Document:-
A/CN.4/SR.1506

Summary record of the 1506th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1978, vol. I

sion's report, so that the attention of the General Assembly would be drawn to the importance of the matter of settlement of disputes.

60. Mr. SCHWEBEL said that the Special Rapporteur had been right to raise the question of the form the articles would ultimately take. In his opinion, the articles should not necessarily be embodied in a convention; it might be better to consider them as a set of guidelines for States wishing to conclude most-favoured-nation clauses. However, the predominant, if not definitive, view in the Commission seemed to be that the articles should become a convention, and he had therefore been puzzled by the Special Rapporteur's suggestion that it was premature to take up the question of settlement of disputes.

61. He realized that, in view of pressure of time and the improbability of reaching an agreement, it would not be prudent to undertake a lengthy discussion of the new article proposed by Mr. Tsuruoka, and it would therefore be best to proceed as Mr. Tsuruoka had suggested.

62. With regard to the wording of the proposed article, paragraph 2 might make it clearer that a party could at its sole instance seize the International Court of Justice of a dispute and that the Court would have compulsory jurisdiction. Also, paragraph 5 of the annex to the proposal might usefully mention the very valuable Model Rules on Arbitral Procedure that the Commission itself had prepared.[15]

63. Mr. Tsuruoka's proposal might be appended to the existing draft articles in parentheses or, if such were the general wish, simply be included in the Commission's report together with a summary of the discussion to which it had given rise.

64. Mr. VEROSTA said that the Commission would be acting inconsistently if it did not include an arbitration clause in the draft articles, since it had from the outset stated that the draft was a supplement to the Vienna Convention on the Law of Treaties and had, in articles 24 and 25, reproduced the provisions of articles 73 and 28 respectively of the Vienna Convention. If the Commission made no mention at all of the question of settlement of disputes, governments might conclude that it was convinced that the articles would never become a convention. He therefore found great merit in Mr. Tsuruoka's proposal.

65. Mr. DADZIE agreed with the Special Rapporteur that the final form of the articles must be known before provision could be made for the settlement of disputes, and that any article on that subject should be based on the existing models. The Commission was perhaps entitled to suggest that its articles should become a convention, but the decision on that matter lay with the General Assembly. He was grateful for the gesture Mr. Tsuruoka had made with regard to his proposal and considered that the proposal should be commented on in the Commisson's report.

66. Mr. JAGOTA agreed entirely with the Special Rapporteur's statement. The Commission should confine itself to producing the best set of articles it could and leave it to the General Assembly to decide what form they should eventually take. That decision would have important implications for the future work of the Commisson. If the General Assembly thought that the articles should constitute a protocol to the Vienna Convention on the Law of Treaties, the Commissiion would not have to concern itself with drafting final clauses or provisions on settlement of disputes, since the relevant provisions of the Vienna Convention would suffice. If the Assembly decided that the articles should form a separate convention, the choice of the method of settling disputes would rest with the plenipotentiary conference or other body that finalized the convention. If the Assembly decided that the articles should be treated merely as a set of guidelines, it would probably be neither desirable nor necessary to add anything on the settlement of disputes.

67. He had raised those points because the settlement of disputes was a divisive question for the world community and had caused considerable problems at the United Nations Conference on the Law of Treaties. Furthermore, if Mr. Tsuruoka's proposal were adopted, there would be not merely a dual problem of interpretation, as the Special Rapporteur had pointed out, but a triple one, because there would also be the question whether the articles should apply to the agreements referred to in article 26.

The meeting rose at 1 p.m.

1506th MEETING

Thursday, 22 June 1978, at 10.50 a.m.

Chairman: Mr. José SETTE CÂMARA

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

The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2, A/CN.4/L.270)

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*concluded*)

THE PROBLEM OF THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES RELATING TO THE INTERPRETATION AND APPLICATION OF A CONVENTION BASED ON THE DRAFT ARTICLES (*concluded*)

[15] *Yearbook... 1958*, vol. II, p. 83, doc. A/3859, para. 22.

New article 28 (Settlement of disputes) (*concluded*)

1. Mr. FRANCIS said he shared what seemed to be the general opinion that the Commission should not embark on a substantive discussion of the question of the settlement of disputes. Mr. Jagota had already reminded the Commission at the previous meeting that that question had almost proved the downfall of the United Nations Conference on the Law of Treaties, and he could indeed think of no subject quite so likely to cause problems in multilateral negotiations.

2. He therefore approved the suggestion that a reference to Mr. Tsuruoka's proposal for a new article 28 (A/CN.4/270) should be included in the Commission's report, for that would show the General Assembly that the Commission was aware both of the existence of the problem and of the need to avoid going too far in proposing solutions to it at the current stage.

3. Sir Francis VALLAT and Mr. SUCHARITKUL were prepared to give general support to an article on the settlement of disputes such as that proposed by Mr. Tsuruoka. They recognized, however, that consideration of the proposal would entail a long debate that might not lead to agreement. They therefore supported the suggestion that a reference to the proposal and a summary of the discussion on it should be included in the Commission's report.

4. Mr. USHAKOV (Special Rapporteur) noted that members appeared to agree that the draft articles should not include a provision on the settlement of disputes and that the Commission should simply indicate in its report that a proposal had been submitted on that question. In his opinion, it would be premature to draw up a provision on the settlement of disputes before the General Assembly had taken a final decision on what was to become of the draft articles. If the General Assembly decided that the draft should take the form of a convention, States could insert a provision on the settlement of disputes during the conference held to draw up the convention, as they had recently in the case of the draft articles on succession of States in respect of treaties, which had contained no arbitration clause.

5. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to include in its report a reference to the proposal made by Mr. Tsuruoka in document A/CN.4/L.270 and an outline of the discussion that had taken place concerning it.

It was so agreed.

ARTICLE 2 (Use of terms)

6. The CHAIRMAN invited the Special Rapporteur to introduce, paragraph by paragraph, article 2, which read:

Article 2. Use of terms

For the purposes of the present articles:

(*a*) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "granting State" means a State which grants most-favoured-nation treatment;

(*c*) "beneficiary State" means a State which has been granted more-favoured-nation treatment;

(*d*) "third State" means any State other than the granting State or the beneficiary State;

(*e*) "material reciprocity" means that the beneficiary State is entitled to the treatment provided for under a most-favoured-nation clause only if it accords equivalent treatment to the granting State in the agreed sphere of relations.

Paragraph (a)

7. Mr. USHAKOV (Special Rapporteur) said that the definition of the term "treaty" given in article 2 (*a*) was the generally accepted definition. It appeared in the Vienna Convention on the Law of Treaties,[1] and the Commission had already reproduced it, without expansion, in the draft articles on succession of States in respect of treaties.[2]

8. Some representatives in the Sixth Committee, and the Government of Luxembourg in its written comments, had considered that paragraph (*a*) duplicated the corresponding provision of the Vienna Convention on the Law of Treaties (A/CN.4/309 and Add.1 and 2, para. 76; A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). He did not share that view, for in the draft articles, as in the Vienna Convention, the terms were defined solely for the purposes of the instrument in which they were used. He therefore proposed that paragraph (*a*) should be retained as it stood.

9. Mr. TSURUOKA was in favour of referring paragraph (*a*) to the Drafting Committee forthwith.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer paragraph (*a*) of article 2 to the Drafting Committee.

It was so agreed.[3]

Paragraphs (b), (c) and (d)

11. Mr. USHAKOV (Special Rapporteur) said that all the comments made on paragraphs (*b*), (*c*) and (*d*), which defined the terms "granting State", "beneficiary State" and "third State", had been favourable. He therefore proposed that those three paragraphs should be retained as they stood.

12. Mr. REUTER observed that the English version of paragraph (*c*) used the past tense where the French and Spanish versions used the present.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission

[1] See 1483rd meeting, foot-note 2.

[2] *Yearbook... 1974*, vol. II (Part One), p. 175, doc. A/9610/Rev.1, chap. II, sect. D, art. 2.

[3] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 102 *et seq.* and 1522nd meeting, paras. 1-9.

decided to refer paragraphs (*b*), (*c*) and (*d*) to the Drafting Committee.

It was so agreed.[3]

Paragraph (e)

14. Mr. USHAKOV (Special Rapporteur) said that paragraph (*e*), which defined the term "material reciprocity", had given rise to reservations by a number of governments, which had expressed doubts about its usefulness and proposed that it should be dropped from the definitions in article 2. Admittedly, the term "material reciprocity" was not entirely satisfactory, but, as he had indicated in his report (A/CN.4/309 and Add.1 and 2, para. 94), he could not suggest anything better. Two problems arose: the use of the term in the draft and its definition in article 2.

15. It was indeed open to question whether the term "material reciprocity" should be used in the draft articles or whether it should be replaced by another expression. Some governments, incuding those of Luxembourg, the Byelorussian SSR and the USSR, had considered that the term was not clear and had cast serious doubt on the advisability of using it in the draft (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A). It was not particularly felicitous, but it would be difficult to replace, because the notion of reciprocity, contrary to the view of the Government of Luxembourg, was not "a secondary and even atypical aspect of the clause", but an absolutely essential element for its application. As he had pointed out in his report (A/CN.4/309 and Add.1 and 2, para. 93), although material reciprocity was simply impossible in the most traditional sphere of application of the clause, namely, trade, in certain other spheres of relations between States, such as consular and diplomatic relations and establishment treaties—in other words, those in which material reciprocity was possible in practice—it was appropriate and logical to use clauses that were conditional on material reciprocity.

16. In commenting on the definition of "material reciprocity" in paragraph (*e*), some governments had criticized the term "equivalent treatment" and proposed that it should be replaced by an expression such as "the same treatment" or "similar treatment". But although in the sphere of diplomatic and consular relations, which were governed by international law, a State might grant another State the same privileges and immunities as were accorded to itself, the same was not true in the matter of establishment, which came under internal law. Hence in the latter sphere it was impossible to speak of "the same treatment", but only of "equivalent treatment".

17. For lack of anything better, the term "material reciprocity" should be retained in the draft and consequently defined in article 2. He therefore proposed that paragraph (*e*) should be referred to the Drafting Committee, in the hope that it would be able to find a more satisfactory form of words.

[4] *Ibid.*

18. Sir Francis VALLAT agreed that the definition of the term "material reciprocity" should be referred to the Drafting Committee. Strictly speaking, the text proposed in paragraph (*e*) was not a definition of that term, and it was in any case so ambiguous that it raised more problems than it resolved. In the first place, it was unclear to what, and how far, the "equivalent treatment" must be equivalent. But it was the last part of the paragraph that caused him the most concern and was in greatest need of revision: he did not see why, when most-favoured-nation clauses were drafted with reference to States, people and things and to the treatment of them, mention had been made of "relations", and he could not understand what was meant by an "agreed sphere".

19. Mr. ŠAHOVIĆ was not sure that it was necessary to define "material reciprocity"; if that term were defined, other and perhaps more important notions would have to be defined as well. He thought it would be better to draft article 10 in such clear terms that a definition of the notion of material reciprocity would not be required. In French, the expression "réciprocité trait pour trait" ("point for point") would be preferable. The Drafting Committee should reconsider the definition in paragraph (*e*) in the light of the provisions of article 10, for the definition might raise problems for governments.

20. Mr. REUTER thought it would be wise to retain, in article 2, a definition that adumbrated article 10. It should be remembered that the draft related to applicaion of the most-favoured-nation clause in general, not only in the sphere of trade, as articles 21, 22 and 23 might suggest. But although material reciprocity played no part in customs matters, it played a very important part in the sphere of diplomatic and consular relations and in that of the right of establishment. It should therefore be brought out, as early as article 2, that the draft covered very diverse matters in which the most-favoured-nation clause did not necessarily operate in the same way.

21. With regard to the terminology to be used, one might hesitate between the terms "material" and "trait pour trait", but the term "reciprocity" must certainly be retained. Admittedly, the word "equivalent" was ambiguous, but its ambiguity was absolutely necessary.

22. As to the phrase "agreed sphere of relations", current international practice required that the matters to which the most-favoured-nation clause applied should be defined with extreme precision. For example, article 2, paragraph 1, of a trade agreement concluded by EEC provided that:

> 1. In their trade relations the two Contracting Parties shall accord each other most-favoured-nation treatment in all matters regarding:
>
> (*a*) customs duties and charges of all kinds applied to the import, export, re-export or transit of products, including the procedures for the collection of such duties or charges;
>
> (*b*) regulations, procedures and formalities concerning customs clearance, transit, warehousing and transhipment of products imported or exported;

(*c*) taxes and other internal charges levied directly or indirectly on products or services imported or exported;

(*d*) administrative formalities for the issue of import or export licences.[5]

23. He wondered, therefore, whether the words "in the agreed sphere of relations" should not be replaced by the words "on an agreed matter". The use of an expression that was too general would dangerously expand the notion of reciprocity in the direction of general conditionality. It was not a mere question of terminology to be dealt with by the Drafting Committee, but a question of principle on which the Commission must take a position. If the Commission decided on a precise expression, it would limit the sphere of material reciprocity. On the other hand, if it chose a fairly broad expression, it would give considerable importance to the idea of conditionality in the most-favoured-nation clause. It was his impression that the Special Rapporteur favoured a precise formulation that would limit the sphere of material reciprocity. If that view were accepted, it would be necessary to find a less general expression than "agreed sphere of relations".

24. Mr. JAGOTA believed it had been found necessary to include a definition of "material reciprocity" in the draft because that term appeared in article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity) and article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause), where most-favoured-nation treatment was described in general terms to cover not only matters relating to trade, but also other matters. The Special Rapporteur had explained that article 8 (Unconditionality of most-favoured-nation clauses), article 9 (Effect of an unconditional most-favoured-nation clause) and article 10 had been drafted on the basis of the idea that most-favoured-nation clauses were to be classified either as unconditional or as subject to a condition of material reciprocity.

25. Whether the expression "material reciprocity" were defined in the draft or not, it would be understood in its normal sense of "equivalent treatment". In the context, it meant reciprocity that was material, as against unrelated, to the subject-matter of the clause. The term aslo imported an element of flexibility, so that the treatment in question did not necessarily have to be the same, but only equivalent. Consequently, it was a matter of choice whether to define the term in the body of the draft articles or to leave it to be interpreted in the context of articles 10 and 19. His own view was that a definition would be useful if the distinction between the two types of clauses were maintained. During the discussion on draft articles 8, 9 and 10, however, Mr. Tsuruoka had introduced a proposal relating to a most-favoured-nation clause made subject to a condition other than material reciprocity.[6] If that proposal were accepted, the Commission would have to reconsider whether a definition of "material reciprocity" was necessary. He thought the Drafting Committee should take that point into account when it considered Mr. Tsuruoka's proposal in the context of articles 8, 9 and 10.

26. He could not agree that the phrase "in the agreed sphere of relations", in article 2 (*e*), was vague; it clearly referred to the scope of the most-favoured-nation clause and would be interpreted to mean that the clause did not apply only to trade, but could also be extended to other matters.

27. Mr. FRANCIS urged the need for caution. The Commission should not, at that stage, seek to go beyond the definition of material reciprocity appearing in article 2 (*e*). The meaning of that term was, in any event, made quite clear in the commentary to article 2, according to which "material reciprocity" had been defined as an identical consideration executed by a party and as the mutual consideration stipulated by States in a treaty.

28. To his mind, "material reciprocity" clearly denoted equivalent treatment: one reason why the latter term had not been used in place of "material reciprocity" might be because article 4 (Most-favoured-nation clause) already dealt with most-favoured-nation treatment. Moreover, material reciprocity occupied a predominant place in the structure of article 9 (Effect of an unconditional most-favoured-nation clause), article 10 (Effect of a most-favoured-nation clause conditional on material reciprocity), article 18 (Commencement of enjoyment of rights under a most-favoured-nation clause) and article 19 (Termination or suspension of enjoyment of rights under a most-favoured-nation clause). He therefore considered that the definition should stand, and that it should be left to the General Assembly or some other body to find a more appropriate expression. It should not be forgotten that the Special Rapporteur had recognized that the term "material reciprocity" was not entirely satisfactory, but had recommended it for want of anything better.

29. Mr. TSURUOKA said he had submitted to the Drafting Committee an amendment to article 4 that would replace the words "in an agreed sphere of relations" by the words "with respect to a subject-matter specified in such provision". That amendment also applied to article 2 (*e*).

30. In the Drafting Committee, he had also proposed the addition to article 2 of two new paragraphs, (*f*) and (*g*), containing definitions of the terms "persons" and "things". Those terms, which appeared in articles 5 and 7, required clarification, and it would be better to define them in article 2 than unnecessarily to encumber the text of the provisions containing them.

31. Mr. USHAKOV (Special Rapporteur) said it was essential to define the term "material reciprocity", which appeared in several provisions of the draft, since its meaning was not obvious. Under a clause conditional on simple reciprocity, the treatments accorded to each other by the granting State and the

[5] *Official Journal of the European Communities*, Luxembourg, 11 May 1978, vol. 21, No. L 123, p. 2.

[6] See 1490th meeting, para. 6.

beneficiary State were not identical. Each undertook to accord to the other the most favourable treatment it accorded to a third State; hence everything depended on the treatment of third States. Under a clause conditional on material reciprocity, on the other hand, the beneficiary State was entitled to the most favourable treatment accorded by the granting State to a third State only if it accorded that treatment, or equivalent treatment, to the granting State.

32. In the light of the comments and suggestions made during the discussion on article 2 (*e*) and of the draft definition he proposed to submit to the Drafting Committee, that Committee should be able to work out a satisfactory definition.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 2 (*e*) to the Drafting Committee.

It was so agreed.[7]

34. Mr. USHAKOV (Special Rapporteur) pointed out that the Drafting Committee would also have to consider the definitions proposed for the terms "persons" and "things". The Committee might also consider it necessary to define other terms used in the draft.

35. Sir Francis VALLAT said that some thought should be given to defining the term "State", and he wished in that connexion to refer the Commission to the suggestion submitted by EEC in its written comments:

> The expression "State" shall also include any entity exercising powers in spheres which fall within the field of application of these articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it is composed (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 7).

36. A provision along those lines was necessary if the draft articles were to be viable and to form the basis for a convention. He appreciated that such a definition, although technically simple, would offend some members in their understanding of the term "State", and that its inclusion in article 2 would effectively alter the scope of the draft articles. It would, moreover, have implications for the formal articles. If a "State" were so defined for the purposes of a convention, the implication would be that the definition applied both to the formal and to the substantive articles of the convention, with the result that an organization could become a party to the convention in the same way as a State—which would inevitably give rise to considerable political problems. There were, however, a number of ways in which the objective could be attained. The definition did not necessarily have to provide that an organization should be regarded as a State, which implied that it was entitled to become a party to the convention. Instead, it could be provided that the convention would be open to certain kinds of organizations which, if they became parties, would be treated as States for the purposes of the convention. Politicially, that was a very different proposition from saying that an organization was, in effect, a State for the purpose of the draft articles.

37. He was not pressing for the inclusion of a definition of a "State" in the draft articles at that stage, but he considered that the Commission should make it clear in its report that it had taken cognizance of the problem that arose where the powers of the State had been conferred on a central organization.

38. He requested that the substance of his statement be included in the Commission's report.

39. Mr. REUTER thought that, in a matter of such far-reaching effect, the Commission could not simply refer to a draft provision submitted by a regional group of States. Nor was it possible to pass over the matter in silence. Article 12, paragraph 2, of the Charter of Economic Rights and Duties of States[8] contained a passage upon which the Commission might draw, without reproducing it word for word in the draft, and which should be mentioned in the Commission's report to the General Assembly. That passage read:

> In the case of groupings to which the States concerned have transferred or may transfer certain competences as regards matters that come within the scope of the present Charter, its provisions shall also apply to those groupings in regard to such matters, consistent with the responsibilities of such States as members of such groupings.

40. In its report, the Commission should also refer to the explanatory note to article 1 of the Definition of Aggression,[9] under which the term "State" included the concept of a "group of States", where appropriate.

41. Mr. EL-ERIAN said that the question raised by Sir Francis Vallat concerned an international phenomenon of great importance that called for the most careful consideration. He would, however, hesitate to include a definition of a "State" in the draft articles, since that question was closely related to the scope of the draft articles. It was worth noting that Professor Lauterpacht, in his report on the law of treaties, had preferred the term "organization of States" to that of "international organization".[10] There was also the question whether the will of States persisted after an international organization had been established or whether, as the International Court of Justice had held in its advisory opinion in the *Reparation for injuries suffered in the service of the United Nations* case,[11] international organizations had a separate legal personality. The main point, of course, was to ensure that the application and relevance of the draft articles were not prejudiced.

42. The CHAIRMAN said that the statements of Sir Francis Vallat and Mr. Reuter would be reflected in the Commission's report.

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[7] For consideration of the text proposed by the Drafting Committee, see 1521st meeting, paras. 102 *et seq.*, and 1522nd meeting, paras. 1-9.

[8] General Assembly resolution 3281 (XXIX).

[9] General Assembly resolution 3314 (XXIX), annex.

[10] *Yearbook... 1953*, vol. II, pp. 93 *et seq.*, doc. A/CN.4/63, art. 1 and para. 3 of the commentary thereto.

[11] *I.C.J. Reports 1949*, p. 174.

43. He reminded members that the Commission still had to consider the form in which the draft articles would finally appear.

The meeting rose at 12.55 p.m.

1507th MEETING

Tuesday, 27 June 1978, at 10.15 a.m.

Chairman: Mr. José SETTE CÂMARA

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

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

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 39 (General rule regarding the amendment of treaties)

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/312), and in particular his draft article 39, which read:

Article 39. General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in part II apply to such an agreement except in so far as the treaty may otherwise provide.

2. Mr. REUTER (Special Rapporteur) said that his seventh report dealt with part IV of the draft articles, entitled "Amendment and modification of treaties". It contained three articles, which corresponded to three articles of the Vienna Convention on the Law of Treaties:[1] the first laid down a general rule on the amendment of treaties while the other two dealt with multilateral treaties only. The Commission must now consider how far it wished to extend to treaties concluded between States and international organizations or between two or more international organizations the consensual approach adopted in the Vienna Convention. That question had already arisen at the time the Commission had considered other articles of the draft, particularly those on reservations.

3. In regard to the general rule laid down in article 39, it certainly seemed that the Commission should keep to the consensual approach. On the other hand, for multilateral treaties, dealt with in articles 40 and 41 (A/CN.4/312), that approach was less indicated. It was clear from international practice that multilateral treaties were not often open to international organizations. Multilateral treaties concluded solely between international organizations were rare, while multilateral treaties concluded between States and international organizations, although more frequent, were not usually open treaties. Since the Commission had not excluded the case, however, particularly in article 9,[2] he had thought that he could submit provisions on multilateral treaties. His proposed text for article 40 was modelled on the corresponding article of the Vienna Convention, while for article 41 he proposed two variants that derived from two different approaches.

4. One member of the Commission had already told him privately that he was totally opposed to the provisions of article 39. To forestall those objections, he would point out that, in the case of amendment of treaties, the United Nations Conference on the Law of Treaties had made a point of excluding the application of a rule that had never existed in international law but that had often been invoked, namely, that of the *acte contraire*. That was why the expression "by agreement" had been preferred to the words "by treaty" in article 39 of the Vienna Convenion. Moreover, the Vienna Conference had rejected a draft article providing for the possibility of modifying a treaty by subsequent practice.[3] Limits had thus been set on the rule laid down in article 39 of the Vienna Convention.

5. Under the second sentence of article 39, the rules in part II of the draft applied to the agreement by which a treaty might be amended unless the treaty provided otherwise. The procedure for amending treaties was thus made subject to all those rules and, in particular, to the rule in article 6 concerning the capacity of international organizations to conclude treaties. Article 39 might seem inappropriate in so far as it would mean, if taken literally, that an international organization could derogate from article 6 when it concluded an agreement amending a treaty. In his view, such an interpretation would be contrary to elementary common sense. Since capacity always preceded the conclusion of agreements, there could be no question of an agreement modifying the capacity by virtue of which the agreement was concluded. Should the Commission consider that common sense was not enough, it would perhaps be advisable to in-

[1] For the text of the Convention (hereinafter referred to as the "Vienna Convention"), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[2] For the text of the articles so far adopted by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 96 *et seq.*, doc. A/32/10, chap. IV, sect. B, 1.

[3] *Yearbook... 1966*, vol. II, p. 187, doc. A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, with commentaries, art. 38.