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A/CN.4/SR.1702

Summary record of the 1702nd 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:-

1982, vol. I

applied only to treaties concluded between States. However, the case of such treaties, which was governed by the Vienna Convention, did not come within the scope of the draft articles under consideration. It would therefore be preferable to retain for paragraph 4 the text adopted on first reading, in which international organizations were specifically mentioned among the parties to the treaties.

27. With regard to paragraph 5, he favoured maintaining the words in square brackets, which also appeared in the corresponding provision of the Vienna Convention (art. 30, para. 5). Rather than trying to improve the provisions of that Convention, it would be better at the present stage to ensure the greatest possible uniformity between the two texts.

28. Mr. McCAFFREY suggested that, since the Commission's aim was to follow the provisions of the Vienna Convention as closely as possible, paragraph 1 of article 30, an introductory provision which applied to the remainder of the article, should be brought into line with the corresponding provision of the Vienna Convention. Paragraph 1 would thus open with the words "Subject to Article 103 of the Charter of the United Nations ...". Paragraph 6 of draft article 30, which had no counterpart in the Vienna Convention, could then be deleted.

29. He appreciated the Special Rapporteur's efforts to render the wording of article 30, paragraph 4, less cumbersome. If possible, the Commission should adopt the version that had been proposed in the Special Rapporteur's eleventh report (A/CN.4/353, para. 19), for it represented a definite linguistic improvement over the longer version.

30. The words "as between two parties" proposed in the Special Rapporteur's simplified version of subparagraphs 4 (*a*) and (*b*) nevertheless seemed to have given rise to difficulties. Since treaty provisions were often quoted out of context, it should be made clear that those subparagraphs referred to treaties between States and international organizations. It might therefore be helpful for the subparagraphs to begin with the words "as between a State and an international organization ...". This assumes it is not necessary to refer to those bodies as "parties" in the opening clause. That would not seem necessary, since they are described as such in the balance of each subparagraph.

31. He also suggested that, as a point of grammar, the words "which are each parties to both treaties" in the simplified version of subparagraph 4 (*a*) should be amended to read "each of which is a party to both treaties".

32. He fully agreed with Mr. Flitan that the words in square brackets in article 30, paragraph 5, should be retained in order to ensure conformity with the corresponding provision of the Vienna Convention.

The meeting rose at 1 p.m.

1702nd MEETING

Friday, 7 May 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 1]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING[2] (*continued*)

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)[3] (*concluded*)

1. Sir Ian SINCLAIR said that article 30 of the Vienna Convention, on which article 30 of the draft was closely modelled, had been one of the most difficult provisions to draft at the United Nations Conference on the Law of Treaties. Even in the case of treaties between States, the application of successive treaties relating to the same subject-matter gave rise to problems which did not yield to easy solutions. Most legal advisers to ministries of foreign affairs had, at one time or another, been confronted with difficult technical and legal issues arising out of successive treaties, particularly in the area of industrial or intellectual property rights.

2. Although it was obviously right that draft article 30 should be modelled on article 30 of the Vienna Convention, questions had been raised at the preceding meeting with regard to the scope and wording of paragraph 4. Mr. Flitan had, for example, expressed concern about the fact that article 30 as it now stood seemed to regulate the consequences for States of successive treaties relating to the same subject-matter, even though that question was already governed by article 30 of the Vienna Convention.

3. He continued to be puzzled by Mr. Flitan's comment. As he understood the position, article 1 stated that the draft articles applied to: "(*a*) treaties concluded between one or more States and one or more international organizations, and (*b*) treaties concluded between international organizations". The definition of the term "treaty" in article 2, subparagraph 1 (*a*), faithfully reflected the scope of the draft articles as defined in article 1. Article 30 thus applied only to successive treaties relating to the same subject-matter and concluded between one or more States and one or more international

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

[3] For the text, see 1701st meeting, para. 22.

organizations or between international organizations. In other words, the scope of article 30 could not exceed the scope of the draft articles as a whole. It therefore determined only the rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter and concluded between one or more States and one or more international organizations or between international organizations, and it did not overlap with article 30 of the Vienna Convention, which determined only the rights and obligations of States parties to successive treaties relating to the same subject-matter and concluded between States.

4. If his analysis was correct, he could see no problem with the simplified version of paragraph 4 of article 30 proposed by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 19). Indeed, article 30, paragraph 3, referred to the case in which "all the parties to the earlier treaty" were "parties also to the later treaty". That reference to "parties" clearly covered States and international organizations in the case of treaties between States and international organizations, and international organizations in the case of treaties between international organizations. It would therefore be unnecessary, in drafting article 30, paragraph 4, to go into all the detail contained in the text adopted on first reading. In any event, he found it difficult, except as an abstract and largely theoretical exercise, to envisage "chains" of successive treaties relating to the same subject-matter and concluded between States and international organizations or between international organizations. Indeed, in many instances, the participation of an international organization in a treaty would be the essential condition for the participation of the States parties. What he had in mind was, for example, the category of trilateral safeguards agreements concluded between two States with the active participation of the IAEA. Although the situation envisaged in article 30, paragraph 4, would apply to such agreements only in very rare cases, he freely conceded that that situation had to be covered, and to that end he would have a marked preference for wording along the lines of the simplified text of paragraph 4 proposed by the Special Rapporteur. That was not to say that he was entirely satisfied with the wording of that simplified text, but he thought that the finer points of drafting could be dealt with by the Drafting Committee, to which article 30 should be referred.

5. Mr. THIAM said that he supported the Special Rapporteur's proposed new wording of article 30, paragraph 4 (*ibid.*), which was much less cumbersome than that adopted on first reading. Although he understood the reservations expressed in that connection by some members of the Commission and, in particular, by Mr. Flitan, who considered that it would be better to use the terms "State party" and "international organization party" rather than the term "parties", which, in his view, was too vague, he did not think that those reservations were justified, because the title of the draft articles made it quite clear that the treaties to which the provisions of the draft applied were treaties concluded between States and international organizations or between international organizations. It was obvious, therefore, that when the word "parties" was used in the body of the text it referred to at least one international organization. Any further clarification was unnecessary.

6. Since most of the observations on article 30 related to form rather than substance, he proposed that the article should be referred to the Drafting Committee, which could, if necessary, improve on the text of paragraph 4 proposed by the Special Rapporteur in paragraph 19 of his eleventh report.

7. Mr. CALERO RODRIGUES said that article 30 of the Vienna Convention and article 30 of the draft articles were intended, not to state the principle of *lex posterior derogat anterior*, something that would be quite unnecessary, but rather to enunciate some exceptions to the application of that principle. Those exceptions were set out in paragraph 2. Paragraph 3 dealt with the normal situation in which all the parties to both treaties were the same, while paragraph 4 dealt with the special situation in which the parties to the earlier treaty were not all parties to the later treaty. In such a case, the solution adopted in the Vienna Convention and in the draft articles was to apply the general rule of paragraph 3 as between any two parties, whether two States, two international organizations or one State and one international organization, which were parties to both treaties.

8. Nevertheless, the simplified version of subparagraph 4 (*a*) which the Special Rapporteur had proposed in his eleventh report and which referred simply to "two parties, which are each parties to both treaties" was fully justified, as was the Special Rapporteur's proposed simplified version of subparagraph 4 (*b*), which did not refer separately to the different types of relations between a State party to both treaties and a State party to only one of the treaties, a State party to both treaties and an international organization party to only one of the treaties, an international organization party to both treaties and an international organization party to only one of the treaties and an international organization party to both treaties and a State party to only one of the treaties, but simply stated that, as between two parties, of which one was a party to both treaties and the other to only one of the treaties, the treaty which bound the two parties in question governed their mutual rights and obligations.

9. The point raised by Mr. Flitan in that connection (1701st meeting) had undoubtedly been the result of concern that the Commission might be dealing in article 30, paragraph 4, with relations between States only. In his own view, however, article 30 dealt only with treaties to which at least one international organization was a party and, in such a case, even the relations between two States parties to such treaties were governed by the draft articles, not by the Vienna Convention.

10. Although he was in favour of the adoption of the simplified version of paragraph 4, he would go one step further than the Special Rapporteur and suggest the following wording:

"4. When the parties to the later treaty do not include all the parties to the earlier one:

"(*a*) as between parties to both treaties, the same rule applies as in paragraph 3;

"(*b*) as between a party to both treaties and a party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations."

That suggestion was, of course, a matter to be considered by the Drafting Committee.

11. In reply to Mr. McCaffrey's suggestion (*ibid.*), he said that the reference to Article 103 of the Charter of the United Nations had probably been included in a separate paragraph 6 and not at the beginning of paragraph 1, as in article 30 of the Vienna Convention, because of the doubts that had been expressed about the possibility of applying Article 103 of the Charter, which referred specifically to the Members of the United Nations and not to other subjects of international law.

12. Mr. JACOVIDES, referring to article 30, paragraph 6, said that the provisions of the draft articles followed those of the Vienna Convention as closely as possible, subject, of course, to any adaptations that might be necessary to take account of the situation of international organizations. The United Nations Charter, which was a treaty between the Member States of the United Nations, was of a special nature in that its provisions were, as stated in its Article 103, hierarchically superior to those of any other treaty, whether earlier or later and whether between States, between States and international organizations or between international organizations. It would therefore seem logical to follow the order of the Vienna Convention and place the reference to Article 103 of the Charter in article 30, paragraph 1, as Mr. McCaffrey had suggested (*ibid.*). Moreover, the words "without prejudice to Article 103 ..." used in article 30, paragraph 6, were perhaps weaker than the words "Subject to Article 103 ..." used in article 30, paragraph 1, of the Vienna Convention. It would therefore be better to use the wording of the Vienna Convention.

13. Mr. MALEK said he was afraid that the Drafting Committee, to which the Commission would no doubt refer draft article 30, might give too much weight to the rather severe criticism expressed with regard to the new text of paragraph 4 proposed by the Special Rapporteur. To counterbalance that criticism, he wished to state that, in his view, the text was simple, sufficiently explicit and technically well-conceived. There was absolutely no need to reiterate in paragraph 4 terms already used in the title and in paragraph 1 of article 30. In any event, the text of paragraph 4 adopted on first reading could not be retained in its present form. As it now stood, it could not be incorporated in a treaty or even in a declaration or a resolution. Its major defect was that it did not just define a rule, but sought to explain it.

14. Mr. USHAKOV proposed that the wording of paragraph 5 should be improved on by replacing the words at the end of the paragraph, "its obligations towards a State or an international organization not party to that treaty, under another treaty", which were incorrect, by the following words, which were based on the Vienna Convention: "its obligations towards another State or an international organization or, where applicable, towards another international organization or a State under another treaty".

15. Mr. NI said that the text proposed by the Special Rapporteur would do much to make paragraph 4 less cumbersome. Furthermore, since the word "treaty" was clearly defined in article 2, there was no doubt that the word "parties" used in paragraph 4 referred both to an international organization and to a State. That word was therefore entirely relevant and devoid of any ambiguity.

16. The simplified version proposed by the Special Rapporteur offered a further advantage: the use of the general formula "as between two parties" did away with the problem raised by the wording of the first part of subparagraph (*a*) of the text adopted on first reading ("as between two States ... parties to both treaties") and the wording of the first part of subparagraph (*b*) ("as between a State party to both treaties and a State party to only one of the treaties"), which suggested that the treaties in question were treaties between States and therefore did not come within the scope of the draft articles under consideration. Consequently, the text proposed by the Special Rapporteur was more satisfactory than the text adopted on first reading.

17. Mr. SUCHARITKUL said that the drafting problems to which article 30, paragraph 4, gave rise had been sufficiently debated, and that the time had come to refer the article to the Drafting Committee. In his view, the Special Rapporteur's proposed text would, perhaps, provide an acceptable solution.

18. A number of substantive questions had still not been settled. For instance, it had not been decided how to distinguish between treaties concluded between States, which were covered by the Vienna Convention, and treaties concluded between States and international organizations or between international organizations, which were dealt with in the draft articles now being elaborated. It had not even been decided whether it was possible to draw a distinction between those two kinds of treaties and whether the rules governing the contractual relations between two States parties to a treaty of the first kind differed from those governing the relations between two States parties to a treaty of the second kind.

19. Furthermore, the term "international organization" was not very narrowly defined in the draft articles, since article 2, subparagraph 1 (*i*), simply stated that the term "international organization" meant an

"intergovernmental organization". That lack of precision could be a source of difficulties. For instance, there was little doubt that the Conventions on the Law of the Sea signed at Geneva in 1958 were treaties between States, despite the fact that the signatories included the Holy See, which had been identified as a sovereign State but one without a separate territory. The same did not, however, apply in the case of the recently adopted Convention on the Law of the Sea,[4] to which there were several parties that were not actually States. In such circumstances, it was therefore difficult to say whether that Convention was an international agreement between States or an international agreement between States and international organizations. It was perhaps dangerous to use the word "treaty" in reference both to international agreements concluded between States and to international agreements concluded between States and international organizations or between international organizations.

20. In that connection, he said that it might also be possible to envisage a third kind of international agreement, namely, one concluded between non-governmental organizations in consultative status (category II) such as the ICRC with the Economic and Social Council.

21. Mr. FLITAN said he considered that, in order to follow the text of the Vienna Convention as closely as possible, the square brackets in article 30, paragraph 5, should be deleted, as proposed by the Special Rapporteur in his tenth report (A/CN.4/341 and Add.1, para. 89).

22. To those members who considered that there was no need to state in paragraph 4 that the treaties referred to in that paragraph were treaties concluded between States and international organizations or between international organizations, since, in their view, article 30, paragraph 1, did not leave the matter in any doubt, he would point out that in several other draft articles, and particularly in article 27, the need for such a clarification had none the less been felt.

23. For his own part, he preferred the text of paragraph 4 adopted on first reading to the one proposed by the Special Rapporteur, but he recognized that there were flaws in the former which the Drafting Committee would have to eliminate. The wording of the beginning of subparagraph (*a*) would, for example, have to be re-examined, since the phrase "between two States ... parties to both treaties" was no more satisfactory than the corresponding wording proposed by the Special Rapporteur, namely, "between two parties, which are each parties to both treaties".

24. Mr. QUENTIN-BAXTER, referring to the comments made by Mr. Sucharitkul, said that at a very early stage in the Commission's discussion of the draft articles, the specific case of the ICRC had been cited as an example of an institution which played a very important role in international affairs but whose treaties were not mentioned in the definition of the scope of the draft articles given in article 1.[5] It had in fact been agreed that certain categories of treaties or agreements would remain outside the scope of the draft articles and of the Vienna Convention. That was, of course, the reason for the rather complicated wording of article 3 of the draft.

25. The question which Mr. Flitan had raised (1701st meeting, para. 26) and which had also caused him some concern was whether, in treaties to which States and international organizations were parties, the relations between the States parties were governed by the Vienna Convention or by the draft articles. In other words, if such relations were governed by the Vienna Convention, they should not be dealt with in the draft articles. After some reflection, he had come to the conclusion that such relations were not governed by the Vienna Convention, as was made clear in article 3 of that Convention, which began with the words: "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law ...". The drafters of the Vienna Convention had thus considered that the treaties now under discussion did not fall within the scope of that Convention, even in so far as relations between States parties were concerned. That matter had been left to be governed by the draft articles under consideration. There was thus no reason for concern that the scope of the draft articles would extend to relations between States themselves. The governing consideration was that the treaty in question was one concluded between States and at least one international organization.

26. A further point in support of that conclusion was that the draft articles frequently did not simply use the term "treaty", but, rather, spelled out the type of treaty in question. In that connection, Mr. Flitan had cited the example of article 27, which began with the words "A State party to a treaty between one or more States and one or more international organizations ...". The reason for that particular wording was that article 27 referred to treaties concluded between States and international organizations, but not to treaties concluded between international organizations only. In that article, the specification was necessary, but it seemed to him that, when the Commission was referring generically to all the kinds of treaties with which the draft articles were concerned, it could simply rely on article 1 and use only the term "treaty", as defined in article 2, subparagraph 1 (*a*).

27. Mr. LACLETA MUNOZ said he agreed with the members of the Commission who thought that the simplified version of article 30, paragraph 4, was preferable to the cumbersome text adopted on first reading.

28. In his view, the interpretation of article 30 gave rise to problems mainly because it was not clear whether

[4] See 1699th meeting, footnote 7.

[5] See *Yearbook ... 1972*, vol. II, p. 193, document A/CN.4/258, para. 69 and footnote 172, and *Yearbook ... 1974*, vol. II (Part One), p. 297, document A/9610/Rev.1, chap. IV, sect. B, para. (1) of the commentary to article 3.

paragraphs 3 and 4 were provisions that explained paragraph 2 or whether they stood on their own. The words in paragraph 2 "When a treaty specifies that it is subject to ... an earlier or later treaty" had caused some confusion, particularly in relation to the rule *lex posterior derogat anterior*. It might therefore be better to place paragraph 2, which embodied a specific provision, after paragraphs 3 and 4, which were provisions of a general nature.

29. The CHAIRMAN suggested that the Commission should refer article 30, as well as the amendments to paragraph 4 proposed by the Special Rapporteur (A/CN.4/353, para. 19), to the Drafting Committee.

It was so decided.[6]

ARTICLE 31 (General rule of interpretation)

30. The CHAIRMAN invited the members of the Commission to consider, in turn, articles 31 to 33, which made up section 3 entitled "Interpretation of treaties". Those three articles, which were identical to the corresponding provisions of the Vienna Convention, had not been the subject of any comment. They had not given rise to any objection at the preceding session of the Commission, which had referred them to the Drafting Committee. Article 31, as adopted on first reading, read:

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

31. Mr. USHAKOV said that there was no need for the rules of interpretation of treaties to which one or more organizations were parties to be any different from the rules of the Vienna Convention relating to the interpretation of treaties between States. The reason why the Commission had not simply incorporated in the draft a *renvoi* to the corresponding articles of the Vienna Convention was that the ultimate fate of the draft was still unknown, and such a solution would not be satisfactory if the draft were to serve as a basis for an independent convention. The parties to such a convention might not be the same as the parties to the Vienna Convention, and they would therefore not be bound by the provisions of the latter instrument.

32. Sir Ian SINCLAIR, commenting on Mr. Ushakov's statement, recalled that, in the Sixth Committee, he had himself suggested[7] total simplification of the draft by means of a system of *renvois* whenever draft articles simply reproduced the corresponding articles of the Vienna Convention. After considering the Commission's report on its thirty-third session, however, he understood why the Commission had not wanted to adopt such a procedure. He was satisfied that the best solution, at least at the stage of the second reading, was to retain articles unaltered even where they were identical with the articles of the Vienna Convention.

33. The CHAIRMAN suggested that the Commission should refer article 31 to the Drafting Committee.

It was so decided.[8]

ARTICLE 32 (Supplementary means of interpretation)

34. The CHAIRMAN invited the Commission to consider article 32, which read:

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

35. In the absence of any observations, the CHAIRMAN suggested that the Commission should refer article 32 to the Drafting Committee.

It was so decided.[9]

ARTICLE 33 (Interpretation of treaties authenticated in two or more languages)

36. The CHAIRMAN invited the Commission to consider article 33, which read:

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

[6] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 15.

[7] See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 45th meeting, paras. 22-23, and *ibid., Thirty-sixth Session, Sixth Committee*, 40th meeting, para. 7.

[8] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 *et seq.*

[9] *Idem.*

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

37. In the absence of any observations, the CHAIRMAN suggested that the Commission should refer article 33 to the Drafting Committee.

It was so decided.[10]

ARTICLE 34 (General rule regarding third States and third international organizations) and ARTICLE 2, subpara. 1 (*h*) (Use of terms: "third State" or "third international organization")

38. The CHAIRMAN invited the Commission to consider the articles which made up section 4 entitled "Treaties and third States or third international organizations", starting with article 34. He also invited it to consider, simultaneously, article 2, subparagraph 1 (*h*), which was closely related to article 34. Those provisions, as adopted on first reading, read:

Article 34. General rule regarding third States and third international organizations

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 2. Use of terms

1. For the purpose of the present articles:

...

(*h*) "third State" or "third international organization" means a State or an international organization not a party to the treaty.

39. Mr. USHAKOV, stressing the cardinal importance of article 34, said that it laid down a basic principle of international law which applied to international organizations and States alike and was set forth in the corresponding article of the Vienna Convention—namely, that a treaty could bind only the parties to that treaty. According to article 2, subparagraph 1 (*g*), the term "party" meant a State or an international organization which had consented to be bound by the treaty and for which the treaty was in force. Other articles and, in particular, article 11, specified how a State or an international organization could become a party to a treaty. Article 34 was the first draft provision to use the terms "third State" and "third organization". As defined in article 2, subparagraph 1 (*h*), those terms meant a State or an organization that was not party to the treaty or, in other words, a State or an organization that had not performed the acts provided for in articles such as article 11, which defined the conditions under which a State or an international organization could become a party to a treaty. Article 34, taken together with the definitions given in article 2, subparagraph 1 (*h*), meant that the member States of an organization which concluded a treaty were third States; in such a case, the organization acted as a subject of international law independently of its members. It bound only itself and did not bind its members, which remained third States in relation to the treaty it had concluded. Naturally, an international organization could conclude an agreement with another organization or with a State, whether or not it was a member of that organization, and it could provide that rights and obligations would derive therefrom for its members. However, the latter remained third States in relation to the treaty, whatever the rights and obligations that might derive for them from that treaty. It was the subsequent articles that specified how third States and, in particular, the member States of an organization could assume such obligations and enjoy such rights. In the case of obligations, the express consent of such third States was required.

40. There were, however, organizations that differed from ordinary international organizations and that could be regarded as supranational organizations. There was at least one organization which had, in some respects, the appearance of an ordinary international organization, and in others, that of a supranational organization which could bind its member States at the same time as it bound itself. Such a situation called for special rules.

41. With regard to drafting, the two definitions under consideration were satisfactory, but it might be preferable to retain the two paragraphs of article 34, which dealt with quite separate kinds of treaties.

42. Mr. McCAFFREY, referring to the proposals made by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 24), said that, if the single paragraph form of draft article 34 was less precise than the text adopted on first reading, it was because the word "treaty" could be interpreted to mean a treaty between two States. However, since, according to article 1, the draft articles did not apply to treaties between States and the definition of the term "treaty" in article 2, subparagraph 1 (*a*), excluded treaties to which States alone were parties, there did not appear to be any overlap with the Vienna Convention. Furthermore, any ambiguity which might result from reading draft article 34 in isolation was outweighed by the benefits of simplicity and clarity afforded by the proposed amendment. He also endorsed the Special Rapporteur's proposal that the word "international" should be inserted between the words "third" and "organization", as the Commission had suggested.[11]

43. Mr. FLITAN, referring to Mr. Ushakov's comments, suggested that members should refrain for the time being from discussing matters arising out of article 36 *bis* and deal solely with the provisions under consideration.

[10] *Idem.*

[11] *Yearbook ... 1981*, vol. I, p. 173, 1675th meeting, para. 32.

44. While he preferred the wording of article 34 adopted on first reading, he would not rule out simplified wording such as that proposed by the Special Rapporteur.

45. Sir Ian SINCLAIR said that, in considering section 4 of the draft articles, the Commission would be confronting some rather serious problems. Since Mr. Ushakov's remarks might prefigure a more extensive debate at a later stage, he believed that it would be unwise to refer article 34, together with the definition of a third State, to the Drafting Committee before the completion of the discussion of articles 35, 36 and 36 *bis*.

46. With all due respect, he said that he was slightly troubled by Mr. Ushakov's somewhat formalistic attitude towards the concept of a third party within the context of the current draft. As a general rule of the law of treaties applicable to treaties between States, the *pacta tertiis* rule presented no difficulties: a "third State" meant a State which was entirely outside the treaty-making process. In a case involving an international organization and its member States, however, those States might not be complete strangers to the treaty-making process. Although he accepted the fact that an international organization was an entity separate from its member States, such an organization might none the less be negotiating on the basis of a mandate conferred upon it by its member States. The problem had to be approached from a different angle, and it was not sufficient to enunciate the *pacta tertiis* rule contained in the Vienna Convention. For that reason, the definition of a third State in the current draft was of crucial importance. It would be unwise for the Commission to take any hasty decisions on draft article 34 without first reviewing all the articles in section 4 and considering the overall approach to relations between member States and international organizations.

47. Mr. NJENGA said that, in his view, article 34 was quite straightforward. He endorsed the Commission's suggestion that the word "international" should be inserted between the words "third" and "organization". If some members preferred the original version of the draft article, he would have no objection to referring both versions to the Drafting Committee. He did not believe that article 34 should be held in abeyance until the discussion of other articles had been completed.

48. Mr. FLITAN, endorsing Mr. Njenga's viewpoint, said that there was no need to defer the decision on article 34, which was independent of the three articles that followed. The retention or deletion of article 36 *bis* related to articles 35 and 36, but had no connection with article 34.

49. Sir Ian SINCLAIR said that it had not been his intention to delay the Commission's work. The problem lay not with article 34, but, rather, with the definition of a third State. Perhaps the Commission could refer article 34 to the Drafting Committee and take a final decision on the definition of a third State only after the articles posing problems similar to those raised by article 36 *bis* had been thoroughly discussed. It would, moreover, be extremely helpful to have the benefit of the Special Rapporteur's views during the discussion of articles 35, 36 and, in particular, 36 *bis*.

50. Mr. CALERO RODRIGUES said that he approved of the simplification of article 34 proposed by the Special Rapporteur.

51. As for the procedure proposed by Sir Ian Sinclair, he said that he had no doubt that article 34 as it now stood, together with the definition of a third State, would be accepted. He nevertheless saw some merit in Sir Ian Sinclair's view that article 34 did not have to be referred to the Drafting Committee immediately. The Commission had nothing to lose by deferring its final decision on article 34 until it had completed its discussion of the other draft articles in section 4.

The meeting rose at 1 p.m.

1703rd MEETING

Monday, 10 May 1982, at 3 p.m.

Chairman: Mr. Paul REUTER
later: Mr. Leonardo DÍAZ GONZÁLEZ

Welcome to the participants in the International Law Seminar

1. The CHAIRMAN welcomed the participants in the International Law Seminar, a hallowed institution of long standing which the Commission valued highly. For a jurist, it was always an adventure and a necessity to learn law from sources other than books. In that respect, the Commission's work, which was characterized by simplicity and a spirit of mutual understanding, should be of great interest to the participants in the Seminar.

Mr. Díaz González, first Vice-Chairman, took the Chair.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item]

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).