Document:-

A/CN.4/SR.1704

Summary record of the 1704th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

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been placed in square brackets indicated that the Commission had not been able to agree on those provisions.

46. In relation to international organizations, a distinction had to be made between a treaty concluded by an international organization and having consequences for its States members and a treaty concluded by an international organization and intended to bind its States members in a treaty relationship, as indicated in article 36 *bis*.

47. He had been impressed by Mr. Ushakov's argument that, if article 35 was made subject to article 36 *bis*, the draft articles would be substantially different from the Vienna Convention. Indeed, if it was agreed that article 36 *bis* contemplated a course of action that had an immediate binding effect on the member States of an international organization, it must also be agreed that article 36 *bis* constituted an exception to article 35. Article 36 *bis* would thus affect in a major way the balance of article 35, and the Commission therefore had to decide whether the content of article 36 *bis* was justified by the trends to which Mr. Flitan had referred and whether the draft articles should contain an element of progressive development based on those trends. In his view, however, it would be difficult to say that article 36 *bis* was of such general application in relation to States that it definitely had a place in the draft articles.

48. If the Drafting Committee so agreed, the Special Rapporteur might suggest indicating in the commentary to article 36 *bis* that the provisions of that article would be without prejudice to any other arrangement an international organization might wish to make in respect of its members, in accordance with its relevant rules.

49. Mr. KOROMA said he thought that it would be helpful to retain the words "in the sphere of its activities" in article 35, paragraph 2. Those words had probably been included in that provision in order to take account of so-called "collateral agreements" by which, as the Special Rapporteur had indicated, an international organization could accept obligations deriving from a treaty to which it was not a party, and particularly since the possibility of such agreements was not expressly mentioned in article 46, to which Mr. McCaffrey had referred.

The meeting rose at 6.00 p.m.

1704th MEETING

Tuesday, 11 May 1982, at 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 2]

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

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations)[3] (*concluded*)

1. Mr. SUCHARITKUL said first of all there might be a situation falling between that of States or organizations which were parties to a treaty and that of third States or third organizations. In other words, a State or an international organization which was not a party to an international agreement was not necessarily a third State or a third organization. Although it might be considered that the United Nations was not a party to the Charter of the United Nations, it must be recognized there were links between the Organization and the Charter and that the United Nations could not be regarded as a third organization either. It was, in fact, in the in-between situation referred to above.

2. Article 35 could be seen as an exception to the general principle *pacta tertiis nec nocent nec prosunt* enunciated in article 34, but its purpose was in fact simply to specify the conditions in which an obligation could arise for a third State or a third organization from a provision of a treaty and to determine the manner in which the third State or the third organization must express its consent. It thus provided that the third State must accept the obligation expressly and in writing. That means of acceptance was sometimes known as a collateral agreement.

3. It could be asked whether, in practice, it was enough for a State or an international organization to accept expressly and in writing an obligation arising from a treaty to which that State or that organization was not a party and whether it should not also be made clear which parties to the treaty must be notified of such acceptance. The Government of Thailand and other countries of the region had concluded with United Nations specialized agencies agreements relating to Indo-Chinese refugees. Those agreements established obligations for third States, since they provided that the refugees given temporary asylum by the States parties would subsequently have to settle elsewhere. Certain countries, including France, the United States of America, Australia, Canada and Norway, had stated that they agreed to assume the obligations arising for them from those agreements or, in other words, that

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[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 1703rd meeting, para. 14.

they were prepared to receive the refugees and enable them to settle definitely in their territories. Their acceptance, which they had given expressly and in writing or within the framework of a conference, had been communicated to the Governments of the countries of first asylum.

4. The acceptance by a third State or a third organization of rights arising from a provision of a treaty raised fewer difficulties. In the case of a third State, consent was even presumed, as provided in article 36, so long as the contrary was not indicated.

5. Article 36 *bis* was, on the other hand, very controversial. In fact, the issue was not whether the existence of supranational organizations should be recognized, but, rather, whether provisions relating to the treaties concluded by that type of organization could be incorporated in the draft articles. There was no lack of examples of supranational organizations. In addition to customs unions, to which one member of the Commission had already referred (1703rd meeting, para. 26), there were monetary unions. The member States of such unions accepted *ex ante* to be bound by the obligations arising from the treaties which the unions might conclude.

6. In support of the rule enunciated in article 36 *bis*, subparagraph (*b*), reference could be made to the case of the Headquarters Agreement concluded between Indonesia and ASEAN,[4] which determined the privileges and immunities of the Association, its States members and their representatives. Since each State member of ASEAN had participated in the negotiation of that Agreemeent and had recognized that the implementation of the Agreement necessarily meant that it consented to assume the obligations arising therefrom, the provisions of the Agreement bound not only ASEAN, but also all its States members.

7. With regard to articles 35 and 36, he noted that a distinction could not always be drawn between the rights and obligations arising from a provision of a treaty. In some cases, acceptance of an obligation entailed acceptance of the exercise of the corresponding rights. Similarly, consent to exercise the rights arising from a treaty meant that it was sometimes not possible to refuse to assume the obligations arising from that treaty.

8. In article 35, paragraph 2, the words "in the sphere of its activities" were not intended to protect international organizations—that was the purpose of article 46. Those words merely served to define the sphere in which an obligation could be established.

9. Mr. NI said that articles 34 to 36 *bis* formed a unit. Although it had been possible to consider article 34, which embodied a general rule, separately, article 35 and the revised version of article 36 *bis*, which were closely related, should be discussed together.

10. The wording of article 35 to that of article 35 corresponded of the Vienna Convention, except that, in paragraph 2, the words "in the sphere of its activities" had been added as a means of limiting the scope of the establishment of obligations for international organizations. Those words raised questions about the nature of the obligations established by the treaties in question, but, in his view, the question whether those obligations were within the sphere of the organization's activities would arise even if those words were not included in paragraph 2. Those words were therefore unnecessary. Moreover, paragraph 3, which merely stated how acceptance was to be effected, might be merged with paragraph 2. Paragraphs 2 and 3 of article 36 could also be merged for the same reason.

11. Article 36 *bis* had given rise to much debate and controversy both in the Commission and in the Sixth Committee. The revised version of that article proposed by the Special Rapporteur in his tenth report (A/CN.4/341 and Add.1, para. 104) had been based on the assumptions that it would deal only with the obligations, not with the rights, that might arise for the member States of an international organization; that those member States were not regarded as third States; and that the conditions for the acknowledgement of obligations should be less rigid than those provided for in the text of article 36 *bis* adopted by the Commission on first reading.

12. The most important question which the Commission had to answer was whether or not article 36 *bis* should have a place in the draft articles as a whole. Opinions were divided on that point. He had been impressed by Mr. Ushakov's argument (1703rd meeting) that obligations undertaken by an international organization bound only the organization itself. However, article 36 *bis* had the effect of establishing a direct obligation for the member States of the organization, even if they were not parties to the treaty in question, when the relevant rules of the organization provided that they would be bound or when they expressed their assent to be bound.

13. What made the situation quite delicate was that the Special Rapporteur and Mr. Ushakov had both expressed concern for the interests of third world countries and, indeed, it was quite right that the interests of the majority of the peoples of the world should be taken into account. In that connection, he said he thought, like Mr. Ushakov, that, since under article 36 *bis* consent was given in advance, a resolution adopted by a majority of the members of an organization might involve the conclusion of a treaty by which the organization would undertake certain obligations. He nevertheless thought that account also had to be taken of the position of the minority that had voted against such a resolution.

14. During the Commission's discussions, it had been suggested that, in practice, the application of treaties concluded between States and international organizations or between international organizations would often depend on the fulfilment of treaty obligations by

[4] "Agreement between the Government of the Republic of Indonesia and the ASEAN relating to the privileges and immunities of the ASEAN Secretariat", signed at Jakarta on 20 January 1979, *ASEAN Documents, 1979* (Jakarta, ASEAN National Secretariat, 1980).

the member States of such organizations; that the reduction of formalistic requirements would represent a progressive development of international law; and that, although the number of international organizations could be expected to increase, they would not be given extensive treaty-making powers to bind their member States, whose obligations would derive from the relevant rules, resolutions and decisions of the organization, based on the organization's constituent instrument accepted by the member States *ex ante*. In his own view, those were terminological and psychological problems of academic interest.

15. At the preceding meeting, Mr. Thiam had referred to African and Latin American economic integration programmes whose implementation seemed to require great flexibility and, at the current meeting, Mr. Sucharitkul had referred to monetary and headquarters agreements, which also required such flexibility. In view of such programmes and agreements, those two members had considered that article 36 *bis* would serve a useful purpose. Because of the growing number of international organizations and the need for certainty in international transactions, their view was no doubt correct.

16. Account must, however, also be taken of the fact that all States and, in particular, the newly independent States of the third world, should be adequately protected from the possibility of having to assume unexpected obligations when they became members of international organizations. It would therefore be better to provide safeguards beforehand in a provision such as article 36 *bis*, rather than leaving a gap in the draft articles.

17. In that connection, the Special Rapporteur had pointed out at the Commission's previous session that the original version of article 36 *bis* had referred to the constituent instruments of the international organization and not to its relevant rules.[5] To protect member States against the effects of ill-considered or *ultra vires* decisions or resolutions, he (Mr. Ni) thought that it might be advisable to revert to the text of article 36 *bis* adopted on first reading. In any event, in ordinary cases of participation in an international organization, a member State's acceptance of the organization's constituent instrument would authorize the organization to conclude treaties on specific subjects and could not be regarded as a surrender of sovereignty.

18. He had great difficulty with the question of the reduction of formalities relating to the acknowledgement of treaty obligations by member States of international organizations. In his view, the word "acknowledged" in article 36 *bis*, subparagraph (*b*), was too weak, and the words "that the application of the treaty necessarily entails such effects" in the same subparagraph were not precise enough. The alternative text of article 36 *bis*, subpagraph (*b*) that had been proposed by the Special Rapporteur (A/CN.4/341 and Add.1, par. 104), which provided that assent would derive from "any unequivocal manifestation of such assent", would also not offer adequate protection to the member States of international organizations.

19. In drafting article 36 *bis*, the Commission should therefore avoid placing direct responsibility on member States vis-à-vis the party or parties to a treaty concluded by the international organization. The wording of that provision should be limited to the effects of such a treaty on the member States of the organization.

20. Since the member States of international organizations should not be bound by unwarranted obligations and international organizations should not be hampered in their efforts to promote international cooperation and the mutual benefits it afforded, on the basis of equality, through the normal exercise of their treaty-making powers, he suggested that the Commission might consider the following wording for article 36 *bis*:

> "Obligations arising from a treaty concluded by an international organization shall have effects on the States members of that organization if:
>
> "(*a*) the constituent instrument of the organization applicable at the moment of the conclusion of the treaty expressly provides that the States members of the organization are bound by such a treaty; or
>
> "(*b*) the States members of the organization expressly undertake to assume those obligations."

21. Mr. EL RASHEED MOHAMED AHMED said that the *pact tertiis* rule embodied in article 35 seemed to have been generally accepted and that the apparent intention of article 36 *bis* was to state an exception to that rule. In article 36 *bis* as it now stood, however, the question of express consent loomed large.

22. Indeed, Mr. Ushakov and Mr. Flitan (1703rd meeting) had stressed the fact that no State or international organization could be bound by any agreement unless it was a party to that agreement. Careful consideration of article 35 showed that it laid down no obligation for any State except with the express consent of that State. In article 36, no rights arose for third parties except with their express assent. Article 36 *bis* referred to rights and obligations conferred either under the relevant rules of the organization applicable at the moment of the conclusion of the treaty in question or as a result of participation in the negotiation of the treaty or acknowledgement of those rights or obligations. Participation and acknowledgement were, moreover, both positive acts that implied consent. Although he agreed with Mr. Ni that the term "acknowledged" was weak, acknowledgement was a positive act and it was sufficient as far as consent was concerned.

23. He had been impressed by Mr. Sucharitkul's comment that the concept of a "third party" did not apply in the strict sense to the relationship between an international organization and its member States. In view of the special situation to which that relationship gave rise, article 36 *bis* was amply warranted. He therefore shared

[5] *Yearbook ... 1981*, vol. I, p. 188, 1678th meeting, para. 33.

Mr. Flitan's view (*ibid.*) that article 36 *bis* should be retained, although he thought that its wording could be improved.

24. Mr. AL-QAYSI said that article 35 dealt with the question of treaties providing for obligations for third States or third international organizations. It had been stated that the words "in the sphere of its activities" in paragraph 2 of that article were unnecessary because of the existence of article 46 and because they implied that a third international organization could accept an obligation not within its sphere of activity. In his view, however, those words were absolutely essential because they could be regarded as a means of preventing the parties to a treaty from thrusting obligations on third international organizations. Moreover, article 46 dealt with the invalidity of consent on the grounds of competence to conclude treaties, not with the question of the means by which a third international organization could accept an obligation created by the parties to a treaty. Despite the words "in the sphere of its activities" in article 35, the idea that a third international organization could accept an obligation not within its sphere of activity was implied more in article 46 relating to competence than in article 35.

25. Although article 35 and article 36 *bis* were obviously related, they differed in that article 35 dealt with third States and third international organizations, whereas article 36 *bis* dealt with the member States of an international organization. The means of assuming an obligation created by a treaty was different in those two articles. Article 35 required the express consent of the third State or third international organization, whereas article 36 *bis* referred to consent in terms of the constituent instrument of the organization. The obvious conclusion was that, when referring to the member States of an international organization, the constituent instrument of that organization had to be borne in mind.

26. He agreed with the members of the Commission who considered that article 36 *bis* was a useful provision that reflected a growing trend. He nevertheless thought that its wording might be brought into line with that of article 35 and that its subparagraph (*b*), in particular, could be made clearer and more precise.

27. Mr. REUTER (Special Rapporteur) said that, during the discussion of article 35, several members of the Commission had also dealt with articles 36 and 36 *bis*, but, in accordance with the Chairman's request, he himself would refer only to article 35. With regard to the form of that article, he was of the opinion that it would be possible to amend the wording by merging paragraphs 2 and 3, as certain members had suggested. As to substance, some members of the Commission had objected to the words "in the sphere of its activities" in paragraph 2 and to the reference to the "relevant rules of that organization" in paragraph 3. Others, however, had stated that they were in favour of retaining those two formulations.

28. Although it was quite true that, logically, any provisions of the draft articles which were not absolutely necessary should be eliminated, it would be wrong to approach the elaboration of the draft from a purely logical point of view. Whenever a problem arose, in fact, an attempt should be made to find a solution which, while not necessarily the most logical, would make it possible to reconcile the two quite different attitudes of jurists towards the draft articles. Thus, some jurists were of the opinion that the draft should make it possible to put some order in the practice of international organizations and to protect the member States of those organizations. That position, which was, moreover, quite legitimate, was the one which the Commission had been defending until now. Other jurists, who were far fewer in number, considered that international organizations had a mission to accomplish—their primary task being to promote the development of the third world—and that the draft articles should help them to carry out that task satisfactorily or, at least, make their practice more flexible. It was therefore necessary to strike a balance between those two equally legitimate approaches, and one way of doing so was to include in the draft articles provisions which, from a purely logical point of view, might not be justified. In any event, the few differences of opinion that the members of the Commission might have in that connection were not very serious, and the Drafting Committee could therefore try to settle them.

29. Another very important problem had been raised during the discussions. That problem, which related to the form the draft articles would ultimately take, was the following: if, as envisaged, the draft articles were to become a convention, there would, on the one hand, be the Vienna Convention on the Law of Treaties and, on the other, the convention on the law of treaties concluded between States and international organizations or between international organizations, and the two instruments would use different terminology. For example, the word "treaty" did not have the same meaning in the Vienna Convention and in the draft articles. That problem was obviously outside the Commission's competence and would have to be settled within the framework of a conference of representatives of States, but the Commission was none the less justified in ensuring that there were no gaps in the two texts and that, since they complemented one another, they covered all matters relating to the law of treaties between States and the law of treaties between States and international organizations or between international organizations. Yet, as Mr. Lacleta Muñoz (1703rd meeting) had pointed out, that did not seem to be the case.

30. It was, for example, conceivable that States might conclude a treaty establishing obligations for an international organization. Now, that case would probably not be covered by the Vienna Convention, since international organizations were excluded from the scope of that Convention, and it would only be partially covered by the draft articles under consideration, which would govern the situation created by the consent of the inter-

national organization in question, if it was agreed that such consent constituted a collateral agreement. In no case, however, would the draft articles apply to treaties concluded between States, since that type of treaty did not come within their scope. He proposed that that problem should be briefly mentioned in the commentary to article 35 and considered in the Drafting Committee. He would have no objection if article 35 was referred to the Drafting Committee for consideration together with article 36 and article 36 *bis*.

31. The CHAIRMAN suggested that the Commission should refer article 35 to the Drafting Committee, on the understanding that the articles of section 4, which were closely related, would be considered together.

It was so decided.[6]

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

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

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

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

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

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

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

33. Mr. REUTER (Special Rapporteur) pointed out that, although draft article 36 was very closely modelled on the text of the corresponding article of the Vienna Convention, it did not enunciate exactly the same rule. Whereas article 36 of the Vienna Convention provided that a right arose for a third State from a provision of a treaty if the third State assented thereto, such assent being presumed, article 36, paragraph 2, of the draft stated only that a right arose for a third international organization, if the organization assented thereto. The Commission had, as a matter of fact, been of the opinion that the assent of entities such as international organizations could not be presumed, since their competence was always more or less limited, in accordance with article 6. Such organizations must themselves be able to determine whether they were competent to exercise the rights arising from a treaty to which they were not parties, but they could, of course, express their assent in any way they liked. Such assent was, as stated in paragraph 3, governed by the relevant rules of the organization. The provisions of article 36 did not, moreover, seem to have given rise to any difficulties.

34. However, the consideration of the provisions which were to become article 36 of the Vienna Convention and, in particular, the legal machinery by which a third State acquired a right had given rise to an extremely interesting discussion in the Commission. Half of the members had been of the opinion that the arising of such a right was the result of a collateral agreement, and the other half that it resulted from a "*stipulation pour autrui*".[7] Article 36 of the Vienna Convention had thus been very carefully drafted in order to reflect those two points of view. He referred to that episode because, in his view, it was not a bad thing for the Commission to deal from time to time with purely legal questions, as it had done in the past.

35. With regard to the words "Subject to article 36 *bis*" which had been placed in square brackets at the beginning of paragraph 1, several members of the Commission had rightly pointed out that, if the Commission decided to adopt the new text of article 36 *bis* which he had proposed (A/CN.4/341 and Add.1, para. 104) and which made no reference to the rights which arose for the member States of an international organization from the provisions of a treaty to which that organization was a party, those words would no longer be needed in article 36.

36. Mr. USHAKOV said that the consideration of article 36 prompted him to make some comments on article 36 *bis*. Article 36 *bis* as adopted by the Commission on first reading and article 36 *bis* as proposed by the Special Rapporteur dealt with the consent of the member States of a supranational organization to obligations arising from a treaty concluded by that organization, but that article said nothing of the consent of the member States of a supranational organization to obligations arising from a treaty concluded not by that supranational organization, but, rather, by States and other international organizations or by other international organizations in spheres of activity within the competence of the supranational organization.

37. He was, however, convinced that, in such a case, the member States of the supranational organization could not, on their own authority and without the agreement of the supranational organization, agree to assume the obligations arising for them from such a treaty, since they had surrendered their right to conclude treaties in spheres within the competence of the supranational organization of which they were

[6] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 18.

[7] See the discussion in the Commission, at its sixteenth session of article 62 of the draft articles on the law of treaties: *Yearbook ... 1964*, vol. I, pp. 66-99, 734th to 738th meetings, and pp. 173-183, 750th and 751st meetings; and at its eighteenth session, of the same provision, which had become draft article 60: *Yearbook ... 1966*, vol. I (Part II), pp. 73-82, 854th and 855th meetings, and pp. 171 *et seq.*, 868th meeting.

members. In his view, they could also not assent to exercise the rights arising from such a treaty.

38. Thus, if the Commission wanted to adopt rules expressly governing the consent of the member States of a supranational organization, it would not only have to review the text of article 36 *bis*, which dealt with only one aspect of the question, but it would also have to redraft the texts of articles 35 and 36. Indeed, as it now stood, article 35, for example, dealt not only with the specific case covered in article 36 *bis*, namely, that of the obligations which arose for the member States of a supranational organization from a treaty concluded by that organization, but also with all possible cases and, in particular, the obligations which arose for a member State of an international organization from a treaty concluded by another international organization of which it was not a member.

39. Supranational organizations were in fact special cases that should be considered separately. It was therefore impossible to include in the draft articles relating to treaties concluded between States and international organizations or between international organizations, provisions on treaties concluded by the special type of international organizations that were supranational organizations.

40. Mr. McCAFFREY said that, like Mr. Ni, he believed that paragraphs 2 and 3 of article 36 should be combined in order to make the wording of that provision as simple and economic as that of article 35. Such a change would make the treatment of the third international organization similar to the one-paragraph treatment of the third State and would also bring article 36 into closer conformity with the Vienna Convention. Paragraphs 2 and 3 could be combined by adding, at the end of paragraph 2, a sentence which might read: "Such assent shall be governed by the relevant rules of the organization". Paragraph 3 would then be deleted and paragraph 4 would become paragraph 3.

41. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission decided to refer article 36 to the Drafting Committee, under the same conditions as for articles 34 and 35.

It was so decided.[8]

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

42. The CHAIRMAN invited the Commission to consider article 36 *bis* as it had originally been drafted:

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

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

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

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

43. Mr. REUTER (Special Rapporteur) said that he would not describe the very lengthy process by which article 36 *bis* had taken shape since several of the members who had spoken on the preceding articles had already done so in part. It now seemed to be an established fact that, even in the particular case in which an international organization concluded a treaty which would give rise to obligations for the member States of that organization, their consent was necessary. Such a case did not really give rise to any difficulties that would shake the foundations of the system of consent established for the member States of an organization. For the time being, he would leave aside the very hypothetical case in which an international organization was a member of another organization. He also wished to stress that the Vienna Convention laid down very strict conditions for the arising of obligations for third States. If express and written consent was necessary, it was because such obligations arose from a collateral treaty to a main treaty and because those two conditions were in keeping with the traditional means of expressing willingness to be bound by a treaty. It could then be asked whether that very strict rule or, at least, its formal requirements, could be made more flexible in the particular case in which a third State was a member of an organization which had concluded a treaty giving rise to obligations for that State. In order to solve that problem, three questions had to be answered: Were there reasons for making such consent more flexible? Were there any objections to doing so? How could such flexibility be brought about?

44. It was only the first question that he would try to answer at the current meeting. It first had to be determined who the real beneficiary of such a relaxation of the modalities of consent would be. If the requirement of written consent were eliminated, the treaty partners of the international organization would be the first beneficiaries because, if an organization concluded a treaty giving rise to obligations for its member States and they did not fulfil them, it alone was responsible to its treaty partners. However, if the means by which consent could be given were made more flexible, the treaty partners would enjoy the right directly to require the member States to fulfil the obligations they had undertaken by accepting them. It was actually quite rare for States to empower an organization to conclude treaties that would directly affect them. Usually, an international organization had few means at its disposal and only very little influence for obtaining advantages in favour of its member States. If, in a specific situation, States were to decide to authorize an organization to conclude treaties in an area of common interest, with the result that they would be bound by the commitments thus undertaken, they would have to be certain that the

[8] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 18.

organization had more bargaining power. In order to see whether such a situation was likely to occur frequently and to speak in less abstract terms, reference had to be made to specific cases.

45. In the case of a customs union managed by an organization to which the member States had entrusted the responsibility of concluding tariff agreements, it was quite obvious that States would not go so far as to empower that organization to implement such agreements. That was, moreover, true in spheres of activity other than those of a customs union. It would be quite unreasonable to assume that, once such a tariff agreement had been concluded by the organization and applied by the member States, a State party to the agreement which complained about its application and raised the matter with a member State would be referred to the international organization on the grounds that it was the organization that had concluded the agreement. Such a case was inconceivable because it was always clearly stated, from the outset, that it was the member States that would apply an agreement of that kind and that they would be bound by its provisions.

46. The case of a headquarters agreement was quite different. An international organization might conclude with the host State, which was not necessarily a member of that organization, an agreement providing primarily for rights, but also for some obligations, for its member States. Could it be said that the member States were entitled to invoke their rights because there was, in such a case, a presumption of acceptance, but that, as far as obligations were concerned, they could claim to be third States in relation to such an agreement?

47. A number of small States, each of which exercised traditional fishing rights in its own waters and in the waters of the other States, might decide to unify their fishing regimes and hold negotiations with a large neighbouring State to grant it fishing rights, and obtain such rights from it. To simplify the negotiations, they might set up an organization whose constituent instrument provided that, by a unanimous resolution of one of the organs of the organization, the member States could authorize the organization to conclude a treaty with that neighbouring State. They might, however, also provide that, in such a case, they would consider themselves bound to apply the rules which the organization would embody in the treaty. Such an example did not imply any transfer of competence or any supranationality. If the agreement in question was concluded with the neighbouring State and the neighbouring State required the agreement to be implemented directly by the member States, on the grounds that the fishing rights it had granted to their nationals derived from the reciprocal rights those States had granted to its own nationals, it would certainly be an exaggeration for those States to refer the neighbouring State to the organization on the grounds that they were third parties in relation to the agreement.

48. He then referred to the case of States in a region requiring a campaign to eradicate a certain disease. To that end, they might set up an international organization whose constituent instrument provided that the member States could authorize it to conclude a treaty with a State for the purpose of technical assistance and that, if such an agreement was concluded, the technical experts of that State would benefit from a particular status in the territories of each of the member States. If, once the agreement was concluded, one of those experts claimed the benefit of that status, it was difficult to see how the member States could regard themselves as third parties in relation to the agreement.

49. States might also decide to establish an international bank and empower it, under its statutes, to conclude loan agreements. Usually, however, international organizations did not have good credit ratings. For example, when the Danube Commission, for which such competence had been provided, had approached bankers, the latter had required the States which had established that Commission to act as guarantors for the loans. In such circumstances, the statutes of an international organization sometimes specified how the organization could conclude treaties which would bind its member States; that saved time and money, because it was better to act collectively than individually.

50. All the examples to which he had referred showed that it might be in the interest of the member States of an international organization to assent in advance to the undertakings that might arise for them from the conclusion by the organization of treaties in a specific area. In Mr. Ushakov's view, there was no between-solution: a State was either a party to a treaty or a third party in relation to that treaty. That point of view could, of course be defended, but it was open to question whether the members of an international organization were really third parties in relation to the treaties the organization concluded. From a legal point of view, there was no doubt that they were. Indeed, it was an established fact that an international organization had legal personality, without which it could not conclude treaties, and that its members were thus only third States in relation to the treaties it concluded. A point came, however, when account had to be taken of the facts and it was apparent that an international organization was a means whereby States could take collective action. It existed precisely because the States which had established it existed. In the advisory opinion it had delivered in the case *Reparation for Injuries Suffered in the Service of the United Nations*,[9] the International Court of Justice had expressed both of those ideas. It had stated that, in some respects, an international organization was detached from its members, thus recognizing its international personality. The Court had, however, also stated that the members had a duty of co-operation; they were not strangers to the organization. If they withdrew, the organization would cease to exist. To his mind, the question could be put slightly differently by saying that the member States of an organization were third parties, but special third parties.

[9] *I.C.J. Reports 1949*, p. 174.

It was in the light of those two aspects of the question that article 36 *bis* had been drafted. If the Commission considered that there was no adequate reason to make the rule of consent more flexible, article 36 *bis* should be rejected.

51. In conclusion, he would say a few words about the situation of the countries of the third world. Those countries seemed to be profoundly aware of the contradiction they faced. On the one hand, they had to find their identities, which had been destroyed by foreign domination, and, on the other, since they were poor, it was essential for them to unite, even at the risk of surrendering part of their sovereignty. That explained the faltering steps they had made in the past century in Latin America and were now making, first in Africa, and then in Asia. It would be easy to dismiss them and regard their efforts as quite unconvincing compared with the model of the European Communities. Yet, those countries' dilemma was that they must not only retain their independence, but also unite their efforts whenever possible and desirable. They had considered the radical solution of the EEC, but had rejected it. As he had stated at the preceding session[10] he did not think that the Commission should use the European Communities as an example. The examples he had given in the past should not have been based mainly on that of the Communities, which indeed, had no need of special provisions. Since the Commission was now composed primarily of members from third world countries, it was for them to say whether a special provision should introduce some flexibility in the strict rule of consent so that the countries of the third world might have a more flexible instrument when they wanted it. If so, the matter must be given further consideration; if not, article 36 *bis* should be abandoned.

Drafting Committee

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to establish a drafting committee composed of the following 14 members: Mr. Sucharitkul (Chairman), Chief Akinjide, Mr. Al-Qaysi, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Lacleta Muñoz, Mr. Mc Caffrey, Mr. Ni, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Ushakov and *(ex officio)* Mr. Njenga, Rapporteur of the Commission.

It was so decided.

The meeting rose at 12.55 p.m.

[10] *Yearbook ... 1981*, vol. I, pp. 170-171, 1675th meeting, para. 7, and p. 188, 1678th meeting, para. 31.

1705th MEETING

Wednesday, 12 May 1982, at 10.05 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 2]

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

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)[3] (*continued*)

1. Mr. REUTER (Special Rapporteur), referring to his comments at the previous meeting concerning the arguments in support of relaxing the procedure for consent by States members of an organization to the obligations arising from a treaty concluded by that organization, recalled that two practical requirements now applied with regard to the relatively limited operational activities which a group of States might wish to undertake through an international organization.

2. Generally speaking, the organization's commitment must be accompanied by a commitment on the part of its member States and those States' consent to their commitment must be given by other means than in the case of the conclusion of a traditional collateral agreement subsequent to the main agreement. Nevertheless, it was not necessary for that commitment to apply to an entire category of treaties in advance. In short, the need was for a way of ensuring the relatively rapid conclusion of agreements that would enable the union which a number of States wished to achieve within the framework of an international organization to become effective. That need was felt especially by small and medium-size States, in connection with the situation that would be created by, say, the Convention on the Law of the Sea[4] or the Agreement establishing the Common Fund for Commodities.[5]

3. However, what made the identity of the international organization, namely its personality, also made its weakness, inasmuch as, in the modern world, the States members of an international organization were not fully bound by the commitments that organization contracted. It was also a fact that no provision of the draft could prevent a State from participating in an international organization in order not to promote, but to hinder, the organization's development. A possible counter was to say that it was sufficient for the

[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 1704th meeting, para. 42.

[4] See 1699th meeting, footnote 7.

[5] Agreement concluded at Geneva on 27 June 1980 (United Nations publication, Sales No. E.81.II.D.8).