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A/CN.4/SR.1727

Summary record of the 1727th 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:-

1982, vol. I

44. Mr. SUCHARITKUL, stressing the importance of co-operation in the development of international law, expressed appreciation for the contribution made by Latin America to the development of public and private international law.

45. Mr. FRANCIS said that the presence of the observer for the Inter-American Juridical Committee was indicative of the close links between the Commission and the Committee. The Committee's contribution to the development of international law was recognized throughout Latin America, and the challenge that Latin American jurists now faced was how to forge some means of ensuring compliance with international law. As a national of one of the small countries, he saw no other alternative for them and for Latin America than to devise a means for the peaceful settlement of disputes. He trusted that Latin American jurists would be ready and able to meet that challenge.

46. Mr. BALANDA, speaking on behalf of the African members of the Commission, stressed the importance of the contribution which Latin America had made and continued to make to the development of international law. That contribution had been particularly valuable during the work of the Third United Nations Conference on the Law of the Sea. It should also be noted that the European Convention on Human Rights[10] had been based on the example provided by Latin America. He expressed the hope that Latin American jurists would continue to work to establish the rule of law through co-operation among peoples and to ensure that the earth really belonged to mankind and not to individuals fighting among themselves. That was also the Commission's goal. It was seeking a common denominator in the different legal and political systems so that its members could combine their efforts to ensure the rule of international law. He wished to add Carlos Calvo's name to those of the distinguished jurists to whom reference had been made.

47. Mr. USHAKOV, speaking also on behalf of Mr. FLITAN and Mr. YANKOV, congratulated the observer for the Inter-American Juridical Committee and expressed the hope that the Committee and the Commission would continue to maintain close and fruitful ties.

48. Mr. McCAFFREY said that he came from a part of the United States that was strongly influenced by the Latin American legal tradition and by the Mexican legal system in particular, above all in the private sector. He had done fairly extensive research into the Mexican legal system in so far as it related to transnational problems between Mexico and the United States. He had therefore been particularly interested in the statement by the observer for the Inter-American Juridical Committee, and he welcomed the close working relationships between the Committee and the Commission.

The meeting rose at 6.10 p.m.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (United Nations, *Treaty Series*, vol. 213, p. 221).

1727th MEETING

Tuesday, 15 June 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 80 (Registration and publication of treaties)[3] (*concluded*)

1. Mr. STAVROPOULOS said that he wished to correct a statement he had made at the 1725th meeting (para. 13). He had said that there was a difference in treatment, in regard to application of Article 102 of the Charter, between international organizations and Members of the United Nations, since treaties submitted by the former were not published, whereas those submitted by the latter were registered and published. Having examined the 1946 regulations to give effect to Article 102 of the Charter of the United Nations (General Assembly resolution 97 (I)), however, he had discovered that treaties submitted by international organizations were in fact published. Article 12, paragraph 1, of the regulations read: "The Secretariat shall publish as soon as possible in a single series every treaty or international agreement which is registered or filed and recorded ...". In that context, "filed and recorded" meant registered by the United Nations or a specialized agency.

2. Mr. NI said that the question raised by article 80 was which types of treaties should be registered with the United Nations. General Assembly resolutions 97 (I) and 33/141 provided certain indications in that connection. Under article 1, paragraph 1, of the regulations in resolution 97 (I), treaties entered into by one or more Members of the United Nations had to be registered with the United Nations Secretariat; under article 4, paragraph 1, subparagraphs (*a*) and (*b*), the United Nations was required to register *ex officio* treaties to which it was itself a party and under which it was authorized to effect registration; and, under paragraph 2 of the same article, a specialized agency might register with the Secretariat a treaty entered into

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

[2] The draft articles (arts. 1-80 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 1725th meeting, para. 32.

by one or more Members of the United Nations subject to the following three conditions: first, the constituent instrument of the specialized agency must so provide; secondly the treaty must have been registered with the specialized agency pursuant to the constituent instrument of the agency; and, thirdly, the specialized agency must have been authorized by the treaty to effect registration. In other words, only treaties entered into by one or more Members of the United Nations, or to which the United Nations was itself a party, or whose registration was effected by a specialized agency, subject to certain conditions, fell within the purview of Article 102 of the Charter.

3. That being so, treaties not covered by the regulations would include those entered into by States of which none was a Member of the United Nations, treaties entered into by international organizations *inter se* other than the United Nations, and treaties between such States and organizations. The regulations laid down only the conditions under which a specialized agency might register with the Secretariat a treaty entered into by one or more Members of the United Nations; it did not provide for the registration by a specialized agency of a treaty between a specialized agency and another international organization that was not a specialized agency or a State that was not a Member of the United Nations. In order to effect registration, a specialized agency had either to be involved in the treaty as a party to it or have participated in it in some other way.

4. Draft article 80, however, could not apply to all treaties, since there were certain treaties to which registration under the existing regulations did not apply. The Commission had considered inserting the words "where appropriate" in article 77, subparagraph 1 (*g*). Another suggestion had been to include in that paragraph a reference to Article 102 of the Charter, leaving the interpretation of the Charter to the United Nations itself. A third possibility was for the United Nations to amend the regulations to make them applicable to the new categories of treaty. The first two of those possibilities seemed unlikely to lead to a solution. As for the third, if the draft articles were adopted in the form of a convention before the regulations were amended, there would be a lacuna in the regulations, although it would not be very serious since it would mostly affect treaties between two or more international organizations *inter se*, and an amendment would probably be introduced to cover that case. For all those reasons, he was in favour of retaining draft article 80 in its current form.

5. Mr. STAVROPOULOS read out the following authoritative opinion, which he hoped might shed some light on the matter under discussion:

> The obligation regarding filing, recording and publication by the Secretariat does not apply to treaties or international agreements concluded between international organizations other than the United Nations and the specialized agencies. However, a practice has developed whereby any such treaties or agreements transmitted by such organizations to the Secretariat for filing and recording are published by the Secretariat in part II of the volumes of the *Treaty Series*.

Treaties concluded by international organizations other than the United Nations and the specialized agencies were therefore also filed and recorded by the Secretariat of the United Nations.

6. Mr. USHAKOV recalled that he had proposed (1725th meeting) dividing article 80, paragraph 1, into two subparagraphs. The first subparagraph would begin:

> "Treaties concluded between one or more States and one or more international organizations shall, after their entry into force, be transmitted to the Secretariat of the United Nations ...",

and the second would begin:

> "Treaties concluded between two or more international organizations may, after their entry into force, be transmitted to the Secretariat of the United Nations ...".

7. Mr. FLITAN said that the Commission should adopt the text of article 80 as it stood, since the only obligation involved related to the transmission of treaties. It was certainly in the interest of the parties to treaties and of the international community as a whole to have some sort of record of all multilateral treaties concluded, whether treaties between States—which would be covered by the Vienna Convention—or treaties to which two or more international organizations were parties. Moreover, such a procedure would simply meet the wish expressed by the Commission, in the first reading of article 80,[4] to see the role of the Secretariat of the United Nations expanded. As far as the registration, filing, recording and publication of such treaties was concerned, there were regulations to give effect to Article 102 of the Charter of the United Nations, which fell within the competence of the General Assembly alone. The future changes would depend on many factors, not least the financial and human resources of the Secretariat of the United Nations.

8. Mr. JAGOTA said he agreed that all treaties falling within the scope of the articles should be registered; the question was how to do it. The point had been raised whether Article 102 of the Charter of the United Nations would apply to treaties registered pursuant to draft article 80, so that an obligation would be imposed, not only on the parties to the treaty, but also on the United Nations to file and record that treaty; failure to perform obligation would give rise to the consequences provided for under Article 102, paragraph 2, of the Charter. In his view, Mr. Ni's interpretation regarding the treaties that could be registered by the United Nations was correct. However, the position with regard to treaties between international organizations, namely, treaties to which the draft articles would apply, was not entirely clear. For example, there were agreements between the Asian-African Legal Consultative Committee and the International Centre for Settlement of Investment Disputes (ICSID)—an organ of the World Bank—re-

[4] *Yearbook ... 1980*, vol. I, pp. 54-55, 1593rd meeting, paras. 43-57.

garding general arrangements between the Regional Centres for Commercial Arbitration and ICSID, and the draft articles would apply to those agreements. Would the World Bank, as a United Nations specialized agency, be required to register the agreements, or could the Legal Consultative Committee register them under draft article 80? Again, would the agreement fall within the scope of General Assembly resolution 97 (I)? The same question arose in the case of agreements concluded between the Asian-African Legal Consultative Committee and other regional legal committees, to which the draft articles would likewise apply.

9. His own feeling was that if such agreements were currently registered, it was as part of established United Nations practice, rather than under Article 102 of the Charter or the relevant resolutions. However, he favoured the retention of draft article 80 and would therefore like some clarification as to whether the part of the draft articles that dealt with treaties between international organizations—none of which would necessarily be a United Nations specialized agency—could be registered under Article 102 of the Charter, under the relevant resolutions of the United Nations General Assembly or in accordance with established United Nations practice.

10. Mr. STAVROPOULOS pointed out that, under article 4 of the regulations to give effect to Article 102 of the Charter of the United Nations, the United Nations was itself required to register *ex officio* any treaties subject to article 1 of the regulations, whereas specialized agencies might register such treaties under certain conditions, but were under no obligation to do so. The purpose of his earlier comment had been to show how keenly interested the General Assembly was in having all treaties published, although certain treaties did not have to be published *in extenso* by the Secretariat.

11. Mr. FRANCIS said that, whereas article 80 of the Vienna Convention governed only treaties between States, the draft articles were wider in scope, since they extended to treaties between States and international organizations and between international organizations. In his view, draft article 80, as it stood, was perfectly correct. Article 80 of the 1969 Vienna Convention clearly referred to treaties between Member States of the United Nations, or between Members and non-Members, or exclusively between non-Members. To that extent, the Vienna Convention could rightly be said to go beyond Article 102 of the Charter. Moreover, it was the clear intent of Article 102 of the Charter that all treaties should be registered. Quite apart, therefore, from the final preambular paragraph of the Vienna Convention, which affirmed that the rules of customary international law would continue to govern questions not regulated by the provisions of the Convention, it must by now be firmly established customary practice for all treaties to be registered. Consequently, there was no need to develop draft article 80 any further; all that was required was for the General Assembly, at an appropriate time, to bring up to date the regulations set forth in General Assembly resolutions 97 (I) and 33/141.

12. Mr. LACLETA MUÑOZ said he agreed that draft article 80 fulfilled its purpose perfectly. It was an exact parallel to the corresponding provision in the Vienna Convention and could likewise be applied to treaties where the parties were not bound by the Charter of the United Nations, simply because they were not Members of it.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 80 to the Drafting Committee.

It was so decided.[5]

PROVISIONS ALREADY CONSIDERED IN SECOND READING

ARTICLE 5 (Treaties constituting international organizations and treaties adopted within an international organization) *and*

ARTICLE 20 (Acceptance of and objection to reservations)[6]

14. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission must revert to a number of questions relating to the draft articles which had been left in abeyance. He recalled that, in second reading, the Commission had adopted an article 5 which it had not adopted in first reading, since it had felt it necessary to have a provision extending to the draft articles the rule set forth in article 5 of the Vienna Convention, which stipulated:

> The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Naturally, that assumed that the Commission accepted the idea that treaties could include the constituent instruments of international organizations to which one or more other international organizations were parties—a concept based on the fact that the word "treaty" did not have the same significance in the Vienna Convention as in the draft articles under consideration. It also assumed that the Commission agreed that treaties adopted within an international organization could have one or more other international organizations among their parties. Such arguments were somewhat bold, since few cases in point currently existed; nevertheless, the Commission had been of the view that they should not be excluded, in so far as article 9 of the draft provided that international organizations could participate in conferences of States at which the texts of treaties were adopted.

15. He was not suggesting that the Commission should reopen consideration of article 5, although members of the Commission could, of course, revert to it. He

[5] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 67-68.

[6] For the texts of these articles, see footnote 2 above.

wished to point out, however, that, if article 5 was adopted, the Commission would then, logically, have to review the text of article 20,[7] since the text of that article adopted by the Commission in second reading contained no provision parallel to that of article 20, paragraph 3, of the Vienna Convention. That paragraph had been inserted at the request of the Secretary-General of the United Nations and read:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Actually, that text would not be necessary if the draft articles did not include a provision such as that contained in article 5. However, once the Commission had accepted the idea of including such a provision in the draft, there would no longer be any reason not to include in article 20 a third paragraph modelled on article 20, paragraph 3, of the Vienna Convention. He proposed, therefore, that a third paragraph should be inserted in article 20 of the draft, purely and simply reiterating the provisions of article 20, paragraph 3, of the Vienna Convention, and that the other paragraphs of draft article 20 should be renumbered accordingly. Such a procedure should not give rise to any great difficulty.

16. Mr. USHAKOV recalled that he had proposed[8] the following text for article 5: "The present articles apply to any treaty adopted within an international organization without prejudice to any relevant rules of the organization", in which the word "adopted" did not necessarily imply a formal act of acceptance. The Drafting Committee had decided also to include a reference to treaties which were the constituent instruments of international organizations. However, it was difficult to see how an international organization could be party to the constituent instrument of another international organization. In any event, such a situation would constitute a special case, and should be treated as such if it occurred in the future. The question could be considered by the Drafting Committee.

17. Mr. JAGOTA said that, if he had understood correctly, Mr. Ushakov's point was that, whereas a provision similar to that set forth in draft article 5 had relevance for the Vienna Convention, it had no relevance for the draft articles. Mr. Ushakov had said that he knew of no example of an international organization being established by a treaty between one or more States and one or more international organizations, but that if such an example existed, it should be treated as a special case and should not come within the scope of the draft articles. He, himself, was not certain that such a distinction was justifiable. It might be technically correct to say that a treaty establishing an international organization was a treaty between States, to which the Vienna Convention would therefore apply. However, since the international organization was established pursuant to a constituent instrument and might therefore itself subsequently conclude treaties, he thought that nothing would be lost if the text were retained as drafted.

18. An example was provided by the Convention on the Law of the Sea,[9] which had established the International Seabed Authority and might therefore be considered as the constituent instrument of that Authority. Since the parties to the Convention could be, not only States, but also international organizations, that Convention, as the constituent instrument of the Authority, would certainly fall within the scope of the draft articles. One possible approach, therefore, would be to leave it to the parties to the Convention to take care of their own interests. Lastly, he considered, in the light of those comments, that draft article 5 did have a place in the draft and should be retained. He also supported the Special Rapporteur's proposal that a new paragraph 3 be added to draft article 20.

19. Mr. McCAFFREY said he appreciated Mr. Ushakov's point that the situation contemplated by draft article 5 would be a special case within the context of the draft. He also believed that he understood that Mr. Ushakov's reason for suggesting the deletion of the reference to "any treaty which is the constituent instrument of an international organization" was that there was no need to provide for very infrequent cases if to do so would complicate the draft unnecessarily and possibly create other unforeseen problems. In his own view, such would not be the case. He considered that a provision such as that contained in the first part of draft article 5 would be useful, not only in the context of the law of the sea, but also increasingly so in the course of the coming years. For those reasons, he supported the Special Rapporteur's proposal to retain draft article 5 and to add a new paragraph 3 to draft article 20.

20. The CHAIRMAN, speaking as Special Rapporteur, said that it was quite easy to conceive of international organizations (as well as States, as the case might be) concluding agreements affecting the material interests of international civil servants—who were frequently transferred from one organization to another—in such areas as pensions and the establishment of a fund or of an autonomous institution to manage them. In the case referred to by Mr. Ushakov in which the organization would simply authenticate the text of a treaty, he pointed out that a text could be adopted without any signing formality being provided for other than signature by the chairman of an organ. The Drafting Committee could also consider that question.

Article 5 and article 20, paragraph 3, were referred to the Drafting Committee.[10]

[7] See *Yearbook ... 1981*, vol. II (Part Two), p. 139, para. (3) of the commentary to article 20.

[8] See *Yearbook ... 1981*, vol. I, p. 17, 1646th meeting, para. 41.

[9] See 1699th meeting, footnote 7.

[10] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 12.

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)[11]

21. The CHAIRMAN, speaking as Special Rapporteur, recalled that the Commission had adopted in second reading (1702nd meeting) article 30, which contained the following provision:

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

and that Article 103 of the Charter of the United Nations read as follows:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

A number of members of the Commission had wondered, in respect of articles 30 and 42, whether the Commission should not include in the draft a single final article containing the rule laid down in article 30, paragraph 6, while extending it to cover all the draft articles.

22. He was not very much in favour of that suggestion, for two basic reasons. Firstly, the Commission, if it adopted that suggestion, would be compelled to justify it by providing a fairly precise and exhaustive interpretation of Article 103 of the Charter, which it was not authorized to do. Secondly, the inclusion of such a provison in the draft would be tantamount to pointing out a deficiency in the Vienna Convention. Consequently, he did not consider it necessary to refer the matter to the Drafting Committee. Attention could simply be drawn in the commentary to the provisions of Article 103 of the Charter of the United Nations.

23. Mr. STAVROPOULOS suggested that paragraph 6 of article 30 should be deleted, since it stated the self-evident.

24. Mr. USHAKOV said that a reference to Article 103 of the Charter of the United Nations relating to the draft as a whole, which would ultimately codify the law of treaties concluded between States and international organizations or between two or more international organizations, was unwarranted. It was justified, however, in article 30, which dealt with the application of successive treaties relating to the same subject. Such treaties were quite specific and laid down obligations, over which the obligations assumed under the Charter of the United Nations would, of course, prevail. The Drafting Committee could, in any event, take up the question.

25. The CHAIRMAN, speaking as Special Rapporteur, said that he had simply followed the wording of article 30 of the Vienna Convention, with the sole exception that the provision appeared at the end rather than at the beginning of the article. It nevertheless covered the same paragraphs. While he understood the position of Mr. Stavropoulos, to act upon it would be tantamount to criticism of the Vienna Convention.

26. Mr. STAVROPOULOS asked whether it was the intention that every treaty should contain a reference to article 103 of the Charter. Such a provision would seem unnecessary.

27. The CHAIRMAN, speaking as Special Rapporteur, said that the convincing argument put forward by Mr. Ushakov answered the observations made by Mr. Stavropoulos.

28. Mr. USHAKOV said that article 30, paragraph 1, of the Vienna Convention merely recalled that the Charter prevailed in all cases over all other treaties, regardless of the relationships between the treaties themselves. However, it was unnecessary to recall that fact with reference to the draft as a whole.

29. Mr. LACLETA MUÑOZ said, while he agreed that the reference in draft article 30 to Article 103 of the Charter should be retained, he did not altogether understand why it appeared at the end rather than at the beginning of the article, as was the case in the corresponding provision of the Vienna Convention. Moreover, the whole provision could be cast in the more general terms of article 30 of the Vienna Convention, and the parallelism with that Convention should be strictly maintained.

30. Mr. McCAFFREY said he agreed that no new article should be added. He was also in favour of the inclusion, in draft article 30, of a reference to Article 103 of the Charter, in particular for the reasons stated by Mr. Ushakov. It would perhaps be preferable, for reasons of style and alignments with the Vienna Convention, if the reference were incorporated in paragraph 1 of article 30.

31. Mr. FLITAN supported the proposal to include a reference to Article 103 of the Charter of the United Nations only in article 30 of the draft. He suggested that the question of article 30 and the placing of the reference to Article 103 of the Charter of the United Nations, should be referred to the Drafting Committee for consideration in the light of the observations made by Mr. Stavropoulos.

It was so decided.[12]

RECOMMENDATION TO THE GENERAL ASSEMBLY

32. The CHAIRMAN invited members of the Commission to express their views on the scope of the recommendation to be submitted to the General Assembly regarding the draft articles.

33. Mr. FLITAN said that there were many arguments in favour of the convening of a conference of plenipotentiaries—the same procedure as had been followed in the case of the draft articles on the law of treaties.

34. Mr. USHAKOV said that, while it might be easy to agree on the principle of a recommendation calling

[11] For the text, see 1701st meeting, para. 22.

[12] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 15.

for the conclusion of a convention, the drafting of such a recommendation was a more difficult matter. Should the Commission recommend, for example, the convening of a conference of representatives of States only, or of representatives of States and of international organizations? It was important for the Commission to consider beforehand the situation of international organizations in respect of the future convention, since those organizations could actually become parties to the instrument or could assume obligations in other ways than by signature. Perhaps the Chairman or the Drafting Committee could draft one or a number of recommendations concerning the convening of a conference of plenipotentiaries.

35. Mr. McCAFFREY reiterated his preference for the holding of an appropriately convened conference to adopt a convention. He agreed that the drafting of the recommendation might give rise to some complications, but those complications were not unsurmountable. He agreed in principle to refer the draft articles to a conference of States with the participation of intergovernmental organizations.

36. Mr. JAGOTA endorsed the views of the three previous speakers. The proposed course was a logical one. The draft articles would complete the codification of international law governing the treaties in general. Certain portions of that law had been left outside the scope of the 1969 Vienna Convention. Subsequently, the topic of succession of States in respect of treaties had been the subject of a separate convention. The question of treaties to which international organizations were parties (which had been similarly deferred) should receive the same treatment and be dealt with by a conference of plenipotentiaries.

37. The question of participation by international organizations raised the important practical issue of which organizations would be called upon to participate in the proposed conference, apart, of course, from States. It might be suggested that every intergovernmental organization with treaty-making capacity should be invited to participate. If that proposition were accepted, it must then be decided whether the treaty-making capacity should derive from the terms of the constituent instrument of the organization, or whether it was enough for it to be contained in the internal rules of the organization or merely result from established practice. Obviously, if it was stipulated that intergovernmental organizations should have statutory treaty-making capacity, the number of organizations to be invited would be few. Should the broader view prevail, on the other hand, numerous international organizations would qualify for participation.

38. Should the number of invited organizations be large, the result would be to create uncertainty as to the degree of acceptance of the draft articles. So far, very few organizations had submitted comments on the articles and, if a large number of organizations were to participate in the conference, the outcome would be quite unpredictable. In the circumstances, he felt that the Commission was bound by the terms of draft article 6, which had already been adopted, and stated that the capacity of an international organization to conclude treaties was "governed by the relevant rules of that organization". Accordingly, any international organization having the capacity to conclude treaties in accordance with article 6 should be invited to participate in the conference.

39. Mr. LACLETA MUÑOZ supported the proposal calling for the convening of a conference of plenipotentiaries, which was the method traditionally adopted in carrying out the codification and progressive development of international law. The Commission should recommend that approach in the current instance; only when it was felt that a set of draft articles was not likely to become international law should a different course be recommended. On the subject of participation, he agreed entirely with Mr. Jagota that the criteria for treaty-making capacity should be the same as those stated in articles 2 and 6 of the draft.

40. Mr. DÍAZ GONZÁLEZ said that the question of participation was a matter to be decided exclusively by the General Assembly; the Commission was not empowered to make any recommendations in that regard. It should confine its action to recommending that the draft articles be referred to a conference of plenipotentiaries, in accordance with article 23 of its Statute.

41. Mr. NI said he supported the idea of submitting the draft articles to a conference of plenipotentiaries. The articles constituted the counterpart of those which had become the Vienna Convention, and there was no reason for giving them a different treatment. With regard to participation, he pointed out the difficulties that would result from the extremely large number of existing intergovernmental organizations, some of which, although of a highly technical character, nevertheless had treaty-making capacity. It might be advisable to take the preliminary step of requesting the Secretary-General to ask all intergovernmental organizations first, whether they were interested in participating in the conference and secondly, whether they had the capacity to conclude treaties. In that way, when the invitations to the conference were eventually issued, they would be addressed only to those organizations with treaty-making capacity which were interested in participating.

42. Mr. YANKOV urged caution in making recommendations; the Commission should not go beyond its terms of reference or attempt to do the work of political organs. As he saw it, the question of the procedure for the adoption of the future convention was more important than determining which organizations should be invited to the conference. He suggested, therefore, that the Commission's recommendation in the matter should be confined to the terms of article 23, subparagraph 1 (*d*), of its Statute. Of course, the report could include a commentary summarizing the views expressed on various other points. Such matters as participation, however, should be left to the General Assembly, in ac-

cordance with Article 13, paragraph 1, subparagraph *a*, of the Charter.

43. Two points were of course certain. First, a conference of plenipotentiaries would be held under United Nations auspices, and second, the conference would examine the draft articles. However, the Commission could not deal with the question of the rights of participants in the conference. In the past, as a general rule, international organizations had usually participated in plenipotentiary conferences only as observers; that had been true even in the case of the Third United Nations Conference on the Law of the Sea, when the position of those very organizations was being considered. It was essential to bear in mind that, in international law, lawmaking was essentially the task of States.

44. The United Nations specialized agencies and the IAEA would certainly be invited to participate in the conference. As for other intergovernmental organizations, it would be appropriate to examine their relationship with the Economic and Social Council. In that connection, he recalled the serious problems that had arisen in the special sessions of the General Assembly on disarmament regarding the participation of organizations concerned with disarmament problems. All those questions had significant political connotations, which the Commission should leave to the competent organs of the United Nations.

45. There was also the problem of the large number of intergovernmental organizations which might be eligible for participation. It was not at all improbable that as many as 350 intergovernmental organizations might wish to participate, thus outnumbering the 150 States that would be invited. With regard to Mr. Ni's interesting suggestion that a preliminary survey should be conducted before establishing the final list of invitations, he felt that the matter could not be left to the Secretary-General to decide. That was a matter which should be decided by a resolution of the General Assembly. Such a resolution would not be of a merely procedural character, as shown by the case of the Third United Nations Conference on the Law of the Sea. Clearly, it was not for the Commission to request the Secretary-General to conduct the survey proposed by Mr. Ni; the whole question should first be examined thoroughly by the Sixth Committee. The Commission, for its part, should draw the matter to the attention of the Sixth Committee by means of some appropriate reference in the report. That would give Governments a clear indication on the subject, with a view to the work of the thirty-seventh session of the General Assembly.

46. Mr. QUENTIN-BAXTER agreed with previous speakers on the need for the Commission to be very careful and restrained in its suggestions. It should remember that it was not a decision-making body and should confine its action to drawing the attention of the General Assembly to some relevant considerations. He therefore favoured the adoption of a recommendation to the effect that a conference of plenipotentiaries should be convened to consider the draft articles, qualified by the comment that the case was a very special one. The General Assembly might then wish to consider the special interest of intergovernmental organizations in relation to the treaty which should be the outcome of the draft. The point should also be made that the United Nations must do its best to obtain the reactions of intergovernmental organizations to the draft.

47. The question of participation raised some very real problems. There must be adequate representation of States at the proposed conference. Clearly, States would not be represented at the conference in the same manner as they had been at the two sessions of the United Nations Conference on the Law of Treaties. As he saw it, there was a very real danger that States would be not only outnumbered, but even outshone, by the intergovernmental organizations. There was also the question of the participation of intergovernmental organizations in the future treaty. He earnestly hoped, in that connection, that organizations which did not signify their desire to be bound by the treaty would not thereby automatically be assumed not to be bound by it. It would be most unfortunate for the future if any such precedent were established. In conclusion, he supported the proposal to refer the draft articles to a conference of plenipotentiaries, since those articles were no less worthy of such treatment than earlier drafts relating to the law of treaties.

48. Mr. CALERO RODRIGUES supported the proposal to refer the draft articles to a conference of plenipotentiaries and agreed with previous speakers that caution should be exercised with regard to the question of participation in the conference. There was, of course, no certainty that the Commission's recommendation for the holding of the conference would be accepted. There was currently some reluctance on the part of States to convene conferences, because of the feeling that too many of them were being held. That being so, he believed that the Commission would not be exceeding its mandate if it were to add to its recommendation the comment that, in view of the nature of the draft, intergovernmental organizations with treaty-making capacity should be permitted to participate. There was of course no need for the Commission to go into details regarding such questions as invitations.

The meeting rose at 1 p.m.

1728th MEETING

Wednesday, 16 June 1982, at 10.05 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