United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations

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tlement organ whose decisions were binding upon the parties. Priority was given to the International Court because of the binding nature of its decisions, because it was the principal judicial organ of the United Nations and because it was able to ensure a homogeneous and uniform interpretation of the rules of *jus cogens*. Furthermore, the Manila Declaration on the Peaceful Settlement of International Disputes emphasized that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

39. It was not possible to transfer the provisions of the 1969 Vienna Convention to the present draft. Existing mechanisms did not permit adoption of that solution; the International Court's limited possibility of settling disputes involving international organizations and the right of States to request advisory opinions were well known. A solution therefore had to be found which preserved the procedure of the 1969 Vienna Convention as far as possible, as well as the ideas underlying it, but at the same time took account of the existing legal possibilities. The amendment of which his delegation was a co-sponsor had the advantage of combining both of those features, and he therefore believed it should be acceptable to the international community as a whole. It should be borne in mind, however, that subparagraph 2 (*a*) was linked with the outcome of the negotiations on the new article which had been proposed in connection with article 3.

40. Adoption of the Soviet Union proposal to delete subparagraph (*a*) would cause certain problems, as the meaning of subparagraph (*b*), and particularly of the phrase "any of the other articles in part V of the present articles", would not then be clear. The proposal also appeared to exclude the possibility that a dispute between an international organization and a State might, on a compulsory basis, be subject to proceedings involving binding decisions. The Austrian delegation was not aware of any circumstance that would prohibit the establishment of such an obligation. A large number of headquarters agreements contained such a clause, as did the statutes of some international organizations. For example, article 28 of the 1970 Statute of the International Investment Bank, set up within the framework of the Council for Mutual Economic Assistance, provided that disputes between the Bank and its clients were subject to arbitration. If a State were a client, the same situation as would occur with the International Law Commission's draft would arise. A similar dispute settlement clause was to be found in article 37 of the articles of the Bank for Economic Co-operation. Moreover, the suggestion that the proposed deletion was justified by the unequal position of States and international organizations was not confirmed in practice, because whatever kind of mechanism was provided for in constituent instruments of international organizations and in treaties concluded by them for the peaceful settlement of disputes between States and international organizations, the relevant provisions were based on the principle of equality. The Austrian delegation therefore saw no need to exclude the compulsory jurisdiction of an international mechanism which would lead to binding decisions. On the contrary, such jurisdiction was necessary, particularly in cases involving *jus cogens*.

41. The amendment of Algeria, China and Tunisia called only for an "opting in" procedure for compulsory settlement of disputes, which went only half-way towards the goal which the Conference was striving to attain.

42. The United Nations amendment had basically the same structure as the text proposed in the eight-Power amendment, of which the Austrian delegation was a sponsor. He hoped that a unified text might result from further negotiations.

The meeting rose at 1.05 p.m.

25th meeting

Monday, 10 March 1986, at 3.20 p.m.

Chairman: Mr. SHASH (Egypt)

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] (*continued*)

Article 36 bis (Obligations and rights arising for States members of an international organization from a treaty to which it is a party) (*continued*)*

1. The CHAIRMAN reminded the Committee that, in addition to the amendments proposed to article 36 *bis* itself, by Austria and Brazil (A/CONF.129/C.1/L.49), the Netherlands (A/CONF.129/C.1/L.50), Switzerland (A/CONF.129/C.1/L.51), the International Labour Organisation, the International Monetary Fund and the United Nations (A/CONF.129/C.1/L.56) and the Soviet Union (A/CONF.129/C.1/L.62), the Committee had before it, in accordance with the decision taken at its 23rd meeting, a related proposal by the same three organizations relating to article 73 (A/CONF.129/C.1/L.65).

2. Mr. TEPAVICHAROV (Bulgaria) said that the subject-matter to be regulated by article 36 *bis* was very

* Resumed from the 20th meeting.

complex. The rule embodied in it might well modify an existing rule of treaty law, namely, the one set forth in article 34. Almost all the international organizations which had expressed their views on article 36 *bis* had stated either that the article would not apply to them or that their practice was at variance with its contents.

3. The article was intended to regulate the relations between States members of an international organization but not parties to a treaty to which the organization itself was a party. In its commentary to the article (see A/CONF.129/4), the International Law Commission had made perfectly clear the situations to which the article was intended to apply, as well as the requirements for the establishment of rights and obligations for member States in the situation envisaged. In the light of the Commission's explanations, the text of article 36 *bis* could be interpreted in several different ways. In his delegation's view, the amendments which had been proposed to the article did not succeed in removing the ambiguities.

4. It had been stated that article 36 *bis* provided for the possibility of expressing a collective consent before the treaty was concluded; in his delegation's view, that was only one of several possibilities which the article afforded. The Commission itself had considered the case of such a consent as an exceptional one, but the scope of the article was obviously wide and would extend to headquarters agreements.

5. It could hardly be claimed that article 36 *bis* sought to codify existing international custom or practice. If the article was to form part of the draft convention, a number of questions concerning its interpretation and application would have to be clarified.

6. The introductory wording of the article made it clear that, in order for the obligations and rights to arise for States members of an international organization in the circumstances specified in the article, that intention must be expressly stated in the treaty, as must the conditions and effects to which the parties consented in regard to those rights and obligations. However, the use of the words "or have otherwise agreed thereon" introduced an element of uncertainty, since they could be construed as providing either for an implied consent by some of the parties to the treaty or for a consent which might not be given in written form; and as defined in article 2, subparagraph 1 (*a*), a treaty to which the draft articles applied must be in written form.

7. He now wished to turn to the consent of the States members of the organization and to the conditions laid down in subparagraphs (*a*) and (*b*). Paragraphs (13) to (16) of the International Law Commission's commentary indicated that three conditions were necessary to bring article 36 *bis* into operation and that they applied cumulatively: the consent of the parties, provided for in the introductory wording, the consent of the States members, regulated by subparagraph (*a*), and the communication of that consent, provided for in subparagraph (*b*).

8. The main question raised by subparagraph (*a*) was the manner of expressing the consent. The representative of the Netherlands had explained at the 19th meeting that it could be given through the constituent instrument of the organization containing a provision to that effect; if so, the assumption was that the individual consents of its members would not be needed at the time of the negotiation of the treaty by the international organization and its partners. If that was the case, it was not clear how subparagraph (*b*) would be applied. Who would have to furnish the information concerning the prior consent given by the members? Could it be assumed that the international organization, by virtue of its constituent instrument, was empowered to interpret the will of its member States in the matter? If so, the requirement of communication set forth in subparagraph (*b*) would become a mere formality and would not correspond with the view expressed by the Commission in paragraph (16) of its commentary that the elements communicated before the closure of the negotiation of a treaty with regard to the consent of the members of the organization were "a vital factor".

9. A second means whereby the consent of the States members could be expressed was, as subparagraph (*a*) provided, "by virtue of the constituent instrument". In his delegation's view, that meant explicit consent. The words "or otherwise" in subparagraph (*a*) suggested a further possibility but were extremely vague; the proposal by the Netherlands to replace them by the words "in accordance with other rules" did not do much to clarify the position. The essential element in subparagraph (*a*) was that of the unanimous consent of the States members of the international organization. The question of how that unanimous agreement was reached was a procedural matter which lay outside the scope of the present discussion.

10. The considerations he had mentioned led his delegation to support the Soviet Union amendment. If the majority did not favour that amendment, however, his delegation would formally propose the deletion of the words "by virtue of the constituent instrument of that organization or otherwise" in subparagraph (*a*). As thus amended, the wording of the subparagraph would leave the widest choice possible to the States concerned to determine by future practice how they would express their consent, who must communicate it to the parties to the negotiation and exactly when—prior to, at the same time as, or after the negotiation.

11. Mr. REUTER (Expert Consultant) said that he wished to speak at some length on the problems raised by article 36 *bis* in order to explain the International Law Commission's attitude towards it. His task had been facilitated by the observations made on the article by the representative of the Netherlands, who in his statement at the 19th meeting had expressed some valuable considerations which reflected the Commission's views.

12. The Committee was faced with the apparently simple problem of deciding whether to adopt the article, possibly with some amendments, or to delete it. Three questions therefore arose. The first was whether article 36 *bis* was essential for the future convention. The history of the codification of international law suggested that no article of a draft was indispensable. That being so, a second question arose: Was it advisable to include article 36 *bis* in the draft? He would not comment on that, since it was a question for Governments.

13. There remained the third and more modest question whether article 36 *bis* was useful and, if so, why. He would reply to that in the light of the discussion of the article by the International Law Commission. The article dealt with the circumstances in which a treaty concluded by an international organization had effects for its member States. The question whether such a treaty could have legal effects in the relations between the member States and a State which had concluded the treaty with the international organization was governed by the rules of the organization, and by those rules alone. Normally the treaty would not have such effects, but the rules of the organization might provide for certain effects of the treaty in the relations between the organization and its member States. The position taken by the Commission was that it accepted that the member States of an organization were free to decide their wishes on that point and to include a rule on the subject in the constituent instrument of the organization.

14. Accordingly, it had been suggested that the provisions of article 36 *bis* should be amended so as to subordinate them entirely to the rules of the organization. A formula of that type would mean almost pushing at an open door, for it was obvious that the relations between an international organization and its member States were governed by the rules of the organization.

15. Some of the amendments proposed to the article raised the question whether it was legitimate to require the unanimous consent of the States concerned. It seemed preferable not to do so, and instead to lay down the rule that the member States, as sovereign States, were free to settle that question themselves. Their undoubted right to settle the problem of the effects of the treaties of the international organization was brought out in the wording of subparagraph (*a*) of article 36 *bis*.

16. A further issue would arise in the case of an international organization whose constituent instrument specified that the member States had the obligation to observe the treaties concluded by the organization. A provision of that kind would not have any effect for the State which was the partner of the international organization in a treaty. The International Law Commission had considered whether a treaty concluded by an international organization could create rights or obligations in the relations between its member States and the State which was a partner of the organization in the treaty. The Commission had had to deal with that question in the light of the rules embodied in the 1969 Vienna Convention on the Law of Treaties,[1] in the first place, the rule that a treaty did not create obligations for a third State. There was thus a clear-cut distinction between the parties to a treaty and third parties.

17. It had been pointed out in the Committee that it was somewhat strange to say that the member States of an organization were third parties in their relations with a State which had concluded a treaty with the organization. The International Law Commission had considered that point, and asked itself whether cases existed in which a State was neither a party to a treaty nor a third party, but in a somewhat intermediate position. It had arrived at the conclusion that, where a treaty was concerned, a State must be either a party or a third party. Accordingly, in relation to treaty concluded by an international organization, its member States were third States.

18. The position of third States under the proposed convention was the same as the one set forth in articles 34, 35 and 36 of the 1969 Vienna Convention: in the case of obligations, a treaty could not impose them on a third State without its express and written consent, but in the case of rights there was a presumption of consent by a third State to the creation of a right in its favour—in other words, a strict rule for obligations and a more flexible one for rights. A problem arose, however, with treaties which provided at the same time for rights and obligations for third parties; if a treaty conferred a whole body of such rights subject only to the performance of a single obligation, it would seem that the rule which should prevail was the one which governed the creation of the rights.

19. Reference had been made in the Committee to the case envisaged in article 37 of the 1969 Vienna Convention, namely, that of the revocation or modification of obligations or rights of third States. That article, and the corresponding draft article, stipulated that no such revocation or modification could take place without the consent of the third State—a situation which would create fewest difficulties.

20. In regard to article 36 *bis*, the International Law Commission had been fully aware that a treaty concluded by an international organization did not normally create obligations for its member States. There was some value, however, in providing for the possibility of the member States having relations with the State which had concluded the treaty with the organization. The basic principle underlying article 36 *bis* was quite simple: the member States, the international organization and the third State were free to adopt the solutions they wished, but they should do so with clarity and precision. The provisions of article 36 *bis* as a whole were flexible; they left the States concerned free to decide matters by agreement among themselves.

21. It had been suggested that the provisions of article 36 *bis* might represent a threat to existing headquarters agreements which had been functioning satisfactorily. A headquarters agreement certainly created a legal nexus between the international organization and the host State, but did it also create legal relations between the member States of the organization and the host State? There was no single answer to that question: each agreement had its own pattern, and each organization its own rules and practice. Where a headquarters agreement provided for legal relations between the host State and the member States of the organization, the situation, if article 36 *bis* was deleted, would be governed by article 36. As it stood, that article implied a situation in which the member States would benefit from the rights provided for in the treaty.

22. In conclusion, he stressed that he had not sought to defend article 36 *bis* but merely to explain the thinking of the International Law Commission about the problems which the article involved. The Commis-

[1] *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

sion had worked hard to make article 36 *bis* both clear and flexible. It was for the Committee to weigh the value of those qualities against any advantages which might lie in ambiguity and rigidity.

23. Mr. OGISO (Japan) observed that article 36 *bis* was closely related to the definition of "third State" and "third organization" in article 2, subparagraph 1 (*h*). As the discussion of the draft articles in the International Law Commission had shown, there were two schools of thought about the position of a State member of an international organization in relation to a treaty to which that organization was a party: Was it a third State in the strict sense of the term, or was it a "less pure" third State because, in a way, it participated in concluding the treaty through the organization? His delegation remained undecided on the matter, but took the view that the existence of the former school of thought provided a sufficient reason for considering the problems which the Commission sought to meet in article 36 *bis*. That being so, his delegation was convinced that articles 34, 35 and 36 could deal with the matter adequately, and that discussion of it on the basis of article 36 *bis* would only invite confusion.

24. The Netherlands representative had argued at the 19th meeting that article 36 *bis* sought merely to introduce a new element, namely, that member States might be permitted to express their consent to be bound by a treaty collectively, and possibly beforehand. The Japanese delegation had highly appreciated his detailed explanation of the nature of the article, but was unable to support his argument, since it believed that articles 35 and 36 did not exclude the possibility of prior acceptance of obligations and prior assent to the acquisition of rights by a third State. A third State might normally be expected to express its consent to be bound by specific provisions of a treaty only after the treaty was concluded, but it might conceivably express in advance its acceptance of obligations or its assent to the creation of certain rights by a treaty still under negotiation, in order to encourage the negotiating parties to conclude the treaty.

25. Several speakers had raised the issue of the collective will of the States members of international organizations. His delegation did not believe that article 36 *bis* was necessary to deal with questions of that kind. The general rule regarding third States and third organizations was clearly laid down in article 34, and embodied the principle of consensuality; a third State or third organization was not bound by any provisions of treaties unless it so agreed. That principle certainly applied as well to the relationship between member States of an international organization and a treaty to which the latter was a party. As the representative of the Federal Republic of Germany had correctly explained at the 20th meeting, there were three cases where the States members of an organization were bound by provisions of a treaty which that organization concluded. One was the case where the States members had agreed to be bound beforehand by virtue of the constituent instrument. In such a case, there was absolutely no need for article 36 *bis*. To establish an organization empowered to conclude treaties which would create certain rights and obligations for its member States, without obtaining their specific consent other than by following the procedures set out in its constituent instrument, was undoubtedly to imply the acceptance by those States in advance of such future rights and obligations. That was one of the situations already covered by articles 35 and 36.

26. It might be countered that States did not usually confer such a broad power on an organization in its constituent instrument; that was true, and it was precisely because the rules in article 36 *bis* would rarely be applicable that the Japanese delegation had not been persuaded of its usefulness and necessity. In any case, that question concerned articles 6 and 46, which dealt with the capacity of international organizations to conclude treaties, and not article 36 *bis*.

27. The second case referred to by the representative of the Federal Republic of Germany was that in which member States could be bound by the treaty in accordance with other rules of the organization. The argument which held for the first case was valid for the second as well: the fact of being a member of an organization, participating in the making of its rules and abiding by them, constituted assent to the possible creation of rights and obligations. But the number of international organizations which had "other rules" of the kind envisaged was possibly extremely small. That issue too fell under articles 6 and 46, but where rules empowering the organization to create certain rights and obligations for its member States existed, articles 35 and 36 appeared to regulate the situation adequately.

28. The third case was the *ad hoc* expression of the collective will of the States members of the organization. That was the issue addressed in the Soviet Union proposal. That kind of collective consent appeared not to be covered by articles 35 and 36. The basic principle was once again the same: if the States members of an organization so agreed, they would be bound by the treaty to which the organization was a party; otherwise, they would not. Such agreements could be made individually or collectively, depending on the wish of the member States; and in no case would rights or obligations arise for a member State without its consent, which might be expressed in the constituent instrument or other rules of the organization, or by a specific act of acceptance or assent performed either individually or collectively. Since the case of collective will being expressed on an *ad hoc* basis was so rare, and in any case was already covered in a broad sense by article 34, his delegation considered it unnecessary that a special provision should be prepared for it.

29. All those considerations tended to show that the need to retain article 36 *bis* was very slight. The representative of the International Labour Organisation had rightly pointed out, at the 19th meeting, that since international organizations were so diverse, it was almost impossible to lay down a general rule governing the relationship between them and their member States. Furthermore, the rules and practices of organizations were constantly evolving. A controversial provision would make the situation even more confusing. The Committee had already adopted articles 34, 35 and 36, which regulated the matter clearly. Each international organization had its own constituent instru-

ment as well as other rules, and those rules should be sufficient to regulate the relationships between the organization and its member States. His delegation believed that the deletion of article 36 *bis* would have the benefit of allowing a general rule on the matter to develop freely as practice accumulated.

30. His delegation might be able to accept article 36 *bis* if it was amended appropriately, but none of the changes proposed so far were satisfactory. It would therefore be best to delete the article, as proposed by Austria and Brazil in their amendment.

31. Mr. HALTTUNEN (Finland) said that his delegation shared the doubts expressed about article 36 *bis*. One of its objections to the article lay in the fact that States members of an international organization could be parties to the same treaty as the organization of which they were members, and thereby acquire competing rights and obligations. States members of an organization had a general obligation under customary international law to observe the organization's treaties, and therefore could hardly be seen as real third parties to those treaties.

32. Furthermore, when changes occurred in the membership of an intergovernmental organization—and there were a number of examples of that in practice—difficulties could arise as to the continuance, termination or suspension of the operation of the organization's treaties as between the former member State and the other parties to the treaty, and indeed among the other member States or member organizations.

33. The Finnish delegation shared the view that the subject-matter of article 36 *bis* was not ripe for codification and that the article might well be deleted. In the future, two conventions—the Vienna Convention on the Law of Treaties and the one now being drafted—would be applicable, in some cases simultaneously, to treaty relations between States and international organizations; in that situation, the absence of article 36 *bis* would possibly make it easier to apply not only those conventions but also, in cases where States were not parties to either of them, the general rules of international law.

34. His delegation therefore supported the Austrian-Brazilian proposal. As far as the other proposals for article 36 *bis* were concerned, it saw some merit in them but did not believe that any of them could solve the problems which the article created.

35. Mr. NASCIMENTO e SILVA (Brazil) pointed out that the delegations of Austria and Brazil, in proposing the deletion of article 36 *bis*, had taken into account both the work of the International Law Commission and the past and future practice of international organizations.

36. The explanations of the article given by the Expert Consultant and the representative of the Netherlands corresponded with the International Law Commission's understanding of it, but not "with the ordinary meaning to be given to the terms of the treaty" under article 31 of both the Vienna Convention on the Law of Treaties and the draft convention. In other words, in order to understand article 36 *bis* it would be necessary to have recourse to the supplementary means of interpretation provided for in article 32.

37. He wished to assure the Committee that the purpose of the Austrian and Brazilian proposal to delete the article was not to deny the existence of the rule in question but simply to exclude it from the draft convention, since the issue was not ripe for codification. In his opinion, some international organizations might develop their practice along the lines of article 36 *bis*; others might depart from it. In other words, the deletion of the article was not likely to freeze future developments. He shared the view that articles 34, 35 and 36 covered the matter satisfactorily.

38. Mr. AL-HADDAD (Bahrain) said that article 36 *bis* posed problems for his delegation. That it was open to many different interpretations had been clearly brought out in the debate, and in particular in the excellent explanation provided by the Expert Consultant. Nevertheless, the International Law Commission had made strenuous efforts to draft an acceptable text on the subject. His delegation's attitude to it would be dictated by the need for a consensus, whether that proved to be for the deletion of the article or for its adoption.

39. Mr. SAHOVIC (Yugoslavia) said that his views on article 36 *bis* had changed more than once during the lengthy process of preparation of the draft articles. His delegation had finally concluded that the International Law Commission had been right to include the article in the text in the form it had proposed.

40. In the early stages of preparation, there had been considerable feeling that the subject-matter of the article might be dealt with in connection with third States; later it had become clear that the issue had far broader implications for international organizations and their status in international law than had been supposed. The political and legal issue of the relationship between international organizations and their members had assumed serious proportions, and it would appear that the intention behind article 36 *bis* was to contribute substantially to a strengthening of the role of those organizations and a clarification of that relationship. That was something which should be stressed, because the adoption of the draft, and any consequent decisions, would mark a new stage in the development of the personality of international organizations in international law—in the evolution of what was known as the "organized" international community.

41. Furthermore, article 36 *bis* was one of the few articles which implied a decisive step forward in the progressive development of international law. Although it might be argued, and had been, that practice was not yet sufficiently mature for the Conference to codify a general rule such as the article contained, it would not be the first time that such a step had been taken by a codification conference. Moreover, the arguments which had been advanced in favour of the adoption of the article themselves demonstrated that the issue was one which called for legal clarification as a matter of principle.

42. Looking at the matter from a more technical point of view, he observed that all the proposals to alter the

wording of the article presumed the formulation of a rule; they sought to improve the product of the International Law Commission's lengthy cogitations, and particularly to render more explicit the conditions under which the rule should be applied—for example, by reducing the uncertainty created by the word "otherwise" in the Commission's draft.

43. It was his delegation's view that to omit from the draft convention any reference to the question of obligations and rights arising for States members of an international organization from a treaty to which it was a party would be to neglect an important element of the Conference's task; it therefore believed that article 36 *bis* should be retained. An acceptable formulation for it which accommodated the various proposals for altering the text proposed by the International Law Commission might perhaps be found by the Drafting Committee.

44. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that the statements made by the representatives of the international organizations and by Japan, Brazil and Finland had led him to consider article 36 *bis* in a new light. It had been correctly pointed out that each international organization had its own rules, and that articles 34, 35 and 36 covered the situation contemplated in article 36 *bis* adequately. He therefore withdrew the amendment proposed by his delegation and supported the proposal by Austria and Brazil to delete the article. He appealed to the sponsors of the remaining amendments to do the same.

45. Mr. SIEV (Ireland) said that his grave doubts about the usefulness of article 36 *bis* had been confirmed by the Expert Consultant's statement. His delegation was convinced that the article should be deleted. Article 34 set out the general rule applicable to third States and third organizations, while articles 35 and 36 dealt respectively with their obligations and their rights. The latter two articles were sufficient to regulate the situation of third States with regard to rights and obligations, which was the subject-matter of article 36 *bis*. He thought it would be premature to adopt a provision such as the one in draft article 36 *bis*. His delegation therefore supported the proposal by Austria and Brazil to delete the article.

46. Mr. RAMADAN (Egypt) said that, in his view, it was inadvisable to adopt the article as it stood. The expression in it of the principle of unanimity would amount to giving a right of veto to every member of the organization. As the consent for which the article provided must embrace all the provisions of the treaty establishing the rights and the obligations, it would seem that the relevant conditions should appear in the constituent instrument, in which case subparagraph (*b*) would be superfluous. With regard to the question of notification, it might be impossible to conclude a treaty if some States failed to provide the information mentioned in subparagraph (*b*). Even if the unanimity requirement was replaced by the requirement of a qualified or simple majority, difficulties might arise for the organization in a case in which dissenting States were among its major financial contributors.

47. Those considerations, combined with the fact that the practice of international organizations was not yet established firmly enough for the codification of such a general rule as the one in article 36 *bis*, led his delegation to support the Austrian and Brazilian proposal to delete it. It also supported the three-organization proposal for article 73, which left open the possibility of developing such a rule gradually.

48. Mr. SANG YONG PARK (Republic of Korea) said that he had some sympathy for the International Law Commission's attempt, in article 36 *bis*, to regulate an exceptional situation with legal certainty. He nevertheless supported the proposal to delete the article because it would rarely be applicable. The issue should be left in abeyance until practice in the matter had developed further.

49. Mr. BOONPRACONG (Thailand) said that his delegation considered article 36 *bis* as a progressive development of international law, since it was intended to provide an additional facility for States members of an international organization to accept obligations arising out of treaties to which the international organization was a party, without deviating from the general rule outlined in article 34. He did not believe that a lack of unanimity among member States would prevent an international organization from concluding a treaty. His delegation supported the adoption of article 36 *bis* as it stood.

50. Mr. KADIRI (Morocco) said that article 36 *bis* was intended to break new ground, but legal practice was not yet sufficiently developed for its adoption. In his view, the application of articles 35 and 36 would be amply sufficient to cover for the time being the matter dealt with in article 36 *bis*. If the latter article was adopted, it might, without the guidance provided by established practice, become a mechanism for diminishing the sovereignty of States. He asked himself, for example, whether a headquarters agreement implied an agreement between the host State and a State member of the organization; if so, the State member might become bound against its will. The provision in article 36 *bis* might be appropriate for the integrative type of international organization, of which the European Economic Community was a good example, but less so for one based on co-operation. The sovereignty of States must remain intact, clear and effective. His delegation agreed with the Expert Consultant that the present convention would only be successful if it contained scope for future development. His delegation therefore supported the proposal to delete article 36 *bis*.

51. The CHAIRMAN said that there seemed to be widespread support for the proposal by Austria and Brazil to delete article 36 *bis*. He asked the delegations of the Netherlands and Switzerland and of the International Labour Organisation, the International Monetary Fund and the United Nations whether they could follow the example of the Soviet Union and withdraw their respective amendments, thus paving the way for a decision to delete the article. If they could not, informal consultations on the matter would seem the best course.

52. Mr. SZASZ (United Nations), speaking on behalf of the sponsors of the amendment in document A/CONF.129/C.1/L.56, said that they would withdraw

that proposal if the Committee decided to delete article 36 *bis*. However, its deletion would leave uncharted ground covered neither by the 1969 Vienna Convention nor the proposed convention, which motivated the proposal in document A/CONF.129/C.1/L.65 to add a new paragraph to article 73.

53. Mr. RIPHAGEN (Netherlands), supported by Mr. BARRETO (Portugal), proposed that the consideration of the article should be deferred.

It was so decided.

The meeting rose at 5.55 p.m.

26th meeting

Monday, 10 March 1986, at 8.25 p.m.

Chairman: Mr. SHASH (Egypt)

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] (*continued*)

Article 66 (Procedures for arbitration and conciliation) *and*

Annex (Arbitration and conciliation procedures established in application of article 66) (*continued*)*

1. Mr. BOSCO (Italy) said that in the matter of settlement of disputes it was clearly necessary to adhere as closely as possible to the text of the 1969 Vienna Convention on the Law of Treaties.[1] The notion of *jus cogens* and the identification of peremptory norms of general international law were fundamental questions, and specially effective procedural safeguards in that area were therefore required. Article 66 differed from the corresponding article in the 1969 Vienna Convention because of the need to take account of the fact that, under Article 34, paragraph 1, of the Statute of the International Court of Justice, only States could be parties in cases before the Court. Nevertheless, his delegation considered it important to achieve uniformity of interpretation in a matter as delicate as that of peremptory norms of general international law. That could only be ensured by a judicial body of a universal character enjoying established authority, such as the International Court of Justice. The Court, moreover, in addition to being able to pronounce judgments in contentious cases, could also give advisory opinions which States and international organizations concerned could, if the present Conference so decided, accept as binding. Indeed, even in the absence of a decision of the Court, he believed that an advisory opinion given by the Court would be heeded and taken into due account. His delegation therefore welcomed the amendments of the United Nations (A/CONF.129/C.1/L.66) and of Austria, Colombia, Ireland, Japan, Mexico, Netherlands, Nigeria and Switzerland (A/CONF.129/C.1/L.69/Rev.1), which adopted such an approach.

2. Its position was consistent with its traditional support for mechanisms of third-party settlement that could be activated unilaterally, since they gave full application to Article 1, paragraph 1, of the Charter of the United Nations, which set the aim of bringing about "by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes". In that connection, he emphasized that no State gave up any part of its sovereignty when it freely and voluntarily consented to mandatory jurisdiction. That principle was enunciated, *inter alia*, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex, of 24 October 1970), which stated that "Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality"; and an identical paragraph was contained in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10, annex, of 15 November 1982).

3. The problem of the applicable law would be solved, since the International Court of Justice would apply Article 38 of its Statute. The advisory opinion procedure under Article 66 of the Statute was a very broad one allowing the presentation of written or oral statements and comments on statements made by others, thus providing ample opportunity for intervention in the proceedings.

4. Italy supported the amendment to the annex proposed by the European Economic Community (A/CONF.129/C.1/L.64) since it provided useful clarification. It also supported the proposal by the Netherlands (A/CONF.129/C.1/L.67), which contained a sound principle. He wished to suggest that, for the sake of harmony, a provision similar to paragraph 6 in section II of the annex should be added to section III. His delegation would also like to see added to section II a paragraph listing sources of law to be applied by arbitral tribunals, either specifically or by stating that the tribunal must decide on the basis of international law. He

* Resumed from the 24th meeting.

[1] See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.5), p. 287.