Document:-

A/CN.4/SR.1451

Summary record of the 1451st 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

"the treaty". To avoid problems of interpretation, subparagraph (*a*) had been drafted in terms that were closer to those of the corresponding provision of the Vienna Convention, namely, paragraph 4 (*a*) of article 20; three cases of the entry into force of treaties were now covered. Subparagraph (*b*) had also been brought closer into line with the corresponding provision of the Vienna Convention, and four cases were provided for. The new draft of that provision was cumbersome but had the merit of being precise, and it seemed that in that case precision should take precedence over elegance of style.

55. He suggested that, in paragraph 4, the words "a contracting State or organization" should be replaced by the words "a contracting State or a contracting international organization".

56. Mr. FRANCIS observed that no provision of the kind contained in article 20, paragraph 3, of the Vienna Convention appeared in either article 20*bis* as proposed by the Special Rapporteur in his fifth report (A/CN.4/290 and Add.1) or article 20*bis* as proposed by the Drafting Committee. In the commentary to article 20*bis* in his report, the Special Rapporteur had discussed that omission in the context of the improbability of the formation by two international organizations, in the foreseeable future, of a third international organization of which they themselves would be the sole members. He did not remember whether the Special Rapporteur had also commented at any stage on the possibility of the existence of an international organization comprising States and one international organization; he would be grateful for clarification on that point for it seemed to him that, if such an organization could exist, a provision akin to that of article 20, paragraph 3, of the Vienna Convention should be included in article 20*bis* of the draft.

57. The fact that article 20*bis*, paragraph 2, proposed by the Drafting Committee referred only to the "object and purpose" of a treaty, whereas article 20, paragraph 2, of the Vienna Convention referred to both the "object and purpose" of the treaty and the "limited number" of negotiating entities did not of itself create a problem. There was, however, the problem of determining which of article 20*bis*, paragraph 2, and article 19*bis*, paragraph 2, should prevail over the other, and of reconciling the answer with the dominant provision of article 20*bis*, paragraph 1. For example, it could be argued from article 19*bis*, paragraph 2, that, when the participation of a given international organization in a treaty was essential to that treaty, the organization must have the power to formulate reservations. However, given the fact that the organization's participation was essential to the treaty, should a reservation entered by the organization be subject to acceptance in accordance with the provisions of article 20*bis*, paragraph 2? If that was indeed the case, article 20*bis*, paragraph 1, would make no sense.

58. Although he was aware that article 20, paragraph 3 (*c*), and the corresponding provision of article 20*bis* followed, *mutatis mutandis*, the language of article 20, paragraph 4 (*c*), of the Vienna Convention, he thought that both should be amended since they made no sense as they stood. It was not the "act expressing the consent" of a State or an international organization to be bound by a treaty, subject to a reservation, which was ineffective until that reservation had been accepted but the consent itself. The act would always have an effect, for it was what moved the existing contracting parties to accept or reject the reservation in question. Consequently, he thought that, in both articles 20 and 20*bis*, the first part of paragraph 3 (*c*) should be redrafted to read: "the consent of a State or an international organization to be bound by the treaty, subject to a reservation, is effective as soon as ...".

59. In both articles, he would prefer the revised subparagraph to become the first subparagraph of paragraph 3, the present subparagraphs (*a*) and (*b*) becoming subparagraphs (*b*) and (*c*) respectively.

The meeting rose at 1 p.m.

1451st MEETING

Friday, 1 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

later: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, 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, A/CN.4/L.253, A/CN.4/L.255 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

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

ARTICLE 20*bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) [3] (*concluded*)

1. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the texts of articles 20 and 20*bis* proposed by the Drafting Committee, as orally amended by the Special Rapporteur at the previous meeting.

It was so agreed.

2. Mr. USHAKOV introducing his proposal for an article 20, entitled "Acceptance of reservations and objections to reservations" (A/CN.4/L.253), said that the article

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

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

[3] For texts, see 1446th meeting, para. 4.

like the others he proposed, was based on the principle that an international organization could not enter a reservation to a treaty unless that reservation was expressly authorized by the treaty or it was otherwise agreed that the reservation was authorized.

3. Paragraph 1, which concerned treaties between several international organizations, was intended to replace entirely article 20 as proposed by the Drafting Committee since, under the system he proposed, the questions of acceptance of or objections to the reservations entered by an international organization no longer arose.

4. Paragraph 2 related to reservations expressly authorized by a treaty between States and one or more international organizations or otherwise authorized, while paragraph 3 concerned reservations expressly authorized by a treaty between international organizations and one or more States or otherwise authorized. Both paragraphs were modelled on article 20, paragraph 1, of the Vienna Convention.[4]

5. Paragraph 4 was based directly on article 20, paragraph 2, of the Vienna Convention. It concerned only the relations between States in the case of treaties between States and one or more international organizations. In such a case, the international organizations could enter only reservations which were expressly authorized by the treaty or otherwise authorized, and thus, by analogy with the general rule stated in article 20, paragraph 1, of the Vienna Convention, there was no need for their subsequent acceptance. States could enter other reservations, in which event the rule contained in article 20, paragraph 2, of the Vienna Convention would apply as between them. Consequently, a reservation formulated by a State would require acceptance by all the States parties when it appeared from the limited number of the negotiating States and the object and purpose of a treaty between States and one or more international organizations that the application of the treaty between all the States parties was one of the essential conditions of the consent of each one of them to be bound by the treaty.

6. Paragraph 5 concerned treaties between States and one or more international organizations other than treaties falling under paragraphs 2 and 4, and reproduced without change the provisions of article 20, paragraph 4 (*a*), (*b*) and (*c*) of the Vienna Convention, concerning relations between States. It was important to take account of the provisions of article 3, subparagraph (*c*), of the Vienna Convention, which reserved the application of that instrument to the relations of States as between themselves under international agreements to which other subjects of international law were also parties.

7. Paragraph 6 was based on article 20, paragraph 5, of the Vienna Convention and referred to treaties between States and one or more international organizations. It concerned only the acceptance by a State of a reservation entered by another State in accordance with paragraphs 4 and 5.

8. With regard to articles 19, 19*bis* and 19*ter* as proposed by the Drafting Committee,[5] he noted that, according to the Special Rapporteur's interpretation of the Vienna Convention, it was possible to object to reservations expressly authorized by a treaty. However, article 20, paragraph 4 (*b*) of the Vienna Convention, which concerned objections to reservations, applied "in cases not falling under the preceding paragraphs", among which was paragraph 1 concerning reservations expressly authorized by a treaty. According to the Special Rapporteur, there existed both a right to object to reservations which were authorized by a treaty and a right to object to reservations which were not so authorized, the latter right depending on whether a given reservation fell within the category of authorized reservations. His own view was that what was involved in such a case was not an objection to a reservation but a dispute as to the interpretation of the treaty. Consequently, he was firmly of the opinion that no provision was made in the Vienna Convention for objections to reservations authorized by a treaty.

9. Article 19*ter*, paragraph 2, provided that "A State may object to a reservation envisaged in article 19*bis*, paragraphs 1 and 3". The reason why no mention was made of article 19*bis*, paragraph 2, was precisely because that paragraph concerned reservations authorized by treaty. It was only logical that it should not be possible to object to such reservations. But no such exception to the raising of an objection to a reservation was mentioned in article 19*ter*, paragraphs 1 and 3. It therefore seemed that there was a contradiction between paragraph 2 and paragraphs 1 and 3 of article 19*ter*, and that the possibility given to international organizations by paragraphs 1 and 3 of objecting to a reservation which was not authorized by a treaty was entirely contrary to the spirit of the Vienna Convention.

10. Under article 19*bis*, paragraph 2, when the participation of an international organization was essential to the object and purpose of a treaty, that organization could formulate a reservation only if that reservation was expressly authorized by the treaty or if it was otherwise agreed that the reservation was authorized. It followed that an organization which was party to the same treaty, but whose participation was not essential to the object and purpose of the treaty, could formulate reservations which were not expressly authorized by the treaty. That meant that not all the international organizations parties to the treaty were placed on the same footing whereas, under the Vienna Convention, no distinction was made between States. That novel idea, which the Commission seemed to support, he found disturbing.

11. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished the title and text of the alternative version of article 20 (A/CN.4/L.253) proposed by Mr. Ushakov to be recorded in a foot-note to its commentary and Mr. Ushakov's comments to be reflected in the commentary.

It was so agreed.

12. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee for articles 21 to 26 as well as the titles of section 3 of part II, of part III, and of section I thereof (A/CN.4/L.255/Add.1).

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

[5] 1446th meeting, para. 4.

13. Mr. TSURUOKA (Chairman of the Drafting Committee) said that in document A/CN.4/L.255/Add.1, the Drafting Committee submitted for the consideration of the Commission the titles and texts of articles 21, 22, 23 and 23*bis*, which completed section 2 (Reservations) of part II (Conclusion and entry into force of treaties); articles 24, 24*bis*, 25 and 25*bis*, which constituted section 3 (Entry into force and provisional application of treaties) of the same part; and article 26, which was the first article of section 1 (Observance of treaties) of part III (Observance, application and interpretation of treaties).

14. In formulating those articles, the Drafting Committee had kept to the basic distinction between two different types of treaties, namely, treaties between international organizations and treaties between States and international organizations, to which he had drawn attention in his introduction of the first articles contained in section 2.[6] In the articles of section 2 which it now proposed, the Drafting Committee had continued to use the expression "treaties between States and one or more international organizations or between international organizations and one or more States", to refer to the second of those categories of treaties. In the articles of section 3, where the question was no longer one of reservations, the Drafting Committee had reverted to the original terminology, namely, "treaties between one or more States and one or more international organizations".

15. In consequence of the basic distinction between the two types of treaties which he had mentioned, the Drafting Committee had prepared separate but parallel articles when that had seemed necessary for the purposes of clarity and precision, namely, with respect to the procedure regarding reservations (articles 23 and 23*bis*), the entry into force of treaties (articles 24 and 24*bis*), and the provisional application of treaties (articles 25 and 25*bis*). As in the articles which it had already proposed, the Drafting Committee had made specific reference, as appropriate, to the type of treaty envisaged throughout the group of articles which it now put before the Commission. Subject to some drafting changes, such as the specific reference to "a State or States and an international organization or organizations", the text of those articles corresponded to that of the articles on the same subjects proposed by the Special Rapporteur in his fourth (A/CN.4/285) and fifth (A/CN.4/290 and Add.1) reports, and followed as closely as possible that of the related provisions of the Vienna Convention.

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

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

ARTICLE 23 (Procedure regarding reservations in treaties between several international organizations) *and*

ARTICLE 23*bis*[7] (Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States)

16. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the titles and text of articles 21, 22, 23 and 23*bis*, proposed by the Drafting Committee, which read:

Article 21. Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 19*ter*, 20 and 23 in the case of treaties between several international organizations, or in accordance with articles 19*bis*, 19*ter*, 20*bis* and 23*bis* in the case of treaties between States and one or more international organizations or between international organizations and one or more States:

(*a*) modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a party objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving party, the provisions to which the reservation relates do not apply as between the two parties to the extent of the reservation.

Article 22. Withdrawal of reservations and of objections to reservations

1. Unless a treaty between several international organizations, between States and one or more international organizations or between international organizations and one or more States otherwise provides, a reservation may be withdrawn at any time and the consent of the State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless a treaty mentioned in paragraph 1 otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless a treaty between several international organizations otherwise provides, or it is otherwise agreed:

(*a*) the withdrawal of a reservation becomes operative in relation to another contracting organization only when notice of it has been received by that organization;

(*b*) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the international organization which formulated the reservation.

4. Unless a treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides, or it is otherwise agreed:

(*a*) the withdrawal of a reservation becomes operative in relation to a contracting State or organization only when notice of it has been received by that State or organization;

(*b*) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23. Procedure regarding reservations in treaties between several international organizations

1. In the case of a treaty between several international organizations, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting organizations and other international organizations entitled to become parties to the treaty.

2. If formulated when signing a treaty between several international organizations subject to formal confirmation, acceptance or approval of that treaty, a reservation must be formally confirmed by the

[6] 1446th meeting, para. 5.

[7] For the consideration of the texts originally submitted by the Special Rapporteur, see 1434th meeting and 1435th meeting, paras. 1 and 2.

reserving organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Article 23bis. Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States

1. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated by a State when signing subject to ratification, acceptance or approval a treaty mentioned in paragraph 1 or if formulated by an international organization when signing subject to formal confirmation, acceptance or approval a treaty mentioned in paragraph 1, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to a confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

It was so agreed.

17. Mr. USHAKOV, introducing his proposals for articles 21, 22 and 23 (A/CN.4/L.253) said that his article 21 (Legal effects of reservations and of objections to reservations) should cause no problem. The first three paragraphs concerned treaties between several international organizations, treaties between States and one or more international organizations, and treaties between international organizations and one or more States respectively. Paragraph 4 applied to all those categories of treaties. Paragraph 5, which concerned treaties between States and one or more international organizations, stated a rule of the Vienna Convention which applied to relations between States.

18. Paragraph 1 of his proposal for article 22, concerning treaties between several international organizations, provided that a reservation could be withdrawn without the consent of an international organization which had accepted it. Paragraphs 2 and 3, which concerned treaties between States and one or more international organizations and treaties between international organizations and one or more States respectively, also related to the withdrawal of reservations. Paragraph 4 concerned objections to reservations to treaties between States and one or more international organizations. Where that category of treaty was concerned, an objecting State could withdraw its objections at any time. The remaining paragraphs did not call for any comment.

19. Article 23 (Procedure regarding reservations) also distinguished between the three main categories of treaties. With regard to treaties between several organizations, paragraph 1 provided that a reservation and an express acceptance of a reservation must be formulated in writing and communicated to the "other international organizations entitled to become parties to the treaty". Paragraph 2 provided that, in the case of a treaty between States and one or more international organizations, such communication must be made to the contracting States, to the other States entitled to become parties to the treaty, and to the "contracting organizations" only. It was not necessary for notification to be given to the other international organizations entitled to become parties to the treaty since the type of treaty in question normally involved only a small number of organizations, which were invited to participate in its negotiation and became the "contracting organizations". The communications referred to in paragraph 3 had to be made only to the contracting States, since they concerned treaties between international organizations and one or more States, in which a small number of States were invited to participate. Paragraphs 4 to 7 were self-explanatory.

20. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed that Mr. Ushakov's comments on his proposed articles 21, 22 and 23 (A/CN.4/L.253) should be reflected in the commentary and the texts recorded in a foot-note to the commentary.

It was so agreed.

ARTICLE 24 [8] (Entry into force of treaties between international organizations)

21. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title of section 3 (Entry into force and provisional application of treaties) of part II of the draft articles, and article 24 as proposed by the Drafting Committee, which read:

Article 24. Entry into force of treaties between international organizations

1. A treaty between international organizations enters into force in such manner and upon such date as it may provide or as the negotiating international organizations may agree.

2. Failing any such provision or agreement, a treaty between international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating international organizations.

3. When the consent of an international organization to be bound by a treaty between international organizations is established on a date after the treaty has come into force, the treaty enters into force for that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between international organizations regulating the authentication of its text, the establishment of the consent of international organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

It was so agreed.

[8] For the consideration of the text originally submitted by the Special Rapporteur, see the 1435th meeting, paras. 3-32.

ARTICLE 24*bis* [9] (Entry into force of treaties between one or more States and one or more international organizations)

22. The CHAIRMAN invited the Commission to consider article 24*bis* as proposed by the Drafting Committee, which read:

Article 24bis, Entry into force of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations enters into force in such manner and upon such date as it may provide or as the negotiating State or States and international organization or organizations may agree.

2. Failing any such provision or agreement, a treaty between one or more States and one or more international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and international organizations.

3. When the consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between one or more States and one or more international organizations regulating the authentication of its text, the establishment of the consent of the State or States and the international organization or organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

23. Mr. CALLE Y CALLE said it should be made perfectly clear in the commentary that the references in article 24*bis* to "treaties between one or more States and one or more international organizations" applied to both the categories of treaties involving States with which the Commission had dealt in the earlier articles on reservations, namely, treaties between States and one or more international organizations and treaties between international organizations and one or more States. He was afraid that, unless that clarification was made, the article might be interpreted as applying to only one of those categories of treaties.

24. Mr. USHAKOV said that, in drafting section 2, concerning reservations, the Commission had started from the idea that reservations applied only to multilateral treaties. It had left until later the question of the reservations that an international organization might enter to a bilateral treaty. However, since section 3 concerned the entry into force and the provisional application of treaties, the Commission had decided to return to the general definition of the term "treaty" which appeared in draft article 2 [10] and embraced bilateral and multilateral treaties. Consequently, as was apparent from its title, article 24 applied to both multilateral and bilateral treaties concluded by international organizations. And the same was true of article 24*bis*, as its title indicated.

25. Mr. SCHWEBEL wondered whether the Commission really needed so to complicate the language of the present and other articles as to exclude all possibility of their referring to bilateral treaties in section 2 on reservations. He raised that question, on the one hand, because he was not convinced that there could not be reservations to a bilateral treaty—although he recognized that cases might be exceptional—and, on the other, because he considered that the Commission might well be able either to find language which did not prejudice that point or to decide the point and cover it in a definitions article which would apply to the entire convention, thereby eliminating the circumlocutions and duplication which were to be found in section 2. It would be very useful if the Special Rapporteur and the Secretariat would reflect on the problem and suggest ways in which the draft might be simplified.

26. Mr. USHAKOV said that the Commission had left in abeyance the question of bilateral treaties concluded between international organizations or between a State and an international organization. If the phrase "treaties between one or more States and one or more international organizations", which included bilateral treaties, had been used in the articles on reservations, the wording would have been extremely complicated; each article would have had to be supplemented by a special paragraph concerning bilateral treaties.

27. Mr. REUTER (Special Rapporteur) said that there seemed to be two aspects to the question raised by Mr. Schwebel, one of terminology and the other of substance. On the one hand, Mr. Schwebel had asked whether it would not be possible to simplify the wording of certain articles by including new definitions in article 2. Personally, he did not rule out that solution, although he felt there was a risk that it would give rise to serious problems. It would be better to wait until Governments had shown by their reactions whether they were satisfied with the detailed text drawn up by the Commission or whether they wanted a simpler article.

28. On the other hand, Mr. Schwebel had said that the idea of reservations to a bilateral treaty was quite acceptable, particularly since the Vienna Convention, unlike section 2 of the present draft, did not relate solely to multilateral treaties. In the draft articles which the Commission had prepared for the United Nations Conference on the Law of Treaties,[11] the section on reservations had been entitled "Reservations to multilateral treaties". But in its concern to avoid as far as possible making distinctions between the various categories of treaties, the Conference had deleted the reference to multilateral treaties. As Mr. Ushakov had pointed out, the Commission had postponed a decision on the applicability to bilateral treaties of the articles of section 2 of the present draft. Nevertheless, it seemed that most members considered that the extension of those articles to bilateral treaties would give rise to serious difficulties. It was a fact that the machinery of the Vienna Convention was fully intelligible only as it applied to treaties concluded between at least three States. There was, therefore, a sort of contradiction between the formal liberalism of the Convention and the substantive rules it contained. That

[9] *Idem.*

[10] See 1429th meeting, foot-note 3.

[11] *Yearbook ... 1966*, vol. II, pp. 177 *et seq.*, document A/6309/Rev.1, part II, chap. II.

was why the Commission was provisionally limiting itself to reservations to multilateral treaties. In law, and as regards the French version of the articles relating to treaties between international organizations, there were provisions compatible with a reservation to a bilateral treaty by reason of the use of the word *plusieurs*. The reason why the Commission had adopted that position was simply that it wished to learn the reactions of Governments. If a majority of Governments considered that the provisions of the Vienna Convention applied to bilateral as well as to multilateral treaties, the draft articles would have to be revised and, inevitably, made more complex.

29. The CHAIRMAN, speaking as a member of the Commission, said that he had already been troubled, when the Commission had considered the articles on reservations, by the fact that all of them, and especially articles 20, 23 and 23*bis*, contained language which, at least in English, had seemed to him to exclude bilateral treaties from their effects. When that language was compared with the phraseology of article 24*bis*, which clearly did extend to bilateral treaties, it became obvious that the articles on reservations did, as drafted, exclude bilateral treaties. There were two points which were of concern to him in that respect.

30. First, his recollection was that the United Nations Conference on the Law of Treaties had quite clearly decided that the Vienna Convention would not close the door to the possibility of reservations to bilateral treaties. At the 10th plenary meeting of the Conference, the Chairman of the Drafting Committee had referred expressly to that point, and his remarks had not been contested. He had said:

> In the title of Section 2, the Drafting Committee had adopted an amendment by Hungary ... to delete the words "to multilateral treaties" after the word "reservations", since the adjective "multilateral" did not modify the noun "treaty" in the definition of a reservation given in article 2, paragraph 1 (*d*); that did not, of course, prejudice the question of reservations to bilateral treaties.[12]

Clearly, therefore, the Chairman of the Drafting Committee of the Conference considered that the provisions of the Vienna Convention did not settle the question of reservations to bilateral treaties.

31. Second, and however unlikely a reservation might be to a bilateral treaty concluded between States, there could be cases in which, because of the nature of the internal machinery of an international organization, the formulation of a reservation would be the only way in which an organization could deal with a situation. For example, it might be that, when the text of a bilateral treaty negotiated between international organizations came before their respective competent organs for approval, one of those organs would find the draft unacceptable on some point and instruct the executive officer of the organization to enter a reservation. In the ordinary course of events, that reservation would be deemed to have been accepted if there was no objection to it within a period of 12 months. There was, to his mind, a very real possibility that such a situation would arise. He considered the importance of the point in relation to treaties between international organizations to be greater than it had been in relation to treaties between States. Far from closing the door on reservations to bilateral treaties, as the Commission seemed to be doing, the Commission should, without prejudicing the point, leave it a little wider open.

32. At the present stage in its deliberations, the Commission would have to leave the draft articles as they had been proposed by the Drafting Committee, but he felt that it should bring out very clearly and very fully in its report the fact that it was not, as yet, its intention to determine the question of reservations to bilateral treaties.

33. Mr. EL-ERIAN said he agreed with the Chairman's interpretation of the work of the Conference on the Law of Treaties and with his assessment of the relative importance of the question of reservations to bilateral treaties for international organizations and States. However, the traditional view was that reservations as such could be made only to multilateral treaties, and that entering a reservation to a bilateral treaty was equivalent to proposing a new treaty. Was that in fact the case? He also wondered whether the references in article 23 to treaties between "several" international organizations could be interpreted in English as references to bilateral treaties.

34. CALLE Y CALLE said that he subscribed to the explanations given by Mr. Ushakov for the return in the articles of section 3 to the general definition of "treaty", which covered bilateral treaties, and he considered that those explanations should be reflected in the commentary.

35. Mr. USHAKOV said that the question of reservations to bilateral treaties did not arise with respect to the articles he proposed in document A/CN.4/L.253. As he saw it, an international organization could formulate reservations only if they were expressly authorized by a treaty or it was otherwise agreed that reservations were permitted. Consequently, whether a treaty was multilateral or bilateral, a reservation could be entered by an international organization only if it was expressly authorized.

36. In the case of a treaty between a State and an international organization, it was paragraph 4 of his proposed article 19 which would apply: neither the State nor the international organization would be able to formulate a reservation unless that reservation was expressly authorized by the treaty or it was otherwise agreed that the reservation was authorized.

37. Mr. QUENTIN-BAXTER said he associated himself with the Chairman's remarks on the problem of bilateral treaties. Mr. Francis had also made some very pertinent observations concerning that problem as it related to international organizations and their procedures.

38. The Drafting Committee had decided, for linguistic reasons, that the order of the text of the English version of article 23*bis*, paragraph 2, should be slightly different from that of the French original. It had made the necessary change but had omitted to bring the text of the

[12] *Official Records of the United Nations Conference on the Law of Treaties*, second session, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 28, 10th meeting, para. 23.

corresponding paragraph of article 23 into line. Consequently, the opening of the English version of article 23, paragraph 2, should be amended to read: "If formulated when signing subject to formal confirmation, acceptance or approval a treaty between several international organizations, a reservation ...".

39. Mr. USHAKOV said he still believed that draft article 7, entitled "Full powers and powers", should be expanded for no one could be considered to represent an international organization for the purpose of formulating a reservation unless he produced powers relating expressly to that function.

Mr. Sette Câmara (first Vice-Chairman) took the Chair.

40. Mr. DADZIE said he agreed with the Special Rapporteur that the Commission should wait for the observations of Governments before taking a decision on the question whether the draft articles should be amended in order to take account of the case of bilateral treaties.

41. He also agreed with the Chairman's interpretation of the provisions of the Vienna Convention concerning bilateral treaties. In his opinion, bilateral treaties were governed by the express wishes of the parties to the treaties in question so that any rules relating to bilateral treaties which the Commission was considering would be of limited interest. Lastly, he shared Mr. El-Erian's view that, if a reservation was formulated to a bilateral treaty, it would probably lead to the conclusion of a new treaty between the parties. The reservation itself was therefore of limited importance because it merely reflected a change in the attitude of the parties to the treaty in question.

42. Mr. VEROSTA said that he supported the drafting amendment to article 23, paragraph 2, which had been suggested by Mr. Quentin-Baxter.

43. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to the drafting amendment to article 23, paragraph 2, which had been suggested by Mr. Quentin-Baxter and which applied to the English text only.

It was so agreed.

44. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title and text of article 24*bis*.

It was so agreed.

ARTICLE 25 (Provisional application of treaties between international organizations) *and*

ARTICLE 25*bis* [13] (Provisional application of treaties between one or more States and one or more international organizations)

45. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the titles and texts of articles 25 and 25*bis* as proposed by the Drafting Committee, which read:

Article 25. Provisional application of treaties between international organizations

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating international organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 25bis. Provisional application of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating State or States and international organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and international organization or organizations have otherwise agreed:

(*a*) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty;

(*b*) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

It was so agreed.

ARTICLE 26 [14] (*Pacta sunt servanda*)

46. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the titles of part III (Observance, application and interpretation of treaties) of the draft articles and of section 1 thereof (Observance of treaties) as well as the text of article 26 as proposed by the Drafting Committee, which read:

***Article 26.* Pacta sunt servanda**

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

It was so agreed.

ARTICLE 27 [15]

47. Mr. REUTER (Special Rapporteur) said that the Drafting Committee had still not taken up article 27

[13] For the consideration of the text originally submitted by the Special Rapporteur, see 1435th meeting, paras. 3-32.

[14] For the consideration of the text originally submitted by the Special Rapporteur, see 1435th meeting, paras. 33-36.

[15] For the consideration of the text originally submitted by the Special Rapporteur, see 1435th meeting, paras. 37-53, and 1436th meeting, paras. 1-40.

but had decided to examine first articles 28 and 34 and then to revert to article 27, which had given rise to difficulties when it had been discussed in the Commission. The Drafting Committee had endorsed the comments submitted by him on the question of what the future article 27 might comprise and had requested him to inform the members of the Commission accordingly and to seek their advice.

48. With regard first to the wording of the rules laid down in draft article 27, some members of the Commission had asked the Drafting Committee to follow more closely the text of article 27 of the Vienna Convention and to distinguish between the case of States and that of international organizations. Those two suggestions did not give rise to any difficulty, in his view, and the Drafting Committee might therefore wish, in a paragraph 1 based on article 27 of the Vienna Convention, to formulate a provision concerning States along the following lines:

"A State may not invoke the provisions of its internal law as justification for failure to perform a treaty between one ormore States and one or more international organizations to which it is a party."

49. The Drafting Committee could adopt a symmetrical provision for international organizations in paragraph 2, but in that case it would encounter a twofold problem.

50. It had been pointed out that it might be advisable to define what was meant by "the rules of the international organization" and it had been suggested that the definition given in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character [16] should be followed, which stated:

"rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization.

That definition was sufficiently cautious—and would draw attention to the words "in particular"—and its inclusion in article 2 would not cause any difficulty.

51. The real problem was that certain international organizations—those having the requisite statutory powers—could conclude treaties which were entirely contingent on the execution of an instrument by the organization. That applied to treaties whose sole object was to ensure the execution of an instrument or a resolution of the organization. They were thus treaties which were subordinate to the extent that, as was the case in most States, the executive power was subordinate to the legislative power. That situation had extremely important consequences, since the fact that a Government had taken measures to enforce a law did not deprive the legislator of the right to amend that law and, if the law was repealed, the enforcement measures taken by the Government fell.

52. Consequently, where an international organization concluded a treaty of that kind, if it was clear—without any express indication in the treaty—that the sole object of the treaty was the execution of an instrument of the organization, it was obvious that the organization had not, in concluding the treaty, renounced the right to amend the instrument and that, if it did amend it, the treaty must disappear.

53. It might be asked whether the same situation also applied to States. It was quite conceivable that, under a unilateral law, a State might provide that aliens should enjoy certain rights, subject to certain conditions, and that, when the law was passed, the Government might conclude agreements with foreign States designed to facilitate the application of the law—for example, agreements laying down the kind of condition which aliens would have to fulfil in order to benefit by the law. In such a case, if the law was repealed, the agreements concluded for its application also fell.

54. If no precedent of that kind was to be found in State practice, it was because the sole object of the agreements in question was to facilitate the application of the law and not to bind absolutely the State which had adopted the law. Such agreements would, moreover, be described as administrative arrangements or agreements rather than as treaties, so that the link of subordination was clearly apparent. Legally, however, the problem was the same.

55. In the case of an agreement between an international organization and a State whose object was to ensure the implementation of a resolution of the international organization, the problem was that of the meaning to be attached to the agreement. Had the international organization intended to bind itself definitively or merely to take implementation measures? There was every reason for believing that it had not intended to bind itself, first of all, because it had not the right to do so. An agreement should be so interpreted as not to conflict with the constituent instrument of the organization.

56. It could be argued that, in the new article 27, which would consist of only two paragraphs, one for States and the other for international organizations, it was not necessary to devote a special provision to such agreements and that a reference in the commentary would suffice.

57. It could also be said that it would suffice to refer to article 46, as in the existing text, with the addition of a reference to article 31 (General rule of interpretation) and to article 6 (Capacity of international organizations to conclude treaties).

58. There was still another solution, which was to state expressly that nothing in the provisions of article 27, relating to the possibility of invoking internal law to prevent performance of a treaty, should affect the obligation to respect the dependence of international treaties on the rules of the international organization as regards their scope and nature, when the sole object of those agreements was to apply an instrument of the international organization. On that point, he would be inclined to assimilate the situation of States to that of international organizations.

59. He would like to hear the views of members of the Commission, now or later, on the comments which he had just made, and to know whether the Commission approved the Drafting Committee's suggestion that it should take up articles 28 to 34 and then return to article 27.

[16] See 1435th meeting, foot-note 10.

60. Mr. USHAKOV said that the question of respect for the performance of treaties by international organizations was crucial and should be treated with the utmost caution. He therefore suggested that article 27 be placed between brackets in order to indicate to Governments that it was only a first draft and to invite their comments on the article.

61. Mr. ŠAHOVIĆ said that the explanations given by the Special Rapporteur would assist the Commission in arriving at a satisfactory solution to the problem posed by article 27, which, as Mr. Ushakov had said, was crucial. The Commission should reflect on the difficulties to which the article gave rise and proceed to consider the subsequent articles, as suggested by the Drafting Committee.

62. Mr. TSURUOKA said that he supported the procedural suggestion made by the Special Rapporteur.

63. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to the suggestion by the Special Rapporteur, which had been supported by Mr. Ushakov, Mr. Šahović and Mr. Tsuruoka, that in view of the crucial importance of article 27, the Commission should not take a decision on it until it had approved articles 28 to 34.

It was so agreed.

The meeting rose at 12.45 p.m.

1452nd MEETING

Monday, 4 July 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

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

Long-term programme of work
[Item 8 of the agenda]

and

Organization of future work
[Item 9 of the agenda]

PRELIMINARY REPORT ON THE SECOND PART OF THE TOPIC OF RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (A/CN.4/304)

1. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the second part of the topic of relations between States and international organizations (A/CN.4/304).

2. Mr. EL-ERIAN (Special Rapporteur) said that, at its twenty-eight session, the Commission had stated that, in considering the question of diplomatic law in its application to relations between States and international organizations, it had decided first to concentrate on the part relating to the status, privileges and immunities of representatives of States to international organizations and to defer to a later date the consideration of the second part of the topic. It had then requested him to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States.[1]

3. In preparing the preliminary report, he had endeavoured to reply to five main questions. First, had the legal norms governing that branch of diplomatic law reached a state of evolution that made it ripe for codification? Second, was it necessary and useful to undertake such a task? Third, were the apprehensions which had been expressed in the past on the advisability of such an undertaking still justified? Fourth, was the codification of those norms likely to prejudice in any way existing agreements governing the same subject-matter or to have any adverse effects on the future evolution of those norms? Fifth, what lessons were to be drawn from the work of the Commission on the first part of the topic and from its work on the question of treaties between States and international organizations or between two or more international organizations, in determining the method of work and approach to be followed in the codification of the status, privileges and immunities of international organizations?

4. In attempting to reply to those questions, he had set the following objectives for the preliminary study: first, to trace the evolution of the diplomatic law of international organizations, whether treaty law or customary law, as supplemented by the decisions of courts and by doctrine; second, to analyse the Commission's work on the related subjects which had some bearing on the subject-matter of the preliminary study; and, third, to discuss a number of general questions of a preliminary character with a view to defining and identifying the course to be followed in the work.

5. The report before the Commission consisted of five chapters. Chapter I described the background of the study. Chapter II traced the evolution of the international law relating to the legal status and immunities of international organizations. In that connexion, he noted that, long before the appearance of such general international organizations as the League of Nations and the United Nations, constitutional instruments establishing international river commissions and administrative unions in the second half of the nineteenth century had contained treaty stipulations from which the origin of the privileges and immunities of international bodies could be traced. Examples were to be found in treaties establishing the

[1] *Yearbook ... 1976*, vol. II (Part Two), p. 164, document A/31/10, para. 173.