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Summary record of the 1678th meeting

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

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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]

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. REUTER (Special Rapporteur) said that two of the comments made by Mr. Ushakov at the preceding meeting had been perfectly justified.

2. First, in subparagraph (*a*) of the new text of article 36 *bis* proposed by the Special Rapporteur (1675th meeting, para. 27), the words "States members of the organization are bound by such a treaty" might give the impression that those States had become parties to the treaty. Those words should be replaced by the words "States members of the organization are bound by those obligations"—namely, the obligations referred to in the introductory phrase of the article. In that connection, he stressed the fact that it was not unusual for a subject of international law to be bound by obligations arising from a treaty to which it was not a party. By way of example, he referred to collateral agreements and certain treaties between States which concerned international organizations but to which the international organizations could not be parties, although they could, on certain conditions, accept the obligations arising therefrom.

3. Secondly, the reference in subparagraph (*b*) to "the States and organizations participating in the negotiation of the treaty" was incorrect. Those words should be replaced by: "the States and organizations parties to the treaty".

4. Sir Francis VALLAT said that paragraphs 95 *et seq.* of the Special Rapporteur's report (A/CN.4/341 and Add.1) set out a very convincing case for the inclusion of article 36 *bis* in the draft. After carefully re-examining articles 35 and 36,[2] he thought that in the case of rights there was no need for undue concern. The real problem, in his view, arose out of article 35, paragraph 1, which followed the text of the Vienna Convention[3] in requiring the third State to accept the obligation expressly and in writing. If it was indeed the intention that a treaty concluded by an international organization should be operative and effective for each of its members and that obligations should be imported as between the members and the other parties to the treaty, some provision should be made to deal with that situation. The reason was quite simple: the members of the organization were clearly third States within the meaning of the definitions laid down in article 2.[4] In the circumstances, it must generally be in the interests of other States parties to the treaty that they should have direct recourse against the members of the organization without necessarily having to resort to the machinery of the organization itself. As originally formulated, article 36 *bis* did require revision, and specifically it should be narrowed down to deal with obligations only; the new draft proposed by the Special Rapporteur pointed in the right direction. Personally, he preferred the original drafting, but the general substance of the new draft was on the right lines. In his view, the article was not only desirable but necessary to fill what would otherwise be a gap in the scheme created by the Vienna Convention and the draft articles.

5. Mr. PINTO said that the text of article 36 *bis* did not make clear who were the prospective parties to the treaty referred to. One party, of course, was the international organization whose actions were at issue. He assumed that the other parties were not members of that organization, although it was not readily apparent from the article.

6. The case covered by article 36 *bis* did not fall directly under article 35, since a State member of the organization which concluded the treaty should not be placed in the category of "third State" as defined. It had a legal, factual and constituent connection with the organization by virtue of its membership therein. He therefore agreed that the case should be treated separately. In drawing up a rule to govern the situation, three categories of concern had to be borne in mind: first, the concern of the organization entering into the treaty regarding the implementation of its rules and treaty intentions; second, the concern of the member State of the organization to ensure that it was bound only in a manner provided for by the rules of the organization or, in the absence of any such provision in the rules, by its express consent, however demonstrated; and, third, the concern of the other States and organizations negotiating the treaty to ensure that the scope of the treaty, in the terms of who their treaty partners would be, should be known and acceptable to them.

7. The new version of article 36 *bis* proposed by the Special Rapporteur did not perhaps meet all those concerns, although paragraph (*a*) took full account of the need to observe the rules of the organization and thus, to some extent, afforded a guarantee for members that the scope of their automatic involvement in the organization's treaty activities was circumscribed by a known provision. The consent of member States in cases where the rules did not contemplate automatic binding of members was covered by paragraph (*b*), which was an alternative to paragraph (*a*) and separated from it by the disjunctive "or". The consent of the negotiating entities, however, was covered in paragraph (*b*) only, although it also seemed relevant to paragraph (*a*). The alternative version of paragraph (*b*) proposed by the Special Rapporteur (1675th meeting, para. 29) seemed to cover only the consent of members of the international organizations and not the consent of the other negotiators since the term "such assent" was used in reference to the introductory clause which

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

[2] *Idem.*

[3] See 1644th meeting, footnote 3.

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

covered only the assent of members of the international organization.

8. To take account of the concern to which he had referred, he would suggest that a provision, based on article 36 *bis* but borrowing certain elements from article 35, be drafted to read:

"An obligation arises for a State member of an international organization from a provision of a treaty by that organization if:

"1. the relevant rules of the organization applicable at the moment of the conclusion of the treaty so provides, or the State member of the international organization acknowledges that it is bound by that obligation;

"2. the parties to the treaty intend that provision as a means of establishing the obligation."

9. Lastly, he did not think that the terms "assent" and "acknowledgement", as used in the text of article 36 *bis* proposed by the Special Rapporteur, had the content to distinguish them from more commonly used terms such as "consent". Possibly it should be left to the Drafting Committee to find a solution.

10. Mr. USHAKOV noted that at the preceding meeting Mr. Evensen had said that the expression "relevant rules of the organization" covered only the rules providing that member States were bound by an obligation arising from a treaty. If the General Assembly were to adopt a resolution by which it decided that the United Nations would provide financial assistance to a given State, and the Soviet Union voted against that resolution, the only obligation which could arise from it for the Soviet Union would be to pay its contribution to the regular budget. According to draft article 35, an obligation arose 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". The obligation had therefore to be established directly for the third State. In the case in question, if the General Assembly resolution provided that the Soviet Union must contribute 1 billion roubles for assistance to be provided by the United Nations to a given State, the result would be a direct obligation for the Soviet Union even if it had voted against the resolution. Such a situation was obviously unacceptable, but it was provided for in the draft articles, because the expression "rules of the organization" encompassed not only the rules proper, but also resolutions, decision and practice. However, practice did not imply express consent. In the case in question, practice could not have the effect of obliging the Soviet Union to pay out 1 billion roubles.

11. Article 36 *bis*, as adopted on first reading by the Commission, also referred to the observation by the States members of an international organization of the obligations arising for them from the "provisions of a treaty" to which that organization was a party. A State might, however, be a member of two organizations which concluded treaties from which conflicting obligations for that State arose.

12. Some members of the Commission had expressed the view that it was unnecessary to refer to the rights which could arise for the States members of an international organization from a treaty to which that organization was a party. He did not share that view. In the case of a treaty concluded between the Soviet Union and the EEC in an area within the competence of the Community only, and not of its member States, the draft articles provided that the member States would be bound by the obligations established by that treaty, in accordance with the relevant rules of the EEC. For its part, the Soviet Union would be committed to the Community and not to the member States. The rights corresponding to the Soviet Union's obligations would thus not be the rights of the member States, unless it was otherwise agreed. On the other hand, the Community's obligations would also be those of its member States. The draft articles would thus have the effect of establishing an obligation for the Soviet Union not only towards the EEC, but also towards the member States, and that without its express consent.

13. He stressed the fact that the hypothesis of a resolution whereby the General Assembly decided that the Soviet Union was bound to pay out 1 billion roubles for financial assistance was not a far-fetched one. Such a decision could be aimed at a number of the more wealthy member States. If the draft articles always referred to the member States collectively, it would be designed to cover the specific case of the EEC, whose member States could not undertake treaty commitments separately. There was no doubt that the members of the Commission who favoured a provision relating to the specific case of the Community would not agree to the draft articles referring to a member State. Unlike the States members of the CMEA, the member States of the EEC had all to accept the obligations arising from treaties concluded by the Community, which meant that they had given up part of their sovereignty. In his view, the case of the EEC was unique. The Member States of the United Nations, for example, were not bound by the obligations arising from treaties concluded by the Security Council in the exercise of its functions of maintaining international peace and security. If an agreement concluded between the Security Council and a Member State established obligations for other States, they had to give their express consent.

14. In conclusion, he stressed the fact that an attempt to formulate a provision aimed at a single specific case would create almost insuperable difficulties.

15. Mr. JAGOTA said that the question raised by article 36 *bis* had also been under discussion at the negotiations on the law of the sea, namely, whether the future convention on the law of the sea should be open

for participation to international oganizations such as the EEC. As yet, no solution had been reached.

16. The old and new versions of article 36 *bis* referred to the rights and obligations of member States of an international organization under a treaty which arose from the "relevant rules of the organization applicable at the moment of the conclusion of the treaty". That was a question of fact, evidence of which could be adduced by placing before the other parties to the treaty a copy of the relevant rules. The relationship of the organization with its member States might, however, subsequently be modified, and the question which therefore arose was whether such subsequent modification would affect the cases covered by article 36 *bis* and, specifically, in what circumstances a member of an international organization should be regarded as a third State.

17. States which became members of an international organization did not, of course, thereby lose their sovereignty, but a question concerning their competence to conclude treaties did arise: whether, in becoming members of an organization, States transferred their competence entirely to that organization. The members of the EEC, for example, had vested exclusive powers in the Community to conclude treaties on specific matters. Where such treaties were concerned, the question arose to what extent the members of EEC were to be regarded as third States. His own view was that, in cases where exclusive competence had been vested in an international organization, the term "third State" should not be used in reference to members of that organization. It followed, however, that, if an international organization had not been vested with exclusive competence, it must have been vested with what might be termed residual or concurrent competence. In other words, the member States of an organization as well as the organization itself might conclude treaties on the same subject, in which case the treaty concluded by the organization would prevail. In cases of residual and concurrent competence, the member States of an international organization should, in his view, be termed third States.

18. If his interpretation of the term "third State" was correct, he would have no objection to the substance of article 36 *bis* however drafted, although he favoured the alternative version of paragraph (*b*) proposed by the Special Rapporteur (1675th meeting, para. 29). Alternatively, Mr. Pinto's proposal could be used. He would be grateful for the Special Rapporteur's confirmation of his understanding of the concept of third State.

19. Mr. ALDRICH said that certain comments made during the discussion posed the question whether all members were working on the same assumption. That applied in particular to paragraph (*b*) of the new version of article 36 *bis*. He had assumed that the reference to States and organizations participating in the negotiation of the treaty as well as to the States members of the organizations would be omitted. As he understood it, the purpose of the revised version of the article was simply to make an exception to the requirement laid down in article 35 that consent must be given expressly and in writing. Consequently, article 36 *bis* dealt only with the kind of expression of assent required of States members; it had nothing to do with the attitudes of other States parties to the treaty, which were protected by articles 35 and 36. That, it seemed to him, was one of the answers to the point raised by Mr. Ushakov. No rights or obligations could arise for the States members of an international organization which became party to the treaty unless that was intended by the parties to the treaty. The protection of other parties was clear. All article 36 *bis* was concerned with was to make it somewhat easier for the States members of an international organization which was itself a party to the treaty to become directly bound to other parties. He therefore considered that article 36 *bis* should be limited to the way in which the acceptance of States members of the organization was expressed and should not deal with issues otherwise dealt with in articles 35 and 36.

20. His inquiry at the previous meeting as to why article 36 *bis* was regarded as so important did not seem to have been answered. It had been said that the intent of the article was mainly to protect the interests of non-members of the EEC by providing other parties to the treaties it concluded with direct recourse against the members of that organization—assuming once again that the requisite intent to create rights and obligations was established as required under articles 35 and 36. He still did not see why it was so difficult to establish expressly and in writing the intent of the members of the organization to be bound. All the parties to a treaty had a certain interest in knowing who their treaty partners were. Perhaps, therefore, it would be possible to agree on a compromise solution whereby it was made clear that no exception was being made to the requirement under articles 35 and 36 that all parties to the treaty must intend to confer the obligations and rights on the States members of the organization. Perhaps it could also be made clear that the rules which brought about that binding effect, or the acknowledgement by members in the absence of such rules, should be made public or available to the other participants in the negotiations. He did not think that was an unreasonable idea.

21. It was essential to be quite clear that article 36 *bis* dealt solely with cases in which all members of the international organization were to be bound by the obligations. It was not dealing with cases where only one or two members decided to become bound, which would be governed by the requirement of article 35.

22. So far as concerned Mr. Ushakov's point that article 36 *bis* could be used in other organizations to bind States to obligations which they never intended to undertake, the answer basically was that States must take care to see that they did not agree to anything they

were not willing to undertake. In practice, he did not think that it would be a frequent occurrence, although it was perhaps on the increase in the economic area.

23. Sir Francis VALLAT, having noted that the discussion had clarified the position to some extent, said that the matter could certainly have been dealt with differently, since it arose out of the whole structure of the draft articles including the definitions of "party" and "third State", the provisions regarding the manner in which consent to be bound could be expressed, and the position of third States.

24. He fully agreed that, so far as a member of an organization was concerned, the term "third State" was not a happy one, but it seemed absolutely clear that, within the meaning of the draft articles, a State member of an organization did not become a party to the treaty merely by virtue of the fact that the organization to which it belonged had become a party. As a matter of principle, therefore, where it was intended that a member should have the rights and be bound by the obligations contained in the treaty, some provision must be made to fill a gap in the structure of the draft articles. That in fact was the essence of the problem. He did not see it as an EEC problem as such, since it could arise in any case where an organization had competence to make treaties that were to be binding on individual members.

25. While rights were adequately covered by article 36, a problem arose in the case of obligations, since consent in writing was required. The matter was important for two reasons. One was that, where an organization had authority and competence to enter into treaty obligations on behalf of its members, it was desirable that its authority should be maintained, and it would undermine progress in the world, as it were, if they were to say that in order for an individual member to be bound to the treaty in such cases, its consent must be expressed in writing. Another reason was that, where a number of States parties were members of the organization and the intent was that they should be bound by the obligations under the treaty, it was questionable whether all members of the organization would take the trouble to express their consent in writing. That was just a fact of life.

26. So far as unanimity was concerned, he could not see in principle why a treaty should not be made on behalf of some members of the organization, and he would therefore hesitate to limit article 36 *bis* to cases where the treaty would apply to all members. Possibly, however, the matter required further consideration.

27. The fact that the other parties to the negotiations might not be familiar with the rules of the international organization concerned was an added reason why article 36 *bis* was desirable, for it should be made clear to other States that when negotiating with an international organization they must acquaint themselves with the position under its rules. There was nothing new about that; when negotiations were being held with Governments, account had to be taken of the constitutional position in the State concerned, and there was no reason why the same should not apply to international organizations. He agreed, however, that there were some obscurities in the article that should be cleared up, although he had to confess that he would have difficulty in giving a precise answer as to the position in the case of EEC. If the draft articles could call attention to that kind of need, they would serve a useful purpose.

28. Mr. USHAKOV said that his position had always been quite close to that of Mr. Jagota. The article under consideration covered the particular case of States that had conferred upon an organization of which they were members the capacity to conclude treaties in certain areas, without retaining a parallel capacity for themselves. In relation to such a supranational organization, those States were not genuine third States, but, rather, undercover parties: they were clandestinely parties to the treaties concluded by the organization. What was more, article 36 *bis* formed part of the section entitled "Treaties and third States or third international organizations", even though it did not relate to genuine third States. In his opinion, that article had no place in the draft articles, because it was aimed at a unique situation with characteristics that were not those of international organizations.

29. Mr. REUTER (Special Rapporteur) said that, in the first place, the intent of article 36 *bis* and the way it had been expressed arose from the fact that, on the one hand, the Commission was bound by a rule that it had laid down, namely, that there were only two possible positions vis-à-vis a treaty: that of parties and that of third entities; and that, on the other hand, a very formalistic solution for the establishment of treaty obligations for third States had been adopted in the Vienna Convention. Since the Vienna Convention had entered into force, it could obviously be interpreted only by the parties. Within that general framework, his only concern had been to see how the strict formalism imposed by article 35 could be made more flexible. That objective was nevertheless tempered by the fact that all the problems that might arise could not be solved in a single provision.

30. A number of the comments that had been made with regard to the Commission's draft articles had shown that in general the position of the States members of an organization with regard to the treaties concluded by that organization gave rise to many difficulties. It should be recognized, therefore, that it would be a considerable over-simplification to say that only two possible positions should be allowed for, namely, that of parties and that of third entities. On first reading, the Commission had examined a number of possible cases, including the amendment of the constituent instrument of an organization and a change in the organization's membership, and although they

were all very interesting, they went beyond the scope of the Commission's task, as it had clearly indicated when it had adopted draft article73.[5]

31. Some members of the Commission had emphasized the special case of the EEC. He was, however, of the opinion that that institution was of no particular interest in the current context. The EEC had concluded treaties with a large number of countries, and only the Community's partners could decide how to solve the problems of the effects of those instruments. With regard to the practice of the United Nations, he pointed out that that Organization had concluded a treaty with the United States of America concerning the establishment of its headquarters in New York, and that that treaty established obligations for the States Members of the Organization, which had not, however, accepted them in writing. It might therefore be asked whether the United States was entitled to approach a Member State directly in order to remind it that it was bound by the treaty. It had been in order to try to cater for that type of situation that the Commission had drafted article 36 *bis*. A provision of that kind was of great importance, not for the States members of the organization or even for the organization itself—and Mr. Pinto had correctly analysed the interests at stake in such a case—but, rather, for the countries which had concluded a treaty with an international organization.

32. Mr. Aldrich and Mr. Pinto took the view that article 36 *bis* tended to establish a legal basis for direct relations between the treaty partner of an international organization and the States members of that organization It would therefore be necessary to be sure of the assent of the partners and to determine whether they had agreed to the establishment of such direct relations. The fact was that the partners of the international organization had no obligations to the States members of the organization with which they had concluded a treaty. It had also been said that it must be the intent of the partners of the organization that rights would arise for them. In that connection, he recalled that, early on in the discussion of article 36 *bis*, the Commission had decided that it was unnecessary to provide for the case of rights if provision was made for that of obligations, since the obligations of the States members to the partners of the international organization corresponded to the rights of the latter. Moreover, draft article 36 made it clear that it was presumed that such rights would arise because it was in the interests of the partners of the organization to have such rights. He was, however, prepared to accept any drafting amendment on which the Commission might decide. He realized that subparagraphs (*a*) and (*b*) of the version he had proposed did not fully solve the problem that arose and that they were only two possible approaches, one specific and the other more general.

33. The text he had originally proposed in 1977[6] had been accompanied by a commentary stating the foregoing considerations. The text itself was, however, slightly different in that it referred to both rights and obligations, mentioned the constituent instruments of the organization and not its relevant rules, and described the second case in rather a cumbersome way. The version that had been provisionally adopted on first reading referred instead to the relevant rules, while subparagraph (*b*) had a simplified wording with a slightly broader meaning and tended towards the idea of implied consent. The new version (see 1675th meeting, para. 27) was drafted along the same lines, but his underlying intention was expressed by the words "The assent of States members of an international organization to obligations arising from a treaty concluded by that organization shall derive from", which were designed not to eliminate the concept of assent, but, rather, to make the means of expressing it more flexible. Moreover, the new wording no longer referred to rights and included an alternative for subparagraph (*b*) (*ibid.*, para. 29) affording greater flexibility.

34. The need for the solution thus proposed would be apparent to the Commission. It was obvious that article 36 *bis* would be totally unnecessary if its only purpose was to express approval of the European Communities, which was indifferent to such approval. If that were the situation, that provision, which was as unnecessary as it was dangerous, should simply be deleted.

35. There were, in fact, good reasons for the proposed text. The problem to which it related could, of course, be solved through the participation of the States members of the international organization in the conclusion of treaties into which it entered. In practice, however, it would be difficult to see how an international organization with more than one hundred members could be accompanied by all its member States during the negotiations, or how all the members could be required solemnly to accept the convention in question. It was precisely to meet that particular case that article 36 *bis* was required, and it was justified *a contrario* by the example, given by the EEC in its comments (A/CN.4/339), of "mixed agreements", which had disastrous consequences for the time of entry into force of treaties.

36. By way of example, he referred to the case of a customs union personified by an international organization which was entitled to conclude tariff agreements. In such a case the importance of the absence of formalism was obvious, because it was quite certain that the States which would apply any possible agreement through the intermediary of their administrations would approve the agreement concluded. The same was true of fisheries agreements, in the case of which it could be particularly advantageous for the

[5] See 1647th meeting, footnote 1.

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

State partner of the international organization to be able to invoke the agreement of the member States without going through the organization, especially if a dispute arose, since an international organization, unlike a State, could not be brought before the International Court of Justice.

37. In his view, there would be a definite advantage in trying to reduce formalism in the matter of consent. The solution proposed in article 36 *bis* was, moreover, favourable to international organizations. Although in all probability the number of international organizations could be expected to increase in the future, it was clear that they would not have very extensive powers and that they would certainly not be in a position to conclude many treaties. There was thus an obvious advantage in reducing the formalities guaranteeing the implementation of treaties by member States.

38. Draft article 36 *bis* had encountered only two basic objections, which were both of a political nature and both entirely valid, since political considerations alone could determine the Commission's choice.

39. The first objection was that article 36 *bis* referred only to the situation of a particular European organization. The exchange of views which had taken place in the Commission had shown that some members considered that that article did indeed apply to the EEC and doubted that it could apply in any other area. Such an attitude was a purely political one, because the real problem was one of the future, since it had to be decided whether or not an increase in the number of international organizations was desirable and whether the new institutions provided for in draft conventions, such as that on the law of the sea, should one day be able to come into existence. In that connection, the Commission had to decide whether it intended, in its draft articles, to place formalist obstacles in the way of the application of an agreement of that kind. In the case in question, it should not be forgotten that the countries most concerned were the developing countries. He pointed out that although it could legitimately be maintained that the article under consideration represented a regressive development of international law because it focused on the situation of the EEC, it could just as legitimately be stated that it represented a progressive development of law, since it would eliminate the requirement of formalism and ensure the application by the States members of an international organization of the agreements concluded by it.

40. The second basic objection amounted to determining whether the future of or the need for international law would lead towards a very rigorous or a less rigorous formalism. He stressed the fact that, in that connection, reference was being made only to the formalities for the consent of member States and not for that of international organizations, about which some hesitation would be understandable. He was of the opinion that the two options were equally legitimate and would determine the Commission's decision whether to retain or to delete article 36 *bis*.

41. The members of the Commission had also made a number of detailed comments.

42. The first related to the position of a possible article 36 *bis* in the draft. Mr. Barboza (1677th meeting) had rightly said that, if the Commission confined itself to referring in the provision to the establishment of obligations, the draft article should become article 35 *bis*.

43. Mr. Verosta (1676th meeting) had been of the opinion, rightly also, that the article should have a title different from that which the Commission had adopted on first reading. Although he himself had no specific suggestions to make, he thought that the title should refer to the actual purpose of the article, namely, the reduction of formalism.

44. The expression "the relevant rules of the organization" had been considered dangerous because it would allow for the possibility that an international organization could itself establish rules under which some obligations arising from treaties would have effects on the member States. That was indeed a problem to be taken into account, and he recalled that in his original draft, article 36 *bis* had referred to the constituent instruments of the organization. He was nevertheless of the opinion that the words "relevant rules" meant only the rules of the organization that were in keeping with the constituent instruments. There would thus be no valid reason to deprive an international organization of the right to develop its constitutional law. The Commission should merely acknowledge the fact that some organizations followed a strict practice while others followed a more flexible one. It would be for the Drafting Committee to decide that question.

45. The use of the words "the member States" had been criticized, and Mr. Aldrich had proposed the words "all member States". He himself would prefer to retain the more flexible wording in order not to hamper any future evolution and to avoid the contradictory and dead-end situation in which a State that had concluded an agreement with an international organization of which it was a member would have to be considered as both a party and a third State.

46. The Drafting Committee would also have to clarify the meanings of the word "acknowledgement" and the words "derive from", because it was quite legitimate to try to protect the assent of member States. It was, moreover, for that reason that he had proposed the second alternative for subparagraph (*b*), which required an unequivocal manifestation of assent or, in other words, more than an implied consent.

47. In conclusion, he said that, since the Commission would adopt a position only on a final text, he would like article 36 *bis* to be referred to the Drafting Committee. It would be for the Drafting Committee to

determine the desired degree of flexibility, taking account of the fact that article 36 *bis* had been drafted to serve the Commission and not to defend in any way the EEC—which, moreover, had no need of such defence.

48. Mr. USHAKOV said that, although he too was in favour of referring article 36 *bis* to the Drafting Committee, he reserved the right to comment on it beforehand.

The meeting rose at 1.05 p.m.

1679th MEETING

Thursday, 25 June 1981, at 10.05 a.m.

Chairman: Mr. Robert Q. QUENTIN-BAXTER

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. 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] (*concluded*).

1. Mr. USHAKOV said that he was neither for nor against the EEC as such; it was a reality whose existence had to be recognized. However, the Community was not an ordinary international organization; it was also a supranational organization, and in the present circumstances, the only real interest of article 36 *bis* of the draft was that it applied to the case of the Community. In his opinion, the other examples given by the Special Rapporteur at the previous meeting were not valid.

2. A headquarters agreement, for example, provided for obligations for the host country and for rights for member States and international organizations. Furthermore, any obligations that might arise from a headquarters agreement such as that between the United Nations and the United States of America did not arise by virtue of the rules of the organization or the participation of member States in the negotiation, for participation could not suffice to bind States. It should be noted also that the headquarters agreements referred to by the Special Rapporteur had all been concluded before the Vienna Convention,[2] under which obligations did not arise for a third State unless the State expressly accepted the obligations in writing. It would certainly be better for the host country if obligations arising from a headquarters agreement were expressly confirmed in writing by States which recognized them as binding. Acceptance would then be perfectly clear. Headquarters agreements were not a relevant example.

3. The example of a hypothetical fisheries organization was equally unconvincing. The EEC was, he believed, the only international organization to which member States had transferred the power to conclude fisheries agreements on their behalf. An organization of that kind could accept treaty obligations only for itself. If the organization was empowered by its constituent instrument to conclude treaties on behalf of its member States, the example was pointless.

4. The same was true of commodity marketing organizations. There was no example in contemporary practice of such an organization empowered to create obligations for its members in respect of the sale of commodities, and it was unlikely that commodity organizations with supranational powers would come into being in the foreseeable future. Apart from the EEC, therefore, the examples mentioned by the Special Rapporteur to justify the inclusion of the situation covered by article 36 *bis* were artificial.

5. The Special Rapporteur had said that he wished to make the procedure for the acceptance of treaties more flexible. In contrast, States at the United Nations Conference on the Law of Treaties had been anxious to strengthen the formalities for the acceptance by a third State of obligations arising for it from a treaty. He himself believed that the rules for the acceptance of obligations by a third State should be sufficiently rigid, and that view was as legitimate as the opposite. It might be noted in passing that if the object was to make the rules for acceptance more flexible, article 35[3] would have to be amended, in addition to dealing with the case of member States of international organizations. He did not question the good faith of the Special Rapporteur, but considered that the views he had expressed were no less valid than those of the Special Rapporteur.

6. Nor did he question the good faith of the Special Rapporteur's argument that adoption of article 36 *bis* would help to protect the interests of the third world. For his own part, he believed he was legitimately defending the interests of the developing countries by opposing the article. In the first place, article 36 *bis* concerned the obligations rather than the rights of

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

[2] See 1644th meeting, footnote 3.

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