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Summary record of the 792nd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1965, vol. I

82. In the general practice of States, and particularly in that of the United Nations, it was not admitted that all States were at liberty to accede to the treaties of others, regardless of the nature of those treaties. The Charter itself laid down specific conditions. From the comments of governments on article 8, it appeared that their views ranged from one extreme to the other. Some governments, like that of Denmark, accepted the Commission's proposal. It was difficult to satisfy everybody. The Commission could, of course, take the line of least resistance and simply submit an article which did no more than confirm the present practice.

83. In his opinion, the Commission should, by virtue of its terms of reference, propose progressive rules and take a first step towards extending the right of States to participate in important general multilateral treaties. Accordingly, he suggested that the Commission should not reverse its decision of 1962 and should accept the substance of article 8.

84. So far as the drafting was concerned, he agreed with the proposals by the Special Rapporteur and the Swedish Government, among others, for drafting the article more clearly and concisely. Subject to some drafting improvements, he was prepared to accept the revised version proposed by the Special Rapporteur, which scarcely differed from that suggested by the Swedish Government.

85. Mr. TUNKIN said that paragraph 1 of the article dealt with one of the fundamental principles of the law of treaties and the fate of the Commission's whole draft might hinge upon the way it was formulated. All members were aware of the practice resulting from the cold war whereby certain States had been debarred from participating in general multilateral treaties. From the legal point of view his categorical answer to the question whether States were free to exclude certain members of the international community in that way was in the negative.

86. The Commission's recognition of the existence of a principle that general multilateral treaties should be open to the participation of all States had been a substantial contribution to the development of contemporary international law. It was an aspect of a fundamental principle of *jus cogens*, namely, the sovereign equality of States. By virtue of the definition in article 1 (*c*), each State must have the right to participate in elaborating general norms of international law designed to be binding on all. To close general multilateral treaties to the participation of some States by whatever means, direct or indirect, would be inconsistent with the very nature of such treaties and injurious to the progress of international law. That being so, paragraph 1 of article 8 must be modified so as to consist of nothing more than the statement " In the case of a general multilateral treaty, every State may become a party to the treaty ". The rest of the paragraph should be deleted.

The meeting rose at 12.45 p.m.

792nd MEETING

Monday, 31 May 1965, at 5 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. LACHS said that he proposed to comment on the fundamental issues raised by article 8 and to leave drafting questions aside. The text drawn up by the Commission at its fourteenth session achieved something less than a compromise between two principles, namely, the so-called freedom of States to choose their partners in an international instrument, and the universal character of general norms of international law that were the concern of all States. His view was borne out by the observations of governments and the Special Rapporteur's commentary on them. Many governments had argued that the article did not go far enough, some, like that of Japan, had advocated its deletion, while others had criticized it on the ground that it did violence to the freedom of contracting States to determine the scope of the treaty. At the previous meeting, Mr. Briggs had presented a carefully reasoned case for dropping the article altogether.

3. In his own opinion, traditional solutions were wholly inadequate and the Commission should face the fact that the discussion in 1962 and the considerations put forward since that date had centred on the real crux of the problem, which was recognition, though that had never been explicitly avowed. The time had come to call a spade a spade and to admit that States wished to keep a free hand where the issue of recognition was concerned and were therefore reluctant to enter into treaty relations with governments they did not wish to recognize, or with entities which they refused to admit possessed the status of a State lest that implied recognition. Recognition was a political fact which the Commission should bear in mind.

4. If he were right in his diagnosis of the difficulty, the solution would be to reassure States that the draft article would not imply recognition. That would be consistent with practice before the adoption of the

[1] See 791st meeting, preceding para. 61, and para. 63.

United Nations formula, when States concluding treaties had used two main devices for the purpose of retaining their freedom of action. One was to refuse to accept the obligations flowing from a treaty vis-à-vis a State or government that they did not recognize; that had been done in the case of the International Sanitary Convention of 1926,[2] the 1929 Convention for the Safety of Life at Sea[3] and the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs.[4] The other was to make a declaration that participation in a treaty did not imply recognition; that course had been followed by Austria, at the 1863 Conference on the Scheldt, and by Colombia, with regard to Panama's membership of the League of Nations. There had also been cases where admission to a treaty as such had been refused " until recognition ", as for example, to the Spitsbergen treaty signed at Paris on 9 February 1920, but even then " nationals and companies " of the State whose government had not been recognized were admitted to " enjoy the same rights as nationals of the High Contracting Parties ".[5] But there were treaties in which even such a reservation would be out of place, for it would frustrate the very object of the treaty; an instance was the Paris Treaty of 1928 for the renunciation of war as instrument of national policy, which in fact contained no such reservation.[6]

5. During the period between the two wars, there had been many more cases of non-recognized governments being admitted to international instruments with the reservations he had mentioned than of refusals to admit them. Participation in multilateral treaties without implying recognition had come to be accepted as a general principle of contemporary international law. That view was substantiated by the information submitted to the Foreign Relations Committee of the United States Senate in 1963 by the Legal Adviser of the State Department.

6. The reason why States were apprehensive about the " every State " formula was probably the fear lest admission to a treaty would strengthen the position of a government they did not wish to recognize, but that objection ought to fall once the Commission clearly stated what were the true implications of the article on participation.

7. The proposition that States were free to choose their potential partners in a treaty did not necessarily apply to all categories of treaty, because by definition a general multilateral treaty concerned with general norms of international law or of general interest to all States ought to be open to universal participation. Examples of such instruments were the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and the Briand-Kellogg Pact. The advantage of admitting non-recognized entities to instruments creating new rules of law, or confirming existing ones, clearly outweighed the disadvantages because it secured mutual commitments and guarantees of fundamental importance which would not otherwise be obtainable. It would be both contrary to logic and law to debar such governments or States from adhering to such instruments as the Genocide Convention, the Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery or the Moscow Nuclear Test Ban Treaty because treaties enunciating general or new norms of law must by their very nature be universal and open to unrestricted participation. Were it otherwise, they would fail to meet the purpose for which they were intended. Could the outlawing of genocide be confined to certain areas of the globe simply because certain governments were not recognized by other governments? That was surely not a reason for refusing protection to men wherever they lived or for obstructing co-operation by all in the prevention or prosecution of that crime.

8. The Commission should make an explicit statement to the effect that the mere fact of non-recognition did not deprive the entity in question from being a factor in international relations: its mere existence ensured that. Facts were stubborn, and the proper legal consequence must be drawn from them. To exclude such entities from the law-making process would mean dividing the world into two categories of States, to which two sets of rules would apply, thus creating a most unwelcome duality or plurality and introducing political considerations into a domain in which the legal elements ought to predominate.

9. The argument that the principle of universality would create difficulties for the depositary, and thereby render a provision on those lines unacceptable to the majority of governments could have no bearing on the subject as it was procedural rather than substantive in character, and experience with the recent Nuclear Test Ban Treaty showed how easily such difficulties could be overcome. Eighty States had signed it in all three capitals, namely, Moscow, Washington and London; two in both Washington and Moscow; one in Moscow and London; seven in Washington and London; three in Moscow only, and thirteen in Washington only. Further signatures had been added later. A similar procedure had been advocated in the Committee on the Peaceful Uses of Outer Space in regard to the draft international agreement on the rescue of astronauts and spaceships in the event of accident and emergency landing. Thus a depositary's difficulties were capable of solution and were indeed being solved; the " every State " formula was not an insuperable obstacle, even when the depositary was an international organization.

10. His conclusions therefore were, first, that the Commission should make it clearer in its commentary that participation in a multilateral treaty did not imply recognition; secondly, that the freedom of States to select their partners in a treaty could not apply to general multilateral treaties which, by definition, were universal; thirdly, that the criteria adopted hitherto by the United Nations for admission to international treaties concluded under its auspices, because clearly of a political nature, could not be applied to general multilateral law-making treaties, since that would introduce a two-stage political filter in a legal process; fourthly,

[2] League of Nations *Treaty Series*, Vol. LXXVIII, p. 231.
[3] *Ibid.*, Vol. CXXXVI, p. 82.
[4] *Ibid.*, Vol. CXXXIX, p. 303.
[5] *Ibid.*, Vol. II, p. 14.
[6] *Ibid.*, Vol. XCIV, p. 59.

that the special category designated as general multilateral treaties should be maintained in the Commission's text; and fifthly, that the " every State " formula should be reinforced and extended.

11. Mr. TSURUOKA said that, while he acknowledged that the arguments put forward by Mr. Lachs included certain points that deserved to be borne in mind, he regretted that he was unable to endorse Mr. Lachs's opinion entirely.

12. He attached great importance to the principle, in international law, of the independence of the will of the parties in the matter of contractual relations. According to that principle, States were entirely free to choose their partners when concluding a treaty; the principle promoted international activity and the establishment of closer relations between States. Neither the doctrine nor the practice was opposed to that principle, which was simply the corollary of State sovereignty and the equality of independent States; both those concepts were confirmed by the Charter of the United Nations, which also upheld their corollary. The fact that the right of States freely to choose their contractual partners flowed directly and necessarily from the notion of sovereignty required no explanation; it was inconceivable that an independent State should be required to accept, without its consent, treaty partners imposed on it by other States. The consent of the States parties to the treaty was necessary if the treaty was to be open to participation by " any State ", and that rule applied both to ordinary multilateral treaties and to general multilateral treaties.

13. It did not follow from that that the opening of a multilateral treaty to third States always required the unanimous consent of all the States participating in the conference which drew up the treaty. States saw in a relaxation of the unanimity rule in that matter a consequence of the social needs of the international community. In modern times, an overwhelming majority of the community's members acknowledged that a conference convened to draw up a multilateral treaty was free to determine what majority was required to settle the question whether the treaty should be open to States not participating in the conference, just as it was free to determine the majority necessary for the adoption of other provisions of the treaty. It was for the conference to decide whether it wished to open the treaty to all States, or to a more or less restricted category of States.

14. That was quite different from saying that every multilateral treaty, if it was a general treaty, must, regardless of the will of the States participating in a conference convened to draw up the treaty, be open to all States. The least that could be said was that many States did not recognize that thesis as being the rule of international law.

15. Could those States, then, reasonably be expected to recognize it as a rule *de lege ferenda*? He thought not. Those States would not see either the necessity or the desirability of such a rule in international law. They would even fear that they might, for insufficient reason, be deprived of a part of their recognized freedom; and the fact that they did not know precisely what was and what was not a general multilateral treaty would accentuate their fears.

16. The reason why States considered such a rule as neither necessary nor desirable was that they knew that the conference had no need of such a rule to settle the question of the opening of a treaty to wider participation; the conference could settle that question itself in complete freedom, and always had done so. Besides, in so far as the purpose of opening the general multilateral treaty to " any State " was to ensure universal participation in the treaty, it had to be admitted that States had serious doubts about the efficacy of such a measure in practice. The Treaty of Moscow had been open to all States, yet the two States which many would have liked to accede to that Treaty had not done so and were still not parties to it, nor had they manifested any intention of becoming parties. In other words, the " any State " formula, which might be interpreted as a generous invitation, was no such thing.

17. Nor should it be overlooked that the " any State " formula might cause some States to hesitate to become parties to a treaty containing the formula, with the consequence that the number of participating States would be smaller. Furthermore, any State could conclude, with the partners of its choice, a multilateral treaty covering the same ground as the general multilateral treaty.

18. He was therefore convinced that the inclusion of the " any State " formula presented a very difficult problem; it restricted the independence of the will of States in their contractual relations, which was one of the cardinal principles of international law, and it might infringe the principles established by the United Nations Charter, in particular, the principle of respect for the sovereignty of independent States.

19. States could easily dispense with the " any State " formula for at a conference they were free to adopt that formula whenever they wanted to. The prospect that the use of the formula might reduce the number of States participating in the treaty would probably make it difficult for a conference of plenipotentiaries to adopt it, which was yet another reason for advising the Commission against it.

20. In the opinion of some members the " any State " formula should be regarded if not as a rule of *jus cogens*, then at least as a presumptive rule or as a rule of interpretation covering cases where a multilateral treaty was silent with respect to the possible participation of States other than those which had been concerned in its drafting. He did not see any need for that. As far as interpretation was concerned, the draft articles concerning the interpretation of treaties were amply sufficient. A presumption in favour of the " any State " formula might sometimes even betray the real intention of the States convened in an international conference to draft the treaty. He was thinking of what happened at international conferences held for the purpose of drafting general multilateral treaties. It was unthinkable that at some point one or two States at least out of the hundred or so countries participating in the conference would not inquire about which States would be eligible to join in the treaty. The question would therefore be discussed

and voted on by all conferences convened to draw up general multilateral treaties. Why, then, should any such treaties be silent on that question? Only because proposals on the subject had been rejected. It was not irrelevant to recall that at most conferences, a two-thirds majority was needed for the adoption of any provision of substance. A one-third minority, plus one vote, was therefore enough to reject any proposal of that kind. Consequently, it was not unreasonable to say that a proposal similar to the formula currently prevailing in international practice could be rejected by a minority, plus one vote, supporting the " any State " formula, with the consequence that the treaty would not contain any provision concerning the States to which it would be opened. In such a case, it would be absurd to argue that the will of most of the States participating in the conference was presumed to be in favour of the " any State " formula.

21. In his opinion, therefore, the " any State " formula, as a presumptive rule, was often unjustified, and the argument advanced for its inclusion in the draft convention was unsound.

22. Article 8, paragraph 1, should either be drastically amended or else be omitted altogether.

23. The CHAIRMAN, speaking as a member of the Commission, said that at a diplomatic conference to which a text prepared by the International Law Commission was submitted a two-thirds majority would be needed to reject it; if there was no such text, a simple majority would be sufficient to approve a text in committee, and a two-thirds majority would be necessary to adopt it in the plenary. It was therefore the forces at work in a diplomatic assembly rather than the drafting which were the decisive factor.

24. Accordingly, the problem for the Drafting Committee was to find one formula or two alternatives. If the Commission rejected every formula, however, as from time to time it was inclined to do, it would leave the diplomatic conference in a most embarrassing position for at such meetings the major obstacle was often the lack of a basic text.

The meeting rose at 5.50 p.m.

793rd MEETING

Tuesday, 1 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr.Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. CADIEUX said that he would base his statement on his experience as an adviser to the Government of his country, not only on the legal aspects of the problem but also on its broad foreign policy aspects, particularly as it raised closely interrelated legal and policy considerations.

3. Neither the comments submitted by governments nor the arguments which had been adduced in support of article 8, paragraph 1, had caused him to alter the views which he had expressed in 1962.[2]

4. In support of the formulation of article 8, it had been suggested that it constituted an acceptable compromise. In fact, that formulation did not represent a compromise between the view that general multilateral conventions should be open to any State and the view that the article should reflect the existing United Nations practice on the question. A real compromise would favour neither position, and might, for instance, leave it to the States to decide the issue at each conference, with no presumption either way. Even such a solution, however, would depart from the existing practice and, to that extent, would take sides on the issue. In the circumstances, the deletion of the article was perhaps the only compromise that the Commission could reach. At any rate, neither the 1962 version nor the new text proposed by the Special Rapporteur constituted a compromise, since they laid down a presumption contrary to the existing United Nations practice and put the onus on every conference of accepting or rebutting that presumption.

5. It had also been suggested that article 8 constituted progressive development. In his view, the mere desirability of developing an article on participation was by no means universally accepted, and the formulation of a rule on what was a highly contentious question could well exacerbate the very dispute which the Commission was trying to solve. The discussions in the Commission and in the Sixth Committee, and the written comments by Governments all showed that the question constituted a serious political problem, a fact which must be accepted.

6. From the practical point of view, since the Commission had not provided an adequate legal definition of the term " general multilateral treaty ", article 8 would open for every conference the question whether a general multilateral treaty was in issue. An unnecessary complication would be introduced into the multilateral treaty-making processes. The question of participation in a conference would be debated in the United Nations, then that of accession would be debated in the conference

[1] See 791st meeting, preceding para. 61, and para. 63.

[2] See *Yearbook of the International Law Commission, 1962*, Vol. I, 667th meeting, paras. 7-10.