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Summary record of the 1442nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1977, vol. I

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).

Committee with the request that the Committee take it up as late as possible. He would like the Commission to refer in its report to the problem raised by article 36*bis* with regard to other articles and to state that it had not yet decided how the problem should be solved. He would also like the Commission, when it came to study article 37, to pass rapidly over paragraphs 5 and 6, whose justification depended on article 36*bis*.

6. Finally, he would like to come back to one of the objections which had been raised with respect to article 36*bis* and which seemed to him fundamental, since it related to the fact that the article, in mentioning in paragraph 1 the constituent instrument of an international organization and in paragraph 2 the assignment of areas of competence between the organization and its member States, appeared to be trespassing on matters which were the internal affair of an international organization. Now it was quite inadmissible that States should be able to intervene in the internal affairs of an international organization.

7. That the problem existed was a fact, but the conclusions to be drawn from it should not be as harsh as those which had been expressed, since the objection was valid with respect not only to international organizations but also to federations and confederations of States. As Mr. Calle y Calle had said,[6] the objection raised in advance the problem the Commission would have to solve in article 46 for, as the Chairman had pointed out, it would be very difficult to draft an article corresponding to article 46 of the Vienna Convention. Nevertheless, those difficulties must be overcome for the ultimate consequence of failure in that respect would be that States would be unable to conclude treaties with international organizations, since they would not know in what fields the organizations were competent or even who was competent to give them that information. It was, naturally, for the organization concerned, and not third States, to say when it was competent and who could conclude a treaty on its behalf. It was for the organization alone to say whether the object of the treaty encroached on areas of competence assigned to itself or to its member States. Procedures for solving such problems must exist in practice since the number of treaties concluded by international organizations already ran into thousands.

8. A parallel had been drawn in that respect between international organizations and federations or confederations of States. He did not dispute that there was a parallel but it should not be carried too far. When, in its draft articles on the Law of Treaties, the Commission had taken up the question of capacity to conclude treaties, it had envisaged referring in the same article to States, federations and confederations of States and international organizations. It had very quickly dropped international organizations, but had persisted with the States members of a federal union right up to the end.[7] When the United Nations Conference on the Law of Treaties had studied the question at its first session in 1968, it had not ruled out the idea of including provisions relating to federations and confederations of States; it was not until its second session in 1969 that it had given up the idea for political reasons. The Commission should therefore not underestimate the difficulty of the problem.

9. The CHAIRMAN said it seemed to him that, notwithstanding the substantive objections to article 36*bis* raised by two members of the Commission, the best course of action would be to refer the article to the Drafting Committee on the understanding that that Committee might come to the conclusion that it should not be retained. In making that suggestion, he had in mind, in particular, two considerations: first, that those members of the Commission who were unavoidably absent should be given the opportunity to consider the issues raised by article 36*bis* and, if they so desired, to comment on it; second, that at the present early stage of the Commission's deliberations on the subject, it was useful to retain provisions such as article 36*bis* in the draft so that the views of Governments could be ascertained.

10. Mr. USHAKOV said that the developing countries were at present very jealous of their sovereignty and were unwilling to delegate it to certain groupings for the purpose of the conclusion of treaties. He did not think, therefore, that the provisions of the Charter of Economic Rights and Duties of States could be interpreted as providing for such a possibility.

11. Mr. DADZIE said that he had no objection whatsoever to article 36*bis* being referred to the Drafting Committee, which often succeeded in allaying the misgivings of members of the Commission concerning particular provisions. He was full of admiration for the ingenious way in which the Special Rapporteur had formulated the text of article 36*bis*. Though he had not agreed with that text initially, that did not mean that he was not disposed to reconsider his position when it was referred back to the Commission by the Drafting Committee.

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

It was so agreed.

ARTICLE 37 (Revocation or modification of obligations or rights of non-party States or international organizations)

13. The CHAIRMAN invited the Special Rapporteur to introduce article 37, which read:

Article 37. Revocation or modification of obligations or rights of non-party States or international organizations

1. When an obligation has arisen for a State not a party to a treaty in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the non-party State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for an international organization not a party to a treaty in conformity with article 35, the obligation may be revoked or modified with the consent of the parties to the treaty, except if it is established that the obligation was intended not to be revocable or subject to modification without the consent of the organization.

[6] 1441st meeting, para. 29.

[7] *Yearbook ... 1966*, vol. II, pp. 191-192, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, art. 5, paras. 2-3 of the commentary.

3. When a right has arisen for a State not a party to a treaty in conformity with 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 State not a party to the treaty.

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

5. An obligation or a right which has arisen for States members of an international organization under the conditions laid down in paragraph 1 of article 36*bis* may be revoked or modified only with the consent of the parties to the treaty unless the constituent instrument of the organization provides otherwise or unless it is established that the parties to the treaty had agreed otherwise.

6. An obligation or a right which has arisen for States members of an international organization under the conditions laid down in paragraph 2 of article 36*bis* may be revoked or modified only with the consent of the parties to the treaty and of the State member of the organization, unless it is established that they had agreed otherwise.

14. Mr. REUTER (Special Rapporteur) said that article 37 of the Vienna Convention distinguished between obligations and rights. In the case of obligations, it followed closely the consensus rule. Thus, where an obligation arose for a third State, it did so by virtue of a collateral agreement; such an obligation could therefore be revoked or modified only by agreement, unless agreed otherwise.

15. In the case of rights, the United Nations Conference on the Law of Treaties had adopted another approach; a collateral agreement did not prevent revocation or modification of a right since it had to be established that such a right "was intended not to be revocable or subject to modification without the consent of the third State".

16. Draft article 37 drew a distinction with regard to rights and obligations between States and international organizations. Thus, in the first four paragraphs, it dealt in turn with the rights and obligations of States on the one hand, and the rights and obligations of international organizations on the other. It would be better if paragraphs 5 and 6 were not considered for the time being since they related to article 36*bis*, on which the Commission had not yet taken a decision.

17. With regard to States, he had seen no reason to modify the solution proposed by the Vienna Convention; paragraphs 1 and 3 therefore followed the provisions of that Convention.

18. With regard to international organizations, however, which were dealt with in paragraphs 2 and 4, and specifically in the case where an obligation or right was incumbent upon an international organization by virtue of a collateral agreement to which it was a party, he had adopted an approach which would introduce far greater stability into the agreement. It was based on an idea which he had stressed in his sixth report (A/CN.4/298) and which Mr. Verosta had underlined during the discussion on the articles relating to reservations,[8] namely, that international organizations were wholly subject to the service of a function as internationally defined in relation to States, which was the justification for their competence. Consequently, if it was accepted that the role of an international organization was to serve, it must also be accepted that, where States parties to a treaty had imposed an obligation on an international organization, that obligation could be revoked or modified unless it could be established that the States parties intended otherwise, on the understanding that such modification could not increase the obligation but only diminish it, as pointed out in paragraph 3 of his commentary.

19. Similarly, in the case of rights conferred on an international organization by States parties to a treaty—and, as he had pointed out, rights and obligations were often linked—it was not easy to accept the view that such States had sought to create acquired rights in favour of an organization.

20. Mr. USHAKOV said that he was totally opposed to paragraphs 5 and 6 of article 37 since he was totally opposed to article 36*bis*, to which those paragraphs related.

21. In his view, paragraphs 2 and 4 of article 37 gave rise to the same problem as the previous articles. According to those paragraphs, if an international organization had decided, by virtue of its constituent instrument, to conclude a treaty, it was no longer free, even in the case of a collateral treaty, to take another decision under its rules because it was bound by its first decision. In his opinion, however, if an organization had the discretionary power to take a decision regarding the conclusion of a treaty, it must also be able, if so authorized by its rules, to take another decision which ran counter to the first, regarding the treaty it had concluded. That possibility was available, in particular, to international organizations of a universal character such as the United Nations. States which concluded a treaty with an international organization must be aware that the organization might sometimes take a contrary decision which would affect the treaty.

22. Mr. CALLE Y CALLE said that article 37 was a necessary accompaniment to articles 35 and 36, relating to the assumption of obligations and rights by States or international organizations not parties to a treaty. Article 37 referred to the revocation or modification of such obligations or rights. In paragraphs 1 and 2, the Special Rapporteur had, correctly in his opinion, differentiated between the rule to be applied to States and the rule to be applied to international organizations in regard to the revocation or modification of obligations. In the case of States, the Special Rapporteur had kept to the rule laid down in the Vienna Convention, which provided that the revocation or modification of such obligations required not only the consent of the parties to the treaty but also that of the non-party State. In the case of international organizations, on the other hand, the obligation could be revoked or modified only with the consent of the parties to the treaty, unless it was established that the obligation had not been intended to be revocable or subject to modification without the consent of the organization. A similar distinction between the régime applicable to States and that applicable to international organizations in regard to the revocation or modification of rights was laid down in paragraphs 3 and 4.

[8] 1434th meeting, para. 45.

23. Paragraphs 5 and 6 referred back to article 36*bis*. If it was accepted that a treaty concluded by an international organization gave rise to rights and obligations for its member States, it was logical to stipulate the form in which such rights or obligations could be modified or revoked. Paragraph 5 dealt with obligations and rights devolving upon States members of an international organization by virtue of an express provision contained in the constituent instrument of the organization. It was appropriate that States in those circumstances should have no say in the modification or revocation of an obligation or a right, since the effects of the organization's treaties with regard to its members States derived from that instrument. Paragraph 6 dealt with the case in which no such provision was made in the constituent instrument of the organization concerned and rights and obligations were assumed with the tacit or express consent of its member States. It was logical, in such a case, to provide for the individual consent of the member States.

24. He found article 37 clear and cogent and would have no difficulty in accepting any of its provisions, including paragraphs 5 and 6. Of course, if article 36*bis* was substantially modified when it was considered by the Drafting Committee, paragraphs 5 and 6 would have to be changed accordingly.

25. Mr. FRANCIS said he endorsed the general theme of the comments of Mr. Calle y Calle. As for the text of article 37, he would suggest that the words "except if" in paragraphs 2 and 4 be replaced by the word "unless".

26. Mr. DADZIE said that, subject to his comments on article 36,[9] which had been largely of a drafting nature, he had no difficulty in accepting paragraphs 1 to 4 of article 37. However, he wished to reserve his position regarding paragraphs 5 and 6 until article 36*bis* had been considered by the Drafting Committee.

27. Mr. ŠAHOVIĆ said that article 37 was necessary and he was in favour of its being referred to the Drafting Committee.

28. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 37 to the Drafting Committee.

It was so agreed.

ARTICLE 38 (Rules in a treaty becoming binding on non-party States or international organizations through international custom)

29. The CHAIRMAN invited the Special Rapporteur to introduce article 38, which read:

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

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a State or an organization not a party to that treaty as a customary rule of international law, recognized as such.

30. Mr. REUTER (Special Rapporteur) said that, apart from minor changes of a drafting nature, article 38 corresponded to article 38 of the Vienna Convention, which had never given rise to any difficulty, either in the Commission or at the United Nations Conference on the Law of Treaties. In his opinion, it could be said, without being obliged to take a position on the nature of a customary rule and the manner in which such a rule was created or established, that a customary rule could become binding on an international organization, particularly when it was embodied in a treaty.

31. He had not given any examples in his commentary, but one was the rules governing forces employed for United Nations peace-keeping operations, which provided that such forces should be subject to the general customary rules regarding the use of armed force.

32. There was nothing to prevent an international organization from becoming a party to general treaties, and a number of provisions already adopted tentatively had been drawn up on that understanding. That was an exceptional situation, however, save possibly in the case of certain regional organizations having a limited objective. It was therefore desirable that customary rules should be extended to international organizations.

33. Moreover, a procedure existed whereby an international organization could be made subject to rules without becoming party to a treaty; that was the procedure adopted in the Convention on International Liability for Damage caused by Space Objects,[10] which provided that rules laid down in a treaty could become binding on an international organization if the latter made a declaration that it agreed that those rules should be applicable to it.

34. There was no need to consider the precise legal source—bilateral instrument or simple collateral agreement—of the obligation of the international organization. What mattered was that article 38 was of great importance to international organizations, even more so than to States.

35. Mr. USHAKOV said he was anxious to know what was a customary rule in the case of an international organization. The customary rules established by State practice were largely defined in texts such as the Statute and the advisory opinions of the International Court of Justice. However, in the case of international organizations, it was hard to see how customary rules could be established: were they established by practice or by resolutions of international organizations? The commentary should indicate what such rules consisted of. In his opinion, conventional and customary rules, as well as the rules of *jus cogens* applicable to States, were also applicable to international organizations and other subjects of international law.

36. The CHAIRMAN said that, although he was sure that, for the purposes of its consideration of article 38, the Commission needed to resolve the very fundamental point raised by Mr. Ushakov, it would be helpful to hear first the views of the Special Rapporteur.

37. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov had raised an important question which should be mentioned in the commentary with a note that the Commission had not taken any decision in the matter.

[9] 1440th meeting, para. 23.

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

38. The real problem was what part an international organization could play in the emergence of a customary rule. It might be argued that international organizations did not play any part, at least so far as rules of general international law were concerned, since the general customary rules applicable to an international organization were recognized by all member States. It might also be argued that, in the process of developing a rule of general customary law, an international organization, as a subject of international law, was entitled to establish by its behaviour that it considered that that rule existed so far as it was concerned.

39. Along with customary rules of general international law, however, it was also possible to envisage customary rules which concerned only international organizations. That was a highly theoretical hypothesis since it presupposed the existence of a customary international law of international organizations, and the least that could be said was that such a law, if it did exist, was of very meagre content.

40. With regard to customary rules of regional international law, the same reasoning could be applied as for customary rules of general international law, with the difference that, according to the decision of the International Court of Justice in the *Asylum* case,[11] the creation of regional customary law required a commitment on the part of all States in the region. The hypothesis of a regional customary law would therefore involve special considerations.

41. Consequently, the Commission should confine itself in the commentary to underlining the extremely modest character of the rule laid down in article 38 and to pointing out that it did not commit the international organization. The United Nations Conference on the Law of Treaties had not sought to commit States on the question of custom, and the Commission itself had always hesitated to tackle the question.

42. Mr. ŠAHOVIĆ said that, so far as he was concerned, the question of the nature of customary rules of general international law did not arise. Article 38 was important because it reflected the solution already adopted by the Vienna Convention in the case of treaties concluded between States, and he proposed that the article be referred to the Drafting Committee.

43. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the question of the method of establishment of rules of customary law for international organizations was extremely interesting and important, but, as had already been said, it had not been found necessary to set out in the Vienna Convention the method by which customary rules of international law were established. Admittedly, something close to a description of that method was to be found in article 53 of the Convention, but it was only part of the definition of *jus cogens*.

44. Consequently, he felt that it was not incumbent on the Commission to set out, for the purposes of the present draft articles, the process by which rules of customary law were established for international organizations. What the Commission was saying in article 38 was that such of those rules as existed—and it was not admitting that any did exist—would apply. His own view was that such rules did exist, and that among them were those of *pacta sunt servanda* and the prohibition of aggression.

45. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to refer article 38 to the Drafting Committee, thereby concluding its study of the reports submitted by the Special Rapporteur.

It was so agreed.

Organization of work

46. The CHAIRMAN suggested that, in view of the stage the Commission had reached in its study of the question of treaties concluded between States and international organizations or between two or more international organizations and of the fact that the Drafting Committee, despite having made considerable progress in that field, was not yet ready to make its report, the meeting of the Commission scheduled for the following day should be replaced by a meeting of the Drafting Committee.

It was so agreed.

47. The CHAIRMAN said that the Special Rapporteur for the question of succession of States in respect of matters other than treaties would be available on 20 and 21 June and that the Commission would therefore devote its meeting on those days to the continued study of that topic.

The meeting rose at 12.15 p.m.

1443rd MEETING

Monday, 20 June 1977, at 3.05 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

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

NEW ARTICLE (Newly independent States)

1. The CHAIRMAN invited the Special Rapporteur

[11] *I.C.J. Reports*, p. 266.

* Resumed from the 1428th meeting.