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A/CN.4/SR.1553

Summary record of the 1553rd meeting

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

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which the representative of a State or an international organization received, together with full powers, instructions that restricted those powers. If those instructions had not been notified to the other States or organizations concerned before the consent of the State or organization in question had been expressed or communicated, they could not be invoked as invalidating its consent.

37. As in other provisions of the draft, the verb "communicate" had been used rather than the verb "express", when referring to the representatives of international organizations. The article accordingly differed slightly in wording from the corresponding article of the Vienna Convention, both in the title and in the text, in addition to the fact that it consisted of not one but two paragraphs, dealing respectively with the representative of a State and the representative of an international organization.

38. To cover all the types of treaty contemplated in the draft, the words "to the negotiating States and other negotiating organizations", at the end of article 47, paragraph 2, should be replaced by the words "to the negotiating States, to the negotiating States and other negotiating organizations, or to the other negotiating organizations, as the case may be".

The meeting rose at 12.50 p.m.

1553rd MEETING

Friday, 15 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Ghali, 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.

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 47 (Specific restrictions on authority to express or communicate consent to be bound by a treaty)[1] (*concluded*)

1. Mr. USHAKOV doubted whether paragraph 2 of draft article 47 was necessary. There was indeed a great difference between authority to bind a State by expressing its consent and authority to communicate the consent of an international organization. In accordance with the practice of States and in conformity with article 7 of the Vienna Convention[2] and with the corresponding article of the draft, certain persons were considered as representing the State *ex officio* and as authorized to express the consent of the State to be bound by a treaty without having to produce full powers. That did not apply to international organizations, because the decision of an organization to be bound by a treaty emanated, in all cases, from the competent organ. That was why article 7, paragraph 4, of the draft[3] referred to communication of the consent of an international organization, not to expression of its consent. Paragraph 2 of article 47 referred to that same communication. He wondered what restriction there could be on authority to communicate consent emanating from an organ of an organization. A representative having such authority might or might not communicate the consent, but he could not communicate it partially or provisionally. That being so, paragraph 2 of article 47 seemed to be superfluous.

2. The article under consideration also raised the question of the relationship between articles 7 and 11 of the draft. The two paragraphs of article 11, entitled "Means of establishing consent to be bound by a treaty", referred respectively to the consent of a State and the consent of an international organization. Under the terms of paragraph 2, the consent of an international organization to be bound by a treaty was established "by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed". Those different means, with the exception of signature, involved a decision by the competent organ of the organization. There was no question of a representative of an international organization being able to bind the organization directly and finally by his signature, but unless that possibility existed under article 11 there was no justification for article 47, paragraph 2. He concluded that the Commission had perhaps been wrong in providing, in article 11, that the consent of an international organization to be bound by a treaty could be established by signature.

3. Mr. REUTER (Special Rapporteur) said he did not share Mr. Ushakov's concern at all. As to the possibility of placing a specific restriction on authority to communicate the consent of an international organization, he gave the following example: after taking cognizance of the text of a treaty, the permanent organ of a customs union might give its representative authority to sign the treaty *ad referendum* if he could not persuade one of the other signatories to withdraw a reservation made when the text had been adopted; if the representative then signed the treaty and finally bound the organization without having obtained the desired withdrawal, and if his instructions had been kept secret, article 47 would apply.

[1] For text, see 1552nd meeting, para. 35.

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

[3] *Ibid.*, foot-note 4.

4. With regard to the relationship between draft articles 7 and 11, he pointed out that in article 7, paragraph 4, the Commission had not specified the means of communication that might be used. It had been at Mr. Ushakov's request, and in spite of fairly strong opposition, that the word "communicate" had been used, not in order to exclude the possibility of an international organization binding itself by signature—since that possibility was provided in article 11, paragraph 2—but in order to reserve the hierarchy of powers of international organizations. Thus Mr. Ushakov's demonstration would conduce either to amendment of articles preceding the article under consideration, or to showing that the commission had been wrong to use the word "communicate". In the latter case, it would be better to persist in the error, in order to preserve the logical sequence with the preceding articles.

5. Mr. USHAKOV pointed out that the concept of communication was not peculiar to representatives of international organizations. The representative of a State, for instance, might communicate the ratification of a treaty by that State. If the decision he transmitted was signed by the head of State, he would not be required to produce powers, but if it was not, he would be required to do so. It was because an organization was not itself able to sign its decisions that article 7 provided that its consent should be communicated by a representative. In the case of States, a person might be given general authority to sign treaties, whereas in the case of international organizations the competent organ had to take a decision on the text of a treaty before authorizing a representative to sign it. Article 7 was drafted accordingly. But article 11 provided that an organization could be bound by the signature of its representative. Either article 7 should be brought into line with article 11 or, better, the reference to signature should be deleted from article 11.

6. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov's comments raised questions of both substance and form. With regard to substance, Mr. Ushakov wished to prohibit international organizations from concluding treaties that would bind them solely as a result of signature by their representative. But practice showed that many organizations authorized their executive secretaries or secretaries-general to sign agreements, which thus became final. Taking that practice into account, the Commission had included signature among the means of establishing the consent of an international organization to be bound by a treaty. Mr. Ushakov was now reopening the whole question on a purely terminological argument. The word "communicate" had been used in draft article 47 rather than the word "express", purely in the interests of consistency with articles already adopted. That being so, the Commission could only note Mr. Ushakov's position and decide to consider it during the second reading of the draft.

7. Mr. JAGOTA said it appeared to be Mr. Ushakov's view that the treaty-making procedures of international organizations differed from those of States in that they were of a more formal character. In other words, authorization for an international organization to be bound by a treaty depended on a decision by the competent organ of that organization, and only after that decision had been taken could consent to be bound by the treaty be communicated. Mr. Ushakov therefore concluded that there could be no secret restrictions on authority to communicate the consent of an international organization to be bound by a particular treaty. Nevertheless, it was necessary to take account of the normal course of treaty-making by States and international organizations. In that respect, the Special Rapporteur had made a valid distinction between States and international organizations in article 47 by providing that the consent of a State was expressed whereas the consent of an international organization was communicated.

8. Article 7 of the draft specified who had authority to express or communicate consent to be bound by a treaty, and article 11 dealt with the manner in which such consent was to be expressed or communicated. Article 47, however, was concerned not with authority to express or communicate consent, but with the entirely different question of restrictions on such authority. The article provided, in effect, that, regardless whether the restrictions imposed on the representative of a State or an international organization were confidential, they must have been notified to the other negotiating partner in order to be invoked by the State or organization if its representative had failed to observe them. Where a negotiating State was made aware, either formally or informally, that the representative of the other negotiating State was required to enter a reservation to a particular clause of the treaty but had failed to do so and proceeded to sign the treaty as a whole, it must endeavour to make sure that the representative in question had meanwhile obtained authorization to sign the treaty without reservation. Otherwise, the matter would come under the provisions of article 47, paragraph 1. The same held true, *mutatis mutandis,* for international organizations.

9. The draft rightly differentiated between the question of the competence of the person authorized to express or communicate consent to be bound by a treaty, which was dealt with in articles 7 and 11, and the question of restrictions on his authority, which was dealt with in article 47. The latter article differentiated between States and international organizations solely for drafting purposes, since the same rule would apply both to a State and to an international organization. If article 47 were to be regarded as simply another aspect of the question of competence to express or communicate consent to be bound by a treaty, then articles 7, 11 and 47 would all have to be reconsidered.

10. Mr. USHAKOV said he did not see how it could be maintained that article 7, paragraph 4 (*b*), authorized a person to express rather than to communicate the consent of an organization. He could not conceive that practice or other circumstances could show that a person was considered as representing an organization

for the purpose of expressing its consent without having to produce powers. It was quite impossible to maintain that practice empowered certain persons to bind international organizations directly, in the same way as it empowered heads of State, heads of Government and ministers for foreign affairs to bind States. In reality, article 7, paragraph 4, was concerned with quite a different idea—that of communication, which also applied to States. For instance, the Secretary-General of the United Nations had general authority to transmit the decisions of the General Assembly and the Security Council; any other person had to be specially authorized to do so. In either case, it was only a matter of transmitting instruments or decisions. Authority to sign could be conferred on the representative of an organization only by a decision of the competent organ, and never in advance, as in the case of States.

11. Mr. FRANCIS said he had no difficulties with the substance of the formulation proposed by the Special Rapporteur. The conclusion of treaties by an international organization had to be considered in the light of the provisions of article 6 and other articles of the draft, in particular articles 7 and 11. Mr. Ushakov's argument was valid if, for example, the consent related to a matter that required a decision by the international organization. But under article 2, paragraph 1 (*j*), the rules of the organization included not only its decisions but also its established practice. It was the established practice of the United Nations to establish UNDP offices in Member countries, and he believed that the appropriate UNDP officials had the authority to conclude binding agreements with those countries. The legal efficacy of that established practice could not easily be challenged.

12. If the powers of the Secretary-General of the United Nations were made subject to a restriction that was at variance with normal practice in regard to the conclusion of agreements, and if that restriction were not notified to the other negotiating State, the case would clearly fall within the scope of article 47. On the other hand, the established practice of an international organization might be such that it was unnecessary to produce appropriate powers in written form on every occasion. With regard to the application of article 47, it was especially important to make it clear that any change in the established practice of an international organization should be communicated to the other parties concerned. In his opinion, it was not enough for the organization to claim that it had instructed its executive head to notify the other parties of any change: the organization must itself make sure that the parties had in fact been notified.

13. Mr. SCHWEBEL said it was not difficult to think of cases in which the Secretary-General of the United Nations might be able, through an agreement by letters equivalent to a treaty, to make binding arrangements in respect of a resident representative in a Member State, without any need for approval by the General Assembly. Such arrangements might be in keeping with established guidelines or with an earlier arrangement approved by an appropriate organ of the United Nations. However, the Secretary-General might alter the arrangements to meet local requirements, and impose restrictions on his representative, who represented him and, in turn, the Organization. Such practice was doubtless followed in connexion with the United Nations public information offices established in many countries.

14. Even in matters of more serious import he wondered whether, for example, agreements concluded between the United Nations and host States for the maintenance of peace-keeping forces were in fact regularly approved by the Security Council or the General Assembly. The practice might simply be for the Secretary-General to submit a report containing a description of his activities and intentions; the appropriate organ, in approving the report, would thus approve the actions of the Secretary-General. Similarly, if the commander of a United Nations peace-keeping force entered into a cease-fire agreement in order to give his troops the freedom of movement envisaged in the pertinent resolution of the Security Council, that agreement was in effect a treaty, although it might not have been approved in advance by the United Nations. It would form the subject of a report by the commander to the Secretary-General, who would then report to the appropriate United Nations organ.

15. Many situations could obviously fall within the ambit of article 47, even in the context of the United Nations, and particularly in the case of customs unions, to which the Special Rapporteur had referred. Consequently he was prepared to accept the substance of article 47, and he doubted whether any change was required in the wording.

16. Mr. SUCHARITKUL was satisfied with article 47, which seemed perfectly in keeping with practice. The authority of a representative was often restricted in respect of time or for budgetary reasons, and it was right that, if the co-contracting party were not notified of those restrictions, non-compliance with the instructions thus given should not be able to be invoked by the State or organization represented.

17. Mr. VEROSTA thought draft article 47 was in conformity with the practice of States and of international organizations. As a matter of drafting, it might be better to specify that the organizations referred to in paragraph 2 were "international" organizations. Moreover, if the Commission came to the conclusion that the word "express" might be restored in certain articles, that word would also have to be used in paragraph 2 of the article under consideration.

18. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 47 to the Drafting Committee for consideration in the light of the discussion.

It was so decided. [4]

The meeting rose at 11.30 a.m.

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