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Summary record of the 1699th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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Election of officers

Mr. Reuter was elected Chairman by acclamation.

Mr. Reuter took the Chair.

27. The CHAIRMAN thanked the members of the Commission for electing him Chairman. After paying tribute to his predecessor, he extended a welcome to the new members of the Commission. As now constituted, the Commission was more representative of the international community and, with all the means that were available to it, it should be in a position to fulfil the many tasks that lay ahead.

Mr. Díaz González was elected first Vice-Chairman by acclamation.

Mr. Flitan was elected second Vice-Chairman by acclamation.

Mr. Sucharitkul was elected Chairman of the Drafting Committee by acclamation.

Mr. Njenga was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/349/Rev.1)

28. Mr. NI said that, as a new member of the Commission, he would like to ask two questions concerning agenda item 10, on the "Programme and methods of work", two terms that, in his view, were highly specific. However, General Assembly resolution 36/114, referred to by the Legal Counsel, endorsed the establishment of "general objectives and priorities" which would guide the Commission's study of the topics on its programme of work. Those were, in fact, guidelines, a much broader concept. He would also like to know whether the thirteen items on the provisional agenda had to be considered in their numerical order. If that was so, he believed that item 10 should be brought forward.

29. The CHAIRMAN said, in reply, that the adoption of the agenda did not prejudge the order in which the items were to be considered. With regard to the Commission's programme and methods of work, it was precisely the task of the Planning Group, under the chairmanship of the first Vice-Chairman, to prepare for a very general exchange of views on that extremely important point, which would certainly not be defined until the end of the session. The members of the Commission would thus be required to take a decision on the matter, without any restriction on their right to make proposals or to participate in the discussion. But they must also take certain decisions, forthwith, regarding their immediate work.

The provisional agenda (A/CN.4/349/Rev.1) was adopted.

Organization of work

The Commission decided to start its work with item 2 of the agenda (Question of treaties concluded between States and international organizations or between two or more international organizations)

30. Mr. ROMANOV (Secretary to the Commission) said that, in accordance with established practice, the Secretariat had prepared two conference room documents concerning item 2 of the agenda. The first (ILC(XXXIV)/Conf. Room Doc. 1) set out articles 1 to 26 of the draft articles on treaties concluded between States and international organizations or between international organizations, as adopted on second reading at the Commission's thirty-third session. The second (ILC(XXXIV)/Conf. Room Doc. 2) contained the text of article 2, subpara. 1 (*h*), and articles 27-80 of the draft, adopted on first reading. Those documents would be circulated at the following meeting.

The meeting rose at 5.35 p.m.

1699th MEETING

Tuesday, 4 May 1982, at 11 a.m.
Chairman: Mr. Paul REUTER

Organization of work (*continued*)

1. The CHAIRMAN, reporting briefly on the outcome of the Enlarged Bureau's discussion regarding the Commission's work for the immediate future, said the Bureau took the view that the Commission should allot two weeks to consideration of agenda item 2 (Question of treaties concluded between States and international organizations or between two or more international organizations), beginning at the present meeting. It should then proceed to consider agenda item 6 (Jurisdictional immunities of States and their property) for a further two weeks, and afterwards revert to agenda item 2 with a view to completing it in the first week of June.

2. If there were no objections, he would take it that the Commission agreed to that proposal.

It was so decided.

Appointment of special rapporteurs

3. Mr. CALERO RODRIGUES said that at its previous session the Commission, despite strong criticism, had decided to postpone the appointment of a new special rapporteur on the topic of the law of the non-navigational uses of international water courses. It had had good reasons for that decision. However, in resolution 36/114 the General Assembly had stressed the desirability of the Commission's appointing a special rapporteur at the commencement of the thirty-fourth session. He feared that if that was not done, the Commission could expect further criticism in the General Assembly. Again, prompt appointment of a special rapporteur would allow him time to become familiar with Mr. Schwebel's report (A/CN.4/348).

4. The CHAIRMAN said the Enlarged Bureau's view was that the Commission should not delay in appointing

a new special rapporteur. However, the appointment called for consultations between the Chairman and the members of the Commission and also among the members themselves.

5. Mr. FRANCIS said he agreed that a new special rapporteur should be appointed at the earliest opportunity. However, some members were unable to attend the opening meetings, and the Commission should therefore wait until the following week before discussing the appointment.

6. Mr. DÍAZ GONZÁLEZ said events had shown that the Commission's decision to postpone the appointment of a new special rapporteur had been correct. The appointment was indeed a matter of great importance, but he agreed with the Chairman that the necessary time must be set aside to learn the opinion of the majority of the members of the Commission. He therefore believed that the appointment would be best left until the beginning of June. In any case, no rapporteur, however qualified, would be in a position to submit a report by the end of the session.

7. Mr. PIRZADA agreed that the new special rapporteur should be appointed after consultations between the Chairman and the largest number of members possible. If that process could not be completed in the course of the week, he would suggest that the Commission should appoint the special rapporteur on 10 or 11 May.

8. Sir Ian SINCLAIR said that Mr. Calero Rodrigues' point was well taken. For his part, he would be content if the Chairman embarked on private consultations with the members present and, after obtaining a broad spectrum of opinion, suggested an appropriate date for appointing the special rapporteur. He did not believe the matter ought to be left to the beginning of June, but he was willing to leave the date to the discretion of the Chairman.

9. Mr. CALERO RODRIGUES explained that he had not suggested that the special rapporteur should be designated immediately; he had simply wished to call attention to the General Assembly's request that the appointment should be made at the commencement of the session. He agreed with Sir Ian Sinclair that it would be unfortunate to delay the appointment an entire month, and that the date for taking the decision should be left to the Chairman's discretion.

10. Mr. USHAKOV said that, despite the General Assembly's recommendation, the Commission did not have to take a hasty decision, since the new special rapporteur would not be able to begin his work until the Commission's session was over. Furthermore, the Commission had always preferred to appoint its special rapporteurs by consensus rather than a vote and, in order to achieve a consensus, consultations and exchanges of views were required between the Chairman and the members of the Commission and between the members themselves.

11. Mr. NJENGA pointed out that the decision to postpone the appointment of a new special rapporteur had been taken because of factors beyond the Commission's control. He agreed with Sir Ian Sinclair that a new special rapporteur should be appointed rapidly, but that the Commission should first engage in the appropriate consultations. A prompt decision would have the additional benefit of allowing the new special rapporteur to consult with members of the Commission during the present session. He was confident that the Chairman would be able to secure a consensus on the matter well before the beginning of June.

12. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that consultations should be held on the appointment of a new special rapporteur, on the understanding that a consensus would be reached as soon as possible.

It was so decided.

Filling of casual vacancies in the Commission (article 11 of the Statute) (A/CN.4/355 and Add.1 and 2)

[Agenda item 1]

13. The CHAIRMAN pointed out that the Commission had to fill the casual vacancy caused by Mr. Bedjaoui's election to the International Court of Justice. That could be done at the end of the week or the beginning of the following week. There were four candidates, and their *curriculum vitae* had been distributed to the Commission (A/CN.4/355/Add.1 and 2).

14. Mr. BOUTROS GHALI noted that the four candidates were well known among international jurists and said that the Commission could move to fill the vacancy very quickly.

15. Sir Ian SINCLAIR said that he endorsed Mr. Boutros Ghali's statement. The information needed to fill the vacancy was already available to members and it was desirable to reach a decision rapidly.

16. Chief AKINJIDE said he agreed with that view. The election should be held on the following Thursday at the latest, for the Commission stood in need of the contribution that would be made by the person who was elected.

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to fill the vacancy on Thursday, 6 May.

It was so decided.

Question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

18. The CHAIRMAN, speaking in his capacity as Special Rapporteur, said that before introducing his eleventh report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/353), he wished briefly to summarize the work carried out on that topic.

19. The first reading of the draft articles had bee completed in 1980,[2] and in his tenth report (A/CN.4/341 and Add.1), submitted to the Commission in 1981, he had submitted observations on articles 1 to 41, tying in the elements of the very general articles, such as article 2, to each of the other articles concerned. All those articles had been considered on second reading and referred to the Drafting Committee, which had only been able to consider articles 1 to 26.[3] At the present session, the Commission could send articles 27 to 41 direct to the Drafting Committee and consider them when they were returned; but out of consideration for the new members, he felt that the Commission could proceed to at least a brief review of articles 27 to 41 before referring them to the Drafting Committee.

20. The Commission had before it a number of documents concerning the item under consideration: the eleventh report of the Special Rapporteur (A/CN.4/353) and the section of the tenth report (A/CN.4/341 and Add.1, paras. 86 *et seq.*) that related to articles 27 to 41; the comments submitted in 1981 by Governments and the principal international organizations (A/CN.4/339 and Add.1-8); the summary of the discussion of the item in the Sixth Committee at the thirty-sixth session of the General Assembly (A/CN.4/L.339); and the comments received from Governments and the principal international organizations following the thirty-sixth session of the General Assembly (A/CN.4/350 and Add.1-11). In preparing his eleventh report, he had not been in a position to take into account the comments of the Governments of Canada, Denmark and the German Democratic Republic, or those of the EEC, the United Nations and the IAEA. Nor had he been able to take into account the most recent work of the Third United Nations Conference on the Law of the Sea, which some of the members present would be able to enlarge upon.

21. It was obvious from the comments of Governments and international organizations that the draft articles must closely follow the text of the 1969 Vienna Convention on the Law of Treaties[4] and take into account the specific problems of international organizations, but at the same time be simple and clear, yet precise.

22. In two instances, the Commission would doubtless have to reconsider draft articles that had already been adopted: article 7, when it came to consider article 47; and one of the provisions of article 20, following the introduction on second reading of article 5, at the initiative of Mr. Ushakov. It was understood that if the Commission completed the second reading of all the draft articles, the Drafting Committee would have to "clean up" the text as a whole and make any necessary minor drafting changes.

23. The question of the final form that the draft articles were to take would undoubtedly be settled by the General Assembly, but the Commission had undertaken to make a suggestion in that regard. It would obviously have been helpful to know from the outset whether the draft was to form a convention separate from the Vienna Convention; whether it was to be incorporated in that instrument, which would then be revised; or whether it was simply to be the subject of a declaration that the General Assembly would recommend for application by Governments and international organizations. In its drafting work, the Commission had taken the broadest view, which called for the most comprehensive text, and had elaborated a draft that could become a convention separate from the Vienna Convention. In doing so, it had not, for all that, taken up a position, and the fate of the draft would have to be decided at the present session. Hence, it would doubtless be better to wait until the Commission had a comprehensive view of the articles. For the time being, the form the Commission had given to its draft had an obvious advantage. If the General Assembly decided on a declaration, it would be sufficient to simplify the text, and if it opted for a convention, all the necessary provisions would have been prepared.

24. Mr. MALEK said that, although he was a new member of the Commission, he had always followed the Commission's work on the item under consideration with great interest, first as an officer in the Codification Division of the Office of Legal Affairs up until 1979, and later as his country's representative in the Sixth Committee of the General Assembly. It was gratifying that in preparing the draft articles the Commission was endeavouring to follow very closely the rules of the Vienna Convention, rules that it wished to see applied as far as possible to the situations covered by the draft. As to the form of the draft, the Commission had also been right to prepare a text which could become a convention that was independent of the Vienna Convention.

25. Although he had no specific comments to make for the time being on articles 27 to 41, he would none the less like to point out that article 36 *bis* appeared to be one of the most controversial provisions and had given rise to widely differing comments by members of the Commission at the previous session. In view of the cases in which article 36 *bis* could be applied, some members had considered that the article might raise

[2] For the text of the articles adopted on first reading, see *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.*

[3] For the text of draft articles 1-26 and commentaries thereto, adopted on second reading, see *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

[4] Hereinafter called Vienna Convention.

more problems than it solved. Some had expressed doubts about the *raison d'être* of the provision. In his opinion, article 36 *bis* was not entirely devoid of interest, because it tried to settle a confused legal point, namely, the position of the member States of an organization with regard to the treaties concluded by that organization.

26. Sir Ian SINCLAIR said it was clear that the time had not arrived for the Commission to decide on its final recommendation to the General Assembly regarding the ultimate form of the draft. Nevertheless, during its discussion of the draft articles the Commission should bear in mind that, if it recommended that they should take the form of a convention, serious problems would arise in connection with the participation of international organizations in the convention and the manner in which such organizations would express their consent to be bound by it.

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

27. The CHAIRMAN, speaking in his capacity as Special Rapporteur, said that article 27 was one of the provisions to which the Commission, Governments and international organizations had given the most attention. It did not appear to pose them any really substantive difficulties, but is caused some concern because of a drafting problem. The corresponding article of the Vienna Convention had not given rise to any difficulty, either in the Commission or at the United Nations Conference on the Law of Treaties; it set forth the obvious principle that a State could not invoke the provisions of its internal law as justification for its failure to perform a treaty to which it was a party, a rule that was without prejudice to article 46, which covered the possibility of the unconstitutionality of the treaty. An unconstitutional treaty could not, indeed, be invoked against the State that had concluded it. It was plain that the situation of a State party to a treaty and that of an international organization party to a treaty must be the subject of two separate paragraphs in the article now under consideration. If it was agreed that the reservation in article 46 applied to both situations, a third paragraph would have to be envisaged to allow for the application of that reservation to paragraphs 1 and 2. The disadvantage of such a solution, which he had proposed initially, was that it placed the reservation in a third paragraph, something which could give rise to some concern on reading the first two paragraphs. That was why he had gone on to propose, in his tenth report (A/CN.4/341 and Add.1, para. 88), that the reservation relating to article 46 should be inserted at the beginning of paragraphs 1 and 2, so that article 27 would read as follows:

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

1. Without prejudice to article 46, a State Party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. Without prejudice to articles 46 and 73, 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.

28. Other concerns had arisen because of the exception contained in paragraph 2, since members of the Commission had had in mind a case in which an organization concluded an agreement with a State in order to implement a decision taken by one of its organs, yet reserved its freedom to modify that decision. Such a case arose when the Security Council adopted a resolution concerning the conditions of a cease-fire and the United Nations concluded an agreement with one or more States with a view to implementing the resolution. The role of an agreement of that kind was to facilitate the implementation of the organization's decision, as long as that decision remained operative. In fact, a prudent organization would set a time-limit for the implementation of its decision and would reserve the right to review it. As a matter of principle, there was no doubt that an agreement concluded in implementation of a Security Council decision became void if the decision was rescinded. However, practical difficulties had sometimes arisen. For that reason, some people considered that the article under consideration should be more precise. At the previous session, a member of the Commission had pointed out that the same situation could occur in the case of treaties concluded between States, if the purpose of the treaties was to apply a national law.[5] International agreements concluded for the purpose of implementing measures under a national law that granted international assistance loans were obviously subject to the law itself remaining in force. While the situation might seem clear in theory, it was frequently complicated in practice.

29. In order to take account of the concerns expressed, even though the case in point did not appear to him to arise more frequently with regard to international organizations than it did with regard to States, he had proposed, in his tenth report, that article 27, paragraph 2, should specify that an international organization party to a treaty might 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". However, the criterion of the intention of the parties had been judged subjective and the notion of the exercise of the functions and powers of the organization had been considered vague. Consequently, he was proposing in his eleventh report (A/CN.4/353, para. 17) either that the exception in para. 2 be deleted, as follows:

> "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."

[5] *Yearbook ... 1981*, vol. I, p. 164, 1674th meeting, para. 16 (Mr. Aldrich).

and the problems considered by the Commission should be reflected in the commentary to the article, or that the exception should be redrafted in the following way:

"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 the latter [the treaty], by reason of its subject, depends on the adoption or maintenance of a decision of the organization."

30. In their comments and observations, Governments and organizations wondered what happened to a treaty properly concluded by an international organization if that organization changed, either because it had altered its structure, revised its constituent instrument or lost a large proportion of its members. In that respect, he would point out that draft article 73 expressly referred to cases that fell outside the scope of the draft. However, at the previous session, the members of the Commission had decided that it was not necessary for article 27 to include a *renvoi* to article 73.[6]

31. Lastly, to round out his comments, he wished to refer to the Convention recently adopted by the Third United Nations Conference on the Law of the Sea, which had decided that the Convention would be open to signature by some international organizations. Consequently, the Conference had established the conditions for their participation, more particularly in annex IX, article 4, paragraph 7, according to which:

7. In the event of conflict between the obligations of an international organization under this Convention and its obligations arising under the terms of the agreement establishing the organization or any acts relating to it, the obligations under the present Convention shall prevail.[7]

It was a provision which reflected a trend that would have to be borne in mind in considering the pros and cons of the two solutions for article 27, paragraph 2, proposed in the eleventh report on the topic under consideration.

The meeting rose at 12.50 p.m.

[6] *Ibid.*, pp. 159 *et seq.*, 1673rd meeting, paras. 23, 35, 36 and 42; 1674th meeting, paras. 4, 10 and 26.

[7] The Convention on the Law of the Sea was adopted on 30 April 1982 at the eleventh session of the Third United Nations Conference on the Law of the Sea. For the text, see A/CONF.62/122 and Corr.3 and 8.

1700th MEETING

Wednesday, 5 May 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING[2] (*continued*)

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)[3] (*concluded*)

1. Mr. NI said that, although the ultimate decision concerning the final form of the draft articles would be taken by the General Assembly, the draft already seemed to have assumed the shape of a convention that would be a counterpart of the Vienna Convention and would be a very useful instrument in view of the growing number of international organizations.

2. It was perhaps the content that would determine the structure of article 27, rather than the reverse. In fact, article 27 was intended to prevent a State or an international organization from invoking its internal law or its constituent rules as justification for failure to perform treaty obligations, whereas article 46 was intended to prevent a State or an international organization from invoking its internal law or its constituent rules as grounds for invalidating consent already given. The two articles thus covered two different situations. However, in order to mirror the corresponding provision of the Vienna Convention, a *renvoi* to article 46 might be retained in article 27. Article 73 was an entirely different matter, since it related to subsequent events that bore no relation to what was provided for in article 27. Moreover, article 73 also applied in the case of States, as rightly pointed out by the Special Rapporteur.[4] It was therefore perplexing to find a *renvoi* to article 73 in paragraph 2 of article 27 and not in paragraph 1.

3. As far as the structure of the article was concerned, it might be preferable to revert to the three-paragraph formula adopted on first reading and to refer to article 46 in paragraph 3. With regard to paragraph 2, the second alternative proposed by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 17)[5] called for further reflection. The exception contained therein might not be necessary at all, but if it was, some drafting changes would be required. He suggested that the word "latter" should be replaced by "treaty" and that the words "by reason of its subject" should be replaced by "by the nature of its subject-matter". The problem was one that would have to be referred to the Drafting

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] The draft articles (arts. 1 to 80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

[3] For the text, see 1699th meeting, para. 27.

[4] *Yearbook ... 1981*, vol. I, p. 165, 1674th meeting, para. 20.

[5] For the text, see 1699th meeting, para. 29.