

Document:-  
**A/CN.4/SR.1525**

**Summary record of the 1525th meeting**

Topic:  
**<multiple topics>**

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

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60. Mr. RIPHAGEN said that, as he had stated during the Drafting Committee's discussion of the question, he agreed fully with Mr. Ushakov that an international organization was limited in its capacity to accept obligations only by the provisions of its own rules.

61. Mr. REUTER (Special Rapporteur) suggested that the second and third sentences of paragraph (2) should be replaced by the following text: "All organizations pursue their activities in a sphere whose extent is determinable externally and it is logical that the parties to a treaty will not intend to create an obligation for an international organization outside that sphere of activity".

*Paragraph (2), as amended, was approved.*

Paragraph (3)

62. Mr. USHAKOV, referring to the second sentence of paragraph (3), said it was inaccurate to state that the expression "by those rules" referred not only to the rules that concerned the organization's capacity but also to those that determined its competent organs, the procedures it must follow, the form of its acts and the entire legal régime that continued to govern the acceptance it had given. The expression "rules of the organization" had already been defined in article 2, paragraph 1 (j), which made no reference to rules such as those that determined an organization's competent organs, the procedures it must follow and the form of its acts. Why should the expression "rules of the organization" now be given another meaning?

63. Mr. REUTER (Special Rapporteur) said that there was a misunderstanding. The material expression in the second sentence of paragraph (3) was not the words "by those rules", but the word "governed". The sentence in question had been included in the commentary because, in the Drafting Committee, Mr. Ushakov had pointed out that what was being dealt with was not only the capacity of the organization, but also the entire legal régime. Since Mr. Ushakov did not find the sentence satisfactory, it would be best to delete it.

64. Mr. USHAKOV said that there was a difference between the content of article 6, relating to the capacity of international organizations to conclude treaties, and paragraph (3) of the commentary to article 35. He could therefore accept the deletion of the second sentence of that paragraph.

*Paragraph (3), as amended, was approved.*

Paragraph (4)

65. Mr. SCHWEBEL (Chairman of the Drafting Committee) suggested that, in order to reflect more accurately the outcome of the Commission's discussion of article 36 bis, the word "approve" should be replaced by the word "adopt".

*Paragraph (4), as amended, was approved.*

*The meeting rose at 6.05 p.m.*

## 1525th MEETING

*Tuesday, 25 July 1978, at 11.25 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.*

### Organization of future work (*continued*)

[Item 10 of the agenda]

#### APPOINTMENT OF SPECIAL RAPPORTEURS IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 32/151

1. The CHAIRMAN said that, pursuant to the provisions of paragraph 7 of General Assembly resolution 32/151, the Enlarged Bureau recommended that Mr. Quentin-Baxter should be appointed Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law and that Mr. Sucharitkul should be appointed Special Rapporteur for the topic of jurisdictional immunities of States and their property.

2. If there were no objections, he would take it that the Commission approved those recommendations.

*It was so agreed.*

### Organization of work

#### APPOINTMENT OF OBSERVERS TO THE WORLD CONFERENCE TO COMBAT RACISM AND RACIAL DISCRIMINATION

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the recommendation of the Enlarged Bureau that Mr. Tabibi and Mr. Dadzie should be appointed the Commission's observers to the World Conference to Combat Racism and Racial Discrimination.

*It was so agreed.*

### Draft report of the Commission on the work of its thirtieth session (*continued*)

#### CHAPTER V. *Question of treaties concluded between States and international organizations or between two or more international organizations (concluded)* (A/CN.4/L.277)

#### B. *Draft articles on treaties concluded between States and international organizations or between international organizations (concluded)*

TEXT OF ARTICLES 35, 36, 36 bis, 37 AND 38, AND OF ARTICLE 2, PARAGRAPH 1 (h), WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION (*concluded*)

ARTICLES 35, 36, 36 bis, 37 AND 38 (*concluded*)

*Commentary to article 36 (Treaties providing for rights for third States or third international organizations)*

Paragraph (1)

4. Mr. REUTER suggested that, in order to take account of a criticism which had been raised with him privately, the second sentence of paragraph (1) should be redrafted to read: "The solution embodied in article 36 of the Vienna Convention<sup>1</sup> is proposed in the former circumstance (paragraph 1), but a somewhat stricter régime in the latter (paragraph 2)."

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were approved.*

Paragraph (4)

5. Mr. USHAKOV suggested that, as in the case of paragraph (4) of the commentary to article 35, mention should be made of the fact that the Commission had not approved article 36 *bis*.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

*The commentary to article 36, as amended, was approved.*

*Commentary to article 36 bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

Foot-note 22

6. Mr. USHAKOV said it was his understanding that the agreement reached by the Commission at its 1512th meeting had concerned article 36 *bis*, not "the text of article 36 *bis*". The statement that the Commission had agreed "to consider the article further in the light of comments made on the text by the General Assembly, governments and international organizations" was also inaccurate, since, at the current stage, the General Assembly could not be expected to make comments on the text of article 36 *bis*, and it was not planned to submit that text to governments and international organizations. The foot-note should be brought into line with the agreement actually reached by the Commission.

7. Mr. RIPHAGEN said it should be verified whether the statement made in foot-note 22 was, as he believed, an accurate reflection of the agreement reached by the Commission concerning article 36 *bis*.

8. The CHAIRMAN said that paragraph 41 of the summary record of the Commission's 1512th meeting indicated that the Commission had "decided that article 36 *bis* should appear in its report in square brackets, and that the report should reflect the comments made on the subject-matter of the article and indicate clearly that no decision had been taken on the text other than to reconsider it in the light of the comments made by Governments and international organizations".

9. Mr. USHAKOV said he continued to maintain that the foot-note was inaccurate, since the Commis-

sion was not at the moment expecting comments from governments and international organizations; at most, comments on article 36 *bis* might be made by members of the Sixth Committee of the General Assembly.

10. Mr. REUTER (Special Rapporteur) suggested the deletion of the words "the text of", which were ambiguous. It was for the Commission to decide whether the articles thus far adopted should be submitted to governments and international organizations at the current stage. If it so decided, the foot-note would be more accurate.

11. Mr. USHAKOV observed that it was the Commission's custom to await completion of the first reading of all the articles in a particular draft before submitting them to governments.

12. Mr. ŠAHOVIĆ suggested that the second phrase of the foot-note should be reworded to read "and to consider the article further on second reading". Since the Commission would have to be in possession of the comments of the General Assembly, governments and international organizations before beginning the second reading, that solution would serve to advance the Commission's work.

13. Mr. TSURUOKA said that the Commission would do well to confine itself to a factual statement and to reword the second phrase of the foot-note to read: "and to consider the article further, particularly in the light of the reactions of the General Assembly".

14. Mr. USHAKOV pointed out that the fact of placing an article between square brackets meant that the Commission retained the option of reconsidering it on first reading, which was quite a different matter from retaining the possibility of reverting to the article on second reading.

15. Mr. RIPHAGEN said that, with the amendment suggested by the Special Rapporteur, foot-note 22 should be acceptable to all members of the Commission, since it reflected the actual situation. The mere fact that the Commission published the results of its work could be considered as an invitation to governments and interested parties to comment on them.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the Special Rapporteur's proposal for the deletion of the words "the text of" in foot-note 22.

*It was so agreed.*

*Foot-note 22, as amended, was approved.*

Paragraph (1)

17. Mr. REUTER (Special Rapporteur) said that, as a result of a private conversation with a member of the Commission, he wished to propose the deletion of the word "formally" in the second sentence of paragraph (1). Moreover, in the light of the suggestion made at the previous meeting that the passage deleted from the commentary to article 2, paragraph 1 (*h*), should be reproduced in the commentary to ar-

<sup>1</sup> See 1524th meeting, foot-note 5.

ticle 36 *bis*, he proposed that the phrase“; however, some members of the Commission expressed reservations concerning the term ‘third State members of an international organization’” should be added at the end of that sentence.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the Special Rapporteur’s suggestions.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

19. Mr. REUTER (Special Rapporteur) said that it had been pointed out to him privately that the preliminary question at issue was not only in what cases and to what extent the system advocated might be made more flexible, but also what reasons there were for making it more flexible. The words “for what reasons” might therefore be inserted before the words “in what cases”.

20. Mr. USHAKOV would have liked those reasons to be indicated in the commentary.

*Paragraph (2), as amended, was approved.*

Paragraph (3)

21. Mr. REUTER (Special Rapporteur) suggested that the words “might be assumed” should be replaced by “might, from one standpoint, be assumed”, since a member of the Commission had observed to him in private that the current wording committed the Commission too much and did not accurately reflect the discussions.

22. Mr. USHAKOV said that the statement made in the first phrase of paragraph (3) was altogether unacceptable. The constituent instrument of an international organization could not create treaty rights for the States members of that organization and, consequently, obligations for other parties to the treaty. Such obligations could arise only by virtue of international law. The Commission could not subscribe to such opinions.

23. Regarding the second phrase of paragraph (3), the fact of being cognizant of the provisions of the constituent charter of an international organization was not a sufficient basis for consent to the effects set out in article 36 *bis*.

24. Mr. SCHWEBEL pointed out that the differences of opinion within the Commission concerning the substance of article 36 *bis* had been reflected by placing the article in square brackets, even though its text had received a very wide measure of support, and by recording the distinctive views of some members of the Commission in paragraph (4) of the commentary to the article. It should therefore be unnecessary to reopen the debate on the article.

25. Mr. USHAKOV said it could not be maintained that the constituent instrument of an international organization bound the other parties to a treaty.

26. Mr. ŠAHOVIĆ stressed that paragraphs (2) and (3) should be read in conjunction with paragraph (4), in which it was stated that the proposition set forth in paragraphs (2) and (3) had been subjected to sharp criticism.

27. Mr. REUTER (Special Rapporteur) suggested that the word “have”, in the first phrase of paragraph (3), should be replaced by the words “might have”, thus changing an assertion into a supposition.

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the two amendments suggested by the Special Rapporteur.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

29. Mr. REUTER (Special Rapporteur) suggested, in order to forestall a possible criticism, that the words “while many members of the Commission”, at the beginning of paragraph (4), should be replaced by the words “while some members of the Commission”.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

Paragraph (5)

30. Mr. REUTER (Special Rapporteur) said that a member of the Commission had told him privately that he did not share the Special Rapporteur’s interpretation of the two examples cited in paragraph (5). To meet that objection, the words “to take a simple example”, at the beginning of the second sentence of paragraph (5), could be replaced by the words “the Special Rapporteur had given an example:”, and the following sentence could be added at the end of the paragraph: “Some members of the Commission objected to that interpretation.”

31. Mr. SCHWEBEL said that the proposed addition to the end of the paragraph should avoid giving the erroneous impression that the members of the Commission in general had been opposed to the theses in question.

32. Mr. USHAKOV was prepared to accept the wording: “One member of the Commission strongly objected to that interpretation.” The main point was to emphasize that the interpretation given in paragraph (5) was not that of the Commission. The Commission must refrain, indeed, from interfering in the internal affairs of international organizations and, in particular, from interpreting headquarters agreements.

33. The CHAIRMAN said that, if there was no objection, he would take it that the Commission accepted the replacement of the words “to take a simple example” by the words “the Special Rapporteur had given the following example:”, and the addition, at the end of paragraph (5), of the sentence: “One member of the Commission strongly objected to this interpretation.”

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

## Paragraph (6)

34. Mr. REUTER (Special Rapporteur) suggested the deletion of the word "technical", in the third sentence of paragraph (6), as it was inadequate.

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

## Paragraph (7)

35. Mr. REUTER (Special Rapporteur) proposed that the words "the vast majority of treaties", in the second sentence, should be replaced by "many treaties".

36. Mr. USHAKOV could not accept the phrase "the two being inseparably linked", which he considered to be contrary to articles 35 and 36 of the Vienna Convention. Although the rights of a person and the corresponding obligations of another person were inseparable, the rights and obligations of one and the same person were always divisible.

37. Mr. REUTER (Special Rapporteur) proposed the replacement of the words "ultimately prompts the conclusion", in the first sentence, by the words "prompted some members of the Commission to conclude", in order to take account of Mr. Ushakov's comment.

38. Mr. TSURUOKA proposed that the words "inseparably linked", in the second sentence, should be replaced by "closely linked".

39. Mr. RIPHAGEN supported the amendment to the second sentence suggested by the Special Rapporteur. There were numerous types of treaty in which the exercise of a right was linked to the performance of an obligation, as the Commission had recognized in its draft articles on the most-favoured-nation clause.

40. Mr. ŠAHOVIĆ proposed the deletion of the words "the two being inseparably linked", at the end of the second sentence.

41. Mr. RIPHAGEN objected that the final phrase of the second sentence was necessary, because the problem considered in paragraph (7) existed only in relation to treaties in which rights and obligations were in fact inseparably linked.

42. Mr. USHAKOV observed that the Vienna Convention distinguished between the rights and the obligations arising from a treaty. Although, under paragraph 4 of article 36 (which was based on article 36, paragraph 2, of the Vienna Convention), a State or an international organization exercising a right in accordance with a treaty was required to comply with the conditions for its exercise provided for in the treaty, that in no way meant that the rights established by a provision of a treaty and the obligations established by another provision of the same treaty were inseparable.

43. Mr. REUTER (Special Rapporteur) supported Mr. Šahović's proposal for the deletion of the words "the two being inseparably linked". However, he would point out that, although there were cases in

which the rights and obligations arising from a treaty could be separated, there were also, under article 44 of the Vienna Convention, cases in which they were inseparable.

44. Mr. VEROSTA supported Mr. Tsuruoka's proposal that the words "inseparably linked" should be replaced by "closely linked".

45. Mr. USHAKOV said that any instances in which the rights and obligations arising from a treaty were inseparable were exceptions to the general rule, since in principle rights and obligations could be separated. If that were not the case, the régime that should prevail would be the stricter one—in other words, the régime relating to obligations.

46. Mr. RIPHAGEN said he had always understood that, in the case of States members of an international organization, the acknowledgement mentioned in article 36 *bis*, subparagraph (b), must be collective. It would, indeed, be contrary to the right of all members of an organization to equal treatment for any one of those members to be able to refuse to agree to the creation by the organization of obligations and rights "in its regard", as the final sentence of paragraph (7) suggested was the case. That sentence might perhaps be amended to take account of his objection.

47. Mr. USHAKOV observed that the condition laid down in article 36 *bis*, subparagraph (b), was tantamount to giving the right of veto to all States members of the organization, and not only to those that had participated in the negotiation of the treaty.

48. Mr. REUTER (Special Rapporteur) suggested that the reservation made by Mr. Riphagen should be mentioned in the Commission's report.

49. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved paragraph (7) of the commentary to article 36 *bis*, subject to the reservation made by Mr. Riphagen and to the following amendments: in the first sentence, the words "ultimately prompts the conclusion" should be replaced by "prompted some members of the Commission to conclude"; in the second sentence, the words "the vast majority of treaties" should be replaced by "many treaties", and the words "the two being inseparably linked" should be deleted.

*It was so agreed.*

*Paragraph (7), as amended, was approved.*

## Paragraph (8)

50. Mr. REUTER (Special Rapporteur) proposed the deletion of the word "final", in the last part of the text.

51. Mr. SCHWEBEL suggested that the opening clauses of the paragraph, which he found too emphatic in their existing form, should be amended to read: "Since, however, it is primarily for governments to interpret articles 35 and 36 of the Vienna Convention, and since it is primarily for those gov-

ernments and for the international organizations concerned to say what needs arise...”.

52. Mr. USHAKOV suggested that Mr. Schwebel's amendment should be modified to refer, at the beginning of the sentence, not to “governments” but to “the parties” to the Vienna Convention, since only the parties to a treaty had the right to interpret it.

53. Mr. RIPHAGEN supported the suggestions made by Mr. Schwebel and Mr. Ushakov.

54. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the drafting changes suggested by the Special Rapporteur, by Mr. Schwebel and by Mr. Ushakov.

*It was so agreed.*

*Paragraph (8), as amended, was approved.*

*The commentary to article 36 bis, as amended, was approved.*

*Commentary to article 37 (Revocation or modification of obligations or rights of third States or third international organizations)*

Paragraph (1)

55. Mr. USHAKOV emphasized that it should be indicated that the fact that paragraphs 5 and 6 of article 37 had been placed in square brackets meant that those paragraphs had not been adopted.

*Paragraph (1), as amended, was approved.*

Paragraph (2)

56. Mr. REUTER (Special Rapporteur) proposed that the words “reproduce the exact wording of”, in the first sentence, should be replaced by “follow the wording of”.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraphs (3)-(5)

*Paragraphs (3)-(5) were approved.*

*The commentary to article 37, as amended, was approved.*

*Commentary to article 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom)*

Paragraphs (1)-(4)

*Paragraphs (1)-(4) were approved.*

Paragraph (5)

57. Mr. REUTER (Special Rapporteur) proposed that paragraph (5) should be replaced by the following text:

“The present draft article does not prejudice in one way or the other the possibility that the effects of the process of the formulation of customary law might extend to international organizations, and it

was with that consideration in mind that the article was adopted by the Commission.”

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

*The commentary to article 38, as amended, was approved.*

*Section B as a whole, as amended, was approved.*

*Chapter V as a whole, as amended, was approved.*

*The meeting rose at 1 p.m.*

## 1526th MEETING

*Wednesday, 26 July 1978, at 10.10 a.m.*

*Chairman: Mr. José SETTE CÂMARA*

*Members present: Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.*

### **Review of the multilateral treaty-making process (para. 2 of General Assembly resolution 32/48) (A/CN.4/L.283)**

[Item 8 of the agenda]

1. The CHAIRMAN invited the Chairman of the Working Group on review of the multilateral treaty-making process to introduce the Group's report (A/CN.4/L.283).

2. Mr. QUENTIN-BAXTER (Chairman of the Working Group) said that the Group's report was constructed in such a way that the Commission, if it so wished, could make paragraphs 4 to 9 part of its own report to the General Assembly.

3. In paragraph 4 there was a general statement of the Commission's attitude to a review of the multilateral treaty-making process. The paragraph made it clear that the Commission regarded the question as an important one and that, in view of the role the Commission played in the progressive development of international law, it welcomed the opportunity to make a contribution to the study of the matter.

4. In paragraphs 5 and 6, the Working Group made the point, which followed directly from the terms of General Assembly resolution 32/48, that the role of