Document:-
A/CN.4/SR.1706

Summary record of the 1706th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1982, vol. I

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]

---

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

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. McCAFFREY said that he experienced no difficulties regarding the basic thrust of article 36 *bis* and he agreed with the well-substantiated view taken by the Special Rapporteur and other members of the Commission that there was ample justification for such an article, independently of its application to EEC. He also agreed with the basic principle that, in certain exceptional and well-defined circumstances, an international organization might, by entering into a treaty, create rights and obligations for its member States. Hence the Commission's task was to define those circumstances in such a way as to ensure adequate protection of the interests of the three categories of parties, or more properly speaking, "actors", potentially affected by the article, namely, international organizations, the member States of those organizations and States parties to treaties with international organizations.

2. The Special Rapporteur had clearly explained who the beneficiaries of article 36 *bis* would be, but it still had to be determined whether the benefits would create a correlative detriment for one or more of those three categories of actors and whether it would be so unacceptable as to dictate that article 36 *bis* should be abandoned altogether.

3. At the Commission's previous session, the interests of each of the three categories of actors to be safeguarded had been clearly summarized by Mr. Pinto.[4] First, the organization entering into the treaty had an interest in ensuring observance of its rules and implementation of its treaty intentions. Second, the member States of the organization had an interest in ensuring that they were bound only in a manner clearly set forth in rules of the organization to which they had agreed or, in the absence of any such rules, by their express consent, however demonstrated. Third, the other States participating in the negotiation of the treaty and later parties to the treaty had an interest in ensuring that they would know in advance which other States would receive benefits and incur obligations under the treaty—in other words, ascertaining in advance who their treaty partners would be. Those three groups of interests seemed to him to boil down to what would be referred to in German as *"Rechtssicherheit"*, namely, legal certainty and predictability.

4. For the purposes of the discussion of article 36 *bis*, it was important to concentrate on one version or the other. The revised version proposed by the Special Rapporteur (A/CN.4/353, para. 26) was better because it offered the two advantages of emphasizing the requirement of assent and eliminating the term "third States". Again, it had to be borne in mind that the basic question of need for consent by the member States of the organization was clearly covered by articles 35 and 36, and that article 36 *bis* dealt only with the manner in which the member States of an international organization could express their consent to be bound by a treaty entered into by the organization. Thus, as far as obligations were concerned, article 36 *bis* was an exception to the requirement in article 35 that the consent of third States should be expressed in writing. In considering whether the interests of the three categories of actors were adequately protected, it must also be asked whether the relaxation of the rule embodied in article 35 created a potential for "unfair surprise" for the actors in any one of the three categories.

5. With regard to the first category he had mentioned, it was plain that when the purpose of the organization in entering into the treaty in question was to create obligations and/or rights for its member States, that purpose would be thwarted if the member States could avoid the obligations by claiming that they had never given their consent to the treaty. The organization itself, and the member States which had expected to incur obligations, would thus want some kind of clear agreement that all of the member States would be bound by the treaty. If the organization was to function effectively, such an important matter as the circumstances under which the member States could be said to assent to obligations arising from treaties concluded by the organization should not be left to implication, for a recalcitrant member State might claim that, in the absence of its express assignment to the organization of the right to bind it by treaty, the organization had no such power. Even if a competent tribunal were later to find that the organization did, in fact, have such power, the entire dispute settlement process would, at the very least, disrupt the smooth functioning of the organization and could even prevent it from functioning at all if the recalcitrant State was a sufficiently important member.

6. It therefore seemed that the interest of the organization in ensuring observance of its rules and implementation of its treaty intentions could be effectively safeguarded only by a provision spelling out in clear terms what kind of conduct, short of written acceptance, would create obligations for the member States. In his view, however, that objective could be achieved if the revised version of article 36 *bis* was redrafted, partly along the lines suggested by Mr. Ni (1704th meeting, para. 20).

7. With regard to the second category of actors, namely the member States of the international organization, the question was whether article 36 *bis* sufficed to protect their interest by ensuring that they were bound only in so far as they had given their express consent or in so far as rules of the organization to which they had agreed clearly specified the circumstances under which

[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] *Yearbook ... 1981*, vol. I, p. 184, 1678th meeting, para. 6.

they were considered to have assented to obligations arising from treaties concluded by the organization. That category of actors was, of course, the one that had aroused the greatest interest, and the concern of most of the members of the Commission who had expressed reservations about the effect of article 36 *bis* seemed, basically, to be a fear that the member States of an international organization would be the victims of "unfair surprise" and would have obligations imposed upon them unexpectedly and against their will.

8. Mr. Ni had emphasized the particular importance of protecting the newly independent States of the third world from incurring unexpected responsibilities when they became members of international organizations, and even after, a legitimate concern and certainly one which most, if not all, States would share. Indeed, international organizations were playing an increasingly important part in today's interdependent world as vehicles for collective action, and their role was particularly critical for the countries of the third world, which might wield greater influence by acting collectively than by acting alone. The Commission must undoubtedly avoid sowing the seeds of distrust of such organizations by appearing to give them more power over their member States than was its real intention. The question that then arose was whether it was possible to relax the formal requirements for expressing consent—something that would strengthen the international organization as an actor on the international scene—and at the same time, safeguard the interest of its member States in knowing in advance precisely how much of their sovereignty they were surrendering by joining the organization.

9. The Commission could indeed achieve both of those objectives, which did not appear to be inconsistent, by following Mr. Ni's proposal that in subparagraph (*a*) the phrase "the relevant rules of the organization" should be replaced by "the constituent instrument of the organization", that subparagraph (*a*) as a whole should be amended to read: "the constituent instrument of the organization applicable at the moment of the conclusion of the treaty expressly provides that the States members of the organization are bound by such a treaty", and that subparagraph (*b*) should be amended to read: "the States members of the organization expressly undertake to assume [the] obligations" arising from a treaty concluded by the organization.

10. The problem regarding the phrase "the relevant rules of the organization" was that those rules, as defined in article 2, subparagraph 1 (*j*), included resolutions, which might not have met the support of a member State, which would then have grounds for a justifiable objection to the imposition of an obligation arising from a treaty entered into by the organization. One solution would be to require that resolutions empowering the organization to create treaty obligations for its member States should be adopted unanimously, or that no member State would be deemed to have given its consent on the basis of "relevant rules" to which it had not expressly agreed. A solution of that kind would be cumbersome both in terms of drafting and in terms of the functioning of international organizations, but it might be worth considering in the light of the Special Rapporteur's point that making everything dependent upon the constituent instrument of the organization might hamper the organization's development.

11. The advantages of requiring that such a provision should be expressed in the constituent instrument of the organization were that the member States would know in advance to what extent they were surrendering their sovereignty and that there would be no problem of deciding whether unanimity was necessary in order to adopt a rule of the organization allowing the organization to bind its member States through treaties. The principal disadvantage of making the constituent instrument the sole determinant was that the provisions of constituent instruments were cast more or less in concrete and did not lend themselves to development through practice in the same way as did rules that were expressed in resolutions. A stipulation that the requisite power should be conferred upon the organization in its constituent instrument might not be the ideal solution, but it might be the most practical course and the best compromise between the exclusive requirement of express consent in writing, as specified in article 35, and total flexibility.

12. As to subparagraph (*b*), the main problem seemed to lie in the rather vague term "acknowledgement", which could conceivably be interpreted as meaning anything from an express undertaking in writing to mere passive acquiescence. Although he agreed with Mr. Ushakov that that term was not the most felicitous, article 36 *bis* need not be eliminated in order to solve the problem it posed. As far as the member States of an organization were concerned, an improvement would be to replace the requirement of acknowledgement by the requirement of an express undertaking to assume the obligations in question. That would apparently reflect the practice of CMEA, as described at the previous meeting by Mr. Ushakov, and would allow member States to accept obligations under a treaty concluded by the organization when they had not consented in advance to the imposition of such obligations.

13. The amendments to subparagraphs (*a*) and (*b*) proposed by Mr. Ni therefore seemed to safeguard adequately the interests of the member States of the organization by affording them an opportunity to determine in advance the extent to which the organization had the power to bind them through its treaties, or at least to give their *post hoc* consent to obligations arising from treaties concluded by an organization that lacked such power.

14. With regard to the third category of actors, namely, the States parties to treaties concluded with an international organization, it could well be asked whether their interest in determining in advance all of their treaty partners and those on whom they would be conferring rights was properly safeguarded by article 36 *bis*. The answer to those questions was contained not in article 36 *bis* alone but primarily in articles 35 and 36,

both of which protected the interests of States parties by requiring that it should be the intention of the parties to the treaty to create the obligation or right for the "third State", namely, the member State, in the present instance. Parenthetically, he pointed out that Mr. Riphagen's suggestion (1705th meeting, para. 21) regarding the insertion of a separate article stating that the provisions of section 4 were without prejudice to the rights and obligations of States members would be a simpler solution than attempting to reformulate the definition of the term "third State" contained in article 2, subparagraph 1 (*h*). Hence, if the requirements of articles 35 and 36 were not met, no obligation or right arose with respect to the member State and there was nothing to which it could assent under article 36 *bis*, which therefore posed no difficulties on that score. Similarly, articles 35 and 36 would not appear to threaten the interests of the States parties, if the latter did not intend the member States to be their treaty partners.

15. It might be desirable, however, to amend the opening paragraph of article 36 *bis* to make it clearer that the constructive consent of the member States was required before they could be bound by treaties concluded by the international organization. The entire article, including a slightly modified version of the amendments to subparagraphs (*a*) and (*b*) proposed by Mr. Ni (1704th meeting, para. 20), would then read:

> "A treaty to which an international organization is a party does not create obligations with respect to States members of that organization without their consent/assent. States members will be considered to have given such consent/assent where:
>
> "(*a*) The constituent instrument of the organization applicable at the moment of the conclusion of the treaty expressly provides that States members of the organization are bound by such a treaty; or
>
> "(*b*) States members of the organization expressly undertake to assume such obligations".

16. Although the wording was certainly subject to refinement, it would appear to meet much of the concern expressed by members of the Commission and by Governments and international organizations which had commented on article 36 *bis*.[5] It would also afford adequate protection for the interests of each of three of the categories of actors. Such an approach was preferable to a compromise on the question of introducing flexibility by making an addition to article 35. Admittedly, deletion of article 36 *bis* would eliminate the entire problem, but he doubted whether an attempt to conceal the problem in article 35 would have the desired effect of eliminating the controversy. The best course was to meet the controversy head-on by removing the uncertainties that now existed in article 36 *bis*.

17. Mr. EL RASHEED MOHAMED AHMED said that the exception to article 35 embodied in article 36 *bis* was more apparent than real. If the words "Subject to article 36 *bis*" had not been placed in square brackets in article 35, paragraph 1, articles 35 and 36 *bis* would not have given rise to so much discussion. Article 36 *bis* was, of course, quite controversial, but the Special Rapporteur had rightly pointed out in his eleventh report (A/CN.4/353, para. 27) that its purpose was to render more flexible the modalities of assent which article 35 had made subject to very strict formal requirements.

18. Mr. Al-Qaysi (1704th meeting) had noted that, while article 35 referred to third States, article 36 *bis* referred to the member States of an international organization. A distinction was thus made between States which were third parties and States which were members of an international organization, just as there was a distinction between a treaty to which an international organization was a party and the treaty establishing that organization. Moreover, the member States of the organization were not really third parties to treaties concluded by that organization.

19. Mr. Ushakov (1705th meeting) had replied in the negative to the Special Rapporteur's question (1703rd meeting) as to whether an international organization was a third party in relation to the States that had established it, and had said that, while the organization was composed of all its member States, the member States could not bind the organization. However, the question of whether the organization could bind its member States depended on the constituent instrument of the organization and, above all, on the consent of the member States.

20. The Special Rapporteur had pointed out (*ibid.*) that any obligation arising for a third international organization from a treaty provision was necessarily limited to the activities of that organization. There were, however, a number of ways in which the organization could absolve itself of an obligation, as could be seen from articles 54, 59 and 62. Perhaps article 62 could provide an answer to Mr. Ushakov's question (*ibid.*) as to whether consent to an obligation would subsist even if the organization ceased to exist.

21. The Special Rapporteur had also asked (1704th meeting) whether the member States of an international organization would benefit from article 36 *bis*. Mr. McCaffrey had given a very clear answer in his analysis of the actors whose interests were affected by that provision. In his own view, the member States of an international organization were not complete strangers to the rights and obligations assumed by the organization and they could not refuse to assume an obligation arising from an agreement concluded by the organization on the grounds that they were third parties in relation to that agreement.

22. In that connection, the Special Rapporteur's example (*ibid.*) of an international bank which offered benefits to its member States but also imposed obligations on them was particularly pertinent, because article 36 *bis* covered both obligations and rights and stipulated that the obligations must be expressly accepted. It

[5] A/CN.4/339 and Add. 1-8, reproduced in *Yearbook ... 1981*, vol. II (Part Two), annex II.

therefore safeguarded the interests of all the member States of an international organization, including those of third world countries, and should be retained in the draft articles, although the wording would have to be improved. To that end, either the phrase "[Subject to article 36 *bis*]" should be deleted from article 35, paragraph 1, or the phrase "[Subject to article 35]" should be added at the beginning of article 36 *bis*. The Drafting Committee should also pay careful attention to the drafting suggestions made by Mr. McCaffrey.

23. Mr. CALERO RODRIGUES said that the approach taken by the Special Rapporteur and by Mr. Ushakov differed so much that, in the course of the discussion, he had often wondered whether they were referring to the same article.

24. The Special Rapporteur had said that article 36 *bis* was a straightforward provision, which did not constitute an exception to the principle of consent enunciated in article 35 and was aimed solely at eliminating the requirement that consent should be given in writing in every case. According to Mr. Ushakov, adoption of article 36 *bis* would call into question the basic principles of the draft articles as a whole and the international legal order, because it involved problems relating to the sovereignty of States, discrimination between international organizations, future models of economic integration and the interests of developing countries. Some of the problems to which Mr. Ushakov had referred were very important indeed, but he did not think that they came within the limited framework of article 36 *bis*.

25. Some of the points raised by other members of the Commission who did not have the same apocalyptic view of article 36 *bis* as did Mr. Ushakov were also irrelevant to the discussion. For example, the question of whether the member States of an international organization should or should not be regarded as third States in relation to treaties concluded by the organization had no bearing on whether article 36 *bis* should be retained or deleted. The argument that the article was improper because it related to the case of only one international organization was also irrelevant. Article 36 *bis* did not refer to any organization in particular, and although at present it applied to only one organization, there was nothing to prevent other organizations of the same type from being established in the future.

26. He shared the Special Rapporteur's realistic view of the problems regarding article 36 *bis*, which merely stated that acceptance in writing was not necessary in the case of States that wished to assume obligations established by a treaty concluded by an international organization of which they were members. Their acceptance of such obligations would either be implicit, if the relevant rules of the organization specified that they were bound by such a treaty, or explicit, if all the States and organizations participating in the negotiation of the treaty and all the States members of the organization concerned acknowledged that the treaty necessarily bound the member States of the organization. By acknowledging that the treaty was binding on them, the member States were giving their consent to be bound, and no further formal act of acceptance in writing was required. Although he was not entirely satisfied with the word "acknowledged" used in article 36 *bis*, subparagraph (*b*), and thought that a better term could be found, he realized that the Special Rapporteur had probably intended to leave the wording vague in order to take account of every eventuality.

27. Mr. Ushakov (1703rd meeting) had rightly drawn attention to the subsidiary nature of the rules contained in section 4, and particularly in article 36 *bis*. Indeed, there might be cases in which, despite the relevant rules of the organization, the member States would not be bound by a treaty concluded by that organization. An example was to be found in the Convention on the Law of the Sea,[6] which could be signed by organizations in regard to matters in which competence had been transferred to them by their member States. States were thus entirely eliminated from annex IX of the Convention, and their rights and obligations were transferred to the organization.

28. The Commission was facing a problem because, as the Special Rapporteur had noted (1705th meeting), the controversy over article 36 *bis* had become more symbolic than anything else. It was perhaps too late to consider the provision dispassionately and in the technical terms in which it should have been discussed in the first place. Perhaps it was also impossible to keep article 36 *bis* as it now stood and as he would have liked it to be adopted, subject to some drafting improvements. The Special Rapporteur had admitted that it was not essential, but it would nevertheless be useful to all concerned—international organizations, their member States and the other parties to treaties concluded by such organizations. The answer to the question of whether it should be retained might therefore lie in adopting the amended wording proposed by Mr. Ni (1704th meeting, para. 20) and refined by Mr. McCaffrey at the current meeting (see para. 15 above) or in adopting the suggestion made by Mr. Riphagen (1705th meeting, para. 21).

29. Mr. NJENGA said that, in the controversial discussion of the consequences of article 36 *bis*, the arguments for discarding it far outweighed those for adopting it. Although EEC was the only specific example of an international organization to which article 36 *bis* now applied, he would not go as far as to say that that alone was a conclusive reason for removing the article from the draft. However, the Commisison should not engage in drafting provisions for future contingencies unless it could be sure that a trend towards the surrender of State sovereignty to international organizations did exist. If he could be persuaded that there was indeed a trend in that direction, he would be able to agree that article 36 *bis* would serve a useful purpose.

[6] See 1699th meeting, footnote 7.

30. From what he had seen, particularly in Africa, no such trend was to be found. There was, admittedly, a move towards economic integration in that part of the world and the Heads of State and Government of the African countries had, for example, met at Lagos in April 1980 to adopt the Lagos Plan of Action,[7] which aimed at the economic integration of the continent by the year 2000. In that connection, he also mentioned the Economic Community of West African States (ECOWAS) and the treaty signed at Lusaka in December 1981 to establish a preferential trade area covering countries in eastern and southern Africa. Under that agreement, an organization would be established to monitor the preferential trade area, but nowhere in the constituent instrument was it specified that the organization could contract on behalf of its member States.

31. East Africa had also had extensive experience of economic integration in the form of the East African Community, which, in its time, had in some respects been even more integrated than the European Economic Community. In every act involving treaties with non-members, however, each of the three member States had been associated with the Community in a kind of mixed arrangement. Again, the African Development Bank and the Arab Bank for Economic Development in Africa assumed rights and obligations on behalf of their member States, but the latter had consented to those rights and obligations in advance in the sense that they had each agreed to pay a share of the contributions to the capital of the Bank.

32. In the light of those examples, his impression was that the African countries were very cautious about surrendering their sovereignty to international organizations over which they might not have full control and that strong nationalistic feelings would continue to prevail in that part of the world for some time. He therefore saw no point in including in a draft of a general nature a specific provison which would cater only for eventualities or for one particular international organization. Moreover, the case of EEC had been taken into account in the Convention on the Law of the Sea. Following that example, instances in which States surrendered their treaty-making powers to an international organization should be dealt with in particular treaties or agreements concluded by the organization concerned and not in the draft articles, which contained general rules. In his opinion, article 36 *bis* was unnecessary, although a case could be made for easing the modalities of assent by the member States of an international organization to the obligations established by a treaty concluded by the organization. Provisions on consent given in advance might therefore be included in a new article 35 *bis*.

33. Mr. KOROMA said it seemed to him that the points at issue in article 36 *bis* were whether the member States of an international organization could assume obligations under the organization's constituent instrument and whether the consent of the member States to those obligations should be express or construed.

34. It was theoretically possible for the member States of an international organization to assume obligations under the constituent instrument, but practically speaking, in most cases the trend was in the opposite direction, as had just been shown by Mr. Njenga. The Commission's task was therefore one of matching the theoretical possibility with what might be termed the practical impossibility. If article 36 *bis* was to be drafted to take account of the theoretical possibility, it would have to refer to "States members of an international organization", not to "third States members of an international organization". Any reference to "third States" would hamper rather than advance the cause of the progressive development of international law.

35. The article as it now stood also gave rise to difficulties because of its title: "Effects of a treaty to which an international organization is party with respect to third States members of that organization". It could be asked whether the member States of the organization were third parties in the sense that they had not severally negotiated all aspects of the treaty or in the sense that they had legal personality distinct from that of the organization. If they did have different legal personality, there might be a multiplicity of parties to the treaty, as happened in the case of the Convention on the Law of the Sea; but that was a specific situation involving EEC, and it did not reflect a general trend.

36. If article 36 *bis* was to be retained, it would have to be placed elsewhere in the draft. The reference to "third States" members of the organization would also have to be replaced by a reference to the "member States" of the organization, because he was not persuaded that the member States of an organization which accepted obligations established by a treaty concluded by the organization could realistically be regarded as third parties to the treaty.

37. Article 36 *bis* might also prove to be dangerous in that different organs of an international organization might conclude treaties and, if the member States had to assume the obligations established by such treaties, they might find themselves in situations beyond their control.

38. Mr. PIRZADA said that the Special Rapporteur's presentation of a controversial article had been instructive and affirmative. However, Mr. Ushakov's views, particularly his criticism of subparagraph (*b*), carried great weight. In view of the conflict of opinion over whether to retain the article, the balanced approach was that taken by Mr. Ni (1704th meeting), who had expounded the point of view of the third world with respect to international co-operation and suggested constructive amendments to both paragraphs.

39. The first controversial area relating to article 36 *bis* concerned international organizations. The article

[7] Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa (A/S-11/14, annex I).

appeared to have been tailored to suit EEC, and it had therefore been suggested that the treaty-making capacity of such supranational institutions replaced that of the member States. Reference had also been made to the Convention on the Law of the Sea, which, as Mr. Riphagen had pointed out (1705th meeting), represented a special situation owing to its "package" character. Other members had cited other categories of organizations, such as customs unions, headquarters agreements between organizations and host States, the West African Monetary Union and arrangements among Asian States concerning refugees. Since the term "international organization" signified an intergovernmental organization for the purposes of the draft articles, only one specific international organization met the situation envisaged in article 36 *bis*, but it was true that international organizations were growing in number, and perhaps the Commission would be called upon in the future to make provisions of the kind under discussion.

40. The second point concerned the position of the member States of such international organizations. The Special Rapporteur (1704th meeting) had referred to the observations of the International Court of Justice in its advisory opinion regarding the *Reparations for Injuries Suffered in the Service of the United Nations* case; an element of detachment did enter into the matter, but the member States could not be described as aliens to an agreement concluded by the organization. Such positions appeared even in municipal law and in cases of corporations or companies with limited liability. Such bodies were distinct and had their own legal personality, but occasions arose when the veil of incorporation had to be lifted. Again, to speak of surrender of sovereignty or abandonment of authority to give consent was too technical an approach. Anticipatory assent might well be involved, but in substance the Commisison was dealing with constructive consent and providing for an exception to articles 35 and 36.

41. He therefore believed that article 36 *bis* should be retained for the reason suggested by the Special Rapporteur in his eleventh report (A/CN.4/353, para. 27), in other words, to render more flexible the modalities of assent which article 35 had made subject to very strict formal requirements. On the other hand, too much flexibility must be avoided. For that reason, he endorsed Mr. Ni's suggestion (1704th meeting, para. 20) that the expression "relevant rules of the organization" in subparagraph (*a*) should be replaced by "constituent instrument". Mr. Ni's formulation for subparagraph (*a*) could in fact be taken as the point of departure, and the improvements suggested by Mr. McCaffrey and the Special Rapporteur could be examined in the Drafting Committee.

42. As to subparagraph (*b*), the word "acknowledged" was ambiguous and, together with the phrase "necessarily entails such effects", could create complications. At the same time, Mr.Ushakov's suggestion (1705th meeting) should not be overlooked. There were two choices: either subparagraph (*b*) should be discarded, or, if it was to be retained, Mr. Ni's or Mr. Ripagen's suggestions should be taken into consideration.

43. Lastly, with regard to article 35, paragraph 2, he supported Mr. McCaffrey's suggestion (1703rd meeting) that the words "in the sphere of its activities" should be deleted.

44. Mr. LACLETA MUÑOZ said that, unlike several previous speakers, he was convinced that an article like 36 *bis* should be retained. Mr. Ushakov was right to say that, so far, the rules of article 36 *bis* fully applied to only one organization, EEC. However, was that sufficient reason for the Commission to disregard the legal characteristics that had given rise to the existence of that organization? Such a course could prevent a move in the future towards organizations that would fall under the terms of subparagraph (*a*), namely, organizations whose constituent instrument provided that the member States were bound by the treaties concluded by the Organization.

45. He did not believe the problem should be judged in isolation for the degree of integration reached by an organization. It was difficult to imagine a situation in which an organization would be created in order to conclude treaties that were binding upon its member States. Rather, the treaties entered into by an organization would apply automatically to the member States because of the degree of integration reached by the organization. The world of today unquestionably displayed a marked trend towards integration. Since the Commission had been criticized for a predilection for codifying existing practice and an ostensible fear of making proposals to cover the future development of international law, it was important to retain an article like article 36 *bis*.

46. In his opinion, the article, or one like it, could not be condemned on the grounds that it overlooked the significance of State sovereignty, for there was nothing in the construction of the theory of sovereignty itself to prevent States from giving their consent in advance, under a rule whereby it was understood that they would continue to give their consent to each of the treaties concluded by an organization of the type in question.

47. He had spoken of "an article like 36 *bis*" because the new version proposed by the Special Rapporteur (A/CN.4/353, para. 26) differed in some respects from the text that had been adopted on first reading. It referred to the assent of the States members, which was a step in the right direction, since the previous text could be criticized as relating to one concrete case. The mention of assent was highly beneficial, because it afforded the State a different means of giving its assent while adhering to the essential rule that, in a consensual relationship, there was no obligation without assent. Such an approach considerably enhanced the value of the article.

48. The second difference, also a positive one, was that the new version did not speak of third parties, and he shared the Special Rapporteur's views (1703rd

meeting) on the meaning of the term "third party". Theoretically, as Mr. Ogiso had pointed out (1705th meeting), a State was either a party to a treaty or it was not. For his own part, he was inclined to believe that the member States of an "ordinary" organization, to use Mr. Ushakov's words (1702nd meeting), could be considered third parties, but not the member States of an organization having "supranational" competence. The problem could be evaded, as had been done in the Convention on the Law of the Sea, by referring not to third States but simply to States members of an organization. The last difference was that the original formulation spoke of both obligations and rights, whereas the second spoke only of obligations; however, he did not believe that point was one of major importance.

49. For all that, the text stood in need of some improvements. Mr. Ni's suggestion (1704th meeting, para. 20) that the expression "relevant rules" in subparagraph (*a*) should be replaced by "constituent instrument" was sound and would respond clearly to Mr. Ushakov's well-founded objection (1703rd meeting) by affording member States a guarantee that they would not be surprised by a decision or resolution approved by the majority. He shared Mr. Ushakov's criticisms of subparagraph (*b*) and was also concerned that it was based on an "acknowledgement", a term that raised doubts in international law and should be avoided.

50. In all likelihood, the drafting of article 36 *bis* had been influenced by the fact that the two preceding articles had been confined to observance of obligations and exercise of rights. Since a special case of consent was now involved, it was necessary to recast the article. Perhaps the two subparagraphs could be merged, as the Special Rapporteur had suggested, giving priority to subparagraph (*a*). Other changes had been suggested with regard to subparagraph (*b*), all of which he found valid.

51. Mr. FRANCIS said that, whatever the decision on the question of whether it was advisable to allow for some flexibility in the matter of assent by a member State of an international organization, the general question involved in article 36 *bis* should be mentioned in the Commission's report.

52. He inclined to the view that, in a strictly legal sense, the member States of an international organization were third States in relation to treaties concluded by the organization. However, they were third States of a unique kind: third States with a special interest. Mr. McCaffrey had cited the views expressed at the previous session of the Commission by Mr. Pinto in connection with the interests of member States of an organization and the organization itself. In another context, it would be useful to proceed further with the question of interest. To the extent that an organization had the capacity to conclude a treaty, he was convinced that the individual members had a collective interest in terms of the objective of the treaty, for as Mr. Ushakov had rightly observed (1705th meeting), the members were constituent elements of the organization. But each one also had an identical interest in ensuring that the treaty fell within the mandate of the organization and, as members, an interest identical with that of the organization itself so far as the performance and the effectiveness of the treaty were concerned. The treaty-making powers of an organization were in fact nothing more than the collective will of its members. For that reason, it was advisable to comment on that important question in the report, outside the context of "supranationality".

53. The Special Rapporteur had suggested (*ibid.*) that some flexibility could be introduced in respect of article 35, either by inserting a separate paragraph or adding an article 35 *bis*, and that Mr. Ni's suggestion (1704th meeting, para. 20) would form a sound basis for such a course. The answer would depend on whether the Commission wished to state a positive rule in the draft. If so, Mr. Ni's proposal would be an excellent starting point: it had the virtue of getting away from the rigid element of obligation, since it spoke of "effects" on the member States. If, however, the Commission did not wish to go so far as to introduce a positive rule, then the matter should be pursued on the basis of Mr. Riphagen's suggestion (1705th meeting, para. 21).

54. Mr. QUENTIN-BAXTER said that, for pragmatic reasons, article 36 *bis* should be retained at the present time; after all the time, effort and skill that had been brought to bear upon the question, it would be quite impossible to do otherwise. The General Assembly was entitled to the best advice and should be given every opportunity to reach its own conclusions on the basis of a developed draft. Secondly, it was true that article 36 *bis* was something of a departure from the pure symmetry of the draft. A relationship other than a relationship between parties to treaties was being examined, and from a more positive standpoint than that of the articles of the Vienna Convention relating to the rights and obligations of third parties. Thirdly, the Commission was not making the fundamental law of international organizations and it should therefore be careful when dealing with the relationship between the members of an organization and the organization itself. That matter fell within the Commission's purview, but not within the scope of the topic itself. Fourthly, on the question of protection, he was concerned not so much with the interests of the member States of an organization, which were generally in a position to look after themselves, as with the interests of the States which must deal with the organization. They might have rather less opportunity to form a proper view of the extent of the relevant rules of the organization.

55. A paradigm of all those questions could be provided by Mr. Riphagen's suggestion that, at the very least, a saving clause should make it clear that nothing in the draft would effect the operation of other laws in relation to the matters dealt with in article 36 *bis*, particularly in subparagraph (*a*). At a practical level, such a saving clause would delineate a gap between the Vienna Convention and the rules applied to organizations in

their relationships with States and with other international organizations.

56. Of course, as the Special Rapporteur had said, the case of EEC stood alone at the present time and no article in a law-making treaty was actually necessary to provide other States security in their dealings with EEC, a circumstance that was adequately covered by its constituent instruments. Yet it was something of a confession if, at the end of the codification exercise, other laws independent of the Commission's codification and of the Vienna Convention had to be relied upon. It had to be remembered that the Commission was dealing with a substantial percentage of all treaties concluded in the modern world.

57. It was not easy to be clear when speculating about the future. In considering the small States in the southern Pacific and in his own region, he would agree with Mr. Njenga that there was no immediate likelihood that those States would wish to take advantage of the kind of arrangements made between the members of EEC. Pardoxically, the strong and large States appeared to be the ones that felt able to sacrifice some of their individual freedom in the interests of common action; they did so because the sacrifice of individual discretion represented a gain in strength and influence. Yet he could imagine the possibility that States much smaller and weaker than those composing EEC might wish to strengthen their own hands by adopting such measures, and there was some advantage in not foreclosing the possibility.

58. Like other members, he was extremely interested in Mr. Ni's suggestion for redrafting subparagraph (*a*) in terms which would emphasize the "constituent instrument" rather than the broader expression "rules of the organization". In that respect, the Commission would have to be clear about the scope of the draft. He would suppose that, whatever was said in the draft articles, they would not in the final analysis govern the relations between an organization and its members. If the rules of an organization had the effect of binding the members under treaty obligations of the organization itself, a narrower scope would not in itself affect the relationships between the organization and its members. The situation would be similar to the existing situation regarding relationships between members of an organization *inter se* and between the members and the organization. Alternatively, one could follow Mr. Lacleta Muñoz's line of thought and say that the precedent of EEC was a good one in that the position had been made clear in its constituent instruments, and that the same thing should be done in other cases.

59. In conclusion, he agreed with the general opinion that removal of the term "third State" was a great advantage, that the emphasis on assent was entirely positive, and that the looseness of the term "acknowledged" in subparagraph (*b*) gave cause for concern.

Organization of work (*continued*)*

MEMBERSHIP OF THE PLANNING GROUP

60. The CHAIRMAN suggested that the Planning Group should be composed of the following members: Mr Díaz González (Chairman), Mr. Castañeda, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, and Mr. Ushakov.

It was so decided.

The meeting rose at 1 p.m.

* Resumed from the 1699th meeting.

1707th MEETING

Friday, 14 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. Chief AKINJIDE, comparing article 36 *bis* to a problem child no one knew how to handle, said that the real impact of that article, if adopted, would be felt by the developing countries, as Mr. Ushakov (1705th meeting) and Mr. McCaffrey (1706th meeting) had both implied. In that connection, Mr. Ushakov had been correct in referring specifically to EEC. He himself did not wish to indulge in politics, but it had to be acknowledged that the effects of colonial rule since 1885 were indelible and that EEC had an economic impact not only on the countries of Europe, but also on their former colonies that were now independent. The various European contries had ruled over virtually every country in Africa, including his own, and, unfor-

[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.