Document:-

A/CN.4/SR.1707

Summary record of the 1707th meeting

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

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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.

tunately, the consequences of colonial rule varied along racial lines. The effects of European rule in Australia, Canada, New Zealand and America had been quite different from those in the African, Asian and Latin American countries.

2. The consequences of article 36 *bis* were far greater than its words indicated and could even be devastating. He agreed with Mr. Reuter's analysis (1704th meeting) of the fate of the developing countries, particularly regarding economic issues. The real impact of article 36 *bis* would be greatest in economic matters, and there could be no political independence without some degree of economic independence.

3. In economic matters, the developing countries were, so to speak, caught between Scylla and Charybdis. They wanted to be independent and to have three square meals a day, which they could not provide on their own. Since the countries having the greatest impact on their economic well-being were the countries of Europe, it would be risky for the developing countries to divorce themselves from EEC. For that reason, they had found it imperative to conclude the Lomé Convention,[4] which, in a way, tied many of the developing countries of Africa to EEC.

4. Mr. Ushakov's argument (1705th meeting) on the power and structure of EEC was unassailable. That group of States had its own institutions: a parliament, a cabinet, the presidency, which rotated among its members, a court and a military arm. In certain matters, its members had no final right of appeal, which lay with the supranational court. He was not criticizing EEC, but simply analysing the consequences of its structure. It was only natural for the Community to protect the interests of its members and for the interests of the developing countries to be secondary. For their part, the developing countries did not want their hands to be tied economically and more than they already were.

5. Against that background, he entirely agreed with the analyses (1706th meeting) of Mr. Njenga and Mr. Francis. Mr. Thiam had spoken of customs unions (1703rd meeting), and references had been made to headquarters agreements, but, in his own view, EEC had no parallel anywhere in the world. The debate on article 36 *bis* was an attempt to protect the interests of the developing countries, and not the member States of EEC. The developing countries were the children of the world and must be nurtured and protected.

6. It could not be said that EEC represented a trend. If a trend was emerging, it was the one reflected by the attempts of the countries outside EEC to protect their independence. For example, at the meetings of the OAU at which the Charter of Human and People's Rights[5] had been elaborated, each member State had made a concerted effort to protect its independence. Mr. Balanda had referred to a provision of his country's Constitution which enabled that country to forgo part of its independence.[6] To his own knowledge, however, that provision, which was called an "enabling act" in municipal law, had never been invoked. On the other hand, the Constitution of his own country provided that a treaty would not have force of law unless it received the express approval of the legislative power, and he could not imagine the National Assembly agreeing to surrender part of the country's independence.

7. As for subparagraph (*b*), he said that he was not convinced of its significance either in theory or practice. Mr. Ushakov's analysis (1705th meeting) could hardly be improved. To which stage of the treaty-making process did the word "acknowledged" refer? Did it refer to the negotiating process? Agreeing in advance to be bound appeared, to say the least, bizarre. Even assuming an agreement was reached, would it involve unanimity, consensus, majority rule or veto power? Subparagraph (*b*) was, in his view, extremely vague and had no right to exist.

8. He agreed with Mr. McCaffrey's analysis (1706th meeting) of subparagraphs (*a*) and (*b*), but not with the cure proposed. Mr. McCaffrey had spoken of an "element of surprise", "danger to the developing countries", and "danger of relaxing consent". If those dangers existed, the cure must be commensurate with the malady; article 36 *bis* should die. Retaining it would intensify the economic bondage of the developing countries, and he did not think those countries would preside over the tightening of their chains and fetters. He was not unaware that articles 35 and 36 created obligations and rights and that the fate of article 36 *bis* would inevitably affect article 37, paragraphs 5 and 6. Yet why not let the consequences of removing article 36 *bis* flow? He appealed to the members from the developed countries not to look at the problem from the point of view of their own interests alone, but with the interests of the developing countries at heart.

9. Mr. Al-QAYSI said that the basic question raised by article 36 *bis* was clear: could a State member of an international organization be regarded as a third State in relation to a treaty concluded by that organization? In attempting to answer that question, it must not be forgotten that an international organization possessed legal personality in detachment from its members, but only after the organization had come into being as such as a result of the adoption of its constituent instrument by those members. At the same time, in performing the tasks entrusted to it by its constituent instrument, the organization operated as a legal entity, at the policy-making level at least, through the participation of its members. Consequently, what an international organization could and could not do depended on how it had been conceived by its member States at the

[4] Second ACP-EEC Convention, signed at Lomé (Togo) on 31 October 1979, between the African, Caribbean and Pacific States and the European Economic Community (*Official Journal of the European Communities* (Luxembourg), vol. 23, No. L 347 (22 December 1980)).

[5] Adopted at the 18th Assembly of Heads of State and Government of the OAU, held at Nairobi, 24-28 June 1981 (CAB/LEG/67/3/Rev.5).

[6] See 1705th meeting, footnote 9.

formative stage, in its constituent instrument, and on their participation in practice throughout the process of its evolution.

10. In the Vienna Convention, the term "third State" meant a State not party to a treaty, a party being a State which had consented to be bound by the treaty and for which the treaty was in force. Similar rules had been elaborated in article 2, subparagraph 1 (*h*), and article 34 of the draft. But those rules did not pretend to be more than they were. The rules of the Vienna Convention related to the situation of States entirely outside the treaty-making process. In the draft articles being elaborated, the rules applied not to States, but to a subject of international law which had come into being through an instrument which had been concluded by States as sovereign entities, and which defined the parameters of its functions and powers. Those functions and powers could be exercised only through the participation of the members. Accordingly, even on the basis of a strict notion of sovereignty, it was legally conceivable that the member States of an organization could, through express intention in the constituent instrument, transfer treaty-making power, for all or some specific purposes, to the organization.

11. In such circumstances, the question as he saw it was not one of stressing or easing the requirement of consent. Rather, the question was what mode or form constituted consent; was it possible to satisfy the rule embodied in article 34 by a form of consent given in general terms in advance of the conclusion of a particular treaty in the sphere of activities of an international organization?

12. The decisive factor was not whether such a situation was conceivable in law—as he believed it was—but, rather, whether general practice at present warranted the formulation of a general rule of that type. Opinions were divided, comments and observations expressed by Governments were polarized, and the views of international organizations[7] had not been of great assistance so far. The Commission must rely on its good sense and adopt a functional approach in deciding whether there was a need for an article like article 36 *bis*, regardless of ideologies or the argument that the sole precedent was that of EEC.

13. The Special Rapporteur had admitted that he had perhaps relied too heavily on the European experience and had hinted at a possible solution, as had Mr. Ni (1704th meeting) and Mr. Riphagen (1705th meeting). The Convention on the Law of the Sea,[8] though it represented a special situation, also offered an example of a possible "way out" through the adaptation of a general formula to the needs which the Commission thought should be covered in the draft articles. In his analysis of the interests to be protected, Mr. McCaffrey (1706th meeting) had also suggested a formula. With regard to the remarks made by Chief Akinjide, he (Mr. Al-Qaysi) said he considered that there was a need for a comprehensive approach which took opposing viewpoints into account. His own country was also a developing country and he noted that, in connection with article 36 *bis*, members had pleaded the cause of the developing countries from diametrically opposed angles. Some considered that that provision would not serve the interests of the developing countries, while others thought that it would. To his own mind, it might not, in future, be in the interests of the third world countries to have the door closed in their faces through the elimination of article 36 *bis*.

14. As Mr. Quentin-Baxter had pointed out (*ibid.*), however, the ultimate decision lay in the hands of Governments, which would decide whether the draft articles were a significant contribution to the law of treaties. That was a practical consideration that had to be borne in mind. For that reason, the draft articles must contain a functional provision which would be of practical value and could not be said to set up EEC experience as a general rule, but which States, developing and developed alike, would be free to use if they wished.

15. Mr. SUCHARITKUL said that the problem raised by article 36 *bis* involved a number of difficulties. First of all, reference had been made to the "third world", but that term was confusing, as was the term "third States" and the word "third" used in reference to "non-parties". It would be preferable to abandon the word "third" and maintain the distinction between "parties" and "non-parties".

16. Secondly, as Mr. Ushakov (1705th meeting) had rightly pointed out, the trend was not towards a surrender of sovereignty. Referring to the 1955 Asian-African Bandung Conference, he pointed out that the final communiqué of 24 April[9] contained articles of good neighbourly relations, a declaration on the speedy granting of independence to peoples and an appeal to the United Nations to admit members of the Asian-African Conference who were not members of the United Nations, such as Japan. With regard to regional co-operation in Asia, the trend was not towards an intensification of economic integration, but, rather towards co-operation in various fields on the basis of equal partnership, perhaps more along the lines of the model of CMEA. Neither of the two main examples given, namely, CMEA and EEC, had been labelled an international organization.

17. A third difficulty, moreover, arose in connection with the meaning of the word "organization". According to the second type of treaty, of course, the term "international organization" meant an intergovernmental organization. However, had an analysis really been made of what an international organization was? There was a tendency to forget, for example, that the Security Council was not an international organization, but an organ of the United Nations, and that, just as

[7] See 1706th meeting, footnote 5.

[8] See 1699th meeting, footnote 7.

[9] See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2.

there existed a great variety of States, international organizations were so different in terms of their composition, activities, functions and purposes that it was not possible to identify one model with another.

18. He agreed with Mr. Ushakov that provision should not be made for one organization, namely, EEC. Provision should be made generally for the treaty relations of the member States of an organization which had concluded a treaty. In that connection, Mr. Al-Qaysi had been quite right to say that the conclusion should be drawn from general practice. Referring to examples of several international organizations which had been established in Asia, he was himself of the view that the trend was away from the surrender of sovereignty, as was only natural for the countries of continents such as Asia and Africa which had recently recovered their sovereignty. Yet geographical circumstances sometimes compelled States to give up some of their sovereign rights. A case in point was the Committee for Co-ordination of Investigations of the Lower Mekong Basin, which was composed of Thailand, Kampuchea, Laos and Viet Nam: each of the four countries had surrendered some of its sovereign rights to the Committee.[10]

19. Perhaps the Commission was thinking too much in terms of the European experience; the Asian experience was slightly more pragmatic and less legalistic. ASEAN, for example, did not have all its powers included in one instrument; declarations were added every year. Other organizations had been established and some had been disbanded: experience had emphasized the importance of adaptation to the needs that arose. He therefore advised the Commission to take a great deal of care in redrafting article 36 *bis* in order to cover not only EEC or CMEA, but also the situation as it stood at the present time.

20. In that connection, he would like to say a few words about the practice of the United Nations. Headquarters agreements should not be belittled. In the case of ASEAN, for example, the member States had given their consent before the agreement had been concluded, because the draft had been prepared by all the countries concerned and then signed by the Association and the host Government.[11] The Special Rapporteur had rightly pointed out that headquarters agreements did not have to be concluded with member countries. Switzerland, for example, had concluded a headquarters agreement with the United Nations;[12] the agreement provided certain privileges and immunities to representatives of member countries, who, in turn, were bound to respect the laws of the host country. When Thailand had concluded an agreement relating to the headquarters of ECAFE[13] it had been the belief that all Members of the United Nations had rights and obligations arising from that agreement. All those obligations resulted from practice of the United Nations.

21. He hoped that his contribution, which was based primarily on practice, would enable the Commission to go on to consider the possibility of including an accurate and useful provision in the draft articles. In his view, article 36 *bis* constituted codification rather than the progressive development of international law, since it related to existing practice.

22. Mr. RAZAFINDRALAMBO said that his point of view differed in some respects from that of some other representatives of third world countries, but it tied in with that of Mr. Njenga (1706th meeting). First of all, he did not think that article 36 *bis* contradicted the principle enunciated in article 34, namely, that a third State had to consent to be bound by a treaty; rather, it merely sought to make the means of such consent more flexible in the case where the third State was a member of an organization that was a party to the treaty in question. Such flexibility was dictated by the commendable aim of strengthening international organizations, bearing in mind the need to protect the member States through machinery enabling them to express their will advisedly. Those two objectives, which might appear to be contradictory, could be achieved by formulating two separate rules in article 36 *bis*.

23. The words "relevant rules of the organization" in subparagraph (*a*) had rightly been criticized. As to substance, he said he had no objection to the principle that the member States would be bound by the treaties concluded by the organization if they had consented *ex ante* to be bound in the constituent instrument of the organization. He also thought that it would be preferable to refer to the constituent instrument rather than to the relevant rules. Such a principle might, however, be quite obvious.

24. He was, on the other hand, much less inclined to say that, as indicated in subparagraph (*b*), the object of the treaty could imply the consent of the member States. To the extent that they referred to genuine international organizations, most of the examples cited related to specific spheres of activity, primarily of an economic or financial nature, and formed part of what Mr. Riphagen (1705th meeting) had called objective regimes.

25. Some members had said that young States were very jealous of the sovereignty and independence it had cost them so much to acquire or recover, but the fact was that, when necessary, they were prepared to accept limitations for the sake of their priority development needs. Apart from Mr. Balanda's example (*ibid.*) of a constitutional act of the State which provided for the possibility of a surrender of sovereignty, it was quite common for the Governments of third world countries

[10] The work of this committee is being assured by the Interim Committee for Co-ordination of Investigations of the Lower Mekong Basin, in which the Democratic Republic of Laos, Thailand and Viet Nam participate.

[11] See 1704th meeting, footnote 4.

[12] Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, entered into force on 1 July 1946 (United Nations, *Treaty Series*, vol. I, p. 163).

[13] Agreement signed at Geneva on 26 May 1954 (*ibid.*, vol. 260, p. 35).

to agree to sign clauses by which they waived jurisdictional immunity, a basic component of sovereignty, in order to implement their development policies. It was, however, open to question whether those States would agree to establish as a general rule the principle that the member States of an international organization could be bound by the treaties concluded by that organization by reason only of the fact that the States or organizations which had participated in the negotiation of the treaty and the *mem*ber States of the organization had "acknowledged" that the application of the treaty necessarily entailed such an effect. It had been with good reason that many members of the Commission had expressed reservations concerning the use of the word "acknowledged".

26. It should be borne in mind that many young States might have some difficulty in fully grasping the implications of a provision that was worded in such a vague and general way and on whose scope opinions in the Commission seemed to be divided. It seemed to him that any legal provision that might establish for the member States of an international organization obligations deriving from a treaty concluded by that organization should not leave room for any ambiguity about the means by which those States could consent to be bound by those obligations. That nevertheless brought the Commission back to the ordinary law embodied in article 35 and it had apparently been in order to avoid that dilemma that the Special Rapporteur had decided to say that he was prepared to abandon the article under consideration (*ibid.*). If the Commission did not want to give the impression of having forgotten the case of the member States of an international organization, it could add to article 35 a paragraph in which it would merely require the member States to accept obligations expressly, but not in writing, as in the case of third States in general. It would then not have to include a provision referring to the constituent instrument of the organization, which did not appear essential at the present stage.

27. Mr. BALANDA pointed out, for the benefit of those who had claimed that the phenomenon of supranationality was entirely unknown in Africa, because, in their view, the young African States were too jealous of their sovereignty to surrender any portion of it to an international organization, that the Constitutions of Mali, Guinea and Zaire, for example, contained provisions under which the State could transfer competence to an international organization. Thus, article 70 of the Constitution of Mali provided that: "The Republic... shall be empowered to conclude with any African State treaties of association or partnership which may include partial or total renunciation of its sovereignty for the purpose of realizing African unity."[14] Article 108 of the Constitution of Zaire, which stated the same principle in a slightly different form, provided that "In order to promote African unity, the Republic may conclude treaties and agreements of association which involve partial abandonment of its sovereignty".[15] Those provisions had not remained a dead letter. Zaire, for example, had concluded, in accordance with article 108 of its Constitution, a convention with Rwanda and Burundi establishing the Economic Community of the Great Lakes Countries.[16] To enable the Community to perform satisfactorily the tasks with which it had been entrusted, the member countries had transferred some of their competence to it, thereby surrendering part of their sovereignty.

28. It should also be noted that, in the Constitutions of most French-speaking African countries, a very clear distinction was made between co-operation agreements, which sought to establish co-operation on an equal basis, and association agreements, which provided for the possibility of achieving integration, particularly in the economic and monetary fields, and assumed that States were prepared to surrender at least part of their sovereignty.

29. That trend towards integration was, however, not found in the French-speaking African countries alone. For example, the signatory States of the Treaty establishing the Economic Community of West Africa,[17] which included several English-speaking countries, had undertaken to adopt a common external tariff within a period of fifteen years. In other words, they had surrendered their sovereignty in tariff matters.

30. The trend towards economic integration was therefore quite real, not only in Europe with EEC, but also elsewhere in the world, particularly in Africa. The Commission should not only take account of that trend, but should also encourage it, since it reflected the needs of a fairly large group of States.

31. He therefore proposed that the Commission should retain the principle enunciated in article 36 *bis*, changing its wording in the light of the proposals made by Mr. Riphagen (1705th meeting), Mr. Ni (1704th meeting) and Mr. McCaffrey (1706th meeting).

32. Mr. THIAM said he regretted the fact that Chief Akinjide had seen fit to give a political turn to the discussion. Only States could praise or criticize a given organization, and the Commission, which was a purely technical body, should confine itself to determining the means of the expression of the consent of the member States of an international organization to obligations arising from a treaty concluded by that organization. In other words, should those States accept those obligations expressly and in writing like third States or in another manner?

33. Article 36 *bis*, which sought to reply to that question, had caused so much controversy primarily because

[14] *Constitutions of the Countries of the World*, A. P. Blaustein and G. H. Flanz, eds. (Dobbs Ferry, N.Y., Oceana, 1977), p. 18.

[15] See 1705th meeting, footnote 9.

[16] Convention concluded at Gisenyi (Rwanda) on 20 September 1976.

[17] Treaty concluded at Lagos (Nigeria) on 28 May 1975 (text in: *International Legal Materials* (Washington, D.C.), vol. XIV, No. 5 (September 1975), p. 1200).

there were two types of entirely different international organizations. There were international organizations of a universal character, such as the United Nations, within which the young States must unquestionably be protected against the great Powers by ensuring that the member States were not automatically bound by all the decisions taken by the Organization. In Africa, in Asia and on other continents, however, there were also organizations that comprised States which belonged to the same geographical area and had reached the same level of development. In that case, a more flexible attitude could be adopted, since all the member States were on an equal footing and none of them required special protection.

34. What was, in fact, needed was a realistic approach. If an international organization was established, it must be given the necessary means to function properly. States which considered that national sovereignty was an absolute principle from which no derogation was possible and that international organizations constituted a hindrance should refrain from becoming members of such organizations. Those which considered that international organizations constituted, at the current stage of development, a particularly effective instrument should transfer some of their competence to them so that the organizations could achieve the goals they had been assigned. The member States of the Economic Community of West Africa, for example, had surrendered part of their sovereignty to enable the Community to create a customs union and to introduce the free movement of goods and persons within a period of fifteen years.

35. Apart from EEC, which was a somewhat special case since its creation had involved the establishment of a supranational authority, there were many organizations to which the member States had transferred competence, and article 36 *bis*, which provided that the assent of member States of an international organization to obligations arising from a treaty concluded by that organization could be expressed by other means than in writing, merely sought to take account of that fact. Moreover, it was entirely logical to seek to make the means of expressing assent more flexible, since that would facilitate the task of international organizations.

36. Instead of deleting article 36 *bis*, it would be preferable to try to improve its wording on the basis of the text proposed by Mr. Ni (1704th meeting, para. 20). That text made it possible to reconcile the positions of those who wished primarily to protect small States within international organizations of a universal character and those who considered it necessary to simplify the task of homogeneous international organizations—namely, organizations comprising States which belonged to the same region and had almost the same political and economic weight—by giving them somewhat more room to manœuvre.

37. Mr. NI said that article 36 *bis* raised the question whether there was a need for a provision relating to the effects, with respect to the member States of an international organization, of an obligation established by a treaty concluded by that organization and another party and, if so, under what conditions the member States of the organization would be bound by the obligation thus undertaken.

38. In considering that question, the Commission should broaden its sights and tailor article 36 *bis* to suit every possible situation and not just that of one or two international organizations, such as EEC and CMEA. A decision to retain article 36 *bis* should not be regarded as tantamount to wanting to take account only of EEC. In that connection, he said that one of the five principles of coexistence was that of equality and mutual benefit. That principle was especially applicable to article 36 *bis*, which should ensure equality between States, whose sovereignty should not be surrendered to international organizations without their express authorization, and promote better co-operation among States with a view to mutual benefit. If the members of the Commission bore that principle in mind, they would find it easier to solve the problems to which article 36 *bis* gave rise.

39. Referring to the progressive development of international law, several members of the Commission had noted that, with a view to establishing closer co-operation and ensuring increased protection of their interests through collective action, States were tending to transfer their competence over certain specific matters to international organizations, which were often given treaty-making power. For example, the negotiations at the eleventh and last session of the Third United Nations Conference on the Law of the Sea had resulted in the elaboration of the text of annex IX of the draft Convention,[18] which provided for the transfer to an international organization of competence over matters governed by the Convention, including competence to conclude treaties in respect of such matters. That annex also provided that the international organization concerned and its member States should make declarations specifying the matters over which competence had been transferred to the international organization.

40. The specialized agencies of the United Nations system had also had experience in concluding treaties on behalf of their member States. FAO had, for example, indicated that, in a number of cases, treaties concluded by an organization had given rise to rights and obligations for the member States, but that that had not caused any particular problem.[19] Concern about acceptance of obligations in advance was thus perhaps more imagined than real. States knew best how to protect their interests and what safeguards they could rely upon. That was why it was necessary to streamline the wording of article 36 *bis* as it now stood.

41. Mr. FLITAN said that unduly flexible means by which the member States of an international organization could express assent to obligations arising from a treaty concluded by that organization might pose

[18] See 1699th meeting, footnote 7.

[19] *Yearbook ... 1981*, vol. II (Part II), annex II, sect. B.3, para. 5.

serious problems for small and medium-size countries which were not yet really in a position to defend their interests in international organizations with complicated internal mechanisms. It was therefore necessary to avoid any arrangement that might harm those countries. However, it must be recognized that international organizations were extremely useful and necessary instruments which must be given the necessary means to function properly and that the interests of small and medium-size countries had to be protected as well.

42. He also wished to warn the Commission against the danger of allowing its discussions to take a political turn. Its role was not to provide support for EEC or CMEA, which had no need of such support, but, rather, to elaborate draft articles on treaties concluded between States and international organizations or between international organizations. In other words, the task it now had before it was to decide on the manner in which a member State of an international organization could indicate its assent to be bound by obligations arising from a treaty concluded by that organization. Should it make the means of assent more flexible, or closely follow the rules of the Vienna Convention?

43. In his opinion, it would be appropriate to provide for greater flexibility in the means of assent and to accept the possibility of assent *ex ante*. Indeed, members were aware that States which concluded a multilateral treaty setting up an organization could include in that treaty a clause under which the organization would be competent to conclude, on their behalf, agreements with third countries or third international organizations. That was a fact that must be taken into account. However, that did not mean that it was necessary to retain article 36 *bis*, which might make undue allowance for a particular organization. At the current stage of the codification of international law, it would be preferable to elaborate a clear and simple text which would take account of the *de facto* situation to which he had referred above, while protecting the interests of small and medium-size States. Such a text, which should be more concise than that of article 36 *bis*, could be incorporated in article 35 after paragraph 3.

44. The CHAIRMAN, speaking as a member of the Commission, said that, in view of the very extensive debate to which article 36 *bis* had given rise, he had thought that he could afford to remain silent. Unfortunately, however, considerations of a political nature had been expressed at the current meeting and they were, in his opinion, quite out of place, because it was not the Commission's role to judge or criticize an international organization for its actions. He had therefore decided that he could not run the risk of allowing his silence to be misconstrued.

45. If the only purpose of article 36 *bis* was to protect the interests of and strengthen EEC, he, a citizen of a developing country which had suffered in the grip of colonialism, could not support the inclusion in the draft of a provision that would benefit an organization which had served the cause of colonialist and imperialist aggression.

46. If, however, the purpose of article 36 *bis* was to allow some flexibility in the expression of consent and to ensure the smooth functioning of international organizations, he could agree that such a provision of a general nature should be included in the draft. As Mr. Ushakov had said, the members of the Commission were not prophets, but they were able to forecast certain trends, one of which, the progressive development of international law, came precisely within the Commission's terms of reference.

47. States established international organizations for specific purposes and should therefore not hamper those organizations' functioning. The sole purpose of article 36 *bis* was to provide for some flexibility in the expression of the consent of the member States of international organizations to obligations established by treaties concluded by those organizations. In drafting article 36 *bis*, the Special Rapporteur had not had in mind EEC in particular. He had, rather, been trying to provide for the future by laying down general rules designed to protect the member States of international organizations and ensure those organizations' smooth functioning.

48. In his own opinion, the Commission should therefore adopt article 36 *bis*, subject, of course, to amendments that would improve its wording, or draft a new article 35 *bis*, or add a new paragraph to article 35 to take account of the ideas and concerns expressed during the discussions, particularly with regard to the interests of the countries of the third world.

49. Mr. USHAKOV said that he would like some clarifications concerning article 36 *bis*. In particular, he would like to know whether subparagraph (*a*) of that article applied to EEC, whether, by concluding a treaty with an international organization, a State thereby concluded collateral agreements with all the members of that organization; whether, under such collateral agreements, direct relations were established between that State and each of the members of the international organization; and whether there was a direct commitment on the part of the members of the international organization. In other words, did subparagraph (*a*) really seek to make the means by which collateral agreements were concluded more flexible or did it meet another objective?

50. He would also like to know whether, in the opinion of the Special Rapporteur, a State which concluded an agreement with CMEA was in the same legal position as a State which concluded an agreement with EEC.

51. When CMEA concluded an agreement creating obligations for its members, the agreement always included a special clause under which the member countries of CMEA had to accept those obligations expressly. If they did accept them, there was a collateral agreement between each of them and the country with

which CMEA had concluded the agreement. If one of the CMEA member countries subsequently failed to fulfil those obligations, the State with which CMEA had concluded the agreement would turn not to CMEA, but to the country concerned, which had expressly undertaken to fulfil the obligations arising from the agreement.

52. He himself did not believe that a State which had concluded an agreement with EEC and which did not succeed in securing fulfilment of the agreement by one of the member countries of the Community could turn directly to that country. In his opinion, it was clear that, when an international organization of the type referred to in article 36 *bis*, subparagraph (*a*), concluded an agreement with a third State, the result was neither a collateral agreement nor a direct relationship between the members of the international organization and that third State.

53. He also wished to know whether the relevant rules of the organization referred to in article 36 *bis*, subparagraph (*a*), were rules which provided that the agreement did not bind the organization itself, but produced its effects directly between the member States of the organization and the third State with which the organization had concluded the agreement or, rather, rules which provided, for example, that the international organization alone was competent to conclude agreements, and implied that the obligations arising from the agreements concluded by the organization were established for its member States.

54. All those questions raised by article 36 *bis* were of a purely legal, rather than political, nature.

The meeting rose at 1.05 p.m.

1708th MEETING

Monday, 17 May 1982, at 3.05 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (A/CN.4/340 and Add.1,[1] A/CN.4/343 and Add.1-4,[2] A/CN.4/357, A/CN.4/L.337, A/CN.4/339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report on the topic of jurisdictional immunities of States and their property (A/CN.4/357).

2. Mr. SUCHARITKUL (Special Rapporteur) said that, at the present stage, it might be useful to review the Commission's study of the topic so far. The work had begun in 1978 with the submission of an exploratory report by the Working Group on jurisdictional immunities of States and their property,[3] a report that had dealt, amongst other things, with the historical background of the topic and with the justification for examining it for the purposes of codification and progressive development of the law.

3. In 1979, he had submitted a preliminary report[4] suggesting possible approaches and identifying source materials. The guidelines laid down by the Commission called on the Special Rapporteur to concentrate initially on main principles, and then proceed to the examination of exceptions, and subsequently to the question of immunities for execution.

4. In his second report,[5] he had submitted five draft articles comprising part I of the draft, entitled "Introduction". Article 1, concerning the scope of the articles, had been adopted provisionally[6] and the phrase "questions relating to the immunity ..." used therein was intended to afford a degree of flexibility in studying matters pertaining to the topic. Draft articles 2 to 5 had been submitted not for immediate discussion, but simply as a framework indicating the various elements to be considered.

5. Draft articles 6 to 10, comprising part II, entitled "General principles", had been submitted in the second report and also in the third report (A/CN.4/340 and Add.1). On the basis of an examination of judicial practice of States, national legislation and governmental practice, he had drawn the conclusion that there was a well-established rule of international law in support of the general principle of the jurisdictional immunity of States. As had been noted, the concept had developed differently in different legal systems. In the common-law system, it had evolved from an extension of the doctrine of the immunity of the local sovereign to cover foreign sovereigns. In civil-law jurisdictions, on the other hand, the question of jurisdictional immunity had been primarily one of the competence or jurisdiction of the courts.

6. The original formulation of article 6 had been amended with the help of the Drafting Committee. The use of the phrase "in accordance with the provisions of the present articles" had given rise to some controversy, on the grounds that it did not definitely establish the existence of a legal principle of State immunity because it made such immunity dependent on the provisions of subsequent articles of the draft. However, other

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

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

[3] A/CN.4/L.279/Rev.1, reproduced in part in *Yearbook ... 1978*, vol. II (Part Two), pp. 153-155.

[4] See *Yearbook ... 1979*, vol. II (Part One), pp. 227 *et seq.*, document A/CN.4/323.

[5] See *Yearbook ... 1980*, vol. II (Part One), pp. 199 *et seq.*, document A/CN.4/331 and Add.1.

[6] For the text of draft article 1 and the commentary thereto, see *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142.