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A/CN.4/SR.1459

Summary record of the 1459th 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

29. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt Mr. Ushakov's suggestion that, in the French text of article 30, paragraph 4 (*b*), the words *en cause* should be replaced by the words *en question*.

It was so agreed.

30. The CHAIRMAN then referred to Mr. Reuter's suggestion concerning article 30, paragraph 5, that the words "another State or another international organization under another treaty" be replaced by the words "a State or an international organization under another treaty".

31. Mr. CALLE Y CALLE said he thought the wording of paragraph 5, which corresponded to that of article 30, paragraph 5, of the Vienna Convention, should be retained as it stood in the text proposed by the Drafting Committee.

32. The CHAIRMAN suggested that the Commission should continue its consideration of article 30 and, in particular, of the suggestion made by Mr. Reuter concerning paragraph 5 at the following meeting.

Most-favoured-nation clause

[Item 6 of the agenda]

33. The CHAIRMAN said that the General Assembly, in recommending in its resolution 31/97 of 15 December 1976 that the International Law Commission should complete at its thirtieth session the second reading of the draft articles on the most-favoured-nation clause, had referred to the comments to be received, in particular, from the competent organs of the United Nations and from interested intergovernmental organizations. It seemed to be the General Assembly's intention that the Commission should itself decide to which organs the draft articles adopted by it on first reading at its twenty-eighth session [10] should be circulated for observations.

34. The Commission could either restrict the circulation of the draft to the organizations and agencies listed in the Special Rapporteur's second report [11] or extend it to the United Nations bodies, specialized agencies and intergovernmental organizations indicated on the standard list used by UNCTAD.

35. The Enlarged Bureau had recommended that the Commission should use the standard UNCTAD list and that the international organizations and United Nations bodies concerned should be asked to submit their observations on the draft articles by 31 December 1977.

36. If there was no objection, he would take it that the Commission agreed to approve that recommendation.

It was so agreed.

The meeting rose at 1.05 p.m.

[10] *Yearbook ... 1976*, vol. II (Part Two), pp. 11 *et seq.*, document A/31/10, chap. II, sect. C.

[11] *Yearbook ... 1970*, vol. II, p. 242, document A/CN.4/288 and Add.1, annex III.

1459th MEETING

Wednesday, 13 July 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

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

Question of treaties concluded between States and international organizations or between two or more international organizations (*concluded*) (A/CN.4/285,[1] A/CN.4/290 and Add.1,[2] A/CN.4/298, A/CN.4/L.255/Add.3)

[Item 4 of the agenda]

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

ARTICLE 30 (Application of successive treaties relating to the same subject-matter) [3] (*concluded*)

1. Mr. REUTER (Special Rapporteur) suggested that, in the light of the comments made by Mr. Ushakov and Mr. Calle y Calle at the 1458th meeting, the last part of paragraph 5 be worded to read: "towards a State or an international organization not party to that treaty under another treaty".

2. Mr. FRANCIS said that neither the text of the last part of paragraph 5 adopted by the Drafting Committee nor the new version just proposed was satisfactory in English, because they were not sufficiently precise. If the new version was acceptable to the members of the Commission, he would certainly not object to its adoption, but he would prefer a formulation such as "... incompatible with their respective obligations towards another party under another treaty" or simply "... their respective obligations under another treaty".

3. The CHAIRMAN said that a text of the type suggested by Mr. Francis might eliminate the distinction between parties to the treaty in question and parties to another treaty, which was the very essence of the part of the paragraph under consideration.

4. Mr. USHAKOV said he thought the text suggested by the Special Rapporteur clearly conveyed the intended meaning of paragraph 5, namely, that the preceding paragraph would apply without prejudice to any possible incompatibility between the obligations laid on a State or an international organization by the earlier treaty and the later treaty, respectively.

5. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve

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

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

[3] For text, see 1458th meeting, para. 20.

article 30 as proposed by the Drafting Committee, with the amendments made by the Commission.

It was so agreed.

ARTICLE 2 (Use of terms), paragraph 1 (*j*) ("rules of the organization") *and*

ARTICLE 27 [4] (Internal law of a State, rules of an international organization and observance of treaties)

6. The CHAIRMAN invited the Commission to consider article 2, paragraph 1 (*j*),[5] in conjunction with article 27, as proposed by the Drafting Committee, since the views expressed on article 27 might well affect the definition contained in article 2.

7. He read out the texts proposed by the Drafting Committee, which were worded as follows:

Article 2. Use of terms

[1. For the purposes of the present articles:
...]

(*j*) "rules of the organizations" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

Article 27. Internal law of a State, rules of an international organization and observance of treaties

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

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

8. Mr. DÍAZ GONZÁLEZ said that, in the Spanish version of article 2, paragraph 1 (*j*), commas should be inserted before and after the words *en particular*. In addition, the words "and established practice of the organization" should be rendered in Spanish by the words *y la práctica inveterada en la organización*, which would signify a practice that was constantly applied by the organization.

9. The CHAIRMAN said that the secretariat would check the form of words used in the Spanish version of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[6] on which the definition was based.

10. Mr. USHAKOV suggested that, in the French text of article 27, paragraph 2, either a comma should be inserted after the words *l'exécution du traité* or the comma after the words *dans l'intention des parties* should be deleted. He found that paragraph generally acceptable, although he would prefer it to refer to the interpretation of the treaty rather than to the intention of the parties.

11. Mr. REUTER (Special Rapporteur) said that he was in favour of the deletion of the comma after the words *dans l'intention des parties*.

12. The CHAIRMAN observed that, in the English version, it would be advisable to retain both the commas.

13. Mr. DÍAZ GONZÁLEZ said that the use of commas in the Spanish version was correct.

14. Mr. SCHWEBEL said that the formulation of paragraph 2 proposed by the Special Rapporteur to the Drafting Committee, namely:

> An international organization may not invoke the provisions of the rules of the organization as justification for its failure to perform a treaty,

was preferable to the Drafting Committee's proposal, which provided that an international organization could not invoke its rules as justification for failure to perform the treaty unless performance was subject to the exercise of the functions and powers of the organization. Surely, the performance of treaties entered into by international organizations was invariably subject to the exercise of the powers and functions of the organization. Fortunately, the Drafting Committee's text was qualified by a reference to the intention of the parties, which indicated that it was not the will of the international organization alone that would be legally dispositive. Nevertheless, in the absence of any clear demonstration of the intention of the parties, it could be presumed that their intention was that performance of the treaty by the international organization would be subject to the exercise of the functions and powers of the organization, for the simple reason that such an attitude was the most plausible one, particularly in the case of a treaty between an international organization and a group of States that were members of that organization.

15. He hoped the Commission's report would mention the text he had quoted and indicate that it had attracted some measure of support. Governments should have the opportunity to reflect on that alternative approach, which was more in keeping with article 27, paragraph 1, and, if followed, would clearly inhibit any efforts by an international organization to escape from its international obligations.

16. Mr. SUCHARITKUL pointed out that the term "international organization" included the United Nations. In the case of a treaty between the United Nations and Member States, for example, if a doubt or controversy arose regarding the meaning of a particular provision of the treaty, it was always possible for the United Nations to seek an advisory opinion from the International Court of Justice, which might then be invoked by the United Nations. Moreover, under the definition contained in article 2, paragraph 1 (*j*), the United Nations could also invoke decisions of the Security Council or resolutions of the General Assembly.

17. Mr. QUENTIN-BAXTER said that the balance between article 6, article 27, paragraph 2, and article 46, which had yet to be considered, was one of the most critical matters involved in the entire set of draft articles.

[4] For the consideration of the text originally submitted by the Special Rapporteur, see 1435th meeting, paras. 37-53, and 1436th meeting, paras. 1-40. See also 1451st meeting, paras. 47 *et seq.*

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

[6] See 1458th meeting, foot-note 7.

When an international organization entered into a treaty with a State, both parties probably held similar expectations regarding the relationship between the treaty obligations and the constitutional freedom of the organization concerned. In the case of a disease-eradication programme conducted by an international organization in a particular country, it was unlikely that either the organization or the State envisaged a situation that would cause the organization to claim that it could not carry out its obligations under the arrangements made. It was also possible, however, that, in the case of a treaty with the United Nations, there might be no doubt in the minds of the parties that major policies of the United Nations might, in the course of time, affect details of the treaty.

18. The difficulty which States might have encountered regarding the relationship between article 6, article 27, paragraph 2, and article 46 had been overcome by the insertion of the words "unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization", an addition which he regarded as very important. That reservation did not create any presumption as to the intention of the parties; it simply pointed out that, in interpreting a treaty between States and international organizations, it was necessary to seek the best indications of what the parties had had in mind, always allowing for the fact that international organizations had limited competence and were composed of States which wished to retain their freedom to direct the organization on major issues, and the fact that a certain respect was required for the actual terms of the treaty.

19. In his opinion, the compromise text proposed by the Drafting Committee formed a useful basis for discussion and comment by Governments.

20. Mr. CALLE Y CALLE said it was true that the Commission could have chosen a straightforward formulation like that contained in article 27 of the Vienna Convention,[7] but it was important, in the case of treaties involving international organizations, to specify that the obligations assumed by the international organization must be compatible with its internal rules. Generally speaking, an international organization could not invoke its internal rules as justification for failure to perform a treaty. Under the terms of the text proposed by the Drafting Committee, however, if it was apparent from the intention of the parties that performance of the treaty was subject to observance of the internal rules of the international organization, then—and only then—the internal rules of the organization could prevail over the provisions of the treaty, precisely because that was the wish of the parties.

21. Like Mr. Quentin-Baxter, he considered the additional element proposed by the Drafting Committee extremely useful, for it would elicit comments from international organizations and also from States, which had nothing to gain by complicating the life of international organizations.

22. Mr. FRANCIS said that, even with the best of intentions, a treaty could be negotiated and ratified but something might arise which would cause the situation to be challenged—something that was inconsistent either with the fundamental law of the State or with the constituent instrument and internal rules of the international organization. His position remained unchanged, for he considered that there were circumstances in which, given the particular situation, the constituent instrument and internal rules of the international organization might very well have to prevail over the provisions of the treaty.

23. The CHAIRMAN speaking, as a member of the Commission, congratulated the Drafting Committee on producing a text which to some extent unified the views of the members and also pinpointed the difficulty involved in the very important provisions set out in article 27. He did not wish to take a final position on the wording but thought that it could certainly be approved on first reading.

24. The inclusion in article 2 of a definition of the "rules of the organization" introduced a welcome clarification, but the problem of the definition of an international organization was not solved in the context of article 2, paragraph 1 (*j*) or of article 27, paragraph 2. Moreover, that problem was further complicated by the formulation employed in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

25. In article 2, paragraph 1 (*i*), the English text should be aligned with the French and Spanish versions by replacing the words "rules of the organizations" by "rules of the organization". The words "the organization", at the end of the definition, should remain as they stood because they were based on a text which had already been adopted internationally. At the end of article 27, paragraph 2, however, the same words could perhaps be replaced by "that organization", but he would not press for that change.

26. Mr. DADZIE said that he did not object to the text of article 27, paragraph 2, at the stage of first reading. On second reading, however, steps would have to be taken to improve the drafting, for the phrase introduced by the Drafting Committee: "unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization", could be used to justify failure to perform a treaty. While it did provide some clarification, it should not form part of a rule.

27. Mr. SCHWEBEL said that the phrase "according to the intention of the parties", in article 27, paragraph 2, although not necessarily adequate, was of critical importance. The absence of such a qualification would open the way for arbitrary repudiation of treaties by international organizations, which could simply adopt resolutions incompatible with them. He hoped the commentary would show that at least some members of the Commission believed that the provision as a whole could be much criticized if it did not include the phrase in question. Some of the examples cited in the Drafting Committee in support of a provision containing no such phrase had clearly demonstrated that other members of the Commission took the view that international organizations should have an unfettered power to repudiate

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

treaties to which they were parties—a view that he could not accept.

28. Mr. SETTE CÂMARA said that he had doubts about the parallelism between paragraphs 1 and 2 of article 27 because the relevant rules of an international organization were the source of its treaty-making capacity. An international organization might be in a position to invoke its internal rules in the case of treaties concluded *ultra vires*, under the terms of article 47 of the Vienna Convention. He fully recognized that that was a remote possibility but it should not be overlooked.

29. At the same time, he wished to congratulate the Drafting Committee on a very good compromise formulation, which would help to elicit comments from Governments.

30. The CHAIRMAN said that one of the useful features of the draft was that article 27, paragraph 3, referred separately to article 46, which would show the reader that the Commission still had to consider that article. The commentary would doubtless mention some of the problems arising in connexion with the relationship between article 27 and article 46.

31. If there was no objection, he would take it that the Commission agreed to approve the text of article 27 and that of article 2, paragraph 1 (*j*), as proposed by the Drafting Committee.

It was so agreed.

32. Mr. USHAKOV said he wished to point out that the words "according to the intention of the parties", even if they referred only to the intention of the contracting parties, meant that it would be necessary to interpret the treaty. He did not see what else they could mean.

The meeting rose at 11.30 a.m.

1460th MEETING

Thursday, 14 July 1977, at 10.10 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. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

State responsibility (*continued*)* (A/CN.4/302 and Add.1-3)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 21 (Breach of an international obligation requiring the State to achieve a particular result) [1] (*continued*)

1. Mr. THIAM agreed with Mr. Ushakov that the expression "*in concreto*" in paragraph 1 should be deleted since a result could only be concrete. He said that the words "but leaving it free to choose at the outset the means of achieving that result" and "by the conduct adopted in exercising its freedom of choice" should also be deleted. The statement should simply read:

> "A breach of an international obligation exists if the State has not achieved the internationally required result".

2. It seemed to him that paragraph 2 introduced the idea of means whereas article 21 dealt exclusively with obligations of result. He wondered about the meaning of the expression "breach begun" since, in his view, a breach either existed or it did not. He nevertheless agreed with those who had proposed that article 21 be referred to the Drafting Committee.

3. Mr. ŠAHOVIĆ said that, in principle, he favoured the solution proposed by the Special Rapporteur in article 21, but he thought that a clearer idea should be had of the Special Rapporteur's intentions regarding the continuation of the work before a final position was taken on the article. Articles 20 and 21 seemed logical to him and they accorded with the existing position in regard to State practice and international law in general. He wondered, however, whether the Special Rapporteur had succeeded in reflecting in those articles the wealth of complex propositions which he had put forward in his report. In his opinion, a number of questions raised in the report had not been answered in article 21, and paragraph 2, in particular, did not take account of all the problems to which the Special Rapporteur had himself referred in his report.

4. He considered, first, that the content of the international obligation referred to in article 21 should be defined in that article. He further considered that article 21 modified to a certain extent the definition of a breach given in article 16,[2] which was perhaps too general to meet the needs of the draft. He wondered whether the cases covered by article 21 were exceptional or an intrinsic part of the obligation of result. In that connexion, the Special Rapporteur had given examples drawn from State practice, but one might ask whether the circumstances they involved were a logical consequence of the obligation of result and always occurred with every obligation of that kind, or whether they represented a third category of obligation.

5. He also wondered whether the remedy referred to in paragraph 2 was a legal remedy in the usual sense of the term or whether it was inherent in the obligation of result. In his view, paragraph 2 left unanswered a number of questions concerning the situations described.

6. It was necessary to determine how and when an initial course of conduct led to a situation incompatible with the required result. It was also necessary to determine how and when a treaty obligation permitted the

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* Resumed from 1457th meeting.

[1] For text, see 1456th meeting, para. 37.

[2] See 1454th meeting, foot-note 2.