

Document:-
A/CN.4/SR.1429

Summary record of the 1429th 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:-
1977, vol. I

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

point in time was the benefit to be assessed? Was it when the utilization of the debt had created property or satisfied a need, or was it later, at the time when the succession of States occurred? The benefit could have disappeared by then, for the property created by the utilization of the debt might have been destroyed in a war between two States that had led to the transfer of part of the territory of one State to the other, or in a war of national liberation that had led to the birth of a newly independent State. The notion of benefit had many facets and could be viewed from different angles.

13. As for decolonization, the case of the Cabora Bassa dam in Mozambique, mentioned by Mr. Njenga,⁶ was a borderline case; although the dam had been built for the purposes of Portuguese colonization, it could now be considered as useful to Mozambique. However, there were instances of property which had been of benefit only to part of the population of the colonial territory—for example, in Algeria, where wine growing had been a colonizers' activity specifically designed to meet the needs of the metropolitan State. Following Algeria's independence, the vines had had to be uprooted in order to reconvert Algerian agriculture, because wine production had exceeded the capacity of the national market and it had been difficult to find outlets abroad.

14. Again, port or highway infrastructures, military installations and so on might have been built during the period of colonization for the benefit of the colonizers. An industrial or agricultural complex might have been created, in the colonial context, in order to tie the colony's economy to that of the metropolitan State, since colonial development was then conceived in terms of ties to make the colonial economy dependent on the metropolitan economy. As a consequence, some economic developments, both industrial and agricultural, had proved very difficult to convert after the territory's accession to independence and had become a burden rather than a benefit. Again, highly sophisticated military bases installed by the metropolitan State in a dependent territory might be totally useless to the newly independent State. The notion of benefit was therefore difficult to define, since the economic and political courses followed by the newly independent State might be different from those which had been imposed on it by the former metropolitan State.

15. Consequently, if the aim was to apply the principles of equity, the benefits gained by the colonizers over many years or even centuries of colonization had to be taken into consideration. The case of the Cabora Bassa dam could itself be posed in such terms. Moreover, the various conferences of Heads of State or Government of the non-aligned countries, from that of Belgrade in 1961 to that of Colombo in 1976, had all talked about compensation for colonial exploitation.

16. What had to be emphasized first and foremost was the principle of equity and that meant taking into account the circumstances of each particular case, for equity did not mean equality or an automatic symmetry between the passing of property and the passing of debts. In its

judgment of 20 February 1969 in the *North Sea Continental Shelf* cases, the International Court of Justice had stated that

In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others.

The Court had added: "The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case".⁷

17. Mr. Yankov had rightly noted that the agreement between the parties should itself be equitable and, consequently, the notion of equity should also be introduced into paragraph 1. It might well be asked who was to apply the criterion of equity in the event of disagreement between the predecessor State and the successor State. In his opinion, that problem did not fall within the scope of the draft article, but was a matter for the procedure to be followed for the settlement of disputes, which would form the subject of later articles. The International Court of Justice had made a distinction between obligations of means and obligations of result. States could be required to engage in negotiations, which was an obligation of means, but they could not be required to reach an agreement, which was obligation of result.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article Z/B to the Drafting Committee.

*It was so agreed.*⁸

19. The CHAIRMAN announced that there would be a meeting of the Enlarged Bureau after the closure of the present meeting.

The meeting rose at 11.05 a.m.

⁷ *Yearbook ... 1976*, vol. II (Part Two), p. 133, document A/31/10, chap. IV, sect. B, para. (23) of the introductory commentary to section 2 of part I of the draft.

⁸ For the consideration of the text proposed by the Drafting Committee, see 1447th meeting, paras. 3 and 10, and 1449th meeting, paras. 1-3.

1429th MEETING

Friday, 27 May 1977, at 11.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

⁶ 1426th meeting, para. 21.

Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

**DRAFT ARTICLES SUBMITTED BY
THE SPECIAL RAPPORTEUR**

ARTICLE 19 (Formulation of reservations in the case of treaties concluded between several international organizations) and

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations)

1. The CHAIRMAN invited the Special Rapporteur to present the general introduction to part II, section 2, of his draft articles, as contained in his fifth report (A/CN.4/290 and Add.1) and articles 19 and 20 which read as follows:

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

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

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

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

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

2. When it appears from the limited number of the negotiating international organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

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

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

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

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

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

2. Mr. REUTER (Special Rapporteur) said that he proposed first to discuss some general problems and to recall certain matters for the benefit of the new members of the Commission.

3. At its 1974 and 1975 sessions, the Commission had adopted articles 1 to 4 and articles 6 to 18 of his draft on first reading; the text of those articles was reproduced in the Commission's report on the work of its twenty-seventh session.³ At that session, the Commission had also begun its consideration of the articles concerning reservations, more particularly articles 19 and 20. In the course of the discussion, it had emerged that those two provisions did not fully reflect the views of the Commission. For the 1976 session, therefore, in his fifth report (A/CN.4/290 and Add.1), which was now before the Commission, he had drafted a fresh introduction and proposals for articles 19 and 20. For the present session, he had prepared a sixth report (A/CN.4/298), dealing with articles 34 to 38. Once the Commission had considered articles 19 to 23, concerning reservations, contained in the fifth report it could proceed to examine articles 24 to 33 in his fourth report (A/CN.4/285) and perhaps then move on to articles 34 to 38 in his sixth report.

4. In its earlier work on the topic, the Commission had decided to keep as close as possible in its draft to the articles of the 1969 Vienna Convention on the Law of Treaties.⁴ Whenever there were two acceptable solutions, the Commission had worked on the principle that the one closer to the Vienna Convention was to be preferred.

5. There were two good reasons for a set of draft articles on the present topic. First, to have extended the Vienna Convention to cover treaties concluded by international organizations would have entailed serious drafting problems, as the United Nations Conference on the Law of Treaties had quickly realized. Second, while some articles posed no problem for the Commission, for example, those which differed little, if at all, from the corresponding provisions of the Vienna Convention, others were very difficult, for example, article 6, concerning the capacity of international organizations to conclude treaties.

6. As was clear from the title of the topic, the Commission had to deal both with treaties concluded between States and international organizations and with treaties concluded between two or more international organizations. For the sake of simplicity, it had sought to cover categories of treaties in one and the same provision, whenever such a course had been possible. However, for reasons either of form or of substance, the two categories sometimes had to be considered separately. The

³ *Yearbook ... 1975*, vol. II, pp. 171-183, document A/10010/Rev.1, chap. V, sect. B, subsect. 1.

⁴ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention is hereafter referred to as the "Vienna Convention".

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

reasons of substance all related to the nature of international organizations. The Commission felt, as he did, that it would be a mistake to assimilate international organizations to States. In point of fact, it was not clear what exactly an international organization was. For the purposes of the articles that had already been adopted, the Commission had taken the definition given in the Vienna Convention, that an international organization was an intergovernmental organization. However, that definition was insufficient.

7. The Commission had decided not to consider a delicate problem that he had raised, which was that of treaties concluded by a subsidiary organ of an international organization. But although delicate, the problem did exist. For instance, the United Nations Council for Namibia, a subsidiary organ of the United Nations and the possible embryo of a future State, was participating in the United Nations Conference on the Law of the Sea and in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. As it was not uncommon for the embryo of a State to be assimilated to a State, it might be asked whether United Nations responsibility would be involved if the Council for Namibia were to sign a treaty drawn up by one of those Conferences.

8. International organizations were different from States in another respect: while States were identical in the legal concept, international organizations were very different. For the purposes of the present draft, therefore, the only points that could be considered were those that they had in common. That was the thinking underlying article 6, which, in the matter of the capacity of international organizations to conclude treaties, referred to the relevant rules of each organization. Moreover, international organizations had a composite structure: they were composed of States which remained States. An international organization which was a party to a treaty might thus find that the other parties to the treaty included some, all, or none of its member States, a situation that could give rise to formidable problems. He personally had been inclined to disregard such distinctions for one simple factual reason: the agreements in question might be headquarters agreements concluded between a State and an international organization, co-operation treaties between international organizations, or treaties between one organization and several States. But the major concern of those who had wanted to have such treaties covered by the Vienna Convention had been how to define the status of agreements on nuclear matters, in which one State supplied something, another received it, while an international organization ensured observance of the rules of international law.

9. Assistance agreements under which one State rendered assistance to another State, with the participation of an international organization, fell into the same category. Such cases were fairly straightforward compared with that of a relatively open multilateral treaty. So far, States had not agreed that an international organization might become a party to a treaty of that kind, but the Commission had already had occasion to state that such an eventuality should be taken into consideration. That

explained his approach in the drafting of article 9, paragraph 2, a "futuristic" provision which he had submitted to cover the hypothetical case of a technical multilateral convention on customs nomenclature to which States agreed that a customs union should be admitted as a party. Meanwhile, yet another step forward had been taken. The participants in the United Nations Conference on the Law of the Sea were considering articles under which the future convention on the law of the sea would be open to one or more, or even all, international organizations. The Council for Namibia had asked to participate in that Conference and he wondered whether the United Nations could participate in a treaty as the representative of a territory. At his request, the Secretariat had prepared a study on that point,⁵ and both he and the Commission had decided to exclude the question of representation from their study.

10. Another question had arisen at the United Nations Conference on the Law of the Sea. EEC had embarked on negotiations on an exclusive fishing zone with a number of States, some of which did not fully recognize the concept of a fishing zone. If the Community concluded a treaty on the subject, its member States would not be in a position to sign without reservations a treaty on the law of the sea containing provisions that fell solely within the competence of an international organization. The Commission should therefore bear that problem in mind in considering the question of reservations. When both an international organization and some of its member States were parties to a treaty, both the organization and its member States could formulate, or object to, reservations.

11. At the outset of its work, the Commission had decided to draw up a set of draft articles that was independent of the Vienna Convention. It followed that the convention which might one day emerge could enter into force independently of the entry into force of the Vienna Convention. Again, for legal reasons and for the sake of clarity, the Commission did not wish simply to refer in its draft articles to provisions of the Vienna Convention, but that decision related purely to form and, naturally, did not mean that an article of that Convention could not be reproduced word for word.

12. The question of reservations, more particularly articles 19 and 20, had revealed yet a third consequence of the autonomy of the draft, which was, in fact, of general significance. Article 3 (c) of the Vienna Convention had followed from the Conference's decision to exclude from its work treaties concluded by international organizations. Since some delegations had feared that it might be concluded from that decision that none of the rules of the Convention being prepared by the Conference would apply to that category of treaties, particularly trilateral treaties on nuclear matters, the Conference's Drafting Committee had added a subparagraph to article 3, providing that the fact that the Convention did not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law did not affect the

⁵ *Yearbook...1974*, vol. II (Part Two), pp. 8-32, document A/CN.4/281.

application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties. The Conference had therefore recognized that, in a treaty between States and one or more international organizations, it was possible to isolate purely inter-State relations, which fell under the Vienna Convention, whereas the treaty itself was not subject to the Convention. That provision gave rise to problems in the case of "integral treaties". It could be regarded either as an expedient or as reflecting a new way of looking at the situation. In the latter case, the draft would have to contain provisions specifying that purely inter-State relations were governed by the Vienna Convention. If there was no major obstacle, therefore, he would have to isolate, for each article of the draft, the inter-State relations and reproduce the relevant applicable rule of the Vienna Convention. A more straightforward solution would be to draft a general reservation on the point, once all the articles of the draft had been considered. Since the Commission could adopt that approach only after it had considered each draft article, for the time being it would have to adopt complicated provisions in the hope of simplifying them later.

13. That led him to the problem of "intermittent treaties". He had in mind the case of a treaty that had been negotiated and signed by States and international organizations and so would come under the future convention. If the international organizations concerned then refused formally to confirm their will to become parties to the treaty, the latter would become a treaty concluded between States. In that event, would it thenceforth, after having been governed by the future convention, come under the Vienna Convention? And if one of the international organizations concerned then expressed its will to become a party to the treaty, would the treaty once again be governed by the future convention? The question had already been raised in the Commission, but it had not yet been discussed at sufficient length. In his opinion, a treaty of that kind would always be governed by the future convention. The fact that an international organization was given the opportunity to become party to a treaty to which States were themselves parties was so important and extraordinary that the entire structure of such a treaty rested upon that fact. However, that was not yet the official view of the Commission.

14. With regard to articles 19 and 20, he would not repeat what he had said in the commentary in his fourth report.⁶ Quite simply, for reasons both of drafting and of substance, he had thought it preferable to provide different régimes for treaties concluded between two or more international organizations, and for treaties concluded between States and international organizations. He had also taken the view that there was no reason not to apply the rules of the Vienna Convention to treaties concluded exclusively between international organizations. Thus, the Commission would have to take a decision on two points: whether to study separately agreements between States and international organizations on the one hand and agreements between international organizations on

the other hand, and whether to apply to the latter rules which followed very closely those of the Vienna Convention.

15. As he had indicated in his commentary to article 19 (A/CN.4/290 and Add.1), the proposed wording followed faithfully the text of article 19 of the Vienna Convention, the only change being to replace the word "ratifying" by the words "formally confirming", as an expression of the will of an international organization.

16. Mr. USHAKOV said he wondered whether it was not possible to make a distinction between different categories of multilateral treaties concluded between international organizations, just as, in the case of multilateral treaties concluded between States, it was possible to distinguish between multilateral treaties of a universal character, concluded for the benefit of the whole of the international community and open to all States, multilateral treaties of a regional character, as provided for in Chapter VIII of the Charter of the United Nations, and multilateral treaties with limited participation. It was a problem that had to be considered: did not multilateral treaties concluded between international organizations also include a category of universal treaties open to all international organizations, existing or future, and a category of regional treaties concluded between, for example, organizations of African or European States? The words "or acceding to", in article 19, seemed to indicate that some agreements among international organizations might be open to other international organizations.

17. The possibilities regarding multilateral treaties concluded between States and international organizations were endless. Article 3 (c) of the Vienna Convention envisaged the possibility of an agreement between States to which international organizations were also parties, but another possibility was an agreement between international organizations to which one or more States were also parties. The difference was important with regard to reservations because, in the case of an agreement concluded between States with the participation of one or more international organizations, what was essentially involved was reservations by States whereas, in the case of an agreement between international organizations with the participation of one or more States, what was essentially involved was reservations by international organizations.

18. In article 20, paragraph 2, the expression "negotiating international organizations" raised a problem since it might be asked whether it should be understood to mean the same thing as the expression "negotiating State", which was defined in article 2, paragraph 1 (e), of the Vienna Convention.

19. Mr. AGO said that the Special Rapporteur had been right to draw attention to the need to avoid following too closely the system of the Vienna Convention with regard to reservations to treaties concluded between international organizations. He questioned whether the concept of reservations applied in the same way in the case of agreements between States and in the case of agreements between international organizations. It was difficult to conceive of a treaty concluded exclusively

⁶ *Yearbook ... 1975*, vol. II, pp. 36-37, document A/CN.4/285, general commentary to section 2 of part II of the draft.

between international organizations to which some of them might enter reservations. The purpose of reservations was to protect particular interests of a State and it was not easy to picture a situation where the need of an international organization to protect a particular interest would lead it to formulate a reservation to a multilateral treaty concluded with other international organizations. Thus, so far as reservations to a multilateral treaty confined to international organizations were concerned, it would be artificial to assimilate the situation of an international organization almost entirely to that of a State. To establish such a strict parallel would mean pushing assimilation between the régime of treaties between States and the régime of treaties between international organizations too far.

The meeting rose at 12.55 p.m.

1430th MEETING

Tuesday, 31 May 1977, at 3.05 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz Gonzáles, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/285,¹ A/CN.4/290 and Add.1,² A/CN.4/298)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 19 (Formulation of reservations in the case of treaties concluded between several international organizations) and

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations (continued)³

1. Mr. REUTER (Special Rapporteur) said that, after listening to the comments of Mr. Ago⁴ and Mr. Ushakov,⁵ he had realized that his commentary and oral introduction had not allayed all the concern expressed with regard both to basic principles and to drafting

problems. For example, Mr. Ago had said that he did not see what practical scope a reservation to a treaty concluded between international organizations would have, since relations between international organizations seemed to him to be very different from relations between States, while Mr. Ushakov had asked about the specific nature of the various types of multilateral treaties concluded between international organizations. He therefore intended first to review the types of treaties covered by articles 19 to 23 and then to consider the consequences of such different types of treaties, in the matter of reservations.

2. With regard to Mr. Ushakov's question concerning the different types of treaties, he said that, for the purposes of the draft articles, he had already made a distinction between treaties concluded between States and international organizations and treaties concluded between two or more international organizations. That distinction was, however, inadequate because, as was implied in articles 19 and 20 of the Vienna Convention,⁶ a distinction also had to be made between "open" treaties of universal character and "closed" treaties of restricted character.

3. Of the various types of possible treaties, however, some already existed but others did not. It was a question whether the latter types of treaties could be expected to exist either in the relatively near future or in the very distant future. The problem was thus to decide whether rules should be formulated only for types of treaties which already existed and of which examples could be given, or whether rules should be formulated for types of treaties which were merely possible, ruling out the types of treaties which were theoretically possible but could not be expected to exist in the sufficiently near future.

4. The position he had adopted on that question was that the Commission must not confine itself to existing types of treaties but must also consider other possible types of treaties, although it should rule out those which could not be expected to appear until the very distant future and would require the formulation of rules whose consequences could not yet be foreseen.

5. He had reached the conclusion that it was difficult to imagine an international organization whose members were States and one or more international organizations, or whose members were all international organizations. Indeed, such an extremely remote possibility would be contrary to the definition given in article 2, paragraph 1 (i),⁷ which stated that an "international organization" meant "an intergovernmental organization". He had therefore not proposed, in draft articles 20 and 20 bis, a provision corresponding to the one contained in article 20, paragraph 3, of the Vienna Convention.

6. The Commission should, however, look ahead and try to allay the concern of international organizations, which feared that the future convention might hamper their development. The draft articles should provide a framework for the accommodation of the international organizations rather than impose something on them.

¹ *Yearbook ... 1975*, vol. II, p. 25.

² *Yearbook ... 1976*, vol. II (Part One), p. 137.

³ For texts, see 1429th meeting, para. 1.

⁴ 1429th meeting, para. 19.

⁵ *Ibid.*, paras. 16-18.

⁶ *Ibid.*, foot-note 4.

⁷ *Ibid.*, foot-note 3.