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A/CN.4/SR.1508

Summary record of the 1508th 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:-

1978, vol. I

tion to conclude treaties was governed by the organization's constituent instrument. He had simply pointed out what was stated in article 6, namely, that the capacity of an international organization to conclude treaties was governed by the relevant rules of that organization. However, under the definition given in article 2, paragraph 1 (*j*), "rules of the organization" meant, "in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization". Accordingly, an organization might conclude treaties only if its relevant rules permitted it to do so. It was not for the Commission but for international organizations themselves to decide whether, under their relevant rules, they could conclude treaties.

45. Mr. SCHWEBEL said that Mr. Ushakov's clarification had been very cogent and perfectly correct. However, if an international organization that had not been expressly endowed by its constituent instrument with the power to conclude a treaty found itself faced for the first time with the question whether it could subscribe to such an instrument, it would have no practice of its own to guide it. In the light of the manner in which international organizations generally behaved, he thought that an organization composed of States would have the power to conclude a treaty in such a case.

46. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 39 to the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

1508th MEETING

Wednesday, 28 June 1978, at 10.15 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 40 (Amendment of multilateral treaties)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 40 (A/CN.4/312), which read:

Article 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and international organizations, each one of which shall have the right to take part in:

(*a*) the decision as to the action to be taken in regard to such proposal;

(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State and every organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(*b*), applies in relation to such State or organization.

5. Any State or organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

2. Mr. REUTER (Special Rapporteur) said that the main purpose of article 40 of the Vienna Convention,[1] which corresponded to the article under consideration, was to enable all the parties to a multilateral treaty to participate in the amendment procedure, to afford them an opportunity to become parties to the amended treaty on terms of equality and to provide for cases of States that did not accept the amendment and of those that became parties to the treaty after its amendment. Since all the principles set forth in that provision seemed applicable to treaties between States and international organizations or between international organizations, he had considered that he could propose a text which, except for drafting changes, was the same as that of article 40 of the Vienna Convention.

3. Mr. USHAKOV said that, generally speaking, he had much the same difficulties with article 40 as with the preceding article. Referring to the first phrase of article 40, paragraph 1, he wondered whether international organizations could really agree by treaty to rules concerning them that differed from the rules set forth in the draft articles. For example, could an international organization derogate by treaty from the rules of its own constituent instrument, such as those concerning its capacity to conclude treaties?

4. With respect to paragraph 2 (*b*), he wondered whether international organizations could take part in the negotiation and conclusion of any agreement for the amendment of a multilateral treaty. Could they really conclude such an agreement, even tacitly?

5. The term "agreement", which appeared, *inter alia*, in paragraphs 4 and 5 of the article, could be in-

[1] See 1507th meeting, foot-note 1.

terpreted in different ways, as had been shown by the discussion on article 39. To ensure that the term did not cover tacit agreement, he had at the previous meeting made a suggestion in relation to article 39,[2] which should be taken into consideration.

6. Finally, the form of article 40 should be modified. As in the case of the articles relating to reservations, the Commission should distinguish between treaties concluded between States and organizations and treaties concluded between organizations only. Paragraphs 2, 4 and 5 should be divided accordingly. Under the existing wording of paragraph 2, for example, any proposal to amend a multilateral treaty as between all the parties must be notified "to all the contracting States and international organizations". It was obvious that, in the case of a multilateral treaty concluded between international organizations only, such notification should not be made to States.

7. Mr. ŠAHOVIĆ approved the rules proposed by the Special Rapporteur in the article under consideration. From the standpoint of content, those rules could not differ from the rules set forth in the corresponding article of the Vienna Convention.

8. The points raised by Mr. Ushakov, particularly concerning the special situation of international organizations as parties to multilateral treaties, were of course pertinent. Most of those points, however, had already been discussed during the consideration of article 39. Such being the case, the Drafting Committee should now seek formulations acceptable to all members of the Commission.

9. Mr. SCHWEBEL also endorsed article 40 as proposed by the Special Rapporteur and considered that it could be referred to the Drafting Committee. Such problems as the text might pose seemed to him to be not so much substantive as the consequence of a distinctive philosophical approach to international organizations.

10. With regard to the presentation of the article, he was opposed, as he had been when the Commission had discussed other articles, to the subdivision and duplication of paragraphs, which would make the text too cumbersome. He did not think that paragraph 5, for example, required elaboration, since its existing wording seemed to him already to take account of the possibility that there might be treaties to which only international organizations were parties.

11. Mr. SUCHARITKUL found article 40 acceptable, subject to a few drafting changes. Paragraph 1 of the article safeguarded the freedom of the contracting parties, whether States or international organizations, to conclude multilateral treaties and to agree on any kind of amendment procedure. There did not seem to exist, in that sphere, principles so essential as to limit the freedom of the contracting parties. It was therefore in the absence of contrary provisions of the treaty that the provisions of paragraphs 2 to 5 of article 40 were applicable.

12. Mr. JAGOTA observed that Mr. Ushakov had once again drawn attention to what he believed to be a basic difference between treaties concluded between States and international organizations and treaties concluded between international organizations alone. The Commission itself had already distinguished between those two types of treaties in articles 24 and 24 *bis* and 25 and 25 *bis*,[3] and, with regard to the articles contained in his seventh report, the Special Rapporteur had acknowledged at least the possibility of the existence of such a distinction by proposing two versions of article 41 (A/CN.4/312). If the Commission chose variant I of article 41, it would be obliged, for the sake of consistency, to treat the two types of treaties separately in article 40 as well. It was therefore important to determine whether the distinction itself was sound and why the Special Rapporteur considered that it was unnecessary in article 40, but might be necessary in article 41.

13. For Mr. Ushakov, the basis for the distinction between the two types of treaty in question lay in the fact that international organizations were governed by their own rules and, unlike States, did not have an independent personality. Hence, the main point Mr. Ushakov had made in relation to both article 39 and article 40 was that the rules of an international organization were paramount: they governed the capacity of the organization to conclude treaties—as the Commission itself had recognized in article 6— and the organization should not be able, through the amendment of a treaty, to alter those rules, and hence that capacity. Mr. Ushakov had also been concerned that an international organization should not be able to accept such an amendment tacitly or by mere conduct.

14. In considering Mr. Ushakov's points, the Commission should bear in mind its own article 27, paragraph 2, and article 46 of the Vienna Convention, to which it would presumably wish to prepare a parallel provision. In its article, the Commission provided that, if the rules of an international organization gave it competence to conclude treaties, the organization must perform in full any treaty to which it became a party, unless the treaty itself acknowledged possible limitations on that performance deriving from the rules. He believed that, after drafting that provision, and including a reference to the rules of international organizations in the article corresponding to article 46 of the Vienna Convention, the Commission should cease to distinguish between the parties to a treaty according to whether they were States and international organizations, or international organizations alone.

15. Subject to the need to consider splitting the article in the light of the decision on article 41, he found article 40 as proposed by the Special Rapporteur generally satisfactory. In particular, the fact that

[2] *Ibid.*, para. 39.

[3] *Ibid.*, foot-note 2.

it spoke of "agreement" for the amendment of the treaty, rather than "consent" to amendments, seemed, as in article 39, to preclude the acceptance of amendments by implication.

16. Sir Francis VALLAT agreed with the remarks made by Mr. Jagota.

17. Mr. REUTER (Special Rapporteur) noted that the discussion had revealed both substantive and drafting problems, although it was not always easy to distinguish between the two, certain changes having been presented sometimes as mere drafting matters and at other times as questions of substance.

18. As Mr. Ushakov had pointed out, it was clear that, since the term "agreement" appeared several times in article 40, the Commission must decide, in article 39, whether that term should be maintained as it stood or, as he himself had suggested orally,[4] expanded into "express agreement", thereby precluding acquiescence, as the United Nations Conference on the Law of Treaties seemed to have done by rejecting draft article 38,[5] or whether, as Mr. Ushakov had proposed, that term should be deleted and replaced by a reference to the consent of the parties.

19. Clearly article 39 was a key article and the positions adopted on that article would therefore determine the positions to be adopted on article 40, not only with respect to the term "agreement" but also, as Mr. Ushakov, Mr. Jagota and Sir Francis Vallat had emphasized, with respect to the question whether it was necessary to refer to the principle laid down in article 6, under which "the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization". That question arose in the case of article 40 as it had already arisen and would arise again in the case of other articles.

20. If, as Mr. Ushakov had proposed, an alternative wording were accepted for article 39, that wording should also apply to article 40, and even to article 41. In the latter case, the matter might be slightly more complex, because articles 39 and 40 spoke of the amendment of treaties, whereas article 41 referred to the modification of treaties. That did not mean that the wording adopted in article 39 should be repeated in articles 40 and 41; it meant that, if article 39 contained a provision referring to the fact that the agreement of an international organization party to a treaty was governed by the relevant rules of that organization, that provision should be formulated in such a way as to apply to articles 40 and 41.

21. With respect to the phrase "unless the treaty otherwise provides", in paragraph 1 of article 40, Mr. Ushakov had wondered whether it could be accepted that, in a particular treaty, an organization should be exempted from applying the provisions of article 40. While understanding Mr. Ushakov's concern, he considered it excessive. In its existing form, article 40 assimilated international organizations to States and gave them the same rights. Therefore the reservation "unless the treaty otherwise provides" could operate only to limit the rights of international organizations. In that respect, it could have a more important function than in article 40 of the Vienna Convention, because it could prevent an international organization from participating in the negotiation of the agreement amending the treaty. It was quite conceivable that an international organization should be admitted as a party to a treaty but with slightly more restricted rights than the States parties.

22. He noted that Mr. Ushakov and, after him, Mr. Jagota and Sir Francis Vallat, had wondered whether a distinction should not be made, in article 40 and in the other articles, between treaties concluded between international organizations alone and treaties concluded between one or more States and one or more international organizations; Mr. Ushakov had made the point as one of a drafting nature, whereas Mr. Jagota and Sir Francis Vallat had considered that it was more a question of substance. He pointed out that, wherever possible, he had avoided making a distinction between treaties between international organizations only and treaties between States and international organizations, so that the text should not be unduly cumbersome. Moreover, he agreed with Mr. Schwebel that there was no danger of confusion in article 40. Obviously, however, it could be argued, as had Mr. Ushakov, that the Commission shoud not be afraid to encumber the text if that served to avoid any ambiguity. That was a problem that would have to be settled by the Drafting Committee.

23. However, that drafting problem might conceal a problem of substance which, although not arising in the case of article 40, might arise in the case of other articles, such as article 41. It was for reasons not of drafting but of substance that article 41 drew a distinction between treaties concluded between international organizations only and treaties concluded between States and international organizations. As far as substance was concerned, two different positions could be adopted. It could be considered that, with very rare exceptions, international organizations were assimilated to States. It could also be considered, however, that treaties concluded between international organizations only could be assimilated to treaties concluded between States only because, when international organizatons negotiated with each other, they negotiated on an equal footing whereas they did not negotiate on an equal footing when they negotiated with States.

24. If the second position were adopted, a distinction would have to be made in nearly all the articles between treaties concluded between international organizations only and treaties concluded between States and international organizations. The rules applicable to treaties between States—the rules of the Vienna Convention—could simply be transposed in respect of treaties between international organizations only. A problem of adaptation would arise only in the case of treaties between international organiza-

[4] *Ibid.*, para. 38.

[5] *Ibid.*, foot-note 3.

tions and States, because it might be necessary to subject international organizaions to special treatment.

25. For his part, he had at the outset adopted the first position. He had considered that, since the Vienna Convention was based on the principle of consensus, international organizations in general should, with very rare exceptions, be assimilated to States and that, accordingly, the same rules held good for treaties between States only, between international organizations only, and between States and international organizations. He had also considered that, if special treatment were to be given to international organizations, it rested with States to make provision for such treatment in the treaty. He had, however, taken account of the different opinions expressed in the Commission.

26. In conclusion, he said that it would be unwise to adopt a general theoretical position at the outset and that it was better to proceed empirically, examining, in the case of each article, whether the distinction between the two categories of treaties was justified for reasons of drafting or for reasons of substance.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished to refer article 40 to the Drafting Committee.

It was so agreed.

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)

28. The CHAIRMAN invited the Special Rapporteur to introduce article 41 (A/CN.4/312), which read:

Article 41. Agreements to modify multilateral treaties between certain of the parties only

Variant I

1. Two or more of the parties to a multilateral treaty between international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Two or more States parties to a treaty between States and one or more international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

3. One or more States and one or more international organizations parties to a treaty between States and international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) it is so agreed between all parties to the treaty.

4. Unless, in the case provided for in subparagraph (*a*) of paragraphs 1, 2 and 3, the treaty stipulates otherwise, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications made in the treaty by the agreement.

Variant II

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

29. Mr. REUTER (Special Rapporteur) said that the position adopted in article 41 differed from that taken in articles 39 and 40, since the subject-matter of article 41 was more sensitive than that of the two preceding articles.

30. Article 41 of the Vienna Convention dealt with the problem of *inter se* agreements. In the case of States, the Conference on the Law of Treaties had placed very strict conditions on the modification of multilateral treaties in relations *inter se*. There was naturally no problem if the possibility of such modification was provided for by the treaty. The Commission had proposed three conditions to apply in the absence of such a possibility, and they had been maintained, in amended form, in article 41, paragraph 1 (*b*), of the Vienna Convention: the modification in question must not be prohibited by the treaty, must not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, and must not relate to a provision, derogation from which was incompatible with the effective execution of the object and purpose of the treaty as a whole.

31. He had submitted two variants of article 41. Although he preferred the simpler variant, which reproduced the text of the article of the Vienna Convention, he had placed it second, in deference to the view, which several members of the Commision had upheld, that international organizations, by their very

nature, often required treatment differing from that reserved for States.

32. Variant I, which was based on that view, referred to three separate cases: that of treaties between international organizations alone and, in the case of treaties between States and international organizations, that in which the *inter se* agreement was concluded between States alone and that in which it was concluded between one or more States and one or more international organizations.

33. In the case of treaties concluded between international organizations alone, he had simply transposed the rule laid down in article 41 of the Vienna Convention for treaties between States, on the grounds that international organizations, like States, were bodies that were equal as between themselves.

34. He had also followed the course taken in the Vienna Convention in the case of treaties between States and international organizations where the *inter se* agreement concerned only States, for the fact that States were parties to a treaty to which international organizations were also parties did not diminish their rights.

35. In the third case, however, he had departed from the text of the Vienna Convention, for he had thought that, in a treaty between States and international organizations, the possibility of an *inter se* agreement between one or more States and one or more international organizations could be admitted only if one of two conditions were met: if such a possibility was provided for by the treaty, or if it was agreed between all parties to the treaty. The basis for his proposal of that rule was the belief that, in agreements of that kind, the situation of internatonal organizations was always specific and they could not be given the same freedom as States. Although the Commission had not ruled out such a case, there were as yet no examples of general treaties between States to which international organizations might also be permitted to become parties. Such treaties as currently existed between States and international organizations were specific and tightly closed—for instance, the treaty between IAEA, EURATOM and the States members of EURATOM, which was designed to ensure the application of the Treaty on the Non-Proliferation of Nuclear Weapons and in which careful thought had been given to the respective roles of the international organizations and the States concerned. It was therefore conceivable that, in treaties of that kind, the possibility of an *inter se* agreement might be provided for in the text of the treaty itself.

36. Since variant I employed the term "agreement", all the comments that had been made on that subject were applicable to it.

37. Variant II reproduced article 41 of the Vienna Convention without change. His own view was that that variant would be sufficient, for the triple barrier established by the Convention was already very solid and he could see no reason for laying down stricter requirements for international organizations. He had submitted variant I merely in response to certain legitimate concerns.

38. Mr. USHAKOV saw no reason to cater for the cases referred to in paragraphs 1 and 3 of variant I. He therefore proposed that those two paragraphs should be deleted and that only paragraphs 2 and 4 should be retained.

The meeting rose at 11.35 a.m.

1509th MEETING

Thursday, 29 June 1978, at 10.50 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Ago, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)[1] (*concluded*)

1. Mr. RIPHAGEN noted the statement in paragraph (6) of the Special Rapporteur's commentary (A/CN.4/312) to the effect that variant I of article 41 raised a kind of presumption that "modifications affecting international organizations are assumed *a priori* to upset the balance established by the treaty". He failed to see how such an assumption could be justified and, for that reason, preferred variant II.

2. There seemed to be a certain parallelism between article 41 and article 19 *bis*,[2] paragraph 2 of which laid down a special rule regarding the formulation of reservations by international organizations. It might perhaps be logical to include a similar provision in variant II of article 41.

3. The Commission should not be unduly restrictive in regard to the treaty-making powers of international organizations and, above all, should not make it too difficult for organizations that were not of a universal character to enter into treaty relations

[1] For text, see 1508th meeting, para. 28.

[2] See 1507th meeting, foot-note 2.