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Summary record of the 1719th meeting

Topic:

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

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ceptional case, something that would be absolutely unjustified, and second, because article 36 *bis* would be unnecessary in view of article 35. At least one other member of the Commission had endorsed that second point. Some other members had adopted a less negative position; they had felt that the article was ill-advised and that it would be better to eliminate it, for it had too many implications. Still others had felt that they could accept article 36 *bis*, subject to two changes: subparagraph (*a*) should be confined to cases in which the organization's constituent instrument itself specified that treaties concluded by the organization were binding on the member States, and subparagraph (*b*) should establish that the member States must have expressly consented to the fact that the application of the treaty necessarily entailed certain effects for them. As one of those members had also pointed out, in those circumstances article 36 *bis* would be of no value, since the situation would be that envisaged in article 35, which stipulated express acceptance in writing. Again, if subparagraph (*a*) was to be limited to constituent instruments alone, it would be referring all the more to the special case of the European Communities.

43. Yet other members had pointed out that, when it had examined the situation of third parties with respect to a treaty, the Commission had never envisaged such a special case as that of the member States of an international organization. A proposal had been made to delete article 36 *bis* and to introduce an article reserving any special provisions which could govern the relations between an international organization and its member States in special cases. It had also been pointed out that the effects referred to in article 36 *bis* could result not only from a provision of a constituent instrument but also from a special unanimous agreement by the member States of an organization.

44. The members of the Commission who were favourable to a provision on that subject had generally leaned towards the idea of rendering the consent more flexible. With respect to article 35, that flexibility could take two forms. Either the requirement of express written consent laid down in article 35 could be relaxed, or it could be specified that the consent could have been given previously. The members who had discussed the second possibility had explained that they were not thinking of the special case of the European Communities, in which the consent was given once and for all under the constituent instrument, but the case of an operation which must commit both the organization and its member States. In such a case, it was quite conceivable that the member States would agree to commit themselves under a future agreement of the organization. One example was afforded by the practice followed in international assistance, when it was supplied both to the member States and to a body required to perform certain administrative functions. Finally, it had been proposed that article 36 *bis* should be deleted and that a paragraph should be added to article 35 to allow for some flexibility.

45. The Drafting Committee would inevitably have to consider article 36 *bis*, which was already the subject of at least five formal proposals for amendments. If opposition to the article remained, a solution proposed at the previous session could be considered. The solution was based on the fact that, when an organization was on the verge of concluding a treaty and knew that the treaty would entail obligations for its member States or that the latter had already accepted those obligations, its duty was to so inform the States or the international organizations with which it intended to conclude the treaty.[12] That duty, which emerged from practice, could be set forth in a provision. It was admittedly a minor obligation, but none the less an obligation of good faith and, by mentioning it, the Commission would show that, although it had not been able to resolve all the difficulties, there were at least a few important problems it had discussed.

46. Speaking as the *Chairman*, he said that, if there were no objections, he would take it that the Commission agreed that the Drafting Committee should still consider article 36 *bis*.

It was so decided.

The meeting rose at 1 p.m.

[12] *Yearbook ... 1981*, vol. I, p. 186, 1678th meeting, paras. 20-21 (Mr. Aldrich).

1719th MEETING

Thursday, 3 June 1982, at 10 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] (*concluded*)

[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.

1. Mr. USHAKOV said he was surprised that the Special Representative had not replied at the previous meeting to certain questions he had raised during the discussion on article 36 *bis*. In view of the importance he attached to those questions, he wished to revert to them. He observed, first, that the need for an article on supranational organizations and, in particular, on the EEC, was shown by the numerous interventions which had dealt with that question. In that connection, he wondered whether subparagraph (*a*) of article 36 *bis* really concerned the conclusion of collateral agreements by States members of a supranational organization. Were States members of such an organization really bound to the party which concluded a treaty with it? A purely hypothetical example would clarify his thinking. If the Soviet Union wished to conclude with France an agreement on fishing in the exclusive economic zone of that country and it approached the French Government, that Government would reply that it was not in a position to conclude the agreement, because competence to conclude all agreements of that kind had been transferred to the EEC. If an agreement was concluded directly with the Community, it would not establish any direct relation between the Soviet Union and France, which would not conclude a collateral agreement. In that respect, the situation was thus quite different from that of States members of an ordinary organization.

2. With regard to the application of such an agreement, it might be imagined that the French coastguard arrested a Soviet trawler in the exclusive economic zone of France. To demand the application of the treaty thus violated, which it had concluded with the Community, the Soviet Union could not approach France directly, since there was no collateral agreement between the two countries. It would have to approach the Community, which would in turn approach France requesting it to release the trawler. Similarly, if the Soviet Union violated certain provisions of the treaty, France must not approach it directly but must approach the Community, which would act as an intermediary. In either case, there were no direct relations between the States concerned deriving from the agreement concluded, since the States members of the supranational organization had delegated to it the power to conclude certain treaties.

3. A question of responsibility arose if the seizure of the trawler caused damage to the Soviet Union. In the absence of even a collateral agreement between France and the Soviet Union, the Soviet Union could not approach France. But what, then, was the responsibility of the Community as a supranational organization? That question had not yet been settled for ordinary international organizations, let alone supranational organizations. In the case considered, the Soviet Union could not sue the Community in an international court either.

4. In that respect, the situation was quite different from that provided for in articles 34, 35 and 36 of the draft, which envisaged the conclusion of collateral agreements. In such cases, the States concerned accepted, expressly and in writing, the obligations incumbent on them, and direct relations were established between them and the co-contracting party of the organization. When CMEA had concluded a treaty with Mexico,[4] the States members of that organization had accepted, expressly and in writing, by means of collateral agreements, the obligations which were thus laid upon them. Each of them could have concluded an agreement with Mexico, but they had opted for a treaty accompanied by collateral agreements. That procedure, which could be followed in the case of an organization of the conventional type having no exclusive competence to conclude treaties, was not applicable to supranational organizations. Treaties concluded by supranational organizations created only indirect relations between member States and the co-contracting parties of those organizations. Hence it was wrong to say that article 36 *bis* provided for the conclusion of simplified collateral agreements.

5. Under the terms of article 36 *bis*, subparagraph (*a*), treaties concluded by a supranational organization were binding on its member States if the relevant rules of the organization provided that those States were bound by the treaties it concluded. In his opinion, those rules were rules of competence, which provided for the transfer to the organization of competence to conclude treaties, without creating any direct relations between the member States and the co-contracting parties of the organization. The situation would be different if the rules provided that member States were "directly bound" by the treaties concluded by the organization, in which case the organization would really represent its member States in the conclusion of treaties.

6. What was more, he doubted whether States members of a supranational organization were free to accept rights deriving from treaties concluded by that organization. If the Soviet Union concluded an agreement with Bulgaria establishing fishing rights in their exclusive economic zones in the Black Sea for members of EEC, the States members of the Community might not be free to accept those rights, for as they had transferred competence to conclude all agreements of that kind to the Community, it might be that they were not even free to accept the rights which could pass to them from an agreement such as that concluded between the Soviet Union and Bulgaria.

7. Personally, he had nothing against supranational organizations, of which there was at least one example, but he found that their legal situation was totally different from that of the conventional organizations to which the draft articles applied. Logically, the whole draft should be recast to take account of the special case of supranational organizations. For example, the provisions relating to acceptance of reservations could not be the same for the two types of organization. He wondered whether EEC could, in the same way as a

[4] CMEA, *Agreement on Cooperation between the Council for Mutual Economic Assistance and the United Mexican States* (Moscow, 1975).

State, tacitly accept reservations to a treaty, for itself and on behalf of its member States. It seemed essential not to mix the rules relating to conventional organizations and those relating to supranational organizations. For the latter there was no question of relaxing the modalities for expression of consent, since the agreements concluded by a supranational organization were not accompanied by collateral agreements.

8. At the previous meeting, the Special Rapporteur had again emphasized the fact that, strictly speaking, States members of an international organization were third States with respect to the treaties concluded by that organization, whether it was an ordinary organization or a supranational one. He had observed, however, that member States were not entirely third States, but had not explained in relation to who or to what that was the case. He himself had already pointed out (1702nd, 1705th meetings) that in relation to an organization, all States which were not members were third States, but with respect to a treaty concluded by an organization, all States were third States because they were not parties. The Special Rapporteur appeared to consider that States members of an organization were third States with respect to treaties concluded by it, but were not third States in relation to the organization.

9. In conclusion, he maintained that neither article 36 *bis* nor any other provision relating to supranational organizations had a place in the draft being prepared. The situation of supranational organizations should be dealt with in a different draft of articles. It would of course be possible to prepare such a draft, but it would be for the General Assembly to decide whether it was necessary.

10. Mr. JAGOTA said that some of the questions raised by Mr. Ushakov concerning article 36 *bis* had been discussed in detail at the recent session of the Third United Nations Conference on the Law of the Sea and answered in annex IX to the Convention on the Law of the Sea adopted on 30 April 1982.[5] He wished to make it clear at the outset that the provisions of annex IX related only to international intergovernmental organizations. They had, of course, been discussed with EEC in mind, but the question whether EEC was a supranational organization as opposed to an international organization had not been considered at all, the general view at the Conference on the Law of the Sea being that any general provisions adopted would be applicable to EEC and *mutatis mutandis* to other international organizations.

11. With regard to Mr. Ushakov's questions whether the States members of an international organization could be third States with respect to the treaties concluded by that organization, it was worth noting that article 2, subparagraph 1 (*h*), of the draft under consideration, referred to "a State" and to "an international organization", but not to the member States of an international organization. Assuming, however, that an international intergovernmental organization was an organization of sovereign States, article 2, subparagraph 1 (*h*), could be interpreted to mean that the member States of an international organization did not surrender their sovereignty or their status as States. The definition in that provision might have to be amended to make that point clear.

12. In any event, the general reaction at the Conference on the Law of the Sea to the question whether a member of an international organization could be a third State in relation to the treaties concluded by that organization had been negative, although, as a result of a compromise, the Conference had ultimately decided to include, in articles 305 to 307 of the Convention, references to annex IX. Articles 2 and 3 of that annex, which related to the signature and act of formal confirmation of and accession to the Convention by international organizations, provided that: "An international organization may sign this Convention if a majority of its States members are signatories to this Convention"; and "An international organization may deposit its instrument of formal confirmation or of accession if a majority of its States members deposit or have deposited their instruments of ratification or accession". In other words, if a majority of the States members of an international organization had become parties to the Convention on the Law of the Sea, the organization could also become a party to that Convention. That in itself amounted to an admission that there might be some States members of the organization which had not become parties to the Convention and which would have the status of third States.

13. The question of third State status had arisen precisely in connection with the question of the relationship between the international organization and the member States which were parties to the Convention and the question of the relationship between the organization and the member States which were not parties to the Convention. The first question had been answered in annex IX, article 5. Paragraph 1 of that article provided that "The instrument of formal confirmation or accession of an international organization shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its States members which have ratified or acceded to the Convention", and paragraph 2 provided that "A State member of an international organization shall ... make a declaration specifying the matters governed by this Convention in respect of which it has transferred competence to the organization".

14. It had, moreover, been by reference to such competence that the questions of the responsibility of the organization and its member States and the settlement of disputes between them had been answered. In other words, whichever one was competent would be responsible and, if competence was shared, there would be joint and several responsibility. The question of the relationship between the international organization and its member States which were parties to the Convention

[5] See 1699th meeting, footnote 7.

did not involve third State status and was thus outside the scope of article 36 *bis* of the draft under consideration.

15. The only States which would have the status of third States were those which were not parties to the Convention. In that connection, annex IX, article 4, paragraph 5, clearly provided that no member States of an international organization which were not parties to the Convention would enjoy any rights provided for under the Convention. That provision was, in a way, a negation of article 36 *bis*, which related to the rights and obligations of States members of an international organization arising from the provisions of a treaty to which that organization was a party, which rights and obligations had, at the Conference on the Law of the Sea, been regarded as an internal matter for the international organization.

16. The concept of third State status had been accepted at the Conference on the Law of the Sea only in order to enable international organizations to become parties to the Convention on the Law of the Sea, not in order to create rights and obligations for the States members of an international organization which did not become parties to that Convention. The provisions of the Convention relating to third States thus enunciated a particular rule, and the question that had to be asked in regard to article 36 *bis* was whether a more general rule was also needed.

17. He was inclined to suggest that article 36 *bis* should be deleted, for the simple reason that questions relating to the rights and obligations of the member States of an international organization arising from the provisions of a treaty to which that organization was a party were adequately covered by articles 35 and 36. A second option, however, would be to retain article 36 *bis* as it stood, in square brackets, and submit it for consideration to the Sixth Committee or to a conference of plenipotentiaries. A third option would be to make article 36 *bis* a residual rule and leave it to the parties to a treaty to which an international organization was a party to determine which rules applied to the rights and obligations of the international organizations and its member States. If article 36 *bis* was retained in any form, he thought its wording would have to be amended.

18. With reference to subparagraph (*a*), he drew the attention of the Special Rapporteur and the Drafting Committee to the fact that the Conference on the Law of the Sea had decided that, instead of referring to the relevant rules of the organization "applicable at the moment of the conclusion of the treaty"—in other words, at a definite point in time—a more flexible rule should be laid down to reflect the possibility of a transfer of competence. Such a flexible rule might also be included in subparagraph (*a*). The Conference on the Law of the Sea had also decided that the rules of the organization relating to the competence transferred to it by its member States should be notified to the depositary of the Convention and to the other parties, so that they would be aware of the relationship between the organization and its member States. Perhaps a similar provision could be included in subparagraph (*a*). In subparagraph (*b*), the word "acknowledged" might be replaced by the word "agreed" in order to introduce the idea of collateral agreements to which Mr. Ushakov had referred.

19. Mr. REUTER (Special Rapporteur) said there were several reasons why he had not answered all the questions raised by Mr. Ushakov. First of all, the answers to his questions were often provided by Mr. Ushakov himself. On one point, however, he must say that he fully agreed with Mr. Ushakov: the Commission was not required to settle, in its draft articles, questions relating to special cases. It was a fact that the European Communities constituted a special case, however they might be described. If article 36 *bis* were considered as relating only to the European Communities, it was unsatisfactory and should be deleted; but in his opinion that provision had a wider scope. The questions raised by Mr. Ushakov all related to EEC alone; paradoxically, Mr. Ushakov blamed him for proposing an article which dealt only with that organization, while at the same time asking him to speak of nothing else. Mr. Ushakov had thought fit to interpret the rules of the Community, but he (the Special Rapporteur) did not feel the need to do so.

20. It should be noted that, following the criticisms made, he had strongly emphasized, starting with the second version of article 36 *bis* (A/CN.4/353, para. 26), the need for consent given through the classical mechanism of the collateral agreement. Mr. Ushakov's view that that mechanism had nothing to do with the European Communities was quite legitimate, but he did not subscribe to it. It was precisely because the Commission was not called upon to take a position on what EEC was, that he had not answered Mr. Ushakov's questions about that organization. Similarly, however interesting Mr. Jagota's comments on the United Nations Conference on the Law of the Sea might be, they were not relevant to the case in point. It mattered little what type of organization that conference had had in mind. In any case, there was no question of re-examining the draft articles as a whole, having regard to organizations to which a transfer of competence had been made.

21. At the previous meeting, he had said that States members of an organization were, strictly speaking, third States in relation to treaties concluded by the organization; then he had added that, for practical reasons, these States found themselves in situations which presented special features. In that connection, he had suggested that no change should be made in the rule in article 35 requiring consent for the creation of an obligation, but that the conditions for expression of consent might be relaxed by providing that it could be given in advance or that it might be expressly formulated without being in written form. If the Commission was opposed to such increased flexibility, article 36 *bis* should be dropped.

22. Mr. Jagota had been right to emphasize one point: if an international organization was a party to a treaty and was determined, together with other parties, to create obligations for third States, and in particular for the States members of the organization, it was clear that the organization must indicate what was, or should be, the procedure for acceptance of those obligations by its member States. Lastly, he remained convinced that it was important, not in the interests of the European Communities but in the interests of all States which had to carry out joint enterprises, to make the procedure for expression of consent more flexible.

23. Mr. USHAKOV explained that it was for lack of other examples that he had constantly referred to EEC. Rather than naming it in the commentary, the Commission might refer to an organization whose member States had given it competence to conclude treaties, but that would change nothing. Other organizations of that kind might be established, and as their position would be quite different from that of ordinary organizations, they would require other articles.

24. Mr. CALERO RODRIGUES said that the example which Mr. Ushakov had given to illustrate his point of view could be regarded as a plea in favour of article 36 *bis*. Indeed, everything Mr. Ushakov had said seemed to indicate that article 36 *bis* was necessary. In Mr. Ushakov's hypothetical example of a violation by French officials of a treaty between the Soviet Union and EEC, the incident could, of course, be settled by the two States concerned. What lay at the root of that incident, however, was a question of rights as between the Soviet Union and EEC, and it seemed to him that the Soviet Union would be in a better position to assert its rights if article 36 *bis* made it clear that, in such a case, France was required to fulfil the obligations assumed by EEC in its treaty with the Soviet Union. Although article 36 *bis* would not expressly require acceptance in writing of the obligations created by the treaty between EEC and the Soviet Union, such obligations would exist *ipso facto,* because of the obligations which France had accepted on becoming a member of EEC.

25. The CHAIRMAN said that if there were no objections he would take it that the Commission confirmed its decision to refer article 36 *bis* to the Drafting Committee, on the understanding that the articles in Section 4 (arts. 34 to 38) must be examined together.

It was so decided.[6]

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

26. The CHAIRMAN invited the Commission to consider draft article 37, which read:

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

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

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

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

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

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

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

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

27. Mr. REUTER (Special Rapporteur) said that no particular observations had been made on draft article 37 by Governments or international organizations. With regard to that article, he would therefore confine himself to mentioning Mr. Jagota's comment, namely: either the Commission would decide to retain article 36 *bis* in one form or another, and it would then have to decide the question whether the paragraphs of article 37 which related to article 36 *bis* should be retained or amended; or it would decide to omit article 36 *bis* or any text of that kind, in which case paragraphs 5 and 6 of draft article 37 would also be deleted and paragraph 7 would become paragraph 5.

28. Since the question of collateral agreements had been raised at the present meeting, however, he wished to add that article 37 of the Vienna Convention on the Law of Treaties dealt differently with the cases of an obligation and a right. That solution, which had, moreover, been retained in draft article 37, paragraphs 1 and 2 of which dealt with the revocation or modification of a right, seemed somewhat paradoxical at first sight. Indeed, it gave the third State a better guarantee in regard to the obligations than in regard to the rights created for it by a treaty: in the case of an obligation, the consent of the third State was presumed to be re-

[6] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 21-40.

quired before the obligation could be extinguished, whereas in the case of a right, the third State had to establish that the intention of the parties had been to grant it a right which would be irrevocable without its consent.

29. He believed that that difference was due to the existence in the Commission of two theories on consent and its effects: one group of members believed that it was the theory of the collateral agreement which justified and explained the creation of an obligation and the creation of a right; the other group considered that that theory applied to the creation of an obligation, but not to the creation of a right, which was a clear case of *stipulation pour autrui*. And it was to satisfy those who took the latter position that the case of creation of a right had been treated separately in article 37, paragraph 2 of the Vienna Convention, and also in paragraphs 3 and 4 of the draft article 37 he proposed, though admittedly the situation of the holder of a right appeared at first sight to be less secure than that of the subject of an obligation.

30. With regard to the deletion of paragraphs 5 and 6 of draft article 37 if article 36 *bis* were deleted, and to the retention of those paragraphs in the contrary case, he would refrain from taking a position at the moment; he preferred to await the proposals of the Drafting Committee. He pointed out, however, that the views of members of the Commission differed and that Mr. Riphagen, for example (1705th meeting), considered that even if article 36 *bis* was retained, paragraphs 5 and 6 of draft article 37 should be deleted, or at least greatly amended.

31. He proposed that draft article 37 should be referred to the Drafting Committee so that it could pronounce on that article in the light of its decisions on article 36 *bis*. In that connection he pointed out that among the proposals relating to article 36 *bis* that were before the Drafting Committee, some concerned a text which would refer both to the creation of an obligation and to that of a right. In his eleventh report (A/CN.4/353) he had pointed out that it was clear from the discussions in the Commission that if article 36 *bis* was to be included in the draft, it should deal only with the creation of an obligation. But paragraphs 5 and 6 of article 37 related to both obligations and rights; hence the Drafting Committee might also have to study that question.

32. Mr. USHAKOV said that paragraphs 5 and 6 of draft article 37 would raise a problem if article 36 *bis* was retained, for they provided that an organization, by virtue of its relevant rules, could unilaterally decide the fate of rights and obligations, so that no account was taken of the intention of the parties, as it was in draft articles 35 and 36.

33. Mr. RIPHAGEN said he agreed with Mr. Ushakov: the words "unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide", in paragraph 5 of article 37, and the words "and of the States members of the organization", in paragraph 6, should be deleted, since the revocability or irrevocability of rights and obligations of third States members of an international organization should be determined entirely by the provisions of the individual treaties. Moreover, the parties to a treaty could always change the basis of the rights and obligations of such third States without any need for the subsequent consent of the States concerned. Consequently, if article 36 *bis* was to be retained, the words in question should be deleted. Conversely, the words "unless it is established that the parties to the treaty had otherwise agreed", in paragraph 5, and the words "unless it is established that they had otherwise agreed", in paragraph 6, should be retained, since they made it clear that it was the treaty itself which determined the rights and obligations of the parties.

34. Mr. CALERO RODRIGUES agreed that the words "unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide" should be deleted from paragraph 5 of draft article 37. He also agreed that the fate of paragraphs 5 and 6 would depend on the final wording of draft article 36 *bis*. However, if that article was to apply only to obligations, then the reference to rights in paragraphs 5 and 6 should be deleted. He wondered whether it was necessary to give different treatment to the situations contemplated in subparagraphs (*a*) and (*b*) or 36 *bis*. If not, paragraphs 1, 2, 5 and 6 of article 37 could be combined, as could paragraphs 3 and 4.

35. Mr. LACLETA MUÑOZ agreed with Mr. Calero Rodrigues. If the words in question were deleted from paragraph 5, that paragraph could be combined with paragraph 6. Similarly, paragraph 1 could be combined with paragraph 2 and paragraph 3 with paragraph 4. That possibility should be considered by the Drafting Committee.

36. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 37 to the drafting Committee under the same conditions as for article 36 *bis*.

It was so decided.[7]

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

37. The CHAIRMAN invited the Commission to consider article 38, which read:

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

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

[7] *Idem*, paras. 2 and 41.

38. Mr. REUTER (Special Rapporteur) said that article 38 had not been the subject of any comments, either by Governments or by international organizations. He therefore proposed that the Commission should refer it to the Drafting Committee.

39. Mr. USHAKOV pointed out that the word "rule" used in the article could include "the relevant rules" referred to in article 36 *bis*. That being so, he wondered whether the rules of an organization—for example, the provisions of a treaty which was its constituent instrument—could become, for third States or for a third organization, customary rules of international law recognized as such. It would be well for the Drafting Committee to study that problem and perhaps to define what was to be understood by the word "rule".

40. Mr. REUTER (Special Rapporteur) said that the problem raised by Mr. Ushakov had arisen during the drafting of the Vienna Convention on the Law of Treaties. The constituent instrument of an international organization was a treaty to which the Vienna Convention applied. No State, either during the preparation of the draft articles on the law of treaties or during the sessions of the United Nations Conference on the Law of Treaties, had ever considered that a rule which concerned the mechanisms of an international organization and was included in its constituent instrument would become a customary rule. It was true that the United Nations Charter, which was, after all, a treaty, set out substantive rules and principles that had subsequently been codified; but the idea that a rule concerning abstention from voting, for example, could become a general custom had never been put forward—although such a rule was the subject of a special custom in the Security Council, as the International Court of Justice had decided in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.[8]

41. The problem raised by Mr. Ushakov was not a serious one, for in view of the difficulty of creating a customary rule, it had never been considered that a rule concerning the institutional mechanisms of an international organization could be generally extended to all organizations, each of which had its own system and its own rules. The relations between an organization and its member States were not a matter that lent itself to the development of customary rules. But the Drafting Committee could no doubt discuss the problem raised by Mr. Ushakov.

42. Mr. USHAKOV said he agreed with the Special Rapporteur's comments on substantive rules, but in his opinion, rules governing the competence of an organization to conclude certain agreements and which thus removed that competence from its member States, were indeed substantive rules. The problem should therefore be examined by the Drafting Committee, or at least be dealt with in the commentary.

43. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 38 to the Drafting Committee under the same conditions as the other articles in section 4.

It was so decided.[9]

ARTICLE 39 (General rule regarding the amendment of treaties)

44. The CHAIRMAN invited the Commission to consider article 39, which read:

Article 39. General rule regarding the amendment of treaties

1. A treaty may be amended by the conclusion of an agreement between the parties. The rules laid down in Part II apply to such an agreement.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

45. Mr. REUTER (Special Rapporteur) reminded the Commission that in his eleventh report (A/CN.4/353, para. 33), he had proposed that paragraph 1 of article 39 be brought more closely into line with article 39 of the Vienna Convention. The paragraph would then read:

"1. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

46. As to paragraph 2, some members considered that it was self-evident and therefore unnecessary. In that connection, he pointed out that the Commission had referred in a number of other provisions of the draft articles to the requirement that an organization must comply with its relevant rules in all conduct relating to treaties; that had been done to take account of the frequently expressed concern that organizations might have a tendency to go beyond their normal rules of operation. He himself preferred the text adopted by the Commission on first reading, and believed that paragraph 2 should be retained.

47. Mr. USHAKOV agreed with the Special Rapporteur's comments on paragraph 2 and thought it could only be an advantage to repeat even what was self-evident. In fact, if the expression "except in so far as the treaty may otherwise provide" was adopted in paragraph 1, paragraph 2 would be necessary, since it would provide a guarantee that the rules of an international organization would not be amended merely because the parties to a treaty so desired.

48. Mr. CALERO RODRIGUES said he shared the view that paragraph 2 was unnecessary, particularly in view of what was laid down in article 6 of the draft. The paragraph should therefore be deleted.

49. Mr. EL RASHEED MOHAMED AHMED agreed. Paragraph 2 could be deleted, since it was

[8] *I.C.J. Reports 1971*, p. 16.

[9] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 42.

unnecessary to repeat a rule that was already stated in article 6.

50. Mr. JAGOTA said that it was not entirely clear whether the question of the consent of an international organization to an agreement amending the treaty was already covered in part II of the draft. If so, paragraph 2 of article 39 could be deleted. However, part II was concerned with the means of expressing consent to be bound by a treaty. If it was necessary to specify that the same means of expressing consent also applied to agreements amending a treaty, paragraph 2 should perhaps be retained.

51. The Drafting Committee might also consider whether it was useful to retain, in paragraph 1, the words "the conclusion of", which did not appear in the corresponding provision of the Vienna Convention. If the element of formality they introduced in regard to agreements between States and international organizations was considered necessary, perhaps those words should be included.

52. Mr. Al-QAYSI, referring to Mr. Jagota's comments, said that even if part II was not considered to cover the question of the consent of an international organization to agreements amending treaties, and bearing in mind the observations made by Mr. Ushakov, it could still be argued that the words "the conclusion of" referred back to part II of the draft.

53. Mr. RIPHAGEN said it might be argued that paragraph 2 of article 39 was necessary because it referred to agreements, whereas part II referred specifically to treaties, a term which was narrower in scope. If part II was in fact intended to refer to agreements, it might be advisable to say so in article 39.

54. Mr. REUTER (Special Rapporteur) said that Mr. Jagota's comments on paragraph 1 were pertinent: the words "the conclusion of" had been included to introduce an additional formal safeguard.

55. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 39 to the Drafting Committee.

It was so decided.[10]

ARTICLE 40 (Amendment of multilateral treaties)

56. The CHAIRMAN invited the Commission to consider article 40, which read:

Article 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:

(*a*) the decision as to the action to be taken in regard to such proposal;

(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (*b*), applies in relation to such a party.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

57. Mr. REUTER (Special Rapporteur) said that article 40 had not elicited any comments from Governments or international organizations.

58. The CHAIRMAN said if there were no objections he would take it that the Commission decided to refer article 40 to the Drafting Committee.

It was so decided.[11]

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)

59. The CHAIRMAN invited the Commission to consider article 41, which read:

Article 41. Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless, in a case falling under paragraph 1 (*a*), the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

60. Mr. REUTER (Special Rapporteur) said that no Government or organization had commented on article 41.

61. Mr. USHAKOV said that the expression "multilateral treaty" should be made more precise, as in the Vienna Convention.

62. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 41 to the Drafting Committee.

It was so decided.[12]

[10] *Idem*, paras. 2 and 43.

[11] *Idem*, paras. 2 and 44.

[12] *Idem*.

ARTICLE 42. (Validity and continuance in force of treaties)

63. The CHAIRMAN invited the Commission to consider article 42, which read:

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty between two or more international organizations or of the consent of an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

2. The validity of a treaty between one or more States and one or more international organizations or of the consent of a State or an international organization to be bound by such a treaty may be impeached only through the application of the present articles.

3. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

64. Mr. REUTER (Special Rapporteur) said that article 42 had not been the subject of any comments by Governments or international organizations. His own view, as he had proposed in his eleventh report (A/CN.4/353, para. 35), was that it might be advisable to combine paragraphs 1 and 2 in a single paragraph, which would read:

"1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present articles."

The Commission would probably have to revert to article 42 when it came to examine article 73.

65. During the first reading, the Commission had wondered, with regard to article 42 in particular, whether it should not refer to Article 103 of the United Nations Charter.[13] That was a problem which would have to be examined at the end of the second reading of the whole draft, when the Commission might consider the addition of an article referring in a general way, in respect of the whole draft, to Article 103 of the Charter.

The meeting rose at 1.00 p.m.

[13] See *Yearbook ... 1979*, vol. II (Part Two), p. 149, para. (3) of the commentary to article 42.

1720th MEETING

Friday, 4 June 1982, at 10 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)

[Item 2 of the agenda]

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

ARTICLE 42 (Validity and continuance in force of treaties)[3] (*concluded*)

1. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer article 42 to the Drafting Committee.

It was so decided.[4]

ARTICLE 43 (Obligations imposed by international law independently of a treaty)

2. The CHAIRMAN invited the Commission to consider article 43, which read:

Article 43. Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty, shall not in any way impair the duty of any international organization or, as the case may be, of any State or any international organization, to fulfil any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

3. Mr. REUTER (Special Rapporteur) said that no Government or international organization had made any comments regarding article 43. He therefore proposed that the article should be referred to the Drafting Committee.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer article 43 to the Drafting Committee.

It was so decided.[5]

ARTICLE 44 (Separability of treaty provisions)

5. The CHAIRMAN invited the Commission to consider article 44, which read:

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present ar-

[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 1719th meeting, para. 63.

[4] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 45.

[5] *Idem*, paras. 2 and 46.