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Summary record of the 1676th 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:-
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of paragraph 1 as it stood and the retention of paragraph 2 would render the provision unacceptable to those concerned about the rights of private creditors. Yet to leave the article as drafted would oblige creditors to rely on its inherent inconsistencies and ambiguities, and it was highly doubtful that legal advisers to banks would regard that as the best basis of protection. He therefore urged the Commission to stipulate for clarity in the terms of article 18.

43. Mr. ŠAHOVIĆ regretted that the Special Rapporteur was not present, the more so as he was not sure he had correctly understood the Special Rapporteur's comments in paragraph 176 to 182 of his report. The fact that the Special Rapporteur made so few specific proposals suggested that he was basically in favour of deleting the article. Before going further, the Commission should therefore decide whether the provision should be discarded or not.

44. For his part, he had approved the article in the first reading as providing a general safeguard clause intended to protect creditors of all categories in a succession of States. From that point of view, article 18 seemed necessary. The drafting was perhaps unsatisfactory, but it was difficult to see how it could be substantially improved.

45. The Special Rapporteur proposed to delete paragraph 1 on the ground that it served no useful purpose and introduced the concept of novation to show that a succession of State debts affected the rights of creditors. At the same time, he stressed that the patrimonial right of the creditor must remain intact; in his (Mr. Šahović's) view, protecting that right was surely the purpose of paragraph 1. The replacement of one debtor by another was a technical aspect of the problem with which paragraph 1 did not deal. The final wording of the paragraph would depend on what was decided regarding article 16, paragraph (*b*) and the suggestion, which he considered acceptable, that paragraph 1 should become a general safeguard clause.

46. Article 18, paragraph 2, developed the principle enunciated in paragraph 1 and coupled it with the two conditions in subparagraphs (*a*) and (*b*). In that connection, the Special Rapporteur endorsed the position of the Government of Czechoslovakia in its written comments (A/CN.4/338/Add.2): an agreement between a predecessor State and a successor State (or between several successor States) could not be invoked against a creditor third State if the latter had not accepted it and was not a party to the future convention. Subject to that reservation, the Drafting Committee should be careful, in reviewing the text of article 18, not to upset the compromise which had led to its present wording.

47. Mr. USHAKOV said that paragraph 2 of article 18 was of little interest to creditors. Under the paragraph, a creditor third State or creditor international organization could oppose an agreement for the distribution of debts. However, the important point for a creditor was to get his money back—it hardly mattered from whom. In some cases it might even be preferable for responsibility for the debt to be shared between two States. Under article 18, the only ground on which a creditor third State or international organization could oppose such an agreement was that it was not in accordance with the rules of the draft articles, which essentially provided that the State debts of the predecessor State should pass to the successor State "in an equitable proportion". However, equity did not mean the same to creditors as it did to States participating in the succession.

48. The CHAIRMAN said that, if there was no further comment, he would take it that the Commission wished to refer article 18 to the Drafting Committee.

It was so decided.[8]

49. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission wished to refer article 19 to the Drafting Committee.

It was so decided.[9]

The meeting rose at 1 p.m.

[8] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 109–110.

[9] *Idem*, para. 111.

1676th MEETING

Monday, 22 June 1981, at 3.10 p.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. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Questions 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 34 (General rule regarding third States and third international organizations),

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations),

ARTICLE 36 (Treaties providing for rights for third States or third international organizations), *and*

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*), *and*

ARTICLE 2 (Use of terms), subpara. 1 (*h*) ("third States", "third international organization")

1. Mr. REUTER (Special Rapporteur), summarizing the discussion of article 34, remarked that the only opinion expressed in regard to this article had been favourable.

2. He noted that Mr. Ushakov had suggested that the definition of the terms "third State" and "third international organization" in article 2, subparagraph 1 (*h*), which the Commission had not yet considered in second reading, should have been taken up at the same time as articles 34 to 36.

3. The CHAIRMAN said that if there was no objection he would take it that the Commission decided to refer article 34 and article 2, subparagraph 1 (*h*), to the Drafting Committee.

It was so decided.

4. In connection with article 35, Mr. USHAKOV said he would consider only the problems of interpretation that might be raised by that article.

5. It should be noted, in the first place, that under paragraphs 2 and 3 an obligation arose for a third international organization from a provision of a treaty if the organization expressly accepted the obligation in writing. The requirement that acceptance should be given in writing was not essential. As the Special Rapporteur had indicated, examples in which acceptance was not given in writing could be found in practice. The requirement that acceptance should be expressly given was, on the other hand, essential; it was natural that a treaty obligation could not arise for a third State or for a third international organization without its express assent. In principle, a State or an international organization might expressly accept in advance any treaty obligation whatsoever, although it might seem very odd to do so. The member States of the European Economic Community in fact did so, but the Community was, it must be recognized, somewhat different from "normal" international organizations. The assent given in advance was limited to treaties concluded by the Community in a specific area, such as foreign trade. The treaties were concluded by the Community on behalf of and for member States, and were binding on them.

6. Referring to his earlier comments (1674th meeting) on article 30, on the application of successive treaties relating to the same subject-matter, he said that if the members of the EEC were empowered to conclude treaties on the same matters as the Community and two treaties entailing different obligations were concluded, the first by the EEC and the second by a member State, under article 30 the later treaty would prevail. The difficulty had been avoided, since the members of the Community had undertaken not to conclude treaties on matters within the Community's competence. The case of the EEC was, however, unique. Treaties concluded by an international organization were normally binding only on the organization, and not on member States, and were performed by the organization. In contrast, treaties concluded by the Community were performed by member States.

7. Although the possibility that States might agree in advance to accept any treaty obligation whatsoever in a specific field was not so far-fetched as might appear, the draft articles should not generalize a situation peculiar to the EEC.

8. Mr. SUCHARITKUL observed that, as the Special Rapporteur had pointed out, the requirement that acceptance should be expressed in writing was not so much a strict formal requirement as a means of establishing that assent had been given. Acceptance of an obligation did not entail a formal communication and might, for example, be established by a declaration made at a conference. In his view it would suffice for an oral acceptance to be recorded or reported in the minutes of the meeting at which it had been expressed.

9. The provisions of article 35 were in fact an exception to the rule *pacta tertiis nec nocent nec prosunt*. It was natural that the exception should require express, or even written, assent, but that requirement could be interpreted flexibly, as not entailing a formal instrument, or strictly, as in the case of novation. The situation of the EEC, to which Mr. Ushakov had referred, seemed to come under article 36 *bis* rather than article 35, because what was involved was the relations between the Community and its members.

10. With respect to acceptance in advance, he referred to an agreement for the return of Vietnamese refugees concluded in the 1960s between the Red Cross of Thailand and the Red Cross of North Viet Nam under the auspices of the International Committee of the Red Cross. The obligations arising from the agreement had been accepted in advance by Hanoi and Bangkok, and then by Saigon.

11. Referring to Mr. Jagota's observations on the acceptance of a right and of attendant obligations during the consideration of the topic of succession of States in respect of matters other than treaties, he noted that paragraph 4 of article 36 was very clear in that connection, because it provided that the State or international organization exercising a treaty right was bound to comply with the conditions provided for in the treaty or established in conformity with the treaty.

12. With regard to the question whether the EEC was an international organization, he observed that the

[1] For texts, see 1675th meeting, para. 1.

Community had been organized under Belgian law and derived its corporate status from Belgian law.

13. Mr. REUTER (Special Rapporteur) said that articles 35 and 36 raised no major problems, and suggested that they should be referred to the Drafting Committee. The Committee could consider the relationship between articles 35 and 30 to which Mr. Ushakov had referred. He pointed out that the two-fold requirement that acceptance should be express and in writing was set out in paragraph 1 of article 35 in the case of third States, whereas the corresponding requirement in the case of third international organizations was divided between paragraphs 2 and 3. The members of the Commission seemed to agree that that difference was of no consequence.

14. Speaking as a member of the Commission, he commented that articles 35 and 36 were closely modelled on the corresponding provisions of the Vienna Convention.[2] With all due deference to the authors of the Convention, it had to be recognized that some of its provisions might require interpretation, although it was doubtful that the Commission was qualified to interpret them, the more so as the Convention had entered into force. He generally endorsed the views expressed by Mr. Ushakov regarding the EEC, but was less certain that the rule that acceptance should be expressly given was essential. When sanctions were taken in response to an international crime, the rule that obligations arising from a treaty were not binding on a third State without its express assent was inapplicable. It was on that basis that peace treaties had been declared valid even before their acceptance by the State regarded as the aggressor.

15. In that connection, he drew a parallel between internal and international law. The Roman law systems rejected the potestative condition: it was possible for one party to accept in advance on the basis of what another party would decide. It might be asked whether the nature of the State was not such that it was inconsistent with a State's sovereignty and its dignity to enter into a commitment the content of which would be wholly determined by an agreement between third States.

16. The CHAIRMAN said that if there was no objection he would take it that the Commission decided to refer articles 35 and 36 to the Drafting Committee.

It was so decided.

17. In regard to article 36 *bis*, Mr. CALLE Y CALLE said that if a State or international organization was not a party to a treaty, then clearly no obligations could arise for it, as a third State or organization, save with its consent. In practice, however, obligations that had been collectively assumed through a collective body might have to be met on a direct and individual basis. It was quite conceivable, for example, that the Intergovernmental Council of Copper Exporting Countries might enter into a contract with a State or another body on special terms whereby the members of the Council were required to meet directly the undertakings which the Council, acting as a collective body, had assumed on their behalf. Article 36 *bis* therefore seemed to him to be very much in point. He was quite certain that if the draft were to be laid before a plenipotentiary conference the same problems would arise and an attempt would be made to draft a provision to deal with them.

18. The wording of article 36 *bis* had been simplified (see 1675th meeting, para. 27). Formerly, the text of that article had been somewhat peremptory in tone, and had been drafted in terms of the effects on third States of a treaty entered into by an organization. The new wording was based more on the modalities of consent and on consent given collectively and in advance by the member States of an organization. Such consent would be an intimation not that those States were renouncing entirely their capacity to conclude treaties, but rather that they found it more practical for treaties on specific subjects to be concluded by their organization.

19. In the light of these considerations, it might be advisable to refer expressly in the article to the advance or pre-established consent of the member States of an international organization, and also, in connection with the reference to the obligations arising for third States, the word "directly", so as to distinguish between direct obligations and the other obligations of a more or less general nature that were incumbent on member States. There was, for instance, a general obligation under article 18[3] not to do anything that would defeat the object and purpose of a treaty prior to its entry into force: once a treaty concluded by an international organization had entered into force States had a clear obligation to co-operate within the framework of the organization in fulfilling their obligations. In article 36 *bis*, the emphasis was on obligations that arose directly for States—obligations governed not by the rules of the organization but by international law.

20. He was in favour of retaining article 36 *bis*, but considered that the drafting required clarification.

21. Mr. RIPHAGEN said that article 36 *bis*, like several other articles in the draft, raised a general problem, that of the relationship between a treaty with an international organization and the internal rules of that organization. Obviously, in view of the wide variety of treaties and organizations, it was difficult to determine the nature of that relationship, and the Commission could therefore do no more than state a number of rebuttable presumptions.

22. The basic rule of the law of treaties was, of course, that a treaty could not take effect without

[2] See 1644th meeting, footnote 3.

[3] For text, see 1647th meeting, para. 1.

mutual consent. It seemed to him, however, that treaty instruments could introduce the modalities of consent, as also of effect. In that connection, he considered that the rules laid down in the Vienna Convention concerning the effect of treaties and the procedure for concluding them could not be applied to international organizations without adaptation, since such an organization was itself the product of a treaty between States. The technique of personalizing an international organization could perhaps be used, as had been the case when dealing with the treaty-making power of such organizations. But, in his view, personalization was an awkward legal device, since an international organization was more than the creation of a decision-making power: it was, after all, a social system. Quite apart from the general obligation of solidarity incumbent upon its members, there was the special matter with which the organization was itself directly concerned.

23. There were many ways in which the characteristics of each international organization might be reflected, but he did not think sharp distinctions could be made between supranational organizations, such as the EEC, which were not normal international organizations, and intergovernmental organizations.

24. So far as treaties with international organizations were concerned, he would, however, be inclined to make a distinction between three categories: first, treaties between an international organization and an outside entity; secondly, treaties between an international organization and its member States; thirdly, treaties between one international organization and another where both had substantially the same membership.

25. The analogy with treaties between States was far greater in the case of the first of those three categories of treaty than in the second. In that connection, he would remind members of the mandate treaties between the League of Nations and some of its members. The International Court of Justice had decided that those treaties could be unilaterally terminated by the organization without the need to have recourse to any procedure for the settlement of disputes. They were a very special category of treaty, and should perhaps be distinguished on the ground that they had not always been entered into on the basis of equality.

26. The position in regard to treaties between one international organization and another was a little different. He noted, in that connection, that article 5 of the Vienna Convention seemed to recognize that there were treaties with special characteristics where international organizations were concerned.

27. Article 36 *bis* dealt with the requirement of consent, but not in any revolutionary way. It was quite clearly concerned with not only the modalities of consent but also with its effects; in that connection, the various types of rights and obligations arising from a treaty between an international organization and an outside entity should perhaps be considered further.

28. It must be assumed that the member States of an international organization had no rights or obligations in respect of action to be taken with regard, for example, to the amendment or revocation of a treaty concluded by the organization. Only the organization itself could take action of that kind.

29. In exceptional cases, however, the rights and obligations of an international organization that concluded a treaty could become the rights and obligations of the member States vis-à-vis the outside entity with which the treaty was concluded, as, for example, in the case of the customs union referred to by the Special Rapporteur in paragraph 101 of his tenth report (A/CN.4/341 and Add.1).

30. Another category of phenomena, which might be taken into account but not necessarily explicitly referred to in article 36 *bis*, were what Mr. Calle y Calle had described as the negative obligations of the member States of an international organization, including the obligation not to defeat the object and purpose of a treaty concluded by the organization and an outside entity and the obligation not to contribute to the non-performance of a treaty by the organization and an outside entity.

31. Except in the cases to which he had just referred, he did not think that the member States of an international organization had any rights and obligations under a treaty concluded by that organization and an outside entity, unless, of course, the treaty itself made it clear that such rights and obligations existed.

32. A treaty concluded between an international organization and an outside entity could, however, have effects within the organization itself, particularly in respect of the rights and obligations of the member States of that organization *inter se*, as in the case of the EEC, whose member States had the possibility of invoking treaties concluded by the Community and outside entities. Such a possibility nevertheless depended on the internal rules of the organization, which could take precedence over a treaty concluded by the organization, as was made clear in article 27, paragraph 2,[4] and article 46, paragraph 3.[5]

33. Mr. ŠAHOVIĆ said that he had followed with great interest the evolution of article 36 *bis* in the course of the Commission's deliberations. Its consideration in second reading was, in fact, a third stage. The Special Rapporteur had first proposed a draft article 36 *bis* entitled "Effects of a treaty to which an international organization is party with respect to States members of that organization",[6] and in first reading the Commission had provisionally adopted an article

[4] *Idem*, 1673rd meeting, para. 4.

[5] See 1647th meeting, footnote 1.

[6] See *Yearbook... 1977*, vol. II (Part One), pp. 128–129, document A/CN.4/298.

entitled "Effects of a treaty to which an international organization is party with respect to third States members of that organization". In second reading, the Special Rapporteur's report proposed a new version, for which the suggested title was "Assent to the establishment of obligations for the States members of an organization".[7]

34. The development was surprising, and was the combined outcome of the Commission's deliberations and the comments of Governments and international organizations. He was grateful to the Special Rapporteur for his unremitting efforts to take into account the various comments on his proposals.

35. Unlike the earlier text, the text proposed by the Special Rapporteur in second reading was not limited to the effects on third States members of an international organization of a treaty concluded by the organization. That issue was set aside, and the new provision constituted essentially the statement of a rule concerning assent. The purpose and advisability of that change needed to be considered.

36. From a theoretical point of view, the situation of a third State member of an international organization with respect to a treaty concluded by the organization was certainly a question that could be raised. For his own part, he had felt from the beginning that the situation was one that concerned the organization, and that the draft adopted on first reading was not satisfactory.

37. Turning to the new wording proposed by the Special Rapporteur (1675th meeting, para. 27), he noted that it was concerned with the effects of treaties as well as with the question of assent. It was arguable that all the States members of international organizations must, as States possessing a legal personality of their own, be treated as third States with respect to treaties concluded by the organization of which they were members and which had its own legal personality and was capable of concluding treaties independently. In practice, however, only certain States members might be parties to treaties concluded between an international organization and States, and some States members would be third parties with respect to a treaty concluded by it.

38. He pointed out that if the proposed article was concerned with the assent of States members of an international organization and not to the situation of third member States, it was out of place in Part III, Section 4 of the draft, "Treaties and third States or third international organizations".

39. Although he was not persuaded that the proposed article was necessary, he was prepared to accept it as the statement of an extremely general rule, applicable to all international organizations. He thought that the wording of the introductory phrase and of subparagraph (*a*) was not completely satisfactory, and believed that subparagraph (*b*) should be drafted more precisely and coupled with an interpretation clearly explaining the scope of the article with respect to the position of members regarding treaties and their effects.

40. He would therefore be prepared to accept the new provision suggested by the Special Rapporteur, on the understanding that its meaning as compared with the version adopted on first reading was clearly indicated. He would nevertheless reserve his position if it turned out that the text could be interpreted as the equivalent in another form of the text provisionally adopted on first reading. The Commission should eschew a formal approach and should consider the concrete consequences of the draft it was preparing.

41. Mr. VEROSTA said that, unlike Mr. Šahović, he thought that the new article 36 *bis* proposed by the Special Rapporteur was properly included in the Commission's draft. International organizations such as the EEC might conclude treaties with third States or third international organizations that affected member States. An article dealing with that possibility had a logical place in Part III, Section 4 of the draft.

42. In its written comments (A/CN.4/339), the EEC had pointed to the case of "mixed agreements" to which the Community might become a contracting party together with its member States when they involved treaties covering areas within which the competences were mixed. The EEC declared in that connection that "it should be clear that article 36 *bis* also applies in the case of mixed agreements to those rights and obligations provided for in the agreement which fell within the competence of the international organization". It also noted that "in the case of mixed agreements, the member States of the international organization would not necessarily be 'third States' ".

43. He suggested that the title of the new article should be "Effects of a treaty to which an international organization is party with respect to States members of that organization" and that the words "with a third State or a third international organization" should be inserted after the words "by that organization" in the introductory part of the article proposed by the Special Rapporteur.

The meeting rose at 6 p.m.

1677th MEETING

Tuesday, 23 June 1981, at 11.25 a.m.

Chairman: Mr. Robert Q. QUENTIN-BAXTER

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz Gonzáles, Mr. Evensen, Mr. Francis, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr.

[7] A/CN.4/341 and Add.1, footnote relative to para. 104.