Document:-
A/CN.4/SR.1465

Summary record of the 1465th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1977, vol. I

Paragraph (2)

28. Mr. SCHWEBEL proposed the addition, at the end of the paragraph, of a sentence reading:

> "Another member did not accept the foregoing line of argument, but maintained that international organizations are no less bound by their treaties than are States and that, consequently, international organizations are not free to amend their resolutions or take other measures which absolve them of their international obligations without engaging their responsibility under international law."

29. Mr. AGO questioned whether the amendment of a resolution really constituted a breach of an international obligation of an organization.

30. Mr. SCHWEBEL explained that he had made his proposal not because he did not agree that international organizations should be able to amend their resolutions but because it would be unacceptable for them to have the right to repudiate their treaties by making such amendments.

31. The CHAIRMAN said, that if there was no objection, he would take it that the Commission approved the amendment proposed by Mr. Schwebel.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraph (5)

32. Mr. REUTER (Special Rapporteur) pointed out that the penultimate word of the penultimate sentence should be amended to read "potestative".

33. The CHAIRMAN suggested that the Secretariat be asked to find a more appropriate English translation of the term *clause potestative* than the one given.

34. Mr. SCHWEBEL proposed that, in the sixth sentence, the word "some" be replaced by the word "the".

It was so agreed.

35. Mr. USHAKOV suggested that the word "constitutional" should be deleted from the fourth sentence for the limits to the treaties which an international organization might conclude were not necessarily constitutional.

36. The CHAIRMAN suggested that, if there was no objection, the words "constitutional limits" could be replaced by the words "certain limits".

It was so agreed.

37. Mr. USHAKOV also proposed that the fifth sentence should be deleted since it prejudged the Commission's decision on the validity of treaties, a matter it had not yet taken up.

38. Mr. AGO said that, if an international organization concluded a treaty which exceeded the organization's appointed limits, that treaty might be void. That did not mean, however, that a treaty was void whenever an international organization exceeded certain limits, for the constitutional limits applicable to an international organization were not always very precise. Nor could it be said that a treaty was valid if those limits were not transgressed for it might be void for other reasons. In his opinion, therefore, the second part of the fifth sentence might be deleted.

39. Mr. REUTER (Special Rapporteur) agreed that the fact that certain limits had been exceeded did not necessarily entail the invalidity of a treaty; yet, the question of the invalidity of the treaty did none the less arise. He saw no problem in deleting the second part of the fifth sentence, as suggested by Mr. Ago.

40. Mr. AGO proposed that the first part of the fifth sentence should be replaced by a sentence reading: "If those limits are overstepped, the question of the validity of the treaties will arise". It should be stated in a foot-note that the Commission would study the matter at a later stage.

It was so agreed.

41. The CHAIRMAN suggested that a reference to a new foot-note be added at the end of the fifth sentence and that the foot-note read: "This is a matter for future study by the International Law Commission".

It was so agreed.

Paragraph (5), as amended, was approved.

The meeting rose at 1 p.m.

1465th MEETING

Wednesday, 20 July 1977, at 4 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Draft report of the Commission on the work of its twenty-ninth session (*continued*)

CHAPTER IV. Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

B. Draft articles on treaties concluded between States and international organizations or between international organizations (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

TEXTS OF ARTICLES 19, 19*bis*, 19*ter*, 20, 20*bis*, 21-23, 23*bis*, 24, 24*bis*, 25, 25*bis*, 26-34, AND OF ARTICLE 2, PARAGRAPH 1 (*j*), AND COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (*continued*) (A/CN.4/L.261 and Corr.1 and Add.1-2)

ARTICLE 2, PARAGRAPH 1 (*j*), AND ARTICLE 27 (*concluded*) (A/CN.4/L.261/Add.1)

Commentary to article 27 (Internal law of a State, rules of an international organization and observance of treaties) (*concluded*)

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

1. Mr. USHAKOV said that the commentary to article 27 did not, as a whole, place enough stress on the basic question raised in paragraph 2 of the article, in particular by the words "according to the intention of the parties", namely, the question whether, as the result of the conclusion of a treaty, an international organization might have to amend its rules, including its constituent instrument. A State certainly had to change its internal law if that law was not in conformity with its international treaty obligations since international law took precedence over internal law. That was not true, however, of an international organization, and treaty law did not take precedence over the rules of an organization.

Paragraph (7) was approved.

The commentary to article 27, as amended, was approved.

ARTICLES 28-34 (A/CN.4/L.261/Add.2)

Commentary to article 28 (Non-retroactivity of treaties)

The commentary to article 28 was approved.

Commentary to article 29 (Territorial scope of treaties between one or more States and one or more international organizations)

2. Mr. USHAKOV said he was surprised that the commentary to article 28 was so short and the commentary to article 29 so long. Article 29 required few explanations since it enunciated a rule which applied to States and was already in the Vienna Convention on the Law of Treaties, whereas article 28 contained a new rule which was of great importance to international organizations.

The commentary to article 29 was approved.

Commentary to article 30 (Application of successive treaties relating to the same subject-matter)

The commentary to article 30 was approved.

General commentary to section 3: Interpretation of treaties (articles 31-33)

The general commentary to section 3 was approved.

Commentary to article 34 (General rule regarding third States and third international organizations)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

3. The CHAIRMAN suggested that the end of the first sentence should be amended to read: "examined on first reading but which, in the time available, were not examined by the Drafting Committee". Obviously, if articles 35 *et seq.* had not been examined by the Drafting Committee, they could not be adopted on second reading.

It was so agreed.

4. The CHAIRMAN suggested that the commentary should not end with the word "etc. ...".

5. Mr. NJENGA suggested that, in the last part of the sentence, the words "for example" should be inserted between the words "to" and "the" and that the word "etc. ..." should be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

6. Mr. USHAKOV said that, in his view, the commentary to article 34 did not really reflect the basic problem dealt with in the article. The fact that, according to paragraph 2, a treaty between one or more States and one or more international organizations did not create either obligations or rights for a third organization without the consent of that organization meant that the organization in question was invited to assume an obligation which did not derive from its own rules. If it accepted the obligation, it would have to amend its constituent instrument or any other applicable rules. It was therefore questionable whether an international organization should really be invited to assume, even with its consent, an obligation which did not derive from its rules. He did not object to article 34, paragraph 2, but he would like the commentary to explain that it contemplated the case in which a collateral treaty gave rise to the amendment of the rules of an international organization.

The commentary to article 34 as a whole, as amended, was approved.

With the exception of paragraph (6) of the commentary to article 19bis,[1] *chapter IV as a whole, as amended, was approved.*

State responsibility (*continued*)* (A/CN.4/302 and Add.1-3)

[Item 2 of the agenda]

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

ARTICLE 22 (Exhaustion of local remedies)[2] (*continued*)

7. Mr. REUTER said that he had submitted to the Special Rapporteur a text which was intended to replace the proposed text of article 22 but made no changes in the substance of the provision. The new text was based on the ideas, solutions and language employed by the Special Rapporteur. As appeared essential, it consisted of a single sentence. It was not a formal proposal, only a drafting suggestion.

8. The text of article 22 and the Special Rapporteur's written and oral commentaries had left him confused because the article suddenly posed an enormous problem. It followed two articles relating to the effects of the nature of the international obligation on the determination of a breach of the international obligation. Although article 20 had been accepted without too much difficulty, article 21, paragraph 2, had shown that there might subsequently be some complications. The Special Rapporteur was now proposing an article 22 designed to make the specific case of an obligation ultimately involving co-operation by private persons part of the breach of an international obligation. In so doing, the Special Rapporteur was bringing the formidable question of the treatment of private persons into the sphere of responsibility.

9. In the final analysis, the question of injuries suffered indirectly by a State but directly by private persons might be of historical interest only, having played an important

* Resumed from the 1463rd meeting.

[1] See 1464th meeting, para. 16.

[2] For text, see 1463rd meeting, para. 1.

role in the nineteenth and twentieth centuries until the end of the Second World War. Moreover, since the question of the treatment of aliens posed particular problems, the Commission had decided to leave it aside throughout the formulation of the draft articles on State responsibility. Now, article 22 suddenly brought the subject to the fore again. Doubtless the question was only one aspect of the problem that had to be faced in determining a breach of an international obligation. Even if that was the Special Rapporteur's intention, however, the fact remained that the questions touched on so far went beyond the limited framework of the determination of a breach of an international obligation. He had derived that impression particularly from the ideas the Special Rapporteur had expressed about exhaustion of local remedies in the case of investments made abroad.

10. It therefore seemed to him that the whole question of the treatment of aliens had how been raised, in which case it should be discussed in depth, taking into account all its implications. On the strength of his arbitration experience, he would be reluctant to advise a State to waive by treaty the rule of exhaustion of local remedies. Such a waiver might in some cases result in the speedier settlement of disputes but it could also give rise to enormous difficulties. Although he did not have any strong objections to article 22 as proposed by the Special Rapporteur, he feared that the Commission would not have time to discuss it with the thoroughness it required. For the time being, he would merely point out some of the difficulties to which the article gave rise.

11. As the Special Rapporteur had very rightly noted, the problem was not one of trying to determine whether the rule of exhaustion of local remedies was substantive or procedural. The mere fact that everything had already been said on that subject and that some writers had not hesitated to contradict themselves clearly showed that the problem should not be viewed from that angle. What was certain was that responsibility was engaged only at a particular time, but it did not necessarily follow that there was no adumbration of responsibility before local remedies had been exhausted, as was shown in article 18, paragraph 5 [3] and in other provisions. In that connexion, the Special Rapporteur appeared to treat the alternatives rather lightly when he said that a breach of an international obligation either existed or it did not. It was in fact conceivable, as the United Kingdom Government had held at the Conference for the Codification of International Law (The Hague, 1930), that a breach could exist without, however, being definitive. The notion of suspension had been widely employed in the Vienna Convention [4] in the matter of treaties. Until then, it had been applied only to the effects of war on treaties; it could however very well be extended to State responsibility, the argument being that the responsibility of a State existed at a certain time but that its effects were suspended.

12. The article under consideration raised another general but nevertheless fundamental question, namely, what law applied to aliens in the absence of treaty provisions? At the 1930 Codification Conference, many States had maintained that, in respect of treatment of aliens, the only obligation under general international law was the obligation not to deny them justice. If the Commission endorsed that view, it would end up with an article 22 that was even more rigorous than the one proposed by the Special Rapporteur. The contents of the article would then depend on the position which the Commission adopted on the general question of treatment of aliens. He wondered, however, whether Governments would allow the Commission to deal with that question outright in article 22.

13. The solution to another substantive problem, that of the *tempus commissi delicti* would also depend on the Commission's decision concerning the role played by the rule of exhaustion of local remedies in the determination of a breach of an obligation. The Special Rapporteur had indicated that an article would be devoted to that question later and that it would have to be drafted in the light of article 18, paragraph 5. His own opinion was that it would be very awkward to take a decision at present on the abstract question dealt with in article 22 unless all its practical consequences could be assessed.

14. The problem of the existence of injury might also complicate the formulation of an article relating to exhaustion of local remedies. According to the Special Rapporteur, that problem was secondary to the problem of responsibility. Even so, the question of injury was intimately linked to the contents of article 22 and should have been taken into consideration in a number of the cases already mentioned in the discussion. For example, several members of the Commission had expressed the view that there could not have been any injury if a law had been enacted but not applied. At least in market-economy countries, however, the mere enactment of a law could have immediate effects on the value of property and thus cause injury. Perhaps the wrongful act was not complete in such a case, but he was not sure. In any event, none of those problems could be considered in isolation.

15. He felt also that the points mentioned so far in respect of investments belonged to the past. The developing countries were now masters of their own destiny and relatively free to decide how to deal with former investments. Moreover, they could either accept—and negotiate the conditions for—or refuse new investments. He therefore considered that the investments problem was not of direct concern to the Commission. It would, however, be advisable for the Commission to consider the frequent case in which private persons suffered injury directly and the State suffered it indirectly, and the case in which the State suffered injury directly. In the former case, the question arose whether one kind of injury took precedence over the other.

16. In the *Aerial Incident of 27 July 1955* case, which had been brought before the International Court of Justice and was mentioned by the Special Rapporteur in paragraph 100 of his report (A/CN.4/302 and Add.1-3), he wondered what would have happened if the Israeli aircraft had been shot down in Greek or Yugoslav air space rather than in Bulgarian air space. Would it then have been maintained that the victims should have exhausted Bulgarian local remedies or that Bulgaria had

[3] See 1454th meeting, foot-note 2.

[4] See 1456th meeting, foot-note 6.

committed an act that went beyond the normal scope of its "jurisdiction"? It might also have been claimed that the Greek Government or the Yugoslav Government had been guilty of a serious breach of an obligation. In the *Certain Norwegian Loans* case, the French Government had maintained that the principle of exhaustion of local remedies was not applicable in cases of injury caused to non-resident foreigners.[5] During the events preceding Algeria's accession to independence, however, France had stopped and searched foreign commercial vessels; doubtless the French Government had then required the owners concerned to exhaust French local remedies first. Such incidents were obviously of concern not only to the private persons directly injured; they also had an impact on international insurance and on freight rates. Consequently, a State other than the one whose nationals were involved might very well have a separate right of action.

17. In the case of transboundary pollution causing injury to private persons, would the State charged with responsibility maintain that no claim could be advanced until the local remedies had been exhausted? If the Commission found that the rule of exhaustion of local remedies applied in regard to pollution, States would have to sign conventions undertaking to grant national treatment to aliens in case of transboundary pollution. The injured aliens could then apply to the local courts and there would no longer be any question of international responsibility. States would thereby show that they had enough confidence in one another to disregard problems of international responsibility and apply private international law solutions. He was not certain, however, that such an arrangement would be satisfactory, particularly in cases of pollution covering broad areas, such as had occurred in the Pacific.

18. In conclusion, he would be prepared to follow the Special Rapporteur's path provided the Commission succeeded in producing an article whose text was in keeping with the preceding articles and did not prejudge any of the important questions involved in the determination of a breach of an international obligation in the light of the rule of exhaustion of local remedies.

19. The CHAIRMAN said that it might be appropriate if he were to indicate how he, as Chairman, viewed the situation regarding article 22. Problems of two kinds were involved in the article: problems of theory, which were the subject of controversy among the writers, and marginal problems, in which the interests of the State and private interests were to some extent interlocked. He did not think that at its current session the Commission would be able to solve the problems of doctrine or even all the marginal problem. What it could do, however—perhaps using techniques somewhat similar to those employed in the Vienna Convention in regard to fundamental change of circumstances—was to draft an article which would give the essential rules while leaving the door open for any future discussion of points of doctrine. On that basis, it seemed to him that the main task would be for the Drafting Committee at the current session. Unless the Commission approached article 22 in that spirit at the current session, it might find itself in difficulties.

20. Mr. AGO (Special Rapporteur) said he had the impression that Mr. Reuter had perhaps exaggerated the importance of the points which he had raised. He would reply to them at the following meeting. In the meantime, he agreed with the Chairman that the Commission should simply draft a general rule and not seek solutions to all the problems which could arise.

21. Mr. USHAKOV said he thought that it was necessary to establish whether or not the rule of exhaustion of local remedies was applicable to the matter in hand, but without trying to find solutions for specific cases and without dealing with primary rules.

22. Mr. FRANCIS asked whether the Chairman was suggesting that the general debate be postponed until the following year. For his part, he hesitated to enter into a discussion on such an important matter when he had not had time to digest the Special Rapporteur's report fully.

23. The CHAIRMAN said his suggestion was that the Commission should have a brief general debate and then refer the essential rules to the Drafting Committee for early consideration. That was the only way for it to deal with the essence of the problem at that session.

24. Mr. JAGOTA agreed with Mr. Ushakov that the Commission was not concerned, in the present instance, with the material law relating to treatment of aliens and property of aliens or primarily with diplomatic protection, but basically with the question of responsibility, as was clear from the formulation proposed by the Special Rapporteur. Admittedly, the inclusion in draft article 22 of the phrase "namely, to accord certain treatment to individuals, natural or legal persons" indicated that exhaustion of local remedies was being considered within a particular context, but the Commission should bear in mind both the contemporary and the future aspects of the question of treatment of aliens and their property and proceed a little more slowly on that point.

25. In view of the crucial importance of the article and the need to present the Sixth Committee of the General Assembly with a text which would provide a sound basis for its deliberations, the matter required close examination before it was referred to the Drafting Committee, and members should be given time to read and ponder the Special Rapporteur's lengthy report.

26. The crucial issue, as Mr. Reuter had stated, and one on which both doctrine and State practice were divided, was whether responsibility was generated before or after the exhaustion of local remedies. If before, then exhaustion of local remedies would be a procedural device that was essential to make the claim ripe. Mr. Reuter, however, seemed confident that responsibility was in fact generated after the exhaustion of local remedies. Since the reference in draft article 22 to "initial conduct" implied recognition of incipient responsibility, the dichotomy of an initial act which gave rise to responsibility and the final act which took place after the local remedies had been exhausted required careful consideration.

27. An article on exhaustion of local remedies (article 14) had been included in the "informal single negotiating

[5] *I.C.J. Pleadings, Certain Norwegian Loans*, vol. I, pp. 182-186.

text", in the chapter "Settlement of disputes", in connexion with the jurisdiction of the law of the sea tribunal to be established under the convention on the law of the sea.[6] That article had, however been omitted in the "informal composite negotiating text" currently under consideration.[7] He mentioned that fact to indicate the need for caution in developing a theoretical assumption, and on that basis a substantive rule, that no question of responsibility would arise, irrespective of the facts of the case, unless the local remedies had been exhausted. It was always dangerous to go to extremes. For instance, as Mr. Reuter had questioned, would the rule of exhaustion of local remedies also apply in the case of responsibility towards a third party in a third country? Recent examples of State practice indicated that it would be going too far to say that no responsibility would be generated until all the local remedies had been exhausted. Possibly, therefore, the best solution would be for the Commission to state the principle without taking a final position on the matter.

28. In conclusion, he considered that the Commission should devote one or two meetings to a substantive discussion of the question before referring it to the Drafting Committee.

29. The CHAIRMAN pointed out that the Commission had very little time. If the general debate was prolonged by more than one day, the Commission could not physically complete its work before the closing of the session on 29 July 1977. In view of the importance of the article, he considered that two meetings would be required for the general debate. He suggested that they take place the following day so that the matter could be referred to the Drafting Committee before the end of the week.

30. Mr. ŠAHOVIĆ said that, although he shared Mr. Reuter's concern, he thought the Commission had reached a point where it had to take a decision on the inclusion of the rule of exhaustion of local remedies in the draft articles. Article 22 was the logical consequence of the two preceding articles. The Commission therefore might discuss the exhaustion of local remedies but it should express a general reservation in the commentary to the article.

31. Article 22 raised the question of the nature of the rule of exhaustion of local remedies. On that point the Commission was on solid ground. As clearly shown in the report under consideration, there was no doubt that the rule was one of customary international law. The Special Rapporteur had dealt with the question of the limits of the rule, paying due regard to the literature, international jurisprudence and State practice. The text he proposed was perfectly in keeping with his analysis, and the limits he placed on the rule of exhaustion of local remedies reflected accurately the present stage of development of international law.

32. It was obvious that the article proposed by the Special Rapporteur left a number of questions unanswered, but he saw no danger in that. For the time being, it was important for the Commission to produce a draft article and a commentary which would give Governments an opportunity to indicate their views on the question. If the Commission became involved in a long and thorough discussion of all the problems to which the article could give rise, it might be unable to take a decision on the article at the current session and would thus fail in its duty.

33. In formulating draft article 22, the Special Rapporteur had endeavoured to reconcile the sovereign interests of the State charged with responsibility and those of the State of which the injured private persons were nationals. In addition, he had taken into consideration the various legal solutions which had recently been devised, particularly in the area of human rights, and which might one day be part of customary international law.

34. As a whole, the proposed article was therefore acceptable, having regard to the drafting problems involved in a provision of that kind and the theoretical difficulties which the Commission would not fail to encounter if it now tried to solve all the problems which the article posed.

35. Mr. SCHWEBEL said that he was unwilling to express his views on such an important article until he had had time to digest in full the Special Rapporteur's report. He therefore considered that members should be allowed time to study the report.

36. Mr. TABIBI too thought that members should be given time to read and reflect on the Special Rapporteur's report. The Commission should, however, devote as many meetings as necessary to the formulation of an article that would be acceptable to the Sixth Committee of the General Assembly.

37. Mr. USHAKOV, Mr. SETTE CÂMARA and Mr. QUENTIN-BAXTER agreed with the procedure outlined by the Chairman.

38. After an exchange of views, the CHAIRMAN suggested that the Commission devote two meetings on the following day to the general debate on draft article 22, and that the morning meeting be postponed until 11 a.m. to give members a little more time for reading. He further suggested that, on conclusion of the general debate, draft article 22 should immediately be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 6.15 p.m.

1466th MEETING

Thursday, 21 July 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-

[6] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. V (United Nations publication, Sales No. E.76.V.8), p. 185, document A/CONF.62/WP.9/Rev.1.

[7] *Ibid.*, vol. VII (Sales No. E.77.V.10), document A/CONF.62/WP.10.