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**A/CN.4/SR.1441**

**Summary record of the 1441st 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:-

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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.

1. Mr. RIPHAGEN said that, if the Commission wished its draft articles to include a section on the effects of treaties with respect to third States, it seemed inevitable that, in dealing with the question of international organizations as parties to treaties, it should lay down rules governing the legal position of States members of those organizations in relation to the treaties in question. The Commission had recognized, as the basis for its work, that international organizations were or could be subjects of international law, and it must therefore also recognize that they could have that status independently of their member States. Consequently, it could not avoid the questions whether, and to what extent, the States members of an international organization should be treated as third parties in relation to a treaty to which the organization was a party. Since those were the questions dealt with in article 36*bis*, that article constituted an essential part of the draft.

2. The Special Rapporteur had said that, when an international organization concluded a treaty with a State or another organization, it did so in its own name. Consequently, it was to the treaty that attention must first be devoted in each case in order to assess its legal effects on any third parties, including States members of the organization. The treaties of an international organization were often intended to create rights and obligations for the organization only, as distinct from its member States; such a treaty might, for example, refer to matters which only the organization itself could handle, such as the exchange of information on its activities or the question of participation in its work as an observer. States members of an organization which concluded such a treaty were, so to speak, "in the second row" in relation to the instrument, and they could safely be said to be bound by it for they had, at least, a duty to place no obstacles in the way of its implementation by the organization.

3. In other types of treaties concluded by an international organization—those dealt with in article 36*bis*—the role of the member States was more active. For such treaties to exist, the international organization must have the capacity to conclude agreements in fields other than that in which it was completely autonomous in relation to its member States; and the question therefore arose whether the legal effect of those treaties was such as directly to bind the States members of the organization to exercise rights or perform obligations with respect to the organization's co-contractor. As the Special Rapporteur had said, it was easy to accept that such direct rights and obligations did arise when the organization's constituent instrument provided that the members of the organization were bound by the treaty; that explained the rule laid down in article 36*bis*, paragraph 1. However, even in that situation, it could be claimed that the constituent instrument contained no more an offer to the entity with which the organization sought to conclude a treaty, and that it was primarily for that entity and the organization to define the effect they wished the treaty to have. It might be that an organization was fully competent to conclude a treaty binding itself and its member States, but that both it and the entity with which the treaty was to be concluded, or one of them, wished to limit the relationship resulting from the treaty to the organization and the co-contracting entity. He thought the rule stated in article 36*bis*, paragraph 1, should be redrafted to take account of those possibilities,

4. With regard to paragraph 2 of the article, he agreed with the Special Rapporteur that it was reasonable to presume that, if an international organization concluded a treaty with an external entity, that entity would wish for an assurance that the object of the treaty would not be frustrated because some aspects of its subject-matter were perhaps not within the exclusive competence of the organization. In such a situation, it was clearly in the interest of full application of the *pacta sunt servanda* rule to facilitate the creation of direct rights or obligations for the States members of the organization concerned. But since the organization would presumably be unable to create such rights or obligations itself, its member States must be given the right to opt out of them. That was the purpose of paragraph 2 of article 36*bis*, and he fully approved of it. However, he believed that the rights and obligations to which the paragraph referred should be placed on an equal footing and that each of the members of the organization should be permitted to accept or reject them only as a complete package. He agreed that acceptance of the package could be presumed, but thought that rejection of it should be explicit and timely.

5. Mr. ŠAHOVIĆ said that the Special Rapporteur had been right to devote an article to the effects of a treaty concluded by an international organization with respect to States members of that organization—a matter which had already been frequently raised during the discussions. The question was so fundamental that it seemed relevant not only to the articles concerning third States and organizations but to the whole draft. Generally speaking, he approved of the solutions proposed by the Special Rapporteur, but he wished to ask him a few questions so that he might clarify his position or modify the expression of his ideas on certain points.

6. The importance of article 36*bis* necessarily raised the question of its place in the draft. He was not sure that all the aspects of the problem should be dealt with in section 4 of part III. In particular, paragraph 1 stated a rule which derived from the nature of the constituent instruments of international organizations and was so obvious that it might be better to refer to it in the commentary. It could also be mentioned in the commentary to article 6 [4] or might even lead to definitions being included in article 2 of the terms "third organization" and "third State" as understood in the draft.

7. On the other hand, paragraph 2 of article 36*bis* was certainly necessary. It concerned a very real situation, which seemed likely to arise more and more often in the future. Nevertheless, it was open to question whether the content of that paragraph really belonged in a section of the draft dealing with the effects of treaties on non-party States or organizations.

8. With regard to drafting, it would be advisable to clarify the meaning of the expression "even implicitly",

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

which appeared in paragraph 2 (ii). In other articles, such as article 35, the Special Rapporteur had used a different formula, which was more precise. Even if the Special Rapporteur's intention in using different expressions was to refer to different conditions, it might perhaps be useful to expand the phrase "even implicitly" or make its meaning more precise.

9. Mr. SUCHARITKUL said that, in view of the practice of certain intergovernmental organizations in south-east Asia, he was convinced that article 36*bis* was useful and necessary. In paragraph 1, the Special Rapporteur referred to the "constituent instrument" of an international organization, which he saw as a general instrument. But the constituent instruments of international organizations possessing legal personality varied as to generality. It was not uncommon for the constituent instrument of an international organization to lack the precise nature of a general instrument at the outset. That did not apply to the Charter of the United Nations, but it was true of the Treaty of Rome, which had acquired its general character in several stages. As to the Bangkok Declaration of 8 August 1967, which had established ASEAN, that instrument did not contain any entirely general provisions. It was also possible for an international organization to have a succession of evolutive constituent instruments. It was to take account of those situations that the Special Rapporteur had included in article 36*bis* a second paragraph which seemed indispensable.

10. With regard to the practice of ASEAN, he pointed out that in 1968 that Association had concluded an agreement with ECAFE, which was now known as ESCAP. That Commission had undertaken to appoint a group of economists to determine the fields in which ASEAN could profitably engage in economic co-operation. The agreement had been concluded by ASEAN itself, so that its member States had not been parties. Nevertheless, those States had accepted the rights and obligations deriving from the agreement—the situation covered by article 36*bis*, paragraph 2—and had undertaken, for example, to provide the group of experts with the facilities necessary for its work. That situation had recurred several times, with the conclusion of agreements between ASEAN and various Governments in Asia or the Pacific. Since the time of the Bangkok Declaration, the constituent instrument of ASEAN had constantly evolved as and when conferences had been held at different levels.

11. Mr. FRANCIS said that article 36*bis* covered a difficult and twilight area of international law. It would be hard for the Commission to be sure that it was anticipating in the article all the situations which needed to be covered, but it must be bold and imaginative.

12. He was in general agreement with the conclusions of the article but, on reading its first paragraph, he felt bound to ask whether the subject of that provision was the direct effect of a treaty concluded by an international organization on the relationship between the organization and its member States, or the effect of the treaty on the constituent instrument of that organization, or yet again the effect of the constituent instrument on the treaty. As he saw it, none of those questions could be answered in direct terms, and the situation to which the paragraph gave rise was in fact a mixed and entirely new one as far as treaty relationships were concerned. On the other hand, the fears he had expressed concerning the possible need to modify article 34 [5] had been allayed by the Special Rapporteur's introduction of article 36*bis*, [6] in so far as the Special Rapporteur had shown that States members of an international organization could agree to accept rights and obligations through the organization's constituent instrument.

13. However, problems also arose in regard to article 34 as a result of the provisions of article 36*bis*, paragraph 2. The emphasis in that paragraph was apparently on intention, but was it the element of consent or an element of what might be termed "estoppel", which was the predominant feature of that intention? If it was the former, the rule in article 34 would remain inviolate but, if it was the latter, article 34 would need to be amended by some reference to that fact.

14. The stipulation that the effects of a treaty concluded by an international organization would arise only if the constituent instrument of that organization "expressly" so provided seemed unduly restrictive. For example, it was clear from Article 105 of the Charter of the United Nations that a convention concluded by the United Nations concerning privileges and immunities for itself, its officials or the representatives of its Members, would be binding on the States Members of the Organization if it was proposed by the General Assembly. The situation would, however, be less clear if a treaty of that kind was proposed by the Secretary-General, a procedure which was not "expressly" provided for in the Charter. Or it might be that, in order better to afford mutual assistance in carrying out the measures decided upon by the Security Council (Article 49 of the Charter), certain States Members of the United Nations entered into a treaty with the Organization. If the action decided on by the Security Council was cancelled as unacceptable and the Organization refused to pay the States with which it had concluded the treaty the expenses they had incurred, should those States be deprived of recourse against the members of the Security Council simply because the Charter contained no express reference to such an agreement as they had concluded? Similarly, a regional agency might be called on by the Security Council, acting under Article 53 of the Charter, to take enforcement action and might conclude a treaty with the United Nations for that purpose. If the States Members of the United Nations subsequently decided against the action agreed by the Security Council and therefore withheld payment to the regional agency, should it be deprived of recourse against them because there was no express reference in the Charter to the kind of agreement it had concluded?

15. Mr. USHAKOV said the discussion had shown that, by article 36*bis*, which concerned the relations between international organizations and their member States, the Commission would in fact be imposing an interpretation of the constituent instruments of those organizations. That interpretation would constitute an interference in the

[5] 1439th meeting, para. 19.

[6] 1440th meeting, paras. 32 *et seq.*

internal affairs of international organizations. Interpretation of their constituent instruments was not a matter for the Commission or any State, but for the organizations themselves. Any interpretation by the Commission of the Charter of the United Nations or of the constituent instruments of regional economic, political or military organizations was quite inadmissible. If the Commission persisted in its present course, it might just as well draft a provision imposing an interpretation of the constitution of federal States in regard to the relations between the central State and the members of the federation.

16. The interpretation entailed by article 36*bis* was confined to the effects which a treaty concluded by an international organization might have for the States members of that organization, but it related both to the constituent instrument of the organization, as provided in paragraph 1, and to the assignment of areas of competence between the organization and its member States, as provided in paragraph 2. In his view, those two matters were both governed solely by the internal order of the organization. Furthermore, article 36*bis* referred not so much to treaties concluded between States and international organizations or between international organizations, as to agreements constituting international organizations. It had, however, been firmly established, for example, at the United Nations Conference on International Organization (San Francisco), that, where the Charter of the United Nations had to be interpreted, only a unanimous interpretation by a United Nations organ would be authentic. Legal theory was equally categorical on that point.

17. Even if there were contradictions in a treaty to which both an organization and its member States were parties—for example, in regard to any reservations which might have been formulated—it was not for the Commission to lay down rules to settle questions which arose within the internal order of the organization. Consequently, he was entirely opposed to article 36*bis*.

18. Mr. TABIBI agreed with Mr. Ushakov that there would be cases in which it would be very difficult to apply the rules laid down in article 36*bis*, for the situation with regard to the effects, for their member States, of treaties concluded by international organizations was very complex and constantly evolving. The nature, membership and constituent instruments of international organizations varied widely, and so did their practice in regard to treaties. Even where an organization's constituent instrument clearly gave it treaty-making power, there could be grey areas in which its competence was uncertain or the implementation of a treaty required special arrangements with individual countries. Notwithstanding those complications, there was a need for rules of the type laid down in article 36*bis*, for the conclusion of treaties by international organizations was an important part of current international life. Moreover, since the Commission had already accepted articles 35 and 36, it needed to add to them the safeguard provided in article 36*bis*.

19. In the operation of the type of treaty the Commission was now studying, the principle of good faith was naturally of great importance for all concerned: the international organization and its member States and, above all, the organization's co-contractor. It was, therefore, essential to provide machinery for the settlement of disputes in the event of a breach of that principle.

20. Mr. DADZIE said he fully associated himself with Mr. Ushakov's remarks, since the interpretation of the constituent instrument of an international organization and the assignment of areas of competence between the organization and its member States were clearly matters for them, not the Commission, to settle. If the Commission decided to retain article 36*bis*, he would prefer it to provide for some more specific method of determining a State's acceptance of rights than that set out in paragraph 2 (i).

21. Mr. QUENTIN-BAXTER thanked the Special Rapporteur for his very full commentary to article 36*bis*, which he had found particularly illuminating and helpful. The article could be viewed in two quite different lights: either as providing for a very special case—so special, in fact, that it might more appropriately be dealt with in the commentary than in the body of the draft articles—or as a genuine glimpse of the reality of the future. He inclined towards the latter view.

22. He found it easy to follow the logic of Mr. Ushakov's position when, for instance, he said that the Commission should not go beyond the provisions of the Vienna Convention.[7] The only response to that point was a pragmatic one; after dispensing with subjects of international law other than States in article 3 of that Convention, the United Nations Conference on the Law of Treaties had no longer felt any need to concern itself with the existence of international organizations, except in regard to the very specific matter of constituent instruments which themselves established such organizations. On the other hand, there were other aspects of Mr. Ushakov's position which he had greater difficulty in understanding.

23. The Commission had only two basic insights to guide it in its deliberations on the subject. The first was the fact, which had emerged clearly from its discussion of the question of reservations, that an international organization party to a treaty involving States could have one of two entirely different roles. An international organization might have a special role quite different from that of any State participating in the treaty. Such would be the position of the Authority which it was proposed to establish under the future convention on the law of the sea. Although such a case might give rise to technical problems, it fitted within the concept which had marked the starting-point of the Commission's work, namely, that international organizations were the creatures or servants of States. It was also necessary, however, to provide for the case in which an international organization participated in the negotiation of a treaty on a footing not radically different from that of States and had the same interest as States. In such a case, if States and international organizations tackled the same problems, negotiated with each other and recognized each other as subjects of international law, where could the difference between States and international organizations be said to reside? To say that States were sovereign whereas inter-

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

national organizations were not was a somewhat unhelpful generalization, and the concept of "sovereignty" had many imprecise overtones. In his view—and that was the second of the two insights to which he had referred—such organizations could be said to differ from States in their capacity to undertake and to fulfil obligations.

24. It surely followed from that conclusion that, in examining a provision such as article 36*bis*, the Commission could not draw an analogy between the constitution of a State and the constituent instrument of an international organization. A State was presumed to have full capacity to enter into obligations, and any defect of its legislation which impaired that capacity was a problem for the State itself to solve. In the case of an international organization, the reverse situation obtained; such an organization might be said to bring its constitution with it as part of its credentials for taking part in negotiations. Thus, even when international organizations and States represented the same kind of interest and had the same sort of stake in the outcome of negotiations, their basic capacity to enter into such negotiations was different. That difference had caused the Commission some difficulty in its consideration of article 36*bis* and of preceding articles. In the case of article 27, for instance, it had been thought necessary to establish a rule for international organizations parallel to the rule laid down for States, so that neither States nor international organizations could invoke weaknesses of their internal law or their internal rules, respectively, to excuse their failure to comply with treaty obligations. Thus, while the capacity of an international organization to enter into treaty commitments was limited by its constituent instrument or internal rules, a State was entitled to expect that the organization would not invoke that instrument or those rules to justify its failure to perform an obligation. There was thus a fine balance to be struck.

25. In the case of article 36*bis*, it was necessary to bear in mind that there already existed international organizations which acted in place of States and had the same interests as States in particular contexts. The most striking example was, of course, EEC, whose members were quite deliberately transferring elements of their sovereignty to a supranational body. The Community was enough of a reality to make it necessary for most non-EEC States to accredit diplomatic missions to the headquarters of the Community itself, in addition to being represented in the individual States members of the Community. In many cases, negotiations with non-EEC States were conducted both by the Community as such and by the individual member States. The case of EEC raised another aspect of the question of capacity, namely, the ability to fulfil obligations. In the case of EEC as in that of customs unions, there was a division between legislative power and the power to discharge obligations.

26. Considering that reality, which was reflected in a practical and reasonable form in draft article 36*bis*, he believed that the Commission had a duty to facilitate the dialogue between States and international organizations in circumstances of that kind. He also believed that it was right, instead of placing general reliance on "the rules of the organization", to refer more strictly to the constituent instrument of the organization and to the express provisions of that instrument. Where such provisions were complied with and the organization presented its constituent instrument as part of its credentials, he saw no reason why negotiations for a treaty should not take place and why the resultant treaty should not be applied. In other cases where the indications were not so clear, the broader rule set out in paragraph 2 would apply, reference being made to the nature of the subject-matter and the understandings on the basis of which the parties to a treaty had contracted. While he could appreciate that the matter under discussion raised far-reaching theoretical and technical problems, he believed that the Commission would be right to take account of actual situations and to reflect them in its draft articles, so as to encourage the formulation of rules that would facilitate dealings between States and international organizations in the future.

27. Mr. CALLE Y CALLE said that he regarded article 36*bis* as a keystone of the draft. The case of a treaty to which an international organization was a party raised a technical problem regarding the effects of that treaty with respect to States members of the organization concerned. Those member States were not individual parties to the treaty; at the same time, however, they were not third States for, if they were, it would be necessary for them to consent to the assumption of obligations or rights on an individual basis and in the specific form provided for in articles 34, 35 and 36. In such a case, a State member of the organization concerned could not be regarded as alien to a treaty concluded by the organization in the exercise of the functions pertaining to its composite personality, especially when, by virtue of the constituent instrument of the organization, member States gave their prior consent to be bound by the treaties it concluded. It could thus be said that member States were collectively parties to the treaty.

28. As he saw it, article 36*bis* followed naturally from article 26, which laid down the *pacta sunt servanda* rule. When a party to a treaty was a State, that treaty, through the mechanism of internal law, was binding on all the inhabitants of the State and in respect of its entire territory. When a party to a treaty was an international organization, that treaty bound the organization, its organs and its member States. At the same time, article 36*bis* complemented articles 35 and 36, which dealt with the question how non-party States or international organizations could assume obligations or acquire rights under a treaty. It was necessary to include an article dealing with States which were vested with obligations and rights under a treaty by reason of their membership in an international organization. That was the purpose of article 36*bis*, paragraph 1 of which dealt with the case in which States members of an organization consented in advance to such rights and obligations through an express provision embodied in the constituent instrument of the organization, while paragraph 2 dealt with rights which member States were presumed to accept in the absence of any indication to the contrary and with obligations they accepted, even implicitly. That provision raised the problem whether States members of an international organization could be held directly responsible for obligations arising from a treaty concluded by the collective entity of which they formed part. In such a case,

could the other contracting party to the treaty make a claim against the individual members of the organization concerned? Although that point provided food for thought, he considered that, in certain cases at least, the States members of an organization would have a clear responsibility to fulfil obligations assumed by it. If, for instance, a sum of money was lent to the Andean Group [8] and the latter was subsequently dissolved, its individual member States would have a responsibility to discharge the debt.

29. It did not seem to him that it would constitute undue interference in the internal affairs of an international organization to refer to the constituent instrument of that organization. It was necessary to know the true limits of the capacity of the organization to contract. In other articles, the Commission had referred to the relevant rules of international organizations as being a factor governing their capacity to enter into treaty commitments. Moreover, when the Commission came to take up the draft article corresponding to article 46 of the Vienna Convention, it would be dealing with cases in which a manifest violation of such internal rules constituted grounds for invalidating a treaty. Finally, the constituent instrument of an international organization imposed general obligations on its members, from which further specific obligations might derive; if, for instance, an organ of the organization took a decision within its competence, its action produced effects for all members of the organization.

30. To sum up, he believed that article 36*bis* regulated satisfactorily, and without undue interference in the internal affairs of international organizations, the rights and obligations arising for States members of an organization from a treaty concluded by it. The effects of such a treaty could not be strictly confined to the organization itself but had implications for its individual members, who would ultimately have to bear all the financial obligations of the organization and enable it to carry out its commitments under the treaty.

31. Mr. TSURUOKA said he was inclined to the view that article 36*bis* was useful and should, in the main, be retained. But he did not think the article was absolutely necessary for, as some members of the Commission had pointed out, other articles in the draft had the same effects. He noted, however, that the situations contemplated in article 36*bis* were becoming increasingly frequent in the modern world and that the rules which governed them in practice were constantly evolving. It was therefore necessary to state a general rule which would make it easier to solve the problems that arose. However, as the situation was relatively fluid and constantly evolving, care must also be taken not to hinder the natural development of international organizations.

32. Consequently, he thought article 36*bis* should remain very general; first, because it was difficult to go into details and, second, because, if the Commission took up questions which were too specific, it would be obliged to lay down fairly rigid rules. The Special Rapporteur had therefore been right in adopting the principle of consensus, for that made it possible to lay down a rule which would be sufficiently flexible not to obstruct the free development of international activities, which were becoming increasingly necessary to meet the new needs of the contemporary world.

33. With regard to article 36*bis*, paragraph 1, he thought the Special Rapporteur had been right to refer to the constituent instrument of an international organization, for that instrument was the source of an international organization's capacity to conclude treaties, recognition of which was the starting point for the draft articles. The use of the word "expressly" safeguarded the principle of consensus, for it showed that an organization's constituent instrument would give effects to a treaty with respect to States members of the organization only when none of them was opposed to those effects.

34. In paragraph 2, however, the Special Rapporteur had introduced an exception to the principle of consensus by limiting it, in subparagraph (i), by the words "is presumed to accept" and, in subparagraph (ii), by the words "even implicitly".

35. He would prefer the article to adhere more closely to the principle of consensus and to remain general, without going into too much detail.

36. Mr. SCHWEBEL said that article 36*bis* dealt with an exceptional case in a largely unexceptionable manner. It seemed to him to be perfectly appropriate to recognize the terms of a treaty concluded by an international organization and to give effect to the intention of the parties to such a treaty. Any State not wishing to become a member of an advanced international organization of the kind dealt with in article 36*bis* need not do so, though it was perhaps interesting to note that the major organization of that kind was not lacking in applicants for membership. Similarly, any State not wishing to conclude treaties with such organizations was not bound to do so, but examples of such treaties were multiplying and the third States entering into such treaty relations showed a wide variety of geographical and ideological origins. In cases of that kind, it was in the interests of third States to be able to hold both the organizations and their members responsible for the performance of treaties. In any event, the reservations of certain States concerning the existence or procedures of advanced international organizations should not prevent others from creating and furthering such organizations if they so wished or inhibit the Commission from drawing up appropriate provisions recognizing that fact of international law and international life.

37. Contrary to what had been suggested at the present meeting, he did not believe that it was so extraordinary for international instruments to refer to the treaty-making capacity of federal States, and it would seem no more objectionable to refer to the treaty-making capacity ot international organizations of the kind under discussion. The emergence of EEC represented one of the most positive developments of the period following the Second World War. Even if one held a contrary opinion, it was necessary to recognize the existence of such an international organization. Moreover, as Mr. Calle y Calle had observed, there were other international organizations having the authority, if not to conclude treaties which

[8] Established by the signatories of the Cartagena Agreement (Andean Pact), signed on 26 May 1969.

bound their members, then at any rate to take decisions which had such binding effects. He could see no objection to taking account of developments which had actually occurred.

38. The CHAIRMAN, speaking as a member of the Commission, said that he had no contention with the substance of article 36*bis*. With all due respect to the arguments put forward by Mr. Ushakov, he did not see how, in the light of article 2, paragraph 1 (*g*), States members of international organizations which entered into treaties with other States or other international organizations could be regarded otherwise than as third parties in relation to those treaties. He considered that it was appropriate to keep article 36*bis* in its present position and not to place it among the general provisions of the draft.

39. The cases dealt with in paragraphs 1 and 2 corresponded to actual situations, several of which had been referred to by the Special Rapporteur in his very rich commentary. In paragraph (14) of that commentary (A/CN.4/298), it was stated that the over-all aim of article 36*bis*, as proposed, was to take some account of the situation as it existed, without sacrificing principles. He concurred with that approach. He did, however, have some misgivings about the principle embodied in paragraph 2 (ii), which seemed to him to constitute a departure from previous provisions of the draft articles, including article 35. In his view, it would be better to stipulate that a member State must expressly accept obligations.

40. Mr. USHAKOV said that the example of EEC was valid only within certain limits, for that body sometimes gave the impression of being not an international but a supranational organization. The same was true, in certain respects, of other organizations which had been mentioned. It was difficult to place those two notions on the same footing, and he therefore thought it preferable to consider only international organizations proper.

*The meeting rose at 1.0 p.m.*

## 1442nd MEETING

*Thursday, 16 June 1977, at 10.05 a.m.*

*Chairman:* Sir Francis VALLAT

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, 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]

[1] *Yearbook ... 1975*, vol. II, p. 25.
[2] *Yearbook ... 1976*, vol. II (Part One), p. 137.

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

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

1. Mr. REUTER (Special Rapporteur) said that, whereas two members of the Commission had declared themselves firmly opposed to article 36*bis*, others had all felt that the question raised by the article was a fundamental one which must be answered. That common feeling notwithstanding, numerous approaches had been suggested. Some speakers had asked what place an article of that kind should occupy in the draft, while others had questioned the need for the two provisions the article contained, either because they felt that the one or the other was superfluous or because, although they accepted the principle each laid down, they preferred that it should simply be mentioned in the commentary.

2. Some members of the Commission had questioned the legal basis of the two paragraphs of the article. He had tried to keep to the principle of consensus, which governed the entire Vienna Convention [4] and which, he thought, should also govern the present set of articles, but it had been asked whether there was not an element of the theory of estoppel in certain of those articles.

3. Doubts had also been expressed about the wording of paragraph 2; some speakers had suggested that the two subparagraphs it contained should be merged or that the effect of the proposals they contained should be restricted inasmuch as they seemed to diverge from the principle of consensus by introducing the idea of presumed or implicit consent.

4. Finally, the criticism had been made that, both in his commentary and in his oral explanations, he had cited too frequently the example of EEC. He entirely accepted that criticism and felt that the Commission would be wrong to attach too much importance to an example which he had mentioned only for purposes of illustration. After all, EEC was not the only economic grouping which could be mentioned: in article 12 of the Charter of Economic Rights and Duties of States,[5] which it had adopted in its resolution 3281 (XXIX), the General Assembly had expressed the concern of all the third world countries to unite in order to establish a more constructive dialogue with the major Powers. Paragraph 2 of that article stated:

> In the case of groupings to which the States concerned have transferred or may transfer certain competences as regards matters that come within the scope of the present Charter, its provisions shall also apply to those groupings in regard to such matters, consistent with the responsibilities of such States as members of such groupings.

5. The debate showed that, with the exception of two of their number, members of the Commission had not rejected article 36*bis* out of hand, but had expressed a desire to reflect on it at greater length. He therefore proposed that the article be referred to the Drafting

[3] For text, see 1440th meeting, para. 31.
[4] See 1429th meeting, foot-note 4.
[5] General Assembly resolution 3281 (XXIX).