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

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28th meeting of the Committee of the Whole

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provided for in the International Law Commission's draft.

89. Mr. KOTSEV (Bulgaria) said that, whatever dispute settlement mechanism was eventually chosen by the present Conference, it should be one capable of the widest possible acceptance. His delegation wished to reaffirm its position that international disputes should be settled on the basis of the sovereign equality of States and the principle of free choice of the means of settlement.

90. The provision in subparagraph (*a*) of the International Law Commission article 66 for compulsory arbitration of disputes concerning the application or interpretation of articles 53 or 64, at the request of only one of the parties, was not justified or appropriate. Arbitration should take place only with the consent of all the parties. His delegation held the view that the most widely acceptable procedure was conciliation. For reasons already given by a number of delegations, it therefore favoured deletion of subpararaph (*a*) of the article.

91. He agreed with the view that there should be a single competence to provide judgement on matters involving *jus cogens*, and that that competence should lie with the International Court of Justice. His delegation rejected, however, any proposal designed to modify the existing legal situation whereby only States could appear before the International Court. The Conference was not competent to decide otherwise.

92. He expressed surprise that the representative of the United Nations, an organization of which Bulgaria was a Member, should have introduced an amendment which did not take account of his delegation's position. His understanding of that amendment was that, at the request of a State member of an international organization, any dispute concerning *jus cogens* to which that organization was a party could be brought before the General Assembly or before the Security Council, as provided in Article 96 of the Charter of the United Nations, with a request that the dispute be forwarded for an advisory opinion to the International Court of Justice. The principal organs of the United Nations would thus be involved in dealing with a dispute relating to *jus cogens*. Discussion as to the appropriateness of such a procedure would inevitably take place within the United Nations.

93. The representative of the United Nations had reminded the Committee (24th meeting) that the present Conference could not draft a provision binding on the United Nations itself, and had therefore suggested the adoption by the Conference of an appropriate resolution. At the same time, he had proposed that a State might, on behalf of an international organization, submit to the principal organs of the United Nations a dispute on legal and political matters related to norms of *jus cogens*. It was therefore his understanding that the Secretariat of the United Nations was expressing a preference for judicial settlement of disputes over the other means recommended in Article 33 of the Organization's Charter. In the view of his delegation, the Secretariat of the United Nations was by definition impartial, and should reflect and promote an uncontroversial policy. His delegation would wish to see its own position reflected in the opinions of the Secretariat. He was not aware that there was any legal ground for the Secretariat to maintain a separate policy of its own.

94. For the reasons he had given, his delegation could not accept the amendments of the United Nations and the eight Powers. In the event of a vote, it would vote in favour of the Soviet Union amendment. His delegation could also support the three-Power amendment.

The meeting rose at 6.10 p.m.

28th meeting

Thursday, 13 March 1986, at 3.30 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*)

Statement by the President of the Conference on articles 9, 36 bis, *73 and new article*

Article 9 (Adoption of the text) (*concluded*)*

Article 36 bis (Obligations and rights arising for States members of an international organization from a treaty to which it is a party) (*concluded*)**

Article 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization (*concluded*)***

Proposals for a new article (*concluded*)****

* Resumed from the 10th meeting.

** Resumed from the 25th meeting.

*** Resumed from the 23rd meeting.

**** Resumed from the 16th meeting.

1. The CHAIRMAN invited the President of the Conference to make a statement to the Committee on consultations relating to articles 9, 36 *bis* and 73 and to a new article which had been held under his chairmanship among delegations, and to introduce the new text of article 9, paragraph 2, which had been prepared within the framework of those consultations.

2. Mr. ZEMANEK (Austria), President of the Conference, said that as a result of the consultations, delegations had reached general agreement on a new text for article 9, paragraph 2 (A/CONF.129/C.1/L.73), and had decided that it should be referred to the Drafting Committee for drafting improvements. They had also agreed that the proposals by Cape Verde (A/CONF.129/C.1/L.19/Rev.1) and the United Kingdom (A/CONF.129/C.1/L.27), which contained the same idea as each other, should form the basis of a new article and should be referred to the Drafting Committee for consolidation.

3. Finally, it had been agreed that article 36 *bis* should be deleted and that an additional paragraph 3 should be inserted in article 73 along the lines of the amendment proposed by the International Labour Organization, the International Monetary Fund and the United Nations (A/CONF.129/C.1/L.65). It was his understanding that the Drafting Committee had received two suggestions for drafting improvements to the expression "obligations and rights arising for States members" in that paragraph, and the Committee might wish to ask the Drafting Committee to consider them.

4. The CHAIRMAN said that he had been informed that Italy would not insist on its proposal for a new article (A/CONF.129/C.1/L.42).

5. If there were no comments on the statement made by the President of the Conference, he would take it that the Committee adopted paragraph 2 of article 9 as proposed in document A/CONF.129/C.1/L.73 and referred it to the Drafting Committee; that it approved the idea in the proposed amendments of Cape Verde and the United Kingdom and referred both proposals to the Drafting Committee for the preparation of a consolidated text of a new article to be based on them; and that it deleted article 36 *bis* and included in article 73 a paragraph 3 worded along the lines of the proposal submitted by three international organizations, on the understanding that the Drafting Committee would review the wording of the new paragraph, in particular in regard to the words "obligations and rights arising for States members", as well as the title of article 73.

It was so decided.

6. Mr. SZASZ (United Nations) said that the international organizations wished to place on record their hope that the new article to be included in the future convention would not be used by States to the prejudice of international organizations which were parties to a treaty in which the relations between the States parties to the treaty were governed by the 1969 Vienna Convention on the Law of Treaties.[1]

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

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

7. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that some of the amendments to article 66 reflected and carried on the idea in that article's subparagraph (*a*) and some negated it. The question arose as to what could and should be the criterion for evaluating that paragraph and the amendments relating to it, or, in other words, the criterion for determining which of the proposed rules for settling disputes concerning *jus cogens* were in accordance with international law in force, and which contradicted its norms.

8. It could be said with full confidence that the criterion was a generally recognized norm/principle of customary law that parties to a dispute should have a free choice of the procedural means of dispute settlement. That norm/principle had developed over centuries of international relations and most adequately reflected international legal reality.

9. His delegation therefore firmly supported the amendment proposed by the Soviet Union (A/CONF.129/C.1/L.60), as well as the three-Power amendment (A/CONF.129/C.1/L.68), which provided a good basis for rules to govern the settlement of disputes. It both corresponded to existing international law and took account of the specific nature of international organizations. The legal problems that could arise where international organizations were parties to a treaty had been the subject of careful consideration during the preparation of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[2] That Convention took account of the particular features of disputes between States and international organizations, and it included procedural rules for settlement of such disputes which corresponded with general international law. In the view of his delegation, the present Conference should follow that example, in order to ensure the effectiveness of the proposed new convention and make it a reliable instrument to meet the needs and interests of both States and international organizations.

10. His delegation believed that the need to harmonize the specific subject of the present Conference with general international law was reflected in all the proposed amendments, even those with which his delegation could not agree as a matter of principle, such as those of the United Nations (A/CONF.129/C.1/L.66) and of the eight Powers (A/CONF.129/C.1/L.69/Rev.1). It was known that only States could appear before the International Court of Justice, the only body which could rule on disputes relating to norms of *jus cogens*, since *jus cogens* was laid down in the Charter of the United Nations. The specific nature of *jus cogens* required special procedural guarantees for the settlement of disputes concerning it.

[1] *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

[2] *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12), p. 207.

11. The norms of *jus cogens* were norms of general international law, and the most important of them were set out in the Charter of the United Nations. They had therefore not been drawn up by the International Court of Justice or by any other international body, but by States, on the basis of agreement between them. It followed that the settlement of disputes involving *jus cogens* was primarily a matter for States themselves. The parties to a dispute could, if they deemed it necessary, use the procedure of seeking an advisory opinion from the International Court of Justice, but that required the consent of all the parties. Furthermore, it was only logical, in matters relating to the norms of *jus cogens*, which reflected the interests of the international community as a whole, that the advisory opinion of the Court should be the unanimous opinion of all its members, elected to represent "the main forms of civilization and of the principal legal systems of the world", as is said in Article 9 of the Statute of the Court, points not specified in the United Nations and eight-Power proposals.

12. However, the greatest shortcoming of those amendments was that they called for the settlement of disputes by compulsory judicial procedure, which contradicted existing international practice, did not reflect the sovereignty of States and ran counter to the almost universally accepted principle contained in Article 36, paragraph 1, of the Statute of the International Court of Justice.

13. In conclusion, his delegation stressed the need to find a solution which took account of the interests of all States, existing practice and the norms of general international law.

14. Mr. RIPHAGEN (Netherlands) said that in the view of his delegation, since *jus cogens* was a relatively new concept, it required a relatively new approach for the settlement of disputes concerning it. In view of the specific character of *jus cogens*, if States and international organizations invoked it as a ground for invalidating a treaty, objections could be raised by other parties. In that case the first possibility would be recourse to one of the means of settlement referred to in Article 33 of the Charter of the United Nations, such as negotiation. However, he wondered what the subject of the negotiation could be. The subject was either a rule of *jus cogens* or it was not. Even if an agreement was reached by negotiation, it would not be valid if it was contrary to *jus cogens*. The problem had been correctly dealt with in the 1969 Vienna Convention, which provided for settlement through the International Court of Justice at the request of any party. In his view that principle should be retained.

15. However, in the context of the present draft convention a technical difficulty arose from the fact that an international organization raising an objection could not appear before the International Court of Justice. The only solution then was a request for an advisory opinion. Such a request required use of the procedures laid down in the Charter of the United Nations, and was therefore dependent on the collaboration of organs of international organizations which were not parties to the dispute. In order to avoid the situation where a settlement could not be achieved, due to the non-collaboration of such organs, an alternative procedure was required, and that was compulsory arbitration. Without that, it would never be known what the rule of *jus cogens* was. A similar situation would arise where only international organizations invoked *jus cogens*. There again, if there were no collaboration in seeking an advisory opinion, another procedure would have to be followed. The only possible procedure was then compulsory arbitration. He therefore urged the Committee to adopt the eight-Power amendment.

16. Mr. ALMODÓVAR (Cuba) said that he was frankly amazed at the approach adopted by the International Law Commission in article 66, in view of the Commission's statements in pararaph (3) of its commentary to the article (see A/CONF.129/4) that "the considerations which had led it fifteen years ago not to propose provisions for the settlement of disputes in the draft articles on treaties between States had lost none of their weight", and that "the Commission remains fully alive to the continuing differences among States on this question today. The solution which it adopted in second reading was rejected by some members; it establishes compulsory arbitration for disputes concerning the application or the interpretation of articles 53 or 64 and compulsory conciliation for disputes concerning the other articles in part V."

17. In paragraph (4) of the same commentary, the Commission had further stated: "The transposition of the solutions adopted at the Conference in 1969 concerning disputes to which international organizations are parties involves a major procedural difficulty: international organizations cannot be parties in cases before the International Court of Justice." The Commission had gone on to recognize that recourse could therefore not be had to the International Court. In 1980, it had studied various means of remedying the situation but had to abandon its efforts because of "the imperfections and uncertainties" of the procedure in question, as it said in the same paragraph (4).

18. The solid arguments thus put forward by the Commission itself strengthened his delegation's opposition —and that of most other delegations—to compulsory dispute settlement procedures not agreed to by a sovereign decision taken by a State in each specific case.

19. It was in the light of those considerations that his delegation whole-heartedly supported the two amendments proposed by the Soviet Union (A/CONF.129/C.1/L.60 and L.61), which were well balanced, respected the rights of States and international organizations and were well rooted in international practice. While his delegation could not support the amendments of the European Economic Community (A/CONF.129/C.1/L.64), the United Nations (A/CONF.129/C.1/L.66), the Netherlands (A/CONF.129/C.1/L.67) and the eight Powers (A/CONF.129/C.1/L.69/Rev.1), it appreciated the efforts made by their sponsors.

20. As for the joint amendment submitted by Algeria, China and Tunisia (A/CONF.129/C.1/L.68), his delegation would not object to its being referred to the Drafting Committee.

21. Mr. SOMDA (Burkina Faso) said that two problems had stood in the way of accession by States to the

1969 Vienna Convention: the problem of *jus cogens* and that of the settlement of disputes.

22. *Jus cogens* or a peremptory norm of general international law had been defined in article 53 of that Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." However, neither that Convention nor the present draft provided any criteria for determining how a norm would be accepted and recognized as having a peremptory character. For the solution of that problem, the 1969 Convention had resorted to judicial settlement by the International Court of Justice. In the case of the present draft, since international organizations could not be parties to a case before the International Court the International Law Commission had adopted the solution of compulsory conciliation and arbitration. That solution, however, presupposed that some authority would be capable of determining whether a norm constituted a rule of *jus cogens* or not.

23. Burkina Faso was not opposed to the use of arbitration for the settlement of international disputes. It favoured the principle of peaceful settlement and accepted any such means of settlement that could bring about a solution, provided always that that means of settlement was not imposed upon it.

24. Compulsory arbitration was often provided for in agreements of a limited and specific character, but was not suitable for a universal convention. The question of the settlement of disputes was connected with the principle of State sovereignty and with that of freedom of choice of the means of settlement of disputes. For that reason his delegation was unable to accept the International Law Commission's draft of article 66.

25. It could not support the eight-Power amendment, because that text provided for procedures which would be difficult to apply and which would prove unacceptable to many States. For similar reasons, his delegation could not accept the first amendment of the Soviet Union, nor that of the United Nations.

26. His delegation could, however, accept the three-Power amendment and suggested that it should be referred to the Drafting Committee together with the second Soviet Union amendment.

27. Mr. SATELER (Chile) said that the discussion of the question of settlement of disputes arising from the concept of *jus cogens* had revealed a cleavage of opinion on two points. The first related to the compulsory character of the settlement procedure and the second to the choice of the means of settlement.

28. His delegation considered that the means of settlement of disputes should lead to a binding decision, and secondly, it felt that the disputes in question should be referred to the International Court of Justice.

29. Regarding the general obligation to settle disputes by peaceful means, he could not accept the view put forward by certain delegations that negotiation constituted a special and somehow privileged means of settlement. There was no basis for that interpretation in any of the provisions of the Charter of the United Nations or in the relevant General Assembly resolutions. On the contrary, there was only one means of settlement that was really privileged by the Charter, namely, reference of disputes of a legal nature to the International Court of Justice. That was a strong argument in favour of judicial settlement.

30. Another important point to be borne in mind was that article 66 of the 1969 Vienna Convention was the result of a compromise achieved after difficult negotiations. It was essential not to upset the delicate balance of that compromise. Unfortunately, however, it was not possible to transpose *mutatis mutandis* the provisions of that article into the present draft convention.

31. Article 66 as prepared by the International Law Commission had accordingly replaced judicial settlement by arbitral settlement. That system would ensure that any disputes relating to *jus cogens* would be the subject of compulsory arbitration and would be adjudicated upon in accordance with principles of law.

32. In his delegation's view, it was preferable to maintain the system of recourse to the International Court of Justice, with such adaptation as was necessary for the case where an international organization was a party to a dispute. That was the purpose of the eight-Power amendment and also of the amendment proposed by the United Nations.

33. His delegation favoured adjudication by the International Court of Justice, because that Court constituted the only judicial authority recognized by the international community as a whole. It should be remembered that, according to article 53 of the 1969 Vienna Convention, a rule of *jus cogens* had to be "accepted and recognized by the international community of States as a whole." The International Court of Justice was the body best qualified to interpret a rule of that nature. Apart from the excellent reasons already given by the representative of Japan on that point (24th meeting), his delegation wished to stress the negative impact which divergent or conflicting arbitral awards in respect of *jus cogens* could have. Awards of that kind could even imperil the very concept of *jus cogens* and its meaning for the law of treaties and international law in general.

34. In view of those considerations, his delegation was unable to support the amendments of the Soviet Union and the three Powers.

35. Mr. GAUTIER (France) said that his delegation's attitude towards article 66 proceeded directly from its position on articles 53 and 64. Those articles were not acceptable to his delegation because of the uncertainty which they introduced into treaty law.

36. The system instituted by the 1969 Vienna Convention constituted a commendable attempt to remedy the situation which that Convention created for the States parties to it. In his delegation's view, however, the system which had been adopted did not avoid the risk of peremptory norms being established without their having been accepted or recognized by States.

37. He proposed to confine his comments on the various amendments which had been submitted to certain

technical points. The Soviet Union's amendment to article 66 would have the effect of eliminating all reference to arbitration with regard to articles 53 and 64. Since the amendment would rule out all judicial settlement and provide only for a conciliation system, it constituted a retrograde step which, from the point of view of France, was open to criticism.

38. The eight-Power amendment attempted, in a laudble manner, to cover the various types of situation that arose in the case of disputes, but from the legal standpoint it was open to certain legal reservations connected, in particular, with the nature of advisory opinions rendered.

39. Mr. VAN TONDER (Lesotho) supported the eight-Power amendment for the reasons given by the Japanese delegation and other delegations which had spoken in its favour.

40. In so doing, his delegation was motivated by reasons of fair play and logic. It started from the simple premise that international organizations as subjects of international law participated in the development of peremptory norms of international law both through their practice and through the treaties into which they entered. As equal partners in the development of those norms and in those treaties to which they were parties, they should also be treated as equal partners when having recourse to legal remedies in cases of disputes.

41. The eight-Power amendment improved article 66 because it provided a means whereby an advisory opinion could be sought from the International Court of Justice on disputes relating to a conflict between treaties and *jus cogens*, including disputes involving international organizations. His delegation also supported the provision in subparagraph 2 (*e*) of the amendment that such opinions should be accepted by all the parties in the controversy as decisive.

42. With regard to the annex, his delegation supported the amendments submitted by the European Economic Community and the Netherlands, which introduced valuable improvements into the International Law Commission's draft.

43. Mr. RESTREPO PIEDRAHITA (Colombia) said that his delegation, as one of the sponsors of the eight-Power amendment, fully endorsed the Japanese representative's admirable presentation of that proposal.

44. The field of application of article 66 was undoubtedly one of the most sensitive, complex and controversial of international legal questions. The political and legal philosphy underlying the amendment took account of both the concept of the State and that of the international community. The basis element of that philosophy was the judicial function, which, in the case of a State, was exercised in the ambit of its territory and, in the case of the community of nations, in that of the whole world. That function was conferred upon judges, who were empowered to render binding decisions for the purpose of settling disputes over rival interests or claims. In the internal order of States the highest judicial authority—or supreme court—was entrusted with the settlement of disputes concerning issues of constitutional law. In the same way, the nations of the world had set up the International Court of Justice as a supreme court to safeguard international law.

45. Disputes concerning the application or interpretation of rules of *jus cogens* (articles 53 and 64) not only were of a legal character but could also involve highly political issues. It was therefore essential that they should be submitted to careful scrutiny and to effective adjudication.

46. His delegation, together with the other sponsors of the eight-Power amendment, urged the international community to have confidence in the International Court of Justice as the supreme judicial body for the settlement of international disputes. The history of the Court showed that its judges had always commanded universal respect by reason of their moral integrity and professional competence.

47. His delegation was aware of the reservations of certain delegations with regard to the compulsory jurisdiction of the Court that was envisaged in the amendment. Those reservations were rooted in fears relating to sovereignty and to the exclusive competence of States to choose the mode of settlement of disputes.

48. Representing as it did a developing country and people, his delegation had the fullest confidence in the existence and operation of institutions which guaranteed the rules of *jus cogens*, rules which were of vital importance to States. It believed in the rule of law and had faith in the authorities instituted to make it effective. It placed its trust in judges, who alone could render authentic justice between men, maintain the rule of law and rule out the law of the jungle. The concept of sovereignty did not mean that only rulers—to the exclusion of judges—were entitled to uphold the integrity of the basic principles governing the relations between nations.

49. Mr. HUBERT (Canada) said that the position taken by his delegation was based on a number of fundamental principles derived from its conception of relations within a community of countries and organizations respectful of the international legal order.

50. The norms of *jus cogens* were, by their very nature, universal and created *erga omnes* obligations. There could be no derogation from them by any subject of international law without threat to the fabric of the relations involved.

51. Some delegations had called for acknowledgement of the fact that those norms sometimes gave rise to controversies of a legal or even political nature. However, the Canadian delegation regarded that fact as an additional reason for ensuring that all such disputes could if necessary be subjected to judicial or arbitral adjudication.

52. His delegation believed that every adjudication bearing on *jus cogens* should have the following three minimal and essential characteristics. First, the adjudication must emanate from an independent and fully qualified organ. Secondly, unilateral recourse to such adjudication must be available to all parties in the dispute. Thirdly, the judicial or arbitral decision must be binding on all the parties.

53. His delegation found it difficult to understand how it could be argued that compulsory judicial or arbitral adjudication could constitute what had been termed "legal or political oppression". It believed, on the contrary, that such a risk could arise out of a situation contrary to that envisaged in the International Law Commission's draft of article 66, or in the United Nations amendment and the eight-Power amendment. It would in its view be unreasonable, inequitable and consequently unacceptable to envisage that a party to a treaty might unilaterally withdraw from its obligations by invoking *jus cogens* without the other party or parties involved being able to have recourse to an independent judicial or arbitral procedure. The amendments submitted by the Soviet Union sought clearly to eliminate the possibility of such recourse.

54. The three-Power amendment was less radical, but nevertheless sought to make such resources subject to prior agreement by—and consequently subject to the veto of—the other party. Those two possibilities appeared to the Canadian delegation to run counter to the common interest of the international community as a whole. Nor did those proposed solutions seem to offer the best guarantee of respect for the principle *pacta sunt servanda* embodied in article 26.

55. His delegation therefore had no doubt which was the best solution as far as protection of the rule of law against the rule of the strongest was concerned.

56. Those considerations led his delegation to ask what would any subject of international law, claiming to act in accordance with the law, have to fear from the submission of its action to judicial or arbitral adjudication, especially where—as in the present instance—*jus cogens* was involved.

57. It had also been argued that compulsory adjudication constituted an infringement or a limitation of the sovereignty of States. The Canadian delegation's position on that point had been expressed during the discussions leading up to the adoption of article 66 of the 1969 Vienna Convention. In the context of the present debate he wished to assert that the proposal in article 66 before the Committee, or in the modified form thereof proposed in the amendment of the United Nations and that of the eight Powers, was no more inconsistent with the principle of sovereignty than was the Charter of the United Nations.

58. The establishment in the present draft convention of the right of any party to a dispute involving *jus cogens* to resort unilaterally, if necessary, to judicial or arbitral adjudication would tend to incite the parties to reach an understanding. In fact, if the parties to a treaty knew in advance that they might eventually have to submit to an impartial decision that would be binding on them, they would see the advantages of a just and equitable settlement of their differences.

59. It was consequently obvious that the Canadian delegation could not accept the first amendment submitted by the Soviet Union or paragraph 2 of its second amendment. Nor could it accept the three-Power amendment. All the amendments would, it believed, constitute a retrograde step in relation to the valuable achievements of the 1969 Vienna Convention. *Jus cogens* must remain *jus cogens*; the fact that the present draft convention concerned treaties to which international organizations were parties changed nothing.

60. Of the United Nations and eight-Power amendments, the Canadian delegation preferred the latter because, besides fully responding to the basic criteria which he had mentioned, it took more specific account, and with greater clarity and precison, of what was already stipulated in the Charter of the United Nations and the Statute of the International Court of Justice.

61. As to the choice between the eight-Power amendment and the International Law Commission's draft, it would be noted that he had consistently referred throughout his statement to "judicial or arbitral adjudication". Both satisfied what he had qualified as minimal characteristics for any adjudication bearing on *jus cogens*. In opting, finally, for the eight-Power amendment, his delegation was expressing the belief that the International Court of Justice offered better guarantees of continuity in the interpretation of the law.

62. Should it prove impossible to reach a consensus in favour of that amendment, his delegation would do all in its power to secure the adoption of a text which retained, as a minimum, the provisions envisaged in the International Law Commission's draft of article 66.

63. His delegation considered that the amendments submitted by the European Economic Community and by the Netherlands, as well as the first part of the Soviet amendment in document A/CONF.129/C.1/L.61, might be referred to the Drafting Committee.

64. Mrs. SIMBRAO (Angola) said that her delegation wished to make two general observations. First, it was clear that since international organizations could not be parties in cases before the International Court of Justice, the provisions of article 66 (*a*) of the Vienna Convention on the Law of Treaties could not be transferred *ipsis verbis* to the present draft. Second, any solution to the problem of placing States and international organizations on as equal a footing as possible as far as the settlement of disputes was concerned must be approached with circumspection, and above all with respect for the principle of the sovereignty of States.

65. Of the different solutions proposed, one in particular, that involving recourse to the International Court of Justice through an intermediary, seemed likely to lead to confusion. Pointing to the organic link between article 66 and article 65 in its entirety, she stressed that the most important elements were the principles of common consent and the free choice of means.

66. Her delegation welcomed the three-Power amendment, which it considered faithful to the spirit in which the text of the article had been drafted. In disputes involving *jus cogens*, arbitration would become obligatory provided there was common consent; the minimum agreement that was sought as a basis for the settlement of such disputes would thus be guaranteed.

67. Mr. AKA (Côte d'Ivoire) observed that the persistence of differences with regard to part V of the 1969 Vienna Convention could not fail to have an effect on

the stability of treaty relations between States, and hence on peaceful and friendly co-operation between them.

68. The issue concerning part V of the draft convention had led many delegations—including his own—to believe that a special and compulsory procedure for the settlement of disputes related to articles 53 or 64 was both justified and necessary. For its part, his delegation maintained and would continue to maintain the position it had taken at the 1969 Vienna Conference, especially since the International Law Commission had wisely decided to preserve a certain parallelism between the earlier instrument and the draft under discussion. It would thus have no difficulty in accepting the Commission's draft of article 66.

69. As far as possible improvements in that text were concerned, his delegation favoured the eight-Power amendment, which took account of the need to guarantee, by all possible means, the peaceful settlement of disputes.

70. Mr. LARSSON (Sweden) said that his delegation endorsed the idea underlying the International Law Commission's draft of article 66. In its view, the provisions of that draft were the absolute minimum it could accept in a convention such as the one under elaboration.

71. Knowledge that automatically available settlement procedures existed would discourage unfair obstruction and abuse and would also encourage the parties to a dispute to agree spontaneously on a method of settlement. Far from preventing the parties from concluding special agreements in the form of a *compromis*, the procedures proposed would, he felt, encourage them to do so.

72. While his delegation therefore generally endorsed the Commission's proposal, it also saw considerable merit in the eight-Power amendment, as well as in the proposals concerning the annex submitted by the European Economic Community and the Netherlands. On the other hand, it considered that the United Nations amendment fell short of the desired goal. His delegation could not support the amendments proposed by the Soviet Union and by Algeria, China and Tunisia.

73. Mr. PISK (Czechoslovakia) said that his comments would be brief, as almost all the possible arguments for and against compulsory jurisdiction had been put forward.

74. As had been pointed out, the approach adopted by the 1969 Vienna Convention on the question of compulsory jurisdiction continued to make it difficult for a number of States to accede to that instrument, despite their recognition of its value.

75. Article 66 of the 1969 Vienna Convention and the present draft article 66 both envisaged disputes involving two or more parties to a treaty. It was inconceivable, however, that a court would rule on the invalidity of a treaty as between two or more parties only, the remaining parties continuing to be bound by the treaty regardless of the fact that the norms of *jus cogens* had been violated and articles 53 and 64 applied. To replace in the new convention the compulsory judicial settlement involving the International Court of Justice which was provided for in the 1969 Vienna Convention by compulsory arbitration was merely to transpose the problem in its entirety; there again, the invalidity of a treaty under article 53 or 64 would apply to all the parties to the treaty, and not merely to those involved in the dispute.

76. It might be asked whether a State could be obliged to submit to the ruling of the International Court of Justice or to an arbitration procedure disputes that might involve different subjects of international law —States and international organizations—and might concern the very foundations of the foreign policy of States. For example, the issue might be that of deciding on the nullity of a treaty due to the use of force or the threat of force. The determination of the use of force as an act of aggression was a matter for the Security Council, not for an organ of arbitration or the International Court of Justice. The interpretation of *jus cogens* must, in his delegation's opinion, be left to States and not to an organ composed of experts, however highly qualified. International arbitration was a suitable means of resolving some disputes, but a distinction had to be made between the use of compulsory arbitration for dealing with certain special, non-political problems and its use for settling disputes involving fundamental aspects of State policy.

77. Those considerations led his delegation to support the first amendment proposed by the Soviet Union and also the three-Power amendment, which tended in the same direction. It was unable to accept either the International Law Commission's draft of article 66 or the amendments which provided for the obligatory jurisdiction of the International Court of Justice or arbitration, or for advisory opinions of the Court that were not based on the consent of all the parties concerned.

78. Mr. KANDIE (Kenya) said that settlement of disputes played an important dual role in any legal system: that of resolving disputes that might arise in the application of law and that of interpreting the provisions of law, a process that involved adding to the law and making it more certain.

79. Probably the most far-reaching proposal before the Committee was the one contained in the eight-Power amendment. In the view of the Kenyan delegation, the scheme which it proposed could play an extremely useful role by making it possible for disputes relating to *jus cogens* to be referred to the world's highest judicial body, the International Court of Justice. That was, he believed, only proper; and although the proposed recourse by organizations not entitled under the Charter of the United Nations to approach the Court directly was by a rather circuitous route, his delegation found the amendment totally acceptable.

80. Since Kenya favoured compulsory procedures for the settlement of disputes, it had no difficulty in supporting the amendments proposed by the European Economic Community and by the United Nations, although the ideas they contained seemed to be embodied in the eight-Power amendment. It could also support the Netherlands amendment, which aimed at giving greater clarity to the annex. All those amendments

could, he believed, be referred to the Drafting Committee.

81. In view of its support for the eight-Power amendment, his delegation would find it difficult to accept the Soviet amendments or the three-Power amendment.

82. Mr. SIEV (Ireland) voiced his delegation's firm belief that all small States stood in special need of the protection of the rule of law. That was why Ireland, as one such State, was a sponsor of the eight-Power amendment.

83. The procedure to be followed by a party to a treaty wishing to take action with respect to invalidity, termination, withdrawal from or suspension of its operation was set out quite precisely in article 65. Assuming that one of the parties refused to discuss the matter in dispute, refused to negotiate, refused arbitration and refused conciliation, what possible solution was there other than the one set out in the eight-Power amendment?

84. The Irish delegation recognized that both sovereign States and international organizations involved in disputes concerning a treaty should have the opportunity to negotiate directly in the first instance; but at the same time it considered that, whether or not a *jus cogens* issue was involved, adequate safeguards must be provided against abuse of a right by one or more parties to a treaty leading to a dispute. The treaty interests of small States in particular should be protected by appropriate measures, for in a lawless society the most powerful prevailed because they did not need the protection of the law. At the international level, too, the strong might make their own law. There was no greater potential for inequality than when there was nothing in a treaty to enable a party to enforce its rights and to prevent the latter from being unilaterally terminated. In the view of his delegation, the eight-Power amendment offered the best protection against such an eventuality.

85. The Irish delegation considered that the amendment proposed by the European Economic Community and the Netherlands amendment might be referred to the Drafting Committee. It was unable to support the other amendments before the Committee.

86. Mr. RAMADAN (Egypt) said that the issue before the Conference was not new. It had been discussed in numerous international bodies, and the positions of States on it were well known. It should therefore not be allowed to pose a threat to the present draft convention, as it had done to the Vienna Convention on the Law of Treaties in 1969, particularly given the spirit of conciliation that had thus far prevailed at the present Conference.

87. There were three main points to be taken into consideration: first, the fact that article 66 of the 1969 Vienna Convention had been signed by more than 70 of the States represented at the present Conference; secondly, the difference in legal status between a State and an international organization, as affirmed by a number of delegations and also by the International Law Commission; and, thirdly, the fact that article 66 was similar to the corresponding provision of the United Nations Convention on the Law of the Sea, which had been signed by over 159 States, both Members and non-Members of the United Nations.

88. He proposed that further consideration of article 66 should be suspended to allow informal negotiations to be held with a view to arriving at a satisfactory solution that would take account of the three points he had mentioned.

89. Mr. BIPOUN WOUM (Cameroon) said that the difficulties inherent in article 66 and the annex thereto would take a long time to resolve. His delegation, for its part, would do its utmost to find a solution that would command as much support as possible and thus help to safeguard the universal character of the future convention. With that in mind, he had three points to raise. The first point concerned the distinction between disputes according to whether they related to articles 53 and 64 or to other articles in part V of the draft convention: article 66 provided for arbitration in the former case and for conciliation in the latter. The draft convention, however, like the 1969 Vienna Convention, introduced the notion of compulsory conciliation, which meant, in effect, application of the conciliation procedure inherited from classical international law under such instruments as the Hague Conventions of 1899 and 1907, the General Act for the Pacific Settlement of International Disputes of 1949, the 1957 European Convention for the peaceful settlement of disputes and the 1964 Protocol of the Organization of African Unity. That procedure resulted, not in a decision, but in a proposed solution which left the parties free to decide whether or not to adopt it. He therefore wondered whether it might be possible to improve on that procedure somewhat in order to find a way out of the present difficulty.

90. His second point concerned the need to ensure consistency in interpretation of the rules of *jus cogens*. In his delegation's view, since the concept of *jus cogens* had a decisive role to play in the new international law, it was essential to prevent the conceptual fragmentation that would occur if disputes concerning the application or interpretation of treaty provisions embodying such rules were submitted to compromise-type procedures.

91. The third point concerned the fact that some countries recognized the compulsory jurisdiction of the International Court of Justice while others did not. His delegation therefore considered it essential to promote a solution that would enable the maximum number of States to accede to the draft convention.

92. Mrs. GOLAN (Israel) said that at the Vienna Conference on the Law of Treaties her country had voted in favour of providing for the possibility of the emergence of new peremptory norms of international law. Nevertheless, it still had some doubts regarding the existence of such norms not already embodied in international treaty instruments.

93. The Conference's main objective should be to provide for speedy and just settlement of disputes by peaceful means freely chosen and in conformity with the principle of the sovereign equality of States. Accordingly, dispute-settlement procedures should be agreed by all the parties to the dispute, irrespective of whether they were States or international organizations.

94. With regard to the settlement procedure, her delegation's preference was for conciliation, although arbitration was nevertheless also a possibility, provided it was agreed to by the parties, by common consent. It did not favour application to the International Court of Justice for an advisory opinion, even in the limited cases proposed in the amendments of the United Nations and of the eight Powers, as the opinion of the Court would then acquire a compulsory character which it did not at present have, and that would constitute a dangerous precedent. The three-Power proposal, which incorporated the principle of common consent, was more suitable, although her delegation did not favour the application of different procedures for the interpretation of the provisions of part V of the draft convention.

95. Lastly, her delegation was not opposed to the proposals of the Netherlands and the European Economic Community for amendment of the annex, both of which could be referred to the Drafting Committee.

96. Mr. OGISO (Japan) said that one theme had been consistently stressed throughout the Conference: the importance of maintaining parallelism between the 1969 Vienna Convention and the present draft convention. There was an apparent consensus that, in so far as possible, the provisions of the latter should follow those of the former.

97. The intent of the eight-Power amendment, which he had introduced on behalf of the sponsors, was to respect that parallelism and, as could be seen from its paragraphs 1, 2 (*a*), 3 and 4, the basic approach of article 66 of the 1969 Vienna Convention had been retained. New elements had been introduced solely to take account of the case in which an international organization might be involved in a dispute, but there, too, every effort had been made not to depart from the spirit of the 1969 Convention.

98. It was clear that the first Soviet amendment and the three-Power amendment constituted a radical departure from the system of the 1969 Vienna Convention, for they not only dispensed with the role of the International Court of Justice but also weakened the compulsory arbitration procedure by rendering it voluntary.

99. Some doubts had been expressed regarding subparagraph 2 (*e*) of the eight-Power amendment, under which advisory opinions would be accepted by the parties as "decisive". Such a provision, however, was not unusual; a similar one was to be found in the Convention on the Privileges and Immunities of the United Nations and in the Convention on the Privileges and Immunities of the Specialized Agencies.

100. Another point which had been raised concerned the important principle of free choice of means for the settlement of disputes, which was affirmed in article 65, paragraph 3. It was not the intent of the eight-Power amendment to deny that principle but, rather, to provide for an additional safeguard in the event that the dispute-settlement procedure selected by the parties concerned proved to be unworkable. Such an additional procedure was particularly necessary given the unique *jus cogens* nature of the disputes concerned. Moreover, the proposed compulsory settlement procedure was not new to multilateral treaty-making and did not infringe the principle of free choice of means, for it would apply solely to States that became a party to the convention and thereby agreed in advance to the procedure.

101. Mr. NOLL (International Telecommunication Union) said that his organization was unable to agree to subparagraph (*a*) of article 66 as contained in the International Law Commission's draft. In its view, any dispute concerning *jus cogens*, which was a fairly new concept, not yet free of uncertainty as to its content and practical application, should be referred, whenever possible and in the first instance, not to an arbitral tribunal but to the highest judicial body that existed, namely, the International Court of Justice. That would be in keeping with the spirit of the 1969 Vienna Convention.

102. He therefore wanted to comment further only on the proposals of the United Nations and of the eight Powers. His organization's preference was for the United Nations amendment, which provided that the advisory opinion of the International Court of Justice should be sought in the case of a *jus cogens* dispute. It thus placed the international organization on an equal footing with the State party involved. It was that latter aspect which made it difficult for the International Telecommunication Union to support the eight-Power amendment, under subparagraph 2 (*a*) of which an international organization would be precluded from submitting its views to the International Court of Justice in any dispute brought before the Court by a State.

103. Furthermore, under subparagraph 2 (*b*) of the same amendment, if a State was a party to a dispute to which one or more international organizations were parties, the State could ask the General Assembly or the Security Council only to request an advisory opinion of the International Court of Justice and would thus be precluded from requesting the competent organ of the international organization concerned of which that State was a member to submit an application to the International Court of Justice in accordance with Article 96 of the Charter of the United Nations.

104. Consequently, and following consultations between the delegations of his organization and the International Labour Organisation, he wished to suggest for the consideration of the sponsors of the eight-Power amendment that, after the words "Security Council", in subparagraph 2 (*b*), the following phrase should be added: "or, in appropriate cases, the competent organ of an international organization that is authorized in accordance with Article 96 of the Charter of the United Nations".

105. He expressed the view that it might be possible, within the framework of the consultations held at the Conference, to combine the essential elements of the proposals put forward in the United Nations amendment and in the eight-Power amendment.

106. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that provision for the compulsory jurisdiction of the International Court of Justice was unacceptable to his delegation, which therefore could

not support the amendments that called for such jurisdiction. He failed to understand how, when only some 40 States accepted that jurisdiction, in many cases with reservations, certain delegations were anxious to provide for it in the draft convention. His delegation was not opposed in principle to the submission of disputes to any court, arbitral tribunal, conciliation commission, or other such organ, but such submission must be voluntary and have the consent of the parties.

107. The CHAIRMAN said that, in the light of the debate, he took it that the Committee wished to defer its decision on article 66 and the amendments thereto, so that those matters could be considered in consultations to be held under the chairmanship of the President of the Conference.

It was so decided.

The meeting rose at 5.40 p.m.

29th meeting

Monday, 17 March 1986, at 5.15 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 3 (International agreements not within the scope of the present articles) (*concluded*)*

1. The CHAIRMAN drew attention to the text of article 3 reproduced in document A/CONF.129/C.1/L.75. The text had been agreed by delegations in consultations held under the chairmanship of the President of the Conference. If he heard no objection, he would take it that the Committee adopted that text and referred it to the Drafting Committee.

It was so decided.

Preamble

2. The CHAIRMAN drew attention to the text of the preamble to the draft convention, which was reproduced in document A/CONF.129/C.1/L.77. That wording had also been agreed by delegations in consultations held under the chairmanship of the President of the Conference. It was based on the formal proposals submitted to the Committee by Brazil and India (A/CONF.129/C.1/L.71) and by Czechoslovakia, the German Democratic Republic and the Ukrainian Soviet Socialist Republic (A/CONF.129/C.1/L.72), as well as on various informal proposals. If there was no objection, he would take it that the Committee adopted the preamble reproduced in document A/CONF.129/C.1/L.77 and referred it to the Drafting Committee.

It was so decided.

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

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

Statement by the President of the Conference

3. Mr. ZEMANEK (Austria), President of the Conference, said that the General Committee had reviewed the results of attempts which delegations had made informally to agree on a text for article 66 which would be generally acceptable. It had come to the conclusion that there was no immediate prospect of any such agreement. It therefore recommended that the Committee of the Whole should take an indicative vote by roll-call on each of the amendments which had been submitted to article 66 as drafted by the International Law Commission. The results of the votes should assist delegations in deciding whether to hold further consultations with a view to working out a text that would command the widest possible support. The General Committee further recommended that the Committee should meet the following day in order to take a vote on article 66 and the annex, if there was no indication by then that general agreement on the matter had been or was about to be reached, and also in order to deal with the final clauses of the draft convention. Those recommendations were made in accordance with rule 63 of the rules of procedure.

4. The CHAIRMAN observed that the amendments to the annex proposed by the Soviet Union, the European Economic Community and the Netherlands (A/CONF.129/C.1/L.61, L.64, and L.67, respectively) were excluded from the procedure recommended by the General Committee, the reason being that the first of those proposals was consequential upon the Soviet Union's proposal for article 66 (A/CONF.129/C.1/L.60) and the other two were of a drafting nature.

5. Unless he heard any objection, he would take it that the Committee wished to adopt the procedure recommended by the General Committee.

It was so decided.

6. The CHAIRMAN invited the Committee to take an indicative vote by roll-call on the amendments proposed to article 66. It would be unable to vote on the United Nations proposal (A/CONF.129/C.1/L.66), since, in accordance with rule 60 (1) (*d*) of the rules of procedure, a vote on that proposal would require to be

* Resumed from the 5th meeting.