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Summary record of the 1350th meeting

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

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1350th MEETING

Monday, 14 July 1975, at 3.15 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, 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; A/CN.4/L.234)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 19 (Formulation of reservations)

ARTICLE 20 (Acceptance of and objection to reservations) AND

ARTICLE 21 (Legal effects of reservations and of objections to reservations) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 19 to 21.¹ The Special Rapporteur's revised text of articles 19 and 20 read:

Article 19

Formulation of reservations

1. A treaty between one or more States and one or more international organizations and a treaty between several international organizations may only be the subject of a reservation:

- (a) if the reservation is expressly authorized by the treaty; or
- (b) if the reservation is expressly accepted by all the States and international organizations parties to the treaty.

2. Notwithstanding the rule laid down in the preceding paragraph, a treaty concluded between States on the conclusion of a general conference, in which one or more international organizations participate on the same footing as those States and in respect of which it does not appear [either from the limited number of the negotiating States or] from the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, may be the subject of a reservation formulated by a State or an international organization, when signing, accepting, approving, ratifying or acceding to a treaty, unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under 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. In the case falling under article 19, paragraph 2, and unless the treaty otherwise provides:

(a) acceptance by another contracting State or international organization of a reservation constitutes the reserving party a party to the treaty in relation to that other contracting party if the treaty is in force or when it comes into 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.

3. For the purposes of the preceding paragraph 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 its consent to be bound by the treaty was established, whichever is later.

2. Mr. REUTER (Special Rapporteur) said that the new texts of articles 19 and 20 reflected the position which he had outlined at the previous meeting. Rather than open a fresh discussion, he considered that it would be better to refer them to the Drafting Committee since they involved only minor changes to articles 21, 22 and 23.

3. The only point to which he need draw attention in draft article 21 was a drafting point. If the Commission accepted his new article 19, it would probably have to make a minor change in article 21, paragraph 3. The new article 19 first enunciated a general principle, that of unanimous consent to reservations, and then provided for a fairly limited exception, that of the application of the reservations régime of the Vienna Convention on the Law of Treaties. Consequently, it should be specified that article 21, paragraph 3, applied only to the special case referred to in article 19, paragraph 2. That could be done by wording the beginning of paragraph 3 of article 21 to read: "When, in the case provided for in article 19, paragraph 2, a contracting State or international organization . . .".

4. Mr. USHAKOV said that article 21 did not cause him any difficulty, but if the new articles 19 and 20 were adopted, article 21 would apply only to treaties of a universal character. Since reservations to restricted treaties had to be accepted by all the parties, the provisions of article 21 could not apply in that case. Consequently, article 21 could be referred to the Drafting Committee, which would determine its precise scope.

5. Mr. REUTER (Special Rapporteur) said he had thought about the question raised by Mr. Ushakov but had reached the conclusion that article 21, paragraphs 1 (a) and (b), and paragraph 2, could apply in the general case referred to in article 19, paragraph 1. According to the latter provision, the reservation must either be authorized by the treaty or be accepted by all the parties to the treaty. He had in mind the case of a treaty concluded between a number of States and an international organization, which permitted the States and the organization to formulate a specific reservation. If a State made the reservation, the reservation was then in conformity with the

¹ For the text of article 21, see 1348th meeting, para. 38.

treaty and applied only in relations between that State and the other contracting parties, and not in the relations between the contracting parties themselves. Those relations were governed by the text of the treaty as a whole. The Drafting Committee should take that case into account when it came to consider article 21.

6. Sir Francis VALLAT said that, in view of the lack of time, there appeared to be no alternative to referring article 21 to the Drafting Committee, though he seriously doubted the possibility of arriving at a satisfactory draft. The position had been materially altered by the Special Rapporteur's redrafts of articles 19 and 20. Those new texts cut across the classifications of the Vienna Convention on the Law of Treaties and called for consideration of the substance.

7. Mr. USHAKOV said he was in full agreement with those remarks. One solution might be for the Drafting Committee to prepare a text of article 21 and place it between square brackets; the Commission would then take its decision at the next session.

8. Mr. KEARNEY said he noted the reference to a "general conference" in paragraph 2 of the Special Rapporteur's redraft of article 19 and the fact that Mr. Ushakov had equated the product of such a conference with a treaty of a "universal character". He himself had misgivings about the use of both the term "general conference" and the term "treaty of a universal character". It seemed to him that very large and important conferences in which all the States in a large region of the world participated, such as conferences of the Organization of American States or the Organization of African Unity, could properly be described as "general conferences", even though they did not produce treaties of a universal character. In view of the many unknowns involved, he felt that if article 21 were referred to the Drafting Committee, it was doubtful whether satisfactory results would be obtained.

9. The CHAIRMAN said that the Commission would have full latitude to discuss whatever texts eventually emerged from the Drafting Committee.

10. Mr. USHAKOV, in reply to the point raised by Mr. Kearney, said that the essence of the Special Rapporteur's new proposal was in the idea it contained, rather than in the actual texts of articles 19 and 20. The expression "general conference", for example, gave rise to misgivings in some quarters. It would be for the Drafting Committee to examine the underlying idea of the Special Rapporteur's proposal and to formulate redrafts of articles 19 and 20 for submission to the Commission.

11. Mr. HAMBRO said that it would be much wiser not to press for the adoption of articles 21 to 23 at the present session. It was important that the Commission should not submit to the General Assembly any articles which had not been the subject of a thorough discussion.

12. Mr. PINTO said that he wished to place on record the fact that his reservation regarding like treatment of States and international organizations applied to all the articles, and therefore to the articles now under discussion.

13. It would be a great help to the reader if the texts of the draft articles were presented in such a manner as

to show clearly, by means of underlining, where they differed from the corresponding texts of the Vienna Convention on the Law of Treaties. In the Special Rapporteur's fourth report (A/CN.4/285), the corresponding provisions of the Convention were given in foot-notes, a method which involved tiresome checking.

14. The CHAIRMAN said he could assure Mr. Pinto that his first point would be reflected in the Commission's report. The second would be examined by the Secretariat.

15. If there were no further comments, he would take it that the Commission agreed to refer articles 19, 20 and 21 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.

16. Mr. REUTER (Special Rapporteur) said that, if the Drafting Committee was unable to agree on the articles relating to reservations, or if the Commission wished to obtain further clarifications, those articles should not be adopted at the present session. Nevertheless, it was very important that he should know the views of members of the Commission for the purposes of the continuation of his work. If the Commission decided not to submit any draft articles to the General Assembly, it should state that it had been obliged to follow that course for lack of time, a point which would inevitably raise the question of its methods of work.

ARTICLE 22 (Withdrawal of reservations and of objections to reservations) AND

ARTICLE 23 (Procedure regarding reservations)² (*continued*)

17. Mr. REUTER (Special Rapporteur), said that, with regard to article 22, he would confine himself to drawing attention to a question which might either be dealt with in the commentary, or be reflected in an amendment to paragraph 3 (b) of the article. He would take the case of a general conference in which an international organization was participating on the same basis as States. The treaty which resulted from the conference would be governed by the future convention. If the international organization formulated a reservation to which all the States objected, and which would prevent them from considering the international organization as a party to the treaty, the organization would lose its status as a party. The treaty would then become a treaty concluded between States and the Vienna Convention would apply to all the effects subsequent to the last objection by the last State. If one of those States subsequently withdrew its objection, the international organization would again become a party to the treaty, which would again fall within the scope of the draft articles. In a situation of that kind, notification of the withdrawal of the objection should normally be addressed not only to the international organization, but to all the States concerned, since each of them would be interested in learning of the change of régime applicable to the treaty.

18. Consequently, he suggested that the following sentence be added to article 22, paragraph 3 (b): "If, how-

² For the texts of articles 22 and 23, see 1348th meeting, para. 38

ever, the withdrawal of an objection to a reservation has the effect of making an international organization a party to a treaty to which no international organization was any longer a party before such withdrawal, notice of the withdrawal shall be given to all the parties". That sentence might be placed in square brackets, in order to leave the Drafting Committee free to delete it, adopt it or reproduce its substance in the commentary.

19. Article 23 did not call for any particular remarks on his part.

20. Mr. KEARNEY said it seemed to him an over-elaboration to make provision in the article for the hypothetical case mentioned by the Special Rapporteur, which was highly unlikely to occur in practice. It was difficult to see how a treaty adopted at a conference of the kind envisaged could lead to a participating organization making reservations to which all the other parties objected; a majority of the States concerned would also be members of the international organization and if the organization made a reservation, it would not seem within the reasonable bounds of possibility that all its members should object to that reservation.

21. He was much more concerned with the more likely possibility that one or two States might object to a reservation made by an international organization. Such objections would undoubtedly lead to complications.

22. Sir Francis VALLAT said that paragraph 3 (b) of the Special Rapporteur's proposed article 22 stated that the withdrawal of an objection to a reservation became operative only when notice of it had been received "by the reserving party", whereas paragraph 3 (b) of article 22 of the Vienna Convention used the words "by the State which formulated the reservation". The use of the expression "the reserving party" illustrated the effect of changing the structure of the Vienna Convention. According to paragraph 1 (g) of article 2 of the draft, the term "party" meant a State or an international organization which had consented to be bound by the treaty and for which the treaty was in force. Consequently, the text now proposed, by introducing the concept of "reserving party", also introduced the requirement of the treaty being in force. The corresponding text of the Vienna Convention, by simply referring to the State "which formulated the reservation" had avoided that requirement.

23. In his view the proposed provision would not work satisfactorily. It would restrict the effect of the provisions of article 22, not only in relation to international organizations but also in relation to States. It was for that reason that he had mentioned the possibility of dealing with the relations between States in one way, and relations involving international organizations in another.

24. An examination of paragraph 1 of article 19 as redrafted by the Special Rapporteur showed that the concept of the "formulation" of reservations had disappeared. That concept had been at the heart of the corresponding provision of the Vienna Convention on the Law of Treaties. He had serious misgivings on that point and about the effect of that alteration on the subsequent articles.

25. Mr. USHAKOV, referring to the case, mentioned by the Special Rapporteur, of a change of the régime applicable to a treaty, said that he would take another case, that in which an international organization was participating, as a party and on terms of equality with States, in a treaty of a universal character. If a State formulated a reservation to the treaty and the reservation was accepted by the other States but objected to by the international organization, the legal effects of the reservation would operate solely between States and would be governed by the 1969 Vienna Convention. That case was much more likely to occur than one where a reservation formulated by the international organization was objected to by all the States parties to the treaty.

26. To cover those different cases, he would suggest including a general saving clause applicable to the draft as a whole, to the effect that relations between States only would be governed by the Vienna Convention on the Law of Treaties or by the relevant rules of general international law.

27. Mr. REUTER (Special Rapporteur) said he was inclined to accept Mr. Ushakov's suggestion. A general saving clause could apply not only to the case mentioned by Mr. Ushakov, but also to other cases, unrelated to reservations. The Commission should indicate in its commentary that such a clause would be drafted later.

28. Referring to Sir Francis Vallat's remarks, he said that the Commission had decided, a long time ago and after lengthy debate, that the draft articles should be regarded as an autonomous whole, independent of the Vienna Convention. If the Commission maintained that position, it would have to draft provisions applicable to relations between States, even if those relations only came into being on the conclusion of a treaty between States and international organizations. There was nothing to prevent the Commission from reversing its decision, but it should delay doing so as long as possible, because such a reversal would involve changing a great many articles. If it maintained its decision, the Commission would have to make sure that it did not draft any articles, for relations between States resulting from the conclusion of a treaty governed by the future convention, which differed from the corresponding provisions of the Vienna Convention.

29. The Vienna Convention had established two régimes: first a general régime and, secondly, a special régime applicable when it was apparent from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties was an essential condition of the consent of each party to be bound by it. His personal view was that as soon as an international organization became a party to a treaty, it became a treaty *intuitu personae*, since no international organization was equal to a State or to another international organization. For that reason he proposed, as a general rule, the régime which constituted the exception in the Vienna Convention, and conversely, as an exception, the general rule in that Convention.

30. Referring to an observation by Mr. Ushakov, that the articles referred solely to treaties of a universal character, he said that the treaties could be general treaties, particularly regional treaties. Those treaties could also be defined, as he had defined them in paragraph 2 of his new article 19, by expressing in negative form the criteria laid down in article 20, paragraph 2, of the Vienna Convention. Then, if it did not follow either from the limited number of the negotiating States, or from the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties was an essential condition of the consent of each one to be bound by the treaty, the general rule in article 20, paragraph 1, of the Vienna Convention applied to a treaty to which an international organization was a party.

31. Mr. AGO said it was important to consider all the possible consequences of the change of régime which the Commission was preparing to accept. He had in mind the case where a treaty was adopted at a general conference in which States and international organizations were participating on terms of equality. It was not only through the operation of reservations that an international organization might cease to be a party to that treaty; it could happen that, after the adoption of the treaty, an international organization might consider that it was not entirely satisfactory and refrain from approving it. The treaty, when ratified by the States concerned, would become a treaty concluded between States. Must it then be considered to be governed by the Vienna Convention? In his opinion it must not, because the international organizations retained the right to become parties to the treaty. If they subsequently approved it, the treaty, which would in the meantime have been governed by the Vienna Convention, would once again fall within the scope of the future convention.

32. Sir Francis VALLAT said that he was anxious that there should be no doubt as to which of the two régimes would apply. He was thinking of the possibility that a State might in the future be a party both to the Vienna Convention on the Law of Treaties and to the convention that would result from the draft articles now under discussion. Care would have to be taken to show clearly which of the two conventions would apply in a particular situation. It was essential that the Commission should clarify its views on the fundamental point of the relationship between the rights and obligations under the Vienna Convention and those provided for in the draft. That problem had only stood out sharply when the Commission had taken up the articles on reservations.

33. As he saw it, the effect of paragraph 1 of draft article 19 would be to apply to any treaty not falling under paragraph 2 the régime applicable under article 20, paragraph 2, of the Vienna Convention, if one State participated in the treaty. According to the Special Rapporteur, if an international organization participated in a treaty together with States, then of necessity the treaty became a restricted multilateral treaty in the sense of article 20, paragraph 2, of the Vienna Convention; but it was doubtful whether that was necessarily so. There might be many conferences in the future in which an organization would participate in much the same way as a State. Was it contended that, simply because a

conference was not a universal conference, even States were to be prevented from making reservations in accordance with the facilities granted to them by article 19 of the Vienna Convention? That seemed to be a very restrictive view.

34. Mr. USHAKOV said that only treaties between one or more States and one or more international organizations, excluding treaties between international organizations only, could fall within the scope of the Vienna Convention. As regards treaties between international organizations, he agreed with the Special Rapporteur that they could not be of a universal character. As for treaties in the other category, he wondered how their restricted character was to be decided. Was it the number of States or the number of international organizations which had participated in the negotiation of the treaty that had to be limited? Perhaps it would be better, in the articles on reservations, to separate treaties between international organizations, which created fewer problems, from treaties between States and international organizations, which could lead to the application of the rules of the Vienna Convention. For the latter category of treaties, a general rule might be formulated.

35. Mr. REUTER (Special Rapporteur), referring to the case envisaged by Mr. Ago, said that a general saving clause would appear to be necessary, but a decision on its wording should be left until later. In reply to Mr. Ushakov, he said that the Commission might consider examining separately the case of treaties between international organizations and that of treaties between States and international organizations. With regard to the terms to be used to describe the scope of treaties, he would suggest abandoning the adjectives "universal" and "general", which had no equivalents in the Vienna Convention on the Law of Treaties. As he had already said, it would be better to state in negative form the criteria set out in article 20, paragraph 2, of that instrument.

36. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 22 and 23 to the Drafting Committee, which would thus have before it the whole section on reservations, articles 19 to 23.

It was so agreed.

The meeting rose at 4.30 p.m.

1351st MEETING

Wednesday, 16 July 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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