UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/4235
6 October 1959
ENGLISH
ORIGINAL: ENGLISH/FRENCH

Fourteenth session
Agenda item 65

RESERVATIONS TO MULTILATERAL CONVENTIONS: THE CONVENTION ON THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

Report of the Secretary-General

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I. STATEMENT OF FACTS

A. The Convention

1. In compliance with resolution 35 (IV) adopted by the Economic and Social Council on 28 March 1947, the Secretary-General of the United Nations convened the United Nations Maritime Conference in Geneva on 19 February 1948. Thirty-six States, including States then or now non-Members of United Nations, were represented at the Conference. Basing its deliberations on a draft agreement which had been prepared by the United Maritime Consultative Council, the Conference drew up the Convention on the Inter-Governmental Maritime Consultative Organization[1] and on 6 March 1948 opened it for signature and acceptance. It was deposited with the Secretary-General of the United Nations.

2. The Convention came into force on 17 March 1958 upon its acceptance by the necessary twenty-one States, including seven having each a total tonnage of not less than 1 million gross tons of shipping. By its terms, the States parties established the International Maritime Consultative Organization (hereinafter referred to as IMCO). The functions of the Organization are consultative and advisory,[2] and its purposes technical. The Organization is to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade. It is to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation, as well as the removal of unnecessary governmental restrictions affecting the availability of shipping services to world commerce.[3]

3. The Organization consists of an Assembly, a Council, a Maritime Safety Committee, and a secretariat.[4] The Assembly has authority under the Convention to perform the functions of the Organization, to vote its budget, to determine its financial arrangements, to apportion the expenses among the members, and to appoint

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1/ For the Final Act of the Conference and text of the Convention, see United Nations, Treaty Series, vol. 289, p. 3, or United Nations Maritime Conference, Final Act and Related Documents, United Nations publications, Sales No.: 1948. VIII.2.

2/ IMCO Convention, art. 2.

3/ Ibid., art. 1.

4/ Ibid., art. 12.

personnel; and to make recommendations on maritime safety and other technical shipping subjects. The Council acts between sessions of the Assembly.5/

4. The first session of the Assembly was convened in London on 6 January 1959. By the adoption of its resolution A.7(I), approving the Agreement bringing the Organization into relationship with the United Nations, IMCO on 13 January 1959 became a specialized agency in accordance with Article 57 of the Charter of the United Nations.

B. Procedures affecting the reservation by India

5. As noted above, the IMCO Convention came into force on 17 March 1958 and the first session of the Assembly convened on 6 January 1959. Likewise on 6 January 1959, the Government of India submitted for deposit with the Secretary-General of the United Nations an instrument of accpetance of the Convention, "subject to" what it termed a "condition", to the effect that any measures which that Government adopts or may have adopted or may adopt on various shipping subjects are consistent with the purposes of the Organization as defined in the Convention (see annex I for the text of the instrument).

6. In accordance with established practice, the Secretary-General informed IMCO of the instrument of acceptance tendered for deposit subject to the stated condition. Noting that the condition seemed to be in the nature of a reservation, he suggested to the IMCO secretariat that the matter be placed before the IMCO Assembly, then in session, "for decision".

7. At its sixth meeting on 13 January 1959 the IMCO Assembly adopted a resolution by which it took note of the information received from the Secretary-General concerning the instrument of acceptance submitted for deposit by the Government of India and resolved "to request the Secretary-General of the United Nations to circulate the document to Member States of the Organization"; it further resolved "that until the Member States have had an opportunity of expressing their views, the representatives of India shall be free to take part, without vote, in the proceedings of this Assembly". Before the vote the representative moving the resolution explained that this form of participation was necessary "for constitutional reasons".6/

5/ Ibid., art. 27.

6/ See IMCO/A.I/SR.6.

8. The Secretary-General accordingly, by circular note of 16 February 1959, informed the States members of IMCO of the submission of the instrument and set out the text of the condition declared by India. In so doing he requested of the Minister for Foreign Affairs of each member State that he be "informed as soon as possible of the attitude of ... /his/ Government with respect to the above-mentioned declaration". At the same time he gave notice of the contents of the declaration to States entitled to become parties to the Convention. He likewise addressed a note to the permanent representative of India to the United Nations outlining the procedure which he had followed, referring to the request of the IMCO Assembly that he make this circulation in order to give the States members of the Organization "an opportunity of expressing their views", and mentioning that the circular note to members requested them to inform the Secretary-General as soon as possible of their attitude in respect of the declaration. He concluded:

> "If the Secretary-General receives no objection to the declaration from a State party to the Convention on the Inter-Governmental Maritime Consultative Organization, India will be listed as a party to the said Convention and all interested States will be notified accordingly."

9. Certain Governments replied that the Indian declaration required no comment or that it elicited no objection on their part. The French Government, however, replied by note of 18 March 1959 that it felt "bound to express its opposition to the reservations contained in the declaration of the Government of India" (see annex II). The United States Government transmitted the considerations on the basis of which it concluded that no part of the declaration constituted a reservation (see annex III). A communication from the Federal Republic of Germany examined the terms of the condition and concluded:

> "In view of the difficulties in reconciling the Indian reservation with the general principles of shipping policies and with the purposes of IMCO, the Government of the Federal Republic of Germany suggests that, in due time, within the framework of IMCO, thorough-going negotiations should be conducted with the Indian Government, with the aim of causing the Indian Government to withdraw this reservation." (For the full text see annex IV.)

The Secretary-General circulated to Governments the contents of all such communications.

10. While these communications were being received and circulated, but subsequent to receipt of notice of the French objection, the permanent representative of India wrote to the Secretary-General noting the reasons for his circulation of the text as requested by the IMCO Assembly, but inquiring as to the significance to be attached to the final observation of the Secretary-General as quoted at the end of paragraph 8 above. The permanent representative stated that the Government of India could not believe that it could be the intention of the Secretary-General to introduce in this regard, by such a statement, a rule or principle of unanimity. The Government of India considered that the States parties to the Convention had had adequate time to indicate their views and, if objection had not been received from "all" the States parties, the Government of India had no doubt that the Secretary-General as depositary would list India as a member of the Organization.

11. In a note of reply to the permanent representative of India, the Secretary-General explained the position of the Secretariat. The form of the circular notes used by him followed the previous practice which the General Assembly had recognized as applicable in respect of conventions concluded prior to its resolution 598 (VI) on reservations to multilateral conventions. Consequently, until the resolution adopted by the IMCO Assembly was modified by a new resolution or decision taken by a competent IMCO organ, the Secretary-General, in view of the expressions of attitude by certain IMCO members toward the condition to which India subjected its acceptance, was unable to receive the instrument in definitive deposit. So long as objection existed to the terms of the Indian acceptance, it would exceed the authority of the Secretary-General, he explained, to make the affirmative decision implicit in the request of India that it be listed as a member. Such a step would constitute an action in favour of one Government's position and against that taken by another. In abstaining from such action, however, the Secretary-General would be reserving to IMCO its right to pass upon the legal status of the acceptance by India, on the basis of its compatibility with the Convention.

II. CONSIDERATIONS OF LAW AFFECTING THE RESERVATION OF INDIA

A. The steps taken by the Secretary-General have not amounted to "application of the unanimity rule"

12. In its explanatory memorandum[7/] proposing the present item for inclusion in the agenda of the General Assembly, the Government of India states that it finds no resolution or decision that would "authorize the application of the unanimity rule in regard to multilateral conventions concluded under the auspices of the United Nations". The statement thus raises both the question of authority and the question of unanimity.

13. The broad authority of the Secretary-General to serve as depositary of multilateral conventions concluded under the auspices of the United Nations derives, of course, from policy decisions of the General Assembly taken as early as its first session and regularly renewed thereafter as an administrative matter. In taking specific depositary actions, however, the Secretary-General acts under the authority of the final articles of the conventions in question; as to matters which the States concluding a convention have not expressly covered in the articles on depositary functions, the Secretary-General seeks to follow those established depositary procedures understood to have been contemplated by the States parties at the time of the adoption of a given convention. Moreover, in the instant situation, when circulating the text of the Indian reservation and requesting the views of the IMCO members, it is clear that the Secretary-General was specifically acting as agent of that Organization, not as agent of the General Assembly. Accordingly, his authority in this respect is to be found in the resolution of the IMCO Assembly; he would not have been prevented from complying with that request on the grounds of the absence of an express decision by the General Assembly of the United Nations.

14. The Secretary-General believes that it would assist in the consideration of this question, however, if he drew attention to the fact that, while he has sought to follow established procedures in the matter, he has not purported to be applying a "unanimity rule" to the reservation of India. In the indication to the permanent representative of India quoted at the end of paragraph 8 above, he did make clear that if there were no objection to their reservation, he would be in a

7/ A/4188.

position to list India forthwith as a member of IMCO. It did not, in his intention, follow from this statement that another and different proposition was true: i.e., that he considered that, if any state member of IMCO did object to the reservation, India was to be excluded from membership in that organization. He had merely indicated on the contrary that, in the absence of objection, there would be no obstacle to his treating the matter as already settled by the States concerned.

15. As explained in his reply to the permanent representative of India, summarized in paragraph 11 above, the Secretary-General reserved to the members of IMCO, acting through an appropriate channel or organ, the final decision as to the legal consequences of the condition attached by India to its acceptance of their Convention. This was not tantamount to a requirement of unanimity on his part but was only a preservation for the member States of the entire decision, including the question of unanimity. Whether the Assembly or Council of IMCO - upon consideration of the question after receiving the views of the States members of the Organization - would decide that any given numerical vote was necessary for determining the question would be a matter for decision under the IMCO Convention and not for the Secretary-General of the United Nations. That Convention, in fact, itself contains provisions which apply to voting in the Assembly and the Council and which indicate the vote required for various types of decisions.[8/]

16. It may be that to a certain extent the present difficulties have arisen out of some misunderstanding on this issue. To the best of the information available to the Secretary-General, the IMCO Assembly took no decision, nor was any suggestion made at that time, that a unanimous vote in India's favour was required. The representative of India addressed the Assembly only after the resolution deferring a final decision had been adopted. He then made a formal statement of position[9/] which could not have been implied in a vote actually preceding it and which was not taken with reference to any legal opinion of the United Nations

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8/ See IMCO Convention, art. 43. The Secretary-General does not suggest that the stated majorities would necessarily apply to a question of the present nature, but only that the existence of constitutional provisions regulating voting indicate the propriety of his leaving such questions to the bodies concerned.

9/ See IMCO/A.I/SR.6.

Secretariat or the IMCO secretariat. He stated that his Government considered itself to be a full and unconditional member of that Organization. In fact, it was the representative of India who attributed to IMCO the application of a rule of unanimity. The attitude of the Assembly, he stated, appeared to be based on the view that India could not be treated as a party until "all the other signatories" had accepted the terms laid down in the Indian instrument - which his Government was prepared, for the purpose of determining its status as a party to the Convention, to assume to be a reservation. Was it, he asked, suggested that the objection of one State would suffice to exclude India from membership in IMCO? That might be the legal position, he acknowledged, in respect of certain multilateral conventions but, with respect to those parts of conventions which merely indicated in general terms certain desirable courses of action as an object toward which the parties would strive without assuming legal obligations, the Government of India thought itself entitled to make reservations the validity and effect of which were not dependent upon acceptance by the other parties. That must be so, he concluded, since the Indian reservation was consistent with the general purpose and object of the Convention. For, he noted, the terms of the Indian instrument did not refer to the constitutional parts of the Convention but only to article 1, which determined the purposes of IMCO.

17. These assumptions were not confirmed by the Assembly. The sponsor of the resolution at once made it clear that the Indian statement had not been known in advance and that the existing position was confined to the statement contained in the resolution which had just been adopted by the Assembly. In any case, the Secretary-General has summarized the IMCO proceedings on this point for the information of the General Assembly and, in particular, in order to demonstrate that any question of the application of a unanimity rule is one which has been, and remains, before IMCO.

B. <u>The reference to IMCO was not a controversial action under any theory of reservations</u>

18. The Secretary-General was at no point in doubt as to the propriety of his referring to IMCO itself the question of the acceptance of India. This procedure conformed (1) to the terms of the IMCO Convention; (2) to the precedents in depositary practice where an organ or body was in a position to pass upon a

reservation; and (3) to the views on this specific situation expressed by the General Assembly during its previous debates on reservations to multilateral conventions.

1. The reference to IMCO was in accordance with the IMCO Convention

19. As already noted, the IMCO Convention entered into force on 17 March 1958. The Indian instrument of acceptance was not submitted until 6 January 1959. Clearly the status of that acceptance was governed by the terms of the Convention under which it was submitted and by the intention of the parties thereto. Its article 5 opens membership in the Organization to all States, subject to the relevant provisions of the Convention. Article 6 entitles United Nations Members to join in accordance with the provisions of article 57, which provides for signature and acceptance, the acceptance to be effected by the deposit of an instrument with the Secretary-General of the United Nations. The Indian reservation relates essentially to article 1, which establishes the basic purposes of the Organization. It seemed plain to the Secretary-General that if there was any question concerning the effectiveness of the acceptance, that question was one of interpretation of the IMCO Convention and could and should be determined in accordance with the terms of the Convention itself. Its article 55, entitled "Interpretation", provides:

> "Any question or dispute concerning the interpretation or application of the Convention shall be referred for settlement to the Assembly, or shall be settled in such other manner as the parties to the dispute agree. Nothing in this Article shall preclude the Council or the Maritime Safety Committee from settling any such questions or dispute that may arise during the exercise of their functions."

As the Assembly was convening on the very day on which the permanent representative of India submitted his Government's instrument, the Secretary-General could not but treat the legal consequences of the condition to which the Indian acceptance was subjected, and the consistency of that condition with the purposes of the Organization, as a question of interpretation to "be referred for settlement to the Assembly".

20. The propriety of this procedure was impliedly recognized by the IMCO Assembly in connexion with the reservation which had been proposed by another State prior to

the Indian submission. At the time of the tender for deposit of an instrument of acceptance by the Government of Turkey, a procès-verbal had been drawn up on 25 March 1958 setting forth the Turkish reservation of its law concerning cabotage and monopoly. The text of the procès-verbal was communicated to all interested States by a circular note of 9 April 1958, with a request to States parties to the Convention to inform the Secretary-General as soon as possible of their attitude toward this reservation. None of the replies contained any express objection to the reservation, and indeed certain of them specified that the IMCO Assembly should definitively pronounce itself on the matter. Consistently with his established procedure the Secretary-General, in reporting to the IMCO Assembly on the status of the Convention, set out the text of the Turkish reservation and indicated the actions he had taken to date. This report constituted an item on the agenda of the first session and the IMCO Assembly, in receiving the report and seating the Turkish delegation without qualification, tacitly accepted the reservation.

2. The reference to IMCO conformed to precedent

21. In previous cases where reservations had been made to multilateral conventions which were in force and which either were constitutions of organizations or which otherwise created deliberative organs, the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question.

22. Thus, in 1948 the Secretary-General informed the States parties to the Constitution of the World Health Organization that he was not in a position to determine whether the United States of America had become a party to that Constitution by depositing an instrument containing a reservation, but he noted the authority of the World Health Assembly to interpret the Constitution under its article 75. The Assembly accepted the ratification as not inconsistent with the Constitution. In 1949, a meeting of the contracting parties to the General Agreement on Tariffs and Trade considered (in accordance with a procès-verbal of signature drawn up by the Secretary-General) the reservations which the Union of South Africa desired to append to its signature of a protocol to the General Agreement which had been adopted by the contracting parties. A declaration accepting the reservations was then transmitted to the Secretary-General. At a later date, at their third session, the contracting parties took a similar decision, declaring valid and effective a Southern Rhodesian acceptance, subject to a reservation, of another of their protocols.

3. Constitutions of international agencies have been recognized as not subject to unilateral reservation

23. It has frequently been observed that, whatever might be the best rule for handling reservations to humanitarian or other normative types of multilateral conventions, stricter procedures apply to conventions which establish and provide for the governance of international organizations and which are therefore in the nature of constitutions. Thus, it was recognized in the debates in the Sixth Committee, at the fifth and sixth sessions of the General Assembly, on the item concerning reservations to multilateral conventions that no reservations to the United Nations Charter were permissible, and representatives of quite different philosophical persuasions took the position as to constitutions of international organizations that at least some form of consent within an organization was required in order to maintain its basic structure as among all the members. It was acknowledged that here the principle of universality of application yielded to that of integrity of the constituent instrument. This is because members of a functioning organization undertake common obligations, and necessarily do so on a multilateral basis, since it would be impossible for an agency to conduct broad operations if it had to apply a constitutional provision differently as between different members. In short, it is not feasible for State A to be a member of an organization in respect of State B and not a member as regards State C.

24. The obvious demonstration of this principle is that there could be no unilateral right to join an international organization subject, for example, to a reservation that the new entrant would pay less than the financial contribution provided under the constitution; nor could a situation be permitted by which one member would count the vote of another member but a third would not. In the IMCO Assembly it appeared that the Government of India wished to acknowledge and avoid this principle by distinguishing between the particular articles of a constitution to which a reservation was in substance applicable. Thus its representative stressed that the Indian condition "did not refer to the cnnstitutional parts of the Convention" but only to those that "laid down general standards of conduct".[10] To the best of the Secretary-General's knowledge, this

10/ Ibid.

distinction between types of articles for determining the permissibility of unilateral reservations to the constitution of an operating agency is entirely new, but he has not sought, and would not now wish, to pass judgement on this doctrine as a matter of substance. For the purposes of the depositary it has sufficed that, if it is possible to make such a distinction between articles of the IMCO Convention, then it can be accomplished only through the process of interpretation of that Convention. And the process of interpretation is assigned to the Assembly or Council of the Organization by article 55 of the Convention. It may be that the Assembly could hold that, even if no reservation to the article on the apportionment of expenses among members could be permitted, one addressed to the basic constitutional statement of the purposes and functions of the Organization could be accepted by majority or other vote, or even on a unilateral basis. But so far as concerns the depositary actions of the Secretary-General, the decision whether the Indian reservation as to the purposes of the Organization is consistent with the object and purposes of the Convention rests with IMCO, which remains seized of the entire question. The very fact that the argument in favour of the new proposition has already been placed before the Assembly of that Organization is evidence of this point.

25. It is the conclusion of the Secretary-General from the above that the submission of the Indian reservation for consideration by IMCO does not in any real sense engage the conflicting doctrines that have heretofore led to controversy over the underlying theories of reservations. His referral of the reservation to IMCO did not commit the United Nations to an application of the unanimity rule, since the majority required for a vote within an IMCO organ is for the Organization to determine. Moreover, those who have upheld the classic League of Nations, or contractual, view of reservations have recognized that where the convention in question establishes an organization, that organization is the best medium for providing the necessary consent. Spokesmen for the Pan-American method have also made exceptions for constituent instruments. Nor can there be serious ground for complaint from representatives of the view that would have the depositary leave to States the determination of the legal effect of reservations. In the present case the States concerned are necessarily the members of the Organization whose constitution was made the subject of the reservation, and it is with them that the authority to make the ultimate decision continues to lie.

C. The referral to IMCO members was not in conflict with the advisory opinion of the International Court of Justice

26. The explanatory memorandum of India expresses the view that the submission of its reservation to the membership of IMCO, as determined by the IMCO Assembly resolution, was contrary to the advisory opinion of the International Court of Justice on reservations to the Convention on genocide. The Court, however, expressly stated that the replies which the Court was called upon to give to the questions put by the General Assembly concerning reservations to the Convention on genocide were "necessarily and strictly limited to that Convention".[11/] Moreover, the General Assembly in resolution 598 (VI), noting the advisory opinion, recommended to States that they be guided by it "in regard to" the Convention on genocide, and requested the Secretary-General, "in relation to" reservations to that Convention, to conform his practice to the advisory opinion. This limiting language, it will be recalled, was intentional, since the Court had determined that the solution of the problems placed before it "must be found in the special characteristics of the Genocide Convention".[12/]

D. The referral was not in conflict with the General Assembly resolution on reservations

27. The explanatory memorandum also expresses the view that the submission of the Indian reservation to the membership of IMCO, as determined by the IMCO Assembly resolution, was not in conformity with resolution 598 (VI) of the General Assembly of the United Nations. That resolution, however, in requesting the Secretary-General to adopt a new procedure for handling reservations, expressly confined the new practice to "future" conventions. It did not apply to conventions which, like that on IMCO, had already been adopted. The summary records of the Sixth Committee at the sixth session leave no doubt that this distinction was conscious and purposeful. The word "future" was inserted because representatives had expressed doubts as to the powers of the General Assembly in relation to conventions

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11/ I.C.J. Reports 1951, p. 20. At the sixth session, the representative of India in the Sixth Committee "emphasized" that the comments of the Court were "limited to the Convention on genocide" (Official Records of the General Assembly, Sixth Session, Sixth Committee, 267th meeting, para. 33).

12/ I.C.J. Reports 1951, p. 23.

already adopted by States. This view was that the General Assembly would not have legal competence to pronounce itself upon matters affecting the legal status of parties to existing conventions, or to modify a practice already followed by the depositary and to substitute one which could not have been contemplated by the negotiators of treaties drafted prior to the advisory opinion of the Court. In other words - to take the problem as it was then stated and to apply it in terms of IMCO - that Convention had already been adopted some four years prior to the Sixth Committee debates, and not by the General Assembly but by the United Nations Maritime Conference, which included States then or now non-members of the United Nations. The General Assembly, having in this connexion powers of recommendation only, could neither make a determination as to the procedures contemplated by the original negotiators, nor pass upon a difference between the Government of India and the IMCO Assembly. It would not be for the General Assembly to fix a rule for determining a question of membership in another international organization; nor would it wish to take a decision in interpretation of the IMCO Convention, a power assigned by that treaty to the IMCO Assembly and Council. To do so, according to the views which seemed to prevail in the Sixth Committee at the sixth session, would be to amend, or modify the application of, the IMCO Convention.

28. Indeed, the deliberate intention of the General Assembly to include the limiting language is demonstrated by the voting. The represenative of the USSR called for a separate vote on the phrase relating to future conventions; thereupon the spokesman for its joint sponsors "explained that the purpose of the addition of the words referred to by the USSR representative in the joint amendment was to show that the instructions given to the Secretary-General were not to have any retroactive effect on existing conventions or conventions that had merely been signed, but were only to be applied with respect to future conventions".[13/] The Committee then adopted this language by a vote of 32 to 5, with 12 abstentions. Moreover, to make quite clear how the Secretariat understood that it was to cary out its functions, the Assistant Secretary-General in charge of the Legal Department had made a formal statement to the Sixth Committee:

13/ Official Records of the General Assembly, Sixth Session, Sixth Committee, 277th meeting, para. 65. The representative of India had also stressed that "the Committee's decision related to future conventions and not to conventions concluded in the past" (ibid., 267th meeting, para. 32).

"Whatever decision the Sixth Committee might take, the Secretary-General would endeavour to implement it to the best of his ability. Nevertheless, it was clearly understood that any instructions issued to the Secretary-General in his capacity of depositary would be supplementary instructions, applicable solely to future conventions concluded under United Nations auspices and not containing special clauses on reservations." 14/

E. IMCO being seized of this question, the decision rests with that organization

29. Apart from questions discussed above as to the administrative procedures of the depositary, or even as to reservations doctrine, a practical matter concerning conflicts of jurisdiction between international organs now arises. The Secretary-General apprised IMCO of the condition to which the Government of India subjected its membership in that organization; the IMCO Assembly not only took jurisdiction of the question but retained it. Its resolution of 13 January 1959 was by nature a provisional decision "until" the Member States should have an opportunity of expressing their views; it therefore did not divest IMCO of its jurisdiction of the question but rather confirmed it. The circulation by the Secretary-General being thus inherently an interim measure, he was serving strictly as agent of the IMCO assembly, acting at its request. That the question remains pending is further suggested by the fact that the recent session of the IMCO Council has taken note of a report by the IMCO secretariat on the status of the Convention, which referred to the Indian reservation.15/ Complications could arise if the General Assembly of the United Nations were now to give him instructions as to the procedure to follow in a question still to be considered by an appropriate organ of IMCO; it might even create for the Secretary-General a direct conflict between the authority given him by IMCO as its agent and the views of the General Assembly as a principal organ of the United Nations.

30. This practical difficulty suggests a risk that, if a question which is still sub judice within IMCO were now transferred to the General Assembly of the United Nations by one of the parties to the question remaining for settlement within that organization, the General Assembly might unintentionally become a court of appeal from adverse decisions within the governing bodies of specialized agencies. A

14/ Ibid., 276th meeting, para. 40.

15/ IMCO/COUNCIL II/3, "Status of Convention"; IMCO/COUNCIL II/SR.1, 1st meeting, 6 July 1959.

different type of referral is provided by the terms of the IMCO Convention, however. As already noted, article 55 authorizes the Assembly, or the Council during the exercise of its functions, to settle any question concerning the interpretation of the Convention. Article 56 then provides:

> "Any legal question which cannot be settled as provided in article 55 shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with Article 96 of the Charter of the United Nations."

This decision too is plainly one to be taken by IMCO.

III. CONCLUSION: GENERAL CONSIDERATIONS AFFECTING DEPOSITARY FUNCTIONS RELATING TO CONVENTIONS CONCLUDED PRIOR TO THE ADOPTION OF GENERAL ASSEMBLY RESOLUTION 598 (VI)

31. The explanatory memorandum poses the question now before the General Assembly "with particular reference to the Convention on IMCO", and this is the light in which the question has been examined above. In so formulating the question, however, the memorandum states that "the Government of India considers that the General Assembly should pronounce itself clearly on the principles and procedure to be followed by the Secretary-General in the discharging of his functions as a depositary" of conventions concluded before the date of adoption of General Assembly resolution 598 (VI). It is the belief of the Secretary-General that the information set out above would suggest that the procedures which have been followed in the IMCO case do not in themselves raise broader questions of principle on which the General Assembly is required to pronounce itself. For, under any theory of reservations, the question would still have been for settlement by IMCO. A new directive by the General Assembly to the Secretary-General as to reservations procedures in general, therefore, could not alter the status or nature of the specific problem before IMCO.

32. Nevertheless, it might be of interest to the General Assembly if the Secretary-General were to conclude this report with general information of a factual character on the broader question, in order that the General Assembly might judge whether reservations procedures since the date of resolution 598 (VI) have to any practical extent presented difficulties either to the depositary or to the States parties to multilateral conventions.

33. As recalled in paragraphs 27 and 28 above, that resolution created a procedural distinction between conventions concluded prior to its adoption and conventions subsequently concluded. Thus far, substantive differences in legal consequence do not seem to have flowed from that difference in practice.

34. A number of conventions concluded under the auspices of the United Nations since the date of the resolution have complied with its recommendation that the drafters of multilateral conventions insert provisions for determining the admissibility or not of reservations and their legal effect. Under such conventions procedural problems of any moment have been obviated. A few conventions have not followed the recommendation, but no objection has been

received to any reservation yet made, and in any case conclusions as to the legal consequences of such a reservation and objection will not be the concern of the depositary but, under the resolution, will be left to be drawn by each State concerned.

35. Accordingly, no difficulty has yet arisen concerning the practice as to the "future" conventions referred to in resolution 598 (VI). What is of more immediate interest in relation to the present agenda item, is that until the current session no difficulty had arisen in respect of the practice followed as to the conventions concluded prior to the adoption of the 1952 resolution. Thus, almost eight years have elapsed since its adoption without any legal dispute arising in relation to, or resulting from, the principles and procedure to be followed by the Secretary-General concerning conventions concluded before 1952. In all probability this fact is due to the lack of substantive difference in the two procedures: regarding the functions of the Secretary-General, the distinction in effect amounts only to one of the style in which the circular notes of the depositary are formulated. That is to say, in circulating the text of a reservation made to a convention existing at the time of that resolution, he requests States parties to advise him of their "attitude" toward the reservation; in the case of conventions concluded subsequent to the resolution, he circulates the text without this request. On the other hand, in either the one case or the other, the Secretary-General publishes only the essential facts: the deposit of instruments, the texts of reservations, and the fact of objections, regardless of the date of the convention.[16/]

36. It may also be that, as time progresses and accessions to the older conventions diminish, the prospect of any significant number of reservations, and therefore the possibility of objections, steadily recede. Certainly, the

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16/ To the extent possible the results are shown in tabular form, and in any case without comment on the legal consequences. Compare the "Tabulation of reservations and objections thereto", Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (an "existing convention" at the time of resolution 598 (VI)) with the similar table for the Convention on the Political Rights of Women (a "future" convention), "Status of Multilateral Conventions of which the Secretary-General acts as Depositary", ST/LEG.3.

particular problem which gave rise to the question of the reservations to the Convention on Genocide - whether the entry into force of the Convention could be declared in the face of the depositary's uncertainty as to the number of States to be counted as parties for that purpose - can no longer arise. This is because no more of the conventions existing at the time of the resolution are due for entry into force.

37. In any case it has seemed to the Secretary-General that if any new legal question of substance were now to arise in some future dispute (none at present existing within the United Nations) as to the legal consequences of a reservation and objection thereto, the method of solution would be essentially the same, regardless of whether the convention had been concluded prior or subsequent to resolution 598 (VI). If there were uncertainty as to whether the reserving State had a right to treat itself and be treated as a party to the convention in question, that doubt would not be settled by the forms of correspondence which the Secretary-General had followed. In either case it would remain for solution, at the instance of an interested State, by way of international procedures; it could be referred to an appropriate organ or to the International Court of Justice, in the same way for an earlier convention as would be necessary for a later one.

38. If the General Assembly were now, however, to wish to suggest some different or more uniform procedure for the Secretary-General in a sense contrary to the requests made to him in the 1952 resolution, the Secretary-General stands ready to provide the necessary information regarding the adaptability of his administrative procedures as depositary to any such alteration.

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ANNEX I

INSTRUMENT OF ACCEPTANCE BY INDIA OF THE IMCO CONVENTION SUBJECT TO A CONDITION

TO ALL TO WHOM THESE PRESENTS COME. GREETING!

WHEREAS, a Convention relating to the Inter-Governmental Maritime Consultative Organization was signed at Geneva, on the sixth day of March in the year one thousand nine hundred and forty-eight, by the Plenipotentiary and the Representative of the Government of India, duly authorized for that purpose, which Convention is annexed herewith.

AND WHEREAS, it is fit and expedient to approve and accept the aforesaid Convention subject to the following conditions:-

"In accepting the Convention of the Inter-Governmental Maritime Consultative Organization, the Government of India declare that any measures which it adopt or may have adopted for giving encouragement and assistance to its national shipping and shipping industries (such, for instance, as loan-financing of national shipping companies at reasonable or even concessional rates of interest, or the allocation of Government-owned or Government-controlled cargoes to national ships or the reservation of the coastal trade for national shipping) and such other matters as the Government of India may adopt, the sole object of which is to promote the development of its own national shipping, are consistent with the purposes of Inter-Governmental Maritime Consultative Organization as defined in article 1(b) of the Convention. Accordingly, any recommendations relating to this subject that may be adopted by the Organization will be subject to re-examination by the Government of India. The Government of India further expressly state that its acceptance of the above-mentioned Convention neither has nor shall have the effect of altering or modifying in any way the law on the subject in force in the territories of the Republic of India."

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NOW, THEREFORE, BE IT KNOWN THAT the Government of India, having seen and considered the said Convention hereby approve and accept the same subject to the stipulation referred to above.

IN TESTIMONY WHEREOF I, Rajendra Prasad, President of India, have signed these Presents and affixed hereunto my Seal at New Delhi this thirty-first day of December of the year one thousand, nine hundred and fifty-eight.

(Signed) RAJENDRA PRASAD
President of India.

ANNEX II

REPLY OF FRANCE TO THE COMMUNICATION CONTAINING THE INDIAN CONDITION

Letter dated 18 March 1959 addressed to the Secretary-General by the Minister Plenipotentiary, Director of United Nations Affairs and International Organizations at the French Ministry of Foreign Affairs

By your letter C.N.17.a.1959.TREATIES-4 of 16 February 1959, you informed me of the tender for deposit with the Secretariat, on 6 January 1959, of the instrument of acceptance by the Government of India of the Convention on the Inter-Governmental Maritime Consultative Organization, signed at Geneva 6 March 1958, in accordance with article 57, paragraph (c) of that Convention. You requested me at the same time to communicate to you my Government's attitude with respect to a declaration contained in the instrument of acceptance.

In acknowledging receipt of that communication, I have the honour to inform you that the French Government feels bound to express its opposition to the reservations contained in the declaration of the Government of India.

My Government has always considered that the reservations by which a State qualifies its signature, ratification or acceptance of a multilateral treaty are valid only if they are accepted by all the States parties to the treaty.

The French Government is unable to accept the wording of the Indian reservations for two reasons:

1. It is in the first place impossible to accept that a Government party to a multilateral convention should itself decide unilaterally that any measures which it might adopt in the future in regard to the subjects covered by the convention, shall automatically be deemed consistent with the convention.

The question at issue is whether it appertains to a State party to a multilateral treaty to take a decision on this point itself, its discretionary judgement in the matter being then imposed on all the other States parties to the treaty. The determination whether a

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reservation is consistent with the spirit, object or purpose of a treaty is, in itself, a juridical question of general interest which too closely affects the structure of the treaty to be decided unilaterally. It is for the States parties to the treaty to take a decision on this point, it being understood, to quote the words used by the International Court of Justice in its Advisory Opinion of 28 May 1951 that "if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention" (International Court of Justice, Reports of Judgements, Advisory Opinions and Orders, 1951, page 29).

In these circumstances it would seem impossible to accept the declaration of the Government of India that "any measures ... and such other matters as the Government of India may adopt, the sole object of which is to promote the development of its own national shipping, all consistent with the purposes of the Inter-Governmental Maritime Consultative Organization". The parties to the Convention are in fact being asked to give a free hand for the future, and they would not be justified in doing so. To be acceptable, a reservation must be precise and strictly limited. It is easy to see that the reservation made by the Government of India is not of this nature.

2. The Government of India adds in its instrument of acceptance that "any recommendation relating to this subject that may be adopted by the Organization will be subject to re-examination by the Government of India".

The acceptance of such a formula by the other parties to the convention would in practice make the mechanism of the Convention of 6 March 1948 ineffective by subordinating the application of each and every recommendation adopted by the Organization to the consent of the appropriate constitutional organs of the various signatory States. Acceptance of such a system would be tantamount to calling

into question the provisions agreed to in 1948. By definition a ratification or an acceptance cannot be conditional. Nothing in the Convention, as it was accepted by the signatory States, authorizes such an interpretation. Acceptance of the Indian doctrine at the present stage would open the door to requests of a similar nature which would undoubtedly be made in the future and which would rapidly destroy the effectiveness of the provisions that were jointly elaborated and approved.

ANNEX III

REPLY BY THE UNITED STATES OF AMERICA
TO THE CONDITION DECLARED BY INDIA

Letter dated 30 June 1959 from the representative of the United States of America to the United Nations addressed to the Secretary-General

The representative of the United States of America to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to refer to note C.N.17.a.1959.TREATIES-4 from the United Nations Legal Counsel, dated 16 February 1959, requesting the United States to inform the Secretary-General of its attitude with respect to the declaration contained in the acceptance by India of the Convention on the Inter-Governmental Maritime Consultative Organization.

The Government of the United States does not consider that the declaration of the Government of India constitutes a reservation on the part of that Government.

With respect to the first sentence of the declaration, it is not considered that there is anything inconsistent as between the language of the sentence and the purposes of the Inter-Governmental Maritime Consultative Organization as defined in article 1 (b) of the Convention. Article 1 (b) states that assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination. The measures which the Government of India sets forth as the kinds of measures which it has adopted or may adopt, are of a kind which constitutes assistance and encouragement for development of its national shipping, and are not designed to restrict the freedom of shipping of all flags to take part in international trade, within the meaning of the proviso to article 1 (b); in this connexion, it is understood that, in reserving the right to limit its coastal trade for national shipping, India's intention is not inconsistent with the generally recognized principle that a nation may exclude vessels of other countries from transporting passengers or merchandise between ports or places within that nation. Although the Government of India, in the first sentence, also states that it may adopt "such other matters", on the principle of ejuadem generis, these "such other matters" are to be interpreted normally as being of the kind and character as

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those specifically set forth by the Government of India in the parenthetical expression in its first sentence. Furthermore, all of these measures are stated to be with the sole object of promoting India's national shipping, and thus do not indicate that they are designed to restrict the freedom of shipping of all flags to take part in international trade. Accordingly, in the opinion of the Government of the United States of America, there is nothing in the language of the first sentence of the declaration by the Government of India which is inconsistent with the purposes of the Convention on the Inter-Governmental Maritime Consultative Organization as defined in article 1 (b). Moreover, the Government of India itself declares such to be the case. The position of the United States regarding the first sentence of the declaration should not, of course, be taken to constitute affirmative approval of any specific measures taken or to be taken within the terms of the more general reference to measures as set forth in the declaration, since information regarding such specific measures was not made available with the declaration. The position of the Government of the United States is simply that the declaration by the Government of India does not legally constitute a reservation.

With respect to the last two sentences of the declaration, it is noted that, since the functions of the Inter-Governmental Maritime Consultative Organization are declared by the Convention (article 2) to be consultative and advisory only, it is obvious that any recommendation adopted by that Organization would not have binding effects on governments. Any such recommendation would be examined by the governments concerned, and, if expressed in the form of an agreement or convention, would be accepted or rejected, as the case might be, by each government in accordance with its constitutional procedures. The last two sentences of the declaration of the Government of India are, therefore, a restatement of the right of examination and decision on the part of the Contracting Parties which is implicit in the Convention.

It would be appreciated if the Secretary-General would inform the other interested Governments of the position of the United States with respect to this matter.

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ANNEX IV

REPLY BY THE FEDERAL REPUBLIC OF GERMANY
TO THE CONDITION DECLARED BY INDIA

Letter dated 2 July 1959 from the acting permanent observer of the Federal Republic of Germany addressed to the Secretary-General

The Acting Permanent Observer of the Federal Republic of Germany to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to refer to Circular Note 17.a.1959.TREATIES-4 of 16 February 1959 regarding the declaration contained in the instrument of acceptance by the Government of India of the Convention on the Inter-Governmental Maritime Consultative Organization.

Upon instruction from his Government the Acting Permanent Observer of the Federal Republic of Germany has the honour to transmit to the Secretary-General the following comments of the Federal Government on this declaration:

> The Government of the Federal Republic of Germany has some difficulties in reconciling its views with the reservation regarding the "allocation of Government-owned or Government-controlled cargoes to national ships" made by the Government of India in its instrument of acceptance of the Convention on the Inter-Governmental Maritime Consultative Organization.
>
> The Government of India considers this reservation as being "consistent with the purposes of the Inter-Governmental Maritime Consultative Organization as defined in article 1 (b) of the Convention". In the view of the German Federal Government, however, any measures, taken by a Government, that are clearly designed to favour one-sidedly its national ships conflict not only with the general principles of unrestricted world trade and with the particular principles of freedom in maritime traffic like, for instance, the principles of free choice of flag, of free and fair competition and of non-discrimination of foreign flags through government interference into the shipping business, but also with the very provisions of the IMCO Convention itself. The measures which the Indian Government reserves the right to adopt would restrict the freedom of ships of all other flags to participate in international trade. Therefore, they are inconsistent with article 1 (b) of the IMCO Convention and hence with the declared purposes of the Inter-Governmental Maritime Consultative Organization. By providing for certain cargoes to be shipped exclusively or preferably by its national ships, a government measure

necessarily restricts the competitive possibilities of foreign shipping firms to take part in the international maritime traffic with that country and, by its nature, results in a restriction of the freedom of shipping for all foreign flags.

In view of the difficulties in reconciling the Indian reservation with the general principles of shipping policies and with the purposes of IMCO, the Government of the Federal Republic of Germany suggests that, in due time, within the framework of IMCO, thoroughgoing negotiations should be conducted with the Indian Government, with the aim of causing the Indian Government to withdraw this reservation.
