Document:-
A/CN.4/SR.1682

Summary record of the 1682nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

its amended form and retain article 18 as proposed by the Drafting Committee.

67. The CHAIRMAN noted that the Commission decided to retain the amendment to article 16, on the understanding that the article would be accompanied by an appropriate commentary to reflect the doubts expressed by some members.

68. If there were no objections, he would take it that the Commission agreed to adopt the text of article 18 proposed by the Drafting Committee.

It was so decided.

The meeting rose at 11.55 a.m.

1682nd MEETING

Wednesday, 1 July 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

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

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/339 and Add.1–7, A/CN.4/341 and Add.1, A/CN.4/L.327)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 2, SUBPARA. 1, (*c*), AND ARTICLES 7, 9, 10 AND 17 (*continued*)[1]

1. Mr. USHAKOV said that he wished to make a few comments that had come to mind on reading the Russian version of the articles the Commission had adopted at the previous meeting further to the proposals by the Drafting Committee (A/CN.4/L.327).

2. Under article 7, subparagraph 2 (*d*), heads of permanent missions to an international organization were considered as representing their State "for the purpose of adopting the text of a treaty between one or more States and that organization". However, under the terms of article 7, subparagraph 2 (*b*), of the Vienna Convention,[2] heads of diplomatic missions were considered as representing their State only "for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited". As they were competent only to adopt the text of a treaty concluded by the States which had accredited them, it would be advisable to replace the last part of draft article 7, subparagraph 2 (*d*), by the words "for the purpose of adopting the text of a treaty between the accrediting States and that organization".

3. Similarly, in the case provided for in article 7, subparagraph 2 (*e*), heads of permanent missions to an international organization should only be considered as representing their State for the purpose of signing or signing *ad referendum* a treaty "between the accrediting States and that organization" and the clause should be amended accordingly.

4. Under article 7, subparagraph 2 (*c*), heads of delegations of States to an organ of an international organization were considered as representing their State "for the purpose of adopting the text of a treaty between one or more States and that organization". If the Commission adopted draft article 5, which the Drafting Committee had prepared after the previous meeting and which was modelled on article 5 of the Vienna Convention, the last part of article 7, subparagraph 2 (*c*), should be replaced by the words "for the purpose of adopting the text of a treaty within that organization".

5. The phrase "The adoption of the text of a treaty between States and one or more international organizations at an international conference of States in which one or more international organizations participate", at the beginning of article 9, paragraph 2, could be replaced by "The adoption of the text of a treaty between States and international organizations at an international conference of States in which international organizations participate", wording which would clearly cover cases in which only one international organization was involved.

6. If that amendment were adopted, if would be necessary to specify that the international conference contemplated under article 7, subparagraph 2 (*b*) was an international conference of States in which international organizations participated, and even if it were not adopted, to specify that it was an international conference of States in which one or more organizations participated. In the latter part of the provision, the words "between one or more States" should be replaced by "between States", in line with the wording of article 9, paragraph 2, the words "and one or more international organizations" being replaced, if necessary, by "and international organizations".

7. As to article 10, subparagraph 2 (*b*), he wondered whether it would be advisable to provide for the unlikely case of the adoption of a treaty of a universal character by international organizations. In that connection, he pointed out that article 9, paragraph 2, laid down a procedural rule for the adoption of the text

[1] Resumed from the 1681st meeting.

[2] See 1644th meeting, footnote 3.

of a treaty at a conference of States in which international organizations participated but that there was no corresponding rule for the adoption of the text of a treaty by international organizations alone. Provision could be made for the case of a conference involving participation solely by international organizations, but it would seem that the special case of the adoption of a treaty of a universal character by organizations could be omitted and that the words at the end of the subparagraph, "or of the final act of a conference incorporating the text", could therefore be deleted.

8. In the light of articles 19 to 23, and particularly article 20, the last part of article 17, paragraph 1, should be amended to read: "or if the other contracting States and contracting organizations or, as the case may be, the other contracting organizations and contracting States, so agree". In the first instance, the situation was viewed from the standpoint of a State, and in the second, from that of an international organization.

9. Referring to the definition of the term "full powers" in article 2, subparagraph 1 (*c*), he said that the words "between one or more States and one or more international organizations" could be deleted, since the concept of full powers had nothing to do with the parties to the treaty in connection with which the full powers were conferred. The treaty could be one between any subjects of international law, whether one or more States, one or more international organizations, or other entities regarded as subjects of international law.

10. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee), suggested that there should be no discussion on the points of drafting raised by Mr. Ushakov, more particularly because the Special Rapporteur on the topic was absent.

11. The articles to which Mr. Ushakov had referred could be remitted to the Drafting Committee, which could re-examine them in the presence of the Special Rapporteur. There was no reason why the Commission should not refer to the Drafting Committee articles which it had already adopted, so that the Committee could make improvements in matters of form.

It was so decided.

State responsibility (*continued*)* (A/CN.4/344)

[Item 4 of the agenda]

The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)

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

ARTICLES 4 AND 5[3] (*continued*)

12. Mr. RIPHAGEN (Special Rapporteur) said that, before formally introducing articles 4 and 5 (A/CN.4/344, para. 164), he wished to remind the Commission of a number of general remarks he had made when it had discussed articles 1 to 3.

13. First, he had said that State responsibility as a legal notion was only one link in the realization of the requirements of the law. Second, he had pointed out that a particular wrongful act was only one among the many elements that comprised a particular situation. Third, he had observed that the administration of justice, especially in the international sphere, often took the form of an attempt to restore the balance disturbed by a wrongful act, rather than to bring about the situation to which the law in question had been intended to give rise. Fourth, he had noted that the enormous variety of "wrongful acts"—ranging, for example, from an incidental breach of a technical obligation to intentional aggression—made some degree of categorization inevitable.

14. Articles 4 and 5 dealt with what he had termed the "first parameter" of State responsibility, namely, the new obligations of the author State which had committed an internationally wrongful act (see A/CN.4/344, para. 7). As he hoped his report made clear, that parameter could not be viewed in isolation. For example, it might well be that no consequences would ensue for the perpetrator of a wrongful act if the State affected by the act made no request for redress. More important, however, the first parameter was linked to the later part of the draft articles by the fact that it specified what the author State must do if it was to escape the legal consequences described in the second and third parameters.

15. Broadly speaking, articles 4 and 5 made two kinds of distinction: between "belated performance" and "substitute performance" of an obligation, and between two types of wrongful acts. The concept of "belated performance" of a primary obligation implied voluntary performance of the obligation by the author State through three forms of action: the stopping of the breach, the application of local remedies, and what Mr. Reuter had termed "the most perfect performance possible of the original obligation" (see 1666th meeting, para. 24)—in other words, re-establishment of the situation as it had existed before the breach. "Substitute performance" entailed reparation *lato sensu*, whether *ex nunc*, *ex tunc* or *ex ante*.

16. By dealing with the articles in terms of different types of wrongful acts, he had made an initial attempt at categorizing such acts, a categorization which was justified by practice, jurisprudence and doctrine, and which the Commission had already accepted in connection with Part 1 of the draft. Basically, the categorization involved a division of wrongful acts into

* Resumed from the 1670th meeting.

[3] For texts, see 1666th meeting, para. 9.

acts that directly infringed the rights of a foreign State and acts that infringed those rights only indirectly, through the person of the foreign State's nationals. However, the division between the two types of acts was not necessarily absolute: the true intention of a State's breach of an obligation towards aliens might be to harm the interests of the aliens' State of origin, in which case the act would then also be a breach of an obligation towards a State. Similarly, if a State breached an obligation to accord certain treatment to aliens, it might also act in breach of another obligation to observe internationally recognized "minimum standards"—for example, because it failed to provide those aliens with effective local remedies. The draft articles must take account of such cases of coincident breaches.

17. As an extension of their categorization of wrongful acts, articles 4 and 5 represented an attempt to introduce an element of "proportionality" between wrongful acts and their consequences for the author State. However, he had deliberately refrained from mentioning the concept of proportionality in those provisions and considered that it should not be cited anywhere in Part 2. It underlay the draft, but it would not be appropriate for the Commission to enunciate it in the form of a rule.

18. Turning to the actual text of the articles, he said that article 4 began with a reference to article 5 because each article dealt with a different type of obligation. Paragraph 1 of article 4 detailed the successive stages of belated performance of an obligation. Thus, a State must first stop the breach and take action to "prevent [its] continuing effects", a concept borrowed from Part 1 of the draft, and then apply such remedies as were possible under its internal law. The reference to article 22 of Part 1 of the draft[4] was intended to show that, whereas, in a case of injury to aliens, it was those aliens who must take the initiative in seeking the benefit of the local remedies, in a case of direct damage to the interests of another State—for example, in an attack upon one of its diplomatic missions—it was the author State itself which must automatically extend those remedies. The rule stated in subparagraph (*c*) was, as could be seen from his report, the most controversial.

19. Paragraph 2 provided for substitute performance of the obligation through the payment of a sum of money if it proved materially impossible for the author State to apply the provisions of paragraph 1. Since the amount of the payment could only be determined in the light of the specific damage caused, he had merely reproduced the very general wording used in the judgement of the Permanent International Court of Justice in the *Factory at Chórzow* case (see A/CN.4/344, para. 37).

20. Paragraph 3 provided for substitute performance *ex ante*. He was uncertain whether paragraphs 2 and 3 should always go together, and had included the latter provision simply because material impossibility to comply with paragraph 1 would, after all, be the fault of the author State, and he did not think that payment of damages by that State would be sufficient, particularly if the harm suffered by the other State was not of the kind that could be offset by monetary payment.

21. With regard to article 5, paragraph 1, it should be noted that article 22 of Part 1 of the draft stipulated that local remedies must have been exhausted before a damaging act could be considered a wrongful act of a State. Since the wrongful act would have occurred within the domestic jurisdiction of the author State, it was justifiable to give that State the option of re-establishing the situation that had existed before the breach or of paying monetary compensation. He favoured the incorporation in the text of the words "within its jurisdiction", but had placed them within brackets in deference to the members of the Commission who had expressed the opposite view during the lengthy discussions on that subject in connection with article 22 of Part 1 of the draft.

22. Paragraph 2 of article 5 covered cases in which the wrongful conduct against aliens was aggravated by an intention to harm their State of origin or by the non-availability or inadequacy of local remedies. In his opinion, the author State should once again be given a choice of procedure in such circumstances, but if it opted to act in conformity with article 4, paragraph 2, it should also be required to comply with article 4, paragraph 3, since it would not have been materially impossible for it to repair the breach.

The meeting rose at 11.25 a.m.

[4] See 1666th meeting, footnote 3.

1683rd MEETING

Thursday, 2 July 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

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

Relations with the International Court of Justice

1. The CHAIRMAN said that the Commission was greatly honoured to welcome Mr. El-Erian, Member of the International Court of Justice. He asked Mr. El-Erian to convey the Commission's greetings and good wishes to the Members of the Court and the Registrar.

2. Mr. EL-ERIAN, representing the Court in the absence of Sir Humphrey Waldock, thanked the