Document:-

**A/CN.4/SR.1512**

**Summary record of the 1512th 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:-

**1978, vol. I**

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

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

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

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

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

*The meeting rose at 1 p.m.*

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

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

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

## 1512th MEETING

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

*Chairman:* Mr. José SETTE CÂMARA

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

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

[Item 4 of the agenda]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[5] General Assembly resolution 169 (II).

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

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

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

*It was so agreed.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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

## 1513th MEETING

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

*Chairman:* Mr. José SETTE CÂMARA

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

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

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

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

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

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

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

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

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

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

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

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

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

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

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

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

* Resumed from the 1482nd meeting.

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