Document:-

A/CN.4/SR.1724

Summary record of the 1724th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1982, vol. I

an organization could, in such a case, make a notification without any time limit and take action before the expiry of the three-month period. It could act in the same way as a State, which was, in cases of special urgency, entitled to take the measure in question before the expiry of the three-month period.

55. Mr. RIPHAGEN said he did not think that paragraph 2 meant that an objection could not be made after the expiry of the three-month period. An objection could, in fact, be made at any time. Paragraph 2 also did not mean that a party which took unilateral action was justified in that action, to which an objection could always be made. Legally speaking, paragraph 2 was therefore not of any great importance, particularly in the light of paragraph 6, because if a party considered a treaty to be invalid, it could simply stop performing that treaty. Paragraph 2 could therefore be modelled on the corresponding provision of the Vienna Convention.

56. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 65 to the Drafting Committee.

It was so decided.[19]

The meeting rose at 1 p.m.

[19] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 61.

1724th MEETING

Thursday, 10 June 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

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

ARTICLE 66 (Procedures for judicial settlement, arbitration and conciliation) *and*

ANNEX (Procedures established in application of article 66)

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

[2] The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

1. The CHAIRMAN invited the Commission to consider draft article 66 and the annex thereto, which read:

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, 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.

ANNEX

Procedures established in application of article 66

1. 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.

2*bis*. 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.

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 12 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.

2. Mr. REUTER (Special Rapporteur) said that on first reading, the Commission has adopted for article 66 the text and commentary reproduced in its report on its thirty-second session.[3] At the time, the Commission had had to consider, among other things, the question whether to propose an article on procedures for judicial settlement, arbitration and conciliation, although in most of the draft articles it prepared it did not deal directly with the settlement of disputes, leaving it to Governments, at diplomatic conferences, to decide on the procedures they preferred. In any case, if the Commission decided not to adopt such an article, the annex to the draft articles (Procedures established in application of article 66) would disappear *ipso facto*. But the Commission had thought that it should be guided, as far as possible, by the Vienna Convention and that it could therefore retain article 66 without committing itself, and draw the attention of Governments to the possibilities for adapting article 66 of the Vienna Convention to the draft articles under study.

3. Many Governments considered that, in the case in point, questions of procedure had some connection with substance, and it was thus that, at the United Nations Conference on the Law of Treaties, the majority of Governments had considered that acceptance of the articles in part V of the Vienna Convention, in particular, depended on the establishment of suitable procedures. The fact remained that draft article 66—but perhaps not draft article 65—would be justified only if the Commission recommended the General Assembly to give the draft articles the form of a convention, since procedures could only be established within a treaty framework. That had, moreover, been pointed out by one Government in its comments (A/CN.4/350/Add.9, para. 9). Consequently, the Commission could now discuss the question whether it should recommend the General Assembly to make the draft articles into a convention or simply to adopt a resolution recommending compliance with the rules stated in the draft—although he did not think the time had yet come to do that.

4. In his eleventh report (A/CN.4/353, para. 45) he had proposed, though without insisting on the point, that paragraphs 2 and 3 of draft article 66 should be merged in a single paragraph—in other words that the article should be reduced to only two paragraphs.

5. One Government held the view (A/CN.4/350/Add.8) that when a dispute arose between States—which was the case referred to in paragraph 1 of draft article 66—recourse to the International Court of Justice was possible only with the consent of all the par-

[3] *Yearbook ... 1980*, vol. II (Part Two), pp. 85-88.

ties to the dispute; but that was a radical change from the Vienna Convention, which appeared to permit reference to the International Court of Justice by unilateral application. Nevertheless, that comment could be mentioned in the commentary adopted on second reading.

6. At least two other Governments (A/CN.4/350/Add.1, para. 5, and A/CN.4/350/Add.9, para. 5) had asked the Commission to reconsider the solution it had adopted which consisted, in the cases referred to in paragraphs 2 and 3 of article 66, in not mentioning that an international organization could ask the International Court of Justice for an advisory opinion. It was certain that an international organization could not be a party to a case brought before the Court, but it could, of course, request the Court for an advisory opinion. In the first draft he had proposed, in his ninth report,[4] he had considered mentioning several possibilities in that connection. He had suggested saying that an international organization which was a party to the dispute could ask the International Court of Justice for an advisory opinion if the General Assembly of the United Nations had accorded it the right to do so. He had also suggested indicating that an international organization entitled to do so could ask the Court for an advisory opinion even if it was not a party to the dispute.[5] The Commission had decided not to include any mention of those procedures, because it must either be possible or not possible to ask for an advisory opinion, irrespective of the will of the parties, so that there was no need to mention the matter in the draft article; and in any case, any international organization which asked for an advisory opinion did so by virtue of an authorization given through certain procedures which the Commission was not in a position to change, even if the draft articles became a convention. He had also suggested stipulating in advance that the advisory opinion, if given, would be binding on the parties to the dispute. That provision was technically difficult, however, and the Commission had rejected it too.

7. Though glad that paragraph 1 of draft article 66 reproduced the provisions of the Vienna Convention relating to disputes between States, one Government had taken the view (A/CN.4/350/Add.9, para. 6) that the paragraph should be strengthened: it feared that if the draft articles became a convention, the parties to the Vienna Convention and to the new convention would be the same, or at least that problems would arise under article 40 of the draft and that a dispute which arose between two States might degenerate into a dispute to which international organizations were also parties—in which case paragraph 1 would not be safeguarded. He thought that such scruples were honourable, but rather exaggerated. If the draft articles became a convention and a dispute arose between two States concerning a question of *jus cogens* and it was referred to the International Court of Justice, any international organizations that were parties to the treaty could ask to intervene and state their views before the Court. That was very fortunate, because it was impossible to imagine that a judgement by the International Court of Justice on a dispute between two States concerning a question of *jus cogens* would not have repercussions, in fact first, and perhaps also in law, which would go beyond the case of the two parties.

8. Mr. USHAKOV said that, compared with States, which in the event of a dispute about a multilateral treaty to which at least one international organization was a party could apply to the International Court of Justice or ask for arbitration, the position of international organizations was difficult, to say the least. For an international organization, which a dispute could concern just as much as the State involved, could not be a party to a case before the International Court of Justice, even though it could state its views before the Court. Perhaps, therefore, paragraph 1 of article 66 should be brought into line with paragraphs 2 and 3. It was precisely with regard to paragraphs 2 and 3, however, that he wondered why, in the event of a dispute, two international organizations, neither of which was the United Nations, in order to set the proposed conciliation procedure in motion must submit a request to that effect to the Secretary-General of the United Nations. That procedure was quite understandable in the case of States, nearly all of which were Members of the United Nations, but it could be troublesome for some international organizations. For international organizations, the Commission could perhaps consider the possibility of starting the conciliation procedure in a manner different from that provided for in the draft article.

9. With regard to the final treatment of the draft articles, he saw no reason why the Commission should not recommend the General Assembly to give them the form of a convention; but perhaps the Commission could decide that question after it had examined the whole of the draft. In any case, he thought that draft article 66 could be retained for the time being.

10. Mr. REUTER (Special Rapporteur) pointed out to Mr. Ushakov that the case in which the United Nations was a party to, or was included in one of the parties to, the dispute was provided for in the annex as a special case, at the end of section I, paragraph 2. In that connection, he wondered whether it would not be advisable to include a reference to the annex in draft article 66.

11. Mr. JAGOTA said that the question of the settlement of disputes was a sensitive one on which the views of States differed. Some States maintained that a procedure allowing one party to a treaty to take unilateral action and invoke a ground for impeaching the validity of the treaty, terminating it, withdrawing from it or suspending its operation, might be subject to abuse and undermine the treaty in question. Others, which did not accept the compulsory settlement of disputes, argued that, in order to avoid unnecessary delay or expense,

[4] *Yearbook ... 1980*, vol. II (Part One), p. 137, document A/CN.4/327.

[5] *Ibid.*, pp. 138-139, paras. (6) to (8) of the commentary to article 66.

any dispute arising in connection with the application or interpretation of a treaty should be settled by negotiation between the parties concerned or by any other means on which they agreed.

12. Those two conflicting views had nearly caused the breakdown of the United Nations Conference on the Law of Treaties. Ultimately, however, a compromise solution had been found and it had been agreed not only that a dispute concerning the application or the interpretation of articles 53 or 64 of the Vienna Convention might be submitted to the International Court of Justice, unless the parties by common consent agreed to submit the dispute to arbitration, but also that any dispute concerning the application or the interpretation of any of the other articles in part V might be submitted to the conciliation procedure specified in the annex to the Vienna Convention. That compromise had saved the Conference on the Law of Treaties and had also paved the way for the drafting of annex V to the Convention on the Law of the Sea,[6] concerning compulsory conciliation procedures. Thus, although many States still held the view that they could not be compelled to submit to arbitration, they tended, by and large, to accept compulsory conciliation, and the draft under consideration should reflect that trend. Article 66 and the annex should therefore be included in the draft for the guidance of a conference of plenipotentiaries, which would, of course, be free to amend those provisions if it so wished.

13. In his view, article 66 as it now stood was entirely acceptable. With regard to the substance, however, Mr. Ushakov had raised an interesting question: he had asked whether, in the case of a treaty to which both States and international organizations were parties and whose validity was being impeached, all the parties, States and international organizations alike, should not have the right to submit the dispute to the International Court of Justice. In the case of a treaty between States, article 66, subparagraph (*a*), of the Vienna Convention provided that any of the parties to a dispute concerning the application or the interpretation of a rule of *jus cogens* could submit the dispute to the Court. That provision did not explicitly state that all the parties to the treaty in question had to agree to submit a dispute concerning articles 53 and 64 to the Court. But if the International Court of Justice decided that the treaty violated a rule of *jus cogens* and was void, it would be void for all the parties to that treaty, whether or not they were parties to the dispute.

14. If that interpretation of article 66, subparagraph 1 (*a*), of the Vienna Convention was correct, it seemed to him that that provision should also apply *mutatis mutandis* to a dispute concerning a rule of *jus cogens* embodied in a treaty to which States and international organizations were parties. Subparagraph 1 (*a*) of draft article 66 should therefore provide that international organizations were entitled to be parties to cases brought before the International Court of Justice as a result of disputes concerning the application or the interpretation of articles 53 or 64 of the draft. They should also be so entitled in the cases covered by paragraphs 2 and 3.

15. Referring to paragraphs 2 and 3, Mr. Ushakov had also asked why the procedure specified in the Annex to the draft articles should be set in motion by the submission of a request to the Secretary-General of the United Nations. Although he himself had no definite opinion on that matter, he would point out that the procedure in question could be set in motion only if the parties had been unable to agree on any other procedure after negotiating for 12 months as from the date on which the objection had been raised. He did, however, think that the compulsory conciliation procedure specified in the Annex was merely a means to an end and would not entail the involvement of the United Nations in the dispute in question.

16. At the preceding meeting, Mr. Riphagen had said that article 65, paragraph 2, could be interpreted to mean that an objection could be raised even after the expiry of "a period which ... shall not be less than three months after the receipt of the notification". That three-month period was only a minimum period, and it would have to be decided how long the maximum period could be. That question was relevant to article 66, paragraphs 1 to 3, which stated that "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 ...". Since that "date" was unknown, because an objection could be raised even after the expiry of the three-month period referred to in article 65, paragraph 2, it would not be clear when the 12-month period provided for in article 66, paragraphs 1 to 3, would begin. To avoid any confusion or controversy arising from that uncertainty, he thought the word "reasonable" should be added before the word "period" in the first line of article 65, paragraph 2. It would then be unnecessary to amend the wording of article 66, paragraphs 1 to 3.

17. With regard to the question whether reference should be made in article 66 to the advisory opinion procedure in disputes relating to treaties between States and international organizations or between international organizations only, he noted that, although precedents for such a procedure did exist, it was the interpretation of the constituent instrument of an international organization that would determine whether it could request the International Court of Justice for an advisory opinion. It would therefore be enough to refer in article 66 to the procedure specified in the Annex and applicable to disputes concerning any of the articles of part V of the draft.

18. Mr. REUTER (Special Rapporteur) said he did not think that a treaty declared invalid between two States parties to a dispute because it was contrary to *jus cogens* would also be invalid for all the other parties to the treaty. He pointed out, in that connection, that article 66 of the Vienna Convention had been drafted in

[6] See 1699th meeting, footnote 7.

special political circumstances and perhaps did not cover all the possibilities. Two of the comments made by Mr. Jagota followed from the Vienna Convention, which the Commission was not in a position to review.

19. It was, indeed, incorrect to say that the treaty would be invalid for all parties, since Article 59 of the Statute of the International Court of Justice—which was an integral part of the United Nations Charter and therefore took precedence over any other treaty provision—provided that "The decision of the Court has no binding force except between the parties and in respect of that particular case". As an example it might be supposed that two States, parties to a treaty which had four parties, referred a dispute concerning a rule of *jus cogens* to the International Court of Justice and that the other two States did not intervene. The Court would declare the treaty invalid with respect to relations between the two States parties to the dispute referred to it; the treaty would remain in force for the other two States. Those two States could, at that point, assert that if the treaty was not valid between two States it was not valid between them either, and they could then ask for radical amendment of the treaty. But it might also be supposed that the International Court of Justice, when seized by a State of a dispute with another State concerning a rule of *jus cogens* in a treaty which had two other parties that did not intervene, might refuse to give judgement and settle the matter, because to do so would inevitably produce certain effects for the other States. Consequently, the Commission should not take sides in the matter—which it would be doing if it accepted Mr. Ushakov's proposal to abandon compulsory recourse to the Court. Nevertheless the comments by Mr. Ushakov and Mr. Jagota should certainly be included in the commentary to article 66.

20. Following the intervention made at the previous meeting by Mr. Riphagen, Mr. Jagota had raised a question relating to draft article 65. The Vienna Convention merely provided that a State which invoked a ground for invalidating a treaty *might* take the corresponding measures if no objection was raised within a period which, except in cases of special urgency, must not be less than three months. Mr. Riphagen's view was that an objection could be raised after the expiry of that period of three months; but that might have consequences if damages were involved. Mr. Jagota had suggested providing that the objection must be made within a "reasonable period". But draft article 45 would then apply; and it was not possible to suppose that a State must "by reason of its conduct" be considered as having renounced the right to object; that was a question of fact. It would certainly be advisable to include those observations in the commentary and to call attention to the imperfections, and even uncertainties, of the Vienna Convention. The uncertainty of article 45 was that there was no basis for affirming that the Vienna Convention had established a period of limitation for the right to raise objections. The Vienna Convention merely provided that a State which invoked a ground for invalidating a treaty must wait for a certain time before taking the measure contemplated, and that after that time it *could* act.

21. Mr. USHAKOV said that even in regard to the Vienna Convention, he could endorse the logic of article 65, but much less that of article 66. According to article 65, paragraph 1, a party which invoked one of the provisions relating to invalidity of treaties must notify "the other parties" of its claim. It was obvious that it must notify all the parties of that claim, since they were all concerned. If an objection was raised, it was paragraph 3 that applied, under the terms of which "the parties" must seek a solution through the means indicated in Article 3 of the Charter of the United Nations. In that case, too, it was obvious that all the parties must seek such a solution. But article 66 of the Vienna Convention, like article 66 of the draft, referred only to the case of a dispute between two parties. The logic of article 65 had been abandoned in article 66. It was not conceivable, for instance, that a court seized on a dispute would declare a treaty invalid between two of the parties only, the other parties remaining bound by the treaty contrary to articles 53 and 64. In the case of the draft articles, where it was impossible to imagine a dispute between two States without an international organization being involved—since then the Vienna Convention would apply—it was all the more logical to consider that all the parties were concerned. As the cases dealt with in the draft necessarily differed from those covered by the Vienna Convention, the Commission was not bound by the Convention on that point, and it could assume that the dispute concerned all the parties to the treaty.

22. With regard to article 65, paragraph 2, he was convinced that it referred to the time-limit for raising objections. In a case of urgency, the party which made the notification might run the risk mentioned by Mr. Riphagen, but it could not be affirmed that an objection could be raised at any time, within any time-limit. A State which took the measure it intended within a period of less than three months, exposed itself to the danger of a dispute if an objection was raised during that period. If there was no objection, consent to the notification was presumed. Nor did it appear possible to affirm that an objection could be made at any time, in view of the period of 12 months provided for in article 66, paragraphs 2 and 3, in regard to international organizations.

23. Mr. LACLETA MUÑOZ said that article 66 introduced a special difficulty: that of discrimination between the parties to a treaty according to whether they were States or international organizations. As the Special Rapporteur had observed, international organizations could not be parties to cases before the International Court of Justice. There were several solutions to that problem. Mr. Ushakov had suggested excluding judicial settlement and the jurisdiction of the Court in cases involving article 53 or 64; both States and international organizations would then simply submit to a conciliation procedure.

24. Perhaps there was another means of placing States and international organizations on an equal footing. Just as in the Vienna Convention care had been taken to provide a really compulsory procedure for the settlement of disputes involving interpretation of *jus cogens*, perhaps a compulsory settlement procedure could be prescribed for the same purpose, to which international organizations could submit. That solution would certainly be difficult and would require additional work, but it was not impossible and it would best respect the spirit of the Vienna Convention. Any other solution would either introduce a marked difference between the draft articles and the Vienna Convention or would involve discrimination between the parties according to whether they were States or international organizations.

25. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov's interpretation of article 65, paragraph 3, was possible, but not necessary. Moreover, the expression used in that provision was not "all the parties" but "the parties", and that expression might apply only to the parties in the dispute. Once again the Commission should refrain from interpreting the Vienna Convention.

26. Mr. BALANDA said he wondered whether it would not be possible to delete paragraph 1 of article 66, which only concerned relations between States, since the draft articles under consideration dealt with treaty relations between States and international organizations or between two or more organizations.

27. Mr. REUTER (Special Rapporteur), referring to Mr. Ushakov's comments, pointed out that if the words "the parties" were understood to mean all the parties, it was not only article 66, but also the annex to the draft articles that would suffer the repercussions. At the stage of second reading, he did not think it possible to consider recasting the annex. As to the deletion of paragraph 1 suggested by Mr. Balanda, that would increase the fears expressed by one Government (A/CN.4/350/Add.9, para. 6) regarding the possible disappearance of the safeguards already provided by the Vienna Convention in regard to *jus cogens*. If it took that course, the Commission would have a further reason for asking that the draft should become not a convention, but a recommendation. Personally, he would be willing to see the General Assembly adopt a resolution approving the substantive rules of a draft from which all provisions concerning the settlement of disputes had been removed. But the Commission must take account of the compromise—imperfect, it was true—reached by the Conference on the Law of Treaties, to which great importance was attached by the States that had ratified the Convention.

28. Mr. CALERO RODRIGUES said he thought that article 66 should be retained with some changes; he agreed with the Special Rapporteur's proposal (A/CN.4/353, para. 45) that paragraphs 2 and 3 should be merged into a single paragraph. From a logical viewpoint, Mr. Jagota's analysis of the present structure of the article was correct. Paragraphs 2 and 3 were practically the same, however, and the draft articles were already fairly difficult to read. Whenever possible, the Commission should try to make them more easily readable, without sacrificing clarity. If paragraphs 2 and 3 were combined, nothing essential would be lost, and the provision would be clearer.

29. The two questions which had been raised were very interesting, but as the Special Rapporteur had pointed out, technically, there was not much that could be done to overcome the difficulties. With regard to the point raised by Mr. Lacleta Muñoz, since the Vienna Convention made a distinction between disputes involving interpretation of article 53 or 64 and other disputes, it would be wrong not to do likewise where international organizations were concerned. It was not enough to rely, in their case, on an international conciliation procedure to settle questions involving *jus cogens* and its effects on a treaty; more must be done. Since a judicial procedure could not be applied because of the Statute of the International Court of Justice, perhaps an arbitral procedure could be established. Disputes concerning articles 53 or 64 in which States were involved would be submitted to the Court, whereas those involving international organizations would be submitted to an arbitral procedure. All other cases would be subject to the procedures provided for in the annex. It was true that those procedures already applied in the absence of any other agreed procedure. However, disputes involving questions of *jus cogens* were so important that it would be unreasonable to leave their settlement to a procedure of compulsory conciliation.

30. Mr. RIPHAGEN said he agreed with Mr. Lacleta Muñoz and Mr. Calero-Rodrigues that a compulsory arbitration procedure should be provided for in cases concerning *jus cogens*. That would require the drafting of another annex setting out the arbitration procedure and its modalities, which should not be technically difficult.

31. Mr. REUTER (Special Rapporteur) said he thought that article 66 could be referred to the Drafting Committee, but that the suggestion made by Mr. Lacleta Muñoz and endorsed by two other members of the Commission should be formally submitted to that Committee.

32. Mr. LACLETA MUÑOZ said that he was prepared to make his suggestion into a formal proposal.

33. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 66 to the Drafting Committee, together with the proposal to be submitted by Mr. Lacleta Muñoz.

It was so decided.[7]

ARTICLE 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty)

34. The CHAIRMAN invited the Commission to consider draft article 67, which read:

[7] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 69-78.

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.

35. Mr. REUTER (Special Rapporteur) said that article 67 had not been the subject of any particular comments by Governments or international organizations. He pointed out that the Vienna Convention was strict in regard to the powers of the author of the instrument which set in motion the procedures referred to in the title of article 67. If the instrument was not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it might be called upon to produce full powers. No exemption based on practice or on special circumstances was permitted. It was obvious that the same rule should be applied in regard to an instrument emanating from an international organization; a sentence to that effect had been added to paragraph 2 of the article under consideration.

36. Mr. USHAKOV compared the "communication" referred to in article 67 with that referred to in article 7, paragraph 4. He proposed that the latter provision should be amended.

37. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov was quite right. The Vienna Convention also used the word "communicating" in regard to the representative of the State. Paragraph 4 of article 7 would have to be recast and the word "communicating" must be deleted from all provisions of the draft based on provisions of the Vienna Convention in which that word did not appear.

38. Mr. NJENGA said that the provision in article 67, paragraph 2, that: "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" was perfectly logical in view of international law. But where an international organization was concerned, the competent authority was usually the head of the organization. The secretary-general of an international organization, who generally had wide freedom of action, was sometimes merely required to notify the organization that an agreement had been concluded. Hence the requirement in the last sentence of paragraph 2 that "If the instrument emanates from an international organization, the representative of the organization communicating it shall produce appropriate powers" could create a situation in which the representative of the organization was called upon to produce powers signed by himself. In those circumstances, perhaps the production of appropriate powers should not be required in all cases.

39. Mr. REUTER (Special Rapporteur) said he thought that in practice the provision would not raise any difficulties, since it referred to "appropriate powers". If the secretary-general of an international organization had obtained all the necessary authorizations in conformity with the constituent instrument of that organization to proceed to the acts, he would communicate the text of the authorizations. If the act depended on him alone and he did not need any authorization, he would instruct an official to whom he would give powers. On the other hand, if he wished to make the communication himself, it would be curious if he gave himself appropriate powers. It should be noted, however, that the Vienna Convention did not require any particular form for the powers. The secretary-general of an organization could write a letter in which he justified his making of the communication.

40. Mr. NJENGA pointed out that under article 2, subparagraph 1 (*c bis*), which he read out, the secretary-general of an organization would still have to produce a document designating himself as the representative of the organization. How to avoid that rather embarrassing situation was perhaps a matter that the Drafting Committee could look into.

41. Mr. CALERO RODRIGUES said that, despite the explanation given by the Special Rapporteur, he agreed with Mr. Njenga's comment. Since it was provided, for a State, that unless the instrument was signed by persons who were supposed to represent the State, full powers were necessary, it would be logical also to provided that, in the case of an international organization, if the instrument was not signed by a person considered, according to practice or by virtue of other circumstances as representing the organization, full powers must be produced. The situation envisaged by Mr. Njenga could exist and would be rather ridiculous; but it would be easy to overcome the difficulty by appropriate drafting.

42. Mr. FRANCIS suggested that the Drafting Committee be asked to clear up that point.

43. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer article 67 to the Drafting Committee, which would try to find an appropriate form of words for the powers of international organizations.

It was so decided.[8]

ARTICLE 68 (Revocation of notifications and instruments provided for in articles 65 and 67)

44. The CHAIRMAN invited the Commission to consider draft article 68, which read:

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.

[8] *Idem*, paras. 2 and 62.

45. Draft article 68 had not been the subject of comment either by Governments or by international organizations. If there were no objections, he would take it that the Commission decided to refer that article to the Drafting Committee.

It was so decided.[9]

ARTICLE 69 (Consequences of the invalidity of a treaty)

46. The CHAIRMAN invited the Commission to consider draft article 69, which read:

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.

47. Draft article 69 had not been the subject of comment either by Governments or by international organizations. If there were no objections, he would take it that the Commission decided to refer that article to the Drafting Committee.

It was so decided.[10]

ARTICLE 70 (Consequences of the termination of a treaty)

48. The CHAIRMAN invited the Commission to consider draft article 70, which read:

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.

49. Draft article 70 had not been the subject of comment either by Governments or by international organizations. If there were no objections, he would take it that the Commission agreed to refer that article to the Drafting Committee.

It was so decided.[11]

ARTICLE 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law)

50. The CHAIRMAN invited the Commission to consider draft article 71, which had not been the subject of any comment by Governments or international organizations, and which read:

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.

51. Mr. USHAKOV said that, unlike the Special Rapporteur, he did not believe that the judgement of a court on the invalidity of a treaty took effect only for the two parties to the dispute.

52. The CHAIRMAN proposed that draft article 71 be referred to the Drafting Committee.

It was so decided.[12]

ARTICLE 72 (Consequences of the suspension of the operation of a treaty)

53. The CHAIRMAN invited the Commission to consider draft article 72, which had not been the subject of any comments by Governments or international organizations, and which read:

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 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.

[9] *Idem*, paras. 2 and 63.

[10] *Idem.*

[11] *Idem.*

[12] *Idem.*

54. Noting that no member of the Commission wished to speak on that article, he proposed that it be referred to the Drafting Committee.

It was so decided.[13]

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)

55. The CHAIRMAN invited the Commission to consider draft article 73, which read:

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

1. The provisioons of the present articles shall not prejudge 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 prejudge 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.

56. Mr. REUTER (Special Rapporteur) said that article 73 had elicited comments from Governments wishing to enlarge its scope. Moreover, several members of the Commission had already had occasion, during the current session, to comment on paragraph 2 of the article, expressing the hope that various terms would be clarified. For his part, he did not really feel the need for clarification, especially as he had initially proposed more easily understandable wording.

The meeting rose at 1 p.m.

[13] *Idem.*

1725th MEETING

Friday, 11 June 1982, at 11.15 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

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

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

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)[3] (*concluded*)

1. The CHAIRMAN suggested that, since no member of the Commission wished to speak on the article, it should be referred to the Drafting Committee.

It was so decided.[4]

ARTICLE 74 (Diplomatic and consular relations and the conclusion of treaties)

2. The CHAIRMAN invited the Commission to consider draft article 74, which read:

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.

3. Mr. REUTER (Special Rapporteur) recalled that, in first reading, the Commission had decided not to deal with the idea of the specific organic relations, permanent or otherwise, that could be established between an organization and a State. However, one international organization had suggested that such cases should be covered by articles 63 and 74. As the Commission had not acted on that suggestion during its consideration of article 63 in second reading, it should probably refrain from acting on it at the current stage.

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 74 to the Drafting Committee.

It was so decided.[5]

ARTICLE 75 (Case of an aggressor State)

5. The CHAIRMAN invited the Commission to consider draft article 75, which had not given rise to any observations on the part of either Governments or international organizations and which read:

[2] The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

[3] For the text, see 1724th meeting, para. 55.

[4] For consideration of the text proposed by the Drafting Committee, see 1740th meeting paras. 2 and 63.

[5] *Idem.*