Document:-

A/CN.4/SR.1796

Summary record of the 1796th meeting

Topic:

Status, privileges and immunities of international organizations, their officials, experts, etc.

Extract from the Yearbook of the International Law Commission:-

1983, vol. I

also to take a decision on the final form of the draft articles on most-favoured-nation clauses.

25. The increase in the membership of the Commission by decision of the General Assembly in 1981 was an inevitable consequence of the increase in the membership of the General Assembly itself in the wake of the decolonization process. That transformation in the membership of the Organization had been accompanied, *inter alia*, by insistent appeals from developing countries for reforms in the international economic, financial and trading relationships between developed and developing countries. The Commission, being a microcosm of the General Assembly, would from time to time have to deal with the legal aspects of such relevant issues arising within the United Nations system with a view to readjusting the international economic and social order. In that connection, he noted that articles 23, 24 and 30 of the draft on most-favoured-nation clauses[5] contained provisions of particular interest to developing countries. The Commission would inevitably be expected to respond to difficult issues and it was well equipped to deal with such contingencies, not only because of its expertise, but also because its members, who served in their individual capacities, formed a close-knit fraternity and because those from developed countries were aware of the problems of the developing world and were willing to help find solutions to those problems. There were thus excellent prospects for continuing good relations among the members of the Commission and for the progressive development of international law in the interests of third world countries.

26. In discharging its functions, the Commission was fortunate to have the services and assistance of a small number of highly skilled, competent and devoted staff members from the Codification Division of the Office of Legal Affairs. He took the opportunity to thank the Secretary-General for that assistance, which had over the years become an integral part of the Commission's work, and to express the hope that, in future, such assistance would not only be maintained, but would also be expanded in response to the Commission's needs at any given time.

27. The Secretary-General's visit to the Commission was of great significance, for as the chief administrator of the Secretariat and the chief executive of the United Nations system, he could be compared to a military commander-in-chief visiting his forces abroad to offer them encouragement in the battle in which they were engaged. Although the Commission was not engaged in battle, it did have a difficult task ahead of it and the Secretary-General's presence would offer it the encouragement it needed to continue to work for the codification and progressive development of international law.

28. He invited the Secretary-General to meet the members of the Commission.

The meeting rose at 12.45 p.m.

[5] *Yearbook . . . 1978*, vol. II (Part Two), pp. 59–68 and 72–73.

1796th MEETING

Monday, 4 July 1983, at 4 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (A/CN.4/370[1])

[Agenda item 7]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that his main purpose in submitting his preliminary report (A/CN.4/370) was to elicit the views of the members of the Commission and, in particular, of the new members on the topic under consideration.

2. Everyone was aware of the problems raised by the second part of the topic of relations between States and international organizations, namely "the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States". The laws and regulations in force in a particular State could, for example, hamper the activities of international organizations. In order to give international organizations full freedom of action to perform the functions assigned to them by the international community, States which agreed to the establishment of such organizations in their territory had to give up part of their sovereignty. In that way, the States members of an international organization were assured of equal treatment.

3. Referring, in 1955, to the legal status of the various international organizations which had their headquarters in Switzerland, the Swiss Federal Council had informed the Federal Assembly of the Confederation that:

> Under international law, an international organization which is established on the basis of a treaty between States enjoys a number of privileges within the State in which it has its headquarters; according to custom, it concludes with that State an agreement stipulating the modalities of such privileges. An organization whose members are States cannot be subject to all the provisions of the internal law of the State where its main or secondary headquarters is located. Otherwise, the State would be able to interfere, either directly or indirectly, in the organization's activities. The honour of having an international organization established in its territory naturally involves an obligation, which

[1] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

is provided for in the law of nations, to enable the organization to carry out its activities as independently as possible.[2]

Of course, not all States in whose territory international organizations had been established had adopted such a flexible approach. For example, the Headquarters agreement concluded by the United Nations and the United States of America[3] was much more limited and did not even refer to the privileges and immunities of the Organization, which had formed the subject of a separate instrument.

4. The age-old principle *ne impediatur legatio*, which justified the privileges of diplomatic missions, had in the case of international organizations become the principle *ne impediatur officia*, a concept which could give rise to serious objections. It did not, for example, explain why international officials should, for the purpose of the exercise of their functions, be exempt from taxes. In view of their high salaries, it was not immediately clear how they might be hampered in the exercise of their functions by having to pay taxes. That was why the granting of privileges and immunities to international organizations and their officials should be based on the equality of States. If a State derived certain advantages from the establishment of an international organization in its territory, it had, out of fairness to other States, to grant privileges and immunities to the organization in question.

5. The granting of privileges and immunities was, moreover, no longer a courtesy, as it had been in the past. It was based on a sound legal instrument and constituted a right. Each State which authorized the establishment of an international organization in its territory and wanted that organization to function as effectively as possible was bound to grant it the facilities necessary for the fulfilment of its purposes, including privileges and immunities.

6. Unlike other treaties, conventions on the privileges and immunities of international organizations and headquarters agreements did not require signature, but simply accession by States and entered into force on their adoption by the General Assembly. Those agreements, which did not contain any provisions relating to denunciation, were intended for the sole benefit of international organizations, in that they established the rights of organizations while stipulating the obligations of States.

7. Referring to the question of the exact nature of the task entrusted to him and to the question of priority, he said that the Commission had to decide whether it should deal only with international organizations of a universal character or with regional organizations as well. In that connection, he recalled that the Commission had agreed to consider the status, privileges and immunities of regional organizations, without taking any final decision on whether they should be included in the draft articles.[4]

Lastly, he noted that, since he had proceeded with caution, his report was far from complete; but before going any further he had wanted to consult the new members of the Commission.

8. Mr. FLITAN, thanking the Special Rapporteur for the importance he attached to the presence of new members in the Commission, said that he agreed with those members who had expressed the view at earlier sessions that the topic was now ripe for codification. A fifth convention, supplementing the rules of diplomatic law that had already been codified, would thus take its place alongside the four other multilateral conventions.[5]

9. For the reasons given by the Secretary-General at the preceding meeting, attention should be drawn to the crucial importance of the role played by international organizations in the contemporary world. As the discussion at earlier sessions, the preliminary report (A/CN.4/370) and the oral introduction showed, the Special Rapporteur's task would not be an easy one. Practice that would be useful to the Special Rapporteur had developed over the years as a result of the proliferation of international organizations. In that connection, he agreed with those members of the Commission who, at the thirtieth session, had expressed the view that the Special Rapporteur should be given full freedom of action, without undue restrictions.[6]

10. The Special Rapporteur should take as a starting-point the headquarters agreements of international organizations, which would serve as a basis for any instrument relating to the topic under consideration. The reports by the previous Special Rapporteur, Mr. El-Erian,[7] and the abundant documentation compiled by the Secretariat[8] should also be taken into account.

11. The Commission had been right to decide that the rules concerning the status, privileges and immunities of regional organizations should be considered.[9] Nevertheless, the reservations with regard to the codification of those rules should be maintained. Important though regional organizations were, the Commission could not, at the current stage, embark on the codification of the rules that applied to them, but must wait until practice had developed further.

12. In conducting the proposed study, the Commission should follow the order of priority indicated in the title of the topic and the Special Rapporteur should begin by considering the willingness of host States to conclude headquarters agreements with international organizations, with all the resulting consequences which that entailed. To that end, the Special Rapporteur should

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[2] Switzerland, *Feuille fédérale* (Berne), 107th year, vol. II, No. 35 (2 September 1955), p. 389.

[3] United Nations, *Treaty Series*, vol. 11, p. 11.

[4] Decision taken by the Commission on the basis of the recommendation made by the previous Special Rapporteur in his second report: *Yearbook . . . 1978*, vol. II (Part One), p. 284, document A/CN.4/311 and Add.1, para. 122.

[5] 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

[6] *Yearbook . . . 1978*, vol. I, 1523rd meeting, p. 266, para. 18 (Mr. Sucharitkul), and p. 267, para. 29 (Mr. Dadzie).

[7] See 1797th meeting, footnotes 4 and 5.

[8] *Ibid.*, footnote 3.

[9] See footnote 4 above.

strike a balance between the status, privileges and immunities of international organizations and the sovereignty of host States.

13. Although it had been proposed at the Commission's twenty-ninth session that the draft articles should take the form of an additional protocol to the 1975 Vienna Convention on the Representation of States,[10] he was of the opinion that they should take the form of an international convention. An additional protocol would not take account of all the available information on the topic. At its preceding session, the Commission had, moreover, completed the draft articles on the law of treaties between States and international organizations or between international organizations,[11] which were to become an international convention. It was not clear, therefore, whether there should be an additional protocol to the 1975 Vienna Convention or to that future convention. There would be a gap of more than 10 years between the conclusion of the 1975 Vienna Convention and that of the future instrument on the first part of the topic under consideration. For the time being, therefore, the Special Rapporteur should take no account of the protocol option.

14. As to methodology, the Special Rapporteur should constantly bear in mind Articles 104 and 105 of the Charter, which formed the basis for the status, privileges and immunities of the United Nations and of many other international organizations of a general nature. The Special Rapporteur should also bear in mind that the rules to be formulated, in particular those that would apply to regional organizations, should be very flexible and that host States should be able to derogate from them easily by express provisions. The draft articles to be formulated should also constitute the minimum standard for the privileges and immunities which international organizations and their officials required in order to exercise their functions. Host States should be able to derogate from those rules in order to grant international organizations broader legal status and more extensive privileges and immunities.

15. Mr. SUCHARITKUL, expressing appreciation for the Special Rapporteur's practical approach, said that the concept of an international organization was a difficult one to assess, even discounting such matters as relations between international organizations themselves and the succession of international organizations, as in the case of the Permanent Court of International Justice and the International Court of Justice. The Commission had therefore decided to deal initially with intergovernmental organizations in the strict sense of the term and to exclude non-governmental organizations such as ICRC and certain national committees, even though the activities of such committees were international in the sense that they rendered or distributed aid to developing countries.

16. Furthermore, relationships beween international organizations and States varied according to whether a State was a member of the organization in question or a non-member having observer status. There was also an infinite variety of intergovernmental organizations, which differed in terms of their nature, size and sphere of influence. The United Nations was of a very special character in that many other subsidiary bodies, such as the Economic Commissions for Africa, Asia and Latin America, had emerged from it. The United Nations also had a number of principal organs, such as the Economic and Social Council, which itself enjoyed special relations with a large number of non-governmental organizations. In addition, the United Nations family included specialized agencies. It therefore had to be decided whether all those organizations and agencies were to be treated in the same way as other, smaller intergovernmental organizations. The powers of international organizations varied according to their functions, which depended on their sphere of competence, whether medicine, telecommunications or some other field of technology, and consequently their requirements in terms of privileges and immunities might not be identical. For that reason, he fully agreed with the Special Rapporteur that the Commission should adopt a cautious approach to the topic and carefully examine all the materials available to it.

17. What were those source materials? In his view, the first one was the charter or constituent instrument setting forth the functions of the international organization concerned. It had to be recognized, however, that not all organizations were brought into being by such an instrument; in practical terms, many of them operated under powers that were renewable from year to year. That, however, was the result of the constant growth that was particularly apparent in Africa, Asia and Latin America.

18. In view of the unique position occupied by a host country, it would be of little use to draft an international convention that would be signed by most countries but not by the host country concerned. What was essential was to secure recognition of the status of organizations of a universal character, such as the United Nations, and to settle the question of the immunities and privileges to be enjoyed by such an organization in the host country. Accordingly, another kind of instrument requiring consideration was the headquarters agreement; in that respect, the Special Rapporteur would have a great deal of material at his disposal, including the headquarters agreements not only of the United Nations and its specialized agencies, but of many other smaller organizations as well. He should also find municipal legislation particularly instructive, since most of the headquarters agreements with specialized agencies had been incorporated into the internal law of the States where the headquarters in question were located. In that connection, it should be noted that there were a number of international organizations that were not so styled, since they were referred to, for instance, as associations, committees, centres or banks. Such organizations could not, however, elude their intergovernmental character if their membership or constituent instrument attested to it.

19. As to points of substance requiring consideration,

[10] See *Yearbook . . . 1978*, vol. II (Part One), p. 271, document A/CN.4/311 and Add.1, paras. 59 and 61 (summaries of the views of Mr. Sette Câmara and Mr. Calle y Calle).

[11] *Yearbook . . . 1982*, vol. II (Part Two), pp. 17 *et seq.*, para. 63.

he said that the question of legal status was of paramount importance. Some organizations did not emerge with ready-made legal personality, although account must of course be taken of the exact meaning of the term "legal personality" in the internal law of the State concerned. For instance, treaties concluded by an economic and social commission of the United Nations were concluded in the name of the United Nations and, under the internal law of the host country, that commission had legal capacity only to conclude contracts. The Special Rapporteur would therefore have many problems to face involving the interplay between public international law and internal law, although in the final analysis it was internal law that would govern, since whether or not a specific immunity was recognized was a matter for the authorities of the country concerned to decide.

20. One further point concerned the tendency to accord more favourable treatment to smaller international organizations than to larger ones, possibly because of closer rapport among the members of the former. Uniformity, however, could not be achieved immediately. The question of privileges and immunities, though basically a matter of reciprocity, was founded in the case of international organizations on functional necessity and was thus limited in scope by the purposes of the organization concerned. To that extent, the immunities and privileges that were conferred upon international officials were enjoyed for the benefit of the organization concerned and could be waived by that organization. International organizations, for their part, wished to achieve as high a degree of standardization as possible; but host countries sought to limit the privileges and immunities of those organizations to the minimum necessary for the effective performance of their functions.

21. Mr. YANKOV said it was encouraging that the Commission was now resuming its consideration of the second part of the topic of relations between States and international organizations. Its study would be yet another contribution to the law of international organizations and to diplomatic law in general. It was obvious that the present topic had its basis in two interrelated fields, namely modern diplomatic law and multilateral institutionalized diplomacy, in which international organizations played an active role. Those two aspects of the topic should be considered in the light both of traditional law and of modern international law, which was particularly relevant to the techniques used for the exercise of the functions of international organizations.

22. In 1977 and 1978, the Commission had discussed matters such as the scope, status and legal nature of the draft articles to be prepared. At present, its main objective should be to define its future course of action. Although the Special Rapporteur's preliminary report (A/CN.4/370) was concise, it raised many delicate questions. Paragraph 9 alone referred to eight difficult questions with which the Commission would have to deal at some stage in its work. Obviously, no clear-cut answers could be given to those questions now.

23. The three questions to which particular attention should be paid were, in his view, the scope of the topic, the methodology to be used and the structure and legal nature of the draft articles. He had doubts about some of the questions mentioned by the Special Rapporteur in paragraph 9 of the report and, in particular, about the "responsibility of States to ensure respect by their nationals of their obligations as international officials". In that connection, he drew attention to Article 100, paragraph 1, of the Charter of the United Nations, which read: "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. . . ." It was important to avoid anything which might detract from the independence of international organizations.

24. The question of scope arose both *ratione personae* and *ratione materiae*. The first aspect concerned the range of organizations to be covered in the draft articles, while the second related to the subject-matter to be covered. The Special Rapporteur had been right to stress the increasing role of multilateral institutionalized diplomacy, which involved the creation of permanent organs, thereby giving rise to the need for a relatively stable régime. Traditional diplomatic law was inter-State law that governed relations between States. It was therefore necessary to examine the rules of customary and conventional diplomatic law and to see to what extent they had to be adapted or modified to meet the needs of international organizations.

25. Neither the Special Rapporteur nor the Commission should lose sight of the fact that States were both actors in international relations and members of international organizations. Those two roles did, of course, have features in common. For example, both States and international organizations acted through their officials, for whom the host State had to provide legal protection. Exceptions from the application of internal law would have to be made and the relationship between the legal capacity of the organization and local jurisdiction would have to be defined. Consideration should also be given to the special or favourable treatment to be granted to international organizations in respect of such matters as inviolability of premises and property and immunities of various kinds.

26. An important point to be borne in mind was that, in traditional diplomatic relations, the relationship between host States and sending States involved an element of reciprocity, which functioned very effectively. In the case of relations between a State and an international organization, however, the reciprocity element was absent. Whereas the relationship between a sending State and a receiving State was a bilateral one, diplomatic relations with international organizations were tripartite, since they involved a sending State, an international organization and a host State.

27. The legal capacity of an international organization differed from that of a State. It was determined by the organization's constituent instrument, whereas the legal capacity of a State was derived from its sovereignty. For example, Article 104 of the Charter of the United Nations provided that: "The Organization shall enjoy in the

territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." Article 105 referred to the privileges and immunities of the Organization, of the representatives of its Members and of its officials. The legal capacity of an international organization was usually limited to capacity to conclude treaties, to acquire movable and immovable property, to institute legal proceedings and to perform any functions within its competence, as defined in its constituent instrument.

28. Article 105 of the Charter of the United Nations made it clear that the privileges and immunities of the Organization and its officials were those "necessary for the fulfilment" of the purposes of the Organization and "necessary for the independent exercise of their functions in connection with the Organization". The basis of the privileges and immunities was thus functional necessity and any new elements must be elaborated on that basis. Bilateral and multilateral agreements on the subject and customary law itself had, moreover, adopted the functional approach regarding international organizations.

29. With regard to the stages in the Commission's work, he said that priority should be given to the question of the scope of the privileges and immunities to be accorded to international organizations. Those privileges and immunities should include inviolability of premises; inviolability of archives and documents; immunity from jurisdiction; immunity of property and assets from civil proceedings and execution; financial and fiscal privileges and immunities; and freedom of official communications.

30. The second range of issues to be examined was that of the privileges and immunities of the officials of international organizations. It should be borne in mind that international organizations needed privileges and immunities not only for themselves, but also for their staff, since they acted through their officials. It would, however, be necessary to determine the categories of officials to be covered and the range of privileges and immunities to be accorded to them. Those privileges and immunities did not constitute an *ex gratia* concession on the part of the host State; nor did they exist by virtue of *comitas gentium*. They were absolutely necessary to the functioning of the organization itself. They included personal inviolability; immunity in respect of official statements or other acts performed in the exercise of official functions; exemption from taxation on salaries and emoluments; exemption from immigration restrictions and registration of aliens; and exemption from inspection of official correspondence.

31. In a third stage, consideration should be given to the position of experts hired by international organizations for temporary assignments. In that connection, he referred to the interesting case of the privileges and immunities of the members of the Commission, about which the Legal Counsel of the United Nations had, in 1978, inquired of the Swiss Federal Council. In its reply,[12] the Federal Council had specified the privileges and immunities enjoyed by the members of the Commission during the performance of their functions.

32. As to the question of scope *ratione personae*, it had to be decided whether the draft articles should apply only to international organizations of a universal character or to regional organizations as well. The importance of organizations such as OAS and OAU could not be overlooked, for they took an active part in United Nations meetings. Provision therefore had to be made for the privileges and immunities to be enjoyed by the official representatives of such regional organizations who attended United Nations meetings.

33. A much more delicate and difficult problem was that of international organizations of an operational character, such as regional banks and regional river commissions. It would have to be decided whether the property and assets of such organizations enjoyed immunity from legal process and taxation and whether they could claim jurisdictional immunity. Such problems were extremely difficult, but they would eventually have to be solved.

34. The wider the range of international organizations covered by the draft articles, the broader the rules would have to be. Account would have to be taken of the multiplicity of situations that would be relevant to the various organizations. It was, however, difficult to see how the legal régime of every individual international organization could be encompassed by unified general rules.

35. There was no doubt about the feasibility and desirability of the study of the present topic. The Commission's efforts would be well worth while, particularly since the topic concerned relations between 160 States and some 300 major intergovernmental organizations, not to mention several thousand less important ones. It was necessary, however, to proceed with caution and to examine thoroughly existing international instruments, national legislation and State practice.

36. The codification of the topic should be based on State practice, but there should also be an element of progressive development with a view to filling existing gaps and formulating general rules to meet new requirements. To that end, a balance had to be struck between the status, privileges and immunities of international organizations and their officials, on the one hand, and the jurisdiction and legitimate interests of host States, on the other.

37. The Commission should adopt a functional and pragmatic approach in dealing with the topic under consideration. It was, however, too early at the present stage to decide what kind of instrument should be framed. It should, of course, contain a set of articles that would not only codify, but also develop the relevant rules of international law. If that instrument was to take the form of an international convention, the Commission would have to decide whether international organizations themselves should, like States, be allowed to become parties to it. That problem could, however, be examined at a later stage.

The meeting rose at 5.55 p.m.

[12] Reproduced in document ILC(XXX)/Conf.Room Doc.6.