Document:-
A/CN.4/SR.1673

Summary record of the 1673rd 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:-
1981, vol. I

consider the possibility of preparing such a clause, and whose work would certainly make it easier for the Commission to adopt a decision later on.

63. Mr. REUTER pointed out that article 16 had been referred to the Drafting Committee even though everyone was aware that it gave rise to problems of substance rather than form. The same was true of article 18, and it could therefore be referred to the Drafting Committee, since experience tended to show that the work of that body was not confined to drafting problems.

64. Mr. JAGOTA said that, if article 18 was referred to the Drafting Committee without first being discussed by the Commission, the Drafting Committee would probably refer it back to the Commission. The article should therefore form the subject of further discussion by the Commission.

65. Mr. ALDRICH said that, as a new member of the Commission, he would certainly profit from a discussion of article 18.

66. Mr. BARBOZA said that, from the methodological point of view, it would obviously be better for the Commission to discuss article 18 and then refer it to the Drafting Committee.

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to continue its consideration of article 18 during the second half of its 1675th meeting, on Friday, 19 June.

It was so decided.

The meeting rose at 1.05 p.m.

1673rd MEETING

Wednesday, 17 June 1981, at 10.05 a.m.

Chairman: Mr. Robert Q. QUENTIN-BAXTER

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

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

[Item 3 of the agenda]

* Resumed from the 1652nd meeting.

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

ARTICLE 26 (*Pacta sunt servanda*)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 26, in section 1 (Observance of treaties) of Part III of the draft articles, entitled "Observance, application and interpretation of treaties". The article read:

***Article 26.* Pacta sunt servanda**

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

2. Mr. REUTER (Special Rapporteur) said that article 26, which was identical with article 26 of the Vienna Convention,[1] did not call for any special comment.

3. He proposed that the Commission should refer the title of Part III, that of section 1 and the text of article 26 to the Drafting Committee.

It was so decided.[2]

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

4. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

***Article 27.* Internal law of a State, rules of an international organization and observance of treaties**

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

5. Mr. REUTER (Special Rapporteur) recalled that the version of article 27 adopted on first reading was the result of a lengthy exchange of views in the Commission, which, moreover, had expressed its intention of examining the article carefully at the second reading. It had also been the subject of an important debate in the Sixth Committee and of written comments by Governments and international organizations, which on the whole had adopted a fairly favourable attitude towards the text approved on first reading, although some had considered that its provisions called for reconsideration.

[1] See 1644th meeting, footnote 3.

[2] For consideration of the article by the Drafting Committee, see 1692nd meeting, para. 46.

6. The German Democratic Republic, in particular, had considered (A/CN.4/399/Add.6) that the text adopted on first reading, accompanied by the Commission's comments,[3] left room for doubt and confusion. Moreover, the ILO had pointed out (A/CN.4/339) that article 27 might create difficulties not unrelated to those the Commission had been required to solve at its thirty-second session during its examination of draft article 73. He recalled the view adopted by the Commission at the time, that the text of article 73[4] should probably be linked to that of article 27. Apart from drafting matters, the latter provision in fact raised three series of questions.

7. One series of questions had arisen when, at the beginning of the current session, the Commission had considered article 2, paragraph 1, subparagraph (*j*), concerning the definition of "rules of the organization" (1644th and 1645th meetings). That expression had been specifically included in paragraph 2 of the text of article 27 adopted on first reading, and the Commission had wondered whether it might not be better to state which particular rules of the organization could not justify failure to perform the treaty. In his view, the expression "rules of the organization" meant the rules which the organization might invoke on the precise subject, that is to say, those concerning its competence to conclude a treaty. He recognized, however, that the wording of article 27 was an awkward one, in that paragraph 3 contained a reference to article 46,[5] which expressly reserved the right of an international organization, in the event of a manifest violation of a provision of its rules, to invoke those rules as invalidating its consent.

8. He thought it would be better to express that limitation as soon as possible, for there was no doubt that an international organization could invoke the rules governing its competence to conclude treaties if a treaty was concluded in conditions manifestly contrary to those rules. The Yugoslav Government had approved the use of the expression "rules of the organization" in its written comments and observations (A/CN.4/339/Add.2) and he noted that a more logical wording of article 27 would meet the criticism expressed by the German Democratic Republic, since it was quite understood that nothing in that article deprived an international organization of the possibility of ensuring observance of the rules governing its competence to conclude treaties.

9. The second series of questions had to do with the fact that, on first reading, the Commission had introduced, in the second part of paragraph 2, an exception to the non-applicability of the internal rules of an international organization in respect of refusal to perform a treaty, as expressed by the formula "unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization".

10. In fact, that expression envisaged an extremely important case, which, moreover, was illustrated in United Nations practice. The Security Council, by a resolution adopted in virtue of its powers of prohibiting aggression and maintaining peaceful relations, could, for example, order a cease-fire along a given front line, entailing the maintenance of certain armed forces in certain places. For the implementation of its resolution, the Council could authorize the Secretary-General of the United Nations to conclude, on behalf of the Organization, an agreement which, on the basis of the cease-fire, introduced certain practical rules to the effect that, at a given time, national armed forces should be maintained on a particular territory.

11. Such an implementing agreement was entirely subject to the functions and powers of the Council. It was inadmissible that the agreement between an international organization and a State should have an autonomous value. Under no circumstances could it deprive the Security Council of its prerogative to exercise its functions and possibly to review its decision. The situation could be compared with that found in the internal law of all countries, in which a legal text of a particular standing, the law, could clearly not provide for everything, and the executive branch was thus inevitably empowered to issue rules, orders or decrees whose purpose was to enable the law to be implemented in a specific set of circumstances. In that context, however, the legislative Power was never paralysed by the fact that the Executive had issued the executing instruments, and if the legislators decided to change the law, those subordinate texts disappeared.

12. Similarly, article 27 provided for the case where instruments concluded by an international organization had merely an implementing function and were therefore of lesser standing. That was by no means a theoretical case, as was shown by the fact that, in practice, the Security Council specified short periods for the performance of executing instruments, as a systematic means of affirming its power to change its decisions.

13. For the rest, paragraph 2 of article 27 had not given rise to any substantive criticism.

14. The last series of problems raised by that provision were the most complex. When the Commission had adopted the article on first reading, it had done so without enthusiasm, but nevertheless, it had not clearly indicated that the exception mentioned in paragraph 2 was not enough and that there were also other exceptions. That problem had cropped up again later, when the Commission had examined article 73, which expressly reserved certain questions the Commission did not intend to examine, having decided to limit its work to the framework provided by article 73 of the Vienna Convention.

[3] See *Yearbook ... 1977*, vol. II (Part Two), pp. 118 *et seq.*

[4] See 1647th meeting, footnote 1.

[5] *Ibid.*

15. In considering draft article 73 at the first reading, the Commission had noted that cases of the transformation of international organizations might create some definite difficulties. In matters pertaining to the succession of States, international law was, in fact, trying to settle the problem of the continuity and identity of the State. Just like a State, an international organization could cease to exist, and it was important to know what would become of the treaties concluded by it. Moreover, an organization which disappeared generally left some debts behind it, for instance, debts owed to its agents. Another case was that of an organization which lost a number of members. Thus, cases had been known in practice where an international organization had, for example, lost a member State which had played a fundamental role in that organization by reason of its particular importance. It was permissible to wonder whether, in such a case, the organization remained the same. There were also international organizations—set up, in particular, to perform an operational function—which had a very limited number of members but had the capacity to conclude international agreements. There again, the question arose of what would become of such an organization if, for example, it lost two of its three members.

16. The Commission had nevertheless decided not to consider the problem of the changed identity of an international organization and that decision might lead it to extend the scope of the reservations expressed in article 73.

17. The general case envisaged by article 27 was that where an international organization had concluded a treaty valid at the time of its conclusion. The organization could, however, evolve, and its rules could be modified in the course of time. The Commission had to decide whether it would accept that an international organization could legitimately change its rules to the point where, perhaps, it was impossible for it to perform a treaty.

18. Although he considered such problems to be outside the Commission's field of study, it was necessary to distinguish between two types of situation. First, an international organization could conclude a valid treaty and then, by measures in conformity with the rules of the organization and without affecting its constituent instruments, render itself incapable of performing the treaty. The problem was then one of the responsibility of the international organization. In his own view, however, it was inadmissible that States acting collectively could release themselves *ad nutum* from the obligations, presumably valid, contracted by them. The consequences of such conduct raised the question of their responsibility. Furthermore, it would be advisable to recognize, in principle, that no international organization that concluded a treaty did so with the reservation that the treaty was concluded on the basis of a potestative clause unless that fact was expressly mentioned. The adoption of any other solution would be tantamount to rendering meaningless the rule of *pacta sunt servanda* set forth in article 26.

19. Another situation was that in which the constituent instrument of an international organization was overthrown, thereby creating the problem of continuity between the organization which had concluded the international agreement and the one required to perform it. He did not think that the Commission should consider that problem either, the consequences of which were particularly complex.

20. Finally, he thought that the Commission should take certain precautions in connection with article 27 and, consequently, should reserve the effects of draft articles 46 and 73. He had therefore suggested (A/CN.4/341 and Add.1, para. 88) that article 27 should be supplemented by deleting paragraph 3 from the text adopted at the first reading and inserting the reference to article 46 in both the other two paragraphs, in view of its capital importance. Paragraph 1, concerning the case of a State party, would then read:

> "1. Without prejudice to article 46, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty."

Paragraph 2, concerning the case of an international organization, would henceforth include a reference to draft articles 46 and 73 and would read:

> "2. Without prejudice to articles 46 and 73, an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization."

21. Mr. USHAKOV noted that paragraph 1 of article 27, concerning States, was in conformity with article 27 of the Vienna Convention, which expressly referred to article 46 of that same instrument and thus clearly removed the case of invalidation of consent from the context of failure to perform the treaty, since the latter was then null and void.

22. Paragraph 2 of article 27, as adopted by the Commission on first reading, proposed a similar solution for international organizations, and it would seem preferable to adhere to that approach and retain the wording of paragraph 3, which was satisfactory. However, he did not exclude the possibility of following the pattern of article 27 of the Vienna Convention by referring to article 46 in each paragraph.

23. On the other hand, to mention article 73 in paragraph 2, as the Special Rapporteur had just proposed, would not serve any useful purpose since, unlike article 46, which proclaimed a rule on the invalidity of treaties, that provision was merely a saving clause invoking other areas of international law. An express reference to article 73 would therefore not

resolve the difficulties pointed out by the Special Rapporteur.

24. The rules of the internal law of a State concerned with its competence to conclude treaties could be modified in exactly the same way as the rules of an organization. Indeed, even the political nature of a State could be modified by certain legislation or by certain expressions of popular suffrage. Accordingly, if it were accepted that such events changed the obligations of States, a similar solution would have to be accepted for international organizations. While he welcomed the fact that those problems had been raised by the Special Rapporteur, he noted that the Vienna Convention had expressly excluded them from its scope, and they should therefore be similarly excluded from the scope of the current draft articles, in view of the fact that they fell outside the framework of the law of treaties.

25. With regard to the difficulties peculiar to international organizations, it should be remembered that a sovereign State was supposed to be master of its internal law and that, if it concluded a treaty which did not fully correspond with that law, it was free to change the content of its internal law, since it possessed inherently both legislative and executive power. The situation of international organizations was entirely different. In principle, such an organization could undoubtedly modify its statutes or its constituent instruments, but it could not assume international commitments which would oblige it to modify its statutes, for such a modification was a matter for its members under the organization's rules. Accordingly, an international organization could not, in principle, act contrary to its constituent instruments and assume commitments inconsistent with them. The draft articles should therefore include a provision to the effect that an organization was entitled not to perform obligations incompatible with its constituent instruments.

26. An apparent contradiction might nevertheless persist, in that draft article 2 contained a general definition of the expression "rules of the organization", to which article 27 then purported to attribute a particular meaning. In his view, the concept of the constituent instrument was not sufficiently precise for the Commission to be able to use it. It would be preferable to determine which rules of the organization were applicable to each specific case, rather than include a general definition of them in the draft. Also, he did not see how the particular meaning to be attributed to that concept could possibly be defined in paragraph 2 of article 27, or how possible exceptions to the rule in question could be indicated in that paragraph. The provision was a legitimate one, but it would have to be interpreted according to the requirements of each specific case.

27. Referring to the necessity of drafting rules as precisely as possible, he noted that the expression "party to a treaty" overlooked the distinction—to his mind essential—between the two categories of treaties envisaged by the draft articles, which inevitably raised problems of a distinct nature. He hoped that the Special Rapporteur would explore the possibility of dealing with the two cases in paragraph 2.

28. He would also welcome a clarification of the meaning of the words "according to the intention of the parties", for he doubted whether an international organization party to a treaty could have any intention other than that of subjecting the performance of the treaty to the exercise of its functions and powers. Consequently, all that could be meant there was the intention of a State party, and the question arose whether that intention should be expressed in the treaty or deduced from the content of the preparatory work, for example. He feared that a solution of the type adopted on first reading would appear to give an international organization the option of overriding its own constituent instruments, which was out of the question. Moreover, the expression "according to the intention of the parties" would be dangerous in the case of treaties concluded between one or more international organizations and one or more member States of the organization, and seemed absolutely unjustifiable in the case of treaties concluded between international organizations.

29. Mr. CALLE Y CALLE observed that draft article 27 was one of the two draft articles forming Section 1 of Part III of the draft. The other draft article, article 26, laid down the fundamental rule of international law *pacta sunt servanda*, which applied equally to States and international organizations. Article 27, which was the complement to article 26, provided in paragraph 1 that a State could not invoke the provisions of its internal law as justification for its failure to perform a treaty and, in paragraph 2, that in general an international organization could not invoke the rules of the organization for the same purpose.

30. Article 46 provided for a single exception to those two rules, and that exception applied to States and international organizations alike. Under the terms of article 46, a State could invoke a provision of its internal law to invalidate its consent to be bound by a treaty provided that the provision in question related to its competence to conclude treaties, that the provision was one of fundamental importance, and that the violation of the provision was manifest. In the case of international organizations, a provision of the rules of the organization relating to its competence to conclude treaties could not be invoked unless the violation was manifest. In his view, however, such a provision should also be of fundamental importance, since there might well be other rules of lesser importance—for instance, providing for publication of the text of the rules in the official journal of the organization.

31. The commentary to the articles should indicate, therefore, that the rules of an international organization relating to its competence to conclude treaties fell into two categories—rules of fundamental impor-

tance and rules of secondary importance—and that only violation of the former would provide the organization with grounds for invalidating its consent.

32. Article 27 made a very broad reference to the rules of an international organization, which was entirely appropriate in the context. The Special Rapporteur had suggested that it might be possible to use the phrase "rules of an organization other than those concerning the conclusion of treaties" (A/CN.4/341 and Add.1, para. 86). Those rules, however, in so far as they concerned the conclusion of treaties, were already covered by article 46, which was the sole exception allowable to article 27.

33. Another question was what would happen if the rules of the international organization which concluded the treaty were subsequently amended. A comment submitted by the ILO, and referred to in the report of the Special Rapporteur (*ibid.*, para. 87), suggested that, if the rules were amended after the treaty had been concluded, the effect would be to modify the treaty obligations without the consent of the interested parties. His own view was that if, as the consequence of amendment to the rules of an organization, new obligations arose for States, those obligations, being of an organizational character, could not prevail over the obligations laid down in a treaty into which the organization, acting collectively, had entered. In the event of any conflict between the obligations under the treaty and the subsequent obligations that arose for the international organization, the former must prevail. In such a case, the organization would have to find a way of denouncing the treaty and of concluding a new treaty with the same contracting parties which was in keeping with the amendments made to the rules of the organization.

34. Paragraph 2 of article 27 provided for a further special exception in the case of international organizations. Whereas an organization had to act in accordance with its aims and objectives, a different situation arose in the case of a treaty whose aims and objectives were expressly made subject to the functions and powers of the organization. That exception should be formulated in very precise terms. He agreed with Mr. Ushakov that to refer to the intention of the parties might not be sufficient, and might even be dangerous. To use the words "subject to the exercise of the functions and powers of the organization" could imply that the object of the treaty was in fact the exercise of such functions and powers. It would therefore be clearer to say "subject to the powers and functions of the organization".

35. Lastly, while he agreed that the reservation in article 73 was a saving clause, he considered that article 46 laid down a clear exception to cases where the provisions of the internal law of a State or of the rules of an organization could be invoked to invalidate consent to be bound by a treaty.

36. Mr. JAGOTA said that the substance of article 27 as drafted and approved on first reading and as proposed by the Special Rapporteur in paragraph 88 of his report was the same. Paragraph 1 simply repeated the parallel provision of the Vienna Convention and presented no difficulty. With regard to paragraph 2, however, which dealt with the position of international organizations, two points had been raised. The first was whether a reference to article 73 as well as to article 46 should be included. In his view, it should not, since article 73 did not protect any particular provision and a reference to it would add nothing. The second point was whether, if a reference to article 46 only was to be included, paragraphs 1 and 2 of article 27 should be redrafted as proposed by the Special Rapporteur or whether the formula adopted in the Vienna Convention should be followed. His view was that the latter would be the neater solution.

37. Speaking on the substance of paragraph 2, Mr. Ushakov had drawn a distinction between two types of treaty: a treaty between a State and an international organization, and a treaty between one international organization and another international organization. For his own part, however, he thought that the question was not so much one of a qualitative distinction between two types of treaties as of interpretation, and specifically of the phrase "the exercise of the functions and powers of the organization". Once the ambit and implications of that phrase were clear, the Commission would be nearing agreement on the point.

38. The basic rule as laid down in article 26 was that, once a valid treaty had been concluded, it must be performed in good faith. Article 27, which to a certain extent qualified article 26, was couched in negative terms: a treaty, as defined in article 1 of the Vienna Convention and also in draft article 2, subparagraph 1 (*a*),[6] was governed by international law and, that being so, a party to it could not invoke its internal law to evade its obligations under that treaty. Internal law might have relevance for the purpose of concluding or implementing the treaty, but, so far as its validity was concerned, a party to it could not evade its obligations by changing or invoking internal law. Internal law had to be brought into line with treaty law and, in cases of inconsistency, the latter would prevail. It was an extremely sensitive issue and one that arose frequently in practice. The one exception was if the treaty itself was invalid which, under article 46, it might be if, for instance, it had been concluded by a person who was not competent under internal law to bind the State and if a violation of the internal law was manifest.

39. The "rules of the organization" were defined in draft article 2, subparagraph 1 (*j*) to include the established practice of the organization, and that could also give rise to problems of interpretation. That was because the effect of article 46, given the terms of draft article 6[7] and of draft article 7, paragraphs 3 and 4,[8] was that a treaty would be invalid if it was signed by

[6] For text, see 1644th meeting, para. 29.

[7] *Idem*, 1646th meeting, para. 36.

[8] *Idem*, para. 47.

anyone who was not competent to do so under the rules of the organization. Moreover, the violation of those rules had to be manifest; in other words, it had to be within the cognizance of both parties: the other party had to know that the party signing was not competent.

40. An international organization could, moreover, invoke its rules to challenge the validity of a treaty only if, at the time when the treaty had been signed, the rules did not empower the organization to conclude such a treaty, in which case the matter would come under article 46. If, on the other hand, the treaty had been validly signed, and the organization had been empowered by its rules to conclude such a treaty, then paragraph 2 of article 27 would apply. The question which then arose was whether the organization could invoke its internal rules in a case where, although it had signed the treaty, it was unable to perform it. Again, the provision was couched in negative terms. The difficulty was that paragraph 2 incorporated an exception and it was the interpretation of that exception that was at issue. In his view, the phrase "subject to the exercise of the function and powers of the organization" did not mean that the organization in question could adopt new rules that were inconsistent with its treaty obligations since, in any event, the latter would prevail. If, however, the phrase was interpreted as referring to methods of implementing treaty obligations, there should be no difficulty.

41. Mr. ALDRICH said that he often failed to understand why a distinction was drawn between international organizations and States. His initial reaction had been that there might be some justification for having two different rules in view of the exception in the case of international organizations incorporated in paragraph 2 of article 27, but the more he listened to the discussion the less certain he was that there really was any difference. If a treaty involving an international organization provided that the organization could modify a requirement under the treaty by a decision of its organs, that might appear as if the organization was citing its own internal rules as an excuse for non-compliance, but in fact there was no question of non-compliance, since that was the intent of the treaty. Such cases could occur not infrequently in practice, since international organizations often provided the forum in which States worked out policy arrangements. It was easy to conceive of a case where the parties to the treaty would in effect permit the treaty to be amended as a consequence of a decision by one party to it, if that party was an international organization whose functions included decisions on issues of that kind. On that basis, therefore, it seemed to him that the provision was an unnecessary one, and he was inclined to revert to his earlier position, namely, that there was no difference between the right of a State to cite internal law and of an international organization to cite internal rules as a justification for non-performance.

42. He would have thought it was hardly necessary to make a cross-reference to article 46, since article 27 dealt with the justification for non-performance and article 46 with questions of invalidity. Consequently the two articles were not inconsistent. It might, however, be desirable for reasons of clarity to have such a cross-reference and, since there was one in the Vienna Convention, he would not object to its inclusion in the draft. He saw no real value, however, in having a cross-reference to article 73: it was a saving clause and therefore no such reference was needed to render it effective.

The meeting rose at 12.55 p.m.

1674th MEETING

Thursday, 18 June 1981, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta.

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

[Item 3 of the agenda]

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

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties[1] (*concluded*)

1. Mr. PINTO said that the basic meaning of paragraph 1 of article 27 seemed to be that a State might not cite its internal law as an excuse for failure to perform a treaty obligation. By contrast, paragraph 2 seemed to say that an international organization might cite its rules, including its charter, relevant decisions and resolutions, and established practice, as an excuse for failure to perform a treaty obligation. It could only do so, however, when all the other parties to the treaty intended, in the sense of understanding and agreeing, that that would be the case. In other words, a plea that the organization's rules would excuse non-performance would succeed only if it had been recognized and agreed at the outset that that was one of the "rules of the game".

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[1] For text, see 1673rd meeting, para. 4.