Document:-

A/CN.4/SR.1431

Summary record of the 1431st 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

administrative matters, decisions on such matters and on future work would need to be taken earlier. The Planning Group, which it was agreed in principle should be established again during the current session, should now be set up to consider the Commission's future programme and methods of work, and report to the Enlarged Bureau, by which any appropriate matters should be submitted to the Commission.

41. If there were no objections, he would take it that the Commission agreed to establish a Planning Group, with Mr. Sette Câmara as Chairman, and Mr. Ago, Mr. Dadzie, Mr. Schwebel, Mr. Tsuruoka and Mr. Ushakov as members.

It was so agreed.

Organization of work (*continued*)[8]

42. The CHAIRMAN said that a decision would be required shortly on the question of dividing the Commission's report into two parts, one relating to administrative matters and the other to the various sets of draft articles.

43. Mr. FRANCIS said it had been his impression that, although the report would be divided into two parts, one part would not necessarily be confined to administrative matters.

44. Mr. VEROSTA said that the Sixth Committee might be disappointed if the first part of the report, which could be prepared towards the end of June, did not include at least one of the substantive items on the Commission's agenda.

45. The CHAIRMAN said that it might prove convenient to Governments to consider the two parts as if they were separate reports: in that way, one government department would be concerned with the administrative aspects only of the Commission's work, while another department considered the draft articles. However, the matter still had to be considered by the Enlarged Bureau.

The meeting rose at 6 p.m.

[8] See 1416th meeting, paras. 47 and 48.

1431st MEETING

Wednesday, 1 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, 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) [3] (*continued*)

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

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations) [4] (*continued*)

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

1. The CHAIRMAN, noting that there were questions of principle which were common to all four articles, invited the members of the Commission to comment not only on articles 19 and 20, which had already been formally introduced by the Special Rapporteur but also on articles 19*bis* and 20*bis*, which read:

Article 19bis Formulation of reservations in the case of treaties concluded between States and international organizations

1. In the case of a treaty between States and international organizations, a reservation may be formulated by

a State, when signing, ratifying, accepting, approving or acceding to the treaty, or

an international organization, when signing, formally confirming, accepting, approving or acceding to the treaty,

only if the reservation is expressly authorized either by the treaty or in some other manner by all the contracting States and international organizations.

2. Notwithstanding the rule laid down in the preceding paragraph, in the case of a treaty concluded between States and international organizations on the conclusion of an international conference in the conditions provided for in article 9, paragraph 2, of these draft articles, 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,

a reservation may be formulated by

a State, when signing, ratifying, accepting, approving or acceding to the treaty, or

an international organization, when signing, formally confirming, accepting, approving or acceding to the treaty, unless:

(*a*) the reservation is prohibited by the treaty;

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

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

[3] For text, see 1429th meeting, para. 1.

[4] *Idem.*

(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 subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

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

1. A reservation expressly authorized either by a treaty or in some other manner by all the contracting States and international organizations does not require any subsequent acceptance by the other contracting States or international organizations unless the treaty so provides or it is otherwise agreed.

2. In the case falling under article 19*bis*, 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 or when the treaty is in force for those 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 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 paragraph 2 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after notification of the reservation was received or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

2. Mr. CALLE Y CALLE said that the very lucid explanations given by the Special Rapporteur and other speakers, especially Mr. Ago,[5] had shed light on the extremely difficult and complex question of reservations and had set it in its proper perspective.

3. In his fourth report, the Special Rapporteur had said that the articles of the Vienna Convention [6] which dealt with reservations were clearly one of the principal parts of that Convention on account of both their technical preciseness and the great flexibility which they had introduced into the régime of multilateral conventions. He had gone on to suggest, in a fairly categorical manner that there was no reason to put international organizations in a situation different from that of States in the matter of reservations, for it was the quality of being a "party" to a treaty which governed the whole system of reservations, and it therefore followed, from the definition of that term given in draft article 2, paragraph 1 (*g*),[7] that an international organization which could be so described was placed on exactly the same footing as a State. He had added:

> ... it cannot be accepted without precautions that an organization should be party to a treaty at the same time as its own members; either a situation of this kind must be governed by special rules, or else it must be ensured that the areas of competence of the organization and of its member States are clearly defined ....[8]

4. That was so because of the risks of conflict between the positions of States as sovereign entities and as members of the organization concerned, or between the positions which an individual would be expected to hold as a representative of his country on the one hand and as an official of the organization on the other. Such a risk of conflict was all the more likely as international organizations were established for specific purposes which, as Mr. Ago had pointed out, they were bound by their own rules to pursue. It was for those reasons that the Special Rapporteur now felt that, where international organizations were concerned, it would not be sufficient to reproduce the corresponding articles of the Vienna Convention, as he had done in his fourth report. Consequently, he now proposed in article 19 a text similar to that of the corresponding article of the Vienna Convention, and in article 19*bis* a separate and less liberal régime to cover the case of treaties concluded between States and international organizations. The second paragraph of article 19*bis* referred to article 9, paragraph 2, which laid down the conditions for the adoption of the text of a treaty between States and one or more international organizations. That being so, he (Mr. Calle y Calle) considered that article 19*bis*, paragraph 2, related not to the formulation of reservations, which was an operation which took place independently of and later than the adoption of a text, but to the conditions which would apply to the adoption of a text which permitted or prohibited reservations.

5. His own view was that the formulation of reservations by international organizations should be subject to a fairly liberal régime. Since international organizations had contractual capacity by reason of their functions, and were accountable for their use of that capacity to their member States, they should be allowed to establish limits to their obligations through the mechanism of reservations. He did not think that they would abuse such a freedom, since they were limited by their constituent instruments and were ultimately controlled by their member States.

6. The international organizations should be asked to express their opinions on the four articles the Special Rapporteur was now proposing, for they had already expressed concern at the elaboration of the draft articles as a whole and were likely to be even more concerned at the elaboration of provisions concerning reservations.

7. Mr. SETTE CÂMARA said that the Special Rapporteur's fifth report (A/CN.4/290 and Add.1) provided not only another example of the exceptional quality of his work but also an illustration of his openness to the views of other members of the Commission and of representatives in the Sixth Committee, for by comparison with the corresponding portion of his fourth report (A/CN.4/285), he had revised the entire section dealing with reservations.

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[5] 1429th meeting, para. 19; 1430th meeting, paras. 26-29.

[6] See 1429th meeting, foot-note 4.

[7] *Ibid.*, foot-note 3.

[8] *Yearbook ... 1975*, vol. II, p. 37, document A/CN.4/285, second part of the draft articles, sect. 2, paras. 1, 2 and 4 of the general commentary.

8. In his fourth report, the Special Rapporteur had proposed for the problem of reservations very simple solutions which, in accordance with the agreed methodological approach, closely followed the corresponding articles of the Vienna Convention. Those solutions had been based on the premise that the participation of international organizations in multilateral treaties between States was still extremely rare, and that the problem of reservations was therefore of no immediate practical interest. However, even while advocating the extension to treaties involving international organizations of the liberal régime provided in respect of reservations by the Vienna Convention, the Special Rapporteur had not omitted to point out the very complicated problems which could arise when both States and an international organization of which they were members were parties to the same treaty. As he had said in his fifth report, the adoption by the Commission of draft article 9, paragraph 2 (which concerned the adoption of the text of a treaty by an international conference in which one or more international organizations participated) had prompted him to embark on the search for provisions to cover the real possibility that international organizations might be permitted to participate in multilateral treaties.[9]

9. It was clear from the fifth report that the liberal régime of the Vienna Convention, if widely applied to treaties between States and international organizations of which those States were members, could lead to a chaotic situation. That suggested that the solution was to accept the abandonment of the principle of freedom to formulate reservations, which the Special Rapporteur had proposed in paragraph 5 of that report and concerning which he had said that it was "designed not to abolish freedom to formulate reservations, but to oblige parties to consider [its] consequences... before adopting it in each particular case". At the same time, the Special Rapporteur had recognized, in paragraph 16 of the same report, that the situation with regard to treaties between two or more international organizations was different, and had concluded that organizations which were parties to such agreements could therefore be given the same freedom with regard to reservations as was granted to States by the 1969 Vienna Convention.

10. It was on the basis of that reasoning that the Special Rapporteur proposed two sets of articles: articles 19 and 20, which were devoted to treaties concluded between two or more international organizations, and articles 19*bis* and 20*bis*, which were devoted to treaties concluded between States and international organizations. The Special Rapporteur had emphasized in paragraph 23 of his fifth report that he was "proposing a quite strict general reservations régime, with exceptions; but in his approach, liberalism and severity apply in the same manner to States and to international organizations".

11. The Special Rapporteur had discussed at length in his fifth report the problems which had already been raised in previous discussions of the Commission concerning the applicability of article 3 (*c*) of the Vienna Convention and the relationship between that provision and article 3 (*c*) of the present draft. He had concluded, in paragraph 24 of that report, that those problems could be solved if the present draft articles constituted a complete whole, or in other words, if they defined "a reservations régime applicable in relations between two States parties to a treaty between States and international organizations". In the opinion of the Special Rapporteur, it was that régime, and not the provisions of the Vienna Convention, which would be applicable. The Special Rapporteur proposed that the situation should be made clear by the insertion in the draft articles of a provision precluding for States parties to the convention deriving from those articles and to the Vienna Convention the application of article 3 (*c*) of the latter instrument. However, the problem of the boundaries between the two conventions was one of great importance, which certainly went beyond the problem of reservations proper, and it was therefore one on which he himself preferred to reserve his position.

12. He had no disagreement with the substance of article 19 as proposed by the Special Rapporteur. However, the phrase "several international organizations", which appeared in both the title and the text of the article, should be replaced by the phrase "two or more international organizations", which were the words used in the title of the agenda item. He agreed that draft article 19 could be referred to the Drafting Committee.

13. Nor had he any disagreement with article 19*bis*, which limited to certain specific instances the faculty of international organizations to formulate reservations to treaties concluded between themselves and States. With regard to paragraph 2 of that article, the suggestion by Mr. Calle y Calle concerning the effect of the reference to article 9, paragraph 2, merited attention. The hypothesis advanced in paragraph 2 of article 19*bis* was very reasonable, as could be judged from the fact that the United Nations Council for Namibia had participated on a par with States, and at their invitation, in the recent United Nations Conference on Succession of States in respect of Treaties.

14. He supported the suggestion by Mr. Calle y Calle that efforts should be made to ascertain the views of international organizations concerning the Special Rapporteur's proposals with regard to their capacity to formulate reservations.

15. Mr. NJENGA said that, while he could accept generally the Special Rapporteur's approach to the problem of reservations, he did have some doubts for, however closely the role of international organizations might be approximated to that of States, it must never be forgotten that international organizations and States constituted two entirely different categories of subjects of international law. Consequently, the limitation which draft article 6 placed on the capacity of international organizations to conclude treaties did not apply to States, which, as sovereign entities, had full powers to enter into such agreements as they chose. He assumed that the Commission had already dealt with the problem of the situation where an international organization desirous of concluding a treaty did not have the "relevant rules" referred to in article 6; his own view was that an international organization should not be excluded from concluding treaties solely because it did not have written

[9] A/CN.4/290 and Add.1, para. 9.

rules. There remained, however, the limitation on its treaty-making power which derived from the purpose of an international organization; he did not believe that such an organization should be considered competent, merely because it was a subject of international law, to conclude a treaty which had no connexion with its own function, let alone enter reservations to that treaty.

16. Perhaps, however, that problem did not arise with respect to articles 19 and 20, since treaties concluded between international organizations would presumably concern matters of relevance to their respective fields of competence. Moreover, such treaties would probably be restricted treaties and therefore of interest to all their parties, who should, logically, be given an equal right to formulate reservations. Given that articles 19 and 20 referred to restricted treaties, he agreed that they should speak not of "treaties concluded between several international organizations", but of "treaties concluded between two or more international organizations".

17. The list of restrictions placed on international organizations by article 19*bis* was acceptable, but perhaps not exhaustive. For example, it could be said that the United Nations Council for Namibia had been permitted to participate in the United Nations Conference on Succession of States in respect of Treaties because it was seen as the representative of a potential sovereign entity and that, as such, it should be treated no differently from fully-fledged States with respect to power to conclude treaties or formulate reservations. The Council would probably be treated in that way at the forthcoming session of the United Nations Conference on the Law of the Sea, but the situation of EEC, which it had already been proposed should be admitted as a party to the eventual convention on the same subject, was very different. The proposal concerning EEC had presumably been made essentially because the members of the Community had entrusted to it the handling of their common fishery policy. He doubted very much whether the Community should be permitted to enter reservations to the eventual treaty on any subject other than fisheries, for all other matters would fall outside its competence.

18. He would, therefore, like the Special Rapporteur to comment on the suggestion that the capacity of an international organization to enter reservations to a treaty should be limited not only by the existing provisions of article 19*bis* but also by the conditions that the reservation should relate to a matter pertinent to the object and purposes of the organization concerned.

19. Mr. SCHWEBEL said that he was sympathetic to the views expressed by both Mr. Njenga and Mr. Calle y Calle. In principle, he favoured the view of Mr. Calle y Calle that the status and potential of international organizations should be enhanced, and that their capacity to enter reservations to treaties to which they were parties should therefore be subject to a flexible régime. On the other hand, he had doubts about the practical impact of such an approach, especially in so far as international organizations continued to operate on the basis of equal votes for all their members. Furthermore, it was his impression that, generally speaking, the treaty-making power of international organizations was not at all well-defined, and that the constraints on that power were equally obscure. Even in the case of the United Nations, the Charter gave no clear indication as to the Organization treaty-making power. Perhaps, however, the *Reparation* case [10] could be seen as inferring that international organizations generally, and certainly the United Nations in particular, were authorized to conclude treaties. Mr. Calle y Calle had been right in saying that there were practical constraints on the use of that power, but it was hard to be sure just how small was the likehood that international organizations would use their power to formulate reservations in a manner contrary to their members' interests. In all, he favoured the approach to the question of reservations adopted by the Special Rapporteur. He saw merit in the suggestion by Mr. Calle y Calle that the international organizations should be asked to state their views on the Special Rapporteur's proposals.

20. Mr. TABIBI said he fully agreed with the Special Rapporteur that, when considering the adoption of a reservations régime, the Commission should make a political choice rather than a choice based on international law, which would raise a host of difficult legal problems. As Mr. Schwebel had remarked, the treaty-making power of international organizations was not clearly defined. The question arose whether international organizations were equal to States in regard to the conclusion of treaties, a question which was particularly complex in the case of a treaty between a State and an international organization. Another difficulty, as the Special Rapporteur had observed, was raised by the case in which reservations to a treaty were formulated by a State member of an international organization which was itself a party to the treaty.

21. At a time when there were already more than 200 international organizations in existence and their membership was constantly increasing, it was necessary to devise rules which would facilitate the operation of such organizations and serve the needs of the community of nations. The activities and objectives of international organizations were for the benefit of mankind as a whole, and such organizations represented the collective voice of States, which should be respected. For that reason, he favoured the approach adopted by the Special Rapporteur and believed that the Commission had no choice but to accept the régime he proposed. He had no substantial disagreement with the wording of the provisions under consideration.

22. Mr. TSURUOKA said that he agreed with the Special Rapporteur that the Commission should take account of both existing treaties and treaties to which international organizations might be parties in future and that, in preparing the draft articles, it should take care not to hamper the natural development of the activities of international organizations. Indeed, in the matter of reservations, such development was particularly rapid.

23. He had no difficulty in accepting articles 19 and 19*bis*. The rules the Commission was formulating were residuary rules and the principle of the freedom of action

[10] Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: *I.C.J. Reports 1949*, p. 174.

of the parties was always safeguarded. The liberal approach on which article 19 was based was in keeping with the Vienna Convention and should not constitute an obstacle to the natural development of the activities of international organizations. He fully supported the restrictive rule which the Special Rapporteur had proposed in article 19*bis*. The liberal solution which the United Nations Conference on the Law of Treaties had eventually adopted for reservations had been the result of a difficult compromise between the supporters of a liberal approach, who had taken the view that a liberal régime would encourage States to accept certain treaties, whereas a restrictive régime would discourage them from doing so, and the supporters of a restrictive régime, whose view was that treaties of universal character were the result of compromises reached after lengthy negotiations and that any reservation could upset the balance thus achieved. The supporters of a restrictive régime had also said that it was not unusual for States pursuing short-sighted policies to formulate reservations for discreditable reasons. Article 19 which had emerged from those discussions required some sacrifice on the part of States, but it benefited the international legal order.

24. Article 19*bis* proposed by the Special Rapporteur stated a general restrictive rule, subject to an important exception. It was a well-balanced provision, which should not hamper the harmonious development of international organizations. It covered the case to which the Special Rapporteur had referred at the previous meeting, where one or two States concluded a treaty with an international organization and objected to the reservations which the organization wanted to formulate; if the treaty related to assistance to be provided by the international organization, its object and purpose would be defeated. A case of that kind was also, and especially, covered by article 19 (*c*) of the Vienna Convention, which provided that a reservation must not be incompatible with the object and purpose of the treaty.

25. With regard to the suggestion made at the previous meeting by Mr. Ushakov,[11] that, in the case of treaties concluded between States and international organizations, States should be subject to a liberal régime and organizations to a restrictive régime, he thought that such a solution offered practical advantages, even though it might seem strange to have two categories of parties to the same treaty.

26. Mr. USHAKOV said that, in his opinion, the question whether an international organization and its member States could, as parties to a treaty, formulate different reservations was not a real problem because, first, the capacity of international organizations to conclude treaties was always very limited and, second, the risk of an overlap of competence between an international organization and its member States was no concern of the Commission.

27. The Commission must, however, limit the capacity of international organizations to formulate reservations. For example, if the United Nations became a party to the future convention on the law of the sea, it was obvious that it would not be able to formulate reservations on matters which did not concern it directly, such as the limits of the territorial sea, the exclusive economic zone or the right of passage through channels and straits. It was therefore necessary to know exactly to what rules international organizations could formulate reservations. The simplest solution would be to provide for a *renvoi* to the treaty. If the treaty was silent on the point, as was often the case, it was then the general rule which would apply. That rule should be that an international organization could formulate reservations to a treaty only if the treaty did not prohibit it from doing so. Thus, if EEC, which was competent to represent its member States for the purposes of concluding certain categories of treaties, such as economic treaties, became a party to the future convention on the law of the sea, it would not be competent to formulate reservations to all the clauses of that instrument. If it were, any conflict of competence between it and its member States would be an internal conflict which would not concern the Commission, since the Commission could not lay down rules governing the internal relationships between international organizations and their members. It was therefore important that international organizations should be subject to special rules and be able to formulate only the reservations expressly provided for in treaties.

28. Mr. EL-ERIAN said he agreed with the approach adopted by the Special Rapporteur in making a distinction between the reservations régime applicable to treaties between States and international organizations, and the reservations régime governing treaties between two or more international organizations. By and large, the formulation of the draft articles took into account the differences between those two situations.

29. With regard to the suggestion by Mr. Calle y Calle and Mr. Sette Câmara,[12] that the Special Rapporteur should seek the views of international organizations, it would certainly be worth making the attempt, even though the organizations might be reluctant to express an opinion on matters where the practice was almost non-existent. The Special Rapporteur had, in fact, already conducted certain consultations with international organizations, and he might perhaps enlighten the Commission as to whether he had followed the practice which had been adopted in connexion with the draft articles on the representation of States in their relations with international organizations, namely, to ascertain the views of such organizations on his reports and on the draft articles.

30. Mr. QUENTIN-BAXTER said that the subject under consideration raised the complex problem of the balance to be struck between codification and the progressive development of international law. Practice was clearly inchoate and incomplete, and in some cases also arcane. To adopt too timid an approach would be to impose a strait jacket on the future development of the law, while to follow too bold a course would mean building an edifice based on only a few known facts.

31. Perhaps the most fundamental consideration was what the members of the Commission thought the nature of an international organization to be. Clearly, the cha-

[11] 1430th meeting, para. 36.

[12] 1431st meeting paras. 6 and 14.

racter of such an organization was quite different from that of the States which created it. Although States themselves were to some degree an abstraction which, as could be seen from the Charter of the United Nations, existed for the benefit of their peoples, international organizations represented an even higher degree of abstraction. In a general context, therefore, such organizations were not to be compared with States. That did not, however, mean that, in a specific context, an international organization did not carry as much weight as, or even greater weight than, States. For instance, the relationship between international finance institutions and individual States members of those organizations which applied to them for supplementary financing was reminiscent of the relationship between banker and client. In such cases, organizations, responding to the collective will of their member States, were required by those member States to negotiate on terms of equality and even of superiority with individual States.

32. In the light of that basic consideration, certain questions came to his mind in connexion with article 19*bis*. First, was it right that, under the provisions of paragraph 1, States should be removed from the ambit of the reservations régime laid down by the Vienna Convention, merely because an international organization or organizations participated in a treaty concluded as a result of an international conference? Second, did the provisions of article 9, paragraph 2, under which the adoption of the text of a treaty between States and one or more international organizations at an international conference was subject to a two-thirds majority, provide sufficient relief from the rigour of the rule laid down in article 19*bis*, paragraph 1? Third, was it really necessary to provide for full equality of rights concerning the making of reservations as between States and international organizations, even when the latter were or might become parties to the same treaty?

33. He found it very difficult to envisage many circumstances in which the case covered by article 9, paragraph 2, would in fact occur. He could conceive of cases where the consideration of a treaty might involve the participation of one or more international organizations. The most obvious example was perhaps international finance agencies, but the United Nations might also play a role in relation, for instance, to the sea-bed, or any specialized agency in relation to a matter within its competence. In such a case, the community of States would conduct negotiations designed to lead to the conclusion of a treaty at an international conference in which international organizations having a competence basic to the purpose of the conference would play a very important and perhaps even a dominating role. He thought it unlikely, however, that such a conference would accord voting rights to the organization or organizations concerned, or that the latter would wish to have such rights. It was customary, in cases of that kind, for treaties to be adopted by a two-thirds majority of States participating in the conference. Moreover, it might be presumed that participating international organizations would not wish the outcome of the conference to turn on their votes.

34. The situation was much the same in the case of a regional conference involving, say, the participation of WHO and the States of the South Pacific region, although it might be somewhat different in the case where an international organization in a sense represented member countries which had vested competence in it. It was possible, for instance, to conceive of circumstances in which EEC as such would participate in a conference, although even there it was difficult to envisage absolute equality in the matter of voting rights. In any event, it would be quite wrong to remove from the scope of the rules laid down in the Vienna Convention the States which furnished the vast majority of participants in an international conference convened to elaborate a new treaty instrument. Such States should surely be governed, at least among themselves, by the rules of that Convention. In regard to methodology, he subscribed to the approach adopted by the Special Rapporteur in reproducing, where necessary, the provisions of the Vienna Convention rather than merely making reference to that instrument.

35. He was not persuaded that it was necessary to provide for full equality of treatment in regard to the formulation of reservations as between States and international organizations, even when they were parties to the same treaty. The manner in which States and international organizations participated in a treaty was invariably different, and obligations fell on such organizations in different ways from what they did on States. He was inclined to think that, in article 19 as well as in article 19*bis*, it might be appropriate to adopt a rather stricter reservations régime than that laid down in the Vienna Convention. In the case of multilateral treaties concluded between States, it was customary for States to be able to formulate reservations regarding not the object and purpose of the treaty but lesser matters where an element of chance and arbitrariness might have been involved. He had in mind, in particular, the proceedings of large multilateral conferences at which, at some time or other, votes were taken on particular provisions of the draft treaty. It was quite proper that a State should be able to make incidental adjustments in cases of that kind by entering reservations. International organizations, on the other hand, were bound not only by the basic clauses of a treaty relating to its object and purpose but also by the limitations imposed by their own constituent instruments. While every effort should be made to make provision in a treaty for restrictions of that kind, it was not always possible to determine with precision what the relationship between the provisions of a treaty and those limitations would be. Although he held no hard-and-fast views on the subject, it did seem to him that that might be an argument in favour of adopting a rather stricter rule concerning reservations formulated by international organizations.

36. Mr. DADZIE said he wished to associate himself with the views expressed by Mr. Ushakov and Mr. Ago. In particular, he believed that account should be taken of two distinct situations: the case in which States were parties to a treaty to which a limited number of international organizations also subscribed, and the case in which international organizations were parties to a treaty to which a limited number of States also subscribed. In the former case, the reservations régime should be

based on the liberal rules laid down in the Vienna Convention, in the latter, provision should be made for the consent of States parties so as to safeguard their position vis-à-vis the international organizations which were parties to the same treaty. Although he could not imagine that, in the case of a treaty involving both States and international organizations, such organizations would formulate reservations on matters of no concern to them, it was better that provision should be made for such an eventuality. In any event, he agreed with Mr. Quentin-Baxter that international organizations should not be placed on the same footing as States in regard to the formulation of reservations.

37. In his introductory statement, the Special Rapporteur had referred to the case of a treaty between States and an international organization in which the organization failed formally to confirm the treaty, thus leaving only States as parties to it.[13] In such a case, was it the provisions of the draft articles or those of the Vienna Convention which should apply? In his view, if it was envisaged that an international organization would at some later stage become a party to the treaty, the rules laid down in the draft articles should apply; if, on the other hand, no such possibility was envisaged, States should then be free to decide whether they would rather be governed by the rules of the Vienna Convention. In the latter case, it would not be fair to insist that States should not avail themselves of their rights under the Vienna Convention but should have to resort to a convention envisaging a situation involving States and international organizations.

38. Mr. ŠAHOVIĆ said that the Special Rapporteur's proposals concerning reservations were logical because they were in keeping with the basic principles already adopted by the Commission. Indeed, those proposals should be viewed in the context of the articles which had already been adopted, particularly article 6 relating to the capacity of international organizations to conclude treaties, and article 9, paragraph 2.

39. Article 6 met a number of the points raised by members of the Commission with regard to the action relating to reservations which international organizations might take under the agreements they concluded with States. The capacity of an international organization to conclude treaties (which, according to article 6, was governed by the relevant rules of the organization) involved not only the act of concluding treaties but also the whole process pertaining to that act. Account should therefore be taken of such capacity in the articles relating to reservations.

40. The solution to the problem of reservations to treaties concluded between States and international organizations which the Special Rapporteur had proposed in article 19*bis*, paragraph 2, was the direct consequence of the rule enunciated in article 9, paragraph 2, of the Vienna Convention.

41. His answer to the question whether, under article 3 (*c*) of the Vienna Convention, the system provided for in that Convention could be applied to agreements between States and international organizations was that it could. The Special Rapporteur had explained the scope of that provision very clearly in his fifth report, which stated that "it was to be only a transitional measure designed partially to fill the gap created by the fact that the scope of the [Vienna] Convention is limited to written treaties between States". (A/CN.4/290 and Add.1, para. 24.)

42. With regard to the relationship between the Vienna Convention and the draft articles, the Commission had agreed that international organizations possessed capacity to conclude treaties with States. The problem was now whether, and how, such capacity should be limited. In his opinion, States must solve that problem within the various international organizations and the Commission should disregard it.

43. Mr. Ushakov's proposal to apply a more restrictive rule to international organizations [14] was interesting, as was Mr. Tsuruoka's comment on the different régimes which applied to States and to international organizations. He nevertheless thought that, if the Commission agreed that two different régimes were applicable, it would be introducing an element of discrimination in the draft articles which might undermine their foundation. The draft articles must be based on a presumption of the full equality of the parties to treaties.

44. With regard to the method to be followed, the Commission should wait until the end of the discussion of all the articles relating to reservations before referring articles 19 and 19*bis* to the Drafting Committee and taking a final decision on them.

45. With regard to the proposal to consult international organizations about the problem of reservations, he thought they should be consulted not only about that problem but also about the draft articles as a whole, and that the Commission should wait until it had completed its work before embarking on such consultations.

46. The CHAIRMAN said that the question how far the Commission should go in its consideration of the draft articles before referring provisions to the Drafting Committee raised something of a problem. His own estimation was that the Commission needed to cover articles 20 and 20*bis* before referring any provisions to the Drafting Committee, since those articles were closely interrelated with articles 19 and 19*bis*. On the other hand, he would be reluctant to carry the debate further than the four articles in question, which raised points that the Drafting Committee could perfectly well consider.

47. Mr. REUTER (Special Rapporteur) said he thought that the Commission should continue the general debate on articles 19, 19*bis*, 20 and 20*bis*, but that, once the general debate had been completed, it should, as a first step, refer those articles to the Drafting Committee, which in any case would have to come back to them later. There would then be two possibilities open to the Commission: either it could consider the other articles relating to reservations, numbered 21, 22 and 23, which might be affected by the position adopted with regard to articles 19, 19*bis*, 20 and 20*bis*, or it could go on to the following articles, which were less difficult than the articles relating

[13] 1429th meeting, para. 13.

[14] 1430th meeting, para. 36.

to reservations, which it could refer to the Drafting Committee.

48. With regard to the possibility of consulting international organizations, which had been mentioned by Mr. Calle y Calle and other members of the Commission, he thought that, for the time being, there could be no question of holding formal consultations with international organizations on the subject of reservations. The Commission had already held general consultations on the draft articles as a whole and, as Mr. Šahović had very rightly pointed out, it was not possible formally to consult international organizations in connexion with each point. The Commission had made it very clear that only a small number of international organizations in the United Nations system would be consulted, even though such a decision would deprive it of some potentially very interesting observations by other international organizations. Finally, the consultations which had been held had been with officials of the secretariats of the organizations, who had been hard put to reply to some of the questions asked, whereas it was the principal organs of the organizations which would have been competent to express an opinion on questions with a significant political background. The replies to the questions asked by the Commission during the general consultations had shown that those questions had not always been fully understood by the international organizations and that some of them had had repercussions in their internal administrations. That seemed to prove that the organizations expected the Commission to give them more detailed information than they could give to it.

49. If two opposing trends emerged within the Commission concerning the system of reservations, it would be necessary to draft two different versions for each article and then submit them to the international organizations for their consideration.

The meeting rose at 1 p.m.

1432nd MEETING

Thursday, 2 June 1977, at 11.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, 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), [3]

ARTICLE 19*bis* (Formulation of reservations in the case of treaties concluded between States and international organizations), [4]

ARTICLE 20 (Acceptance of and objection to reservations in the case of treaties concluded between several international organizations) [5] *and*

ARTICLE 20*bis* (Acceptance of and objection to reservations in the case of treaties concluded between States and international organizations) [6] (*continued*)

1. Mr. VEROSTA said that, in his sixth report, the Special Rapporteur had himself emphasized that "certain secondary details in the articles of the Vienna Convention derive from the fact that the effects in question are to operate with respect to *sovereign* subjects of law, namely, States, whose sovereignty must be carefully respected, whereas in the draft articles consideration must also be given to the effects which are to operate with respect not to sovereign States but to subjects of law which are wholly subject to the service of a *function*, as internationally defined in relation to States". (A/CN.4/298, para. 25.) That passage was extremely important and should appear at the beginning of the commentary to the articles under consideration, because it showed the limits within which international organizations could be assimilated to States. States were sovereign subjects of international law, whereas international organizations were the creations of States, in other words, subjects of international law by derivation, which were, as the Special Rapporteur had stated, wholly subject "to the service of a function, as internationally defined in relation to States", a definition to which the words "and by States" might even be added.

2. During the 1920s, after the founding of the League of Nations, some international organizations had begun to be accorded a position of exaggerated importance. That tendency had been reinforced by Kelsen's theory and had developed, after the Second World War, with the proliferation of international organizations. But in his *Théorie et réalités en droit international public*,[7] Charles de Visscher had demonstrated the fundamental role of States and the limited role of international organizations in international society.

3. International organizations could conclude treaties only within the narrow limits of their functions, as defined in the treaty concluded by the founder States, which was the constituent instrument of every international orga-

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

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

[3] For text, see 1429th meeting, para. 1.

[4] For text, see 1431st meeting, para. 1.

[5] For text, see 1429th meeting, para. 1.

[6] For text, see 1431st meeting, para. 1.

[7] 4th ed. (Paris, Pédone, 1970).