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Summary record of the 1703rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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).

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

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")[3] (*concluded*)

2. Mr. KOROMA said that, although the *pacta tertiis* rule applied to international organizations as well as to States, in the case of the former it raised some problems. Referring to the recently adopted Convention on the Law of the Sea and its annexes, he noted that annex IX of the Convention contained a provision, in para. 4, allowing an international organization to become a party to it, with ensuing rights and obligations for its membership.[4] Since the text of the Convention had not yet been issued, the Special Rapporteur might want to study it carefully before article 34 was referred to the Drafting Committee. If that procedure would cause undue delay, perhaps the Drafting Committee itself could examine the text of the Convention and its annexes.

3. Mr. LACLETA MUNOZ said that he preferred the simpler and more elegant wording of article 34 proposed by the Special Rapporteur (A/CN.4/353, para. 24). It had been stated that the word "treaty" might be interpreted as signifying a treaty between States, but, in order to avoid confusion, it would be sufficient to apply the rules of interpretation enunciated in article 2, paragraphs 1 and 2, of the draft articles.

4. A second problem connected with article 34 was more difficult and could determine whether that article should be referred to the Drafting Committee immediately or not. Certain types of international organizations possessed supranational competence or substituted, in certain areas, for the competence of their member States. The member States could therefore be qualified as third States in relation to the treaties concluded by the organization within the sphere of competence transferred to it by its member States. That could influence not only the drafting, but also the contents of article 2, subparagraph 1 (*h*). Subject to that problem, he would have no objection if the text was referred to the Drafting Committee. It should, however, be emphasized that some of the difficulties mentioned in connection with article 36 *bis* could be avoided if article 2, subparagraph 1 (*h*), was drafted appropriately.

5. Mr. RAZAFINDRALAMBO said that he was in favour of referring article 34 to the Drafting Committee, which should examine it in the light of the observations made by Mr. Koroma. Article 2, subparagraph 1 (*h*), should also be referred to the Drafting Committee because it was difficult to see how there could be any departure from the concise and general definition contained in the Vienna Convention. Although he preferred the simplified wording of article 34, which better emphasized the peremptory nature of the principle of the relativity of treaties, he believed that the division of article 34 into two paragraphs could be justified to the extent that each paragraph served as an introduction to the provisions contained in the following articles. If that division was retained, however, the order of paragraphs 1 and 2 should be reversed, since treaties between one or more States and one or more international organizations were systematically mentioned before treaties between international organizations, not only in the other provisions of the draft, but also in the title of the topic under consideration.

6. Mr. REUTER (Special Rapporteur), summing up the debate, said that the provisions under discussion had given rise to drafting suggestions and had raised doubts about whether they should immediately be referred to the Drafting Committee. Some members of the Commission believed that it was not article 34, but rather the definitions contained in article 2, subparagraph 1(*h*), that might raise the most important question of principle. To reassure them, the Commission might refer both provisions to the Drafting Committee and request it to consider them in the context of the set of provisions constituting section 4, relating to the interpretation of treaties. As to substance, the articles contained in section 4 were obviously some of the most difficult in the draft and it was quite normal that they should cause some members of the Commission problems, which were in fact linked to article 36 *bis* and would be considered only in connection with that article.

7. Replying to the observations made by Mr. Koroma, who thought that account should henceforth be taken of the work of the Third United Nations Conference on the Law of the Sea having a bearing on the articles in section 4, he would, as a member of the Commission rather than as Special Rapporteur, say that the question of the effects of treaties with respect to entities which were not parties to those treaties was different from the question of the conditions under which an international organization could become a party to a multilateral treaty and the effects of such participation. Some interesting aspects of the matter had, admittedly, been introduced at the Conference on the Law of the Sea, but, in the course of its work the Commission had often noted that there were few open multilateral treaties—that is, treaties intended for a wide accession—to which international organizations were parties. There were at present many treaties which had allowed a specific international organization, regarded as a special international organization, to become party, but such treaties laid down all sorts of conditions and provided for all sorts of effects. All the other requests that had been made in the past, such as the suggestion that the United Nations itself should participate in the conferences on humanitarian law, had always been rejected.

[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 texts, see 1702nd meeting, para. 38.

[4] See 1699th meeting, footnote 7.

8. It could be asked whether the Commission wished to draw distinctions between international organizations and define a special category of international organizations for whose sake some of the articles in section 4 would be drafted. To his mind, it would not *a priori* be advisable to try to formulate rules that would be valid for categories that were too specific. Thus, if the sole aim of article 36 *bis* was to take account of a special case, it should not be included in the draft articles. It was to be noted that the Vienna Convention had drawn no distinction between treaties, despite the suggestions made by certain States.

9. It should also be noted that the Vienna Convention enunciated very general rules, which remained valid, even if they were attenuated to some extent, as in the draft under consideration. The principle enunciated in article 34, namely, that treaties did not have effects with respect to third States, was thus absolute. During the Commission's debates on the corresponding draft articles, the proposed exceptions to that principle had been rejected because the rule seemed important enough to be stated generally and virtually absolutely. Exceptions did, however, exist and they had been reflected in subsequent conventions, such as the 1978 Vienna Convention on Succession of States in Respect of Treaties which provided that territorial or dispositive treaties could have effects with respect to third States.

10. The real problem raised by article 34 was whether the member States of an international organization could actually be regarded as third States in relation to agreements concluded by that organization. From the very beginning, he had attempted to introduce the new concept that there was a position falling between that of a third State and that of a State party, but the Commission had rejected that concept. With article 5 of the draft, and on Mr. Ushakov's initiative, the Commission had now taken a position that no longer ruled out the possibility that the constituent instruments of international organizations, which were chiefly treaties between States, might also be treaties that would come within the scope of the draft articles under consideration, if it was acknowledged, as article 5 tended to do, that an international organization could be a member of another international organization. An absurd question would then have to be asked: was an international organization a third party in relation to the instrument which had created it? Was the United Nations a third party in relation to the Charter? That was, in any event, precisely what would have to be argued if article 34 of the Vienna Convention was taken literally. In that connection, it was interesting to note that, when Mr. Stavropoulos had been the United Nations Under-Secretary-General of Legal Affairs, he had always affirmed, as Legal Counsel, that the United Nations was a party not to the Charter—that was not necessary—but, rather, to the treaty concluded between States in respect of the privileges and immunities of the United Nations.[5] In all systems of internal law, it was acknowledged that a corporation was not a third party in relation to the contract establishing it. He had given all that information by way of example and to point out that the logical consequences of a definition should perhaps not be taken too far. The principle of article 34 as it now stood was a sound one, and the Commission had never doubted that that general principle should be retained as it was.

11. It would subsequently have to be decided whether the provisions of the Vienna Convention which enabled third parties to enjoy the rights and assume the obligations provided for by a treaty should be made more flexible. It should not be forgotten that, in drafts such as the one being prepared, the Commission could not deal with the subject-matter exhaustively; sometimes, it even deliberately left aside certain questions that were too complicated. For example, draft article 73 did not deal with a number of problems concerning international organizations. His position was therefore that, although article 34 might be redrafted, its general tenor should be retained.

12. As for the definitions contained in article 2, subparagraph 1 (*h*), consideration of the following articles would show whether they should be retained as they now stood or supplemented by a definition that applied to special cases.

13. The CHAIRMAN suggested that article 34 and article 2, subparagraph 1 (*h*), should be referred to the Drafting Committee, on the understanding that it would consider those provisions together with all the articles in section 4.

It was so decided.[6]

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations)

14. The CHAIRMAN invited the members of the Commission to consider article 35, which read:

Article 35. Treaties providing for obligations for third States or third international organizations

1. [Subject to article 36 *bis*,] an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

15. Mr. REUTER (Special Rapporteur) said that he was not proposing any amendments to article 35. He pointed out that the words "Subject to article 36 *bis*" had been placed in square brackets at the beginning of

[5] Convention on the Privileges and Immunities of the United Nations, of 13 February 1946 (United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1)).

[6] For consideration of the texts proposed by the Drafting Committee, see 1740th meeting, paras. 2, 16 and 18.

paragraph 1 because the Commission had not adopted article 36 *bis*. The retention or deletion of those words would depend on the position the Commission would adopt concerning that article.

16. Article 35 differed from article 35 of the Vienna Convention in two respects, and that was a result of the fact that it was sometimes useful to include in an article a reference which, although not absolutely necessary, offered the advantage of stating a rule which existed elsewhere and whose application was particularly important in the case in question. It had, for example, always been considered essential for an international organization not to go beyond the bounds of its competence. Draft article 6 embodied the rule relating to the capacity of organizations to conclude treaties. It was, accordingly, specified in paragraph 2 of the article under consideration that the parties to a treaty could establish an obligation for an international organization which was not a party to that treaty and that that organization could accept that obligation if the treaty came within the sphere of the organization's activities. That was a frequent but bold technique. Thus, an international convention could assign the Security Council functions and obligations that were new in relation to those provided for in the Charter of the United Nations, and the Security Council could accept them if they came within the sphere of its activities. Paragraph 3 as a whole was, moreover, a new provision which was not absolutely necessary, but was intended to state that any legal activity by an international organization was governed by its statute and its rules. An international organization could accept an obligation deriving from a treaty to which it was not a party by means of what had been called a collateral agreement; such an agreement, which established the obligation, supplemented the principal agreement.

17. Mr. USHAKOV said that, in his opinion, the rule enunciated in article 34, namely that no State or international organization could be bound without its consent, was an inflexible one; it formed the basis of every treaty. The aim of article 35 was to explain how a State or an international organization could, without being a party to a treaty, consent to obligations deriving from that treaty. Paragraph 1 provided that the third State must expressly accept the obligation in writing. Written consent was, however, not absolutely necessary; the provision in which that requirement was laid down was of a residual nature. Paragraph 2 stated that, in order for an obligation deriving from a provision of a treaty to arise for a third international organization, the obligation that the parties to that treaty intended to establish must be within the sphere of activities of that organization and the organization must expressly accept the obligation. According to paragraph 3, such acceptance was governed by the relevant rules of the organization and the consent of the organization, like that of the State, must be given in writing. That rule was also residual.

18. The reference to article 36 *bis* at the beginning of article 35, paragraph 1, raised some difficulties and made it necessary to look into article 36 *bis*. Since the consent of the third State was absolutely necessary under article 34, he did not think that it was possible to provide for another way of expressing such consent. According to article 36 *bis*, the third States which were members of an international organization must observe the obligations arising for them from the provisions of a treaty to which that organization was a party if the States and organizations participating in the negotiation of the treaty as well as the member States of the organization had acknowledged that the application of the treaty necessarily entailed such effects. It followed, then, that, by participating in the negotiation of a treaty, a State consented to be bound by the obligations deriving from a treaty in relation to which it was a third State—something that was impossible. The Vienna Convention made it quite clear that a State which participated in the elaboration of a treaty but did not become a party to that treaty was not bound by the obligations deriving from it. Its participation in the negotiation in no way implied consent to be bound by those obligations; it continued to be a third State. Those obligations were established for it only if it expressly consented to them in writing. It was quite contrary to the rule of express consent enunciated in paragraph 1 of the article under consideration for article 36 *bis* to stipulate that the member States of the organization could acknowledge, by participating in the negotiation of the treaty, that the treaty created obligations which bound them. It was impossible to derogate from the requirement of express consent, and participation in the negotiation of the treaty could not be construed as such consent.

19. According to another provision of article 36 *bis*, there would also be anticipated consent when the relevant rules of the organization applicable at the moment of the conclusion of the treaty provided that the member States of the organization were bound by the treaties concluded by it. He wondered whether a member State of a supranational organization, which, by acceding to the constituent instrument of that organization, had given its consent to be bound by the treaties that the organization might conclude and which subsequently left that organization, would be bound by the obligations deriving from those treaties. That question, like many others, had not been settled. It could also be asked whether a State which became a member of a supranational organization whose relevant rules provided, at the moment of the conclusion of the treaty, that the member States of that organization were bound by the treaties concluded by it was bound by that treaty, even though it had become a member after the conclusion of the treaty. Similarly, since the member States of a supranational organization surrendered to the organization their competence to conclude treaties in certain areas, it could be asked what would happen in the case of a treaty which a member State might none the less conclude on its own behalf.

20. although all those questions related to article 36 *bis*, they could be asked in connection with article 35 as

well. In his view, the various forms of consent referred to in article 36 *bis* were contrary to the basic principle of article 35, which must be in conformity with the corresponding provision of the Vienna Convention.

21. A distinction had to be made between a normal international organization, which bound only itself and not its members when it concluded a contract, and the very special case of a supranational organization, which bound its members when it concluded treaties in an area in which the members had surrendered their treaty-making power. The EEC was a new and quite exceptional phenomenon that could not be taken into consideration in a draft relating to traditional international organizations. The member States of an organization were always third States in relation to the treaties it concluded. If the organization provided for obligations for them, as third States, in the treaties it concluded, they must expressly accept those obligations. Furthermore, such treaties often provided more for rights than for obligations for the member States, in which case the consent of the member States was presumed. The consent of the member States must be express, in writing and special. According to the Vienna Convention, anticipated consent to a treaty was not possible. Yet article 36 *bis* provided specifically that the member States of a supranational organization gave anticipated and general consent; they accepted in advance the obligations deriving for them from the treaties which the organization would conclude in certain areas. Those States would, of course, participate in the elaboration of those treaties, but they would never have veto power. The two-thirds majority rule usually applied to the adoption of the text of a treaty, with the result that a member State which voted against the adoption of a certain treaty would nevertheless be bound by it if the majority prevailed. Such a procedure was obviously unacceptable, except in the very special case of a supranational international organization, which did not, for the time being, require the elaboration of general rules. Perhaps such rules could eventually be incorporated in draft articles devoted especially to organizations of that kind.

22. Mr. FLITAN pointed out that, in article 36, the words "Subject to article 36 *bis*" in square brackets were not justified, because article 36 *bis* dealt with the consent of the member States of an international organization to obligations deriving from a treaty concluded by that organization, whereas article 36 dealt with the rights that arose for a third State or a third international organization from a provision of a treaty. Moreover, article 36 itself provided for more flexible means of consent, since the last sentence of paragraph 1 stated that "Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides".

23. Referring to article 36 *bis*, he said that, in his view, subparagraph (*a*) was the one that gave rise to the greatest number of difficulties. Some members had stated, in support of that subparagraph and the means of expressing consent for which it provided, that, in some cases, States which decided to establish, or to become members of, an international organization undertook, in so doing, to be bound by the treaties which that organization might subsequently conclude. To his mind, however, those cases were still few in number. In fact, in the present-day world, where, despite the proclamation of the principle of *de jure* equality of States, States did not all have the same influence in international life, small and medium-sized countries which were members of an international organization could hardly be asked to consent, *ex ante* and without formulating the least reservation, to the obligations deriving from the treaties concluded by that organization. The principle of the *bona fide* participation of States in the activities of international organizations and the obligation to co-operate to which reference had been made in support of subparagraph (*a*) were not sufficient to justify the inclusion in the draft articles of a rule that was not generally applicable.

24. He agreed that the rule enunciated in article 36 *bis*, subparagraph (*b*), to which he reserved the right to refer again at a later stage, applied to international organizations whose express purpose was to conclude agreements establishing rights and obligations for their member States. The Commission might therefore consider the possibility of retaining that provision, which should, however, be drafted in more precise terms in order to avoid any ambiguity.

25. Mr. THIAM said that the question at issue was whether or not the member States of an international organization should be regarded as third States in relation to treaties concluded by that organization. According to articles 35 and 36 *bis* proposed by the Special Rapporteur, the member States of an international organization were not exactly in the same position as third States, since the means of expressing consent provided for the former differed from that provided for the latter. Whereas third States must expressly accept in writing the obligation arising for them from a provision of a treaty, the consent of the member States of an international organization to be bound by the obligations deriving from a treaty concluded by that organization was the result either of the relevant rules of the organization applicable at the moment of the conclusion of the treaty or of the acknowledgement by the member States of the organization that the application of the treaty necessarily entailed such an effect.

26. He was of the opinion that those two rules, which were embodied in article 36 *bis*, subparagraphs (*a*) and (*b*), respectively, did have a place in the draft articles. There were enough examples of treaties which had been concluded by international organizations and whose application necessarily implied the consent of the member States of those organizations to be bound by the obligations deriving from those treaties to justify the inclusion of subparagraph (*b*) in the draft articles. Subparagraph (*a*) was also fully justified. The member States of certain international organizations surrendered part of their competence to those organizations and accepted the rules of those organizations providing that the member States were bound by the

treaties which the organizations concluded. The member States of a customs union thus surrendered their sovereignty in tariff matters to the union.

27. Organizations of that kind were, moreover, not as few in number as some had claimed and they were even tending to increase. In Africa and Latin America, in particular, many small States, which were concerned because their territories were small, wanted to form large economic entities and, to that end, establish organizations of the kind to which he had just referred. The rule enunciated in article 36 *bis*, subparagraph (*a*), was therefore quite satisfactory. It would, moreover, only promote the progressive development of international law.

28. Mr. McCAFFREY said that he agreed with the substance of article 35, but wished to raise two points, one relating to the words "in the sphere of its activities" in paragraph 2 and the other relating to the treatment of third international organizations in two separate paragraphs.

29. Although the Special Rapporteur had clearly explained why the words "in the sphere of its activities" had been included in paragraph 2, he (Mr. McCaffrey) wondered whether those words were really necessary. They did not appear in the corresponding provision of the Vienna Convention, where they would, of course, be inappropriate, but they had apparently been considered necessary in article 35, paragraph 2, of the draft because of the involvement of an international organization. Those words were, moreover, part of two requirements laid down in paragraph 2, namely that the parties to the treaty intended a provision of the treaty to be the means of establishing the obligation for the third international organization in the sphere of its activities; and that the third organization expressly accepted that obligation.

30. The purport of the first requirement seemed to be that the parties to the treaty must intend not only that a particular provision should be the means of establishing the obligation in question, but also that the obligation should be within the sphere of the third organization's activities. It could then be asked to what extent an international organization would be competent to accept an obligation not within the sphere of its activities. It seemed to him, at least at first glance, that, as soon as it appeared that the parties to the treaty intended the provision to be the means of establishing the obligation, the question whether or not the obligation arose for the third international organization, assuming that the organization accepted it, was a matter of that organization's competence to accept the obligation and had little if anything to do with the question whether the parties to the treaty intended the obligation to be within the sphere of the organization's activities.

31. As a means of testing that hypothesis, he noted that there were two possible situations: the parties to the treaty either did or did not intend the obligation to be within the sphere of the organization's activities. In the first case, if they did intend the obligation to be within that sphere, no ulterior motives could be imputed to them and the organization would presumably be competent to accept the obligation, provided that such acceptance was otherwise consistent with its rules. In the second, where the parties did not intend the obligation to be within the sphere of the organization's activities but did intend the provision to be the means of establishing the obligation, there would be some hint of ulterior motives, but the organization would clearly be protected by article 46 of the draft, since, by definition, acceptance of such an obligation would be a patently *ultra vires* act amounting to a "manifest violation" of the organization's rules and therefore constituting grounds for invalidating the organization's consent under article 46. In that connection, he noted that the commentary to article 35 suggested precisely that result. Paragraph (2) of that commentary read:

> ...an organization could not accept an obligation that was not "in the sphere of its activities". All organizations pursued their activities in a sphere whose extent was determinable externally, and it was logical that the parties to a treaty would not intend to create an obligation for an international organization outside that sphere of activity.[7]

That reinforced the view that, under such circumstances, the third organization would be protected by article 46.

32. It would thus appear that the only conditions that had to be included in article 35, paragraph 2, were that the parties to the treaty intended that the particular provision should be the means of establishing the obligation in question; and that the third international organization expressly accepted that obligation. Those were the only conditions applicable to third States, and there did not seem to be any good reason to lay down an additional requirement for international organizations, which were adequately protected by article 46. The words "in the sphere of its activities" in paragraph 2 therefore seemed unnecessary.

33. Referring to the treatment of third international organizations in two separate paragraphs, paragraphs 2 and 3, he said that, in his view, the structure of article 35 would be much cleaner if it were divided into two paragraphs, one for third States and one for third international organizations. The existing paragraphs 2 and 3 could therefore be merged. Paragraph 3 as it now stood contained two substantive rules: that the third international organization's acceptance of the obligation in question should be given in writing, and that such acceptance was governed by the organization's rules. The first rule could easily be included in paragraph 2 by adding the words "in writing" after the words "expressly accepts that obligation". That formulation would correspond to that of paragraph 1, which was based on the Vienna Convention, and it would avoid the rather clumsy phrase "Acceptance... shall be given in writing". The second rule relating to the organization's internal rules could be enunciated in a second sentence to be added to paragraph 2. That second sentence could be based on the existing paragraph 3, with a few minor changes. As reformulated, the last part of paragraph 2 would read:

[7] *Yearbook... 1978*, vol. II (Part Two), p. 133.

"... and the third organization expressly accepts that obligation in writing. Acceptance by the third international organization of such an obligation shall be governed by the relevant rules of that organization".

34. Mr. CALERO RODRIGUES said that article 35, which embodied an exception to the *pacta tertiis* rule set out in article 34, did not give rise to any substantive problems. All members of the Commission seemed to agree that, even if a State or an international organization was not a party to a treaty, it could assume an obligation if the treaty itself so provided and it expressly accepted that obligation in writing, under what the Special Rapporteur had called a kind of collateral agreement.

35. He nevertheless shared Mr. McCaffrey's view that it was not necessary to refer in article 35, paragraph 2, to the sphere of the third international organization's activities because it was clear that no obligation outside the sphere of that organization's activities was to be contemplated. In any case, the organization had to accept the obligation, and would probably not do so if it was outside the sphere of its activities. It was also unnecessary to state in article 35, paragraph 3, that "Acceptance ... shall be governed by the relevant rules of that organization" because, when the organization expressed its assent to an obligation, it would necessarily act in accordance with its relevant rules.

36. If the references to the organization's sphere of activities and its relevant rules were deleted, article 35 could be simplified and reduced to a single paragraph, which might read:

> "[Subject to article 36 *bis*,] an obligation arises for a third State or a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or third international organization expressly accepts that obligation in writing."

37. Mr. MALEK said that articles 34 to 38, which the Commission was now considering, were closely related and that it was difficult to discuss them separately. As the Special Rapporteur had pointed out in his eleventh report, article 36 *bis* had caused much controversy, whereas articles 34 to 36 had given rise to only a few observations (A/CN.4/353, paras. 25-26).

38. Article 34 applied to international organizations the irrefutable rule of international law enunciated in the corresponding article of the Vienna Convention whereby a treaty created neither obligations nor rights for a third State without its consent. The simplified version of that article which had been adopted on first reading and proposed by the Special Rapporteur in his eleventh report (*ibid.*, para. 24) did not appear to call for any comments either as to substance or to wording.

39. The principle of consent had been stated in article 34 and the modalities of the expression of consent had been defined in articles 35 and 36, which also reproduced the provisions of the corresponding articles of the Vienna Convention, adapting them to the case of international organizations.

40. Article 35, which applied to treaties providing for obligations for third States or third international organizations, should not give rise to many substantive problems unless the Commission wanted, in that article, to relax the means of expressing consent to the obligations deriving for a third State or a third international organization from a provision of a treaty. That did, however, not appear to be the case, because the Commission planned to adopt a separate article for that purpose, namely, article 36 *bis*. With regard to the wording of article 35, he said that it was open to question whether the words "in the sphere of its activities" in paragraph 2 were really necessary.

41. There also appeared to be general agreement in the Commission concerning article 36. However, the reference to article 36 *bis* at the beginning of that article was questionable because the new version proposed by the Special Rapporteur in his eleventh report (*ibid.*, para. 26) dealt only with consent to obligations deriving from a treaty. It was obvious that, if the Commission decided to adopt the new version of article 36 *bis*, the reference to that article at the beginning of article 36 would no longer be justified. If article 36 *bis* was retained, it would, moreover, be preferable to place it immediately after article 35, to which it was closely linked.

42. As for the principle set forth in article 36 *bis*, he feared that the controversy it had caused and the doubts expressed about the need for it would prevent the Commission from reaching general agreement on it. Yet that article might turn out to be very useful in practice because its purpose was to shed a bit more light on a confused legal situation, namely, the situation of the member States of an international organization in relation to the treaties concluded by that organization. With regard to the new version of article 36 *bis* proposed by the Special Rapporteur, he would simply point out that the text of subparagraph (*b*) was rather obscure.

43, Mr. LACLETA MUÑOZ said he agreed with Mr. McCaffrey and Mr. Carelo Rodrigues that there was no real need for the words "in the sphere of its activities" in article 35, paragraph 2.

44. In view of the Special Rapporteur's reference to collateral agreements account should be taken of the fact that the term "treaty" in article 35, paragraph 2, might be interpreted as signifying not only treaties between States and international organizations or between international organizations, but also treaties which were concluded between States only and which gave rise to obligations for third international organizations. In order to avoid such an interpretation, it might be necessary to specify that, for the purpose of paragraph 2, the term "treaty" meant the type of treaty defined in article 2, subparagraph 1 (*a*), of the draft.

45. Mr. FRANCIS said that the fact that the initial phrase of article 35 and article 36 *bis* in its entirety had

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.