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Draft articles on treaties concluded between States and international organizations or between international organizations: text of article 46 proposed by Mr. Ushakov - reproduced in A/CN.4/SR.1552, para. 15

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

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tion. Given such differences of opinion, it could hardly be said that the effect of the limitations in question was sufficiently evident to be manifest to third States.

13. The influence of internal rules and procedures was such that it was often difficult to imagine cases in which article 46 could be invoked. For example, under the constitutional law of the Netherlands, the approval of Parliament was needed before the conclusion of a treaty by the Head of State, unless the treaty was considered to be of paramount importance to the interests of the State, in which case prior approval was not necessary. In such cases, there was no objective criterion that could be manifest to a third State. Conversely, EEC had internal rules under which any State could ask the Court of Justice of the European Communities whether the Community had the power to conclude a given treaty. If the treaty was concluded despite a negative ruling of the Court, an obvious objective criterion would exist that would be manifest to all.

14. There was therefore some interplay between internal constitutional rules, the application of article 46 of the Vienna Convention, and the draft article before the Commission. Since article 46 of the Vienna Convention was sufficiently flexible to take account of that interplay, it could be applied to the consent of international organizations to be bound by a treaty without any need for amendment.

15. Mr. USHAKOV read out the text he proposed for article 46 (A/CN.4/L.296):

> "1. A State may not invoke the fact that its consent to be bound by a treaty between one or more States and one or more international organizations has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
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> "2. A violation as indicated in paragraph 1 is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and is therefore also manifest for any international organization.
>
> "3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of the relevant rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest.
>
> "4. A violation as indicated in paragraph 3 of a relevant rule of the organization in question concerning competence to conclude treaties is manifest if the rule, interpreted in good faith, is clear."

16. He pointed out that paragraph 1 of that text followed the text of the Vienna Convention, since it dealt with States. Under the Vienna Convention, a State could invoke its internal law as invalidating its consent only within certain limits intended to protect the other parties to the treaty: the rule of internal law violated must be of "fundamental importance" and the violation must be "manifest". Paragraph 2 of the relevant article of the Vienna Convention specified:

> A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

In his view, a violation was manifest if the rule broken was manifest—in other words, if it was a rule of international law based on the normal practice of States, namely, a customary rule. Thus paragraph 2 of the Vienna Convention text had introduced, alongside the reference to the internal law of the States, a reference to the customary rules of international law. But the customary rules of international law must be known to every international organization, and that was why he had added, in paragraph 2 of his proposal, the words "and is therefore also manifest for any international organization".

17. If, for example, a customary rule of international law provided that a State's representative to an international organization could conduct negotiations with that organization for the conclusion of a treaty, but was not competent to bind the State by his signature, a State whose representative broke that rule by giving his signature could invoke that violation of a customary rule of international law as invalidating its consent to be bound by the treaty, since the international organization must have known the rule.

18. In addition to the customary rules of international law, however, there were fundamentally important rules of internal law that must be known to the other parties to the treaty. A State could therefore invoke a violation of those fundamental rules to claim that a treaty was invalid. On the other hand, there were also, in the internal law of every State, rather obscure rules which even lawyers of the State concerned did not always know very well, and with which other States or international organizations could not be expected to be familiar. That was why it was necessary to stipulate, with regard to the internal law of States, that the rule violated must have been "of fundamental importance".

19. No such stipulation was necessary in the case of international organizations, however, since it was easy to know what their rules were. He had therefore considered it sufficient to provide, in paragraph 3 of his amendment, that the violation of the relevant rules of the organization must have been manifest, without adding that it must have concerned a rule of fundamental importance.

20. In the case of international organizations, as in that of States, a violation was manifest if the rule violated was manifest, in other words, objectively evident to all when interpreted in good faith. But according to the definition given in article 2, paragraph 1 (*j*), of the draft,[3] the expression "rules of the organiza-

[3] See 1546th meeting, foot-note 4.