Document:-

A/CN.4/SR.1440

Summary record of the 1440th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1977, vol. I

affirmed the right of individuals not to suffer indiscriminate bombing, it would be remarkable if it did not also give rise to an obligation for individual pilots not to engage in such bombing. Questions of that kind had been dealt with at the Nuremburg trials, to which the Soviet Union had made a distinguished contribution. He reserved the right to comment on the text proposed by Mr. Ushakov when he had had an opportunity of studying it.

38. Mr. RIPHAGEN said that, as far as third parties were concerned, the Vienna Convention and the draft articles under consideration treated rights and obligations differently. It seemed to him, however, that the very particular rights and obligations deriving from a function exercised by an international organization in regard to the implementation of a treaty were inextricably interwoven and could not be distinguished in that manner. Neither the Vienna Convention nor the draft articles were altogether adequate in that respect. The further question arose whether an international organization not a party to a treaty, which accepted a particular function under that treaty, bound itself to exercise that function indefinitely. Of course, if the effects of treaties on third parties were based entirely on the concept of the collateral treaty, it was clear that the rights and obligations which arose could only be, so to speak, erased by a further collateral treaty. He was not sure, however, that that legal construction was always the correct one to apply to the functions of an international organization envisaged in a treaty between States or between States and other international organizations. For those reasons, he had certain doubts about the wording of article 35, paragraph 2, and, by extension, about the following articles, which dealt with the consequences of the acceptance of an obligation by a non-party organization.

39. Mr. CALLE Y CALLE said that the acceptance by a non-party organization of an obligation under a treaty might precede the conclusion of that treaty. For instance, the statute of an organization whose functions included arbitration might provide that the organization concerned would act as an arbitrator if two States agreed that it should do so. The Special Rapporteur might wish to cover such cases of prior acceptance of an obligation when drafting the final commentary to the article.

40. Mr. REUTER (Special Rapporteur) said that the case referred to by Mr. Calle y Calle should indeed be mentioned in the commentary. That question would come up again in connexion with article 36*bis*. If Mr. Ushakov had been referring to arbitration cases, he might be right in saying that there was no practice concerning collateral treaties, but he (the Special Rapporteur) had already given examples of other collateral treaties.

The meeting rose at 6 p.m.

1440th MEETING

Tuesday, 14 June 1977, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/285,[1] A/CN.4/290 and Add.1,[2] A/CN.4/298)

[Item 4 of the agenda]

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

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

1. Mr. REUTER (Special Rapporteur) said he noted that some members of the Commission more or less accepted, with certain reservations, the rule he had proposed in article 35, whereas others thought the article should deal only with cases which would not oblige the Commission to take a position, directly or indirectly, on the question whether a treaty between States, which was governed by the Vienna Convention,[4] could create obligations for international organizations.

2. He thought States ought to be informed of all the problems that arose and of all the options open to them, and therefore intended to submit to the Drafting Committee two versions of article 35, reflecting two points of view, one broad and the other more restrictive. The Drafting Committee would consider those two versions and send them back to the Commission, which would then decide which course to adopt. He hoped that the Commission would decide to transmit both versions to Governments (which would not prevent every member from expressing his opinion on them), for the aim should be not to impose a solution on Governments but to offer them the widest possible choice.

3. That method might also be applied to many other articles for, in dealing with difficult questions, it was well to propose a choice between two solutions. The problem was, in fact, very simple: international organizations were not States, and that would justify treating them differently from States; but the Commission was, *ex hypothesi*, considering cases in which international organizations were parties to treaties on the same footing as States. It was therefore necessary to seek a compromise between the principle of relative assimilation of international organizations to States and the fact that they were different from States.

4. Some members of the Commission had asked whether precedents could be cited in support of the rule in article 35. He had not cited many, but he would like to point out that, even if there were numerous precedents for that

[1] *Yearbook ... 1975*, vol. II, p. 25.

[2] *Yearbook ... 1976*, vol. II (Part One), p. 137.

[3] For text, see 1439th meeting, para. 24.

[4] See 1429th meeting, foot-note 4.

solution, States would not find that a compelling reason for choosing it. Governments might wish to reconsider their positions and they should be free to do so from a critical point of view.

5. In the absence of precedents, it was quite conceivable that two international organizations whose major activities included programmes of assistance to third world countries might conclude an assistance agreement containing an offer of an obligation to a third State, for instance, an agreement providing for a joint programme of training fellowships, under which a third State would be invited to receive trainees.

6. Some members of the Commission had pointed out that the Vienna Convention dealt with only two possible cases: the creation of rights without obligations and the creation of obligations without rights. But there were also cases in which a treaty between States could create both obligations and rights for a third State. What would the solution be in such a case? The United Nations Conference on the Law of Treaties had not gone into that question, but it seemed that the strictest régime should be applied. He thought that, in the case of a treaty between States and international organizations which created new functions for an international organization, that was to say, both rights and obligations, the strictest rules should also be applied.

7. Several members of the Commission had asked about the difference between the terms used in paragraph 1 of article 35, which related to States, and paragraph 2, which related to international organizations. In the first case, the obligation had to be expressly accepted "in writing" whereas, in the second, it had to be accepted "in an unambiguous manner and in accordance with the relevant rules of the organization". It was true that it was difficult to imagine how an international organization could accept an obligation otherwise than in writing. In the case of a State, the words "expressly ... in writing" meant a voluntary act expressing its acceptance in an entirely formal manner whereas, in the case of an international organization, the written expression of its acceptance might take another form. Indeed, it might be asked exactly what was meant by the words "international agreement concluded ... in written form": did they mean an agreement the instruments of which were in writing or an agreement of which there was some evidence in writing? The Conference on the Law of Treaties had not settled that question, and it would have arisen if an amendment proposed by Poland and the United States [5] had not attenuated the rule on the means of expressing consent to be bound by a treaty, which was subsequently set out in article 11 of the Vienna Convention. As one member of the Commission had pointed out, it was conceivable that an agreement might simply be established by a procès-verbal drawn up by the secretariat of the organization. If an organization accepted the offer made to it in a resolution adopted by its competent organ, could one speak of an instrument in writing? He did not think so, and that was why he had made a slight difference between acceptance by a State and acceptance by an international organization. However, he would not insist on that difference if the Commission found it unnecessary in the draft article and considered that a mention in the commentary would be sufficient.

8. As Mr. Calle y Calle had said at the previous meeting, the question arose whether a collateral agreement might not sometimes be an unwritten agreement. However, to introduce the notion of an unwritten agreement in the draft article would create a new problem, for that type of agreement would not come within the scope of the draft articles, which related only to agreements in written form. Nevertheless, if the Commission took up that idea, it would not be going farther than the Conference on the Law of Treaties, for in the Vienna Convention, which applied only to agreements in written form, the Conference had provided for the creation of rights by a procedure based on agreements which were not necessarily agreements in writing.

9. In conclusion, he explained that he would adopt the solution proposed by the Commission but would in any case submit two versions of article 35: one very strict and the other more flexible in differentiating between States and international organizations.

10. Mr. USHAKOV said he thought that, in each article, a distinction should be made between two categories of agreements, namely, agreements between one or more States and one or more international organizations and agreements between international organizations, in accordance with the definition contained in article 2, paragraph 1 (*a*).[6] He would therefore prefer the Special Rapporteur to deal separately with those two categories of agreements in article 35. In another connexion, he wondered whether, in article 35 and the following four articles, the Commission was concerned with codification or with the progressive development of international law. In his opinion, whereas articles 34 to 38 of the Vienna Convention could be regarded as codification, the corresponding articles which the Commission was now considering were more in the nature of progressive development. There was no doubt that the rules proposed in those articles were possible, but were they really necessary? That was the question the Commission had to answer.

11. Mr. AGO said that it was difficult to imagine that an international organization to which a treaty offered a right or an obligation would not express its acceptance of that right or obligation in writing. The Special Rapporteur had been thinking of certain cases, such as that of a joint arrangement to provide technical assistance to a State, in which acceptance would be expressed in an unambiguous manner, even if it was not in writing. He had also remarked that the distinction made in the Vienna Convention between the creation of rights and the creation of obligations was, in fact, theoretical because the same treaty very often provided for both rights and obligations for third subjects. But there was, nevertheless, a difference between those two cases for,

[5] *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. 124, document A/CONF.39/14, para. 104(a).

[6] See 1429th meeting, foot-note 3.

whereas it was in general enough for a right to be accepted in an unambiguous manner, it was more difficult to allow that the acceptance of an obligation need not be expressed in writing. He was none the less prepared to support the Special Rapporteur's proposals for both cases.

12. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 35 to the Drafting Committee.

It was so agreed.

ARTICLE 36 (Treaties providing for rights for non-party States or international organizations)

13. The CHAIRMAN invited the Special Rapporteur to introduce article 36, which read:

Article 36. Treaties providing for rights for non-party States or international organizations

1. Without prejudice to article 36*bis*, a right arises for a State not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to accord that right either to the non-party State or to a group of States to which it belongs, or to all States, and the non-party 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 an international organization not party to a treaty from a provision of that treaty if the parties to the treaty intend the provision to accord that right to the organization and the organization assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

3. A State or an organization exercising a right in accordance with the preceding paragraphs shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

14. Mr. REUTER (Special Rapporteur) said that article 36 related to the case in which a treaty created rights for a State or an international organization. Whereas in article 35, for the creation of obligations, he had formulated different rules for States and for international organizations, the rules he was proposing for the creation of rights, in article 36, were the same for States and for international organizations; they were the rules laid down for States in the Vienna Convention. It was thus essentially for drafting reasons that he had proposed separate paragraphs for States and for international organizations. On the one hand, he had considered that the reservation in article 36*bis* applied only to States and, on the other, that the reference "to a group of States ... or to all States", in the Vienna Convention text, could hardly be adapted to the case of international organizations. It was difficult in fact to see how a treaty between international organizations or between States and international organizations could create rights for all international organizations. Perhaps, however, he should have retained the idea of a group of international organizations, which appeared in the practice, in particular in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[7] The organs of the United Nations were, in fact, a group of international organizations of a universal character. He had preferred a more cautious solution, but he was prepared to reconsider his position if the Commission so desired.

15. Mr. USHAKOV pointed out that the question of the relationship between the draft articles and the Vienna Convention had not yet been settled. He considered, however, that, if the Commission intended to adopt more liberal rules than those of the Vienna Convention, it would be logical for it to draft an additional protocol to that Convention and to supplement articles 34 to 38 by dealing with the case in which a treaty between States created obligations and rights for an international organization.

16. With regard to article 36, paragraph 2, he thought the assent of an international organization could not be presumed, even in the case of a right, since acceptance of a right could cause difficulties and it required a political decision. To accept a right, an international organization had to manifest its will by means of a collective decision taken by a representative organ. Thus, an organization's assent could not be presumed until the competent organ of that organization had given it expressly. If the assent of the organization to a right was presumed, the member States would be required to accept not only the right but also the obligations resulting from it, for article 36, paragraph 3, provided that "A State or an organization exercising a right in accordance with the preceding paragraphs shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty". Such a presumption would be contrary to the organization's constituent instrument, which laid down rules for the adoption of certain decisions. An international organization was bound by its constituent instrument and could not undertake to amend it by an agreement concluded with a State or with another international organization. Unlike a sovereign State, which was free to accept rights and obligations and to enter into commitments both at the internal level and at the international level, an organization had to comply with the decisions taken by its organs in accordance with its rules of procedure. Consequently, he was not sure that it was possible to lay down the rules proposed in article 36, paragraphs 2 and 3.

17. Mr. FRANCIS observed that, whereas article 35 provided that obligations for non-party States or international organizations must be accepted expressly and in writing in the case of States and in an unambiguous manner in the case of organizations, article 36, relating to rights for non-parties, was based on the notion of implicit assent. He found that approach reasonable, and concurred with the Special Rapporteur's decision to prepare separate provisions for non-party States and non-party international organizations.

18. With regard to paragraph 2, he wondered whether Mr. Ushakov's reservations might not be met by stipulating that an international organization's presumed assent to be vested with a right must be in accordance with the rules of that organization. Paragraph 3 provided further evidence that even rights were accompanied obliquely by obligations; to exercise a right arising under paragraph 1 or paragraph 2, non-party States or organizations were required—reasonably, in his opinion—to comply with the conditions for the exercise of that right "provided for in the treaty or established in conformity

[7] See 1435th meeting, foot-note 10.

with the treaty". He could accept draft article 36 as it stood.

19. Mr. SCHWEBEL said that, while he found article 36 generally acceptable, he was inclined to favour the deletion of the second sentence in paragraph 2, though not for quite the same reasons as those put forward by Mr. Ushakov. International organizations and their internal organs took decisions by consensus or by the vote of a majority of their members, as prescribed in their constituent instruments or rules of procedure. In the case of the United Nations General Assembly, for instance, Article 18 of the Charter provided that decisions on important questions should be made by a two-thirds majority of the members present and voting and decisions on other questions by a majority of the members present and voting. He was uneasy about the prospect of shifting the burden of proof by establishing a presumption that an international organization assented to a right so long as the contrary was not indicated. How could it be determined, in the case of the General Assembly, that the necessary majority of members tacitly favoured the acceptance of a particular right? The problem would be even more acute in the case of the Security Council. His remarks would also apply, *mutatis mutandis*, to other international organizations. Consequently, while acknowledging that consistency of treatment as between States and international organizations had a certain appeal, he was inclined to support Mr. Ushakov's recommendations.

20. Mr. SUCHARITKUL said that the principles stated in articles 35 and 36 were more or less in keeping with contemporary legal practice in south-east Asia. That practice was very abundant because there was a wide range of intergovernmental organizations in that region, several of which, such as ESCAP, ASEAN and the Ministerial Conference for the Economic Development of South-East Asia, had their headquarters in Thailand. Some of those organizations had well-established rules but others did not yet have a constitution. He thought that fact should be taken into account.

21. He also wished to draw the Commission's attention to the forms which the absence of consent could take. For example, in the case of the Fisheries Development Centre, which had been set up by the Ministerial Conference for the Economic Development of South-East Asia and for which the Japanese Government had provided a ship, the absence of the consent of the Burmese Government, which, although it took part in the Conference of Ministers, was not a party to the agreement establishing the Centre, had taken the form of seizing the ship, which had been sailing near its coast. It could thus be seen that the practice of States in that matter was still far from settled.

22. Mr. DADZIE said that, in view of the very close similarities between the rules laid down in the draft articles and those prescribed in the Vienna Convention, he believed that, when the time came to decide what form the provisions under consideration should take, the Commission should give serious consideration to Mr. Šahović's earlier suggestion that the most appropriate type of instrument to adopt would be a protocol to the Vienna Convention.[8] In a sense, the Commission was unnecessarily duplicating the work already done in 1969. Whenever the rules governing any particular aspect of the present topic were the same as those laid down in the Vienna Convention, it would be sufficient to state that, in that particular case, the rules of the Vienna Convention applied.

23. As to article 36, he had some difficulty in accepting the principle of the presumption of assent to a right by a non-party State or international organization in the absence of any indication to the contrary. Pressure of work often made it impossible for States or international organizations to be fully conversant with all matters of interest to them. In some cases, it might simply be a question of *timeo Danaos et dona ferentes*. He believed that it would be going too far to adopt the rule proposed, which might be dangerous to international relations. It would be better to leave no room for misunderstanding or doubts. Those considerations also applied to paragraph 3, since it was necessary to determine precisely whether a right had been accepted before providing for its exercise. He would be more disposed to accept article 36 if the last sentence of paragraph 1 and of paragraph 2 were deleted or if it was provided that a right must be accepted expressly.

24. Mr. CALLE Y CALLE observed that under article 36 a State or an international organization not a party to a treaty could choose to avail itself of a right arising from a provision of that treaty. There were two ways in which that option might be exercised: either the treaty might require non-parties to accept the right expressly, or the option might remain open in the absence of any indication to the contrary. On that point, he saw no difficulty in retaining the philosophy and terminology of the corresponding article of the Vienna Convention, according to which the assent of a third State to be vested with a right need not necessarily be expressed, but could be presumed. Of course, in the case of an international organization, some procedure would have to be set in motion to ensure the exercise of the right, but that was a purely internal matter which concerned only the organization. On the other hand, he thought that paragraphs 1 and 2 could be merged into a single provision, since the situation of non-party international organizations was practically the same as that of third States in so far as the granting of rights was concerned. He could subscribe to paragraph 3, which embodied the principle laid down in paragraph 2 of the corresponding article of the Vienna Convention, that a third party benefiting from a right must exercise it in conformity with the conditions laid down in the treaty. In his opinion, the Commission should keep as close as possible to the wording of article 36 of the Vienna Convention.

25. Mr. RIPHAGEN, referring to the principle of the presumption of assent in the absence of any indication to the contrary, cited the example of the treaty between the French Republic and the Federal Republic of Germany relating to the Saar (1956), which had provided that certain decisions concerning the administration of that territory should be taken by the Council of the Western European Union according to a specific system of voting, which was admissible under the constituent instrument of that international organization. If the

[8] 1430th meeting, para. 24.

provisions of paragraphs 2 and 3 of draft article 36 had applied to that treaty, it would not have been necessary for the organization to take any decision at all, since it would have been bound in the exercise of its powers by the provisions of the treaty. In fact, the members of the Western European Union had made an agreement *inter se* accepting the functions and system of voting provided for in the treaty between France and the Federal Republic of Germany. It seemed to him that that example tended to bear out the point made by Mr. Ushakov and Mr. Schwebel. It was perhaps desirable that, in the case of international organizations, assent should not be presumed in the absence of any indication to the contrary, particularly in view of the necessary consequence attached to that presumed assent in paragraph 3.

26. Mr. REUTER (Special Rapporteur), summing up the discussion, noted that article 36 had attracted the same comments as article 35, namely, that the Commission should not take up problems it could not solve, and that it should not take a position, even indirectly, on the question whether treaties concluded between States could create rights or obligations for non-party organizations. As in the case of article 35, it would thus be advisable to provide two alternatives for article 36, one showing that that difficulty could be overcome and the other that it could not or should not be.

27. The majority of the members of the Commission seemed to be in favour of deleting the second sentence of paragraph 2. While not expressing any opinion on the need to do so, he would comply with their wish.

28. The wording of paragraph 3 had been considered rather harsh. It could be interpreted to mean that a State or an international organization could exercise a right contrary to the rules of the constituent instrument of the organization. Mr. Francis had therefore proposed wording which could be considered by the Drafting Committee and which was intended to make it clear that a right could be exercised only in accordance with the constitutional rules of the organization or even of the State in question.

29. Lastly, he had been asked to recast article 36 so as to make a clear distinction between the two main categories of treaties which the Commission was considering. He would also act on that suggestion, though he hoped the Commission would subsequently revert to simpler wording if a simplication proved possible.

30. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 36 to the Drafting Committee.

It was so agreed.

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

31. The CHAIRMAN invited the Special Rapporteur to introduce draft article 36*bis*, which read:

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

1. A treaty concluded by an international organization gives 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 gives such effects to the treaty.

2. When, on account of the subject-matter of a treaty concluded by an international organization and the assignment of the areas of competence involved in that subject-matter between the organization and its member States, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member State to:

(i) rights which the member State is presumed to accept, in the absence of any indication of intention to the contrary;

(ii) obligations when the member State accepts them, even implicitly.

32. Mr. REUTER (Special Rapporteur) said that article 36*bis* attempted to answer the following question: in the case of treaties concluded by an international organization, to what extent could it be considered that it was the organization which was a party to such treaties and not its member States? In fact, the commitments assumed by an international organization did sometimes have effects for its member States. Legally, that was a very delicate question, and it had been in order to give the members of the Commission a more complete perception of all the problems raised by the topic under consideration that he had drafted article 36*bis*. The two paragraphs of that article dealt with different cases.

33. The first was that in which the constituent instrument of an international organization which was a party to a treaty provided that the treaties concluded by that organization had legal effects for its member States. That case was relatively simple and had at least one precedent, that of EEC. When a treaty concluded by an international organization had legal effects for its member States, there appeared to be a simple internal solution peculiar to that organization. That solution might be found in one organization but not in another. It was nevertheless important to determine whether that purely internal situation could have the effect of creating rights or obligations for the parties to the treaty concluded by the international organization.

34. There might be some hesitation in replying to that question, not only for legal reasons but also for reasons of legislative policy: was it really in the interests of the co-contractors of an international organization to be certain that the States members of that organization were bound by the treaty it had concluded? From the legal point of view, to what extent could a provision which was only a provision of the internal law of the organization be invoked against those States? In answering the latter question, it must first be recognized that States or international organizations which agreed to contract with an international organization were usually familiar with its constituent instrument. At the time of concluding the treaty, they could therefore expect the agreement concluded by the organization to give rise to rights and obligations for its member States and for themselves. As one member of the Commission had observed, they assented thereto in advance; they knew the situation and accepted it. If the Commission found that legal construction too questionable, however, he would be willing to discard the first case.

35. The second, which was covered by paragraph 2 of article 36*bis*, was not based on the constituent instrument of the organization but on the intention of the parties to a treaty concluded by an organization to create rights or obligations for States members of that organization. To establish that intention, it was enough to refer to the subject-matter of the treaty and to the assignment of powers between the organization and its member States. It was reasonable to believe that the States which contracted with the international organization made a kind of offer to its member States. That hypothesis was much more delicate than the first one because member States had never indicated that they accepted such an offer, so that their interests ought to be protected. That was the purpose of paragraph 2, subparagraphs (i) and (ii), which assumed that member States knew the agreements concluded by the organization. If such agreements created rights for them, they must be granted the faculty of not accepting those rights. Obligations were also subject to their acceptance. To illustrate that case, he referred to a treaty concluded between EEC and the United States, relating to fishing in the exclusive fishing zone established by that country. Formally, that treaty was binding only on EEC and the United States, but there was necessarily a division of competence, relating to the subject-matter of the treaty, between EEC and its member States. In the light of the treaty establishing EEC, it could be considered that the treaty it had concluded with the United States was binding on its member States, as provided in paragraph 1 of the article under consideration. Those States might find the obligations arising from the treaty invoked against them, just as they could invoke the rights arising from the treaty, whether they had expressly accepted them or not.

36. Mr. CALLE Y CALLE said that article 36*bis* was plainly the nucleus of the whole set of draft articles. International organizations, as the Commission defined them, were composed of States, which could have two kinds of relationship to a treaty concluded by an organization of which they were members. In one case, they would not themselves be parties to the treaty but members of the entity which assumed the rights and obligations of a party; in the other case, they would be parties independently of the organization. The Commission had already studied a number of articles relating to the effects of a treaty concluded by an international organization on its member States. For example, it could be seen from article 26 [9] that such a treaty would be binding not only on the organization as a collective entity but also, indirectly, on its members; and from article 18 [10] that those members would be obliged to refrain from acts which would defeat the object and purpose of such a treaty. States members of an international organization could not, however, be parties to a treaty concluded by that organization unless they had participated as States in the negotiation of the instrument, as in the case of mixed agreements, or unless the organization had concluded the treaty not on its own behalf but as the specifically appointed representative of its members.

37. With regard to the text of the article, the rule stated in paragraph 1 was logical and supported by precedents. The only change he would suggest to that paragraph would be to reserve the phrase "rights and obligations", so as to follow the order in which those matters had been discussed in articles 35 and 36. The rule stated in paragraph 2 of the article was also acceptable.

38. Mr. USHAKOV said that he did not see why article 36*bis* should be included in the section dealing with the effects of treaties concluded by international organizations on non-party States or international organizations. The questions with which the article was concerned could arise in connexion with any article in the draft. Those questions were, first, the competence of an international organization to act on behalf of its member States and, second, whether a treaty concluded by an international organization was binding both on the organization and on its member States.

39. Personally, he had the impression that the entire draft was based on the idea that an international organization, when it concluded an agreement, was acting as an organization, as a separate subject of international law, and that any treaty to which it was a party was binding on it as an organization. The case in which an international organization concluded a treaty on behalf of its member States was entirely different; it was a case of representation, with which the Commission was not concerned.

40. Referring to the example given by the Special Rapporteur, he observed that the Soviet Union had also concluded an agreement with EEC on fishing in certain zones. There was no doubt that, in such cases, EEC was acting on behalf of its member States within the limits of its competence. That situation raised many delicate new problems, which did not yet appear to have been studied by theorists. Moreover, problems of responsibility could arise when it had to be determined whether an organization was solely responsible, whether its member States were solely responsible or whether the organization and its member States were jointly responsible.

41. The problems dealt with in article 36*bis* could certainly arise, but they did not concern the effects that a treaty to which an international organization was a party might produce for a third State or a third organization. The article related to commitments assumed directly by an international organization representing its member States, not commitments resulting from a collateral agreement. The mere fact that paragraph 1 referred to the constituent instrument of the organization showed that no collateral agreement was involved and that the States members of the organization were not third States. The problems covered by article 36*bis* warranted examination but they should form the subject of a provision in the general part of the draft.

42. Mr. REUTER (Special Rapporteur), referring to the comments made by Mr. Calle y Calle and Mr. Ushakov, said that article 36*bis* did not relate to the case in which an international organization represented its member States when concluding a treaty, for in that case the organization would not be a party to the treaty, which would be concluded between its member States and their co-contractors. Also outside the scope of the

[9] 1435th meeting, para. 33.

[10] See 1429th meeting, foot-note 3.

article were cases in which one or more States were represented by another State. For example, the members of the European Coal and Steel Community had sometimes authorized the Community to conclude a treaty on their behalf, when the Community was not competent to present its own views on certain matters. Cases of that kind, however, were completely outside the subject under consideration. Just as the United Nations Conference on the Law of Treaties had deliberately left aside all questions of representation, the Commission had already decided not to deal with those questions in the draft articles it was formulating.

43. What he had had in mind in article 36*bis*, paragraph 1, was, for example, the case in which an international organization, acting as such, entered into a commitment with third States. If the constituent instrument of the organization provided that its member States were bound by the treaties it concluded, could it be considered, in the light of such a provision, that the member States were third parties in relation to the organization? If that idea was thought to be exaggerated, it must be rejected, but if it was not, it would have to be dealt with, as he had attempted to do in article 36*bis*.

44. A question of that kind had had to be settled in the nineteenth century, when the European Commission for the Control of the Danube had wished to raise loans. The difficulty had been that a loan was more easily granted to the member States of an international organization than to the organization itself, unless it had its own funds. At the present time, some organizations did have their own funds, so that loan agreements could be concluded direct with an international organization, for example, between a State and an international bank. If the lender State was satisfied with such a treaty, the member States of the organization were regarded as third parties. In pure law, such treaties were conceivable, though mixed agreements were more common. If article 36*bis* did not cover that kind of treaty, it would clearly have no place among the articles relating to third parties.

45. Lastly, the Commission was not called upon to consider questions of responsibility at that time, but Mr. Calle y Calle had been right in saying that State responsibility could have a basis that went beyond the scope of the law of treaties.

46. Mr. USHAKOV, referring to the treaties concluded by EEC with the United States and the Soviet Union respectively, asked whether those treaties had to be confirmed by each State member of the Community and whether the member States were considered as third parties until they had given their confirmation, although the treaty establishing EEC provided that agreements concluded by the Community were binding on its member States.

47. Mr. REUTER (Special Rapporteur) said that the agreement concluded between EEC and the United States had been published in the *Official Journal of the European Communities* [11] and in *International Legal Materials*,[12] but he was not familiar with the agreement concluded between EEC and the Soviet Union. The agreement between EEC and the United States had not been concluded on behalf of the member States of the Community and did not indicate whether the member States were required to confirm it formally. According to the treaty establishing the Community, the member States were bound with respect to the Community. It was only going one step further therefore to conclude that they were bound with respect to the United States, which could require them to perform all the acts within their competence for which the treaty provided. For example, it would be inconceivable for a vessel flying the French flag to be boarded by the United States authorities for infringing the rules laid down in the treaty and for the French Government to claim that France was a third State in relation to that treaty. It was precisely in order to prevent such a result that he had tried to provide legal machinery in article 36*bis*. The fact remained, however, that for the time being the case dealt with in paragraph 1 of that article was peculiar to EEC. In a treaty concluded between CMEA and Finland, it was specified that the text had been previously approved by the States members of CMEA. However, no such statement appeared in the text of the agreement concluded between EEC and the United States.

The meeting rose at 1 p.m.

[11] Agreement between the Government of the United States of America and the European Economic Community concerning fisheries off the coasts of the United States, *Official Journal of the European Communities* (Luxemburg), 9 June 1977, vol. 20, No. L141, p. 2.

[12] *International Legal Materials* (Washington, D.C.), vol. XVI, No. 2, March 1977, p. 257.

1441st MEETING

Wednesday, 15 June 1977, at 10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/285,[1] A/CN.4/290 and Add.1,[2] A/CN.4/298)

[Item 4 of the agenda]

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

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

[1] *Yearbook ... 1975*, vol. II, p. 25.

[2] *Yearbook ... 1976*, vol. II (Part One), p. 137.

[3] For text, see 1440th meeting, para. 31.