United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations

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26th meeting of the Committee of the Whole

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that proposal if the Committee decided to delete article 36 *bis*. However, its deletion would leave uncharted ground covered neither by the 1969 Vienna Convention nor the proposed convention, which motivated the proposal in document A/CONF.129/C.1/L.65 to add a new paragraph to article 73.

53. Mr. RIPHAGEN (Netherlands), supported by Mr. BARRETO (Portugal), proposed that the consideration of the article should be deferred.

It was so decided.

The meeting rose at 5.55 p.m.

26th meeting

Monday, 10 March 1986, at 8.25 p.m.

Chairman: Mr. SHASH (Egypt)

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] (*continued*)

Article 66 (Procedures for arbitration and conciliation) *and*

Annex (Arbitration and conciliation procedures established in application of article 66) (*continued*)*

1. Mr. BOSCO (Italy) said that in the matter of settlement of disputes it was clearly necessary to adhere as closely as possible to the text of the 1969 Vienna Convention on the Law of Treaties.[1] The notion of *jus cogens* and the identification of peremptory norms of general international law were fundamental questions, and specially effective procedural safeguards in that area were therefore required. Article 66 differed from the corresponding article in the 1969 Vienna Convention because of the need to take account of the fact that, under Article 34, paragraph 1, of the Statute of the International Court of Justice, only States could be parties in cases before the Court. Nevertheless, his delegation considered it important to achieve uniformity of interpretation in a matter as delicate as that of peremptory norms of general international law. That could only be ensured by a judicial body of a universal character enjoying established authority, such as the International Court of Justice. The Court, moreover, in addition to being able to pronounce judgments in contentious cases, could also give advisory opinions which States and international organizations concerned could, if the present Conference so decided, accept as binding. Indeed, even in the absence of a decision of the Court, he believed that an advisory opinion given by the Court would be heeded and taken into due account. His delegation therefore welcomed the amendments of the United Nations (A/CONF.129/C.1/L.66) and of Austria, Colombia, Ireland, Japan, Mexico, Netherlands, Nigeria and Switzerland (A/CONF.129/C.1/L.69/Rev.1), which adopted such an approach.

2. Its position was consistent with its traditional support for mechanisms of third-party settlement that could be activated unilaterally, since they gave full application to Article 1, paragraph 1, of the Charter of the United Nations, which set the aim of bringing about "by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes". In that connection, he emphasized that no State gave up any part of its sovereignty when it freely and voluntarily consented to mandatory jurisdiction. That principle was enunciated, *inter alia*, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex, of 24 October 1970), which stated that "Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality"; and an identical paragraph was contained in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10, annex, of 15 November 1982).

3. The problem of the applicable law would be solved, since the International Court of Justice would apply Article 38 of its Statute. The advisory opinion procedure under Article 66 of the Statute was a very broad one allowing the presentation of written or oral statements and comments on statements made by others, thus providing ample opportunity for intervention in the proceedings.

4. Italy supported the amendment to the annex proposed by the European Economic Community (A/CONF.129/C.1/L.64) since it provided useful clarification. It also supported the proposal by the Netherlands (A/CONF.129/C.1/L.67), which contained a sound principle. He wished to suggest that, for the sake of harmony, a provision similar to paragraph 6 in section II of the annex should be added to section III. His delegation would also like to see added to section II a paragraph listing sources of law to be applied by arbitral tribunals, either specifically or by stating that the tribunal must decide on the basis of international law. He

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* Resumed from the 24th meeting.

[1] See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.5), p. 287.

recalled in that connection the difficulties which had arisen from the so-called Kellogg arbitration treaties of the 1920s and 1930s, which excluded from arbitration questions falling within the domestic jurisdiction but failed to specify on what legal basis the distinction was to be made. His delegation, in a spirit of co-operation, would do its utmost to devise for the future convention the best possible system of settlement of disputes.

5. Mr. GÜNEY (Turkey) said that the International Law Commission had drawn a distinction between the procedures to be adopted relating to disputes concerning the application or interpretation of articles 53 and 64 and those concerning any of the other articles in part V of the draft convention. It had therefore concluded that there was insufficient justification for maintaining a distinction between procedures applicable to States *inter se* and those applicable in relations with international organizations. It had not been possible to align article 66 and the annex with the corresponding provisions of the 1969 Vienna Convention, as the former dealt with treaties to which international organizations were parties and such bodies could not submit disputes directly to the International Court of Justice. In his delegation's view, article 66 did not reflect the practical requirements of the international community in respect of the peaceful settlement of disputes. Many States were reluctant to submit to mandatory jurisdiction or jurisdiction organized on a regional basis, and that was also true of mandatory arbitration. The practice of international organizations provided very few examples of their subjecting themselves to mandatory judicial arbitration. In his view, the best way of settling disputes was by direct and meaningful negotiation between the parties, the solution favoured in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes.

6. His delegation supported the amendment of Algeria, China and Tunisia (A/CONF.129/C.1/L.68), which took account of the desire of States not to be limited to mandatory arbitration as a means of settling disputes, as well as of the specific character of the present draft convention and the practices of international organizations. However, if that amendment were not acceptable to the Committee, his delegation could support the proposals in the two amendments of the Soviet Union (A/CONF.129/L.60 and L.61), since they reflected the realities of legal and political relations in the international community and contained the principle of freedom of choice of the means of peaceful settlement of disputes. The three-Power amendment was, he felt, a matter of clarification connected with the specific nature of the draft convention under consideration. It should therefore be referred to the Drafting Committee.

7. His delegation considered the eight-Power amendment incompatible with the realities of international relations and attitudes towards mandatory jurisdiction. It took no account of the specific nature of the future convention and also ran counter to the established practice of international organizations. In his delegation's view, mandatory application of the advisory opinions of the International Court of Justice stretched the limits of international law and practice in consultative procedures and set a bad precedent. It might even be considered to be contrary to the letter and spirit of the relevant provisions of the Charter of the United Nations and the Statute of the International Court of Justice. His delegation was therefore unable to support such an amendment. For the same reason, his delegation could not support the amendment proposed by the United Nations.

8. If the article were not amended, his delegation would be willing to co-operate with the sponsors of the amendments it supported, namely, those of Algeria, China, and Tunisia and of the Soviet Union, in drafting a procedure for the peaceful settlement of disputes based on the corresponding provisions of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the 1978 Vienna Convention on Succession of States in Respect of Treaties.

9. Mr. SURIYA (Thailand) said that his delegation could support article 66 and the annex proposed by the International Law Commission, which had a number of points to commend them. They treated all subjects of international law, whether States or international organizations, equally, in that they could rely on the same forum of justice. They did not force a State to go to any particular forum and gave freedom of choice between the prescribed measure and any other measure which might be preferable to the parties. Nevertheless, in a spirit of goodwill and co-operation, his delegation would not oppose the adoption of a different text, should that be the desire of the Committee.

10. Mr. AINCHIL (Argentina) expressed his delegation's firm and enduring commitment to the peaceful solution of disputes, an approach which the Charter of the United Nations recognized as fundamental to the maintenance of peace and international security. Its preference was for direct negotiation as the best means of settlement of matters in dispute, and it therefore welcomed the three-Power amendment, which introduced some flexibility into the text of the article by making the consent of the parties a prerequisite for the submission of a dispute to arbitration and by providing necessary safeguards.

11. His delegation regretted that it could not support the draft proposed by the International Law Commission, since the principle it contained, which would allow a State, without its consent, to be brought before an arbitral tribunal by an international organization, was unacceptable. There was a profound difference between the nature of States as ordinary subjects of international law and international organizations as subjects derived from the will of States, and that difference called for a different procedure. A formula such as that contained in the three-Power amendment would provide a satisfactory solution.

12. Mr. MIMOUNI (Algeria) said that the eight-Power amendment proposed a complex system of a kind considered and rejected by the International Law Commission. The amendment not only established a variety of procedures for settling disputes, but also contained a dangerous innovation in conferring a mandatory character on advisory opinions of the Inter-

national Court of Justice. His delegation was therefore unable to support it. He felt that in the framework of jurisdictional settlement a pragmatic approach was necessary, given international practice, which had shown that parties to a dispute submitted with difficulty to jurisdictional settlements, whether by raising many objections to the jurisdiction of the body or the inadmissibility of a petition, or sometimes even by refusing to appear before a judicial body. The compromise established by the 1969 Vienna Convention instituting recourse to the International Court of Justice relied on the fact that only States were involved in that instrument. Such a procedure was impossible, however, in the context of the present draft convention.

13. The three-Power amendment, of which his country was a sponsor, did not go so far as to delete all reference to arbitration, as had been proposed elsewhere, but provided an intermediate and realistic solution involving optional arbitration in the case of disputes related to articles 53 and 64. States and international organizations did not have the same characteristics, and it would be unacceptable to allow a distortion of the sovereignty of a State by depriving it of its right to give its consent before the matter was taken up by the arbitral body. There was no intention of introducing any uncertainty into treaty relations governed by good faith. International practice had shown, however that jurisdictional decisions were less likely to be contested when the parties to a dispute had agreed on the choice of procedure.

14. The three-Power amendment did not constitute a departure from the 1969 Vienna Convention, since even in the case of a treaty where the parties were both States and one or more international organizations, disputes between States parties only would be governed by that Convention. That seemed to be the principle in the new articles proposed by Cape Verde (A/CONF.129/C.1/L.19/Rev.1), the United Kingdom (A/CONF.129/C.1/L.27) and Italy (A/CONF.129/C.1/L.42). The three-Power amendment modified the 1969 Convention without departing from it, in so far as it took account of the principle of the common consent of the parties in the matter of the settlement of disputes.

15. His delegation reserved the right to comment on the amendments to the annex once the choice of dispute settlement procedure had been made.

16. Mrs. THAKORE (India) said that the distinction made between articles 53 and 64 relating to *jus cogens* and the remaining articles in part V of the convention was justified because the issues arising under the former articles would necessarily relate to fundamental questions of international law. Since the rules of *jus cogens* had an overriding character, jurisdiction should be conferred on the International Court of Justice in such matters, as was the case under the 1969 Vienna Convention. The use of the same forum for both the 1969 Convention and the present convention would eliminate the risk of widely diverging jurisprudence on a matter of extreme importance. The International Law Commission had dealt with the fact that international organizations could not be parties in cases before the International Court of Justice by providing in subparagraph (*a*) of article 66 for arbitration as the means of settling disputes concerning articles 53 or 64, irrespective of whether the parties to them were States or international organizations. A compulsory conciliation procedure had been provided in subparagraph (*b*) for the remaining articles in part V. The Commission, after due consideration, had rejected the idea of providing for a right to request an advisory opinion from the Court.

17. The Indian delegation was unable to support the amendment of the Soviet Union to article 66, since it departed from the compromise solution arrived at, after lengthy debate, in the 1969 Vienna Convention. Indeed, it hoped that the present Conference would be in a position to adopt, *mutatis mutandis*, a solution similar to that of the 1969 Convention.

18. Her delegation viewed the amendments of the United Nations and of the eight Powers with sympathy. The latter proposal had the merit of clarity, practicality and completeness, and therefore deserved serious consideration. The amendment of three Powers largely retained the wording of the International Law Commission's draft, except that it required the express consent of the parties for submission of a dispute to arbitration. In view of the special nature of the rules of *jus cogens*, that amendment might not meet with universal acceptance.

19. With regard to the annex, the text of the International Law Commission's draft incorporated the corresponding provisions of the 1969 Vienna Convention and also had the merit of simplicity. It might be improved by incorporating the relevant amendments proposed by the Soviet Union and the European Economic Community. Those amendments, together with the amendment proposed by the Netherlands, which provided clarification, could be sent to the Drafting Committee for consideration.

20. Mr. MÜTZELBURG (Federal Republic of Germany) said that his delegation wished to refer to the specific problems related to the effect of *jus cogens*. His delegation was one of those which believed that the notion of peremptory norms called for specially effective procedural safeguards owing to the radical nature of its consequences, the relative scarcity of fully conclusive precedents and the developments that article 64 appeared to foreshadow. *Jus cogens* bound not only the parties to a treaty, but the international community as a whole. In the view of his delegation, there was a need for a single mechanism to safeguard and guarantee the consistency and uniformity that was required for legal certainty.

21. Moreover, decisions produced through such a mechanism would have to be representative of the international community as a whole and reflect the main forms of civilization and the world's principal legal systems. Additional requirements were the highest possible legal competence, independence and international authority of the organ concerned and its members. Probably the only organ meeting such requirements was the International Court of Justice. His delegation therefore deemed it essential to give the International Court a primary role in questions involving *jus cogens*, as had been done in the case of the 1969 Vienna

Convention. Other procedures such as binding arbitration would have only a subsidiary function where the International Court of Justice was precluded from acting.

22. He believed it should be made clear that any decision by arbitration would be binding only on the parties to the dispute and only in respect of the specific case. The procedural problem relating to the right of parties to bring cases before the International Court of Justice could, he felt, be overcome, and in any case should not be used as an excuse for departing from the compromise solution adopted in the 1969 Vienna Convention for reasons unrelated to the specific subject of the draft instrument under discussion. In his view, the best means of overcoming the problem were contained in the precise proposal of the eight Powers, which specifically listed the various possibilities of involving the International Court, depending on the nature of the parties to the dispute. His delegation fully supported that amendment. It also saw merit in the United Nations amendment, which, although formulated in more general terms, also gave the International Court of Justice a primary role.

23. It considered that the amendments of the European Economic Community and the Netherlands, although making no change of substance, helped to clarify the text. They might therefore be referred to the Drafting Committee.

24. Mr. ULLRICH (German Democratic Republic), noting that the position with regard to the issue in article 66 had been the same at the three preceding codification conferences, said that it was essential to arrive at a compromise acceptable to all participants in the present Conference. He made that statement on the assumption that all States and all international organizations were required to settle their international disputes exclusively by peaceful means and in accordance with the principle of free choice of means implicit in Article 33 of the Charter of the United Nations. A provision to that effect was contained in paragraph 3 of article 65. In view of the complexity of the disputes that could arise under part V of the draft convention, his delegation was prepared to accept the idea underlying article 66 which provided for possible solutions in the event that attempts to settle the dispute under article 65, paragraph 3, failed.

25. While his delegation favoured a compulsory conciliation procedure for part V of the draft convention, it was unable, in the light of its experience at various codification conferences, to support subparagraph (*a*) of article 66. It was also unable to support the amendments proposed by the United Nations and by the eight Powers. However, it fully supported the proposals of the Soviet Union, which were in conformity with international law and met the requirements of international practice. His delegation also saw merit in the three-Power amendment, which could perhaps be combined with the Soviet Union amendments. It therefore considered that both those latter amendments and the three-Power amendment could be referred to the Drafting Committee.

26. Mr. BARRETO (Portugal) said that in the matter of the peaceful settlement of disputes, his delegation was in favour of an impartial third-party procedure that would produce a binding decision. It therefore considered that the wording of article 66 should follow the corresponding provisions of the 1969 Vienna Convention as closely as possible. At the same time, it appreciated the difficulties with which the International Law Commission had been confronted because of the fact that an international organization could not submit a dispute directly to the International Court of Justice. Portugal, for its part, had always upheld the role of international judicial bodies, referring cases to the International Court where necessary, and had faithfully implemented the decisions of international courts. His delegation therefore favoured the amendments proposed by the United Nations and by the eight Powers, which would strengthen the role of the judiciary in the settlement of disputes, particularly where *jus cogens* was involved. At the same time, conscious of the sensitive nature of the matters dealt with in article 66 and in the annex, it thought it would be preferable if the Committee, instead of adopting specific amendments, were to concentrate on arriving at a consensus with a view to strengthening the position of the future convention in international law.

27. Mr. MONNIER (Switzerland), speaking as a sponsor of the eight-Power amendment, said that article 66 was a key provision in the convention. The settlement procedures for which it provided did not apply to all disputes arising out of the application and interpretation of a treaty, but only to those that arose when one of the parties to a treaty wished to be released from it in one of the cases specified under part V of the draft and the other party or parties did not agree. One such case was when the validity of the treaty itself was at issue. The draft articles provided for several grounds of nullity, including incompatibility of the treaty with a peremptory norm of general international law.

28. Although articles 53 and 64 were not at present under consideration, they could not be ignored. The concept of *jus cogens* was not universally accepted, and many States had serious reservations about it. That was hardly surprising: the definition of *jus cogens* in article 53 was so vague and general that he wondered whether it was really possible to consider it a definition at all. The practice with regard to *jus cogens* was at once scanty and uncertain; the examples given by the authors were striking in their diversity and sometimes in the contradictions they revealed. That imprecise idea spread results of a radical nature, since any treaty which conflicted with a relevant norm of *jus cogens* was irremediably null.

29. The divergence of views regarding *jus cogens* at the Vienna Conference on the Law of Treaties had been overcome by a compromise solution under which the application of articles 53 and 64 was combined with certain judicial guarantees. The object of that compromise had been to ensure, in so far as possible, the security of treaty relations between States. He wondered whether the present Conference could not adopt the same approach.

30. Despite possible differences between states and international organizations, the inclusion in the present draft articles of provisions corresponding exactly to

articles 53 and 64 of the 1969 Vienna Convention logically called for a similar régime, that is a control conforming to the law of the application of those two articles.

31. The International Law Commission had adopted a standard solution, namely, unilateral recourse to arbitration. That solution could, however, be improved upon, bearing in mind that the régime laid down at Vienna in 1969 provided in the first instance for recourse to the International Court of Justice. That was precisely the object of the eight-Power amendment.

32. In his delegation's view, the present situation was exactly the same as the one with which the 1969 Vienna Conference had been confronted and should thus be dealt with in a similar manner. His delegation could therefore not support the amendments of the Soviet Union and of the three Powers, which did not offer sufficient guarantees since, under their terms, the submission of a dispute to arbitration would be optional. The United Nations amendment followed the same lines as the proposal of the eight Powers as far as substance was concerned but, as worded, he felt that it was still hedged about with too many reservations.

33. Mr. BERMAN (United Kingdom) said that it was a mystery to his delegation why those who strongly opposed the very idea of States voluntarily accepting the discipline of third-party dispute settlement procedures should pursue their campaign unabated even into the area of the law of treaties. Surely, it was in that area above all that it should be easiest to admit the idea of the impartial third party who decided on the basis of what the parties themselves had agreed. His delegation had also been surprised at certain references to the Manila Declaration on the Peaceful Settlement of International Disputes which, whatever else might be said about it, did advise States to adopt a positive approach towards procedures for the peaceful settlement of disputes, including recourse to the International Court of Justice.

34. In its work, the present Conference, unlike previous codification conferences, was not starting with a clean slate but was urged to use as a basis the régime of the 1969 Vienna Convention. The articles on settlement of disputes occupied a very special place in the régime of that Convention, and indeed, the whole success or failure of the 1969 Conference had hinged on the decisions on that vital question. At the very last moment in 1969, a group of 10 countries had come up with a satisfactory compromise and the door had thus been opened for approval of the Vienna Convention. It was on that basis that the United Kingdom had voted in favour of, and was now a party to, that Convention.

35. The present Conference, in considering part V of the draft articles, dealing with invalidity and termination of treaties, was entering on sensitive ground of a highly political nature. In that connection he drew attention to the fact that his country had been able to accept part V of the 1969 Vienna Convention, including the *jus cogens* provisions which continued to cause it serious problems, only in return for a solid guarantee of a binding settlement-of-disputes procedure in article 66. That was the arrangement known as the "Vienna package deal".

36. The fact that the General Assembly had not recommended the major substantive draft articles on invalidity and termination of treaties for inclusion in the list of draft articles for substantive negotiation at the present Conference was perhaps a gentle indication that the Conference should adopt a similar approach in dealing with the settlement of disputes.

37. The question now was whether the Conference was prepared again to apply the "package deal". If so, its task was easy, and all that was needed was to adapt the International Law Commission's draft to make it correspond to the régime agreed upon in article 66 of the 1969 Vienna Convention. The United Kingdom would judge the attitude of other participants in the Conference on the basis of their willingness to accept a similar compromise. There were, of course, procedural problems of judicial settlement, but they could always be overcome by suitable drafting. Any attempt to use procedural problems as a means of undermining the substance of the political agreement reached in Vienna in 1969 must, however, be rejected. His delegation, for instance, rejected absolutely the proposition that, because the subject-matter of the Conference involved different subjects of international law, that would justify placing them on a different plane in relation to settlement of disputes. If it were accepted that a State and an international organization were validly party to a treaty, with the mutual rights and obligations flowing therefrom, surely it could only follow, in law and in equity, that, if one of those parties claimed the treaty to be invalid as against the other, its rights could be no greater and no less than if the claim came from the other side.

38. Turning to the amendments before the Committee, he said that his delegation fully supported the eight-Power amendment, which was in keeping with the spirit of the 1969 agreement and adapted that agreement to the circumstances of the present case. While his delegation was in sympathy with the United Nations amendment, which went in the same direction, it found that that text failed to deal with procedural details and was marred by square brackets and alternative formulations. The three-Power amendment did not have his delegation's support despite the Chinese representative's sympathetic introduction at the 24th meeting. It veered sharply away from the 1969 agreement by reverting to a conception which, in the final analysis, provided a State such as the United Kingdom with no judicial guarantee but only a general hope that the other party might, in a particular case, agree to an acceptable procedure. He was quite unable to agree that the proposal corresponded to article 66 of the 1969 Vienna Convention, since it differed from it on an essential point. The Soviet amendments were so far removed from anything possibly acceptable that he could only assume that they had been tabled for purely tactical reasons. His delegation could, however, support the European Economic Community amendment and the Netherlands amendment, both of which related to the annex and were largely of a technical character.

39. Article 66 occupied a vital place in the whole structure of the convention and went even more deeply into the whole question of good faith in negotiations.

He trusted that it would be possible to reach general agreement on a text that reflected the agreement reached in 1969 and that would also be in accordance with the terms of the 1969 Vienna Convention.

40. Mr. NAGY (Hungary) said that, while disagreement over dispute settlement procedures had a long history, a dispute between an international organization and another international organization or a State was a new element. In that connection, he would like to know whether his delegation was correct in understanding that disputes over articles 53 and 64 between States *inter se* would fall under the 1969 Vienna Convention if all parties to the dispute were parties to that Convention but would fall under customary international law if one of them was not. That interpretation was based on the idea underlying the Italian proposal to introduce a new article reading "The relations of States as between themselves shall not be affected by the present Convention" (A/CONF.129/C.1/L.42).

41. Assuming that the Conference adopted that idea, it would only be necessary to consider whether article 66, subparagraph (*a*), provided an adequate method of settlement of a dispute between an international organization and another international organization or a State. The probability of such a dispute was, of course, very slight, for it was unlikely that an international organization would conclude a treaty in violation of a peremptory norm of international law; that would happen only if the States members of the organization concerned permitted it to happen. That was the situation provided for by article 53.

42. From the rule laid down in article 64 it was apparent that the emergence of a new peremptory norm of general international law could give rise to the termination of a treaty concluded by the organization. In such a case, it was scarcely conceivable that an international organization would deny the effect of the new peremptory norm, since the States members of an organization always exercised control over it.

43. The fact that article 53 had been referred to the Drafting Committee without any substantial debate was indicative of agreement in the Conference that the formulation and recognition of norms of *jus cogens* fell within the exclusive purview of States. Agreement on that point was also reflected in the wording of article 53. A decision that a treaty was in conflict with a peremptory norm of general international law must therefore reflect the opinion of the international community of States as a whole.

44. The question which then arose was whether the arbitral procedure provided for in article 66 satisfied that requirement; in his delegation's view, it did not. Under article 66 and the annex thereto, a separate arbitration tribunal would be appointed in each case, with the highly undesirable result that substantially similar cases would be decided differently by a multiplicity of tribunals. There would thus be a high risk of conflicting judgements concerning the content of peremptory norms, and much confusion would ensue. For those reasons, his delegation was unable to accept the International Law Commission's draft on arbitration.

45. There were, in its view, two possibilities. The first was to leave aside disputes regarding *jus cogens* between States and international organizations and to limit the conciliation procedure to other situations envisaged in part V of the draft articles. While that would be logical, there would then be a lacuna, since disputes concerning articles 53 and 64 would not be covered by the dispute settlement procedure provided for in the convention. His delegation therefore proposed that the competence of the proposed conciliation commission should be extended to cover such disputes; that would also simplify matters, as there would then be a single procedure for the whole of part V.

46. It would help to pinpoint the problems involved if conciliation commissions were permitted to consider matters of *jus cogens*. Although the decisions would not be binding on the parties to the conflict, the way in which the commissions functioned would demonstrate whether any third-party dispute settlement procedure would contribute to the uniform treatment of *jus cogens*.

47. In the light of those points, his delegation supported the two amendments proposed by the Soviet Union, on the understanding that the necessary drafting changes in subparagraph (*b*) of article 66 would be made by the Drafting Committee. If, however, those amendments were unacceptable to the Committee, his delegation would not object to the three-Power amendment. It could also accept the amendments proposed by the European Economic Community and the Netherlands, but not those by the United Nations and the eight Powers.

48. Mr. ABED (Tunisia) recalled that his country had acceded to the 1969 Vienna Convention with a reservation on article 66, subparagraph (*a*), as it considered that a dispute should be submitted to the International Court of Justice only with the express consent of the parties to the dispute. It held the same view in connection with article 66 of the present convention. His delegation was therefore unable to support the eight-Power amendment, which was silent on the need for express agreement between the parties to submit a dispute to the International Court of Justice and which would make that Court's advisory opinion binding for all the parties to the dispute. That amendment might also result in differentiation between the treatment of States and that of international organizations, for procedural difficulties might arise in deciding whether a case should be dealt with on a legal or on a conciliation basis.

49. The United Nations amendment offered some improvement by suggesting that the International Court of Justice should be asked to give an advisory opinion. Unfortunately, should the opinion prove impossible to obtain, the dispute would, for reasons which were not entirely clear, be submitted to arbitration without the express consent of all the parties, merely at the request of one party. The Tunisian delegation could not approve that amendment, nor, for the same reasons, could it approve the amendment proposed by the European Economic Community.

50. The Soviet Union amendment to article 66 followed the recognized principle of international law that

international disputes should be settled on the basis of the sovereign equality of States and with free choice of settlement procedures. However, the Tunisian delegation was unwilling to sacrifice subparagraph (*a*) of article 66. It believed that arbitration should be retained as an effective means for the peaceful settlement of disputes if the parties concerned so decided and wished.

51. That result could be achieved if the International Law Commission's draft was retained, as modified by the three-Power amendment. Compulsory arbitration was likely to hinder the settlement of disputes and was therefore not in the interest of international peace and security.

52. Mr. KOURULA (Finland) said that the rules in part V were one of the basic requirements for a reasonable and useful application of the future convention. His delegation therefore wished to stress the importance of the procedural rules to be applied when even a single party claimed that a treaty was ineffective or alleged reasons for the nullity or termination or suspension of the instrument. A treaty should remain in force until settlement of all disputes concerning its ineffectiveness or termination. Despite the compromise provisions of article 64, it would be regrettable if disputes concerning the content and interpretation of *jus cogens* could not be submitted to the International Court of Justice, as they could under the 1969 Vienna Convention. The text of article 66 should therefore be harmonized as far as possible with article 66 of that Convention.

53. His delegation fully supported the eight-Power amendment, as it considered that the question of identifying and interpreting peremptory norms should be settled by the International Court of Justice and not by the parties to a dispute. Admittedly, the Court's jurisdiction was not binding; in practice, however, and as some delegations had pointed out, one way of settling disputes would be for the parties to accept in advance that an advisory opinion of the Court would be conclusive. In his view, international law should develop, and not merely maintain, human ideas of justice. Only if the settlement of disputes was compulsory would smaller nations have equal possibilities of applying the new convention.

54. However, in view of the reluctance of some delegations to accept such an advance agreement procedure, the Finnish delegation was prepared to support the text of the International Law Commission's draft as amended, though unclearly, by the United Nations proposal. In any case, and as had previously been stated, every effort should be made to rely on the same forum for the resolution of issues concerning *jus cogens* and arising under the 1969 Vienna Convention or under any future instrument based on the present draft convention.

55. The Finnish delegation could also support the amendment submitted by the European Economic Community and by the Netherlands. With regard to the possibility of controversies arising from the application and interpretation of any future convention, questions of that nature were typical legal issues which, under Article 36, paragraph 3, of the Charter of the United Nations, should as a general rule be referred by the parties to the International Court of Justice.

56. There were of course many treaties that lacked binding provisions for the settlement of disputes arising from their application and interpretation. However, the present draft convention was of a constitutional character, and disputes about its application and interpretation were of a legal nature, and should therefore be settled through legal machinery.

57. Mr. SANYAOLU (Nigeria) said that while the draft convention avoided the risk of double treaty régimes by proposing arbitration for the settlement of disputes arising under articles 53 and 64 and a conciliation procedure for disputes arising under other articles in part V, in parallel with the 1969 Vienna Convention, the principle of the equality of States and international organizations with regard to their rights and obligations as parties to a dispute had not been justified. The International Law Commission had referred to that question at the end of paragraph (2) of its commentary to article 66 (see A/CONF.129/4). His delegation felt that the Commission's observation was also applicable to international organizations in the case of the proposed new convention. There were compelling reasons for granting international organizations means of access to the International Court of Justice, even though they could not be parties to cases before that body.

58. His delegation welcomed the wording proposed in subparagraph 2 (*b*) of the eight-Power amendment. Proposals of that nature might contain imperfections and uncertainties, but that consideration should not prevent their acceptance, as those difficulties would probably be resolved in the course of time. The amendment of the United Nations was very similar to the eight-Power proposal and added little that was new in the paragraph (*c*) it proposed. Finally, the introduction of the term "express consent" in subparagraph (*a*) of the three-Power amendment eliminated the notion of mandatory arbitration, something his delegation considered essential in a convention providing for a means of settlement of disputes concerning the application or interpretation of a rule of *jus cogens*.

59. Mr. NEGREIROS (Peru) said that article 66 appeared to supplement article 65. However, the latter article seemed comprehensive enough on its own, its paragraph 3 clearly specifying the means to be used, while its other paragraphs indicated the procedure to be followed. A further article on the same subject might give rise to conflict.

60. Article 66 went beyond proposing ways and means, and sought to make arbitration—a widely used international instrument—a compulsory procedure. Subparagraph (*a*) of article 66 provided alternative machinery in the event of parties to the Convention being unable to resort to the International Court of Justice. However, its main disadvantage was that any one of the parties to a dispute—for example, an international organization—might of its own motion institute a procedure leading in the end to an arbitral decision binding on the other party, which might be a State. Compulsory arbitration was far from accepted by many States, and could not conceivably be applied to

such a case involving an international organization and a State.

61. The aim of arbitration was to settle disputes between States through the intervention of judges appointed by States on the basis of respect for the law. Arbitration therefore was legal in character, for it involved impartial application of rules of law making it binding on both parties. However, the compulsory nature arose from the parties to a dispute agreeing to submit it to arbitration, in other words, from a formal act of consent in which two or more parties agreed to submit to arbitration. They defined the dispute, appointed the umpire and determined his powers and the procedure to be followed. Should the arbitration commitment be of a general nature, a special treaty was drawn up, such as the Pact of Bogotá in Latin America. Article 66, subparagraph (*a*), of the 1969 Vienna Convention thus clearly stated that the parties may "by common consent agree to submit the dispute to arbitration".

62. The Peruvian delegation was therefore unable to support the draft of article 66 proposed by the International Law Commission. It found the amendment proposed by the Soviet Union quite appropriate. However, if that amendment was not approved, it was prepared to support the amendment proposed by Algeria, China and Tunisia.

63. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that article 66 presented a number of difficulties for his delegation. It provided first of all for compulsory arbitration, a solution which, although appearing ideal, posed serious problems for many States. Making arbitration compulsory ran counter to the recognized principle of parties to a dispute being free to choose the procedure for settling it. The International Court of Justice had repeatedly upheld the principle that States should not be compelled to submit their disputes with other States to mediation or arbitration or other forms of peaceful settlement without their consent. The procedure set out in article 65, paragraph 3, was sufficient and guaranteed stability of legal relations, since it expressly referred to Article 33 of the Charter of the United Nations. The question of peremptory norms was of course most important, but disputes involving them should not be considered solely in a legal context, for international practice and the operation and effectiveness of other procedures would then be weakened.

64. There was no need to prejudge the effectiveness of the means of settlement referred to in Article 33, paragraph 1, of the Charter of the United Nations, particularly since respect for treaties was based on the principle of *pacta sunt servanda* and of implementation in good faith.

65. The participation of international organizations marked a substantial divergence from the situation which had existed when the 1969 Vienna Convention had been drawn up. Arbitration could not be unilateral, but had to be entered into with the consent of all the parties to the dispute, whether States or international organizations. The Venezuelan delegation therefore supported the amendment proposed by the Soviet Union in document A/CONF.129/C.1/L.60. However, should the majority in the Committee favour retention of a supplementary provision, his delegation would support the three-Power amendment.

66. With regard to subparagraph (*b*) of article 66, the Venezuelan delegation considered that, as in the case of subparagraph (*a*), compulsion was unsatisfactory.

67. Mr. KADIRI (Morocco) said that the 1969 Vienna Convention, which constituted the basic framework for the present Conference, had almost come to nothing on the point at present under discussion and had been rescued only by a last-minute compromise. The International Law Commission had encountered a major obstacle in its work on the present draft text in endeavouring to establish a régime providing equal facility of access for States and international organizations. It had resolved the problem by proceeding along the lines indicated by article 15 of annex VI of the United Nations Convention on the Law of the Sea,[2] which offered arbitration procedures for cases arising under the present articles 53 and 64. One of the merits of the work done by the International Law Commission in the present instance was that it would facilitate adoption of the proposed convention incorporating the present draft article 66 by a maximum number of States, including those which had been unable to accept the entire text of the 1969 Vienna Convention because of the scope of its articles relating to *jus cogens*.

68. The Moroccan delegation was therefore inclined to approve the Commission's text as it stood. With regard to the amendments before the Committee, the Soviet Union proposal was in its view irrelevant, because it would create an unbalanced situation and because it would eliminate arbitration. His delegation supported the United Nations amendment calling for addition of a subparagraph (*c*) making recourse to the International Court of Justice compulsory. The eight-Power amendment seemed to derogate very considerably from the 1969 Vienna Convention in referring to the International Court of Justice instead of to the arbitration mentioned by the International Law Commission, and seeking to provide a special arrangement for International organizations. His delegation supported article 66, but was willing to help to improve it.

69. Ms. MORGENSTERN (International Labour Organisation) said that her organization would have a specific difficulty with subparagraph 2 (*b*) of the eight-Power amendment. Paragraph 2 as a whole provided for four different situations. The first, that of a dispute between one or more States Members of the United Nations, would find a natural forum in United Nations organs. The second, that of a dispute between one or more States members of an organization not having authorization to request advisory opinions from the International Court of Justice, had its only possible forum in United Nations organs. A dispute between one or more States and several organizations could appropriately be submitted to United Nations organs as the only ones with a general capacity to request advisory opinions of the International Court of Justice. However, in a fourth situation, namely, that of a dis-

[2] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

pute between one or more States and a single international organization authorized to seek advisory opinions from the International Court, the recourse to United Nations organs was not self-evident. The reasons for not allowing the States in such a case to go to the international organization were not self-evident. A text of that nature might cause particular difficulties for an organization such as the one she represented, whose organs differed greatly in composition from those of the United Nations and which often tended to be particularly sensitive to any encroachment on their positions. It would therefore be very difficult for the International Labour Organisation to accept that, in any dispute between itself and States, United Nations organs would necessarily have to decide whether the International Court of Justice should be requested to give an advisory opinion and what the terms of the request should be. The problem might be solved if the Committee could ensure that the provisions relating to advisory opinions were formulated a little less precisely.

The meeting rose at 10.45 p.m.

27th meeting

Wednesday, 12 March 1986, at 4.05 p.m.

Chairman: Mr. SHASH (Egypt)

In the absence of the Chairman, Mr. Nascimento e Silva (Brazil), Vice-Chairman, took the Chair.

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] *(continued)*

Statement by the President of the Conference on articles 2, 5, 6, 11, 19, 20, 27, 35 to 37, 39 and 65

1. The CHAIRMAN invited the President of the Conference to make a statement to the Committee on consultations relating to various articles which had been held under his chairmanship among delegations, and to introduce the new texts of articles 2 and 5 which had been worked out in the framework of those consultations.

2. Mr. ZEMANEK (Austria), President of the Conference, said that the consultations had resulted in proposed new texts for articles 2 and 5, reproduced in document A/CONF.129/C.1/L.70, and had led to agreement among delegations on aspects of articles 11, 19, 20 and 27. It had also been agreed in principle that a change would be made in the wording of articles 5, 6, 35 to 37, 39 and 65.

3. With regard to article 2, the consultations had left the International Law Commission's text substantially the same as before. One of the changes concerned subparagraphs 1 (*c*) and 1 (*c bis*), where the distinction between "full powers" and "powers" had been eliminated, leaving a single definition of the term "full powers" as the new subparagraph 1 (*c*).

4. Subparagraph 1 (*j*), which defined the term "rules of the organization", had been an important issue in the negotiations because it gave rise to several problems. The text now proposed had been agreed to by certain delegations on the clear understanding that the ideas expressed by them during the negotiations with regard to the notion of established practice would be reflected in another part of the future convention, such as the preamble.

5. In article 5, the title had been placed between square brackets because the new wording of the article might require the Drafting Committee to alter the title.

6. As far as article 27, paragraph 2 was concerned, the United Nations had agreed not to insist on its proposal (A/CONF.129/C.1/L.37). Delegations had agreed to refer the International Law Commission's text for that provision to the Drafting Committee on the understanding that the idea contained in the amendment to the paragraph proposed by the Soviet Union (A/CONF.129/C.1/L.39) would be reflected elsewhere in the convention, for instance, in the preamble.

7. Delegations had also agreed in the negotiations that the Committee of the Whole should refer the Commission's text of article 11, paragraph 2, article 19, paragraph 2, and article 20 to the Drafting Committee, subject to the possibility for the Committee of the Whole to adopt additional language based on the amendments in documents A/CONF.129/C.1/L.12, L.34 (para. 2), L.38, L.40 and L.41. The sponsors of those proposals had agreed that the ideas contained in their amendments should be reflected elsewhere in the future convention, possibly in the preamble.

8. Lastly, it had been agreed in principle during the negotiations that the word "relevant" should be deleted before the word "rules" in articles 5 and 6, article 35, paragraph 2, article 36, paragraph 2, article 37, paragraph 5, article 39, paragraph 2, and article 65, paragraph 4, on the understanding that if the Drafting Committee decided that the adjective "relevant" should be restored in any of those provisions it should make a recommendation to that effect to the Committee of the Whole. As far as article 5 was concerned, the text proposed in document A/CONF.129/C.1/L.70 already reflected the agreement to delete the word "relevant".