Document:-

A/CN.4/SR.1648

Summary record of the 1648th 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

Drafting Committee

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to appoint a Drafting Committee composed of the following members: Mr. Tsuruoka (Chairman), Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Jagota, Mr. Njenga, Mr. Reuter, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov and (*ex officio*) Mr. Francis, Rapporteur of the Commission.

It was so decided.

The meeting rose at 11.40 a.m.

1648th MEETING

Monday, 11 May 1981, at 3.10 p.m.

Chairman: Mr. Doudou THIAM

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

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*)

ARTICLES 12–18 AND ARTICLE 2, SUBPARAS. 1 (*e*) AND (*f*) (*concluded*)

ARTICLE 14 (Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty)[1]

1. Mr. REUTER (Special Rapporteur) said that article 14 had not elicited any substantive comments, either in the written observations of Governments and international organizations or in the Sixth Committee. The Commission might simplify the wording of the article by deleting the words "between one or more States and one or more international organizations" in paragraphs 1 and 3.

2. Mr. USHAKOV, referring to the terms "negotiating State" and "negotiating organization", already defined in article 2, subparagraph 1 (*e*), and to the term "the participants in the negotiation", which the Special Rapporteur, in the course of the discussion on article 12 (1647th meeting, paras. 2 and 3), had suggested as a replacement for those terms and had also proposed a definition in paragraph 46 of his report (A/CN.4/341 and Add.1), said that he preferred the two terms adopted on first reading, because some of the draft articles might relate not to "the participants in the negotiation", but rather to a particular participating State or a particular participating organization. Moreover, just as the Vienna Convention[2] contained a definition of the term "negotiating State", because the convention applied to treaties concluded between States, and States alone, the draft must also contain a definition of the term "negotiating State" and "negotiating organization", because it applied to treaties concluded between these entities. According to article 3, the draft did not apply to international agreements to which one or more entities other than States or international organizations were parties, but the term "the participants in the negotiation" might give the impression of covering entities of that kind.

3. Mr. REUTER (Special Rapporteur) said that, if it was simply a matter of amending article 76,[3] which was the only article in the draft to contain the terms "negotiating States" and "negotiating organizations", something would be gained by replacing them by the words "the participants in the negotiation", because the article was particularly long. In addition to his comment on the use of the term "the participants in the negotiation" in the plural, however, Mr. Ushakov had pointed out that the reference in article 3 to entities other than States or international organizations might give rise to confusion. The Drafting Committee would have to settle that question—but in order to do so, it might have to wait until article 76 had been referred to it by the Commission.

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 14 to the Drafting Committee.

It was so decided.[4]

ARTICLE 15 (Accession as a means of establishing consent to be bound by a treaty)[5]

5. Mr. REUTER (Special Rapporteur) said that article 15 had not given rise to any substantive comments. Since the two paragraphs of the article were nearly identical, they might be condensed into a single paragraph, which would read as follows (A/CN.4/341 and Add.1, para. 49):

[1] For text, see 1647th meeting, para. 1.

[2] See 1644th meeting, footnote 3.

[3] See 1647th meeting, footnote 1.

[4] For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 42–45.

[5] For text, see 1647th meeting, para. 1.

"The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

"(*a*) the treaty provides that such consent may be expressed by means of accession;

"(*b*) the participants in the negotiation were agreed that such consent might be expressed by means of accession; or

"(*c*) all the parties have subsequently agreed that such consent may be expressed by means of accession."

6. Mr. USHAKOV said he feared that the wording suggested by the Special Rapporteur might rule out the possibility of the treaty providing that consent to be bound could be expressed by all of the participants in the negotiation or by some of them.

7. Mr. REUTER (Special Rapporteur) said that, in the French version at least, the proposed wording did have the shade of meaning pointed out by Mr. Ushakov. The reference to the consent "of a State" or "of an international organization" and to the case in which the treaty provided that "such consent" could be expressed by means of accession covered both the case of a particular State or international organization and the case of all of the States and international organizations. From the point of view of substance, it was indeed the consent of the State or organization that opened up the possibility of acceding to the treaty. The Drafting Committee might consider it advisable to make it clear that article 15, subparagraphs (*a*), (*b*) and (*c*), referred to the "consent of that State or that organization".

8. Mr. SUCHARITKUL said he wondered whether the simplification suggested by the Special Rapporteur might not have the effect of eliminating the distinction that had been drawn in paragraphs 1 and 2 between a State and an international organization. Subpara. 1 (*a*) referred to the consent "expressed" by the State, while subpara. 2 (*a*) referred to the consent "established" by the organization. Similarly, subparas. 1 (*b*) and (*c*) spoke of the consent "expressed", while subparas. 2 (*b*) and (*c*) spoke of the consent that might "be given".

9. Mr. REUTER (Special Rapporteur) said it was quite true that in article 7 the Commission had already made a distinction between the term "expressing the consent" of a State and the term "communicating the consent" of an organization. If it was insistent that an international organization could never "express" its consent, it would have to retain the words "such consent might be given" in the article under consideration. Indeed, on first reading, a slightly different wording had been chosen for paragraphs 1 and 2 of article 15 in order to meet that concern.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 15 to the Drafting Committee.

It was so decided.[6]

ARTICLE 16 (Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession)[7]

11. Mr. REUTER (Special Rapporteur) said that article 16 had not occasioned any substantive comments. If in article 2 the Commission added a definition of the term "the contracting entities" (see A/CN.4/341 and Add.1, para. 50), which would apply either to one or more States and one or more international organizations or to several international organizations which had consented to be bound by the treaty, regardless of whether the treaty had entered into force, the wording of article 16 could be made considerably less cumbersome. Consequently, article 17 and other articles of the draft, particularly articles 77 and 79, would also be simplified. However, the terms "contracting State" and "contracting organization", which had already been defined, might have to be retained because they appeared in the articles relating to reservations. He therefore suggested that those two definitions should be retained for the time being and that a definition of the term "the contracting entities" should perhaps be adopted.

12. Mr. ŠAHOVIĆ said that, although he understood the reasons that prompted the Special Rapporteur to propose definitions of new terms, he was afraid that by simplifying the wording of the articles in that way the Commission might make them more difficult to understand. The danger was even greater in that the term to be defined was similar to one which had already been defined.

13. Sir Francis VALLAT said that his reaction in the matter under discussion was very similar to that of Mr. Šahović. Personally, he did not find either the English or the French version of the new term proposed by the Special Rapporteur satisfactory, but, other than for that problem of drafting, he could see no reason why article 16 should not be simplified along the lines proposed by the Special Rapporteur in his report.

14. Mr. USHAKOV cautioned the Commission about defining terms in the plural. If the term "the contracting entities" was defined, problems of interpretation were bound to arise in some cases—for example, in article 20, paragraph 1,[8] which contained the term "the other contracting organizations", and article 20, paragraph 3, in which the term "another contracting organization" was used several times. Neither of those terms corresponded to the term for which a definition was now being proposed—a term which covered all of the contracting entities.

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[6] For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 46–49.

[7] For text, see 1647th meeting, para. 1.

[8] See 1647th meeting, footnote 1.

15. Again, as he had already pointed out, it was not advisable to define a term which did not appear in the Vienna Convention and might, in the light of draft article 3, give rise to incorrect interpretations.

16. It would therefore be better to continue to use the terms "contracting State" and "contracting organization" and, if necessary, to define the term "the contracting entity" rather than "the contracting entities".

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 16 to the Drafting Committee.

It was so decided.[9]

ARTICLE 17 (Consent to be bound by part of a treaty and choice of differing provisions)[10]

18. Mr. REUTER (Special Rapporteur) said that no comments had been made concerning article 17. The square brackets around the figures "19 to 23" could be deleted and, if the Commission adopted the term "the contracting entities", article 17 could be reduced to two paragraphs, which would read (A/CN.4/341 and Add.1, para. 51):

"1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits or if the other contracting entities so agree.

"2. The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates".

19. Article 17 could be referred to the Drafting Committee, which would take account of the comments some members of the Commission had made with regard to that simplification during the consideration of other articles of the draft.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 17 to the Drafting Committee.

It was so decided.[11]

ARTICLE 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force)[12]

21. Mr. REUTER (Special Rapporteur) said that article 18 had not elicited any comments and he proposed that it should be reduced to a single paragraph, which would read:

"A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

"(*a*) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

"(*b*) that State or that organization has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry is not unduly delayed".

22. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 18 to the Drafting Committee.

It was so decided.[13]

ARTICLE 2 (Use of terms), subparas. 1 (*e*) ("negotiating State" and "negotiating organization") and (*f*) ("contracting State" and "contracting organization")[14]

23. The CHAIRMAN suggested that article 2, subparagraphs 1 (*e*) and 1 (*f*), should be referred to the Drafting Committee.

It was so decided.[15]

ARTICLE 19 (Formulation of reservations in the case of treaties between several international organizations) *and*

ARTICLE 19 *bis* (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

24. The CHAIRMAN invited the Special Rapporteur to introduce articles 19 and 19 *bis*, which read:

Article 19. Formulation of reservations in the case of treaties between several international organizations

An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, formulate a reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

[9] For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 50–53.

[10] For text, see 1647th meeting, para. 1.

[11] For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 54–55, 1682nd meeting, para. 8; 1692nd meeting, paras. 1–8.

[12] For text, see 1647th meeting, para. 1.

[13] For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 56–68.

[14] For text, see 1647th meeting, para. 1.

[15] For consideration of the text proposed by the Drafting Committee, see 1681st meeting, paras. 6–14.

Article 19 bis. *Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States*

1. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States may formulate a reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

2. When the participation of an international organization is essential to the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States, that organization, when signing, formally confirming, accepting, approving or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

3. In cases not falling under the preceding paragraph, an international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

25. Mr. REUTER (Special Rapporteur) said that the question of reservations to which articles 19 and 19 *bis* related had been discussed at length, and widely diverging points of view had been expressed on it both in the Sixth Committee and in the written observations of Governments and international organizations. The Commission itself had also paid a great deal of attention to the matter. In an earlier wording, the regime governing reservations formulated by international organizations, acceptance of such reservations and objections to them had been subject to the conditions laid down in the Vienna Convention; but the wording had been severely criticized, and the Commission had reached a compromise solution on first reading. That solution, however, had been considered unsatisfactory by one member of the Commission, who had proposed alternative wording.[16] Some Governments and one international organization had subsequently criticized the text adopted on first reading and expressed a preference for a more flexible solution. Many States had taken the view that, although a compromise solution was acceptable, the wording of the one that had been proposed was not satisfactory.

26. Since he was obliged to take account both of the observations of the members of the Commission and of those of Governments and international organizations, he had contacted Professor Imbert, an expert on reservations to treaties who was on secondment to the Directorate of Legal Affairs of the Council of Europe, who had brought his attention to instruments and documents that might constitute examples of reservations and, in particular, of objections to reservations, by international organizations. Like other members of the Commission, he had, until then, been of the opinion that such precedents did not exist, but the examples that had been brought to his notice might constitute such precedents.

27. The question of reservations could unquestionably give rise to practical problems, but as far as international organizations were concerned, such problems were rare. It should be borne in mind that the articles of the Vienna Convention, like those of the draft, were all residual provisions and applied only if the treaty in question did not specify what regime was applicable to reservations, acceptance of reservations and objection to reservations. In the case of treaties between States, the greatest number of difficulties arose in connection with treaties of a universal character. Such open multilateral treaties should be contrasted with two other categories of treaties, namely, bilateral treaties, to which objections could be made in principle (although reservations to such treaties in fact required the negotiations to be reopened, and they were thus of a very special nature), and closed plurilateral treaties, which involved a limited number of parties and usually specified whether reservations were possible and in what circumstances they could be accepted or objections could be made to them.

28. It should be noted that the vast majority of treaties to which one or more international organizations were parties were of a bilateral nature. By making allowance, in draft article 9,[17] for the possibility of multilateral treaties open to international organizations, the Commission had taken a very bold step. It would be difficult at the present time to give relevant examples of treaties of that kind, and it was unlikely that many multilateral treaties were open to international organizations unless all kinds of precautions were taken. The draft articles relating to reservations were thus of some practical value, but rather less than might be believed. The fact remained that they had given rise to strenuous objections, both in the Commission and in the Sixth Committee, and Governments seemed to be making the question a matter of principle.

29. The difficulties regarding the regime for reservations related primarily to formulation. Did international organizations that were parties to a treaty have the same rights as States in respect of the

[16] See *Yearbook ... 1977*, vol. II (Part Two), pp. 109–110 and 113, footnotes 464 and 478.

[17] See 1646th meeting, para. 61.

formulation of reservations? It would be noted that he had considered it advisable to include an article on objection to reservations (art. 19 *ter*), which had no counterpart in the Vienna Convention, where that question was handled together with acceptance of reservations. He now experienced some doubts about the value of the proposed article 19 *ter*.

30. The question of acceptance of reservations had been the subject of a very important comment that went beyond the framework of reservations. The draft had been criticized for extending to international organizations the right to tacit acceptance by generally applying the rule that, after a period of twelve months, silence on the part of a contracting party signified tacit acceptance. Some people took the view that it was very dangerous and indeed unacceptable that, in respect of treaties, international obligations might arise for organizations otherwise than through a formal act. In that connection, the principle enunciated in the draft would, as it was now formulated, have effects that went beyond the framework of reservations and would influence provisions such as articles 45 and 65.[18] The problems should therefore be taken one by one.

31. With regard to the formulation of reservations, the Commission had found it possible to adopt a compromise solution that did not, generally speaking, subject organizations to the same rules as States. It gave them the same rights as States only in respect of treaties between international organizations. In the case of treaties between States and international organizations, it also gave them the same rights, except in the very frequent case in which the participation of the organization was essential to the object and purpose of the treaty. It often happened that an international organization was a party to a treaty without having the same status as the States that were parties to it, for example, when it was entrusted with supervision of the fulfilment of the obligations of those States. Its rights and obligations were then different. At the United Nations Conference on the Law of Treaties, the delegation of the United States of America had in fact been so insistent on taking account of treaties to which an international organization was a party because it had envisaged the possibility of a "trilateral" nuclear treaty. What it had had in mind was that supervision of the implementation of the rules laid down in a bilateral treaty should not be assigned to an organization such as the IAEA through treaties concluded between the two States concerned and that organization. In short, the Commission's compromise was to grant an international organization the same rights as a State when it had the same status as a State in a treaty. However, when it performed a supervisory function and the States parties to the treaty had committed themselves on the basis of such supervision, the organization knew what its supervisory functions were, and it was not desirable for it to be in a position later to formulate a reservation on what had been agreed by the contracting States. In a case of that kind, the participation of the organization was considered essential to the object and purpose of the treaty.

32. If some members of the Commission and some Governments were so cautious about the freedom international organizations might have, it was mainly because the constituent instruments of organizations were generally silent on the question of the treaties they concluded and, in particular, on reservations. For example, the Charter of the United Nations said practically nothing about United Nations treaties. In such circumstances, practices became established, and some States were of the opinion that they did not sufficiently respect the rights of intergovernmental bodies. In his view, that problem could not be solved in the draft under consideration. It came within the constitutional law of each organization, and the Commission would be devoting itself to a study of comparative law, not international law, if it tried to draft provisions in a text that applied to the treaties, and not to the status, of international organizations. In that connection, he referred to footnote 79 of his report (A/CN.4/341 and Add.1) and pointed out that the provisions relating to the implementation of article 41 of the Agreement establishing the Common Fund for Commodities, which gave the Common Fund "full juridical personality", were not at all detailed.

33. Mention should also be made of the particular case of the European Communities, which participated in many treaties at the same time as their member States. The result was participation which, because it was similar to the participation of an international organization, might set a precedent for international organizations, and was therefore a further cause of concern for some members of the Commission and to Governments. What would the respective obligations of such an organization and its member States be if the organization and its member States formulated different reservations? If the view was taken that organizations could be parties to treaties to which their member States were also parties, it would be in keeping with the object and purpose of such treaties for their reservations to be symmetrical, so that third States could be fully aware of the obligations that had been assumed. In such a case, a prohibition on the formulation of reservations that were incompatible with the object and purpose of the treaty should be enough to allay any misgivings.

34. Although he did not intend to deal with drafting questions, he did wish to point out that the wording of article 19 *bis* might be simplified if the Commission remained faithful to its compromise solution.

35. Mr. USHAKOV said that he had three general comments to make. First, he wondered what meaning was to be attached to equality between States and international organizations. The problem was not one of placing international organizations on a fully equal footing with States in the draft. At most, the

[18] See 1647th meeting, footnote 1.

Commission could enunciate a rule of treaty law that applied equally to international organizations and to States. In the case of treaties concluded between international organizations, the question of equality with States obviously did not arise: the rules of treaty law applied uniformly to all organizations. The rule might be that reservations were authorized or, conversely, prohibited, and it was the same rule for all international organizations. However, nothing prevented the parties to a particular treaty from derogating from that rule and granting an organization that was a party a right by derogation from the rule. In the case of treaties between States and international organizations, there was complete equality between States and international organizations if the same rule of treaty law applied to all of them. In general, however, it was not possible, in the draft, to place States and international organizations on a footing of complete equality. Only in the matter of reservations was it possible, in some cases, to place international organizations on the same level as States. Yet, in articles 6 and 7,[19] for example, it had proved necessary to make a distinction between States and international organizations, in the first case because the capacity of international organizations to conclude treaties derived not from international law but from their relevant rules, and in the second case because international organizations did not have an official who was the counterpart of a Head of State, for example.

36. As to reservations, the Commission had proposed, for the text that was later to become the Vienna Convention, a set of articles under the heading "Reservations to multilateral treaties".[20] The Conference on the Law of Treaties, however, had removed that restriction, and the provisions of the Convention relating to reservations applied both to bilateral and to multilateral treaties. Thus, tacit acceptance of reservations after the 12-month period following the date on which the notification was given applied to all types of treaties.

37. In the draft under consideration, the Commission was dealing only with multilateral treaties, as was apparent from the wording of articles 19 and 19 *bis*. He nevertheless took it that the Special Rapporteur intended, starting with draft article 19, to cover all treaties, both bilateral and multilateral, and he doubted whether it was wise to include bilateral treaties in the provisions relating to reservations.

38. In connection with reservations, he would also like a distinction to be drawn between treaties concluded between one or more States and one or more international organizations and treaties concluded between international organizations and one or more States. In that respect, he pointed out that some treaties were concluded chiefly between States, with the participation of one or more international organizations, and that others were concluded chiefly between international organizations, with the participation of one or more States, and therefore contained provisions that applied either to States or to international organizations and provisions that applied to all of them. In the case of the IAEA, for example, the treaties to which that organization was a party were usually treaties between States, with participation by the Agency, which performed supervisory functions. Some provisions concerned the contracting States and others concerned IAEA. That situation was obviously quite different from the one covered by the Vienna Convention, which applied only to States. Consequently, if the contracting international organizations were authorized to formulate reservations and were, for that purpose, placed on the same footing as States, it should be specified whether such organizations could formulate reservations only to provisions relating to international organizations or to all of the provisions of the treaty, including those which related to States.

39. Under the principle of equality, the same rules ought to apply to all States and to all international organizations, but it would still be necessary to determine the instances in which it was essential to provide for equality between the States parties and the international organizations parties to a treaty.

40. In his view, if the participation of the international organization was essential to the object and purpose of the treaty, the contracting international organization could be placed on an equal footing with the contracting States. Conversely, if the participation of a State in a treaty concluded between international organizations and one or more States was essential to the object and purpose of the treaty, the contracting State could be placed on an equal footing with the international organizations. He pointed out that the proposals he had made on that point in 1977 in document A/CN.4/L.253[21] had been based on that approach to the situation.

41. The view that it was not possible to authorize international organizations or States to formulate reservations to provisions that did not concern them had been the basis of a proposal for a wording to the effect that organizations and States were authorized to formulate reservations to certain provisions provided for by the treaty. Such a formulation might be used as a guiding principle to ensure complete equality between the contracting parties, whether States or international organizations.

42. Mr. CALLE Y CALLE said that section 2 of part II of the draft dealt with a difficult and controversial matter. The theories that had been developed on the subject of reservations had started

[19] See 1646th meeting, paras. 36 and 47.

[20] See *Yearbook ... 1966*, vol. II, pp. 202–209, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties with commentaries, part II, sect. 2.

[21] See *Yearbook ... 1977*, vol. II (Part Two), pp. 109 *et seq*, footnotes 464, 478, 480, 482 and 485.

with the well-known advisory opinion delivered by the International Court of Justice in 1951[22] when the concept of compatibility with the object and purpose of the treaty had been introduced, and the Vienna Convention had done much to further the same approach.

43. The right of States to formulate reservations was regarded as inherent in their sovereignty and in their capacity to conclude treaties. Draft article 6 recognized that international organizations also had capacity to conclude treaties: it could be said that they had acquired the right by derivation, inasmuch as States, which had created international organizations to serve the needs of the international community, had conferred such a right upon them.

44. In effect, reservations were no more than a restriction on the scope of the treaty, a view borne out by draft article 17,[23] which recognized that international organizations could consent to be bound by only part of a treaty. They could thus opt in favour of some reservations as opposed to others. Basically, therefore, a reservation could mean either consent to being a party to a treaty or opting in favour of one situation rather than another. Hence, the question at issue was not one of securing the ontological equality of the contracting parties, but of their assimilation. There might be a difference between contracting parties as subjects of law, but that difference could not affect the legal balance of the provisions.

45. The clause whereby an international organization could not formulate reservations if its participation in the treaty was essential to the object and purpose of the treaty was an important new element. In other cases, however, organizations should have almost as wide a capacity to formulate reservations as States, even though there might well be differences in the mode of formulating reservations or in the way of expressing objections to them. For those reasons, the capacity of international organizations should not be unduly restricted.

46. Sir Francis VALLAT said that it was very difficult in practice to persuade international conferences to make express provisions on reservations, which was why residuary articles on the subject were of particular importance. He therefore considered that the Commission should devote a little more time to those articles than it had to the preceding articles.

47. One of the basic questions concerned equality, which in his view was not quite so pertinent to the topic as the Commission had been led to believe. It was, of course, perfectly true that international organizations and States were not equal, inasmuch as they had different status and different capacity. However, what was relevant to the topic was not the abstract idea of equality or inequality, but the fact that international organizations, by their very nature, had not only limited capacity but also their own procedures, as reflected, for example, in the rules of the organization concerned. If those two characteristics were taken into account and adequately provided for in the draft, the question of equality would be dealt with automatically. He therefore agreed with Mr. Ushakov that the whole matter turned on draft article 6 (which in a sense was the most important article in the draft), and under that article the capacity of an international organization to enter into a particular treaty was governed by the relevant rules of that organization: if it became a party to the treaty, the rules of treaty law applied as between the international organization and any other party, naturally and on a basis of equality. It was not possible to distinguish between different kinds of bodies according to whether they were organizations or States. If they were parties to the treaties, they had basically the same rights and obligations, irrespective of whether they were organizations or States. To raise a general question regarding the equality of their status therefore seemed to be largely irrelevant.

48. A difficulty arose in the case of reservations because at that point the international organization had not yet become a party to the treaty and was still in the process—on the threshold as it were—of becoming a party. Two questions must then be posed in any given case: was it within the capacity of the international organization to formulate the reservation? and was the international organization acting in accordance with its relevant rules? If it was contemplated that the international organization might become a party to the treaty, the content of the obligation in question must, by hypothesis, be within the legal capacity of that international organization and it followed that, if the international organization had the capacity to enter into the obligation, it must by implication have the legal capacity to limit that obligation by formulating a reservation.

49. That was the first basic point of principle from which he would approach the matter. Going a step further, he considered that, from the point of view of treaty law, the division of treaties into three classes, though it had arisen for sound, practical reasons, was largely artificial. However, assuming that there was such a distinction, he thought it was agreed that, so far as treaties between international organizations were concerned, there was no particular difficulty in the formulation of reservations by international organizations but that, in the case of treaties concluded between one international organization and several States, it was necessary to curb in some way the ability of organizations to formulate reservations. He wondered whether that opinion was not based on a slightly

[22] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion: *I.C.J. Reports 1951*, p. 15.

[23] See 1647th meeting, para. 1.

distorted view of the significance of reservations. It was quite clear that a State could not alter by a formal reservation the legal position under the treaty as between two other States.

50. In that connection, he would point out that, from the definition of "reservation" contained in article 2, subparagraph 1 (*d*),[24] a reservation by an international organization would not affect the legal effect of the provisions of the treaty in their application as between States parties to the treaty, but only in their application to that international organization. If his understanding of the definition was correct, the idea that a reservation by an international organization altered the rights and obligations of the States as between themselves simply did not arise, because of the nature of the reservation. If an international organization wished to alter the rights and obligations under a treaty as between itself and other parties, whether States or international organizations, and if it was contemplated that that international organization would become a party to the treaty, then in principle it should be at liberty to formulate a reservation. It was important to start out from that basic principle and, if there were to be exceptions to it, to consider the exceptions.

51. Mr. REUTER (Special Rapporteur) said he was pleased to note that the statement by Mr. Calle y Calle was based on the same approach as the one he himself had adopted, for in his view too, it was not a matter of conferring equality on entities as such but of giving equal rights to the contracting parties to a treaty.

52. He also shared Sir Francis Vallat's view, which was, moreover, an illustration of the saying that "he who can do more can do less", since the mechanism of reservations made it possible only to limit commitments that had been undertaken. Sir Francis had been perfectly justified in saying that if the organization had the capacity to become a party to a treaty it could, by that very fact, and in the light of its nature and its own rules, also limit its commitments.

53. He fully grasped the meaning of the statement by Mr. Ushakov, who regretted that the suggestions he had made concerning reservations had been left out of the second version of the draft articles. It would be remembered that the question of the impossibility of entering reservations in the case of bilateral treaties had been considered at the United Nations Conference on the Law of Treaties, which had led to the Vienna Convention, but no decision had been taken on that question.

54. In proposing that a distinction should be made between treaties according to their nature, Mr. Ushakov had seemed to base his reasoning on the saying that "the accessory follows the principal", the idea being that entities which were parties to a treaty in an "accessory" manner were ranked with the "principal" parties. For his own part, he seriously doubted whether a distinction could, in practice, be made between treaties. He thought it necessary to propose straightforward solutions to the General Assembly, which might be averse to a text that was too subtle. One of the results of the Vienna Convention concluded in 1969 was that objections to reservations and acceptance of reservations had in the final analysis the same effect, although he was not entirely sure that that had been the original objective of the participants.

55. In the circumstances, he thought it would be preferable to say that international organizations were prohibited from formulating reservations in all cases. Indeed, Mr. Ushakov had nearly convinced him by stating that the international organization must be able to enter reservations when its participation was essential to the existence of the treaty. Nevertheless, in the text submitted to the Commission on first reading, he had, for the purposes of making a concession to that point of view, adopted an approach that was quite the reverse. Consequently, he was even more mistrustful about making the text inordinately complex.

The meeting rose at 6 p.m.

[24] *Ibid.*

1649th MEETING

Tuesday, 12 May 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Barboza, Mr. Calle y Calle, 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, Mr. Verosta.

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 19 (Formulation of reservations in the case of treaties between several international organizations) *and*

ARTICLE 19 *bis* (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)[1] (*continued*)

[1] For texts, see 1648th meeting, para. 24.