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A/CN.4/SR.1548

Summary record of the 1548th 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:-

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when the Commission, and subsequently the United Nations Conference on Succession of States in Respect of Treaties, had examined the problems raised by the uniting of States, they had taken the position that States could not free themselves from an international obligation by the expedient of a legal mechanism.

40. Mr. USHAKOV was in favour of article 43, but would prefer it to be divided into two separate paragraphs, one dealing with treaties between States and international organizations, the other with treaties between international organizations. The second paragraph would then state the obligation of an international organization to respect the rules of customary law existing between international organizations. He wondered whether that would be possible.

41. Mr. VEROSTA was also in favour of article 43. He had no doubt that international organizations were subject to customary law, in view of their special status.

42. Mr. REUTER (Special Rapporteur) observed that the division of article 43 into two paragraphs involved either a question of drafting, which it was for the Drafting Committee to settle, or a question of substance. In latter case, he was not in a position to affirm that there were customary rules pertaining to international organizations only, but he thought there were customary rules common to States and international organizations.

43. Mr. USHAKOV pointed out that that remark also applied to the text under consideration, since the treaty referred to in article 43 could be a treaty concluded between international organizations only.

44. Mr. TABIBI supported the draft article and recommended that it be referred to the Drafting Committee. He agreed on the need to take account of the fact that certain customary rules applied in the case of international organizations.

45. Sir Francis VALLAT supported the draft article, despite one or two minor points of drafting that did not call for comment at that stage. In his view, the draft article was to be read as implying a phrase similar to that customarily inserted in English pleadings when pleading to the facts, namely, "if any, which is not admitted".

46. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 43 to the Drafting Committee.

It was so decided. [11]

The meeting rose at 1 p.m.

[11] For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

1548th MEETING

Friday, 8 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

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

ARTICLE 44 (Separability of treaty provisions)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 44 (A/CN.4/319), which read:

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under [article 56], to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in [article 60].

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under [articles 49 and 50] the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under [articles 51, 52 and 53], no separation of the provisions of the treaty is permitted.

2. Mr. REUTER (Special Rapporteur) pointed out that article 44 of the Vienna Convention [1] was a technical article, which stated general rules (paragraphs 1

[1] See 1546th meeting, foot-note 1.

and 2), attenuated by exceptions (paragraph 3), and special rules concerning certain cases of invalidity that raised problems of responsibility (paragraphs 4 and 5).

3. Since it was an article dealing mainly with the internal balance of a treaty, he thought the rules of the Vienna Convention could be applied as they stood to the treaties being considered by the Commission. He had therefore confined himself to adding the words "or the international organization" after the word "State" in paragraph 4.

4. As article 44 referred to other draft articles which the Commission had not yet examined (articles 49, 50, 51, 52, 53, 56 and 60), the latter had been placed in square brackets, since the final text of article 44 could not be established until the Commission had decided on those articles.

5. After a brief procedural discussion in which Mr. Njenga, Mr. Verosta, Mr. Ushakov, Sir Francis Vallat, Mr. Tabibi, Mr. Francis and the Special Rapporteur took part, the CHAIRMAN proposed that draft article 44 be referred to the Drafting Committee provisionally, subject to whatever decisions the Commission might take concerning the articles mentioned in it.

It was so decided. [2]

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

6. The CHAIRMAN invited the Special Rapporteur to introduce draft article 45, which read:

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

VARIANT A

A State or an international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [articles 46 to 50] or [articles 60 and 62] if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

VARIANT B

A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under [articles 46 to 50] or [articles 60 and 62] may no longer be invoked by:

(*a*) a State if, after becoming aware of the facts:

(i) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(ii) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

(*b*) an international organization if, after becoming aware of the facts, it has, in accordance with the relevant rules of the organization, agreed that the treaty is valid or remains in force or continues in operation, as the case may be.

7. Mr. REUTER (Special Rapporteur) said that draft article 45 also referred to articles which the Commission had not yet examined (articles 46 to 50, 60 and 62), but that in addition it raised important questions of principle which should be considered at once.

8. Article 45 of the Vienna Convention was intended simply to specify the effects of the positions taken by States in regard to a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. It laid down two rules on the subject. The first, which was not contested, was that a State might agree to consider that, as far as it was concerned, the treaty was valid, or remained in force, or continued in operation. The second, which had been strongly opposed at the United Nations Conference on the Law of Treaties, raised problems which the Commission had already encountered and would meet again in other articles. The words "by reason of its conduct", in subparagraph (*b*), did not indeed belong to the sphere of treaties but pertained to the principle of good faith, since they referred to the case of acquiescence, which was a passive attitude. Some delegations at the Conference on the Law of Treaties had therefore feared that subparagraph (*b*) would give States too much freedom. The Conference had rejected, against the Commission's advice, a draft article 38 [3] based on an award by an arbitral tribunal concerning a dispute between France and the United States of America, in which the tribunal had recognized that there had been a real change in the treaty by reason of the attitude of certain French authorities.

9. With regard to States, the Commission was obliged to follow the rule stated in the Vienna Convention. But should it adopt the same rule for international organizations? If so, it would suffice to take article 45 of the Vienna Convention and merely add the words "or an international organization" after the word "State". That was what he had proposed in variant A.

10. However, another approach might be adopted, which would be to distinguish between the case of States and that of international organizations. That was the approach proposed in variant B, which retained the text of the Vienna Convention for States, but changed it for international organizations by adopting a more treaty-oriented viewpoint. That had been done in two ways: first, by eliminating the concept of conduct and replacing it by that of agreement, which implied a more formal consent; and secondly, by referring to the relevant rules of the international organization. The distinction thus made between the case of States and that of international organizations

[2] For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

[3] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 158, document A/CONF.39/14, paras. 342–348.

was therefore manifest both at the theoretical and at the practical level, because, in the case of organizations, their conduct must take the form of agreement —which meant the positive expression of consent— and must conform to the relevant rules of the organization. Variant B thus provided better protection for international organizations than for States.

11. Article 39 of the Vienna Convention provided that "A treaty may be amended by agreement between the parties". The word "agreement", however, seemed to refer to any form of consent whatsoever, including oral consent, or even tacit or implied consent. Had the Conference on the Law of Treaties intended to go so far as to say that a treaty could be amended by oral agreement? He did not think so, for the Conference had rejected draft article 38 proposed by the Commission, which permitted the modification of a treaty by subsequent practice of the parties. In taking that position, it might be supposed that the Conference had meant to say, in article 39, that amendments were not subject to the same formal conditions as treaties, but that they nevertheless required formal agreement. That was why the new draft article 39 adopted by the Drafting Committee, and not yet submitted to the Commission, provided that "a treaty may be amended by the conclusion of an agreement between the parties". That position taken by the Drafting Committee militated in favour of variant B, which was calculated to prevent international organizations from entering into treaty commitments too lightly.

12. The problem, however, arose not only in the context of treaties; it also related to the question of responsibility. In spite of the efforts made to avoid the problem of responsibility in the Vienna Convention, it still arose in connexion with several articles of that Convention, particularly articles 49, 50 and 60. He had pointed out, in paragraph (3) of his commentary to draft article 45, that "international organizations are, like States, subject to the rules of international relations which render the subjects of international law responsible for their conduct".

13. Thus although variant B protected an international organization in regard to treaties, it did not relieve it of all responsibility. For under that variant, if an international organization behaved as though it had acquiesced in the validity of a treaty, it was not bound by its conduct in regard to the treaty, since mere conduct on its part was not regarded as acquiescence, although it might incur responsibility by reason of its conduct.

14. He therefore emphasized that variant B did not exlude the possible responsibility of an international organization for its conduct, if that conduct caused damage to the co-contracting parties.

15. Mr. USHAKOV was not sure how the phrase "after becoming aware of the facts", which appeared in both variant A and variant B, should be intepreted when it applied to an international organization. With regard to variant B, he could also imagine a case in which an international organization, after becoming aware of the fact that a treaty it had concluded was contrary to its constituent instrument, agreed, in conformity with its relevant rules, to consider the treaty valid. The decision to do so was taken by a two-thirds majority, while a change in the constituent instrument required not only acceptance by a two-thirds majority but also ratification by two thirds of the member States. If, in accordance with its rules on competence to conclude treaties, the international organization recognized as valid a treaty that was contrary to its constituent instrument, could it thus amend that instrument?

16. Mr. REUTER (Special Rapporteur), replying to the first question put by Mr. Ushakov, explained that the facts of which an international organization might have become aware were those which made it possible to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. The question who must have become aware of those facts was decided by the relevant rules of the organization: it would be the organs empowered to invoke the grounds or reasons in question—they might be supreme organs, non-permanent organs, or even the member States in their entirety.

17. The case envisaged by Mr. Ushakov concerned one of the grounds for invalidity of treaties: violation of provisions regarding competence to conclude treaties, which would be dealt with in article 46. Having concluded a treaty contrary to its constituent instrument, which was consequently invalid, an international organization might wish to remove that invalidity. It would then be the relevant rules of the organization that would determine how that aim could be achieved. But in order to achieve it, some of the rules would have to be amended. The amendment would be made in accordance with the rules themselves. If there was a particularly serious breach of a rule, which involved an amendment requiring ratification by two thirds of the member States and, for example, ratification by certain specified member States, renunciation of the particular ground for invalidity could take place only in conformity with that procedure.

18. Mr. PINTO said that, in considering draft article 45, it was necessary to draw a distinction between States and international organizations, since the structure of the former differed from that of the latter in respect of the decision-making process. That was the basis for his preference for variant B.

19. Because of its governmental structure and organization, a State was better equipped than an international organization to take immediate decisions, although obviously the speed of such decisions varied according to the State concerned and its special circumstances. An international organization, on the other hand, although perhaps better equipped than many States in terms of resources and staff, had a more cumbersome decision-making process, one example being the requirement that a decision be taken by a two-thirds majority vote. He could not, however, accept that an organization should be regarded as a weaker subject of international law. It was merely different, and that difference should be reflected in the

draft article. Moreover, an international organization, particularly if it were of a universal character, represented a community of interests requiring protection. It could perhaps be said that such an organization should be judged by its weakest member, and to that extent there was an element of social interest providing the basis for the organization's protection which was reflected in variant B.

20. There was of course little practice in the case of international organizations to support the Vienna Convention formulation, although he wished to draw attention to one possible area of practice reflected in the Loan Regulations of IBRD. Article VII, section 7.03 of Loan Regulation No. 4, of 15 June 1946, relating to failure to exercise rights, read:

> No delay in exercising, or omission to exercise, any right, power or remedy accruing to any party under the Loan Agreement or Guarantee Agreement upon any default shall impair any such right, power or remedy or be construed to be a waiver thereof or an acquiescence in such default; nor shall the action of such party in respect of any default, or any acquiescence in any default, affect or impair any right, power or remedy of such party in respect of any other or subsequent default. [4]

That provision seemed to him to militate in favour of variant B.

21. Lastly, he recognized that international organizations were deemed to be responsible for their acts, but he thought the rules governing such responsibility would perhaps differ slightly from those governing State responsibility.

22. Mr. JAGOTA agreed that there was a fundamental difference between a State and an international organization, but, unlike Mr. Pinto, his preference was for variant A. In the first place, he saw neither reason nor logic in providing an organization with greater protection than a State against the abandonment of certain rights, and that would be the effect of variant B. Indeed, the Special Rapporteur had himself pointed out, in paragraph (3) of his commentary, that it would have "the effect, if not the purpose, of protecting the organization against its own conduct".

23. Secondly, with regard to the substance of the draft article, it was necessary to reflect on what was meant by the words "conduct" and "acquiesced" as used in subparagraph (*a*) (ii) of variant B. Conduct could, of course, take several forms. It might, for example, relate to the material breach of a treaty, whereby the interests of one of the other States parties were affected. If that State expressly agreed that the treaty should none the less remain in force, the position would be covered by variant A. But if it did not do so and, in addition, failed to make a formal protest against the infringement of its rights, that would amount to acquiescence by conduct. The aggrieved State could not then invoke as a ground for suspending or terminating the treaty a material breach of its terms. Again, an international organization might fulfil its obligations under a treaty in regard to some States but not to others, or, for instance, one or two of the parties to a loan agreement, but not others, might be allowed to default on it. In such a case, it would not be possible to invoke a breach of the terms of the treaty or agreement because a breach had already been accepted. Or again, one party might conclude a treaty believing that one of its clauses was invalid. Signature of that treaty would constitute acquiescence, through conduct, in its legal validity. In all such cases, acquiescence through conduct with reference to the same treaty involved loss of the right to invoke the ground in question to terminate or suspend that treaty. If that applied to a State, then it should also apply to an international organization, and to the same extent.

24. The next point that arose was to whom the conduct of an international organization should be attributed. That, however, pertained to the question of competence to conclude treaties, which was governed by draft article 46. Consequently, for the purposes of draft article 45, it had to be assumed that the international organization had competence in the matter, failing which subparagraph (*b*) of variant B could obviously not be invoked.

25. In the light of those considerations, he thought that States and international organizations should be placed on the same footing, and that organizations should not enjoy a privileged position as compared with States.

26. Lastly, he failed to understand the distinction referred to in foot-note 8 of the Special Rapporteur's report. Variant A should apply to both sets of articles: articles 46 to 50 and articles 60 and 62.

27. Mr. REUTER (Special Rapporteur) said that the foot-note in question was doubtless not explicit enough. It proposed a compromise between his own position, supporting variant A, and the conclusion resulting from examination of the Drafting Committee's text of article 39. The solution consisting in distinguishing between certain groups of articles was perhaps not a very good one, but it might be accepted that it was necessary to give more protection to international organizations in the very serious cases covered by articles 46 to 50, concerning the validity of agreement, than in the cases covered by articles 60 and 62, which did not involve consent as such but concerned the occurrence of external events. Thus article 60 raised a question of responsibility. As Mr. Pinto had observed, the question of the responsibility of international organizations, which was different from that of States, had not been studied by the Commission, but it nevertheless came within the same general scheme. Questions of responsibility were in any case much less serious than those of invalidity. The same might be said of article 62, concerning fundamental change of circumstances.

28. Mr. NJENGA said he could see good reason for discriminating between States and international organizations for the purposes of draft article 45, although he recognized that it would give rise to some difficul-

[4] United Nations, *Treaty Series*, vol. 260, p. 396.

ties if international organizations were to lose certain rights by acquiescence through conduct. Indeed, he was not altogether in favour of such a rule even in the case of States.

29. One of the many practical problems involved was that it was difficult to determine to whom the conduct of an international organization should be attributed. For example, to take the case of a loan from IBRD, it could be argued that failure by the local representative to press for repayment by the due date amounted to acquiescence, so that the Bank forfeited its right. But what would be the position when the matter came up before member States, and who would be responsible for meeting the loss? Similarly, although under most headquarters agreements with the host State international organizations enjoyed exemption from taxation, in some instances taxes might be levied initially but subsequently refunded. If, however, an international organization failed to request such a refund, that could be construed as conduct indicating that it had decided to forgo its right. Again, what would the position be when such an international organization had to justify its conduct, and the considerable amounts of money involved, before its member States?

30. In that respect, he could only agree that organizations differed in their decision-making process and structure from States, and should therefore not be equated with the latter for the purposes of draft article 45. He therefore supported variant B.

The meeting rose at 11.35 a.m.

1549th MEETING

Monday, 11 June 1979, at 3.5 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Organization of work (*continued*)*

1. The CHAIRMAN informed the meeting of the Enlarged Bureau's recommendation that the Commission should again, for the current session, set up a Planning Group of the Enlarged Bureau to consider the future programme and methods of work of the Commission and report thereon to the Enlarged Bureau. The Group would be composed of Mr. Pinto (Chairman), Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Reuter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, M. Tsuruoka, Mr. Ushakov, Sir Francis Vallat and Mr. Yankov. As usual, any member of the Commission wishing to do so could attend the meetings of the Planning Group.

2. If there was no objection, he would take it that the Commission decided to accept the recommendation of the Enlarged Bureau.

It was so decided.

3. The CHAIRMAN said that the question of treaties concluded between States and international organizations or between two or more international organizations, which the Commission had taken up on 6 June, would be examined until 26 June. The Special Rapporteur for that topic would be away on 18 and 19 June and the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses would be away for a few days during the period 20-26 July originally scheduled for consideration of the latter topic. The Enlarged Bureau therefore recommended that the meetings of 18 and 19 June should be reserved for the second of those topics. The meetings in the period 20-26 July, which the Rapporteur for that topic could not attend, might be reserved for considering the first report of the Special Rapporteur for the topic of jurisdictional immunities of States and their property.

4. If there was no objection, he would take it that the Commission decided to accept the proposal of the Enlarged Bureau, in which case the programme of work adopted by the Commission at its 1539th meeting on the proposal of the Enlarged Bureau would be amended accordingly.

It was so decided.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319)

[Item 4 of the agenda]

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

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)[1] (*continued*)

5. Mr. DÍAZ GONZALEZ said that, in view of the logical sequence followed by the Special Rapporteur throughout the draft articles, he favoured the text of variant A for article 45.

6. In the case of an international organization, the treaty agreement machinery provided for in the rele-

* Resumed from the 1539th meeting.

[1] For text, see 1548th meeting, para. 6.