Document:-

A/CN.4/L.269

Draft articles on treaties concluded between States and international organizations or between international organizations. Texts adopted by the Drafting Committee: paragraph 1 (h) of article 2, and articles 35, 36, 36 bis, 37 and 38 - in A/CN.4/SR.1509, 1510 and 1512

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1978, vol. I

nature, often required treatment differing from that reserved for States.

32. Variant I, which was based on that view, referred to three separate cases: that of treaties between international organizations alone and, in the case of treaties between States and international organizations, that in which the *inter se* agreement was concluded between States alone and that in which it was concluded between one or more States and one or more international organizations.

33. In the case of treaties concluded between international organizations alone, he had simply transposed the rule laid down in article 41 of the Vienna Convention for treaties between States, on the grounds that international organizations, like States, were bodies that were equal as between themselves.

34. He had also followed the course taken in the Vienna Convention in the case of treaties between States and international organizations where the *inter se* agreement concerned only States, for the fact that States were parties to a treaty to which international organizations were also parties did not diminish their rights.

35. In the third case, however, he had departed from the text of the Vienna Convention, for he had thought that, in a treaty between States and international organizations, the possibility of an *inter se* agreement between one or more States and one or more international organizations could be admitted only if one of two conditions were met: if such a possibility was provided for by the treaty, or if it was agreed between all parties to the treaty. The basis for his proposal of that rule was the belief that, in agreements of that kind, the situation of internatonal organizations was always specific and they could not be given the same freedom as States. Although the Commission had not ruled out such a case, there were as yet no examples of general treaties between States to which international organizations might also be permitted to become parties. Such treaties as currently existed between States and international organizations were specific and tightly closed—for instance, the treaty between IAEA, EURATOM and the States members of EURATOM, which was designed to ensure the application of the Treaty on the Non-Proliferation of Nuclear Weapons and in which careful thought had been given to the respective roles of the international organizations and the States concerned. It was therefore conceivable that, in treaties of that kind, the possibility of an *inter se* agreement might be provided for in the text of the treaty itself.

36. Since variant I employed the term "agreement", all the comments that had been made on that subject were applicable to it.

37. Variant II reproduced article 41 of the Vienna Convention without change. His own view was that that variant would be sufficient, for the triple barrier established by the Convention was already very solid and he could see no reason for laying down stricter requirements for international organizations. He had submitted variant I merely in response to certain legitimate concerns.

38. Mr. USHAKOV saw no reason to cater for the cases referred to in paragraphs 1 and 3 of variant I. He therefore proposed that those two paragraphs should be deleted and that only paragraphs 2 and 4 should be retained.

The meeting rose at 11.35 a.m.

1509th MEETING

Thursday, 29 June 1978, at 10.50 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Ago, Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)[1] (*concluded*)

1. Mr. RIPHAGEN noted the statement in paragraph (6) of the Special Rapporteur's commentary (A/CN.4/312) to the effect that variant I of article 41 raised a kind of presumption that "modifications affecting international organizations are assumed *a priori* to upset the balance established by the treaty". He failed to see how such an assumption could be justified and, for that reason, preferred variant II.

2. There seemed to be a certain parallelism between article 41 and article 19 *bis*,[2] paragraph 2 of which laid down a special rule regarding the formulation of reservations by international organizations. It might perhaps be logical to include a similar provision in variant II of article 41.

3. The Commission should not be unduly restrictive in regard to the treaty-making powers of international organizations and, above all, should not make it too difficult for organizations that were not of a universal character to enter into treaty relations

[1] For text, see 1508th meeting, para. 28.

[2] See 1507th meeting, foot-note 2.

with the outside world. In that connexion, he would point out that article 12 of the Charter of Economic Rights and Duties of States[3] recommended that the policies of groupings of States should be "outward-looking".

4. Mr. JAGOTA considered that the basic difference between the two variants lay in paragraph 3 (*b*) of variant I, which stipulated that any modification of a treaty concluded between one or more States and one or more international organizations required the agreement of all the parties to the treaty. Given the new capacity of international organizations to enter into treaties, that was a desirable requirement. It would provide for an objective test, which would ensure that the balance established by the treaty was not disturbed, and was to be preferred to the subjective test of incompatibility with the effective execution of the object and purpose of the treaty. The Drafting Committee might wish to consider whether that requirement should be retained in variant I, should be embodied in variant II or should form the subject of a third variant.

5. In his commentary to variant I, the Special Rapporteur had dealt with two categories of treaties: treaties between international organizations and treaties between States and international organizations. Modifications to the first category of treaties were covered by paragraph 1 of variant I, and to the second category by paragraphs 2 and 3. Paragraph 2 would apply where two or more States parties wished to modify a treaty, and paragraph 3, where one or more States and one or more international organizations wished to do so.

6. None of those three paragraphs, however, covered the case where the parties to a treaty between States and international organizations wishing to modify the treaty were international organizations only. He would therefore suggest that, to meet that point, a drafting change should be introduced in paragraph 3 of variant I or a new paragraph added to that variant.

7. Mr. FRANCIS recalled that, during the discussion at the Commission's twenty-ninth session on the question of reservations to a treaty concluded between States and international organizations or between international organizations, he had taken the view that, from the contractual standpoint, no distinction should be drawn between the parties, whether they were States or international organizations.[4] It had, however, been decided to make such a distinction, as attested by the provisions of articles 19 to 23 *bis*. He regarded that point as significant because articles 39 and 40 provided for equality between international organizations and States for the purposes of amending a treaty. Thus all parties to a treaty, whether bilateral or multilateral, must consent to its amendment. As far as multilateral treaties were concerned, modification by reservation differed from modification by agreement between certain of the parties only in that the former was a unilateral act, which was subsequently approved by the other parties to the treaty, whereas the latter was an act confined to the parties concerned. For the sake of uniformity, however, he could agree that the approach adopted in articles 19 to 23 *bis* should be reflected in article 41.

8. Of the two variants, he preferred the first, but thought that paragraph 3 should perhaps be clarified to take account of the situation covered by paragraph 2. He therefore suggested that variant I should be referred to the Drafting Committee.

9. Sir Francis VALLAT found it difficult to accept the presumption that variant I was said to raise, namely, that modifications affecting international organizations were likely *a priori* to upset the balance established by the treaty. He did not see why a modification as between international organizations should upset the balance of the treaty or indeed affect the rights and obligations of the States parties to the treaty. It was perfectly possible to provide in a treaty for consultation and exchange of information as between the organizations, and for certain procedures that were in accordance with the wishes of those organizations. In that way, a change in procedure, although of importance to the international organizations, would not necessarily upset the balance of the treaty. It would be a much wiser approach to assume that international organizations would not act irresponsibly and that any question of modifying the object or purpose of the treaty would be dealt with in the same way as under the law of treaties generally.

10. With regard to Mr. Riphagen's comments concerning article 19 *bis*, there was to his mind a difference between reservations and modifications. A reservation was a unilateral act, whereas in article 41 the Commission was dealing with modification of a treaty by agreement between the parties concerned. He was therefore in favour of variant II, which followed the Vienna Convention[5] in that respect; however, if that variant were altered, the drafting of the preceding articles would have to be reconsidered.

11. Mr. TSURUOKA was prepared to join the majority if it opted for variant I, but he preferred variant II because it was more flexible, and flexibility was essential when a time element was involved. In fact, there was little difference between the two variants proposed. Nevertheless, variant II embodied fairly strict conditions, and it was for the parties to a multilateral treaty wishing to make modifications to it to ensure that those conditions were fulfilled. There was therefore little cause for apprehension that an agreement to modify a treaty as between certain parties would affect the other parties. In certain very special situations it might be necessary to introduce in a multilateral treaty, such as the Convention on the Privileges and Immunities of the United Nations,

[3] General Assembly resolution 3281 (XXIX).

[4] *Yearbook... 1977, vol.*I, p. 177, 1448th meeting, paras. 2-4.

[5] See 1507th meeting, foot-note 1.

modifications applicable to relations between certain parties to that treaty only. Such would be the case, for example, if staff members of the United Nations were to be sent to a State where the prevailing situation rendered the accomplishment of their mission particularly difficult.

12. Mr. SUCHARITKUL also preferred variant II, which was both simpler and more flexible than variant I. He saw nothing to prevent internatonal organizations from being assimilated to States in the matter of agreements to modify multilateral treaties between certain of the parties only.

13. Mr. REUTER (Special Rapporteur), reviewing the points raised during the discussion, noted first that paragraph 3 of variant I would have to be modified to cover the case to which Mr. Jagota and Mr. Francis had drawn his attention. Whichever way it was interpreted, that provision could lead only to an inconsistency or an omission. The case omitted was that where a multilateral treaty concluded between one or more States and two or more international organizations was modified as between two international organizations only. It was all the more necessary to provide for that case as it was mentioned in the commentary and there were specific examples of it. Sometimes, after a treaty had been concluded between several international organizations and a single State, more particularly for the purpose of rendering assistance to that State, two of those organizations would wish to rearrange among themselves their participation in such assistance or in its financing.

14. The choice between variants I and II might be governed by considerations of principle such as those set forth in paragraph (6) of the commentary to article 41 (A/CN.4/312). It was also possible, while preferring variant II, to maintain that it was better to follow variant I for reasons of logic and in order to remain consistent with positions adopted previously. A good number of the members of the Commission who had spoken on the question had favoured variant II, but in some cases had observed that account must nevertheless be taken of the approach adopted to a problem very similar to that of article 41, namely, the problem of reservations. One member had suggested combining paragraph 3 of variant I with variant II. Mr. Francis had emphasized that the approach adopted by the Commission in the case of reservations should bind it in respect of article 41; he had noted, however, that a reservation was unilateral in nature whereas modification of a treaty was bilateral or multilateral in nature. In that connexion, it should be pointed out that, although a reservation was indeed unilateral in origin, it nevertheless became conventional and bilateral, or multilateral, as soon as it was accepted. He hoped that the members of the Commission would reflect further on that problem and that the Drafting Committee would try to incorporate certain elements of variant I in variant II.

15. Mr. Ushakov's position (1508th meeting) was that variant II should be discarded, mainly for reasons of principle, and that only paragraphs 2 and 4 of variant I should be retained. Mr. Ushakov's proposal to delete paragraph 1 of variant I was apparently motivated by the rarity and specificity of multilateral treaties concluded between international organizations only; he was not, therefore, raising an objection of principle to that provision. It should, however, be pointed out in that connexion that, to the extent that there was a similarity between article 41 and the articles concerning reservations, the Commission could not ignore the existence of article 19, relating to the formulation of reservations in the case of treaties between several international organizations. However, that would seem to be a matter for the Drafting Committee.

16. Mr. Ushakov's proposal to delete paragraph 3 of variant I was doubtless based more on practical considerations than on considerations of principle. That provision introduced the condition that modifications might be made in a treaty only if it were so agreed between all parties to the treaty. Mr. Ushakov seemed to consider that that condition duplicated the content of article 40, relating to the amendment of multilateral treaties. The amendment procedure provided for in that article already required the consent of all the parties. To meet that objection, he would give a practical example, that of a treaty whereby a group of international organizations provided financial assistance to a group of States. After the conclusion of the treaty, two of those organizations decided that their relations with each other should be modified. Under paragraph 3 of variant I, and if the possibility of such modification were not provided for by the treaty, those two organizations would have to obtain the consent of all the parties to the treaty. That condition was expressed by the formula "if it is so agreed between all parties to the treaty", which could be applied to an agreement in a highly simplified form. Once that consent had been obtained, which might be an easy matter, the two organizations concerned could proceed to conclude an "agreement". Everything would then depend on the meaning given to the term "agreement", which appeared in article 39. If it were specified that it was an express agreement or a written agreement, the modification procedure could nevertheless be rapid. If, however, the Commission deleted paragraph 3 of variant I in the belief that the general amendment procedure of article 40 sufficed, the consent of each of the States and international organizations parties could be obtained only under a constitutional procedure, which in certain cases might be very lengthy. It followed that the practical reasons that Mr. Ushakov seemed to invoke were not really pertinent. In the circumstances, paragraph 3 was probably useful.

17. In conclusion, he suggested that the two variants of article 41 should be referred to the Drafting Committee for consideration in the light of the preference expressed by the majority of the members of the Commission for variant II and of the possibility of introducing in that variant some of the elements of variant I. The solution finally adopted would de-

pend in particular on the meaning attributed to the term "agreement".

18. Sir Francis VALLAT explained that the point he had been trying to make was that, as he saw it, there was a fundamental difference between the system of reservations and that of *inter se* modifications. Under the system applied in the Vienna Convention, which the Commission had adopted for its draft articles, a reservation might and, in principle, did operate against all the parties to a treaty, whereas an *inter se* modification by definition operated only as between the parties. He did not wish to elaborate on the matter, but it would be easy to show, by referring to the provisions on objections and non-objections and the effects thereof and on the unilateral withdrawal of reservations, how different the system adopted for reservations was from a system based essentially on agreement.

19. He had misinterpreted Mr. Riphagen's statement, thinking Mr. Riphagen had said that there was a certain similarity between the system of reservations and the system of *inter se* modifications. He now understood Mr. Riphagen's real point to have been that the rule stated in paragraph 2 of article 19 *bis* might be taken as a practical example of the kind of rule that might be included in article 41. Any decision on that point was naturally a matter for the Drafting Committee.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 41 to the Drafting Committee.

It was so agreed.

Draft articles proposed by the Drafting Committee

Articles 35, 36, 36 *bis*, 37 and 38, and article 2, para. 1 (*h*)

21. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Committee (A/CN.4/L.269), namely, articles 35, 36, 36 *bis*, 37 and 38, as well as paragraph 1 (*h*) of article 2.

22. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that articles 35, 36, 36 *bis*, 37 and 38 had been submitted by the Special Rapporteur in his sixth report,[6] and had been discussed and referred to the Drafting Committee by the Commission at its twenty-ninth session. Owing to its awareness of the delicate nature of the questions involved in those articles and a lack of time, the Drafting Committee had deferred consideration of those provisions until the current session. The five articles concerned were intended to complete part III, section 4, of the draft. In addition to those articles, document A/CN.4/L.269 contained definitions of two terms for inclusion in article 2 (Use of terms).

23. In dealing with the articles referred to it, the Drafting Committee had been concerned to meet the Commission's wish to undertake the codification of the law relating to treaties concluded between States and international organizations or between two or more international organizations in the spirit of the Vienna Convention and, in particular, to maintain, with respect to wording, both the precision and the flexibility of that instrument, while giving due consideration to the specific character of international organizations participating in treaties. To emphasize the parallelism which naturally existed between the Commission's draft articles and the Vienna Convention, the Committee had used the numbering of the articles of the Vienna Convention as far as possible and, in order to preserve the correspondence between the two sets of provisions, had given the article that had no counterpart in the Vienna Convention the number 36 *bis*.

24. Having regard to the fact that the title of part III, section 4, of the Commission's draft corresponded to that of the same section of the Vienna Convention and that that title and article 34, both of which the Commission had approved at its previous session, employed the term "third State", the Drafting Committee had decided to use throughout the section the expression "third States or third international organizations", rather than the expression "non-party States or international organizations", as proposed by the Special Rapporteur in his sixth report. The Committee offered definitions of the component parts of that expression in a subparagraph (*h*) that it proposed for inclusion in paragraph 1 of article 2, the text of which corresponded to that of paragraph 1 (*h*) of article 2 of the Vienna Convention.

25. The solutions proposed by the Drafting Committee generally reflected consensus. The Committee believed that its articles were as valid for international organizations as were those of the Vienna Convention for States. It was naturally very much aware that, with regard to the formal expression of consent, there were requirements arising from the need to protect the independence of States that were not necessarily applicable in the case of international organizations, where the governing concept was the performance of a function. In order to give expression to the distinction between third States and third international organizations, the Committee had decided to devote separate paragraphs, the substance of which had been contained in the articles submitted by the Special Rapporteur, to the rules concerning acceptance, assent or consent on the part of international organizations. In all those paragraphs, namely, paragraph 3 of articles 35 and 36 and paragraph 7 of article 37, subparagraph (*a*) of article 36 *bis* and paragraph 5 of article 37, the Committee had employed the term "rules of that organization", as defined by the Commission in article 2, paragraph 1 (*j*). In all the draft articles, the Committee had used the term "international organization" in the first reference to

[6] *Yearbook... 1977*, vol. II (part One), p. 119, doc. A/CN.4/298.

such a body in any given paragraph and the term "organization" alone in all subsequent references in the same paragraph.

26. With regard to the individual articles, the Drafting Committee had decided to revert in article 35 to the language of the Vienna Convention and to state in paragraph 3 of the article that a third international organization must signify its acceptance of an obligation "in writing". The Committee had considered that expression appropriate in the context of treaties providing for obligations for international organizations and preferable to the phrase "unambiguous manner" that had been used by the Special Rapporteur. However, in order to maintain the necessary distinction between third States and third international organizations, the Committee had decided to include in paragraph 2 the phrase "in the sphere of its activities". That phrase indicated that an obligation which, in the intention of the parties to a treaty, was to be assumed by an international organization, should not be unrelated to the functions of that organization. In the English text of article 35, the Committee had considered that the expression "shall be given", in paragraph 3, corresponded closely to the French phrase "doit être faite". In paragraph 1, the words "Without prejudice" had been replaced by the word "Subject", which was the expression that had been used in recent international conventions.

27. Subject to the changes he had already mentioned, the Drafting Committee had maintained the text of article 36 referred to it. However, in order to reflect the distinction between third States and third international organizations, it had decided not to provide expressly, in paragraph 2, for the presumption of assent in the absence of an indication to the contrary, which had appeared in the original text, and to refer in a new paragraph 3 to the relevant rules of the organization. The Committee believed that no reference to such a presumption was necessary in the case of third international organizations, since the text it now proposed did not preclude the possibility of the treaty's admitting that presumption if it was in accordance with the relevant rules of the organization. To preserve the parallelism between paragraphs 1 and 2 as far as possible, the Committee had introduced in paragraph 2 the words "or to a group of organizations to which it belongs, or to all organizations".

28. The Committee had decided to retain article 36 *bis*, in conformity with what it had regarded as the terms of the referral of the article to it by the Commission. However, one member of the Committee had reserved his position concerning the need for the inclusion in the draft articles of article 36 *bis* and the consequential references to that article in the other provisions. The article covered a situation that actually arose in practice. The Committee had nevertheless modified the text proposed by the Special Rapporteur, in order to convey more clearly and succinctly the meaning of the rules embodied in the article. To that end, it had combined the two paragraphs of the original text, while preserving in subparagraphs (*a*) and (*b*) of the new version the distinction between the two cases dealt with in paragraphs 1 and 2 of the Special Rapporteur's version. The new text emphasized in its title and introductory sentence that it related to the specific case of third States that were members of an international organization and the effects that arose for them from a treaty to which that organization was a party. The article was therefore in harmony with the remaining provisions of section 4. It should be noted that, as drafted, article 36 *bis* made no mention of express or implied acceptance of the rights and duties arising from the provisions of the treaty in question. It placed the emphasis on the duty of third States that were members of an international organization to observe the obligations that arose for them from the provisions of a treaty to which that organization was a party and left it to the States themselves to decide whether or not to exercise the rights that arose from such a treaty. In subparagraph (*a*), the reference to the "constituent instrument" of an international organization had been replaced by a reference to the "relevant rules of the organization", as the Commission had defined them. The Committee had also added the clarifying phrase "applicable at the moment of the conclusion of the treaty".

29. In the case of article 37, the Committee had basically retained the text referred to it. However, it had decided to align the paragraphs dealing with obligations and rights arising for third international organizations with those dealing with obligations and rights arising for third States. Paragraphs 5 and 6 of the article had been reworded to take account of the redrafting of article 36 *bis*.

30. The Committee had made no change in article 38, other than to replace the term "non-party" by the term "third". The refrence to articles 34 to 37 was intended as a reference to those articles alone and not as a generic reference. The text for article 38 proposed by the Committee did not prejudge the question how international organizations were bound by customary international law and it was certainly not intended to deal with the question how they contributed to the creation of such law.

ARTICLE 2 (Use of terms), PARA. 1 (*h*) ("third State", "third international organization")

31. The CHAIRMAN read out the text of paragraph 1 (*h*) of article 2 as proposed by the Drafting Committee:

Article 2. Use of terms

[1. For the purposes of the present articles:

...]

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

32. In the absence of objections, he would consider that the Commission agreed to adopt the text proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 12.55 p.m.

1510th MEETING

Friday, 30 June 1978, at 10.05 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLES 35, 36, 36 *bis*, 37 AND 38 AND ARTICLE 2, PARA. 1 (*h*) (*continued*)

ARTICLE 35[1] (Treaties providing for obligations for third States or third international organizations)

1. The CHAIRMAN read out the text of article 35 as proposed by the Drafting Committee (A/CN.4/L.269):

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.

2. Mr. USHAKOV approved of the text of article 35, except for the phrase "subject to article 36 *bis*", at the beginning of paragraph 1. He considered that reservation entirely unacceptable, not only because he was firmly opposed to article 36 *bis*, but also because he thought that, quite apart from that article, the reservation would completely change the system established by the Vienna Convention.[2] Under article 35 of the Vienna Convention, a third State could expressly accept in writing an obligation arising from a treaty, whereas, under paragraph 1 of the article 35, under consideration, the same third State, if it were a member of an international organization, could not expressly accept in writing an obligation arising from a treaty to which that organization was a party, for as a member of the organization it had lost the right to conclude treaties. Article 36 *bis* obviously related to supranational organizations, such as EEC, which had the right to conclude treaties on behalf of its members.

3. The question of the effects of a treaty to which an international organization was party with respect to third States members of that organization, which was the subject-matter of article 36 *bis*, was one that concerned States members of the organization exclusively, and came under their internal law. He could not agree to altering the system established by the Vienna Convention in order to take account of the case of supranational organizations such as EEC. He was therefore strongly opposed to the reservation at the beginning of article 35, paragraph 1.

4. Mr. QUENTIN-BAXTER expressed doubts about the propriety of the use, in articles 35 and 36, of the phrase "subject to article 36 *bis*", for he had always understood the words "subject to" to imply an order of precedence between two provisions that applied to the same circumstances. He did not think there was such a hierarchical relationship between article 35 and article 36 *bis* or between article 36 and article 36 *bis*. Article 36 *bis* dealt specifically with the rights and obligations of third States in their capacity as members of an international organization party to the treaty, whereas articles 35 and 36 dealt with the rights and obligations of third States, quite independently of whether they were members of an organization or not. He could see no point at which articles 35 and 36 intersected article 36 *bis*, for he believed that the rights and obligations that third States might acquire as strangers to a treaty existed in quite a different context from, and were in no way modified by, the rights and obligations they might acquire as members of an international organization that was a party to the same treaty. If his hypothesis was correct, the use of the phrase "subject to" was wrong and needlessly aggravated Mr. Ushakov's difficulties with the draft articles. If on the other hand, there was some point at which articles 35 and 36 intersected article 36 *bis*, it would be helpful if its nature were clearly explained.

5. Mr. REUTER (Special Rapporteur) said that the Headquarters Agreement concluded between the United States of America and the United Nations was a case in which a treaty concluded between a State and an international organization had effects on the States members of that organization, which were third States, since they were not parties to the treaty. He did not think, however, that the States Members of the United Nations, which had from the outset invoked the provisions of that treaty, had expressly accepted in writing the obligations it might impose on them; they had merely indicated, by their conduct,

[1] For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. I, pp. 128-132, 1439th meeting, paras. 24-40, and 1440th meeting, paras. 1-12.

[2] See 1507th meeting, foot-note 1.

that they accepted those obligations. The phrase "subject to article 36 *bis*" was intended only to draw attention to the particular case in which third States were members of an international organization that was a party to the treaty.

6. Hence, in view of the objections made to the words "subject to article 36 *bis*", that phrase could easily be replaced by the words "without prejudice to article 36 *bis*", which could be placed at the end of paragraph 1.

7. Mr. USHAKOV strongly disputed the proposition that States Members of the United Nations were bound by the treaties concluded by that Organization. In his opinion, the Members of the United Nations remained third States in relation to such treaties and were therefore free to accept or reject the rights and obligations deriving from them.

8. Mr. REUTER (Special Rapporteur) pointed out that, in the case of treaties concluded by the United Nations, it was not subparagraph (*a*) of article 36 *bis* that applied, but subparagraph (*b*), for the States Members of the United Nations had acknowledged, in the case of the Headquarters Agreement concluded between the United Nations and the United States of America, that the agreement necessarily entailed rights and obligations for them. That was an effect of their sovereign will. They had acknowledged it in practice, without expressly accepting it in writing.

9. Mr. USHAKOV disputed that interpretation of subparagraph (*b*) of article 36 *bis* also, since he did not see by what instrument the United States of America and the United Nations could have acknowledged that the Headquarters Agreement concluded between them was binding on States Members of the United Nations.

10. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that, like most of the other members of the Drafting Committee, he found articles 35, 36 and 36 *bis* quite acceptable. He recognized, however, that the words "subject to" might be interpreted as indicated by Mr. Quentin-Baxter, and he therefore supported the Special Rapporteur's suggestion that they be replaced by the phrase "without prejudice to".

11. On the question of the effects of the Headquarters Agreement on Members of the United Nations, his view was substantially in accordance with that of the Special Rapporteur. It appeared quite reasonable to him to say that, under the terms of a headquarters agreement negotiated and signed on behalf of the United Nations by the Secretary-General and unanimously approved by the General Assembly, the Members of the Organization were bound to observe the obligations and might exercise the rights laid down by that agreement.

12. Mr. JAGOTA agreed with the interpretation given to the phrase "subject to" by Mr. Quentin-Baxter, and feared that expressions such as "without prejudice to" or "without affecting in any way" would be interpreted in the same way. The relationship of article 35 and 36 to 36 *bis* was that of a general clause to a special clause. All three articles referred to third States, but articles 35 and 36 related to all third States, whereas article 36 *bis* concerned a subcategory of third States, namely, those that were members of an international organization that was party to a treaty. What the Commission had to do was to make it clear that, in the special case of that subcategory, article 36 *bis* would apply.

13. That object might be best achieved by deleting the reference to article 36 *bis* from articles 35 and 36 and beginning article 36 *bis* by some such phrase as "notwithstanding the provisions of articles 35 and 36".

14. Mr. USHAKOV said that, when an international organization concluded a treaty, that treaty always had to be formally approved by an organ of the organization, whose decision, taken by a vote, was equivalent to an act of ratification by a State. Accordingly, when a State Member of the United Nations voted in the General Assembly in favour of a treaty concluded by the Organization, it approved a treaty that was binding on the Organization only, and did not, by its vote, undertake to accept the obligations arising from the treaty.

15. Sir Francis VALLAT, referring to the statements of Mr. Quentin-Baxter and Mr. Jagota, said that the problem facing the Commission was linked with the definitions it had adopted, according to which a "third State" was a State "not a party to the treaty" (article 2, para. 1 (*h*)),[3] and a "party" was a State "which has consented to be bound by the treaty and for which the treaty is in force (article 2, para. 1 (*g*)).[4] It was fairly obvious, in the case the Commission was considering, that, under the terms of those definitions, a State that was a member of an international organization that was a party to a treaty was not itself a party to that treaty; strictly speaking, such a State was a third State within the meaning of paragraph 1 of articles 35 and 36. If the Commission wished to retain article 36 *bis*, it must find wording that made it clear that, despite what was said in articles 35 and 36 about third States, there were circumstances in which such States might acquire rights or obligations as the result of a treaty.

16. While he was inclined to favour the suggestion made on that point by Mr. Jagota, he thought it would be best to leave the question how to treat the phrase "subject to article 36 *bis*" in abeyance until a final decision had been reached on article 36 *bis*.

17. Mr. SUCHARITKUL shared the views of Mr. Jagota and Sir Francis Vallat on the phrase "subject to article 36 *bis*".

18. With respect to subparagraph (*b*) of article 36 *bis*, he observed that there had been many examples in his region of headquarters agreements in the negotia-

[3] See 1509th meeting, para. 31.

[4] See 1507th meeting, foot-note 2.

tion of which all the members of a regional organization had taken part. In the case of the agreement of that type between the Government of Indonesia and ASEAN, which was currently in preparation, the Secretary-General of the Association had been required to circulate the draft text to all States members of the Association for their comments, and would have to obtain their formal approval of the final text before he could sign it. Subparagraph (*b*) of article 36 *bis* could therefore be considered as representative of an existing state of fact.

19. The CHAIRMAN suggested that the Commission should provisionally approve articles 35 and 36, placing the words "subject to article 36 *bis*" in square brackets, and defer its decision on that phrase until it had considered article 36 *bis*.

20. If there were no objections, he would take it that the Commission decided to approve provisionally article 35 submitted by the Drafting Committee.

It was so agreed.

ARTICLE 36[5] (Treaties providing for rights for third States or third international organizations)

21. The CHAIRMAN said that the Drafting Committee proposed the following wording for article 36 (A/CN.4/L.269):

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

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

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

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

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

22. Mr. USHAKOV proposed that the words "in accordance with paragraphs 1 and 2", in paragraph 4, should be replaced by the words "in accordance with paragraph 1 or 2", since a State would exercise a right in accordance with paragraph 1 and an international organization in accordance with paragraph 2.

23. Mr. SCHWEBEL (Chairman of the Drafting Committee) agreed to that amendment.

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve provisionally article 36 submitted by the Drafting Committee, the phrase "subject to article 36 *bis*" being placed in square brackets.

It was so agreed.

ARTICLE 36 *bis*[6] (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

25. The CHAIRMAN said that the Drafting Committee proposed the following text for article 36 *bis* (A/CN.4/L.269):

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

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

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

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

26. Mr. USHAKOV strongly opposed article 36 *bis*, for both political and legal reasons. From the political point of view, he opposed the attempt made in article 36 *bis* to cover the activities of supranational organizations such as EEC. From the legal point of view, he considered that article 36 *bis* openly contradicted the principle stated in article 34 that "a treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization".

27. That principle was respected in article 35 for obligations, and in article 36 for rights. Under article 35, an obligation could arise for a third State or a third organization from a provision of a treaty only if that third State or third organization "expressly accepts that obligation in writing". Similarly, under article 36, a right arose for a third State or a third organization from a provision of a treaty only if the third State or third organization "assents thereto". In the latter case, under paragraph 3 of article 36, the "assent of the third international organization" was "governed by the relevant rules of that organization". In his opinion, the assent had to be given by the competent organ of the organization, namely, in the case of the United Nations, by the General Assembly. The assent could be tacit only if the relevant rules of the organization so provided.

28. Under article 36 *bis*, on the other hand, third States that were members of an international organ-

[5] For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. I, pp. 132-134, 1440th meeting, paras. 13-30.

[6] For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. I, pp. 134-136, 1440th meeting, paras. 31-47, 1441st meeting, and 1442nd meeting, paras. 1-12.

ization must fulfil the obligations arising for them from a treaty to which that organization was party without having expressly accepted those obligations in writing, as provided in article 35, paragraph 1. Consequently that provision was in conflict with the general rule concerning third States laid down in article 34.

29. The general rule, however, must apply to all third states, including those that were members of an international organization party to the treaty. For, in the case of ordinary international organizations like those to which the draft articles referred, the member States were always third States in relation to treaties concluded by the organization. In the case of a supranational organization like EEC, however, the member States were no longer third States in relation to treaties concluded by the organization in the exercise of its supranational functions, for they had delegated to the organization the power to conclude treaties on their behalf. They were therefore automatically bound by the treaties concluded by the organization, without any need to accept expressly in writing the obligations arising from those treaties. The case of the United Nations was quite different, because the Charter did not provide that the States Members of the United Nations surrendered to the Organization their sovereign right to conclude treaties. Hence the States Members of the United Nations were not bound by treaties concluded by the Organization.

30. Article 36 *bis* was unacceptable in that it sought to apply rules on international organizations to an entity that was not an international organization but a supranational organization. Special rules should be formulated for supranational organizations, since ordinary international organizations, such as the United Nations, could not be treated in the same way as supranational organizations such as EEC.

31. According to article 36 *bis*, "Third States which are members of an international organization... may exercise the rights which arise for them from the provisions of a treaty to which that organization is a party if the relevant rules of the organization... provide that the States members of the organization are bound by treaties concluded by it". But the creation of rights for third States members of an organization entailed the creation of obligations for the States parties to the treaty. And while it could be accepted that States members of an organization were bound by the relevant rules of that organization, it could not be accepted that non-member States were bound by the same rules. For example, in the case of a treaty concluded by EEC, it could not be accepted that the other States parties to the treaty, which were not members of EEC, were bound by the Treaty of Rome, to which they were not parties. It was equally difficult to accept that States parties to the treaty agreed to be so bound during the negotiation of the treaty, as envisaged in subparagraph (*b*) of article 36 *bis*. It could also be asked whether the "States members" referred to in subparagraph (*b*) included only the States that had been members of the organization at the time of the conclusion of the treaty, or also included States that became members of the organization later.

32. Mr. TSURUOKA thought article 36 *bis* was unnecessary, since the question of the effects of a treaty to which an international organization was party, with respect to third States members of that organization, was not of direct concern to the parties to the treaty and could very well be settled by the States members of the organization in question.

The meeting rose at 11.30 a.m.

1511th MEETING

Tuesday, 4 July 1978, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLES 35, 36, 36 *bis*, 37 AND 38, AND ARTICLE 2, PARA. 1 (*h*) (*continued*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)[1] (*continued*)

1. Mr. JAGOTA noted that subparagraphs (*a*) and (*b*) of article 36 *bis* provided that third States that were members of an international organization could acquire rights and obligations under a treaty to which that organization was a party in one of two ways: either if the relevant rules of the organization so provided, or if the States and organizations participating in the negotiation of the treaty, as well as the States members of the organization, acknowledged that the application of the treaty necessarily entailed such effects. He considered that the two conditions prescribed should be combined instead of separated, as in the draft article. Moreover, something more than the relevant rules of the organization was needed to determine the effect of the treaty with respect to the member of an international organization and, bearing in mind emergent practice in the matter, the emphasis should be on the aspect of consent. He would also

[1] For text, see 1510th meeting, para. 25.

remind the Commission that the "rules of the organization" were broadly defined in paragraph 1 (*j*) of article 2[2] to include the constituent instruments, relevant decisions and resolutions, and established practice of the organization. If those rules were to be the only factor determining whether a treaty to which an international organization was a party gave rise to rights and obligations for a third State that was a member of that organization, the parties to the treaty would have to engage in a detailed examination of those rules, and that, in his view, would be undesirable. Lastly, he could not agree to the use of the word "acknowledged", in subparagraph (*b*), since neither the manner of such acknowledgement nor its timing was clear.

2. For those reasons he would suggest that, at the end of subparagraph (*a*), the semicolon should be replaced by a comma, and the word "or" by "and", and that subparagraph (*b*) should be redrafted to read: "the parties to the treaty as well as the States members of the organization give their express consent thereto".

3. One very important point that had not been settled in articles 35, 36 and 36 *bis* concerned the relationship between an international organization and its members when both the organization and its individual members were parties to a treaty. For example, EEC was acquiring increasing competence in many spheres and, at the forthcoming session of the United Nations Conference on the Law of the Sea, the Conference would undoubtedly consider whether EEC competent to become a party to the new convention on the law of the sea, independently of its nine member States. There had been occasions when EEC, as a party to GATT, had expressed on the same subject views different from those of its members, which were also parties to GATT. A similar situation might well arise in connexion with the convention on the law of the sea.

4. Any dispute between a member State and an international organization in regard to their respective rights and obligations under a treaty, where both were parties to the treaty, was of course an internal matter to be decided by the terms of the constituent instrument of the organization. But some provision would have to be made for the guidance of third States so that they would know which party would have rights and obligations in an agreed sphere of activity and whether possible disputes would be determined by the terms of the treaty, by the relevant rules of the organization or by some other mode.

5. The question would arise in an even more acute form with regard to reservations, for the content of a reservation made by EEC, for example, might differ from the content of reservations made by its members. Some guidelines were also required for that question. The whole matter was a reflection of the current trend in regard to the treaty-making capacity of international organizations, and the Commission could not afford to ignore it.

[2] See 1507th meeting, foot-note 2.

6. Mr. USHAKOV, referring to subparagraph (*b*) of the article under consideration, observed that what the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged—or, to use the wording suggested by Mr. Jagota, what they gave their "express consent" to—was the constituent instrument of the organization, and in particular the rule that the States members of the organization were bound by the treaties concluded by it. The sole purpose of the proposed provision was to safeguard the interests of EEC. For treaties concluded by any other international organization such a provision was unwarranted. For instance, in the case of treaties to which the United Nations was a party, there was no need for express acceptance of the Charter of the United Nations, since that instrument did not provide that Member States were bound by the treaties concluded by the Organization. Member States might, of course, be parties to a treaty jointly with the United Nations, but in that case the United Nations was bound as an organization, and the Member States were bound as sovereign States. Consequently the question dealt with in subparagraph (*b*) arose only in the case of the States members of EEC, owing to the fact that they had relinquished part of their treaty-making capacity.

7. The Commission had encountered similar difficulties during its consideration of the articles relating to reservations and those, too, had derived solely from the fact that EEC was a supranational organization. The reservations that an international organization such as the United Nations might make to a treaty bound only that organization, and not its member States; however, the latter could make their own reservations, which were altogether independent of those of the organization. At the previous session, some members of the Commission had insisted that international organizations should be assimilated to States in the matter of reservations and, in particular, that they should enjoy the same rights in that regard. It was on the basis of that approach that the section of the draft relating to reservations had been prepared. He personally considered that an international organization should not have the possibility of making a reservation relating to rules concerning States. In his view, the provisions relating to reservations, although ostensibly applicable to all international organizations, in fact applied only to EEC. Thus the Commission had been led to draft the somewhat odd rule that an international organization party to a treaty was considered to have accepted a reservation if it had raised no objection thereto either by the end of a period of 12 months after being notified of the reservation or by the date on which it had expressed its consent to be bound by the treaty, whichever was later. That rule defied all logic; an international organization could not implicitly accept a reservation.

8. It was not only in regard to the subject under consideration that the Commission was taking account of the special interests of EEC. In the case of the draft articles on the most-favoured-nation clause, it had been suggested that an exception should be

made for customs unions. In its written comments, EEC had even maintained that it should be assimilated to a State for the purposes of the draft (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 7). For purely political reasons, therefore, some members of the Commission were pressing for the formulation of provisions which, far from being applicable to international organizations in general, were in fact directed exclusively at EEC.

9. Mr. QUENTIN-BAXTER said that most members of the Commission would probably have some reservations about the final wording of a provision of the kind embodied in article 36 *bis* and he would not be surprised if it were somewhat modified in the course of the second reading. Members had a very clear idea of third States as strangers to a treaty, and it was a little difficult to accommodate that view to something which, although described as a third State, was for all intents and purposes as much bound by a treaty as if it were a party. They also had a natural reluctance to intrude into the relations between an organization such as EEC and its members.

10. If there were areas where the respective competences of the international organization and its member States were in some doubt, it was not for third States to attempt to assist in deciding where the dividing line lay, always provided that the member States did not make reservations in differing terms. That would be likely to stir up a debate within the organization and might give States that were not members of the organization good grounds for hesitating to accept all or any of the reservations. It should rather be assumed that the parties to such an arrangement would themselves settle such questions with all due care and would not confront the international community with a situation that required it to become involved in the internal affairs of the organization in question.

11. With regard to the drafting of article 36 *bis*, it seemed to him that to make the obligations and rights arising from a treaty subject to the fulfilment of the conditions governed by the word "if" was, in a sense, putting the cart before the horse. On the other hand, the word "acknowledged" caused him no concern. At the time the Vienna Convention[3] had been prepared, certain cases had arisen where it had been necessary to speak with some generality in matters of that kind, for example in connexion with the doctrine of the legal effect of unilateral acts. To express the idea more precisely would not impose additional obligations on the members of the organization but would instead introduce additional hazards for third States dealing with that organization. That was the point that should guide the Commission.

12. The Special Rapporteur had been entirely right not to take the easy course of ignoring a situation that presented difficulties in exposition. The United Nations General Assembly had the right to consider whether the wealth of State practice now arising from dealings with EEC, and the possibility that the same situation might occur in other contexts, did not demand a provision of the kind embodied in article 36 *bis* for the security of third States. He was not concerned whether the members of that organization felt the need for such a provision. The main question was whether other members of the international community that had to deal with that organization felt such a need. That was the point that it was proper for the Commission to put before States.

13. Mr. ŠAHOVIĆ noted that the new wording for article 36 *bis* proposed by the Drafting Committee differed considerably from the wording proposed by the Special Rapporteur in 1977. In its current form, the article under consideration should be accompanied by a particularly detailed commentary making the origin of that provision clear. The version of article 36 *bis* proposed by the Special Rapporteur had been entitled "Effects of a treaty to which an international organization is party with respect to States members of that organization".[4] Several members of the Commission had considered that, in view of the title and content of that provision, an article on a question as general as that of relations between an international organization and its member States should be dealt with in some other part of the draft. The version of article 36 *bis* now being considered by the Commission was entitled "Effects of a treaty to which an international organization is party with respect to third States members of that organization". The problem was being tackled from a different angle—that of third States members of the organization. The term "third States members" was unsatisfactory. It was not immediately apparent what case article 36 *bis* was designed to cover, and an attempt should be made to find a better expression.

14. The question of the link between article 36 *bis* and articles 35 and 36 had been left in abeyance for the time being. It should be pointed out that articles 35 and 36 were based on the Vienna Convention and laid down basic principles. Article 36 *bis*, on the other hand, related to a particular category of third States, calling for special rules that should derive from the rules laid down in articles 35 and 36.

15. With regard to the wording, he considered the text proposed by the Special Rapporteur to be better than that adopted by the Drafting Committee, in the light of the Commisson's discussions. The two situations referred to in paragraphs 1 and 2 of the article prepared by the Special Rapporteur had been combined and dealt with in a single paragraph. The main substantive question raised by the new text was that of the link between its subparagraphs (*a*) and (*b*).

16. However, since a number of problems of terminology subsisted, it might be appropriate to refer article 36 *bis* to the Drafting Committee once again. Perhaps, too, the Commission should place the article in square brackets, since the main point was to in-

[3] See 1507th meeting, foot-note 1.

[4] See *Yearbook... 1977*, vol. II (Part One), p. 119, doc. A/CN.4/298.

dicate to governments that the situation dealt with in article 36 *bis* had been envisaged. In its new wording, and limited as it was to third States members of an international organization, article 36 *bis* was less general in character.

17. Mr. CALLE Y CALLE would on the whole have preferred the earlier version of article 36 *bis*,[5] which provided that a treaty concluded by an international organization gave rise "directly" for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gave such effects to the treaty. There would thus be no requirement that each and every State member of the organization should signify its express acceptance of an obligation in writing, since the matter was already covered by the terms of the constituent instrument of the organization. As far as rights were concerned, they would be exercised only within the limits laid down in the treaty, which must itself take account of the relevant rules and constituent instrument of the organization.

18. An important element of both article 35 and article 36 was that the parties, and not the States members of the organization, had to have the intention of creating obligations and rights under the treaty. Paragraph 2 of the earlier version of article 36 *bis* had provided that such an intention was to be inferred from the subject-matter of the treaty and the assignment of the areas of competence involved in that subject-matter between the organization and its member States, whereas, in the current draft, the element of intention had been replaced by the requirement that the States and organizations participating in the negotiation of the treaty and, in addition, the States members of the organization, should have acknowledged that the application of the treaty necessarily entailed such effects. That presupposed that the States members of the organization knew that it was negotiating a treaty having the effect of creating rights and obligations in respect of them.

19. However, he was prepared to accept the new article 36 *bis*, but considered that the two conditions laid down in subparagraphs (*a*) and (*b*) should be combined.

20. He would also suggest that, in subparagraph (*b*), the words "as well as the States members of the organization" should be deleted and that, in subparagraph (*a*), the word "expressly" should be added after "provide".

21. Mr. TSURUOKA observed that article 36 *bis* related to a highly sensitive question on which no settled ideas yet existed. He therefore wondered whether it was really necessary to deal with that question at the current stage of development of international law. He saw some difficulty in referring to third States members of an international organization party to a treaty, for he was not sure whether States members of an international organization should be considered as third States in relation to treaties concluded by the organization to which they belonged. The capacity of an organization to conclude treaties had its origin in the constituent instrument of that organization, in other words, in the will of the sovereign States that composed it. In that sense, the States members of an organization were not really third States in respect of treaties concluded by that organization. Nor were they third States in the same sense as were non-members of the organization, to the extent that they participated in the negotiation of the treaty and decided upon its conclusion.

22. With regard to EEC, the question dealt with in article 36 *bis* was settled in each individual case. He therefore thought it more prudent not to settle that matter in the article and to leave it to be dealt with by the natural development of international law, which followed the development of the political and economic situation.

23. If the Commission nevertheless decided to deal with that matter, it should be careful, first, not to paralyse emergent practice in regard to the questions for which article 36 *bis* attempted to provide solutions and, secondly, to maintain a fair balance between the interests of the States members of the international organization party to the treaty and those of the States parties to the treaty that were not members of the international organization.

24. That balance was not properly safeguarded by the text of subparagraph (*a*) of the article as currently drafted. In the event of a dispute between a State member of the organization party to the treaty and a State party not a member of the organization concerning the interpretation or application of the treaty, the question arose whether, as provided in the constituent instrument of EEC, the non-member State should appear before the Court of Justice of the European Communities. If the expression "relevant rules of the organization" were construed in that manner, it was clear that the interests of non-member States would not be respected in the same way as those of the States members of the organization, since the Court of Justice, as an institution to which one of the parties belonged, was *ipso facto* opposed to the interests of the other party. Care should therefore be taken to safeguard the interests of States parties to the treaty that were not members of the organization.

25. Mr. FRANCIS said that he had spoken on article 36 *bis* at the Commission's twenty-ninth session,[6] and that he still believed that the provision had a place in the draft articles as a statement of a general principle. When making his earlier statement, he had not found it necessary to refer to the particular case of EEC to demonstrate that obligations might arise for the States members of an international organization from a treaty to which that organization was a

[5] *Ibid.*

[6] See *Yearbook... 1977*, vol. I, p. 138, 1441st meeting, paras. 11-14.

party; instead, he had chosen an example concerning the United Nations, and had said that it would be unthinkable for members of the Security Council to claim that they had no responsibility for treaties concluded by the Security Council pursuant to the Charter of the United Nations. The situation of States members of an international organization that concluded a treaty was very different from that of "third States", in the strict sense of the word, in respect of that treaty. An international organization could not act otherwise than through the will of its member States, and those members had a certain responsibility, which was greater than that of the shareholders in a limited liability company, with respect to "contracts" entered into by the organization.

26. While the final decision concerning article 36 *bis* must be left to the General Assembly, the Commission must consider the question in as much detail as possible, for otherwise it would have failed to contemplate the possibility that a number of States might form themselves into an international body and empower it to enter into treaty obligations. Could the Commission suggest, for example, that States should not be liable to the creditor when, as in the case of the Caribbean Development Bank, they dissolved a regional bank that they themselves had formed and had authorized to enter into an agreement to obtain the major part of its capital from a source other than themselves?

27. He agreed that subparagraph (*b*) of the text proposed by the Drafting Committee might require redrafting, but thought that the ideas it contained should be retained. In that connexion, he pointed out that the acknowledgement of the effects of a treaty by an international organization would be governed by the relevant rules of that organization. He did not think there could be any quarrel with the idea that the States members of an international organization might agree in advance that a treaty concluded by that organization would be binding on them, for those States were in a position to ensure that the treaty was in conformity with the powers they had given the organization. Nor should there be any problem with responsibilities devolving upon members of an organization as a result of decisions or resolutions of that organization; if it were accepted that States could enter reservations to a treaty, it would surely also be accepted that they might enter "reservations" to a decision.

28. Mr. REUTER (Special Rapporteur) was prepared to agree that article 36 *bis* had no place in the draft articles if Mr. Ushakov's view were adopted that the article referred solely to EEC and that EEC was no ordinary international organization, for the draft articles concerned international organizations in general, and not special cases. The question was whether article 36 *bis* was relevant only to EEC, or whether it was broader in scope.

29. He recognized that the case covered by subparagraph (*a*) of the article applied only to EEC, since EEC was the sole organization whose constituent instrument contained a provision concerning the effects of agreements concluded by that organization with respect to its member States. He would therefore readily agree to the deletion of subparagraph (*a*).

30. If it was true that an international organization could be regarded as a screen in so far as it entered into commitments as a legal entity, it was also true that, in certain cases, national legal systems gave a degree of transparency to that screen.

31. The question referred to in article 36 *bis* could therefore be dealt with in one of three ways. It was possible to argue that it was not the organization itself but its member States that were parties to the treaty, as in the case of the 1972 Convention on International Liability for Damage Caused by Space Objects.[7] It could also be considered, as Mr. Jagota had suggested, that both the organization and its members were parties to the treaty; however, that case applied only to EEC, and the Commission should not establish rules for exceptional cases. Lastly, it was possible to consider that it was the organization, and not its members, that was a party to the treaty. That third case was the only one covered by article 36 *bis*, where the States members of an international organization that were parties to a treaty were considered as third States in relation to that treaty. That approach had been adopted in the case of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (1947),[8] and it was also the approach that had to be taken in the case of agreements concerning the establishment of a United Nations emergency force.

32. It might of course be decided that the United Nations, like EEC, should be excluded from the scope of the draft articles and that only small "ordinary" organizations that did not have the right to conclude treaties should be dealt with. The draft articles carried two risks between which the Commission must choose: they might arrest the current development of the subject, as Mr. Tsuruoka had said, or they might confirm practices that existed but that were bad or open to criticism. The Commission had therefore to make a policy decision on that matter.

33. From the technical point of view, it should be considered whether article 36 *bis* had something to add or whether it merely duplicated articles 35 and 36. The question that arose was thus that of the relationship between that article and articles 35 and 36.

34. Under the existing text of article 36 *bis*, the consent of third States members of the organization was not excluded, but the reference to it was fairly flexible—or vague, depending on whether one favoured or opposed the formulation adopted. It would of course be possible to opt for a more precise wording. However, if the word "acknowledged", in subparagraph (*b*), were replaced by the words "expressly accepted", article 36 *bis* would lose much of its useful-

[7] General Assembly resolution 2777 (XXVI), annex.

[8] General Assembly resolution 169 (II).

ness, and it would be of no use at all if the phrase "expressly accepted in writing" were adopted, for that wording was already to be found in article 35.

35. He reminded the Commission that, when it had drawn up the draft that was to become the Vienna Convention, it had adopted a very flexible formula with regard to the creation of rights for third States[9] and a fairly flexible formula with regard to the creation of obligations for such States,[10] for in the latter case it had required only express consent. However, the United Nations Conference on the Law of Treaties had adopted a stricter formula, based on an amendment,[11] requiring that, in the case of obligations, consent must be given expressly and in writing.

36. The point at issue was therefore whether a more flexible form of consent should be adopted in the case of international organizations than had been adopted by the Conference on the Law of Treaties in the case of States. The assumption of the Drafting Committee had been that the States members of the organization party to the treaty would have given their consent in advance and that the States parties to the treaty would agree to that form of consent or would require the participation of the member States. The term "acknowledged", in subparagraph (*b*), was fairly vague, but it maintained the idea of consent. It was of course possible to express a preference, as had some members, for the initial version of article 36 *bis*, which had described the precise circumstances in which consent was admitted.

37. As a member of the Commission, he would be willing to agree that the case of EEC should not be taken into account, for it was an organization of a limited character that had no responsibility for peace. On the other hand, he would find it highly regrettable if no account were taken of organizations of a universal character such as the United Nations, in whose case he did not consider it reasonable to lay down a procedure requiring formal, express and written consent in all cases, even in emergencies and even when it was clear that no State had raised objections. The Commission was of course free to decide not to take any account of the practice of the United Nations in that regard, for it was by virtue of practice and not of the Charter that the Organization had capacity to conclude international agreements.

38. Mr. USHAKOV considered that there was no connexion between the United Nations and article 36 *bis*, since an agreement concluded between the United Nations and a State could not bind the States Members of the United Nations without their consent. Under the general rule laid down in article 34, a treaty between a State and an international organization created neither obligations nor rights for a third State without the consent of that State. In the case of a headquarters agreement concluded by the United Nations, rights accorded to States Members of the United Nations could be accepted implicitly, but obligations must be accepted expressly and in writing.

The meeting rose at 1 p.m.

[9] See *Yearbook... 1966*, vol. II, pp. 227 and 228, doc. A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, art. 32.

[10] *Ibid.*, p. 227, art. 31.

[11] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 268, doc. A/CONF.39/L.25.

1512th MEETING

Wednesday, 5 July 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/312, A/CN.4/L.269)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLES 35, 36, 36 *bis*, 37 AND 38, AND ARTICLE 2, PARA. 1 (*h*) (*concluded*)

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)[1] (*concluded*)

1. Mr. USHAKOV said that if it were decided to delete subparagraph (*a*), which, as the Special Rapporteur had himself acknowledged at the previous meeting, applied only to supranational organizations such as EEC, article 36 *bis* would be pointless, since it would duplicate articles 35 and 36.[2] Those two articles applied to all third States, including States members of an international organization party to a treaty, which were also covered by article 36 *bis*. If the words "subject to article 36 *bis*", which had been placed in square brackets, were deleted from articles 35 and 36, States members of an international organization such as the United Nations would be subject to contradictory rules, as the rule in article 36 *bis* did not correspond to the rules stated in articles 35 and 36.

[1] For text, see 1510th meeting, para. 25.

[2] *Ibid.*, paras. 1 and 21.

2. Articles 35 and 36 made the arising of rights and obligations for third States subject to much more specific conditions than those established in article 36 *bis*. Article 35, paragraph 1, provided that "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". Similarly, article 36, paragraph 1, provided that "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto". Those conditions were not be found in article 36 *bis*, subparagraph (*b*), the wording in which was much vaguer.

3. Moreover, with regard to rights, article 36, paragraph 1, provided that the assent of third States "shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides", but that presumption was not contained in article 36 *bis*, subparagraph (*b*).

4. It was absurd to try to justify the retention of that subparagraph by claiming that it would help universal organizations such as the United Nations to defend world peace; the United Nations contributed to the maintenance of peace through its activities, not through the conclusion of treaties such as headquarters agreements. Thus the only purpose of subparagraph (*b*) was to enhance the acceptability of subparagraph (*a*), which, as the Special Rapporteur had acknowledged, concerned only supranational organizations such as EEC.

5. EEC, moreover, was the only supranational organization currently in existence. As stated in its constituent instrument, CMEA was not a supranational organization, for socialist internationalism respected the sovereignty of States. The third world States, for their part, were not likely to set up supranational organizations in the near future; having only recently acquired their sovereignty, they would hardly agree to give it up to supranational organizations. Thus article 36 *bis* really concerned only the member States of EEC and other Western States.

6. He was strongly opposed to the retention of that article, because it was inadmissible to introduce into draft articles applying to international organizations in general a rule applying to a supranational organization. If the Commission considered it necessary to establish rules relating to treaties to which EEC would be a party, it should do so in the form of special rules, outside the framework of the draft articles, to be adopted only at the express request of the General Assembly.

7. Sir Francis VALLAT said that the liveliness of the debate showed that the text proposed by the Drafting Committee was very useful for a first reading. That text had made it clear that there were real problems connected with the effects of treaties concluded by international organizations, as between the members of such organizations and the other parties.

8. In his view, however, much of the debate had been based on a misunderstanding, for article 36 *bis* had not been tailored exclusively for EEC. As he had already said when EEC entered into a treaty it did so on its own behalf, as an entity, and the Commission of the European Communities would object, in those circumstances, to direct dealings between the members of EEC and the other parties to the treaty. That, at least, was how he understood the operation of the customs union, in particular. If that view was correct, article 36 *bis* would be of only marginal interest to EEC. Admittedly, the situation in regard to agreements such as the proposed convention on the law of the sea would be different; there, as in the case of the EEC common fisheries policy, the essential problem would be the sharing of competence between EEC and its members. That, however, was a practical difficulty to be tackled by EEC, its members and such other States as might be concerned; it was not pertinent to the work of the Commission at that stage.

9. He considered article 36 *bis* to be a very valuable sounding box that the Commission should use, as it had used other controversial articles in the past, to obtain the views of governments and international organizations.

10. He therefore suggested that the text of the article should be included in the Commission's report without change, but with references to its controversial character and to the fact that some members of the Commission had supported and others opposed it; and that the Commission should indicate that it would take its final decision on the article in the light of the reactions of governments and international organizations to it.

11. Personally, he had doubts about various details of the article, but considered it pointless to comment on them at that stage.

12. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that article 36 *bis* had been fully debated and carefully elaborated by the Drafting Committee, where the predominant sentiment had been one of support for the text. Although varying views had been expressed on the article in the Commission, a majority of the members seemed to be in favour of dealing with the substance of the questions it raised.

13. Personally, he doubted the advisability of omiting it and so avoiding problems that were real features of international law and life as they were evolving. Indeed, it would seem unwise to omit such an article from a draft that was specifically intended to elicit the view of States and international organizations. He therefore supported the suggestion that article 36 *bis* should be included in the Commission's report, together with a commentary that fully reflected the animated and extensive debate thereon. The Commission would be able to decide what should finally become of the article in the light of the comments submitted to it by governments and international organizations.

14. The Drafting Committee had not put the article in square brackets, because it had assumed that the commentary would draw attention to the marked differences of opinion on it that had become apparent during the first reading in the Commission, and then in the Committee. Since the text was only provisional, it might reasonably be adopted as it stood. Alternatively, the fact that it had been the subject of differing opinions might be emphasized by placing it in square brackets.

15. Mr. YANKOV said that, since the views expressed on article 36 *bis* differed so widely, he did not think the Commission could submit the text with only a routine commentary. While he did not wish to dwell on the question whether the article had been drafted especially for EEC or similar supranational institutions, he felt bound to say that the consequences of the double participation of such an institution and of its member States in an agreement such as the proposed convention on the law of the sea had been oversimplified. That was true in regard not only to the complex subject of fisheries, but also to the sections of the proposed convention dealing with environmental matters and with reservations and their legal effects. Parties to that convention and, possibly, arbitral tribunals, would find themselves faced with a most unusual situation if a supranational institution formulated a reservation that its own members did not accept, or vice versa. He could see a clear possibility of such a situation arising in regard to environmental matters and also to industrial development and technical assistance.

16. In view of those considerations, he had reservations concerning both the wisdom and the necessity of putting forward, at the current stage, a text that might cause confusion in the majority of cases in which questions might arise regarding the effects, for third States, of a treaty to which an international organization was party. The most he would be willing to accept would be the submission of article 36 *bis* in square brackets and the insertion of a full explanation in the commentary. To allow the text to appear in the report without square brackets would give governments the false impression that it reprsented a compromise between the different views expressed in the Commission.

17. Mr. VEROSTA said that if article 36 *bis*, with all its merits and all its possible shortcomings, appeared in the report otherwise than in square brackets, the General Assembly would be led wrongly to conclude that the text was one on which the Commission had reached a consensus. For the reasons advanced by Mr. Tsuruoka at the previous meeting, the article should be placed in square brackets.

18. Mr. NJENGA did not altogether share the opinions that had been expressed concerning the merits of article 36 *bis* and was not convinced that the article was necessary. He had considered going so far as to suggest that the text should appear only in a foot-note to the report, but he agreed that, in order to reflect the attitude of the members of the Commission in a balanced way, it should be placed in square brackets and accompanied by a full account of the discussion.

19. Mr. ŠAHOVIĆ proposed that, in view of what the Chairman of the Drafting Committee had said, article 36 *bis* should be placed in square brackets, and that it should be stated in the commentary that the members of the Commission had not been able to reach agreement on the text.

20. Mr. CASTAÑEDA believed that article 36 *bis* was useful and that its basic thesis was correct. But since opinions obviously differed even on its substance, he would have no objection to the article being included in the Commission's report in square brackets and accompanied by a full account of the debate thereon.

21. Mr. USHAKOV formally proposed the deletion of article 36 *bis*.

22. Mr. TSURUOKA said it was difficult to adopt an article in square brackets, since adoption implied approval. The reasons why article 36 *bis* had been placed in square brackets should therefore be clearly explained in the commentary.

23. Mr. YANKOV suggested that the Commission should avoid using any terminology suggesting that it had adopted the article. Instead, it should do as other United Nations bodies did in similar circumstances, and simply decide to submit the text for consideration to the recipients of its report, and to place it in square brackets in view of the differing opinions, which would be recorded in the commentary.

24. Mr. USHAKOV was opposed to the retention of article 36 *bis*, even in square brackets. In his opinion, the words "provisionally adopted" were meaningless, for articles were always adopted provisionally on first reading.

25. Mr. JAGOTA suggested that the best course might be to include the article in the report in square brackets and to state, in a foot-note to the introduction to the relevant section, that the Commission had decided to consider the article further in the light of the comments it would receive from the General Assembly, from governments and from international organizations. The foot-note might also refer to the account given in the commentary of the Commission's discussion on the article.

26. If article 36 *bis* were to be placed in square brackets, the same would have to be done with the references to it in paragraph 1 of articles 35 and 36 and paragraphs 5 and 6 of article 37.

27. Mr. SCHWEBEL (Chairman of the Drafting Committee) agreed with Mr. Ushakov that any decision by the Commisson concerning articles examined on first reading was, in a sense, provisional. But some decisions were more provisional than others, and the Commission had therefore adopted, in the past, the system of placing in square brackets elements of a text that required special attention because opinions on them had differed. For example, Mr. Ushakov himself had asked that certain provi-

sions of the draft on succession of States in respect of matters other than treaties should be placed in square brackets. It seemed appropriate to adopte the same solution in the case of article 36 *bis*, although he had no objection to the inclusion in the report of a foot-note of the kind suggested by Mr. Jagota.

28. Mr. QUENTIN-BAXTER said that there would be a qualitative difference between the effects of placing the article in square brackets and the action suggested by Mr. Jagota; the former action would suggest no more than that the Commission had adopted the article provisionally, whereas the latter would show that the Commission intended to revert to the article during its final assessment of the draft on first reading, as he believed it must.

29. He wondered, however, whether Mr. Jagota's proposal removed the need for a separate decision on Mr. Ushakov's motion. If the Commission's intention was definitively to adopt article 36 *bis*, without square brackets, on first reading, he could see some point in Mr. Ushakov's proposal. If, on the other hand, the members of the Commission were agreed that they must revert to the article on first reading in any case, Mr. Ushakov's proposal took on a different character and, if maintained, could only be construed as indicating a desire that the General Assembly should not focus on the Commision's discussion of the article.

30. Mr. USHAKOV pointed out that, in the case of the draft articles on succession of States in respect of matters other than treaties, the articles that had been placed in square brackets had been articles of which the Commission had accepted the principle, if not the form, whereas article 36 *bis* was an article whose principle was absolutely unacceptable.

31. Mr. VEROSTA said that the problems underlying article 36 *bis* were real and that the Commission would be failing in its duty if it did not draw the General Assembly's attention to them. That being so, he appealed to Mr. Ushakov not to press his proposal, but to accept the suggestion made by Mr. Jagota.

32. Mr. CASTAÑEDA said that, since the Commission was not bound by precedent, it could overcome its current difficulties by using a less formal procedure: it could state in its report that it had referred to the Drafting Committee the text of article 36 *bis* submitted by the Special Rapporteur and had subsequently received from the Drafting Committee an amended text, which it had discussed at length without reaching any decision, except to reconsider the article in the light of the comments of governments.

33. Mr. FRANCIS did not think the Commission would create any false impression if it placed the article in square brackets, since that was a practice that was well known to, and had a clear meaning for, the Commission and the General Assembly. But care must be taken to avoid suggesting in any other way that the Commission had adopted the text of the article. For example, a vote against Mr. Ushakov's proposal that the article be deleted might be construed as implying acceptance of the text, unless the Chairman's invitation to the Commission to vote on the motion were very carefully phrased.

34. Mr. USHAKOV did not think Mr. Verosta's suggestion resolved the problem, for if article 36 *bis* were submitted to the Sixth Committee, States would probably be divided on the text.

35. Mr. TABIBI observed that the current situation was perhaps one where the Commission might usefully follow its practice of mentioning, in a foot-note, the names of members who had raised particularly strong objections to a draft article. He agreed that the discussions on article 36 *bis* should be reflected in the commentary and that the article itself should be placed in square brackets.

36. Mr. JAGOTA did not think a negative vote on Mr. Ushakov's proposal to delete article 36 *bis* would imply the adoption of the text. Such a vote would merely signify the rejection of the proposal itself, and it would remain for the Commission to take a separate decision on the fate of the article. He wished to suggest to Mr. Ushakov, however, that it might be unnecessary, and perhaps even undesirable, to maintain his formal motion for deletion of the article, if all the Commission intended to say was that the text committed none of its members and that the article would be reviewed in the light of the reactions to it of the General Assembly and international organizations. It should be noted that, whereas Mr. Ushakov suggested that the Commission should consider the subject-matter of the article only if States requested it to do so, the subject was a live one, which was already being discussed in other forums and which came within the scope of the Commission's work. He hoped that Mr. Ushakov and any other members of the Commission who were opposed to the article would agree to have their views recorded in the commentary or brought to the attention of readers of the Commission's report in the manner suggested by Mr. Tabibi.

37. Mr. TSURUOKA proposed that the Commission should decide to submit article 36 *bis* to the General Assembly and to reconsider it later the light of the comments made by representatives in the Sixth Committee. The Commission should give a true picture of the situation in its commentary, by indicating that it had not been able to reach any decision on the content of the article and had even been seized of a proposal to delete it. He pointed out that the Commission had sometimes adopted a solution of that kind in the past, in similar circumstances.

38. Mr. USHAKOV was prepared to support the solution proposed by Mr. Tsuruoka, provided that article 36 *bis* was placed in square brackets and that the Commission clearly stated in its commentary that it had not come to any conclusion on the article.

39. Sir Francis VALLAT was of the opinion that it would be useless to reconsider article 36 *bis* without having the views not only of Governments and mem-

bers of the Sixth Committee, but also of international organizations, since they were the most knowledgeable on the subject-matter of the provision.

40. He also wished to draw attention to the suggestion that had already been made, namely, that the Commission should seek the views of governments and international organizations on its draft articles once it had completed those portions of its draft that corresponded to the first four parts of the Vienna Convention,[3] a point it was fast approaching.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided that article 36 *bis* should appear in its report in square brackets, and that the report should reflect the comments made on the subject-matter of the article and indicate clearly that no decision had been taken on the text other than to reconsider it in the light of the comments made by governments and international organizations.

It was so agreed.

42. Mr. SCHWEBEL (Chairman of the Drafting Committee) speaking as a member of the Commission, said that the outcome of the procedural discussion had been a decision to accommodate, as far as possible, the views of one or two of the members of the Commission. He trusted that, should the question arise, on another occasion, of so accommodating the minority views of one or two other members, the same attitude would prevail in all quarters.

ARTICLE 37[4] (Revocation or modification of obligations or rights of third States or third international organizations)

43. The CHAIRMAN read out the text of article 37 proposed by the Drafting Committee (A/CN.4/L.269):

Article 37. Revocation or modification of obligations or rights of third States or third international organizations

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third international organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third international organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

5. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in sub-paragraph (*a*) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.

6. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in sub-paragraph (*b*) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty and of the States members of the organization, unless it is established that they had otherwise agreed.

7. The consent of an international organization party to the treaty or of a third international organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

44. Mr. USHAKOV pointed out that, in consequence of the decision taken on article 36 *bis*, paragraphs 5 and 6 of article 37, which related to the situations contemplated in article 36 *bis*, should also be placed in square brackets.

45. The existing wording of paragraph 5 of article 37 was far from satisfactory. According to that provision, an obligation or a right which had arisen for third States members of an international organization under the conditions provided for in subparagraph (*a*) of article 36 *bis* could be revoked or modified only with the consent of the parties to the treaty "unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide". In that case, the rules in question would apply to all the parties to the treaty, not only to the organization itself, which was very strange. The rule stated in paragraph 5 was accompanied by another safeguard clause, according to which the parties to the treaty could agree otherwise. It thus followed that an international organization such as EEC could agree on provisions that were contrary to its own relevant rules.

46. Paragraph 6 of article 37 related to the revocation or modification of an obligation or a right that had "arisen for third States which are members of an international organization under the conditions provided for in subparagraph (*b*) of article 36 *bis*". He was not sure whether, for the purposes of subparagraph (*b*) of article 36 *bis*, it was necessary for all the States members of the organization to acknowledge that the application of the treaty necessarily entailed the effects referred to in that provision and whether, if that were not the case, the States that had not acknowledged such effects would not be bound by the rule stated in article 36 *bis*. In the former case, any State could exercise a veto. The words "third States which are members of an international organization", and "the States members of the organization", contained in article 37, paragraph 6, could thus be interpreted as applying either to all the States members of the organization or only to some of them.

47. It should also be stated exactly when the third States referred to in paragraph 6 had to be members

[3] See 1507th meeting, foot-note 1.

[4] For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol I, pp. 143-145, 1442nd meeting, paras. 13-28.

of the organization and whether they must be among those that had acknowledged that the application of the treaty necessarily entailed the effects referred to in article 36 *bis*. Lastly, it should be made clear which of those States were referred to by the pronoun "they" in the last phrase of that paragraph.

48. Since paragraphs 5 and 6 would probably be placed in square brackets, he would not dwell on the drawbacks of their defective wording. Personally, he thought those provisions should not even be submitted to governments.

49. In paragraph 7, it would be advisable to replace the words "as provided for in the foregoing paragraphs" by the words "as referred to in the foregoing paragraphs", and to specify those paragraphs, since only some of them concerned international organizations.

50. Mr. ŠAHOVIĆ said it might be advisable to show the links between article 41 (Agreements to modify multilateral treaties between certain of the parties only) (A/CN.4/312) and article 37, since both dealt with the modification of treaties.

51. It would be logical to place paragraphs 5 and 6 of article 37 in square brackets, as Mr. Ushakov had proposed, since the Commission had taken no final decision on article 36 *bis*. However, since many members of the Commission had taken the view that the situations referred to by article 36 *bis* should be considered, the Commission could not now omit to consider them.

52. Sir Francis VALLAT said that paragraphs 5 and 6 of article 37 were the corollary to article 36 *bis* and logically, therefore, should also be placed between square brackets. Subject to that change, he would suggest that article 37 be approved for the current purposes of the Commission.

53. Mr. JAGOTA noted that article 36 *bis* and paragraphs 5 and 6 of article 37 referred to "third States" in the plural, whereas the other provisions of article 37, and articles 35 and 36, referred to "a third State" in the singular. As he understood it, the rationale of article 36 *bis* was that States members of an international organization should be treated as a whole, without making any distinction according to whether they did or did not accept the rights and obligations arising under the treaty. Such a distinction would only make it more difficult to decide whether articles 35, 36 or 36 *bis* applied. Possibly the Chairman of the Drafting Committee or the Special Rapporteur could confirm that his understanding was correct.

54. Mr. REUTER (Special Rapporteur) explained that the Drafting Committee had purposely used the plural, since it was its understanding that States acted collectively. To accept dissension among States in such a complex matter would lead to enormous complications. The Drafting Committee had accordingly been careful to give the principle of consensus its proper place in article 36 *bis*. Mr. Jagota's interpretation of the use of the plural was thus correct.

55. Mr. USHAKOV said that if the Drafting Committee had had all States in mind, it should have used the words "all States", and that the word "States" applied only to certain States. If all the States members of an organization had to acknowledge that the application of the treaty necessarily entailed certain effects, as provided for in subparagraph (*b*) of article 36 *bis*, it could be concluded that each State had a right of veto. It would be desirable for the Special Rapporteur to state his view on that point and to say whether States that became members of the organization after the entry into force of the treaty could also exercise a veto. In his opinion, those two questions called for affirmative replies.

56. Mr. TSURUOKA wondered whether paragraph 7 of article 37 referred to an international organization that was a party to the treaty and to a third international organization alternatively or cumulatively.

57. Mr. REUTER (Special Rapporteur), in reply to Mr. Tsuruoka, said that, depending on the case, paragraph 7 of article 37 could refer not only to an organization that was party to the treaty and to a third organization.

58. Referring to the comments made by Mr. Ushakov, he said that an international organization was established at a given time and that, in order to stress the role of consensus in article 36 *bis*, the Drafting Committee had provided that all States members of the organization must give their consent—a practice, incidentally, that had never given rise to difficulties. Evidence of that was to be found in the provision, in the 1947 Agreement between the United Nations and the United States of America regarding the Headquarters of the Organization,[5] relating to the privileges and immunities enjoyed in the territory of the United States by certain categories of representatives of States Members of the United Nations. When a State became a member of an international organization, it must accept the organization as it was; otherwise, insurmountable difficulties would arise.

59. Mr. RIPHAGEN did not think that Mr. Ushakov's interpretation regarding the right of veto of a new member of an international organization would be shared by all members of the Commission. On joining an organization, a new member accepted that organization as it was, with its rights and obligations, and hence could have no right of veto in regard to events that had taken place before it had become a member.

60. Mr. REUTER (Special Rapporteur) could agree to Mr. Ushakov's proposal that the words "as provided for", in paragraph 7 of article 37, should be replaced by the words "as referred to", provided that those words were followed by the words "in paragraphs 2, 4 and [6]".

[5] General Assembly resolution 169 (II).

61. Mr. USHAKOV said that, on reflection, it would be preferable not to change the wording of paragraph 7.

62. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that, apart from the doubts expressed by a few members about certain provisions in article 37 that were connected with article 36 *bis*, there had been no major criticism of the article.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve article 37, paragraphs 5 and 6 being placed in square brackets.

It was so agreed.

ARTICLE 38[6] (Rules in a treaty becoming binding on third States or third international organizations through international custom)

64. The CHAIRMAN said that the Drafting Committee had proposed the following text for article 38 (A/CN.4/L.269):

Article 38. Rules in a treaty becoming binding on third States or third international organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third international organization as a customary rule of international law, recognized as such.

65. Mr. USHAKOV stressed the great importance of article 38, which provided that a conventional rule could become a customary rule binding on a third international organization, not as a result of a decision of an organ of that organization, but merely by reason of its conduct. The idea of tacit conduct signifying acceptance of a conventional rule, which was well established in regard to States, was far from having been accepted by the international community in regard to international organizations. There were no practical examples confirming the rule stated in the article. It would therefore be wiser to confine that rule to third States, as provided in the corresponding article of the Vienna Convention.

66. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the prevailing view in the Drafting Committee had been that article 38 was a safeguard clause that dealt with the possibility of customary international law becoming binding on international organizations. It did not, however, deal with the question whether, or in what way, such organizations contributed to the development of customary international law.

67. Mr. REUTER (Special Rapporteur) said that, in any case, that was how article 38 of the Vienna Convention had been conceived in regard to States. The question of what a custom was, how it was established and how States became bound by a customary rule had not been resolved in the Vienna Convention. He was not sure that, according to that instrument, the tacit conduct of a State was enough to bind it by a customary rule. Perhaps it would be enough to specify, in the commentary to article 38, that a member of the Commission had stressed that aspect of the problem.

68. Mr. YANKOV asked whether he was correct in understanding that, under article 38, third States and third international organizations, although not directly bound by the rules set out in a treaty, could recognize and accept those rules as rules of customary international law. If so, the article was in conformity with article 38 of the Vienna Convention and should present no difficulties. Otherwise, he would reserve his position.

69. Mr. CASTEÑEDA shared the doubts about the article expressed by Mr. Ushakov. As it stood, it clearly gave the impression that the Commission had accepted the thesis that customary rules could be established for international organizations that had not participated in their establishment. That, in his view, would be going rather too far. Although it was well established that customary rules could be created by the practice of States within an international organization, it was another matter to provide that a treaty between international organizations or between international organizations and States could create a customary rule that was binding on a third international organization—which might be of a character very different from that of the international organizations parties to the treaty—without the express consent of its governing organs. He thought the matter required further consideration.

70. Mr. USHAKOV considered that Mr. Yankov's interpretation was unfortunately not acceptable. For an international organization, it was one thing expressly to accept a customary rule by a decision of one of its organs, but quite another to accept, by its conduct, a rule contained in a treaty to which it was not a party. According to article 38 of the Vienna Convention, a rule set forth in a treaty could become binding upon a third State by reason of its conduct. However, a rule set forth in a treaty could not become binding on a third international organization by reason of its conduct, by virtue of the article under consideration. The notion of the conduct of States had been defined, in particular at the United Nations Conference on the Law of Treaties, whereas the notion of the conduct of an international organization—conduct that might make a rule in a treaty to which it was not a party binding upon it—had not been defined.

71. Mr. SCHWEBEL (Chairman of the Drafting Committee) believed Mr. Yankov had correctly interpreted the intentions of the members of the Drafting Committee. The article spoke of a customary rule of international law "recognized as such", but did not stipulate how the rule had come to be recognized, since that was a matter falling outside the scope of the draft articles. The article assumed that an international organization was, or could be, bound by customary international law. There were many examples to support that assumption, for example, the advisory

[6] For consideration of the text initially submitted by the Special Rapporteur, see *Yearbook... 1977*, vol. I, pp. 145 and 146, 1442nd meeting, paras. 29-45.

opinion of the International Court of Justice in the *Reparation for injuries suffered in the service of the United Nations* case,[7] in which international organizations had been treated as having rights and obligations under customary international law, and the application of elements of the customary law of war to the United Nations peace-keeping forces.

72. Mr. VEROSTA had no hesitation in recommending the approval of the article which, in his view, was perfectly straightforward. It was also very necessary, since some of the customary law that came into existence after an international organization became a party to a treaty might well be applicable to that organization, and such a possibility should not be excluded. He thought there was no need to go into the question of the conduct of international organizations, since nothing had been said about the conduct of States.

73. The CHAIRMAN, noting that there were no further comments, proposed that the Commission should approve article 38.

It was so agreed.

The meeting rose at 1.05 p.m.

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

1513th MEETING

Thursday, 6 July 1978, at 10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

State responsibility (*continued*)* (A/CN.4/307 and Add.1, A/CN.4/L.271)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 23-26 as adopted by the Drafting Committee (A/CN.4/L.271). The articles read:

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24. Breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, independently of the fact that the effects of the act of the State may continue subsequently.

Article 25. Breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an internatioanl obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26. Time of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

2. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that articles 23, 24, 25 and 26 as adopted by the Drafting Committee were based on articles 23 and 24 proposed by the Special Rapporteur in his seventh report (A/CN.4/307 and Add.1, paras. 19 and 50), and subsequently referred to the Drafting Committee for consideration.

3. In wording article 23, the Drafting Committee had taken particular account of the relationship of tha article to articles 20 and 21,[1] which dealt respectively with obligations requiring the adoption of a particular course of conduct and with obligations requiring the achievement of a specified result. The purpose of the new formulation was to make it clear that article 23 constituted an application of article 21 to the case of a particular class of obligations of result that was dealt with in general terms in article 21. Thus, whereas the original text had provided that there was no breach unless "the event in question

* Resumed from the 1482nd meeting.

[1] For the text of the articles adopted so far by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 9 *et seq.*, doc. A/32/10, chap. II, sect. B, 1.