Document:-

A/CN.4/SR.1596

Summary record of the 1596th 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:-

1980, vol. I

49. He would be grateful if those members who had taken part in the United Nations Conference on the Law of Treaties could enlighten him on the following point. Had consideration been given—and, if not, should it now be given—to the advisability of not initially making public the recommendations of conciliators? There seemed to him to be a difference between an arbitral or judicial decision, which by its very nature required immediate publication, and the recommendations of a conciliation panel. In the latter case, the findings of the conciliators might be based not so much on the law as on the need to arrive at a compromise position, in which case the possibilities of a practical accommodation could perhaps be furthered if those findings were not published straightaway. He was thinking, in particular, of the process of mediation, the successful outcome of which could depend to a large extent on secrecy for a certain limited period of time, although he was not suggesting that secrecy should be indefinite. Perhaps the paragraphs which dealt with the deposit of the award should be more explicit on that score, while making clear that publication would be required after a time.

50. Lastly, with regard to the questions raised in paragraph (9) of the commentary to the annex (A/CN.4/327), he considered that it would be desirable to broaden the scope of application of the provisions rather than limiting them to Part V of the draft. The Commission might wish to take a step in the direction of the progressive development of international law by making a proposal to that effect with a view to ascertaining the reaction of Member States.

51. Mr. JAGOTA said that the main question dealt with in section II of the annex, the constitution of a conciliation commission and the selection of its members, posed no great difficulty and could be resolved by drafting changes. A more substantive question was whether there was any need for section II at all. Although, under paragraph 1 of the annex, the members of a conciliation commission would be drawn from a list which included the names of persons nominated either by States or by international organizations, subparagraph (*a*) of the second paragraph of paragraph 2 *bis* provided that an international organization could appoint a conciliator who "may or may not be chosen from the list referred to in paragraph 1". In other words, in the event of a dispute between two international organizations or between one international organization and a State, the organizations could appoint anyone at will.

52. He wondered, however, whether, when such disputes arose out of the same treaty, it was really necessary to provide for two or more procedures to be applied according to the parties to, and the subject matter of, the dispute, and whether it would not be preferable to refer the matter to the same conciliation commission, irrespective of the category into which the disputes fell. That was a question which merited careful reflection in view of its relevance for other conferences, including the Conference on the Law of the Sea, which had yet to consider the specific issue involved. Whatever decision the Commission reached would inevitably have persuasive authority in other forums; members should therefore be intellectually convinced of the need to draw a distinction between sections I and II of the annex.

53. Furthermore, subparagraphs (*a*) and (*b*) of the third paragraph of paragraph 2 *bis*, as drafted, applied only to disputes to which one of the parties was an international organization or a group of organizations. Those subparagraphs should therefore be redrafted to make it quite clear that two categories of dispute were envisaged, namely, those between a State and an international organization, and those between one international organization and another.

54. Lastly, with regard to paragraphs 6 *bis* and 7 *bis*, he agreed with the Special Rapporteur's proposal regarding the distinction to be drawn between the functions of the Secretary-General of the United Nations and the President of the International Court of Justice but considered that careful consideration should be given to the question of the categories of dispute to which the United Nations could become a party. For instance, would the United Nations be a party to the future convention and, if not, would the provisions of the convention apply to the United Nations? In the case of action taken pursuant to the provisions of Part V of the draft, would not the terms of the Charter prevail by virtue of its Article 103? It was clear that the United Nations could be a party to a dispute arising out of any agreement into which it had entered—for instance, a headquarters agreement—but in such cases the procedure for the settlement of disputes would probably be prescribed by the agreement itself.

The meeting rose at 1.05 p.m.

1596TH MEETING

Thursday, 22 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

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

ANNEX (Procedures established in application of article 66)[1] (*concluded*)

1. Mr. QUENTIN-BAXTER said that, in the light of the discussion, it looked likely that a way could be found through the problems of detail posed by the draft annex, since some general revision was contemplated by all members of the Commission who had spoken in the debate. So far as conciliation was concerned, the Commission was not obliged to observe the strict division imposed upon it in regard to judicial settlement by the terms of the Statute of the International Court of Justice. It would therefore be possible to condense or elaborate, as appropriate, the distinctions which seemed important to members, and on that basis the Drafting Committee would undoubtedly be able to arrive at a solution that was acceptable to all.

2. He wished, however, to reflect on some of the broader issues that had become fleetingly apparent throughout the Commission's lengthy debate on the draft articles. There had probably never been a codification exercise which presented quite the same features, involving, as it did, minimalist solutions within the framework of the Vienna Convention[2] and a certain consciousness of the maximalist implications for the nature and future of international society. Earnest consideration had been given to such questions as whether an international organization could perform an act of ratification and whether it was possible to refer to the representatives of an organization as having full powers. The painstaking classification of the different relations between international organizations and between international organizations and States had resulted in a degree of elaboration that would undoubtedly cause some difficulty for those who worked in foreign ministries and the secretariats of international organizations. At times, the Commission, no longer on the familiar ground of State practice, had had to rely on shreds of information about organization practice, imparted in confidence by the Special Rapporteur.

3. It was therefore not surprising if, occasionally, some members had seemed to hear the music of Dukas and to dream the dream of the Sorcerer's Apprentice. He did not personally share in their concern, for he did not believe the Commission was moving in an area where international organizations would, by virtue of their number and complexity, bring disorder into a world that was essentially a community of States. If an allusion of a literary kind were needed, he would seek it in a reversal of the Pirandello theme of characters in search of an author: it seemed to him that, as the Commission viewed the empty structure which it was building and dreamt of its being inhabited, it was more like an author in search of characters. Nowhere was that more apparent than in paragraph 1 of the annex. In that provision, either the Special Rapporteur's minimalist solution could be adopted, by referring to international organizations to which the articles had become applicable, or his own (Mr. Quentin-Baxter's) maximalist solution, by referring to international organizations which had become party to treaties to which the present articles applied. Both solutions, however, were no more than a form of words which would have to be changed before the point was reached when the draft articles would be transformed into an international convention. The provision might, therefore, be likened to a motorway intersection, inasmuch as it was designed to promote the growth of international traffic, albeit one that had yet to be linked to the arterial mainstream of international life.

4. In submitting the draft articles to the General Assembly for the first time, the Commission should above all ascertain whether States were prepared to make use of the structure in which the Commission had invested its time and effort. That in turn involved the question of the relationships between international organizations and States. International organizations, although created by States to serve States, must be actors in their own right upon the international stage and be capable of entering into treaty arrangements with States. Consequently, States should not be afraid that the Commission's proposals would in any way disturb the balance between States and international organizations. The true test of the relationship between the two would be whether States were prepared to encourage the international organizations with which they were connected, to enter into consultations with the Commission at some future point, and to offer their own experience as organizations in relation to the draft articles, failing which the Commission would clearly have been wasting its time.

5. Mr. TABIBI said that he fully endorsed the approach adopted by the Special Rapporteur in the annex to the draft articles. Conciliation procedures now had the support of all Member States of the United Nations and were provided for in many international conventions. He considered, therefore, that, irrespective of the nature of the dispute involved, it would make little difference if conciliators were selected from the same list. International organizations, as the collective voice of the community of nations, should be able to appoint conciliators in the same way as States, subject to the proviso that the persons so appointed would be those best qualified for the purpose. In that connexion, he was perfectly satisfied with the procedure outlined in paragraph (9) of the commentary to the annex. He agreed also with the view that, in the case of disputes to which the

[1] For text, see 1593rd meeting, para. 58.
[2] See 1585th meeting, foot-note 1.

United Nations was a party, the Secretary-General should be replaced in his function in that connexion by the President of the International Court of Justice.

6. On the question of costs incurred in cases in which the President of the Court acted, he considered that in principle they should be borne by the parties to the dispute, in view of the International Court's budgetary constraints. Alternatively, once the future convention had been concluded, an additional budgetary appropriation could perhaps be made to cover such costs.

7. Lastly, since the whole question of conciliation was to be submitted to Governments and international organizations for comment and since, moreover, it was also to be considered by the General Assembly, he recommended that the draft annex should be referred to the Drafting Committee forthwith.

8. Mr. FRANCIS, also expressing support for the approach adopted by the Special Rapporteur, said that the most important question raised in the annex related to the role of the Secretary-General in the case of disputes to which the United Nations was a party. For instance, if the chairman or any member of the panel of conciliators had not been appointed within the period specified in section II of the annex, the Secretary-General could be asked to make the appointment. Clearly, that might place the Secretary-General in a very invidious position in the case of disputes to which the United Nations was a party. On balance, therefore, he agreed that in such cases the President of the International Court of Justice should replace the Secretary-General in the functions vested in him by the annex.

9. Mr. TSURUOKA said that he would submit to the Drafting Committee a proposal for simplifying the text of the draft annex.

10. Mr. REUTER (Special Rapporteur), summing up the discussion on section II of the draft annex, noted that the comments had touched on two questions of substance and on one question of form.

11. In general, the members of the Commission had spoken in favour of retaining, as the equivalent of the nationality link, the link existing between a person and an international organization by reason of the fact that that person's name had been entered on the list of conciliators by the organization in question.

12. In his comments on the special case in which the United Nations was a party to a dispute, Mr. Ushakov had expressed the opinion (1595th meeting) that the intervention of the President of the International Court of Justice should preferably be optional, not mandatory. He had added that, when once the Conciliation Commission had been set up, the President of the Court would not need to intervene at all, since the Secretary-General of the United Nations possessed all the necessary guarantees of impartiality. Other members of the Commission had taken the view that it was not so much the Secretary-General's impartiality that was at issue as the drawbacks which such a solution would involve for him, for the consequence would be that he would suffer the loss of the freedom he so badly needed as head of the Secretariat to defend the cause of the United Nations. Hence, it would be better that the President of the International Court should intervene in such cases.

13. The suggestion that the intervention of the President of the Court should be optional and that the functions of the Secretary-General should be enlarged was attractive, but, on reflection, he (Mr. Reuter) felt unable to accede to it. The impartiality of the Secretary-General was beyond question, but there was a danger that, if the intervention of the President of the Court was made optional, the State requesting such intervention might in so doing imply that the Secretary-General was somehow at fault. In order to avoid placing a State in an invidious situation of that kind, the intervention of the President of the Court would have to be automatic.

14. It was not only during the first stage, when the Conciliation Commission was being set up, but also during the second stage, when it was actually performing its functions, that Mr. Ushakov wanted the role of the Secretary-General to be enlarged. But it was precisely during the second stage that the intervention of the President of the Court was so important. In practice the question would, of course, depend on the procedure established by each conciliation commission. Generally, provision was made for a written procedure which required specifying time-limits for filing the documents. Sometimes it was so hard to determine which party was the claimant and which the respondent that a single date was fixed for the filing of documents in the written procedure. In order to ensure that both parties remained on an equal footing, it was important that the time-limits should be strictly observed. If the United Nations was a party to a dispute, it was essential that it should not also be responsible for ensuring that the formalities were observed by the parties. Even if the Secretary-General made one department responsible for conducting the litigation and another for performing the practical functions, he would be placed in an embarrassing situation which might well continue throughout the entire procedure. In practice, the Conciliation Commission would request the President of the Court to designate an official, possibly a member of the Registrar's staff or even an official of the United Nations Secretariat, who would act under the President's responsibility. The Secretary-General of the United Nations would then be free to concentrate on his essential task of defending the interests of the United Nations in an action to which it was a party. Consequently, it was the solution proposed in the draft annex which seemed the most appropriate.

15. The question concerning the form of section II arose out of the imperfect distinction he had made

between disputes in which one or more States constituted one of the parties, disputes in which only international organizations were parties, and disputes in which one or more States and one or more international organizations were parties. That classification had led to the laborious drafting of paragraph 2 *bis* and had resulted in unnecessary repetition.

16. Because sections I and II contained very similar provisions with regard to the functions of the Conciliation Commission, he suggested that the Drafting Committee might try to produce a text dealing first with the role of the Secretary-General of the United Nations or the President of the International Court of Justice as well as the constitution of the Conciliation Commission, and secondly with that Commission's functions. The first part of the text would have to identify each of the three possible situations, and in the second part a single clause could cover the three possibilities, with specific provision for the case in which the United Nations was a party to a dispute.

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

It was so decided.[3]

The meeting rose at 11 a.m.

[3] For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

1597th MEETING

Tuesday, 27 May 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES)

1. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the content, forms and degrees of State responsibility, which constituted part 2 of the draft articles on State responsibility (A/CN.4/330).

2. Mr. RIPHAGEN (Special Rapporteur) said that, since his report was a preliminary one, he had endeavoured to make a systematic and theoretical analysis of the problems with which the Commission would have to deal in preparing draft articles on the content, forms and degrees of State responsibility. Accordingly, the report contained very few references to what Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice called "the teachings of the most highly qualified publicists of the various nations" or to judicial decisions and State practice. The report was also preliminary in nature in the sense that any conclusions it contained were designed solely to provoke criticism. Indeed, what he was seeking at the current stage was the Commission's guidance for the preparation of further reports and draft articles on the topic.

3. In part 1 of the draft articles on State responsibility,[1] the Commission had defined the internationally wrongful act of a State. Such an act created a situation which called for a response; part 2 would therefore deal with allowable and sometimes compulsory responses under international law.

4. Paragraphs 1 to 9 of his report were purely historical, describing the consideration of part 2 of the topic by the Commission and the General Assembly.

5. Paragraphs 10 to 26 dealt with what might be called the overlap between part 1 of the draft articles and the future part 2. Paragraphs 11 to 13 made it clear that some of the distinctions which had been irrelevant to part 1 would have to be made for the purposes of part 2. For example, paragraph 11 stated that, while it had been possible to refer in part 1 to an obligation of a State under international law without necessarily mentioning another entity towards which such an obligation existed, the word "responsibility" seemed to imply another entity towards which a State was responsible. Indeed, in part 1, the term "international responsibility" had been used to mean "all the forms of new legal relationship which may be established in international law by a State's wrongful act".[2] Because the word "relationship" was used in that context, it would be necessary in part 2 to determine the entities with which such a relationship existed or for which it could be created by an internationally wrongful act. As he stated in paragraph 12 of this report, part 2 could not, moreover, ignore the origin—and, in particular, the conventional origin—of the international obligation breached. It must also take account of the fact that the subject-matter of the obligation breached, or, in other words, the content of the primary rule of international law involved, might influence the legal

[1] For the general structure of the draft, see *Yearbook ... 1979*, vol. II (Part II), p. 89, document A/34/10, paras. 66–67. For the text of the draft articles so far adopted by the Commission, *ibid*, pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.I.

[2] *Yearbook ... 1971*, vol. II (Part One), p. 211, document A/CN.4/246 and Add. 1–3, para. 43.