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Summary record of the 1652nd 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:-

1981, vol. I

1652nd MEETING

Friday, 15 May 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/339 and Add.1–5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*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)[1] (*concluded*)

1. Mr. USHAKOV said that it was essential to determine whether an international organization could tacitly accept a reservation, in the same way as a State. In principle, States and international organizations were free to adopt any position on any political or legal question with which they were confronted at the international level, by means of a decision by a competent organ. Under the Vienna Convention,[2] the competent organ of a State must take a position when faced with a reservation; it could either accept it or reject it. As a former member of the Commission, the late Gilberto Amado, used to say, States were not children and they could not be presumed to have forgotten to take a decision on a reservation when they were aware of its existence. The Vienna Convention provided States with two possibilities: they could accept reservations either by a formal act or by remaining silent for twelve months. In either case, they took a decision. In the former case, their decision was published, whereas in the latter, the organ which had taken the decision in accordance with the constitutional procedure did not publish it.

2. The situation of international organizations was the same. When faced with a reservation, they must take a position by a decision of the competent organ. However, the organs of international organizations generally held public meetings, and their decisions were, in principle, published. Consequently, a decision on a reservation could be communicated expressly to the other contracting parties.

3. It was pertinent to consider the scope of the acts of ratification and accession provided for in the Vienna Convention. Clearly, a State which ratified or acceded to a treaty and was aware of the existence of a reservation but did not refer to it in its act of ratification or accession could not be considered as having accepted the reservation. The ratification or accession could, for example, take place one month after the date on which the State had received notification of the reservation, so that it still had eleven months to take a decision on it. The fact that a State expressed its consent to be bound by a treaty before or after it became aware of a reservation was not crucial.

4. In his view, the rule concerning tacit acceptance, as stated in the articles under consideration, could not be applied to objections, since the consequences of acceptance and of objection were different. Acceptance had specific legal consequences, whereas objection could have two kinds of effects. The treaty in question could enter into force between the reserving State and the State objecting to the reservation, except for the provision or provisions to which the reservation related. Alternatively, the State objecting to a reservation might, by so doing, intend to reject the treaty as a whole. Moreover, regardless of the way in which the rule was stated, in either case a decision by a competent organ of the organization or State concerned was necessary.

5. There were important reasons—more of a political than of a legal nature—why the Vienna Convention afforded States a choice between express or tacit acceptance of reservations. In some cases, it was politically preferable for a State not to publish its decision to accept a reservation, for express acceptance might well prove embarrassing, whereas tacit acceptance passed unnoticed. In other cases, constitutional considerations were the determining factors; tacit acceptance meant that a Government could refrain from referring the matter once again to Parliament when the latter had endorsed the ratification of a treaty before any reservation had been formulated. In the case of international organizations, there were, generally speaking, no such political reasons, since the deliberations of their organs were, in principle, public. Consequently, an international organization could not tacitly adopt a position on a reservation. How could an organ like the United Nations General Assembly or Security Council take a tacit decision on a reservation, without deliberating and voting on the matter?

6. Tacit acceptance of a reservation, whether by a State or an international organization, called for a time-limit. Without a time-limit, the concept of tacit acceptance would be meaningless, since the situation

[1] For texts, see 1651st meeting, para. 47.
[2] See 1644th meeting, footnote 3.

of uncertainty could continue indefinitely. A time-limit must also be set if international organizations were to be required to accept or reject reservations expressly. Perhaps the time-limit of twelve months would not be sufficient because, in some international organizations, the competent organs held only two sessions each year. Account should be taken of any comments that international organizations might still make in that regard.

7. In his opinion, if an international organization failed to take a decision on a reservation within the given time-limit, the reservation could not be considered as either accepted or rejected. If the treaty had already been formally approved by the organization at the time the reservation was formulated, but the organization subsequently took no decision on the reservation, the treaty must be considered as suspended as far as relations between the organization and the reserving party were concerned. Such a situation was abnormal but it could arise, as could the abnormal situation covered by article 18 of the Vienna Convention, a situation in which a treaty was signed but not ratified.

8. Lastly, he continued to hold the view that it was impossible to formulate a rule whereby silence on the part of an international organization would be tantamount to acceptance of a reservation. He stressed that the article which he had proposed[3] did not give rise to the same difficulties as the articles under consideration, since it ruled out any problem of objection to reservations.

9. Mr. RIPHAGEN, referring to the question of tacit acceptance of reservations, said that he doubted whether there was much difference between a modern State and an international organization with respect to awareness of the existence of a reservation. For example, in the case of treaties of which the Secretary-General of the United Nations was the depositary, reservations were first communicated to him and then transmitted by him to the States parties to the instruments concerned; whether knowledge of such a reservation reached all the competent authorities of a particular State—and it did not always do so—depended, as in the case of an international organization, on the efficiency of its bureaucracy.

10. More important, the construction of tacit or implied acceptance and that of objections which were not real objections (in the sense that they did not prevent the entry into force of a treaty between a reserving State and a State opposing the reservation) had, he believed, been devised in order to maintain the integrity of multilateral treaties to the greatest possible extent, to avoid splitting them into a series of bilateral agreements. In his view, the reasons which had led the United Nations Conference on the Law of Treaties to adopt the present system with respect to States were also valid with respect to international organizations, and the system should, therefore, be extended to them too.

11. Mr. CALLE Y CALLE said that it was fair to apply not only to States but also to international organizations the principles mentioned by the Special Rapporteur in his report (A/CN.4/341 and Add.1, para. 81), namely, the principles that a legal entity was responsible for its conduct and that it must define its juridical positions within a reasonable time. Furthermore, international organizations were now familiar, through practical experience, with what participation in a treaty entailed and with the possibility of requesting the inclusion in an instrument, should they feel it necessary, of a longer time-limit for expressing their reactions to reservations than the usual and reasonable period of twelve months.

12. For that reason, and also because the rules involved were simply residual rules that catered for situations not expressly covered by a treaty, he believed that article 20, paragraph 4, and article 20 *bis*, paragraph 4, should be maintained in their present form.

13. Mr. TSURUOKA said that he agreed with the comments by Mr. Riphagen and Mr. Calle y Calle. The solution proposed in connection with implicit acceptance was the outcome of a logical interpretation. However, the stipulated twelve-month time-limit for tacit acceptance might lead to some misgivings because of the differences between States and international organizations. He welcomed the fact that the draft adopted on first reading took ample account of the current practice and of foreseeable developments in the fairly near future. In his opinion, the Commission should concentrate on creating international instruments that were easy to apply.

14. He also endorsed Mr. Njenga's comment (1651st meeting) that the capacity to accept reservations was the corollary of the recognized capacity of international organizations to conclude treaties and formulate reservations. Recognition of the capacity of international organizations to formulate reservations signified recognition of the fact that the organization had sufficiently effective machinery to be able to participate in the conclusion of treaties, to formulate reservations and likewise to handle any normal procedure in the life of a treaty.

15. He expressed the hope, therefore, that the Commission would indicate, if not in the actual text of the draft, then at least in the commentary, that the articles related only to international organizations which had the capacity to exercise rights and assume obligations under international law and were thus able to become parties to treaties, in keeping with the opinion expressed by the Canadian Government in its observations (A/CN.4/339).

16. Mr. REUTER (Special Rapporteur) said that the two articles under consideration raised three different problems.

[3] See *Yearbook ... 1977*, vol. II (Part Two), p. 113, footnote 478.

17. To begin with, the Commission must determine whether the twelve-month time limit stipulated in articles 20 and 20 *bis* was long enough in the case of international organizations. Mr. Ushakov had not given any final answer on that point and Mr. Calle y Calle seemed to favour a twelve-month time-limit, provided the commentary made it clear that the rule was a residual one and that an organization permitted to take part in negotiations could argue that such a time-limit was insufficient. The members of the Drafting Committee should reflect on that problem—although it was not, in his view, fundamental—in order to arrive at the most equitable solution.

18. Again, members were generally agreed on the need to set a time-limit, even though the consequences of the expiry of the time-limit still had to be determined later.

19. The third question was the most complex, since it was one of deciding whether an organization's conduct could be invoked against the organization, even in matters of treaties. He emphasized that some standards were undoubtedly necessary in that regard, and perhaps even more so for international organizations than for States. However, he would prefer to postpone consideration of that question, which emerges again in connection with other articles. In considering Mr. Ushakov's proposal at the present stage, the Commission should not adopt a general position that would apply to the draft as a whole.

20. He did not consider it possible to establish a privileged status for international organizations that would be justified by their organic weakness. If the security necessary for legal relations was not to be destroyed, the principle must be that whoever participated in such relations was bound by his conduct. Mr. Ushakov's proposal in that regard was an interesting one, since its effect would be to suspend, on expiry of the twelve-month time-limit, the effects of the treaty in relations between the international organization and the reserving State. Obviously, the effects of the treaty would not be suspended in respect of the other parties. However, in such a case, the international organization's position as a result of its silence would in fact be the same as if the organization had formulated an objection declaring that the effect of the objection, in its relations with the reserving State, was that it would not consider the reserving State as a party to the treaty vis-à-vis the organization itself. Such a position would not be treated as an objection, but it would nevertheless have the effects of an objection. In that connection, Mr. Ushakov seemed to be concerned more with a matter of principle than with a specific problem, since the result was the same as if one decided that the presumption established for States was reversed in the case of organizations.

21. Speaking as a member of the Commission, he pointed out that Mr. Ushakov had stated that, in most cases, the deliberations of the competent organs of international organizations were public. While that was true in the case of the General Assembly or the Security Council, it was nevertheless for the United Nations to determine whether, for example, the Secretary-General was himself competent to make an objection to a reservation. Admittedly, practice afforded examples of circumstances in which the Secretary-General had taken the initiative of making statements which he had qualified as objections—even when they did not constitute objections within the meaning of the Vienna Convention, but rather "legal criticisms". Nevertheless, the problem remained of determining what constituted an objection, for the Vienna Convention was silent on the matter. Moreover, not all the governing bodies of organizations necessarily deliberated in public.

22. To sum up, all members who had spoken had favoured a possible relaxation of the time-limit for international organizations, but wished to retain paragraph 4 of the provisions under consideration.

23. He thought that articles 20 and 20 *bis* could be referred to the Drafting Committee.

24. Mr. USHAKOV said that he had drawn a distinction between two categories of reservations—those which were expressly authorized by the treaty and those which were authorized in some other manner. Reservations in the first category did not in principle call for acceptance, except where the treaty provided otherwise. Reservations in the second category were also authorized, even if not expressly.

25. A legal criticism was made when a State declared that the reservation of another State was contrary to the object and purpose of the treaty. He did not see such a declaration as an "objection", for the fact that a contracting party formulated an unauthorized "reservation" gave rise to a dispute regarding the interpretation of the provisions of the treaty and it had to be resolved by all the parties or by recourse to expressly established procedures for the settlement of disputes.

26. The CHAIRMAN suggested that the Commission should refer articles 20 and 20 *bis* to the Drafting Committee.

It was so decided.[4]

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* (Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States)

[4] For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 25–35.

27. The CHAIRMAN invited the Special Rapporteur to present articles 21, 22, 23 and 23 *bis*, 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, subject to formal confirmation, acceptance or approval, a treaty between several international organizations, a reservation must be formally confirmed by the 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 23 bis. *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.

28. Mr. REUTER (Special Rapporteur), supported by Mr. ŠAHOVIĆ and Mr. USHAKOV, suggested that, since the articles in question had not given rise to substantive comments, it would be preferable for the Commission to refer them to the Drafting Committee, but reserve the right to revert to a number of important points later on, after the Committee's deliberations.

29. The CHAIRMAN suggested that the Commission refer articles 21, 22, 23 and 23 *bis* to the Drafting Committee, under the conditions suggested by Mr. Reuter.

It was so decided.[5]

ARTICLE 24 (Entry into force of treaties between international organizations),

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

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

[5] *Idem*, paras. 36–37, 38–39 and 40–41.

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

30. The CHAIRMAN invited the Commission to consider articles 24, 24 *bis*, 25 and 25 *bis*, 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 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 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.

Article 24 bis. *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 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 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.

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 organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating 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 25 bis. *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 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 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.

31. The CHAIRMAN suggested that articles, 24, 24 *bis*, 25 and 25 *bis* should be referred to the Drafting Committee.

It was so decided.[6]

The meeting rose at 11.30 a.m.

[6] *Idem*, paras. 43–44.

1653rd MEETING

Monday, 18 May 1981, at 3.10 p.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Jurisdictional immunities of States and their property (A/CN.4/331 and Add.1,[1] A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

[1] *Yearbook ... 1980*, vol. II (Part One).