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Summary record of the 1624th meeting

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territorial State, but it could not be coerced by the power of that State. That was the basic general principle, and it was always an absolute principle, because the consent of the territorial State was presumed; it had agreed to the activities of the foreign State and its agreement automatically produced certain consequences. But the absolute nature of the exemption from coercion did not rule out the possibility of exceptions, since the foreign State could always freely consent to submit to the power, whether administrative or judicial, of the territorial State.

24. That, in his opinion, should be the basis of the draft articles, and those were the reasons why draft article 6 should not refer to the "present articles", but state the principle of immunity as an absolute principle, subject to possible exceptions.

25. With regard to the concept of commercial and other activities, he considered it impossible to distinguish the different aspects of the single phenomenon that was the State. The State had only one face, and although, for the sake of convenience, it was possible to distinguish between its political, economic, cultural and other activities, that did not mean that its economic, cultural and other relations were not in themselves political, for all State activities were political. If the territorial State allowed an activity, it did so with the attendant consequences, which was to say, essentially, the application of the principle of exemption from power, without any need to delimit the different activities of the foreign State. For relations of immunity were based on free acceptance of the situation created.

26. He hoped that his comments could guide the Special Rapporteur in his research. The Drafting Committee should be able to put those basic considerations into appropriate form.

The meeting rose at 12.55 p.m.

1624th MEETING

Wednesday, 2 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Jurisdictional immunities of States and their property (continued) (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (continued)

1. Mr. CALLE Y CALLE said that the topic of jurisdictional immunities of States and their property was of great importance by reason of the many and diverse problems which arose all over the world concerning the financial, banking, commercial and other activities undertaken by modern States in the territory of other States. The fundamental task of the Commission was to establish clearly the nature and essence of the concept of State immunity itself. The Special Rapporteur had pointed out that the dramatic changes which had taken place over the past fifty years had given rise to different practices regarding the limitations of, and exceptions to, State immunity. It was worth noting that the Convention on private international law,² concluded in 1928, contained a number of provisions on various immunities and special exceptions.

2. The principle of State immunity should be regarded as a right deriving from other basic principles such as the sovereignty, independence, equality and dignity of States. In paragraph 19 of his report (A/CN.4/331 and Add.1), the Special Rapporteur referred to immunity as "a right or a privilege". There was some difference between those two concepts, for whereas a privilege was granted, a right was enjoyed automatically. If State immunity was to be regarded as a right, the Commission's draft articles should reflect that interpretation. The question whether the right was absolute or limited in a given case should be determined according to the nature of the activity concerned, rather than its purpose, which was a less objective criterion.

3. Referring to draft article 1, he said that, if immunity was recognized as a right, the words "accorded or extended" should be replaced by the word "recognized". Similarly, in draft article 2, paragraph 1 (c), it would be preferable to use the term "invoked" rather than "claimed".

4. He had reservations on the use of the term "jurisdictional immunities". If the intention was to cover all aspects of jurisdiction, it would be preferable to separate the two concepts by referring to the immunity of one State from the jurisdiction of another State. While he had no objection to the use of the terms "territorial State" and "foreign State" to distinguish between the States concerned, many of the problems raised by the present wording of draft article 1 could be avoided by adopting a formulation such as that proposed by Sir Francis Vallat (1623rd meeting, para. 18).

¹ For the text of articles 1-6 submitted by the Special Rapporteur, see 1622nd meeting, para. 4, and 1623rd meeting, para. 2.

² League of Nations, *Treaty Series*, vol. LXXXVI p. 111.

5. In draft article 6, the use of the future tense implied that the enjoyment of immunity would be a consequence of the draft articles; it would be more appropriate to use the present tense.

6. It should be borne in mind that if immunity was to be treated as a right, any State which, having failed to recognize the immunity of another State, instituted proceedings against that State and seized its property on the basis of the judgement, would be guilty of a breach of an international obligation entailing liability.

7. Mr. REUTER observed that the Commission was still at the stage of a very general exchange of views, as all the members who had spoken in the debate had referred to matters of principle or even of history. That approach was justified by the difficulty of the subject. The Special Rapporteur had made a laudable effort to stimulate discussion by proposing specific draft articles in order to evoke the reactions of members of the Commission, even if those draft provisions were not, at that stage, susceptible of being put into final form.

8. In his opinion, draft article 4 was entirely acceptable, and it would be quite wrong to rely on diplomatic immunities, which were an entirely separate matter. He also supported draft article 5, on the non-retroactivity of the articles.

9. On the whole, he could accept the definitions of terms proposed in draft article 2, though he had some reservations, in particular on "trading or commercial activity", which, incidentally, was one of the most important points. Personally, he was inclined to think that the form and intrinsic nature of State activities were a better criterion than their object. He would also like the idea of separability to be taken into account, because an activity whose form was unrelated to the exercise of sovereignty could nevertheless be linked with the exercise of State sovereignty. In that connexion, he referred to the example, given by Mr. Riphagen, of repairs to the heating system in an embassy. Another case which he considered to be of prime importance was that of the participation of foreign States in banking operations, through the intermediary of banks established in the territory of a State. It was obvious that an embassy's bank account was closely linked with the embassy's activity. That matter should be studied in depth.

10. The definition of "State property" given in draft article 2, paragraph 1 (e), touched on a fundamental question, and he did not think it was quite true to say that problems concerning the ownership of State property could necessarily be settled simply by a *renvoi* to the law of the State claiming ownership. In his view, certain distinctions had to be made according to the property in question.

11. With regard to the content of draft article 1, he did not think there was a customary rule establishing State immunity. And he could support the text of draft article 6 but not its title, because he did not believe that there was a principle of State immunity. Rather, he

believed that there were State immunities and that, as Mr. Calle y Calle had said, it was necessary to distinguish between immunity from the jurisdiction of courts and immunity from execution of judgements. He even believed that there were different immunities justified by different circumstances. In order really to exist and to be described as universal, a custom had to be based on uniform practice, which was lacking in the present case.

12. With regard to substance, he stressed that the question of State immunities only arose because a State found itself in a situation which involved the internal legal order to another State. That was a crucial point, and the Commission should seek to determine whether there were any international rules concerning the relation between a State and the national legal rules of another State. There were, in fact, very few rules of that kind. One example was the basic rule that a State did not exercise its sovereignty in the territory of another State. Diplomatic representation constituted an exception to that rule, so that certain immunities had to be granted to enable the State to exercise its sovereignty, which would otherwise be impossible. Similarly, an international rule prohibited States from making any "physical projection" into the territory of another State. To break that rule was an internationally wrongful act, and the Commission should study the question of immunities in the event of such an act.

13. At the previous meeting, Mr. Ushakov had raised a basic question when he had asked what was the legal regime governing a foreign State which engaged in activities coming under the internal law of another State. Very little had been written on the subject; the Commission should enquire whether there were any rules of public international law on it and whether a State was bound to agree to the activities of another State in its territory. The question of immunities arose in a wide variety of fields, such as those of succession, companies and contracts. He, for one, would not lay down a rule of public international law in advance. The Commission's object was to state rules which all courts could apply in the same way, so it had to find the points on which it could establish uniform rules of law.

14. Mr. Ushakov had also said that, if a State allowed the activities of a foreign State in its territory, it also necessarily accepted their consequences. He (Mr. Reuter) did not share that opinion. In France, for example, another State could not engage in trade if there was no law authorizing it to do so. Hence, the fact that the French State allowed a foreign State to form a company in its territory did not mean that it also allowed that State to engage in trade. He did not believe that a rule of public international law could impose a derogation from the internal law of States. Although he would not deny that a rule establishing the immunity of States might have existed in international law in former times or might exist in international law in the future, he did not believe that

contemporary public international law contained any such principle.

15. Mr. QUENTIN-BAXTER said that, while he was attracted to the wording of draft article 1 proposed by Sir Francis Vallat, it would be wise to exercise caution in attempting definitions of concepts such as immunity. With regard to the scope of the term "jurisdictional immunities", the Commission would have to consider whether the limits it was to place on that concept were to be natural or self-imposed.

16. He had reservations concerning article 6, because it stated the central principle in a way that left immunities to be defined at a later stage, but he understood why the Special Rapporteur had felt compelled to formulate the draft article in that way until the Commission had gone through the lengthy process of examining the boundaries of the subject.

17. The difficulties facing the Commission in dealing with the topic had already begun to emerge in the judgement of Chief Justice Marshall of the United States Supreme Court in the case of *The Schooner "Exchange" v. McFaddon and others*.³ In that judgement, the doctrine of sovereign immunities had been expressed as an exception rather than a rule. However, the underlying principle had proved so powerful that Chief Justice Marshall had gone on to enunciate a principle which constituted the very essence of relationships between States, namely, that a sovereign was entitled to expect that he would be able to enter the territory of another State on the basis that his immunities would be respected. Nevertheless, he had felt compelled to draw a distinction between the situation of a vessel that visited foreign ports in the course of its normal activities and that of a military detachment whose presence on foreign soil was subject to the express consent of the receiving State. In other cases cited in the report, including *De Haber v. The Queen of Portugal*⁴ and the "*Parlement Belge*",⁵ pronouncements on the principle of sovereign immunities also contained qualifications. Furthermore, on several occasions, the highest English courts had stated that English law had never been committed to the absolute view of sovereign immunity.

18. The essential difficulty in formulating draft article 6, if it was to state the principle concisely, was that it must still be within the limits of Chief Justice Marshall's original concept. State practice throughout the world imposed limits on what was granted by express consent or by necessary implication of consent, and that situation must be reflected in any statement of the principle in article 6. The principle could not be made to apply to every emanation of a foreign sovereignty which chose to find itself in the territory of another

State. Such a provision would detract from the right of a State to exercise full sovereignty in its own territory.

19. Mr. TSURUOKA said it was well to remind the Commission from time to time that its role, which was different from that of a university or a parliament, was to codify international law and promote its progressive development by modernizing and rationalizing it by essentially inductive methods.

20. Although Japan had long remained isolated from the outside world, it nevertheless had quite abundant jurisprudence on the question of State immunities. It had also concluded conventions on that subject, in particular with the Soviet Union and the United States of America, and its practice was relatively well developed.

21. He emphasized that, in formulating its draft articles, the Commission should try not to go too much against State practice and not to attach undue importance to so-called principles of international law as against that practice, for if it did, the future convention it might eventually produce would certainly remain a dead letter.

22. Recent developments in the practice of Japan showed a tendency to distinguish State activities proper—which were sources of immunities—from State trading activities—which did not give rise to immunities. He stressed that, if the Commission's draft took a different direction, Japan would have the greatest difficulty in ratifying it in the form of a convention. He noted that the theoretical principles of international law were only of minor importance to persons conducting international relations.

23. With regard to the draft articles submitted by the Special Rapporteur, he observed that the Commission was only at the preliminary stage of its work, and that before it could put a set of draft articles into final form it had to determine who enjoyed what immunities in what conditions. He thought, moreover, that it might perhaps be preferable to put the draft articles proposed by the Special Rapporteur in a commentary to the introductory chapter.

24. Mr. ŠAHOVIĆ said that his feelings were very similar to those of Mr. Tsuruoka. The study of jurisdictional immunities was still only in its preliminary phase, and the Commission should not be too hasty. At its previous session, it had decided to invite Governments to transmit information on their practice,⁶ and he would like the Special Rapporteur to tell the Commission how many replies had been received.

25. The Special Rapporteur was proposing several draft articles that were based on specific and objective data, but a detailed examination of the texts showed that they were based essentially on historical ideas. He

³ See A/CN.4/331 and Add.1, para. 75.

⁴ *Ibid.*, para. 68.

⁵ *Ibid.*, para. 123.

⁶ See *Yearbook . . . 1979*, vol. II (Part Two), p. 186, document A/34/10, para. 183.

would prefer the Commission to study mainly contemporary practice. Mr. Reuter had said he was not sure that a principle of State immunity existed in contemporary practice; the Commission must prove the existence of such a rule in contemporary international law before trying to formulate it.

26. On the whole, he shared the views expressed by the members of the Commission on draft articles 2 to 5. On the other hand, he considered that draft articles 1 and 6 did not really express the subject-matter of the titles they had been given. Some clarification was therefore required, and it would be particularly desirable to specify, in draft article 6, the content of the notion of jurisdictional immunity, on which the Commission seemed to have a general idea which was, however, difficult to express.

27. The Commission should not be hasty with such a complex subject, and it was in no way bound to study one, not to say two, drafts of articles every year. It might perhaps be preferable to let the study of such a delicate matter ripen slowly.

**Question of treaties concluded between States and international organizations or between two or more international organizations (concluded)*
(A/CN.4/327, A/CN.4/L.312)**

[Item 3 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE**

ARTICLES 61–80 AND ANNEX

28. The CHAIRMAN invited the Chairman of the Drafting Committee to present the results of the Committee's work on the draft articles which the Commission had referred to it at the current session.

29. The results of the Committee's work were presented in document A/CN.4/L.312, which contained the text of articles 61–80 and of the annex concerning article 66, as well as the titles of the parts and corresponding sections of the draft.

30. The texts proposed by the Drafting Committee read:

[PART V

**INVALIDITY, TERMINATION AND SUSPENSION OF
THE OPERATION OF TREATIES**

...
SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION
OF TREATIES
...]

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty concluded between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

* Resumed from the 1596th meeting.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66. Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to another State, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present articles may set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by an international organization with respect to another organization, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

3. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to an international organization or by an organization with respect to a State, the procedure provided for in paragraph 2 above may be applied.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it shall produce appropriate powers.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI

MISCELLANEOUS PROVISIONS

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 in the membership of an organization]

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization [or from the termination of participation by a State in the membership of the organization].

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and of powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or organization in question;

(e) informing the parties and the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and the contracting organizations, or

(b) where appropriate, of the competent organ of the organization concerned.

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations or, as the case may be, the said organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

ANNEX

Procedures established in application of article 66

I. ESTABLISHMENT OF THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles [and any international organization to which the present articles have become applicable] shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

(a) In the case referred to in article 66, paragraph 1, the State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(b) In the case referred to in article 66, paragraph 2, the international organization or organizations constituting one of the parties to the dispute shall appoint:

(i) one conciliator who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator chosen from among those included in the list who has not been nominated by that organization or any of those organizations.

The organization or organizations constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) In the case referred to in article 66, paragraph 3,

(i) the State or States constituting one of the parties to the dispute shall appoint two conciliators as provided for in subparagraph (a). The international organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b).

(ii) The State or States and the organization or organizations constituting one of the parties to the dispute shall appoint one conciliator who may or may not be chosen from the list referred to in paragraph 1 and one conciliator chosen from among those included in the list who shall neither be of the nationality of that State or of any of those States nor nominated by that organization or any of those organizations.

(iii) When the provisions of subparagraph (c) (ii) apply, the other party to the dispute shall appoint conciliators as follows:

(1) the State or States constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (a);

(2) the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (b);

(3) the State or States and the organization or organizations constituting the other party to the dispute shall appoint two conciliators as provided for in subparagraph (c) (ii).

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General received the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit

the above-mentioned request to the President of the International Court of Justice who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

II. FUNCTIONING OF THE CONCILIATION COMMISSION

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

8. The appointment of conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

31. Mr. VEROSTA (Chairman of the Drafting Committee) said that articles 61 to 80 and the text of the Annex setting out procedures established in application of article 66 completed the first reading of the draft.

32. Commenting on the draft as a whole, he said that the Drafting Committee had been guided by the Commission's intention to maintain, as far as possible, the spirit of the Vienna Convention on the Law of Treaties⁷ with its precision and flexibility in wording, while preserving the specific characteristics of treaties entered into or concluded with the participation of international organizations. The Drafting Committee had kept the same numbering for the articles as in the Vienna Convention, so as to facilitate comparison between the texts. It had also endeavoured to achieve terminological consistency throughout the draft and had therefore included or deleted the word "international" before the word "organization" as appropriate, using the term "international organization" only the first time it appeared in a paragraph, the word "organization" being used alone thereafter in the same paragraph. The only departures from that rule of drafting concerned the use of terms defined in article 2,⁸ such as "negotiating organization" or "contracting organization". The Drafting Committee had also deleted, throughout, the word "concluded", in the phrase "treaties concluded between".

⁷ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The convention is hereinafter called "Vienna Convention".

⁸ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 138–139, document A/34/10, chap. IV, sect. B.1.

33. A number of articles remained unchanged. In others the Committee had maintained the text originally proposed but added, for the sake of precision, a reference to the type of treaty concerned. Thus in article 62, paragraph 2, the word "several", which had appeared before the word "States", had been changed to "two or more"; in article 63 it had been specified that the treaty concerned was between two or more States and one or more international organizations; in article 74 the same particular had been introduced and article 75 now spoke of a treaty "between one or more States and one or more international organizations". In the drafting of articles 76, 77, 78 and 79, the Drafting Committee had attempted to reflect the distinction between the mixed type of treaty and a treaty between organizations only, by referring, as appropriate to the defined terms "negotiating States" and "negotiating organizations", or "contracting States" and "contracting organizations" or simply referring to "States" and "organizations".

ARTICLE 61⁹ (Supervening impossibility of performance)¹⁰

34. Mr. VEROSTA (Chairman of the Drafting Committee) said that no comment was needed on article 61, as no change had been made.

Article 61 was adopted.

ARTICLE 62¹¹ (Fundamental change of circumstances)¹²

35. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 62, in addition to the general changes already mentioned, the Drafting Committee had added the words "by a party" after the verb "invoked" in paragraphs 2 and 3, in order to determine clearly who could exercise the right provided for. The phrase "establishing a boundary", in paragraph 2, was taken from the Vienna Convention, it being understood that the Commission was not taking any position on possible interpretations of the rules concerning treaties involving international organizations in the light of developments taking place in the Third United Nations Conference on the Law of the Sea.

36. Mr. TABIBI said he maintained the views he had already expressed concerning article 62, paragraph 2,¹³ and wished to record his objection.

Article 62 was adopted.

⁹ For consideration of the text initially submitted by the Special Rapporteur, see 1585th meeting, paras. 4 *et seq.*, and 1586th meeting, paras. 9–32.

¹⁰ For text, see para. 30 above.

¹¹ For consideration of the text initially submitted by the Special Rapporteur, see 1586th meeting, paras. 33 *et seq.*, and 1587th meeting, paras. 1–39.

¹² For text, see para. 30 above.

¹³ See 1587th meeting, paras. 7–9.

ARTICLE 63¹⁴ (Severance of diplomatic of consular relations)¹⁵

37. Mr. VEROSTA (Chairman of the Drafting Committee) said that, other than his earlier comments concerning drafting changes of a general nature, no comments were necessary.

Article 63 was adopted.

ARTICLE 64¹⁶ (Emergence of a new peremptory norm of general international law (*jus cogens*))¹⁷

38. Mr. VEROSTA (Chairman of the Drafting Committee) said that no comment was needed on article 64, as no change had been made.

Article 64 was adopted.

SECTION 4 (Procedure)

The title of section 4 was adopted.

ARTICLE 65¹⁸ (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)¹⁹

39. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 65 the Drafting Committee had decided to maintain the three-month period provided for in the Vienna Convention as adequately meeting the requirements of treaties to which international organizations were parties. The Committee had added a new paragraph 4 to emphasize that the notification or objection made by an international organization under that article was to be governed by the relevant rules of the organization. That provision followed similar provisions already adopted.

Article 65 was adopted.

40. Mr. VEROSTA (Chairman of the Drafting Committee) said that he intended to introduce article 66 together with the Annex, after the Commission had completed its consideration of the other articles.

ARTICLE 67²⁰ (Instruments for declaring invalid, terminating, withdrawing, from or suspending the operation of a treaty)²¹ *and*

ARTICLE 68²² (Revocation of notifications and instruments provided for in articles 65 and 67)²³

41. Mr. VEROSTA (Chairman of the Drafting Committee) said that Articles 67 and 68 required no comments, as no changes had been made.

Articles 67 and 68 were adopted.

SECTION 5 (Consequences of the invalidity, termination or suspension of the operation of a treaty)

The title of section 5 was adopted.

ARTICLE 69²⁴ (Consequences of the invalidity of a treaty)²⁵

42. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 69, paragraph 4, the word "particular" had been introduced to qualify the words "State" and "organization", in order to conform with the text of the Vienna Convention.

Article 69 was adopted.

ARTICLE 70²⁶ (Consequences of the termination of a treaty),²⁷

ARTICLE 71²⁸ (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law,²⁹ *and*

ARTICLE 72³⁰ (Consequences of the suspension of the operation of a treaty)³¹

43. Mr. VEROSTA (Chairman of the Drafting Committee) said that articles 70, 71 and 72 required no comments, as no changes had been made.

Articles 70, 71 and 72 were adopted.

PART VI (Miscellaneous provisions)

The title of part VI was adopted.

ARTICLE 73³² (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the

¹⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1587th meeting, paras. 40–54, and 1588th meeting, paras. 1–24.

¹⁵ For text, see para. 30 above.

¹⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1588th meeting, paras. 25–29.

¹⁷ For text, see para. 30 above.

¹⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1588th meeting, paras. 30 *et seq.*

¹⁹ For text, see para. 30 above.

²⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1590th meeting, paras. 29–43.

²¹ For text, see para. 30 above.

²² For consideration of the text initially submitted by the Special Rapporteur, see 1590th meeting, paras. 44 *et seq.*

²³ For text, see para. 30 above.

²⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 1–8.

²⁵ For text, see para. 30 above.

²⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 9–12.

²⁷ For text, see para. 30 above.

²⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 13–18.

²⁹ For text, see para. 30 above.

³⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 19–21.

³¹ For text, see para. 30 above.

³² For consideration of the text initially submitted by the Special Rapporteur, see 1591st meeting, paras. 22–56, and 1592nd meeting, paras. 1–23.

existence of an organization [and termination of participation in the membership of an organization]³³

44. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 73, which had formerly contained only one paragraph, the Drafting Committee had found it appropriate to differentiate, in two separate paragraphs, between the situation of States and that of international organizations, because the cases provided for in the article were not necessarily equally applicable to States and to international organizations.

45. Paragraph 1 provided for the cases concerning States and was modelled on the text of the Vienna Convention, with the further specification of the kind of treaty concerned. The phrase “parties to that treaty” had been added at the end of the paragraph merely as a useful particular.

46. Paragraph 2 embodied the rule regarding international organizations. It did not refer to the cases of outbreak of hostilities or succession, but mentioned instead termination of the existence of the organization and termination of participation by States in the membership of that organization. Reference to the last case had been placed in square brackets in the body of the article and in its title, to indicate the difference of opinion among members of the Drafting Committee as to the need for an express reference to that case as being one comparable to succession of States.

47. Mr. USHAKOV said that the words “by a State” in the last phrase of paragraph 2, should be inserted in the corresponding part of the title of the article. Otherwise, it might be thought that the reference was to termination of participation of an organization in the membership of another organization.

48. The words “the outbreak of hostilities between States parties to that treaty”, at the end of paragraph 1, were not entirely satisfactory either. First, there was no need to refer to States when the provision concerned the case of a treaty to which “one or more States” could be parties; and secondly, the hostilities might involve not only “States parties”, but also one or more contracting States, or even one or more organizations. That question could be considered during the second reading of the draft article.

49. Mr. RIPHAGEN said that it was not clear, with the addition of the words “parties to that treaty”, what would happen in the case of an outbreak of hostilities between a State party to a treaty and a State not party to a treaty but a member of an international organization which was a party. He doubted the wisdom of that addition.

50. The CHAIRMAN asked members of the Commission whether they thought it would be possible to remove the square brackets in the title and in

paragraph 2 of article 73 and to explain the difference of opinion they indicated in the commentary.

51. Mr. REUTER (Special Rapporteur) said that the Drafting Committee had added the wording in question at Mr Ushakov’s suggestion. Mr. Ushakov had in mind the case of a treaty between an international organization and a State member of that organization. Mr. Jagota had then pointed out that, drafted in such a way, article 73 could cover other cases, which might lead some members of the Commission, including himself, to raise objections. By way of compromise, the words had then been placed between square brackets. Personally, he saw no objection to deleting the square brackets if an explanation was given in the commentary.

52. Mr. FRANCIS said that the square brackets might be a clearer warning of the difference of opinion than an explanation in the commentary, though he would not press that point.

53. The CHAIRMAN said that, in the absence of further comment, he would take it that article 73—without the square brackets but with a suitable explanation in the commentary and with the addition to the title of the words “by a State” (and the equivalent in the other language versions)—was adopted.

It was so decided.

ARTICLE 74³⁴ (Diplomatic and consular relations and the conclusion of treaties)³⁵

54. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 74 no changes had been made other than the general drafting clarification he had already mentioned. He had no comments.

Article 74 was adopted.

ARTICLE 75³⁶ (Case of an aggressor State)³⁷

55. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 75 the Drafting Committee had considered it appropriate to define the kind of treaty concerned, since reference to “a treaty” alone might be interpreted as making the provision applicable to a treaty concluded between international organizations only. It had been agreed that the commentary should make some reference to that interpretation.

Article 75 was adopted.

³⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1592nd meeting, paras. 24–30.

³⁵ For text, see para. 30 above.

³⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1592nd meeting, paras. 31–42.

³⁷ For text, see para. 30 above.

³³ For text, see para. 30 above.

PART VII (Depositaries, notifications, corrections and registration)

The title of part VII was adopted.

ARTICLE 76³⁸ (Depositaries of treaties)³⁹

56. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 76, in addition to the use of the defined term "negotiating organizations" already referred to in his general comments, the Committee had decided to depart from the text originally proposed by not providing explicitly for the case of more than one organization acting as a depositary, because that was not yet common practice.

Article 76 was adopted.

ARTICLE 77⁴⁰ (Functions of depositaries)⁴¹

57. Mr. VEROSTA (Chairman of the Drafting Committee) said that in article 77, subparagraph 1 (a), a further provision had been introduced by including a reference to "powers", in addition to "full powers", delivered to the depositary. In subparagraph 1 (g), the Committee had considered it more prudent to follow the language of the Vienna Convention, rather than introduce, as had been suggested, further details concerning the registration and publication of treaties. In that connexion, it had been noted that the introductory sentence of paragraph 1 made it clear that the list of functions of a depositary was not meant to be exhaustive. Paragraph 2 had been divided into two subparagraphs for the sake of clarity, but kept as close as possible to the text of the Vienna Convention.

58. Mr. USHAKOV said he had some reservations on paragraph 1 (g), because international organizations were not required to register treaties concluded between themselves with the United Nations Secretariat, and no doubt the Secretariat was not required to register those treaties either. The question might be left over until the second reading of the draft articles.

59. Mr. CALLE Y CALLE said that the words "full powers" and "powers" in subparagraph 1 (a) seemed to indicate that there were two degrees of powers, whereas what was meant was that there were two types of documents from which the powers derived.

60. Mr. REUTER (Special Rapporteur) said that the reason why both "full powers" and "powers" were included in article 77 was that both expressions had already been used in the draft, and that in article 2, paragraph 1 (c) *bis*,⁴² the term "powers" was defined as "a document emanating from the competent organ of an international organization".

³⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1592nd meeting, paras. 43 *et seq.*, and 1593rd meeting, paras. 1-7.

³⁹ For text, see para. 30 above.

⁴⁰ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 8-31.

⁴¹ For text, see para. 30 above.

⁴² See foot-note 8 above.

61. Mr. ŠAHOVIĆ said that the words "and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty", in paragraph 1 (b), required explanation in the commentary.

Article 77 was adopted.

ARTICLE 78⁴³ (Notifications and communications)⁴⁴
and

ARTICLE 79⁴⁵ (Correction of errors in texts or in certified copies of treaties)⁴⁶

62. Mr. VEROSTA (Chairman of the Drafting Committee) said that articles 78 and 79 called for no comments beyond the general remarks he had made earlier.

Articles 78 and 79 were adopted.

ARTICLE 80⁴⁷ (Registration and publication of treaties)⁴⁸

63. Mr. VEROSTA (Chairman of the Drafting Committee) said that article 80 remained unchanged. It would be noted that the only obligation imposed by the article concerned transmission, the question of determining the manner in which the United Nations would apply article 102 of the Charter being left to the competent organs of the Organization.

64. Mr. USHAKOV said that the use of the word "shall" indicated an obligation to transmit to the Secretariat all treaties, including treaties between international organizations. But the United Nations Charter did not provide that treaties between international organizations had to be transmitted to the Secretariat. The Commission would do well to consider that question during the second reading.

Article 80 was adopted.

ARTICLE 66⁴⁹ (Procedures for judicial settlement, arbitration and conciliation)⁵⁰ *and*

ANNEX⁵¹ (Procedures established in application of article 66)⁵²

65. Mr. VEROSTA (Chairman of the Drafting

⁴³ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 32-37.

⁴⁴ For text, see para. 30 above.

⁴⁵ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 38-41.

⁴⁶ For text, see para. 30 above.

⁴⁷ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 42-57.

⁴⁸ For text, see para. 30 above.

⁴⁹ For consideration of the text initially submitted by the Special Rapporteur, see 1589th meeting, paras. 1-45, and 1590th meeting, paras. 1-28.

⁵⁰ For text, see para. 30 above.

⁵¹ For consideration of the text initially submitted by the Special Rapporteur, see 1593rd meeting, paras. 58 *et seq.*, and 1594th to 1596th meetings.

⁵² For text, see para. 30 above.

Committee) said that in regard to article 66 the Drafting Committee had decided, for the sake of clarity and in order to conform with the structure of other articles, to deal separately in three paragraphs with cases of objections raised by: (a) a State with respect to another State (para. 1); (b) an organization with respect to another organization (para. 2); and (c) a State with respect to an organization or vice versa (para. 3). In reformulating the article, the Committee had attempted to retain as much as possible of the terminology of the corresponding article of the Vienna Convention.

66. The text of paragraph 1 repeated substantially the formula of article 66 of the Vienna Convention and envisaged two different procedures, depending on whether the dispute concerned the application or interpretation of articles 53 or 64, or of the other articles in part V. The Drafting Committee had carefully considered the question of the application of the rule in cases where the objection was raised by, or with respect to, an international organization. It was evident that the procedure in subparagraph (a) could not operate in the case of international organizations, since according to article 34 of the Statute of the International Court of Justice, only States could be parties in cases before the Court. The Committee had decided that, in cases where the objection creating the dispute was raised by, or with respect to, an international organization, the procedure should be that provided for in subparagraph 1 (b). The literal transposition of the rule of subparagraph 1 (b) would have led to the unintended result of making no provision for settlement procedures in disputes involving the application or interpretation of articles 53 or 64, which concerned peremptory norms of general international law. To avoid that result, the Committee had extended the recourse to the conciliation procedure set out in the Annex to all the articles of part V, although in so doing it was not intended to prejudice the possibility of parties having recourse to any other agreed procedure, and specific wording to that effect was included in paragraph 2.

67. In view of the form adopted for article 66, the Annex had been recast to take account of the three cases envisaged in that article. It reproduced the corresponding provisions of the Annex to the Vienna Convention, but for the sake of clarity it separated under two headings the two provisions relating to the establishment and functioning of the Conciliation Commission. Section I contained two paragraphs corresponding to the first two paragraphs of the Annex to the Vienna Convention.

68. Paragraph 1 reproduced paragraph 1 of the Annex to the Convention, with the addition of a clause permitting international organizations to which the articles had become applicable to be invited to nominate two conciliators. That clause had been placed in square brackets to indicate a divergence of

views in the Drafting Committee as to the appropriateness of recognizing such a right in a manner that might be interpreted as prejudicing the question of how the future instrument would become applicable to international organizations. The paragraph also included at the end an additional sentence which was rendered necessary by later provisions involving the President of the International Court of Justice in the conciliation procedure.

69. Paragraph 2 outlined the rules of the Vienna Convention Annex for each of the three cases referred to in article 66. However, the criterion of nationality used in that Annex for the appointment of conciliators by States was not applicable in the case of international organizations, and the comparable criterion adopted by the Drafting Committee was that of the nomination of the conciliators by the organization. Paragraph 2 (a), (b) and (c) covered the cases referred to in article 66, paragraphs 1, 2 and 3 respectively, concerning the appointment of conciliators.

70. The last four undesignated subparagraphs of paragraph 2, which basically reproduced the corresponding passages of the Vienna Convention Annex, were intended to apply to the paragraph as a whole. A specific reference had been added in the penultimate subparagraph to the functions of the President of the International Court of Justice, so that his role in such cases was clearly circumscribed.

71. Section II of the Annex reproduced in paragraphs 3 to 7 the corresponding paragraphs of the Vienna Convention Annex. It included an additional paragraph 8, prompted by provisions already adopted, which referred to the relevant rules of an organization as governing its appointment of conciliators.

72. The CHAIRMAN said that the Commission might wish to consider, in the same spirit of conciliation it had shown previously, the possibility of deleting the square brackets in paragraph 1 of the Annex and including an explanation in the commentary.

73. Mr. USHAKOV said he did not think it possible to delete the square brackets in paragraph 1 of the Annex, since the Commission had not settled the fundamental question of how the articles might become applicable to international organizations.

74. He could not accept the Annex, particularly paragraph 2, in the Commission any more easily than in the Drafting Committee. From paragraph 2 (c) it appeared that States had the obligation, in certain cases, to act together with one or more international organizations. He believed that such an obligation could cause all sorts of difficulties, particularly at the political level. In the Annex to the Vienna Convention there was no objection to providing that States should, where necessary, act together, just as there would be no objection to imposing that obligation on international organizations. But a State should not be obliged to make common cause with one or more

international organizations. It would be better to leave States entirely free in that respect.

75. In its present form, paragraph 2 of the Annex was almost incomprehensible, the rules on the constitution of the Conciliation Commission having been unnecessarily complicated.

76. Mr. RIPHAGEN said he had no objection to deleting the square brackets in the Annex, as suggested. However, he had a comment concerning article 66, paragraph 3, the last part of which read, "the procedure provided for in paragraph 2 above may be applied". Paragraph 2 stated that "any one of the parties to a dispute . . . may . . . set in motion the procedure specified in the Annex". The use of the word "may" seemed to him to be dubious, but he interpreted the text as meaning that paragraph 2 applied.

77. Mr. REUTER (Special Rapporteur) said that Mr. Riphagen was right: the wording of article 66, paragraph 3 should be improved, for example, by replacing the words "may be applied" by "applies".

78. He would try to reflect Mr. Ushakov's objections as faithfully as possible in the commentary. It should be noted that the Drafting Committee did not intend to impose on a State the obligation to act jointly with one or more international organizations. It had only provided for that eventuality so that the other party should not be able to demur and demand parallel procedures for one and the same dispute, arguing that the case was not provided for in the Annex.

79. Lastly, he observed that paragraph 8 of the Annex concerned the appointment of conciliators and that it should be transferred from section II, on the functioning of the Conciliation Commission, to the end of section I, on the establishment of the Commission. To keep the text parallel with the Annex to the Vienna Convention, the paragraph could be numbered 2 *bis*.

80. Mr. USHAKOV said that in article 66, paragraph 3, he was in favour of retaining the words "may be applied", as the verb "may" was used in regard to procedure both in paragraph 1 (*b*) and in paragraph 2.

81. Mr. QUENTIN-BAXTER said that he agreed with Mr. Riphagen. The use of the words "shall apply" in paragraph 3 would preserve the effect of "may" in paragraph 2, and the procedure would still be governed by "may".

82. Mr. TSURUOKA said that he, too, found that the idea of possibility was already contained in paragraph 2.

83. Mr. USHAKOV said that the words "*s'applique*" in French should be rendered by the imperative "shall apply" in English; but there would then be contradiction with paragraph 2.

84. Mr. ŠAHOVIĆ said that the Commission should agree on an interpretation. It could, of course, note in the commentary that members' interpretations had differed, but it could also work out a formula

acceptable to everybody. Personally, he was of the same opinion as Mr. Riphagen.

85. Mr. USHAKOV said that it was not possible to use the word "shall" in the article and explain in the commentary that it meant "may". The Commission could settle the question by repeating in paragraph 3 the wording used in paragraph 2.

86. Mr. RIPHAGEN said he could accept Mr. Ushakov's solution of repeating the text of paragraph 2, from the words "any one of the parties . . ." in paragraph 3.

87. The CHAIRMAN said he took it that article 66 and the Annex were adopted, subject to deleting the words "may be applied" in article 66, paragraph 3 and substituting the relevant wording from paragraph 2, retaining the square brackets in paragraph 1 of the Annex, and transferring paragraph 8 of the Annex to the end of section I, as paragraph 2 *bis*.

It was so decided.

The meeting rose at 1.25 p.m.

1625th MEETING

Thursday, 3 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Francis, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (*continued*)

1. Mr. SCHWEBEL said that the reports and proposals submitted by the Special Rapporteur, with the substance of which he agreed, rightly took account of the evolution of the law on the jurisdictional immunities of States and their property, and of the fact that over the last fifty years States had engaged increasingly in such commercial activities as shipping, trade, finance, manufacturing, exploitation of natural resources and, indeed, agriculture. All those activities

¹ For the text of articles 1-6 submitted by the Special Rapporteur, see 1622nd meeting, para. 4, and 1623rd meeting, para 2.