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Summary record of the 1677th meeting

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

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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.

Šahović, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question 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 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. USHAKOV reaffirmed that article 36 *bis* was based on the very special situation of an international organization, the EEC, which was partly a typical international organization and partly a supranational organization. The draft text adopted on first reading and the new wording proposed by the Special Rapporteur (1675th meeting, para. 27) were virtually identical although the new version raised many problems.

2. Thus, it would have seemed logical to use in article 36 *bis*, as in articles 34 to 36,[2] the expression "a State" rather than "the States". However, a proposal to that effect would undoubtedly have met with strong objections on the part of the members of the Commission who were nationals of States members of the EEC and for whom it was impossible for one State member to act independently of the others. There was nevertheless some justification for questioning the use of the words "States members" in subparagraph (*a*) of the new provision, since that text enunciated a general principle. It seemed that an attempt was thereby being made to conceal the fact that a treaty could not be concluded with a member State in the case of certain special types of organizations whose commitments were necessarily binding on all their member States, whereas organizations of the classical type such as the United Nations could conclude a treaty with one of their member States. Without actually saying so, article 36 *bis* would then be covering the special situation of the EEC, thus justifying the departure from the position forming the basis for draft articles 34 *et seq.*

3. Under the new version proposed by the Special Rapporteur, it was possible to envisage the case where a treaty was concluded between two international organizations, one of which imposed on its member States, by its signature, the obligations which it had contracted, while the other organization did not have that power. In such a case, the absence of reciprocity of obligations between States members of the international organizations would be sure to give rise to many difficulties.

4. Furthermore, subparagraph (*a*) of the new text mentioned the "rules of the organization", which the Commission had defined as comprising the relevant decisions and resolutions of the organization. In the case of an international organization of the usual type, it was possible for a resolution adopted by a majority of members to decide on the conclusion of a treaty, which would obviously be binding only on the international organization. In that case, it would be of little consequence that a State member had voted against the resolution, since only the international organization would be bound and would undertake obligations in accordance with its statute. On the other hand, if the text proposed by the Special Rapporteur was adopted, a State which, in the same case, opposed the resolution in accordance with the relevant rules of the organization would nevertheless be bound by the treaty concluded in accordance with the relevant rules of the organization, and would have to assume obligations it had not accepted. Such an end result was obviously inadmissible.

5. The situation was, of course, different in the case of the EEC, since its member States had relinquished their capacity to conclude treaties in certain fields and it was the supranational organization that exercised the relevant powers.

6. The very terms of subparagraph (*a*) were contrary to the rules laid down by the Commission's draft articles and contrary to the provisions of the Vienna Convention,[3] since neither instrument provided that a treaty could bind an entity that was not a party to it. It would be inconceivable for article 36 *bis* to lay down a rule that departed from the law of treaties and provided that such an instrument could bind an entity which had not signed it, acceded to it or ratified it. The desire to take account of the special situation of the EEC as a supranational organization would oblige the Commission to draft its article 36 *bis* not with reference to the ordinary international law that applied to the usual type of international organizations, but rather, with reference to the international law that was in the process of developing and that applied to supranational international organizations, which did, of course, exist, since the European Economic Community existed and concluded treaties establishing obligations for its member States.

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

[2] *Idem.*

[3] See 1644th meeting, footnote 3.

7. Subparagraph (*b*), which concerned in particular the special situation of the EEC, made use of the concept of acknowledgement of the obligations arising from a treaty, a new concept whose meaning was not defined. Furthermore, that provision would tend to impose obligations not only on the States and organizations participating in the negotiation of the treaty, but also on the States members of the organization which might not have participated in the negotiation. In that connection, it should be borne in mind that draft article 2, paragraph 1 (*e*),[4] defined the terms "negotiating State" and "negotiating organization". However, in the case where the international organization alone was a party to the treaty and the signatory of that instrument, it was difficult to see on what basis the member State could be considered to have participated in the negotiation.

8. With regard to the concept of "acknowledgement", he did not think that the mere participation of a State or an organization in the negotiation of a treaty could establish obligations for it so long as it had not formally adopted the text. For example, a State member of an international organization that had acknowledged, during the negotiation, a text subsequently signed by the international organization of which it was a member could not on that basis alone be regarded as being bound by the obligations arising from the treaty, which bound only the signatory international organization. Participation in the elaboration of the text could not definitively bind the participants under any rule of international law.

9. In normal practice, there was no doubt that an international organization could bind its members by a treaty, through certain formalities. For example, the CMEA, which was an international and not a supranational organization, could not bind its member States through its signature. If it signed a treaty establishing obligations for itself and for its member States, it included in the instrument a special clause providing that the treaty had to be expressly approved by all the member States in a written decision of the competent bodies of the latter. Such a mechanism seemed entirely satisfactory, since the member States could participate in the negotiation, as observers for example, although a member State which had not approved the treaty was not automatically bound by it.

10. In the case of the EEC, such a solution was not feasible, because the Community could not allow the member States to act independently. That was, however, the special situation that article 36 *bis* sought to cover, to the detriment of the general situation.

11. Referring to the case of organizations that were difficult to characterize, he mentioned the example of a customs union which consisted of two or three countries and in respect of which there were good grounds for asking whether it was an international organization or an agreement setting up joint machinery for its members exclusively in the field of customs duties. In his opinion, if the union was not called upon to take decisions, but only established customs duties and rules governing the import and export of goods, it was merely an agreement. However, if such an entity was considered to be an organization, it would represent a new special case.

12. In fact, the Commission's draft was concerned essentially with international organizations of the classical type, such as the United Nations, its specialized agencies and its regional commissions. He doubted whether the draft could and should provide for all types of international organizations, and recalled that Mr. Calle y Calle (1676th meeting) had mentioned the example, which was also a special one, of organizations of countries which exported a given raw material and were not competent to take decisions, particularly in respect of international relations. The basic problem facing the Commission resulted from the absence of an accurate definition of the concept of international organization, which was virtually impossible to formulate. Nevertheless, doctrine recognized the existence of certain criteria for an international organization: it had to be established by a treaty between States, have representative bodies (composed of State representatives), act as a subject of international law distinct from the States members and therefore be capable of concluding agreements establishing obligations for the organization as such, and, lastly, be governed by the rules of international law. That was, however, a theoretical and general definition, which did not cover all the various types of existing organizations. It was for that reason that the Commission had included in its draft the definition of an international organization previously used in other conventions.

13. In his opinion, the draft could not take account of all the special types of international organizations. Indeed, it was a fact of life that it was possible to formulate general rules only for the most frequent cases and that there were always special cases that did not fall into that category. In the case in question, the EEC was of a special character. It existed and concluded treaties that were binding on its States members, but the situation called for certain special rules, which must, however, be applicable to international organizations of the classical type.

14. He therefore considered it impossible to include in the draft a rule that took account of all special situations, including that of the EEC. He thought that the Commission should first seek to formulate general rules to govern the most universal cases.

15. Mr. BARBOZA noted that, rather than focusing attention on regulating the effects of all treaties concluded by an international organization for its member States, the Special Rapporteur had confined himself to two specific cases, as stated in article 36 *bis*, subparagraphs (*a*) and (*b*). As he had concluded in his very clear report, it was simply a question of the

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

modalities of expressing consent. Article 35 of the Vienna Convention provided that, in the case of obligations arising for third States, there must be express consent in writing. The Commission had, however, decided that it could depart from the rules laid down in the Vienna Convention where necessary and where the structure and functions of international organizations so dictated. Article 36 *bis*, which was concerned with international organizations, seemed to be a case in point.

16. As he saw it, article 36 *bis* should seek to protect the position of third States by imposing the formal requirement that consent must be expressed in writing, while allowing international organizations a measure of flexibility in their day-to-day operations by relieving them of the obligation of meeting that cumbersome requirement in all cases.

17. In that connection, he noted that in its written observations, the Federal Republic of Germany (A/CN.4/339) had expressed the view that, strictly speaking, States members were not to be regarded as third States where international organizations were concerned—but that view was based on the special relationship that existed between international organizations and their States members. The Special Rapporteur's proposal (1675th meeting, para. 27) overcame the problem of that special relationship and had the advantage of dispensing with the need to refer to the legal personality of an international organization, since it was necessary only to refer to the assent of its members. Efforts would be made to take account of the needs of international organizations in their day-to-day operations on the basis not of that special relationship, but of the assent of their States members. Such assent, as referred to in draft article 36 *bis*, subparagraph (*a*), must, in his view, be based on the participation of the member State in the constituent instrument of the international organization.

18. It had been suggested that, if the definition of the rules of the organization was to include resolutions and decisions adopted by a majority, it would be open to question whether all member States had assented whenever one of those States had not adopted such a resolution or decision. His own view was that such a simplistic approach could not be adopted: resolutions and decisions would have to be based on the constituent instrument, since no important measures could be adopted unless authorized by the instrument to which all States were parties.

19. For those reasons, he regarded the Special Rapporteur's new proposal as an improvement on the earlier proposal; he also favoured the alternative version of subparagraph (*b*) (*ibid.*, para. 29), which read:

(*b*) any unequivocal manifestation of such assent.

It was clear, however, that another place would have to be found for the article and, in his view, the proper place would be after article 35.

20. Mr. EVENSEN said that some of Mr. Ushakov's reservations seemed to be based on the assumption that the article contained some kind of EEC clause in disguise. He could not agree with that view, since the article was not applicable only to that organization. The EEC was also not the only organization that had supranational powers. A number of other organizations—such as the OAS, for example—had such powers, although perhaps to a lesser extent than the Community; and some fisheries organizations had a decision-making rule whereby acquiescence could suffice, even when indicated by mistake. In addition, the permanent members of the United Nations Security Council could be said to exercise supranational powers in certain important cases. (Admittedly, the latter example was not strictly in point in the context of the draft, but it was indicative of a trend.)

21. He believed Mr. Ushakov's concern that CMEA would be affected by the terms of article 36 *bis* was unwarranted. The new wording proposed by the Special Rapporteur expressly stated that the article would apply where the rules of the organization "provide that States members of the organization are bound by such a treaty". As CMEA had no such rules, it could not be affected by the terms of the article.

22. With regard to the wording of article 36 *bis*, he considered that the new formulation was preferable to the original one and that it would be advisable for a provision of that kind to be included in the convention. Specifically, the reference in the opening phrase of the article to the assent of States members of an international organization was acceptable to him, but the French and Spanish versions of that phrase should perhaps be brought into line with the English. The reference to the relevant rules of the organization, in subparagraph (*a*), was also acceptable to him, since it would avoid misunderstanding. He failed to see how that paragraph could be formulated in any other way or, indeed, why it should be.

23. Since a detailed discussion had taken place on the two alternative versions of article 36 *bis*, he recommended that they should now be referred to the Drafting Committee.

24. Mr. ALDRICH said that it was important to bear constantly in mind the very limited nature of the exception provided for in article 36 *bis* and to recognize that the problem at issue was more a terminological and psychological one than a truly legal one. In the case of many international organizations, it was somewhat strange to speak of the members of the organization as though they were like all other third States—non-participants in the whole process. That tended to create some need, which might otherwise not be felt, for an additional provision to make it clear that the States members of an international organization might not always be exactly like all other third States where a treaty was concerned.

25. There was also the question of the practical operation of an organization: how was it going to make its decision to become a party to a treaty? How were its members going to make their decisions, and what practical problems were involved in complying with the rules laid down in article 35? During the discussion, he had not heard mention of any of the practical problems that would arise in that connection for an organization such as EEC. Why was the matter so difficult that a new article 36 *bis* was needed to provide for exceptions to article 35? In the absence of any definite explanation, his instinct was that Mr. Ushakov had rather had the better of the discussion. The problems were real, but the one article 36 *bis* sought to solve was not as real as it might seem.

26. Article 36 *bis* was limited, in the first place, because it dealt only with how the assent of States members could be expressed and, secondly, because it provided for an exception to article 35, which required assent to be given in writing. It was therefore not creating a situation in which the other parties to the treaty would discover, once the treaty had entered into force, that the States members of the international organizations had acquired obligations and rights under it; that was something that would have to be established during the negotiations. Article 36 *bis* was concerned solely with the question of how the assent of the States members of the organization was expressed; it did not deal with the other, much larger, part of the problem of how the assent of the other parties to the treaty was established. Unless both halves of the equation were present, the article would not be effective. It might also be useful to bear in mind that article 36 *bis* was not needed in order to require States members of an organization to act in conformity with the obligations established by a treaty to which the organization was party. If the rules of the organization, as agreed by its States members, permitted the organization to require its members to act in conformity with treaties to which the organization was party, those members could be so required merely as a matter of the internal rules. They did not have to be parties to the treaty for that purpose. In many cases, all the organization really needed was the ability to compel its members to act as if they were bound. In most cases, it was merely of academic interest whether they owed obligations to other States parties to the treaty, provided the organization, as a party to the treaty, could ensure that its States members did not act contrary to that treaty.

27. He therefore considered that the new alternative proposal provided for a better approach to the problem of laying down an exception to article 35. There were, however, a number of drafting problems, some of which went beyond mere points of drafting. In the first place, there was the basic problem of whether the article was referring to all the States members of an international organization or only to some of them. In his view, if the article was to provide for any rule at all, it must refer to all States members. Secondly, the rules of the organization could be written, and recorded and adopted, in a variety of ways. Thirdly, what would be the position of third State participants at the conference at which the treaty was produced? How would they know what the rules were? How were they to know whether the rules provided that States members of the organization were bound by the obligations of the organization or not? Was there not some requirement that the rules should be brought to the attention of the other participants in the conference and that the consequences for States members of the organization should be made clear? And, if so, when? If those points could be clarified, the article would be greatly improved—always assuming that a provision along those lines was in fact really necessary. Subparagraph (*b*) of the article also raised the problem of knowing what form the acknowledgement referred to would take.

28. In practice, the real problem which the other States participating in the negotiations that were not members of the organization would probably have to face was whether and under what circumstances to allow the organization to become a party to a treaty without its States members necessarily being bound. In his view, those other States would on many occasions have to insist that the States members be bound, as well as the organization, for their own protection. Whenever the question arose, however, the end result would have to be clear at the time of the negotiations. That must also be so to meet the standards of article 35.

29. In the circumstances, he wondered whether article 36 *bis* did not create more problems than it solved.

The meeting rose at 12.50 p.m.

1678th MEETING

Wednesday, 24 June 1981, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question 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]