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Summary record of the 1718th meeting

Topic:
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1718th MEETING

Wednesday, 2 June 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/340 and Add.1,[1] A/CN.4/343 and Add.1-4,[2] A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 10 (Counter-claims)[4] (*concluded*)

1. Mr. LACLETA MUÑOZ said that in the main he approved of article 10, which was not without its difficulties. Some of them, however, could be removed if paragraph 1 was drafted in negative rather than positive terms. In addition, paragraph 2 could be deleted, for the case of the defendant State which made a counter-claim and thereby consented to submit to the jurisdiction of a court or to waive jurisdictional immunity was covered by some paragraphs of article 9.

2. Mr. McCAFFREY said that the two paragraphs of article 10 appeared to deal with two different situations: first, the situation in which the foreign State was the plaintiff and counter-claims were brought against it by the defendant in the action, and second, the situation in which the foreign State was the defendant and was making the counter-claim. While that structure was sound, the wording might be improved for the purposes of greater clarity.

3. The question dealt with in paragraph 1 was the extent to which the bringing of an action by a State against a private individual operated as a waiver of that State's immunity. Naturally, there was a difference between a situation in which a foreign State was the plaintiff and an action between two private individuals. Generally, under United States law, an individual bringing an action subjected himself to the plenary *in personam* jurisdiction of the court and the court could adjudicate with respect to any counter-claim brought by the defendant, provided it was competent to do so under its own rules. In paragraph 1, there was a potential distinction between *in personam* jurisdiction for purposes relating to the legal relationship which was the subject-matter of the foreign State's claim, and the foreign State's immunity in respect of any counter-claim which related to the subject-matter of the State's claim or in respect of which the State would otherwise enjoy immunity. Consequently, the tenor of paragraph 1 appeared to be that a foreign State, by initiating proceedings, conferred jurisdiction on the court in respect of counter-claims brought by the defendant, but only those counter-claims which related to the subject-matter of the State's claim or could be brought by the defendant by virtue of the State's consent or under one of the exceptions provided for in part III of the draft. In other words, by bringing an action the foreign State waived its immunity in respect of some, but not all, counter-claims brought by the defendant. Consequently, the article dealt with a form of implied consent.

4. He agreed with Mr. Balanda (1717th meeting) that the wording of paragraph 1 could be refined. Presumably, the words "has taken part or a step relating to the merit" were not intended to indicate that if a foreign State, for any reason of policy, wished to file an *amicus curiae* brief in order to influence the outcome of a proceeding, it would, by so doing, confer jurisdiction on the court in respect of any counter-claim brought against it by any party to the action. That construction should, strictly speaking, be precluded by the very term "counter-*claim*". It might be preferable, therefore, to replace the words in question with a phrase that would cover all relevant possibilities, such as "or in which a State has intervened". A similar form of language was used in section 1607 of the United States Foreign Sovereign Immunities Act.[5]

5. In addition, the latter part of paragraph 1 could be redrafted to make it clear that they referred to an action by a private party that was covered by consent under part II of the set of draft articles or one of the exceptions provided for in part III. Accordingly, the words, "or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court" could be replaced by "or in respect of any counter-claim as to which a foreign State would not be entitled to immunity under the provisions of parts II or III of the present articles, had such a claim been brought in a separate proceeding against that State". A similar provision could be added to paragraph 2, the purpose being to make it plain that private parties could bring an action against a foreign State in respect of any question involving consent or falling within one of the exceptions in part III.

6. Mr. NJENGA said that, as a statement of the generally applicable principle that a State making a claim could not at the same time insist on retaining its immunities in respect of any counter-claim brought by the defendant in that action, article 10 was quite justified and should be retained. However, the drafting

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

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

[3] The texts of draft articles submitted at previous sessions of the Commission are reproduced as follows: (*a*) art. 1 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp.153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session: *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

[4] For the text, see 1716th meeting, para. 17.

[5] See 1709th meeting, footnote 13.

of paragraph 1 could be improved. In particular, the phrase "has taken part or a step relating to the merit" was somewhat vague and the wording proposed in that regard by Mr. McCaffrey could provide considerable clarification.

7. He encountered considerable difficulty with the latter part of paragraph 1, "or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court". If, as Mr. McCaffrey had affirmed, that provision related to proceedings covered by the exceptions set out in part III of the draft, it would appear to be unnecessary, since the court would have jurisdiction in any event. Moreover, it appeared to relate to jurisdiction in general, rather than jurisdiction in respect of counter-claims in particular. Accordingly, it could be deleted. Paragraph 2 was a logical development of paragraph 1 and should be retained.

8. Mr. KOROMA said that the principle of jurisdictional immunity was itself an exception to the normal rule, and the Commission should be careful not to erode it. He too thought that the words "in which a State has taken part or a step relating to the merit" in paragraph 1 created difficulties, particularly in cases where a State jointed in an action between two other parties in order to defend its property or interests. He was not convinced that such a step constituted sufficient grounds for assuming that the State consented to the jurisdiction of the court in respect of any counter-claim brought against it. Further explanation of that point was needed. The wording of the paragraph could also be clarified, although it was an improvement on article 32, paragraph 3, of the Vienna Convention on Diplomatic Relations. He agreed with the comment that, if the last part of the paragraph was intended to refer to part III of the draft, it should be placed there, rather than in article 10.

9. As to paragraph 2, under the common law system the making of a counter-claim was deemed to amount to consent to the exercise of jurisdiction by the court, but the same might not be true of all legal systems. He would welcome further information on that point. Finally, he wondered what would be the position if a court decided that a counter-claim made by a State did not arise out of the same legal relationship or facts as the principal claim. Would the principal claim none the less proceed?

10. Mr. EVENSEN said that he was impressed with the provisions contained in the article, but the wording of paragraph 1 posed a number of problems and, in that regard, he endorsed the comments made by Mr. Njenga and Mr. Koroma. He therefore proposed that the paragraph should be amended to read:

> "When a State institutes legal proceedings in the court of another State or takes part in such proceedings or in part thereof with regard to the merits of the case, jurisdiction may be exercised against such State in respect of any counter-claim arising out of the same legal relationship or the same facts as the principal claim.
>
> "If, in accordance with the provisions of the present articles, jurisdiction might have been exercised by separate legal proceedings against the State concerned with regard to special claims, such claims may likewise be introduced in the pending case to the extent that the court before which the pending claims have been brought is competent to adjudicate such additional claims as mentioned."

Paragraph 2 could remain unchanged except for insertion of the words "according to article 9" after the word "consent".

11. One aspect not covered by the article was the possibility that certain types of counter-claims might arise out of proceedings instituted against other authorities. Accordingly, the following paragraph should be added to the article:

> "The provisions of the present article are applicable as appropriate to proceedings before such other authorities as defined in article 7 to the extent that such authorities are competent to deal with such issues and counter-issues."

12. Mr. JAGOTA said that article 10 appeared to deal essentially with the question of the scope of counter-claims in relation to the concept of State immunities. In his view, the scope of counter-claims raised against a foreign State under the provisions of paragraph 1 would be the same as for claims arising out of the same legal relationship or facts as the principal claim. Counter-claims or additional claims that were made against a State instituting proceedings in a foreign court and did not arise out of the same legal relationship or facts as the principal claim might be justified under the provisions not only of part III but of any of the draft articles, depending on the facts of the counter-claim concerned. In either case, the court would have jurisdiction and the question of State immunity would not arise.

13. Conversely, under paragraph 2, a State against which proceedings had been instituted by an individual could claim immunity or raise a counter-claim, in which case the court would have jurisdiction in respect of both the principal claim and the counter-claim. In either instance, the scope of the claims concerned would be the same.

14. The two ideas appeared to be clearly stated in the article and, in his opinion, the last part of paragraph 1 served a useful purpose, although the actual wording must be decided by the Drafting Committee. As to the phrase "or in which a State has taken part or a step relating to the merit", in paragraph 1, the final wording should be in keeping with that to be used in article 9, paragraph 4.

15. The CHAIRMAN, speaking as a member of the Commission, said that some of the expressions used in article 10 posed difficulties. Paragraph 2, for example, provided for the case in which a State was summoned before a court. Counsel would first recommend that the

State should argue that the court lacked jurisdiction by reason of the immunity, and, secondly, if the court did not recognize the immunity, that a counter-claim should be made. In public international law and in certain countries, including France, a counter-claim could in no sense be interpreted as a will on the part of the State to waive immunity. In fact, a waiver of immunity was subject to two conditions: the will of the State to waive the immunity and the granting of the immunity by the national courts with respect to a counter-claim. Hence, article 10, which would set forth a rule of public international law binding on national courts, must be drafted extremely carefully.

16. Mr. USHAKOV pointed out that, in the Soviet Union at least, tacit submission to the jurisdiction of a court by instituting proceedings before it did not necessarily mean acceptance of the exercise of its jurisdiction with respect to a counter-claim: the exercise of that jurisdiction required express consent. As Mr. Reuter had pointed out, government and court practice should be taken into account before a rule could be drawn up. The Special Rapporteur should therefore obtain a broader range of information.

17. Mr. NI, referring to Mr. Njenga's comments concerning the last part of paragraph 1, said that one of the prime concerns whenever legal or judicial reforms were being considered was to reduce the burden imposed on the courts by the multiplicity of suits. One way of achieving that aim was to combine suits involving the same parties, even though they might not arise out of the same legal relationship or facts and the court might not normally be competent to exercise jurisdiction. Under the provisions of paragraph 1, it was possible for a court to exercise jurisdiction in respect of a counter-claim which did not arise out of the same legal relationship or facts as the principal claim, thereby saving much time and expense. Even when the court was not normally competent to hear the counter-claim, it would be convenient if it could assume the necessary jurisdiction. The last part of paragraph 1 was therefore a useful innovation and should be retained.

18. Paragraph 2 clearly reflected the idea of allowing counter-claims to be made on the basis of the concept of implied consent. One question which called for further consideration in that connection was whether a foreign State which instituted proceedings could make an express declaration that it would limit its consent to the proceedings in question and would not be subject to the jurisdiction of the court in respect of any counter-claim.

19. Mr. MAHIOU said that he would like first of all to congratulate the Special Rapporteur on the quality and precision of his fourth report (A/CN.4/357).

20. Article 10, paragraph 1, covered a question of principle and the corollary thereto. The question of principle was to what extent a State which instituted legal proceedings or took a step in legal proceedings thereby accepted a counter-claim made by the defendant; the corollary concerned the actual scope of the counter-claim with respect to that State. Perhaps the answer lay in the way in which the State acted. Paragraph 1 envisaged three cases: the case of a State which itself instituted the legal proceedings; that of a State which took part in legal proceedings; and that of a State which took a step in legal proceedings. When a State instituted legal proceedings or took part in them, it ran the risk of being faced with a counter-claim on the whole of the matter in dispute. On the other hand, when it took a step in legal proceedings—for example, when it supported proceedings instituted by one of its nationals, whether an individual or legal entity—it might take a step only in connection with a particular point of contention of special concern to it. Accordingly, article 10 should specify that a counter-claim must not have the effect of involving a State in the whole of the matter in dispute if the State in question was simply taking a step in the proceedings.

21. Mr. KOROMA said that, although Mr. Evensen had probably intended the words "additional claims" at the end of paragraph 1 of his amended version of article 10 to mean "counter-claims", they might be taken to mean claims added by a plaintiff to an original claim. They should therefore be clearly defined.

22. Referring to the question of the relationship between consent and counter-claims, he cited the example of a case in which a State entered into a contract with a local contractor for repairs to its chancery building in a foreign country and, having paid the entire fee for the repairs, found that the work had not been completed and that the local contractor claimed that all he had contracted for was "habitable occupation". The State therefore decided to sue for lack of complete performance and the contractor answered with a counter-claim to the effect that he had done more work on the building than had been contracted for. It was very doubtful that, by bringing a suit with regard to the original contract, the State concerned could be said to be giving its consent to the counter-claim. He would be grateful to the Special Rapporteur for any possible clarification on that point.

23. Mr. RIPHAGEN, referring to Mr. Koroma's comments, said that, in his own view, article 10 was in no sense based on consent. Rather, it sought to show that, in deliberately using the courts of another State, a foreign State ran the risk that the other State might also make use of those courts, something it was fully entitled to do.

24. The point raised by Mr. Mahiou was covered by article 13 of the European Convention on State Immunity,[6] which clearly demonstrated that intervention itself did not make a court competent to adjudicate a counter-claim.

25. Mr. NJENGA said that, if reference were made in paragraph 1 to additional and related claims, the Commission would be on dangerous ground, because it would be saying in effect that the defendant State waived all its immunities forever and could be brought

[6] See 1708th meeting, footnote 12.

to court even on matters not related to the principal claim, including matters not covered by the exceptions dealt with in part III of the draft. The Commission would thus be going much too far if it established in article 10 that a State had no immunities at all when it dared to take part in legal proceedings in the court of another State.

26. He agreed with Mr. Ni that it would be convenient to allow the same court to deal with all related claims by the parties, provided that such claims were justifiable by the court and were not exceptions to the general rule of jurisdictional immunity. Otherwise, States would be penalized every time they brought a suit.

27. Mr. McCAFFREY said it was quite apparent from the discussion of the words "taken part or a step relating to the merit" in paragraph 1 that the meaning of the concept of intervention in a proceeding varied from one legal system to another. Hence it might be necessary to engage in further empirical study of what intervention in a proceeding signified; otherwise, it would be difficult to determine how to limit the scope of a counter-claim resulting from intervention. In that connection, he noted that the provision of the European Convention on State Immunity, to which Mr. Riphagen had referred, was limited to intervention for the purpose of asserting a right to or interest in property, while the United States Foreign Sovereign Immunities Act, which was much broader, allowed counter-claims in any instance in which a foreign State intervened.

28. Mr. FLITAN suggested that the Special Rapporteur should reconsider the phrase "arising out of the same legal relationship or facts as the principal claim", in paragraph 1. That legal relationship and those facts could not logically be placed on the same footing, since a legal relationship always derived from legal acts or facts. Reference could be made only to the same legal relationship, which derived from the legal act or legal fact which had produced it.

29. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion, said that article 10 was concerned exclusively with limiting the scope and consequences of submission by one State to the jurisdiction of another State. It did not seek to expand such jurisdiction. Paragraph 1 dealt with counter-claims brought against a State and, in that connection, he drew attention to the fact that the State's submission to jurisdiction was limited in such cases because it was deemed to have consented only to proceedings arising out of the same legal relationship as the principal claim.

30. In the earlier version of article 10 submitted in his third report (A/CN.4/340 and Add.1, para. 81), in paragraph 1, counter-claims had also been limited as to quantum. At the previous session, Mr. Aldrich had said[7] that such a limitation would be unfair; but the purpose in proposing it had been to give the State an incentive to submit to jurisdiction because any counter-claims would be limited by the quantum of the principal claim. The Commission had none the less agreed with Mr. Aldrich that article 10 should provide for a limitation, not as to quantum but as to subject-matter, in other words, claims arising out of the same legal relationship or facts as the principal claim.

31. In that connection, Mr. Mahiou had raised the point that, in article 9, the Commission would also have to decide to what extent a State in fact submitted to jurisdiction when it asserted a right to or interest in property, and Mr. Ni had correctly pointed out that, in such a case, a State could make a claim but specify that it raised a plea of immunity because the property belonged to it and a court of another State should not exercise jurisdiction in respect of the property.

32. With regard to proceedings relating to counter-claims, there were, moreover, various types of intervention, such as *ex parte* proceedings, interpleader proceedings and the participation of a State which succeeded to an inheritance and against which a counter-claim could be brought. All those questions would have to be dealt with in detail in the commentary to articles 9 and 10.

33. In connection with the words "... had separate proceedings been instituted..." at the end of article 10, paragraph 1, Mr. Jagota had properly noted out that they related more to articles 8 and 9 than to part III of the draft because, under article 9, consent to jurisdiction could have been given in a separate written agreement, treaty or contract and a court, as referred to in article 10, paragraph 1, would then be able to exercise jurisdiction in the light of the earlier consent. If the wording of paragraph 1 was unclear, however, he was prepared to consider any possible improvements.

34. Paragraph 2 related to a State which made a counter-claim in proceedings before a court of another State and was deemed to have given consent to the exercise of jurisdiction by that court, which would also have to rule on the principal claim because the counter-claim was necessarily allied to it. The paragraph thus narrowed down the provisions of article 9.

35. Mr. USHAKOV stressed the importance of the time factor in matters concerning counter-claims. If a State instituted proceedings before a court of another State and was aware of the existence of a counter-claim before the court considered the merits of the case, there was consent on its part. On the other hand, if the counter-claim was made after the court had begun to deal with the merits, that State could not be deemed to have consented to it in advance. Similarly, the State which acted as the defendant and then made a counter-claim was obviously giving its consent twice, but the situation was different when it made a counter-claim before the court had begun to deal with the merits.

36. Mr. KOROMA said that, despite the use of similar wording, article 9, paragraph 4, was predicated on consent but, as Mr. Riphagen had rightly pointed out, article 10 was not. Precisely because express consent was not required under article 10 and because a State against

[7] *Yearbook ... 1981*, vol. I, p. 78, 1657th meeting, paras. 21-24.

which a counter-claim was brought might be placed in the position of having to deal with more than it had bargained for, several members of the Commission had requested the Special Rapporteur to shed further light on the words "legal proceedings ... in which a State has taken part or a step relating to the merit" in article 10, paragraph 1.

37. Again, in referring to article 13 of the European Convention on State Immunity, Mr. Riphagen had said that, under that article, intervention by a party in a claim related to the procedure and not to the merits, whereas such intervention did relate to the merits under article 10 of the present draft. That point might also be considered by the Special Rapporteur and the Drafting Committee.

38. Mr. SUCHARITKUL (Special Rapporteur) said that members of the Commission appeared to have greater doubts about the meaning of the words "stage of the proceedings" in article 9, paragraph 7—regardless of whether the proceedings related to the merits—than about the meaning of the concept of intervention as to the merits. Proceedings could, for example, relate both to the procedure and to the merits when a foreign State claimed immunity in respect of a right to property and the court of the territorial State nevertheless required the foreign State to submit to its jurisdiction so that it could decide whether the claim of immunity was valid. Once it was decided that the foreign State's claim of immunity in respect of the property in question was valid, the court of the territorial State should decline jurisdiction and the question of counter-claims would not arise because the case would then be closed.

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that draft article 10 should be referred to the Drafting Committee.

It was so decided.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/341 and Add.1,[8] 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[9] (*continued*)

Article 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)[10] (*continued*)

40. The CHAIRMAN, speaking in his capacity as Special Rapporteur, said that the discussion on article 36 *bis* had been both lengthy and interesting. He did not intend to give an account of all the opinions expressed, and would confine himself to the comments that might lead to a consensus. The discussion had been lengthy and interesting primarily for reasons of law. It was undeniable that the member States of an organization were, strictly speaking, third parties with respect to treaties concluded by the organization. In point of fact, however, it was plain that an organization consisted of States acting collectively, and no organization could exist without the presence and the action of the member States. Indeed, article 36 *bis* had held the attention of the members of the Commission for so long precisely because it could not be affirmed out of hand that the member States of an organization were merely third parties with respect to the treaties concluded by the organization. It was apparent from the observations by Governments on other articles of the draft that agreements concluded between an organization and its member States called for special treatment, for the member States did not have the same relationship to the organization as did States that were completely outside it. Furthermore, even those opposed to retaining a provision on the matter had felt that it should at least be discussed in the commentary. His own view was that the question was too important to be settled in that way.

41. There was also a practical reason for the lengthy discussion on article 36 *bis*. Generally speaking, it could be said that, in modern times, many initiatives by international organizations could be successfully completed only if the member States committed themselves along with the organizations. He himself had alluded to that fact when he had spoken of modern economic problems. The Commission could not be expected to examine all the ways in which a twofold commitment of that kind could be achieved. The question had arisen in connection with only one technical procedure among many others, and the point now was whether it should be mentioned in the draft. It would be regrettable if the Commission decided not to elaborate any text on the matter, since the draft articles were, in the final analysis, but a pale copy of the 1969 Vienna Convention on the Law of Treaties[11] and nearly all the other problems particular to international organizations had so far been left aside.

42. The positions adopted during the discussion had differed greatly, but no member of the Commission had come out in favour of retaining article 36 *bis*, even in its latest version (A/CN.4/353, para. 26). One member had been completely opposed to article 36 *bis*, or any other similar text, first, because the article highlighted one international organization which was merely an ex-

*Resumed from the 1707th meeting.

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

[9] 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), p. 120 *et seq.*

[10] For the text, see 1704th meeting, para. 42.

[11] Hereinafter called "Vienna Convention".

ceptional case, something that would be absolutely unjustified, and second, because article 36 *bis* would be unnecessary in view of article 35. At least one other member of the Commission had endorsed that second point. Some other members had adopted a less negative position; they had felt that the article was ill-advised and that it would be better to eliminate it, for it had too many implications. Still others had felt that they could accept article 36 *bis*, subject to two changes: subparagraph (*a*) should be confined to cases in which the organization's constituent instrument itself specified that treaties concluded by the organization were binding on the member States, and subparagraph (*b*) should establish that the member States must have expressly consented to the fact that the application of the treaty necessarily entailed certain effects for them. As one of those members had also pointed out, in those circumstances article 36 *bis* would be of no value, since the situation would be that envisaged in article 35, which stipulated express acceptance in writing. Again, if subparagraph (*a*) was to be limited to constituent instruments alone, it would be referring all the more to the special case of the European Communities.

43. Yet other members had pointed out that, when it had examined the situation of third parties with respect to a treaty, the Commission had never envisaged such a special case as that of the member States of an international organization. A proposal had been made to delete article 36 *bis* and to introduce an article reserving any special provisions which could govern the relations between an international organization and its member States in special cases. It had also been pointed out that the effects referred to in article 36 *bis* could result not only from a provision of a constituent instrument but also from a special unanimous agreement by the member States of an organization.

44. The members of the Commission who were favourable to a provision on that subject had generally leaned towards the idea of rendering the consent more flexible. With respect to article 35, that flexibility could take two forms. Either the requirement of express written consent laid down in article 35 could be relaxed, or it could be specified that the consent could have been given previously. The members who had discussed the second possibility had explained that they were not thinking of the special case of the European Communities, in which the consent was given once and for all under the constituent instrument, but the case of an operation which must commit both the organization and its member States. In such a case, it was quite conceivable that the member States would agree to commit themselves under a future agreement of the organization. One example was afforded by the practice followed in international assistance, when it was supplied both to the member States and to a body required to perform certain administrative functions. Finally, it had been proposed that article 36 *bis* should be deleted and that a paragraph should be added to article 35 to allow for some flexibility.

45. The Drafting Committee would inevitably have to consider article 36 *bis*, which was already the subject of at least five formal proposals for amendments. If opposition to the article remained, a solution proposed at the previous session could be considered. The solution was based on the fact that, when an organization was on the verge of concluding a treaty and knew that the treaty would entail obligations for its member States or that the latter had already accepted those obligations, its duty was to so inform the States or the international organizations with which it intended to conclude the treaty.[12] That duty, which emerged from practice, could be set forth in a provision. It was admittedly a minor obligation, but none the less an obligation of good faith and, by mentioning it, the Commission would show that, although it had not been able to resolve all the difficulties, there were at least a few important problems it had discussed.

46. Speaking as the *Chairman*, he said that, if there were no objections, he would take it that the Commission agreed that the Drafting Committee should still consider article 36 *bis*.

It was so decided.

The meeting rose at 1 p.m.

[12] *Yearbook ... 1981*, vol. I, p. 186, 1678th meeting, paras. 20-21 (Mr. Aldrich).

1719th MEETING

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

[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.