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Summary record of the 1510th meeting

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

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1510th MEETING

Friday, 30 June 1978, at 10.05 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLES 35, 36, 36 *bis*, 37 AND 38 AND ARTICLE 2, PARA. 1 (*h*) (*continued*)

ARTICLE 35¹ (Treaties providing for obligations for third States or third international organizations)

1. The CHAIRMAN read out the text of article 35 as proposed by the Drafting Committee (A/CN.4/L.269):

Article 35. Treaties providing for obligations for third States or third international organizations

1. Subject to article 36 *bis*, an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

2. Mr. USHAKOV approved of the text of article 35, except for the phrase "subject to article 36 *bis*", at the beginning of paragraph 1. He considered that reservation entirely unacceptable, not only because he was firmly opposed to article 36 *bis*, but also because he thought that, quite apart from that article, the reservation would completely change the system established by the Vienna Convention.² Under article 35 of the Vienna Convention, a third

State could expressly accept in writing an obligation arising from a treaty, whereas, under paragraph 1 of the article 35, under consideration, the same third State, if it were a member of an international organization, could not expressly accept in writing an obligation arising from a treaty to which that organization was a party, for as a member of the organization it had lost the right to conclude treaties. Article 36 *bis* obviously related to supranational organizations, such as EEC, which had the right to conclude treaties on behalf of its members.

3. The question of the effects of a treaty to which an international organization was party with respect to third States members of that organization, which was the subject-matter of article 36 *bis*, was one that concerned States members of the organization exclusively, and came under their internal law. He could not agree to altering the system established by the Vienna Convention in order to take account of the case of supranational organizations such as EEC. He was therefore strongly opposed to the reservation at the beginning of article 35, paragraph 1.

4. Mr. QUENTIN-BAXTER expressed doubts about the propriety of the use, in articles 35 and 36, of the phrase "subject to article 36 *bis*", for he had always understood the words "subject to" to imply an order of precedence between two provisions that applied to the same circumstances. He did not think there was such a hierarchical relationship between article 35 and article 36 *bis* or between article 36 and article 36 *bis*. Article 36 *bis* dealt specifically with the rights and obligations of third States in their capacity as members of an international organization party to the treaty, whereas articles 35 and 36 dealt with the rights and obligations of third States, quite independently of whether they were members of an organization or not. He could see no point at which articles 35 and 36 intersected article 36 *bis*, for he believed that the rights and obligations that third States might acquire as strangers to a treaty existed in quite a different context from, and were in no way modified by, the rights and obligations they might acquire as members of an international organization that was a party to the same treaty. If his hypothesis was correct, the use of the phrase "subject to" was wrong and needlessly aggravated Mr. Ushakov's difficulties with the draft articles. If on the other hand, there was some point at which articles 35 and 36 intersected article 36 *bis*, it would be helpful if its nature were clearly explained.

5. Mr. REUTER (Special Rapporteur) said that the Headquarters Agreement concluded between the United States of America and the United Nations was a case in which a treaty concluded between a State and an international organization had effects on the States members of that organization, which were third States, since they were not parties to the treaty. He did not think, however, that the States Members of the United Nations, which had from the outset invoked the provisions of that treaty, had expressly accepted in writing the obligations it might impose on them; they had merely indicated, by their conduct,

¹ For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. 1, pp. 128-132, 1439th meeting, paras. 24-40, and 1440th meeting, paras. 1-12.

² See 1507th meeting, foot-note 1.

that they accepted those obligations. The phrase "subject to article 36 *bis*" was intended only to draw attention to the particular case in which third States were members of an international organization that was a party to the treaty.

6. Hence, in view of the objections made to the words "subject to article 36 *bis*", that phrase could easily be replaced by the words "without prejudice to article 36 *bis*", which could be placed at the end of paragraph 1.

7. Mr. USHAKOV strongly disputed the proposition that States Members of the United Nations were bound by the treaties concluded by that Organization. In his opinion, the Members of the United Nations remained third States in relation to such treaties and were therefore free to accept or reject the rights and obligations deriving from them.

8. Mr. REUTER (Special Rapporteur) pointed out that, in the case of treaties concluded by the United Nations, it was not subparagraph (a) of article 36 *bis* that applied, but subparagraph (b), for the States Members of the United Nations had acknowledged, in the case of the Headquarters Agreement concluded between the United Nations and the United States of America, that the agreement necessarily entailed rights and obligations for them. That was an effect of their sovereign will. They had acknowledged it in practice, without expressly accepting it in writing.

9. Mr. USHAKOV disputed that interpretation of subparagraph (b) of article 36 *bis* also, since he did not see by what instrument the United States of America and the United Nations could have acknowledged that the Headquarters Agreement concluded between them was binding on States Members of the United Nations.

10. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that, like most of the other members of the Drafting Committee, he found articles 35, 36 and 36 *bis* quite acceptable. He recognized, however, that the words "subject to" might be interpreted as indicated by Mr. Quentin-Baxter, and he therefore supported the Special Rapporteur's suggestion that they be replaced by the phrase "without prejudice to".

11. On the question of the effects of the Headquarters Agreement on Members of the United Nations, his view was substantially in accordance with that of the Special Rapporteur. It appeared quite reasonable to him to say that, under the terms of a headquarters agreement negotiated and signed on behalf of the United Nations by the Secretary-General and unanimously approved by the General Assembly, the Members of the Organization were bound to observe the obligations and might exercise the rights laid down by that agreement.

12. Mr. JAGOTA agreed with the interpretation given to the phrase "subject to" by Mr. Quentin-Baxter, and feared that expressions such as "without prejudice to" or "without affecting in any way"

would be interpreted in the same way. The relationship of article 35 and 36 to 36 *bis* was that of a general clause to a special clause. All three articles referred to third States, but articles 35 and 36 related to all third States, whereas article 36 *bis* concerned a subcategory of third States, namely, those that were members of an international organization that was party to a treaty. What the Commission had to do was to make it clear that, in the special case of that subcategory, article 36 *bis* would apply.

13. That object might be best achieved by deleting the reference to article 36 *bis* from articles 35 and 36 and beginning article 36 *bis* by some such phrase as "notwithstanding the provisions of articles 35 and 36".

14. Mr. USHAKOV said that, when an international organization concluded a treaty, that treaty always had to be formally approved by an organ of the organization, whose decision, taken by a vote, was equivalent to an act of ratification by a State. Accordingly, when a State Member of the United Nations voted in the General Assembly in favour of a treaty concluded by the Organization, it approved a treaty that was binding on the Organization only, and did not, by its vote, undertake to accept the obligations arising from the treaty.

15. Sir Francis VALLAT, referring to the statements of Mr. Quentin-Baxter and Mr. Jagota, said that the problem facing the Commission was linked with the definitions it had adopted, according to which a "third State" was a State "not a party to the treaty" (article 2, para. 1 (h)),³ and a "party" was a State "which has consented to be bound by the treaty and for which the treaty is in force (article 2, para. 1 (g))."⁴ It was fairly obvious, in the case the Commission was considering, that, under the terms of those definitions, a State that was a member of an international organization that was a party to a treaty was not itself a party to that treaty; strictly speaking, such a State was a third State within the meaning of paragraph 1 of articles 35 and 36. If the Commission wished to retain article 36 *bis*, it must find wording that made it clear that, despite what was said in articles 35 and 36 about third States, there were circumstances in which such States might acquire rights or obligations as the result of a treaty.

16. While he was inclined to favour the suggestion made on that point by Mr. Jagota, he thought it would be best to leave the question how to treat the phrase "subject to article 36 *bis*" in abeyance until a final decision had been reached on article 36 *bis*.

17. Mr. SUCHARITKUL shared the views of Mr. Jagota and Sir Francis Vallat on the phrase "subject to article 36 *bis*".

18. With respect to subparagraph (b) of article 36 *bis*, he observed that there had been many examples in his region of headquarters agreements in the negotia-

³ See 1509th meeting, para. 31.

⁴ See 1507th meeting, foot-note 2.

tion of which all the members of a regional organization had taken part. In the case of the agreement of that type between the Government of Indonesia and ASEAN, which was currently in preparation, the Secretary-General of the Association had been required to circulate the draft text to all States members of the Association for their comments, and would have to obtain their formal approval of the final text before he could sign it. Subparagraph (b) of article 36 *bis* could therefore be considered as representative of an existing state of fact.

19. The CHAIRMAN suggested that the Commission should provisionally approve articles 35 and 36, placing the words “subject to article 36 *bis*” in square brackets, and defer its decision on that phrase until it had considered article 36 *bis*.

20. If there were no objections, he would take it that the Commission decided to approve provisionally article 35 submitted by the Drafting Committee.

It was so agreed.

ARTICLE 36⁵ (Treaties providing for rights for third States or third international organizations)

21. The CHAIRMAN said that the Drafting Committee proposed the following wording for article 36 (A/CN.4/L.269):

Article 36. Treaties providing for rights for third States or third international organizations

1. Subject to article 36 *bis*, a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

4. A State or an international organization exercising a right in accordance with paragraphs 1 and 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

22. Mr. USHAKOV proposed that the words “in accordance with paragraphs 1 and 2”, in paragraph 4, should be replaced by the words “in accordance with paragraph 1 or 2”, since a State would exercise a right in accordance with paragraph 1 and an international organization in accordance with paragraph 2.

23. Mr. SCHWEBEL (Chairman of the Drafting Committee) agreed to that amendment.

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve provisionally article 36 submitted by

the Drafting Committee, the phrase “subject to article 36 *bis*” being placed in square brackets.

It was so agreed.

ARTICLE 36 *bis*⁶ (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

25. The CHAIRMAN said that the Drafting Committee proposed the following text for article 36 *bis* (A/CN.4/L.269):

Article 36 bis. Effects of a treaty to which an international organization is party with respect to third States members of that organization

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States members of the organization are bound by the treaties concluded by it; or

(b) the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects.

26. Mr. USHAKOV strongly opposed article 36 *bis*, for both political and legal reasons. From the political point of view, he opposed the attempt made in article 36 *bis* to cover the activities of supranational organizations such as EEC. From the legal point of view, he considered that article 36 *bis* openly contradicted the principle stated in article 34 that “a treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization”.

27. That principle was respected in article 35 for obligations, and in article 36 for rights. Under article 35, an obligation could arise for a third State or a third organization from a provision of a treaty only if that third State or third organization “expressly accepts that obligation in writing”. Similarly, under article 36, a right arose for a third State or a third organization from a provision of a treaty only if the third State or third organization “assents thereto”. In the latter case, under paragraph 3 of article 36, the “assent of the third international organization” was “governed by the relevant rules of that organization”. In his opinion, the assent had to be given by the competent organ of the organization, namely, in the case of the United Nations, by the General Assembly. The assent could be tacit only if the relevant rules of the organization so provided.

28. Under article 36 *bis*, on the other hand, third States that were members of an international organ-

⁵ For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. I, pp. 132-134, 1440th meeting, paras. 13-30.

⁶ For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. I, pp. 134-136, 1440th meeting, paras. 31-47, 1441st meeting, and 1442nd meeting, paras. 1-12.

ization must fulfil the obligations arising for them from a treaty to which that organization was party without having expressly accepted those obligations in writing, as provided in article 35, paragraph 1. Consequently that provision was in conflict with the general rule concerning third States laid down in article 34.

29. The general rule, however, must apply to all third states, including those that were members of an international organization party to the treaty. For, in the case of ordinary international organizations like those to which the draft articles referred, the member States were always third States in relation to treaties concluded by the organization. In the case of a supranational organization like EEC, however, the member States were no longer third States in relation to treaties concluded by the organization in the exercise of its supranational functions, for they had delegated to the organization the power to conclude treaties on their behalf. They were therefore automatically bound by the treaties concluded by the organization, without any need to accept expressly in writing the obligations arising from those treaties. The case of the United Nations was quite different, because the Charter did not provide that the States Members of the United Nations surrendered to the Organization their sovereign right to conclude treaties. Hence the States Members of the United Nations were not bound by treaties concluded by the Organization.

30. Article 36 *bis* was unacceptable in that it sought to apply rules on international organizations to an entity that was not an international organization but a supranational organization. Special rules should be formulated for supranational organizations, since ordinary international organizations, such as the United Nations, could not be treated in the same way as supranational organizations such as EEC.

31. According to article 36 *bis*, "Third States which are members of an international organization... may exercise the rights which arise for them from the provisions of a treaty to which that organization is a party if the relevant rules of the organization... provide that the States members of the organization are bound by treaties concluded by it". But the creation of rights for third States members of an organization entailed the creation of obligations for the States parties to the treaty. And while it could be accepted that States members of an organization were bound by the relevant rules of that organization, it could not be accepted that non-member States were bound by the same rules. For example, in the case of a treaty concluded by EEC, it could not be accepted that the other States parties to the treaty, which were not members of EEC, were bound by the Treaty of Rome, to which they were not parties. It was equally difficult to accept that States parties to the treaty agreed to be so bound during the negotiation of the treaty, as envisaged in subparagraph (b) of article 36 *bis*. It could also be asked whether the "States members" referred to in subparagraph (b) included only the States that had been members of the organization at the time of the conclusion of the treaty, or

also included States that became members of the organization later.

32. Mr. TSURUOKA thought article 36 *bis* was unnecessary, since the question of the effects of a treaty to which an international organization was party, with respect to third States members of that organization, was not of direct concern to the parties to the treaty and could very well be settled by the States members of the organization in question.

The meeting rose at 11.30 a.m.

1511th MEETING

Tuesday, 4 July 1978, at 10.10 a.m.

Chairman : Mr. José SETTE CÂMARA

Members present : Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (*continued*)

ARTICLES 35, 36, 36 *bis*, 37 AND 38,
AND ARTICLE 2, PARA. 1 (*h*) (*continued*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)¹ (*continued*)

1. Mr. JAGOTA noted that subparagraphs (a) and (b) of article 36 *bis* provided that third States that were members of an international organization could acquire rights and obligations under a treaty to which that organization was a party in one of two ways: either if the relevant rules of the organization so provided, or if the States and organizations participating in the negotiation of the treaty, as well as the States members of the organization, acknowledged that the application of the treaty necessarily entailed such effects. He considered that the two conditions prescribed should be combined instead of separated, as in the draft article. Moreover, something more than the relevant rules of the organization was needed to determine the effect of the treaty with respect to the member of an international organization and, bearing in mind emergent practice in the matter, the emphasis should be on the aspect of consent. He would also

¹ For text, see 1510th meeting, para. 25.