not assimilating international organizations to States could be on grounds of expediency or regard for national susceptibilities. In article 7, the expression "full powers" was used both for representa-

tives of States and for representatives of international organizations, but it could be reserved for representatives of States and the more modest term "powers" could be used instead for the representatives of international organizations. In the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, [1] the term "credentials" was used in the case of representatives of States. Regardless of any difference of substance between the two expressions, it might be advisable to use both of them just in case certain governments should be alarmed to see the expression "full powers" applied to the representatives of international organizations.

30. He noted that the Commission seemed evenly divided on the question whether an international organization could express its consent to be bound by a treaty by ratification. The redraft of article 14 which he had prepared for the Drafting Committee departed materially from the original wording. Speaking as a member of the Commission, he said he agreed with Mr. Tsuruoka and Mr. Kearney that there was no logical reason for preventing an international organization from using the word "ratification" to describe a procedure of giving final consent following upon a first or provisional consent. It was quite possible for one and the same organ first to authorize and instruct a representative and then to ratify. That procedure was not used in the United Nations, but it was not uncommon in the case of highly technical negotiations such as trade negotiations within the European Communities. In such cases, the decision to engage in the negotiations was taken by the Council of Ministers which gave instructions to a representative sent by the Commission of the Communities; the Commission negotiated the agreement and initialled it, then the Council deliberated, authorized the signature, and gave its approval before the exchange of the instrument of ratification of the State concerned and the instrument of approval of the Council. It would seem rather petty to prevent an international organization from describing such a procedure as "ratification". An example of the terminological uncertainty in the matter was to be found in the French Constitution, which mentioned both ratification and approval as means of expressing consent to be bound by a treaty. If an international convention specified that it was subject to ratification or acceptance, without specifying how those terms should be interpreted, the French Government took a decision worded as follows: "The present Convention is approved; this approval has the effect of acceptance within the meaning of the Convention". Similarly, there was nothing to prevent an international organization from informing the depositary of a treaty by letter that its instrument of ratification had the effect of acceptance or approval within the meaning of the treaty. Unless article 11 was to be made a rule of *jus cogens*, which was out of the question, international organizations could not be prohibited from taking such a step.

31. Still speaking as a member of the Commission, he said that, in addition to those arguments, there were some political considerations. It was quite possible that some Governments would not be pleased to see international organizations using the terminology traditionally reserved for States. That aspect of the problem had been brought out by Mr. Pinto and it was precisely because of that psychological factor that he (the Special Rapporteur) had considered it advisable not to use the term "ratification" in connexion with international organizations. To help it to settle that question, the Drafting Committee would have before it the original text of the relevant articles and the text revised by him. The Drafting Committee, and after it the Commission itself, might even decide to submit two alternative texts to the General Assembly. If the Commission decided to model article 14 of the draft on article 14 of the Vienna Convention, it would have to mention ratification first and then assimilate acceptance and approval to it. As far as international organizations were concerned, that would amount to turning the exception into the general rule.

32. The CHAIRMAN suggested that article 11, article 2, paragraph 1 (*b*), and articles 12, 13, 14, 15 and 16 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed. [2]

ARTICLES 17 AND 18

33. The CHAIRMAN invited the Special Rapporteur to introduce articles 17 and 18, which read:

Article 17

Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State or international organization to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States or international organizations so agree.

2. The consent of a State or international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State or international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(*a*) the State or organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, as the case may be, until the State or organization shall have made its intention clear not to become a party to the treaty; or

(*b*) the State or organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

34. Mr. REUTER (Special Rapporteur) said that international organizations should enjoy, under the same conditions, the options open to States under article 17 of the Vienna Convention. In his view, therefore, article 17 did not pose any special problems, any more than did article 18, which stated a general rule linked with the principle of good faith. The two articles differed from

[1] See document A/CONF.67/16.

[2] For resumption of the discussion see 1353rd meeting, paras. 2 and 57.

the corresponding articles of the Vienna Convention only to the extent of the drafting changes required to take international organizations into account.

35. Mr. USHAKOV proposed that articles 17 and 18 be referred to the Drafting Committee.

36. Mr. KEARNEY supported Mr. Ushakov's proposal. In article 17, paragraph 1, he would like the Drafting Committee to consider replacing the word "or" after the word "permits" by the words "and/or".

37. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer articles 17 and 18 to the Drafting Committee.

It was so agreed. [3]

ARTICLES 19, 20, 21, 22 AND 23

38. The CHAIRMAN invited the Special Rapporteur to introduce articles 19 to 23 of section 2 (Reservations), which read:

Article 19

Formulation of reservations

A State, when signing, ratifying, accepting, approving or acceding to a treaty, and an international organization, when signing, accepting, approving or acceding to a treaty, may 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

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

2. When it appears from the limited number of the negotiating States or 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. 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 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 contracting 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 contracting 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.

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 contracting State or international organization if it shall have raised no objection to the reservation by the end of a period of 12 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.

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 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 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.

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 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.

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 international organizations and other States and international organizations 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 or international organization, as the case may be, 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.

39. Mr. REUTER (Special Rapporteur) said that the article concerning reservations would require an exchange of views on the general problem to which they gave rise. He had taken the view that, once an international organization was admitted as a party to a treaty, it was impossible to deprive it of one of the fundamental privileges deriving from that status, namely, that of admission to

[3] *Ibid.*, para. 84.

enjoyment of the reservations régime. He had also accepted that the legal rules relating to reservations should be the same for international organizations as for States. If the Commission accepted that view, it would have to consider articles 19 to 23 one by one in order to decide what changes should be made to the language of the Vienna Convention in order to take account of the addition of international organizations. If, on the other hand, the principle of the assimilation of international organizations to States gave rise to difficulties—difficulties of which he had not been unaware—a debate on the articles would be very useful, since it would enable him to draft new articles for submission to the Commission at its next session. It was clear that if the articles on reservations gave rise to problems of substance, it would be impossible to solve them in the few days that remained.

40. His view had been that, so far as reservations were concerned, there was no fundamental difference between treaties between States and treaties concluded between States and international organizations or between two or more international organizations. The problem of reservations did not, of course, arise with regard to bilateral treaties, for it was always solved in the case of treaties with a limited number of participating States by means of express provisions, as provided in article 20 of the Vienna Convention. The question of reservations was, however, of great importance in the case of general multilateral treaties. At present it was quite hypothetical so far as international organizations were concerned, for there was as yet no general multilateral treaty to which an international organization was a party.

41. He had, nonetheless, emphasized in his report that there was a risk that serious difficulties might arise if an international organization were admitted as a participant, on the same footing as States, in an international conference in which States members of the organization also participated. Clearly, no problem would arise if an international organization were invited to a conference in which its member States did not participate. For example, there might be an international conference on customs techniques in which a customs union would participate as such, but in which its member States would not participate. But that could only happen if the subject of the conference was very restricted and concerned only matters in respect of which the States had no competence. In a case of that kind, there was no problem. On the other hand, virtually insurmountable difficulties arose when an international organization participated in an international conference convened to draft a treaty in which its member States also participated. Did the international organization have the status of a party—a prospective party, but a party nonetheless—in such a case? There were, as yet, no examples of that kind, for it was hardly conceivable that a group of States should expect to be allowed to add to their own votes at an international conference the vote of the organization which they constituted. States members of the organization would have to choose between two alternatives: either to participate in the conference as individual States, or to participate as members of the organization—and in most cases it would be to their interest not to invoke their membership of the organization, since that would have the effect of reducing their total number of votes to one. Faced with the inability of the other States to agree to the addition of the vote of the organization to that of its member States, the latter would retain their own individual votes, and the international organization would be admitted to the conference with consultative status only, to express the collective opinion of the member States it represented, and not as a prospective party to the treaty.

42. In approaching the problem of reservations, it would be found that in most international organizations there was no clear and sharp dividing line between the competence of the international organization and that of its members. That situation, which could be illustrated in many ways, was due partly to the fact that the competence of the organization was defined in rather vague terms, but partly also to the fact that the competence of the organization tended to spread further and further, as its member States daily discovered. The member States did not always accept that extension of the organization's competence with a good grace, as was shown by the various cases brought before the courts for the purpose of settling the rival claims of member States and organizations. An example involving the European Economic Community was the European Road Transport Agreement case, No. 22/70. [4]

43. The uncertainty surrounding the respective competence of an international organization and of its member States was so great that, in the case of a treaty between Finland, on the one hand, and the European Economic Community and its members, on the other, it was not always clear, from reading the treaty, what was meant by the phrase "countries other than Finland": did it mean the Community as such, or its member States, or the Community and its member States? The problem had been fully recognized by the authors of the treaty, who had concluded that it was, as the case might be, either the Community alone, or the member States alone, or the Community and the member States.

44. If that conclusion was correct, it could have important consequences for reservations because, if it was agreed that an organization and its members could, at the same time and independently of each other, freely formulate reservations, it would be necessary, in order to avoid insoluble problems, to lay down a rule that reservations bound member States and the organization in exactly the same way. He had therefore concluded that to allow an organization and its member States to participate at the same time in any treaty was a solution which could only be adopted with the greatest circumspection because, if member States and the organization were to be allowed to formulate reservations, it was essential to make sure that such reservations were identical or that the respective competences of the organization and of the member States were quite distinct.

45. If the Commission had to consider all the problems which could arise from reservations to treaties to which international organizations were parties, it would undoubtedly be carried well beyond the range of the present

[4] *Common Market Law Reports* (London), 1971, Part 50, p. 335.

articles. He had submitted those articles nevertheless, because he considered that if, in future, international organizations were allowed to participate in certain general treaties, special arrangements regarding reservations would be made in each case in order to avoid possible conflicts, either by forbidding reservations, or by obliging the organization and the member States to submit identical reservations, or by some other solution of that kind. But that was not a matter which could be made the subject of a general rule and so he had not submitted one.

46. Mr. USHAKOV said that he would confine his observations to articles 19 and 20 because the other articles or reservations depended in one way or another on those two articles.

47. In his opinion, a distinction should be made between two categories of treaties, namely, treaties between States in which international organizations might possibly be able to take part—not to be confused with treaties concluded under the auspices of an international organization—and treaties to which international organizations were parties for the purposes of all the provisions of the treaty. The 1975 Vienna Convention might belong to the first category of treaties, because it dealt not only with the privileges and immunities which host States were required to grant to sending States—which meant the obligations of host States to sending States and, reciprocally, the rights and obligations of sending States—but also, to a certain extent, with the rights and obligations of international organizations. It was therefore the kind of treaty which might possibly allow a degree of participation by international organizations. In that case, the participating international organizations could formulate certain reservations only, relating exclusively to the articles concerning their rights and obligations. In the second case, on the other hand, the international organizations which were parties to the treaty could formulate reservations to any provision of the treaty.

48. In article 17 and 18, which he had suggested should be referred to the Drafting Committee, the general term "a treaty" could be used to mean both treaties between States and international organizations and treaties between two or more international organizations. But that would not be possible in the following articles because, when dealing with reservations, it was necessary to make a distinction between treaties concluded between States and international organizations and treaties concluded between several international organizations. In his opinion, the rule would be very different depending on whether the treaty was concluded between international organizations only or between States and international organizations.

49. With regard to the principle of the formulation of reservations, set forth in article 19, he wondered whether an international organization must always have the possibility of formulating a reservation "unless the reservation is prohibited by the treaty", as provided in article 19. He was not sure that that question could be answered in the affirmative. The rule stated in article 19 was perhaps valid for treaties concluded between international organizations only, but was it equally valid for treaties concluded between States and international organizations?

50. He had some strong objections to the provisions of article 20. In particular, he had doubts about the legal meaning of the expression "the limited number of the negotiating States or international organizations" in paragraph 2. It was important to know whether it was States or international organizations that were involved, because the solution could vary, depending on whether it was a question of a treaty concluded between international organizations only, or a treaty concluded between States and international organizations. It was also hard to see how a treaty could be "a constituent instrument of an international organization", as in the case dealt with in paragraph 3. In his opinion, such a case would be quite impossible according to the definition of an international organization as an intergovernmental organization.

51. With regard to paragraph 4 (*a*), if a reservation formulated by a State had been accepted by another State, that reservation applied only as between those two States. The question would therefore be governed by the Vienna Convention. In the case dealt with in paragraph 4 (*b*), the objection to a reservation by a State was also governed by the Vienna Convention.

52. He hoped that his comments would help the Special Rapporteur in the preparation of the new articles which he was to submit to the Commission at the next session; he did not see how such important questions could be settled at the present session.

53. Mr. CALLE Y CALLE said that the Special Rapporteur's comments in introducing articles 19 to 23 were no less apposite and well-founded for having been brief.

54. The Special Rapporteur considered that there would be no special difficulty in placing international organizations and States on the same footing in respect of their right as contracting parties to express reservations to a treaty. Since the Commission was discussing the conclusion of agreements between subjects of international law, a matter which was inevitably governed by international law, it should deal with the question, which affected all the draft articles, of the extent to which the parties concerned possessed the same capacity to conclude treaties, and that applied both to treaties between States and international organizations and to treaties between two or more international organizations. For that reason, he supported the extension to international organizations of all the carefully elaborated machinery relating to reservations. He would remind the Commission that great efforts had been made to make Latin American practice in respect of reservations as flexible as possible.

55. In the Spanish version of article 19, he thought that the order of the words "*ratificar*" and "*aprobar*" should be reversed and that, in order to maintain the distinction which had been made between States and international organizations in respect of ratification, the phrase "*segun el caso*" should be inserted after the words "*aceptar o*".

The meeting rose at 1 p.m.