Document:-

A/CN.4/SR.1705

Summary record of the 1705th 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:-

1982, vol. I

It was in the light of those two aspects of the question that article 36 *bis* had been drafted. If the Commission considered that there was no adequate reason to make the rule of consent more flexible, article 36 *bis* should be rejected.

51. In conclusion, he would say a few words about the situation of the countries of the third world. Those countries seemed to be profoundly aware of the contradiction they faced. On the one hand, they had to find their identities, which had been destroyed by foreign domination, and, on the other, since they were poor, it was essential for them to unite, even at the risk of surrendering part of their sovereignty. That explained the faltering steps they had made in the past century in Latin America and were now making, first in Africa, and then in Asia. It would be easy to dismiss them and regard their efforts as quite unconvincing compared with the model of the European Communities. Yet, those countries' dilemma was that they must not only retain their independence, but also unite their efforts whenever possible and desirable. They had considered the radical solution of the EEC, but had rejected it. As he had stated at the preceding session[10] he did not think that the Commission should use the European Communities as an example. The examples he had given in the past should not have been based mainly on that of the Communities, which indeed, had no need of special provisions. Since the Commission was now composed primarily of members from third world countries, it was for them to say whether a special provision should introduce some flexibility in the strict rule of consent so that the countries of the third world might have a more flexible instrument when they wanted it. If so, the matter must be given further consideration; if not, article 36 *bis* should be abandoned.

Drafting Committee

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to establish a drafting committee composed of the following 14 members: Mr. Sucharitkul (Chairman), Chief Akinjide, Mr. Al-Qaysi, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Lacleta Muñoz, Mr. Mc Caffrey, Mr. Ni, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Ushakov and *(ex officio)* Mr. Njenga, Rapporteur of the Commission.

It was so decided.

The meeting rose at 12.55 p.m.

[10] *Yearbook ... 1981*, vol. I, pp. 170-171, 1675th meeting, para. 7, and p. 188, 1678th meeting, para. 31.

1705th MEETING

Wednesday, 12 May 1982, at 10.05 a.m.

Chairman: Mr. leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING[2] (*continued*)

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

1. Mr. REUTER (Special Rapporteur), referring to his comments at the previous meeting concerning the arguments in support of relaxing the procedure for consent by States members of an organization to the obligations arising from a treaty concluded by that organization, recalled that two practical requirements now applied with regard to the relatively limited operational activities which a group of States might wish to undertake through an international organization.

2. Generally speaking, the organization's commitment must be accompanied by a commitment on the part of its member States and those States' consent to their commitment must be given by other means than in the case of the conclusion of a traditional collateral agreement subsequent to the main agreement. Nevertheless, it was not necessary for that commitment to apply to an entire category of treaties in advance. In short, the need was for a way of ensuring the relatively rapid conclusion of agreements that would enable the union which a number of States wished to achieve within the framework of an international organization to become effective. That need was felt especially by small and medium-size States, in connection with the situation that would be created by, say, the Convention on the Law of the Sea[4] or the Agreement establishing the Common Fund for Commodities.[5]

3. However, what made the identity of the international organization, namely its personality, also made its weakness, inasmuch as, in the modern world, the States members of an international organization were not fully bound by the commitments that organization contracted. It was also a fact that no provision of the draft could prevent a State from participating in an international organization in order not to promote, but to hinder, the organization's development. A possible counter was to say that it was sufficient for the

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

[3] For the text, see 1704th meeting, para. 42.

[4] See 1699th meeting, footnote 7.

[5] Agreement concluded at Geneva on 27 June 1980 (United Nations publication, Sales No. E.81.II.D.8).

organization to commit itself along with its member States. The practice of such commitment did exist, and was similar to the practice followed by some large transnational corporations in the sphere of private law, but it was not satisfacory, for it was time-consuming and of uncertain outcome.

4. It was because there could be an affirmative answer to the question whether there were reasons for making the means of consent by the States members of an international organization more flexible that he had proposed the inclusion in the draft of a provision such as article 36 *bis*. As for the question whether the idea of such flexibility had given rise to objections, it, too, had to be answered in the affirmative, since opposition, sometimes strong, had been expressed both in the Commission and by Governments. Article 36 *bis* being, in the final analysis, rather modest, the controversy surrounding it was undoubtedly attributable to political considerations—considerations that were, of course, perfectly legitimate in themselves and that he now found partly convincing.

5. On the one hand, the European Communities were a phenomenon which had undeniable political consequences and raised all sorts of important political problems, particularly territorial problems. That could create the impression that, if its purpose was really to deal with a Community question, article 36 *bis* sought in some way to justify or legitimize EEC. His actual intentions as Special Rapporteur—and perhaps he had allowed himself to be influenced by EEC—were of little account; what mattered was that that was how the article appeared to certain Governments. Some States, then, opposed the article, while others, because they were members of EEC, felt that it must be defended at all costs. That was a very bad situation, and it proved that the article under examination was bad: it was not good to have on the table an article that occasioned controversy and might have the effect of putting the representatives of States which had nothing to do with the European Communities in the position of playing referee.

6. On the other hand, as Mr. Ushakov had stressed (1703rd meeting), the case of EEC was altogether special. It followed that the Commission should not deal with such a case, particularly not by presenting it as a general case. Moreover, if it had EEC in mind and referred to it by the term "international organization", the Commission ran the risk of introducing into the context of international organizations exaggerated ideas and rules that might adversely affect institutions having nothing to do with the European Communities. Those views, as they had been expressed by Mr. Ushakov in particular, led him to feel that article 36 *bis* should perhaps be eliminated, since it seemed to symbolize EEC. Certain parties should, perhaps, accept that sacrifice. There was obviously no question of studying, at the present juncture, all the problems raised by agreements concluded by supranational bodies: for one thing, the Commission was already engaged on its second reading of the draft, and for another, such matters were outside the sphere of the draft.

7. That led him to the third question to which he had alluded at the previous meeting: how could the procedure for consent be made more flexible? If article 36 *bis* was eliminated, it would still be useful to have a provision providing for an instrument that would enable small and medium-size States to unite effectively and flexibly, with a view to limited operations and in pursuit of specific objectives, from a perspective other than the global perspective of the European Communities. Such a provision, which would not correspond to his own convictions, might appear as a paragraph of article 35 or as a separate article 35 *bis*.

8. A few overtures and a few suggestions had already been made in that direction within the Commission, in particular by Mr. Ni (1704th meeting, para. 20). Member States could establish, through the constituent instrument of an international organization, a mechanism whereby they could give their consent rapidly and simply when they considered that advisable. That idea, which would reinforce the guarantees for the member States, might well prove acceptable if it attracted general support. An international organization's constituent instrument was not, however, the only thing to be taken into account; its practice was also very important, for it allowed the organization to adapt. Finally, attention should be drawn to the great merit of Mr. Ni's suggestion if the guarantees for the partners of the organization were to be strengthened. For a negotiation by an organization to be effective, the member States which had created that organization must throw their weight behind it. It was to be expected that States members of a regional economic group, being desirous to help their union, would be willing to commit themselves together with the organization, so making possible relations between the parties contracting with the organization and those member States themselves. At the preceding session of the Commission, Mr. Aldrich had emphasized the need to inform the parties contracting with the organization that the member States were committing themselves together with it.[6] Perhaps that was an area to be explored.

9. Mr. RIPHAGEN, referring to section 4 as a whole, said that when two treaties "met", the question arose whether they were linked in law, for example in such a way that direct legal relationships were created between the States parties to each of them. Article 36 *bis* and article 37, paragraphs 5 and 6, as presented by the Special Rapporteur (A/CN.4/353, para. 30), concerned the case where a treaty to which an international organization was a party "met" the treaty establishing that international organization.

10. Articles 34 to 38 of the Vienna Convention dealt, not with that situation, but only with the position of third States with regard to treaties, irrespective of the legal relationship of a third State with other States

[6] *Yearbook ... 1981*, vol. I, p. 186, 1678th meeting, para. 20.

under a different treaty. That raised the question, touched upon (1703rd meeting) by Mr. Lacleta Muñoz and Mr. Ushakov, whether the problem facing the Commission was a matter of adaptation of those articles or a separate problem.

11. The approach in the Vienna Convention was of the typical unilateral type, in keeping with the notion of the separate sovereignty of each State. As a result, article 34 referred only to the consent of the third State. However, rights and obligations were always linked in a legal relationship between two or more States, and mutual consent between those States was normally required to create such a relationship. Articles 35 to 37 and, to a certain extent, article 38 deduced the existence of such mutual consent from, on the one hand, the intention of the parties to a treaty and, on the other hand, the subsequent conduct of a third State. Article 37 concerned the termination of the relationship created by that deduced mutual consent. As the Special Rapporteur had pointed out (1704th meeting), the Commission had carefully avoided expressing a preference for either a *stipulation pour autrui* or a "collateral agreement". Nevertheless, the article remained based on the establishment by deduction of mutual consent and of its termination.

12. With regard to that establishment of consent, a somewhat artificial distinction was made between rights and obligations. In the case of rights, the consent of the third State was presumed but in the case of obligations of third States, an express acceptance in writing was required. On the other hand, to exercise a right, a third State must, according to draft article 36, para. 4, "comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty"; in that way, the balance of rights and obligations was restored. Furthermore, the right created for the third State by the mutual consent was not necessarily a right at all, since, unless it was established that the other States involved intended otherwise, it could be revoked or modified by those other States. The impact of the distinction between rights and obligations of the third State was therefore reversed, since the third State could lose only its obligations with its own consent.

13. Articles 34 to 38 of the present draft articles, including article 36 *bis* and article 37, paragraphs 5 and 6, similarly relied on deduction for the establishment of mutual consent. He wondered whether such an elaborate method was really necessary when a third State could simply associate itself with a treaty by accession, a point illustrated by the practice with regard to mixed treaties, to which both an international organization and its member States were parties. However, as the Special Rapporteur had pointed out, that practice was somewhat cumbersome.

14. In reality, articles 35 to 37 of the Vienna Convention had been formulated to cater for special treaties, namely treaties establishing "objective regimes" or "territorial regimes". Since the wording of those articles was general, it did not betray what the drafters had had in mind.

15. The Commission was now faced with the case of treaties of a different type. When an international organization participated in a treaty, the treaty establishing that organization was also involved. Treaties in which international organizations participated could also be, and often were, treaties establishing "objective regimes",. Most of the examples given in the course of the discussions had concerned the creation of "objective regimes", such as customs unions, headquarters agreements, or even "communities", such as EEC, to which States had transferred certain competences.

16. An example of a situation in which both the treaty in which an international organization was going to participate and the treaty establishing that organization were "objective regimes" was provided by the Convention on the Law of the Sea, including its clauses on the participation of special international organizations.[7] That was a very particular situation which could not be generalized and made the subject of rules valid for all treaties and all international organizations.

17. The method used by the Special Rapporteur was perfectly legitimate and not fundamentally different from that employed in the Vienna Convention. He had rightly brought together the rights and obligations which had been artificially separated in the Vienna Convention, as he had also done in his proposals relating to article 37, paragraphs 5 and 6. In article 36 *bis*, subparagraph (*a*), the Special Rapporteur had concentrated on a very special type of international organization. So far as he himself knew, the Treaty establishing the European Economic Community was the only treaty to include a clause[8] like that referred to in subparagraph (*a*). Of course, such a clause might be contained in another "relevant rule of the organization", in which case it might be limited to "a" treaty rather than to "the treaties"; that was a point to be taken into account in the drafting of the article. Such a clause actually embodied the transfer of treaty-making power, a feature that was relatively rare in current international practice.

18. Conversely, in article 36 *bis*, subparagraph (*b*), the Special Rapporteur had concentrated on the treaty in respect of which the question of third States arose. The very special "character" of such a treaty was indicated by the requirement that "the application of the treaty necessarily entails such effects", that is, the direct legal relationships between the States members of the international organization and the States parties to the treaty to which the international organization was also a party. With regard to his use of the term "character" of a treaty, the expression already appeared in a quite different article of the Vienna Convention, article 60, subparagraph 2 (*c*).

19. As drafted, article 36 *bis* did not combine the two requirements of a very special international organization and a very special treaty between that international

[7] Annex IX of the Convention (see 1699th meeting, footnote 7).

[8] Art. 228, para. 2 of the Treaty (United Nations, *Treaty Series*, vol. 298, p. 90).

organization and other States. Perhaps such a cumulative formulation could still be found, in order to justify the result of direct legal relationships between the member States of the international organization and the other States parties to the treaty in which that organization participated. On the other hand, it might be useful or even necessary to make clear that the conditions for participation by an international organization in a treaty and the effects of such participation might be specifically regulated by the treaty itself. An example was the Convention on the Law of the Sea, in which the idea of a "package deal", as embodied in the preclusion of all reservations, had created a particular situation.

20. His own conclusion was that article 36 *bis* was sufficiently limited to very special treaties and very special international organizations to be acceptable, subject to drafting amendments. It should also be noted, in connection with article 37, paragraphs 5 and 6, that States members of an international organization were not, in principle, required to give their consent to modification of rights and obligations arising from treaties in which the organization participated. That represented a deviation from the Vienna Convention. Similarly, it might be necessary to make clear, as had been done in the Convention on the Law of the Sea, that participation by an international organization in a treaty might be limited to a particular part of that treaty.

21. Nevertheless, he recognized that members of the Commission might feel either that the drafting of article 36 *bis* and article 37, paragraphs 7 and 6, was not sufficiently limited to very special cases or that, owing to the special characteristics of the situations envisaged, those provisions should not appear in the draft articles. Even in the latter case, however, there was no escaping the fact that, with regard to a treaty concluded by an international organization, that organization's member States were not "third" States either in the normal sense of the term or, in particular, in the sense of the Vienna Convention. If the draft articles were to repeat articles 34 to 38 of the Vienna Convention, that fact should be made clear, perhaps in a special article along the following lines:

> "The provisions of this section are without prejudice to the question of the rights and obligations of the States members of an international organization which may arise from a treaty concluded by that organization."

That formulation was similar to that of article 73, paragraph 2, of the draft articles.

22. The problem was somewhat similar to that of the direct effects of treaty provisions in the national legal sphere, a matter not dealt with at all in the Vienna Convention. It also resembled the inverse problem of the direct effect of the internal legal order of an international organization on the legal relationships between the international organization and other entities under general international law. The latter problem was, however, dealt with to a certain degree in the draft, in articles 6, 27 and 46, as it had been dealt with in the Vienna Convention with respect to the internal legal order of States. The issue was one to which the Commission would come when it took up article 46.

23. He agreed with Mr. McCaffrey, Mr. Calero Rodrigues and Mr. Lacleta Muñoz (1703rd meeting) that the words "in the sphere of its activities" in article 35, paragraph 2, were misplaced. In conclusion, he wondered, although he would not press the point, what exactly was meant by a "third" international organization? It could be said that a third international organization having substantially the same membership was in fact even less "third" than a member State.

24. Mr. BALANDA said that, in his view, article 36 *bis* reflected the current situation accurately. On the one hand, there were traditional international organizations, where the consent of the member States was the rule and those States remained sovereign; on the other hand, there had been a change, which had found expression in the European Communities. The latter did not, however, represent a special case: many African constitutions embodied the concept of abandonment of sovereignty. Under article 108 of its Constitution, Zaire gave up part of its sovereignty with a view to building African unity.[9] Furthermore, in Africa, efforts at integration had already provided opportunities for the practical expression of such a concept. The Commission was therefore right to take into account the twofold reality of international organizations.

25. When considering the concepts of third State and third international organization with regard to the article under examination, account should also be taken of the twofold nature of international organizations. In the case of a traditional organization, the constituent instrument must be consulted to determine whether a third State or third organization was involved. In the case of an integrated or supranational organization, it was more difficult to determine whether the member States were third parties: they parted with their sovereignty in advance and agreed, to a certain extent, that the entity could bind them without their having specifically to express their consent once more. However, it was difficult to maintain that those member States were third parties, since, without their participation, the organization could no longer carry out its activities.

26. Referring to subparagraph (*a*) of article 36 *bis*, he pointed out that the expression "relevant rules of the organization" implied that there might be non-relevant rules and, therefore, a hierarchy among the rules of the organization. In his view, all the rules of an organization were relevant.

27. With regard to subparagraph (*b*), he wondered whether it would not be better to provide that States and organizations participating in the negotiating of the treaty as well as the States members of the organization

[9] See *Constitutions of the Countries of the World*, eds. A. P. Blaustein and G. H. Flanz: *Zaire*, by Jacques Vanderlinden (Dobbs Ferry, N. Y., Oceana, 1979), p. 28.

must have "agreed" that the application of the treaty necessarily entailed the effects in question, or have "consented" to that point, rather than to have "acknowledged" it.

28. In general, article 36 *bis* was justified, for it applied both to traditional international organizations (subparagraph (*b*)) and to the new organizations towards which the development efforts of States, especially African States, were tending. Since it was one of the Commission's functions progressively to develop international law, it was incumbent on it to take account of that trend. With regard to the wording of the article, Mr. Ni's suggestions (1704th meeting) could be examined to advantage.

29. Mr. USHAKOV said that the only example that could have inspired article 36 *bis* was that of EEC. In his eleventh report (A/CN.4/353, para. 27), the Special Rapporteur indicated that the purpose of article 36 *bis* was to introduce exceptions for which it was easy to furnish examples, in particular, those of tariff agreements concluded by an organization administering a customs union, a headquarters agreement concluded by an organization with a host State and a fisheries agreement between an organization and a State. In his view, all the examples given were either erroneous or imaginary.

30. When the Special Rapporteur had referred to customs or monetary unions (1704th meeting), he had prudently specified that, in order to come under article 36 *bis*, such unions must have created an international organization whose constituent instrument provided that the treaties concluded by the organization were binding on its member States. There was no organization of that kind; for the moment, customs and monetary unions appeared to be agreements rather than international organizations. All the examples given in that connection were, therefore, imaginary. As for the many headquarters agreements in existence, none of them contained any such rule. They were normal agreements which basically laid down rights in favour of member States, rights which were presumed to be accepted. Furthermore, even if EEC had concluded a headquarters agreement, the rule in question had not been applied, for it was valid for other categories of treaties. Headquarters agreements were therefore erroneous examples. As for fisheries agreements, and leaving aside the case of EEC, there were most probably no international organizations in the sphere of fishing which had a rule similar to that referred to in article 36 *bis*. That example, too, was imaginary. Finally, with regard to the African countries, OAU did not in any way appear to be a supranational organization. That was why he had always examined article 36 *bis* with only EEC in mind.

31. Many States had shown a desire for integration, particularly in economic matters. Such integration could take two forms. The western countries members of EEC had asked for economic integration based on the principle of supranationality. In other words, they had given up part of their sovereignty to the Community. The mode of integration provided for within the framework of CMEA was entirely different. The socialist countries members of CMEA had decided that economic integration would not be accompanied by the creation of supranational bodies and that each one of them would remain competent to conclude international agreements, especially economic agreements. Nevertheless, the CMEA could, under its charter, conclude with non-member States and with other international organizations treaties providing for obligations for its member States.[10] Those obligations must, however, be accepted expressly and in writing by each of the States members of CMEA.

32. It was impossible to say whether countries wishing to create large integrated economic groups would opt in the future for supranational bodies like EEC or for bodies such as CMEA, for no long-term general conclusions could be drawn from the current tendency to reaffirm the principle of the absolute sovereignty of States. Consequently, the Commission was not able to decide whether it was preferable to draft provisions to regulate international organizations or supranational organizations.

33. Furthermore, the Special Rapporteur had explained at great length that the purpose of article 36 *bis* was to render more flexible the modalities of consent. But that did not mean the modalities of consent in general; it was not a question, for example, of simplifying the procedures whereby a third State or third organization could become a party to a treaty. In fact, in its current formulation, article 36 *bis* strove simply to introduce greater flexibility in the means whereby States members of a supranational organization could consent to be bound by obligations arising from treaties concluded by that organization. In other words, it was not even applicable to international organizations. He doubted whether an article having such a limited field of application could be of any use whatsoever.

34. Turning to the concept of third State or third organization, he said that no reference could be made to a third State or third organization without specifying whether that State or organization was a third party with respect to the treaty or with respect to the organization. A State member of an international organization was a third party with respect to a treaty concluded by that organization—a treaty to which it was not itself a party—but it was certainly not a third party with respect to the organization. On the contrary, it was one of the organization's components.

35. At the beginning of article 36 *bis* as adopted on first reading, the expression "third States" denoted third States with respect to a treaty concluded by the organization of which they were members, whereas, in the first line of subparagraph (*b*) of the same text, the words "the States and organizations" denoted the third States and third organizations with respect to the international organization. That article was too vaguely

[10] Art. III, para. 2 (*b*), of the Protocol of 21 June 1974 amending the Statute of CMEA.

drafted. What was needed was not to delete the word "third" before the word "State" at the beginning of the text, but to specify with respect to whom or what the member States of an international organization and the States and organizations participating in the negotiation of the treaty were third parties.

36. In his proposed new version of article 36 *bis* (A/CN.4/353, para. 26) the Special Rapporteur had eliminated the idea of "third States" and referred simply to "States members of an international organization". He had also refrained from mentioning the rights deriving from a treaty.

37. According to subparagraph (*a*) of the new draft, the assent of States members of an international organization derived from "the relevant rules of the organization applicable at the moment of the conclusion of the treaty which provide that States members of the organization are bound by such a treaty". As it stood, that subparagraph could only apply to supranational organizations, for no other organizations had rules providing that their member States were bound by the treaties which they (the organizations) concluded; the States members of an international organization were always third States in relation to the treaties it concluded. But although it was of extremely limited scope, the subparagraph was incomplete. It was not enough to say that assent derived from the relevant rules of a supranational organization which provided that its member States were bound by the treaties it concluded. Logically, it must be stipulated that the States members of a supranational organization could no longer conclude agreements in spheres of activity within the competence of the organization, for it would otherwise be impossible to determine which treaties (treaties concluded by the States or treaties concluded by the supranational organization) should prevail. But that stipulation would not settle all the problems. There remained the issue of the relationship between the treaties concluded by the supranational organization and the treaties concluded by its member States before its creation.

38. Hence, the elaboration of provisions concerning treaties concluded by supranational organizations, if such was the aim, would require the amendment of article 36 *bis*, which had a number of deficiencies, and the reworking of articles 35 and 36, for States members of a supranational organization, having abandoned to the organization the conclusion of treaties in certain areas, were certainly not free to assume the obligations or to exercise the rights arising from treaties other than those concluded by that organization. In fact, a good many provisions of the draft, including those concerning reservations, would need to be revised.

39. The main reason why he had raised so many points was to show that it was quite impossible to deal with both international organizations and supranational organizations in the same draft articles.

40. As now proposed by the Special Rapporteur, article 36 *bis*, subparagraph (*b*), was extremely obscure and raised many questions. There was, for example, the issue of the identity of the "States and organizations participating in the negotiation of the treaty": did the phrase "States ... participating in the negotiation" mean States members and States not members of the organization? What exactly did the States and organizations in question acknowledge during the negotiation and how was that acknowledgement made? Finally, what was meant by "the acknowledgement by ... the States members of the organizations"; since those States had not necessarily participated in the negotiation, how was the acknowledgement made in their case? If that subparagraph was so vague and difficult to understand, it was undoubtedly because less importance was attached to it than to the preceding one. Presumably it had been thought advisable, once the provisions concerning supranational organizations had been set out in subparagraph (*a*), to supplement them with a few vague provisions concerning international organizations so as to have a more balanced text.

41. Article 36 *bis*, which, for all the reasons he had invoked, did not belong in the draft articles, should be deleted.

42. Mr. OGISO said that, in his introduction to article 36 *bis*, the Special Rapporteur had raised the question (1704th meeting) whether a State member of an international organization was a third State, in the true sense of the term, in relation to a treaty concluded by that organization with States or with other international organizations. For his own part, he subscribed to the view that the States members of an international organization were not ordinary third States in relation to treaties concluded by that organization. Legally speaking, a State was either a party to a treaty or it was not and it could not, therefore, have any intermediate status in relation to a treaty to which an international organization of which it was a member was a party. For that reason, he was of the opinion that the solution provided for in the definition given in article 2, subparagraph 1 (*h*), of the draft was the right one.

43. The Special Rapporteur had also asked whether it was appropriate for the States members of international organizations to ease the very strict formal requirements relating to consent which were applicable under the Vienna Convention to third parties that assumed an obligation arising from a treaty. In his own opinion, cases in which an international organization concluded treaties that bound its member States were quite likely to occur; some, indeed, already existed, as shown by the examples given by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 27). The growing number of such examples seemed proof of a trend in international law towards acceptance of the idea that a treaty concluded by an international organization could bind the States members of the organization if the organization's constituent instrument or other relevant rules so provided. He therefore thought that the strict procedure concerning acceptance by the States members of an international organization of the obligations provided for in a treaty concluded by that organization should be made more flexible, particularly in order to

take account of the future development of international law in that area.

44. In that connection, Mr. Ushakov had referred to CMEA and to EEC, which followed entirely different rules with regard to the effects of treaties to which international organizations were parties with respect to third States members of those organizations. Since those two organizations were very different, Mr. Ushakov might not agree that the direction being taken by one of them provided evidence of a trend, but, in his own view, it would be incorrect to say that such a trend did not exist and that a State member of an international organization was a third State in the strict sense of the term.

45. At the preceding meeting, the Special Rapporteur and several other members of the Commission had implied that article 36 *bis* might jeopardize third world interests. For example, Mr. Sucharitkul had referred to a headquarters agreement between Indonesia and ASEAN in which all the States involved were developing countries, but, in such a case, it was unlikely the concept embodied in article 36 *bis* would have negative implications for the interests of developing countries. Mr. Thiam had cited the example of a customs union composed of developing African countries. The criterion of the interests of third world countries should not, however, be used as a basis for illustrating the merit or demerit of article 36 *bis*.

46. The third question that had been raised by the Special Rapporteur was how the modalities of assent to treaty obligations by the States members of an international organization could be eased. In his own opinion, article 36 *bis* must make it as clear as possible that the States members of an international organization were bound by obligations arising from a treaty concluded by that organization and it must also specify at what moment acceptance was given by those States. If those two requirements were not met, the parties to the treaty other than the organization could not be sure whether the member States were bound by that treaty; such uncertainty might give rise to difficulties in the execution of the treaty.

47. In that connection, he noted that the relevant rules of an international organization, as referred to in article 36 *bis*, subparagraph (*a*), could be interpreted only by the competent organ of the organization or by the organization's member States. The parties to the treaty other than the organization in question had no part to play in determining what the relevant rules were and what they meant. If, after the conclusion of a treaty by an international organization, the interpretation of the relevant rules of the organization raised doubts about whether the States members of the organization were bound by that treaty, the conflict of interpretation would have to be settled within the international organization, not by the other parties to the treaty; that would place those other parties in a rather insecure position in their treaty relations with the States members of the international organization. Consequently, no treaty could be concluded between States and an international organization unless it expressly stated that the relevant rules of the organization provided that the treaty would bind the member States of the organization.

48. In view of the need for such a clarification, he proposed that the words "the organization expressly acknowledges that ..." should be added at the beginning of article 36 *bis*, subparagraph (*a*), as adopted on first reading. That amendment would make it clear that, since the interpretation of the constituent instrument and the relevant rules of the organization depended on the States members of the organization, the other parties to the treaty would have to have express acknowledgement from the organization in order to be protected in their position vis-à-vis the latter's member States. He also suggested that the beginning of article 36 *bis*, subparagraph (*a*), as proposed by the Special Rapporteur (*ibid.*, para. 26), should be amended to read: "(*a*) the express acknowledgement by the organization that the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that ...". For the sake of consistency, the word "express" should also be added before the word "acknowledgement" in subparagraph (*b*) of the revised text proposed by the Special Rapporteur.

49. The wording he had just proposed for subparagraph (*a*) differed from that proposed by Mr. Ni at the preceding meeting only in that it contained a reference to the relevant rules of the organization, but not to the constituent instrument of the organization. In his view, the words "the relevant rules of the organization" should be retained in that subparagraph to cover the case in which a rule of the organization other than its constituent instrument provided that the member States were bound by obligations established under a treaty concluded by the organization.

The meeting rose at 1.15 p.m.

1706th MEETING

Thursday, 13 May 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

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[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).