Document:-

A/CN.4/SR.1509

Summary record of the 1509th 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:-

1978, vol. I

nature, often required treatment differing from that reserved for States.

32. Variant I, which was based on that view, referred to three separate cases: that of treaties between international organizations alone and, in the case of treaties between States and international organizations, that in which the *inter se* agreement was concluded between States alone and that in which it was concluded between one or more States and one or more international organizations.

33. In the case of treaties concluded between international organizations alone, he had simply transposed the rule laid down in article 41 of the Vienna Convention for treaties between States, on the grounds that international organizations, like States, were bodies that were equal as between themselves.

34. He had also followed the course taken in the Vienna Convention in the case of treaties between States and international organizations where the *inter se* agreement concerned only States, for the fact that States were parties to a treaty to which international organizations were also parties did not diminish their rights.

35. In the third case, however, he had departed from the text of the Vienna Convention, for he had thought that, in a treaty between States and international organizations, the possibility of an *inter se* agreement between one or more States and one or more international organizations could be admitted only if one of two conditions were met: if such a possibility was provided for by the treaty, or if it was agreed between all parties to the treaty. The basis for his proposal of that rule was the belief that, in agreements of that kind, the situation of internatonal organizations was always specific and they could not be given the same freedom as States. Although the Commission had not ruled out such a case, there were as yet no examples of general treaties between States to which international organizations might also be permitted to become parties. Such treaties as currently existed between States and international organizations were specific and tightly closed—for instance, the treaty between IAEA, EURATOM and the States members of EURATOM, which was designed to ensure the application of the Treaty on the Non-Proliferation of Nuclear Weapons and in which careful thought had been given to the respective roles of the international organizations and the States concerned. It was therefore conceivable that, in treaties of that kind, the possibility of an *inter se* agreement might be provided for in the text of the treaty itself.

36. Since variant I employed the term "agreement", all the comments that had been made on that subject were applicable to it.

37. Variant II reproduced article 41 of the Vienna Convention without change. His own view was that that variant would be sufficient, for the triple barrier established by the Convention was already very solid and he could see no reason for laying down stricter requirements for international organizations. He had submitted variant I merely in response to certain legitimate concerns.

38. Mr. USHAKOV saw no reason to cater for the cases referred to in paragraphs 1 and 3 of variant I. He therefore proposed that those two paragraphs should be deleted and that only paragraphs 2 and 4 should be retained.

The meeting rose at 11.35 a.m.

1509th MEETING

Thursday, 29 June 1978, at 10.50 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Ago, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, 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 (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

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

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)[1] (*concluded*)

1. Mr. RIPHAGEN noted the statement in paragraph (6) of the Special Rapporteur's commentary (A/CN.4/312) to the effect that variant I of article 41 raised a kind of presumption that "modifications affecting international organizations are assumed *a priori* to upset the balance established by the treaty". He failed to see how such an assumption could be justified and, for that reason, preferred variant II.

2. There seemed to be a certain parallelism between article 41 and article 19 *bis*,[2] paragraph 2 of which laid down a special rule regarding the formulation of reservations by international organizations. It might perhaps be logical to include a similar provision in variant II of article 41.

3. The Commission should not be unduly restrictive in regard to the treaty-making powers of international organizations and, above all, should not make it too difficult for organizations that were not of a universal character to enter into treaty relations

[1] For text, see 1508th meeting, para. 28.

[2] See 1507th meeting, foot-note 2.

with the outside world. In that connexion, he would point out that article 12 of the Charter of Economic Rights and Duties of States[3] recommended that the policies of groupings of States should be "outward-looking".

4. Mr. JAGOTA considered that the basic difference between the two variants lay in paragraph 3 (*b*) of variant I, which stipulated that any modification of a treaty concluded between one or more States and one or more international organizations required the agreement of all the parties to the treaty. Given the new capacity of international organizations to enter into treaties, that was a desirable requirement. It would provide for an objective test, which would ensure that the balance established by the treaty was not disturbed, and was to be preferred to the subjective test of incompatibility with the effective execution of the object and purpose of the treaty. The Drafting Committee might wish to consider whether that requirement should be retained in variant I, should be embodied in variant II or should form the subject of a third variant.

5. In his commentary to variant I, the Special Rapporteur had dealt with two categories of treaties: treaties between international organizations and treaties between States and international organizations. Modifications to the first category of treaties were covered by paragraph 1 of variant I, and to the second category by paragraphs 2 and 3. Paragraph 2 would apply where two or more States parties wished to modify a treaty, and paragraph 3, where one or more States and one or more international organizations wished to do so.

6. None of those three paragraphs, however, covered the case where the parties to a treaty between States and international organizations wishing to modify the treaty were international organizations only. He would therefore suggest that, to meet that point, a drafting change should be introduced in paragraph 3 of variant I or a new paragraph added to that variant.

7. Mr. FRANCIS recalled that, during the discussion at the Commission's twenty-ninth session on the question of reservations to a treaty concluded between States and international organizations or between international organizations, he had taken the view that, from the contractual standpoint, no distinction should be drawn between the parties, whether they were States or international organizations.[4] It had, however, been decided to make such a distinction, as attested by the provisions of articles 19 to 23 *bis*. He regarded that point as significant because articles 39 and 40 provided for equality between international organizations and States for the purposes of amending a treaty. Thus all parties to a treaty, whether bilateral or multilateral, must consent to its amendment. As far as multilateral treaties were concerned, modification by reservation differed from modification by agreement between certain of the parties only in that the former was a unilateral act, which was subsequently approved by the other parties to the treaty, whereas the latter was an act confined to the parties concerned. For the sake of uniformity, however, he could agree that the approach adopted in articles 19 to 23 *bis* should be reflected in article 41.

8. Of the two variants, he preferred the first, but thought that paragraph 3 should perhaps be clarified to take account of the situation covered by paragraph 2. He therefore suggested that variant I should be referred to the Drafting Committee.

9. Sir Francis VALLAT found it difficult to accept the presumption that variant I was said to raise, namely, that modifications affecting international organizations were likely *a priori* to upset the balance established by the treaty. He did not see why a modification as between international organizations should upset the balance of the treaty or indeed affect the rights and obligations of the States parties to the treaty. It was perfectly possible to provide in a treaty for consultation and exchange of information as between the organizations, and for certain procedures that were in accordance with the wishes of those organizations. In that way, a change in procedure, although of importance to the international organizations, would not necessarily upset the balance of the treaty. It would be a much wiser approach to assume that international organizations would not act irresponsibly and that any question of modifying the object or purpose of the treaty would be dealt with in the same way as under the law of treaties generally.

10. With regard to Mr. Riphagen's comments concerning article 19 *bis*, there was to his mind a difference between reservations and modifications. A reservation was a unilateral act, whereas in article 41 the Commission was dealing with modification of a treaty by agreement between the parties concerned. He was therefore in favour of variant II, which followed the Vienna Convention[5] in that respect; however, if that variant were altered, the drafting of the preceding articles would have to be reconsidered.

11. Mr. TSURUOKA was prepared to join the majority if it opted for variant I, but he preferred variant II because it was more flexible, and flexibility was essential when a time element was involved. In fact, there was little difference between the two variants proposed. Nevertheless, variant II embodied fairly strict conditions, and it was for the parties to a multilateral treaty wishing to make modifications to it to ensure that those conditions were fulfilled. There was therefore little cause for apprehension that an agreement to modify a treaty as between certain parties would affect the other parties. In certain very special situations it might be necessary to introduce in a multilateral treaty, such as the Convention on the Privileges and Immunities of the United Nations,

[3] General Assembly resolution 3281 (XXIX).

[4] *Yearbook... 1977, vol.*I, p. 177, 1448th meeting, paras. 2-4.

[5] See 1507th meeting, foot-note 1.

modifications applicable to relations between certain parties to that treaty only. Such would be the case, for example, if staff members of the United Nations were to be sent to a State where the prevailing situation rendered the accomplishment of their mission particularly difficult.

12. Mr. SUCHARITKUL also preferred variant II, which was both simpler and more flexible than variant I. He saw nothing to prevent internatonal organizations from being assimilated to States in the matter of agreements to modify multilateral treaties between certain of the parties only.

13. Mr. REUTER (Special Rapporteur), reviewing the points raised during the discussion, noted first that paragraph 3 of variant I would have to be modified to cover the case to which Mr. Jagota and Mr. Francis had drawn his attention. Whichever way it was interpreted, that provision could lead only to an inconsistency or an omission. The case omitted was that where a multilateral treaty concluded between one or more States and two or more international organizations was modified as between two international organizations only. It was all the more necessary to provide for that case as it was mentioned in the commentary and there were specific examples of it. Sometimes, after a treaty had been concluded between several international organizations and a single State, more particularly for the purpose of rendering assistance to that State, two of those organizations would wish to rearrange among themselves their participation in such assistance or in its financing.

14. The choice between variants I and II might be governed by considerations of principle such as those set forth in paragraph (6) of the commentary to article 41 (A/CN.4/312). It was also possible, while preferring variant II, to maintain that it was better to follow variant I for reasons of logic and in order to remain consistent with positions adopted previously. A good number of the members of the Commission who had spoken on the question had favoured variant II, but in some cases had observed that account must nevertheless be taken of the approach adopted to a problem very similar to that of article 41, namely, the problem of reservations. One member had suggested combining paragraph 3 of variant I with variant II. Mr. Francis had emphasized that the approach adopted by the Commission in the case of reservations should bind it in respect of article 41; he had noted, however, that a reservation was unilateral in nature whereas modification of a treaty was bilateral or multilateral in nature. In that connexion, it should be pointed out that, although a reservation was indeed unilateral in origin, it nevertheless became conventional and bilateral, or multilateral, as soon as it was accepted. He hoped that the members of the Commission would reflect further on that problem and that the Drafting Committee would try to incorporate certain elements of variant I in variant II.

15. Mr. Ushakov's position (1508th meeting) was that variant II should be discarded, mainly for reasons of principle, and that only paragraphs 2 and 4 of variant I should be retained. Mr. Ushakov's proposal to delete paragraph 1 of variant I was apparently motivated by the rarity and specificity of multilateral treaties concluded between international organizations only; he was not, therefore, raising an objection of principle to that provision. It should, however, be pointed out in that connexion that, to the extent that there was a similarity between article 41 and the articles concerning reservations, the Commission could not ignore the existence of article 19, relating to the formulation of reservations in the case of treaties between several international organizations. However, that would seem to be a matter for the Drafting Committee.

16. Mr. Ushakov's proposal to delete paragraph 3 of variant I was doubtless based more on practical considerations than on considerations of principle. That provision introduced the condition that modifications might be made in a treaty only if it were so agreed between all parties to the treaty. Mr. Ushakov seemed to consider that that condition duplicated the content of article 40, relating to the amendment of multilateral treaties. The amendment procedure provided for in that article already required the consent of all the parties. To meet that objection, he would give a practical example, that of a treaty whereby a group of international organizations provided financial assistance to a group of States. After the conclusion of the treaty, two of those organizations decided that their relations with each other should be modified. Under paragraph 3 of variant I, and if the possibility of such modification were not provided for by the treaty, those two organizations would have to obtain the consent of all the parties to the treaty. That condition was expressed by the formula "if it is so agreed between all parties to the treaty", which could be applied to an agreement in a highly simplified form. Once that consent had been obtained, which might be an easy matter, the two organizations concerned could proceed to conclude an "agreement". Everything would then depend on the meaning given to the term "agreement", which appeared in article 39. If it were specified that it was an express agreement or a written agreement, the modification procedure could nevertheless be rapid. If, however, the Commission deleted paragraph 3 of variant I in the belief that the general amendment procedure of article 40 sufficed, the consent of each of the States and international organizations parties could be obtained only under a constitutional procedure, which in certain cases might be very lengthy. It followed that the practical reasons that Mr. Ushakov seemed to invoke were not really pertinent. In the circumstances, paragraph 3 was probably useful.

17. In conclusion, he suggested that the two variants of article 41 should be referred to the Drafting Committee for consideration in the light of the preference expressed by the majority of the members of the Commission for variant II and of the possibility of introducing in that variant some of the elements of variant I. The solution finally adopted would de-

pend in particular on the meaning attributed to the term "agreement".

18. Sir Francis VALLAT explained that the point he had been trying to make was that, as he saw it, there was a fundamental difference between the system of reservations and that of *inter se* modifications. Under the system applied in the Vienna Convention, which the Commission had adopted for its draft articles, a reservation might and, in principle, did operate against all the parties to a treaty, whereas an *inter se* modification by definition operated only as between the parties. He did not wish to elaborate on the matter, but it would be easy to show, by referring to the provisions on objections and non-objections and the effects thereof and on the unilateral withdrawal of reservations, how different the system adopted for reservations was from a system based essentially on agreement.

19. He had misinterpreted Mr. Riphagen's statement, thinking Mr. Riphagen had said that there was a certain similarity between the system of reservations and the system of *inter se* modifications. He now understood Mr. Riphagen's real point to have been that the rule stated in paragraph 2 of article 19 *bis* might be taken as a practical example of the kind of rule that might be included in article 41. Any decision on that point was naturally a matter for the Drafting Committee.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 41 to the Drafting Committee.

It was so agreed.

Draft articles proposed by the Drafting Committee

Articles 35, 36, 36 *bis*, 37 and 38, and article 2, para. 1 (*h*)

21. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee (A/CN.4/L.269), namely, articles 35, 36, 36 *bis*, 37 and 38, as well as paragraph 1 (*h*) of article 2.

22. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that articles 35, 36, 36 *bis*, 37 and 38 had been submitted by the Special Rapporteur in his sixth report,[6] and had been discussed and referred to the Drafting Committee by the Commission at its twenty-ninth session. Owing to its awareness of the delicate nature of the questions involved in those articles and a lack of time, the Drafting Committee had deferred consideration of those provisions until the current session. The five articles concerned were intended to complete part III, section 4, of the draft. In addition to those articles, document A/CN.4/L.269 contained definitions of two terms for inclusion in article 2 (Use of terms).

23. In dealing with the articles referred to it, the Drafting Committee had been concerned to meet the Commission's wish to undertake the codification of the law relating to treaties concluded between States and international organizations or between two or more international organizations in the spirit of the Vienna Convention and, in particular, to maintain, with respect to wording, both the precision and the flexibility of that instrument, while giving due consideration to the specific character of international organizations participating in treaties. To emphasize the parallelism which naturally existed between the Commission's draft articles and the Vienna Convention, the Committee had used the numbering of the articles of the Vienna Convention as far as possible and, in order to preserve the correspondence between the two sets of provisions, had given the article that had no counterpart in the Vienna Convention the number 36 *bis*.

24. Having regard to the fact that the title of part III, section 4, of the Commission's draft corresponded to that of the same section of the Vienna Convention and that that title and article 34, both of which the Commission had approved at its previous session, employed the term "third State", the Drafting Committee had decided to use throughout the section the expression "third States or third international organizations", rather than the expression "non-party States or international organizations", as proposed by the Special Rapporteur in his sixth report. The Committee offered definitions of the component parts of that expression in a subparagraph (*h*) that it proposed for inclusion in paragraph 1 of article 2, the text of which corresponded to that of paragraph 1 (*h*) of article 2 of the Vienna Convention.

25. The solutions proposed by the Drafting Committee generally reflected consensus. The Committee believed that its articles were as valid for international organizations as were those of the Vienna Convention for States. It was naturally very much aware that, with regard to the formal expression of consent, there were requirements arising from the need to protect the independence of States that were not necessarily applicable in the case of international organizations, where the governing concept was the performance of a function. In order to give expression to the distinction between third States and third international organizations, the Committee had decided to devote separate paragraphs, the substance of which had been contained in the articles submitted by the Special Rapporteur, to the rules concerning acceptance, assent or consent on the part of international organizations. In all those paragraphs, namely, paragraph 3 of articles 35 and 36 and paragraph 7 of article 37, subparagraph (*a*) of article 36 *bis* and paragraph 5 of article 37, the Committee had employed the term "rules of that organization", as defined by the Commission in article 2, paragraph 1 (*j*). In all the draft articles, the Committee had used the term "international organization" in the first reference to

[6] *Yearbook... 1977*, vol. II (part One), p. 119, doc. A/CN.4/298.

such a body in any given paragraph and the term "organization" alone in all subsequent references in the same paragraph.

26. With regard to the individual articles, the Drafting Committee had decided to revert in article 35 to the language of the Vienna Convention and to state in paragraph 3 of the article that a third international organization must signify its acceptance of an obligation "in writing". The Committee had considered that expression appropriate in the context of treaties providing for obligations for international organizations and preferable to the phrase "unambiguous manner" that had been used by the Special Rapporteur. However, in order to maintain the necessary distinction between third States and third international organizations, the Committee had decided to include in paragraph 2 the phrase "in the sphere of its activities". That phrase indicated that an obligation which, in the intention of the parties to a treaty, was to be assumed by an international organization, should not be unrelated to the functions of that organization. In the English text of article 35, the Committee had considered that the expression "shall be given", in paragraph 3, corresponded closely to the French phrase "doit être faite". In paragraph 1, the words "Without prejudice" had been replaced by the word "Subject", which was the expression that had been used in recent international conventions.

27. Subject to the changes he had already mentioned, the Drafting Committee had maintained the text of article 36 referred to it. However, in order to reflect the distinction between third States and third international organizations, it had decided not to provide expressly, in paragraph 2, for the presumption of assent in the absence of an indication to the contrary, which had appeared in the original text, and to refer in a new paragraph 3 to the relevant rules of the organization. The Committee believed that no reference to such a presumption was necessary in the case of third international organizations, since the text it now proposed did not preclude the possibility of the treaty's admitting that presumption if it was in accordance with the relevant rules of the organization. To preserve the parallelism between paragraphs 1 and 2 as far as possible, the Committee had introduced in paragraph 2 the words "or to a group of organizations to which it belongs, or to all organizations".

28. The Committee had decided to retain article 36 *bis*, in conformity with what it had regarded as the terms of the referral of the article to it by the Commission. However, one member of the Committee had reserved his position concerning the need for the inclusion in the draft articles of article 36 *bis* and the consequential references to that article in the other provisions. The article covered a situation that actually arose in practice. The Committee had nevertheless modified the text proposed by the Special Rapporteur, in order to convey more clearly and succinctly the meaning of the rules embodied in the article. To that end, it had combined the two paragraphs of the original text, while preserving in subparagraphs (*a*) and (*b*) of the new version the distinction between the two cases dealt with in paragraphs 1 and 2 of the Special Rapporteur's version. The new text emphasized in its title and introductory sentence that it related to the specific case of third States that were members of an international organization and the effects that arose for them from a treaty to which that organization was a party. The article was therefore in harmony with the remaining provisions of section 4. It should be noted that, as drafted, article 36 *bis* made no mention of express or implied acceptance of the rights and duties arising from the provisions of the treaty in question. It placed the emphasis on the duty of third States that were members of an international organization to observe the obligations that arose for them from the provisions of a treaty to which that organization was a party and left it to the States themselves to decide whether or not to exercise the rights that arose from such a treaty. In subparagraph (*a*), the reference to the "constituent instrument" of an international organization had been replaced by a reference to the "relevant rules of the organization", as the Commission had defined them. The Committee had also added the clarifying phrase "applicable at the moment of the conclusion of the treaty".

29. In the case of article 37, the Committee had basically retained the text referred to it. However, it had decided to align the paragraphs dealing with obligations and rights arising for third international organizations with those dealing with obligations and rights arising for third States. Paragraphs 5 and 6 of the article had been reworded to take account of the redrafting of article 36 *bis*.

30. The Committee had made no change in article 38, other than to replace the term "non-party" by the term "third". The refrence to articles 34 to 37 was intended as a reference to those articles alone and not as a generic reference. The text for article 38 proposed by the Committee did not prejudge the question how international organizations were bound by customary international law and it was certainly not intended to deal with the question how they contributed to the creation of such law.

ARTICLE 2 (Use of terms), PARA. 1 (*h*) ("third State", "third international organization")

31. The CHAIRMAN read out the text of paragraph 1 (*h*) of article 2 as proposed by the Drafting Committee:

Article 2. Use of terms

[1. For the purposes of the present articles:

...]

(*h*) "third State" or "third international organization" means a State or an international organization not a party to the treaty.

32. In the absence of objections, he would consider that the Commission agreed to adopt the text proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 12.55 p.m.