



**UNITED NATIONS CONFERENCE  
ON THE LAW OF TREATIES  
BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS  
OR BETWEEN INTERNATIONAL ORGANIZATIONS**

**Vienna, 18 February–21 March 1986**

**OFFICIAL RECORDS**

**Volume I**

**Summary records of the plenary meetings  
and of the meetings of the Committee of the Whole**

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## **INTRODUCTORY NOTE**

*The Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations* consist of two volumes.

Volume I contains the summary records of the plenary meetings and of the meetings of the Committee of the Whole. Volume II contains the report of the Credentials Committee, the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session, the report of the Committee of the Whole, texts submitted to the Conference in plenary meeting by the Drafting Committee, proposals submitted to the Conference in plenary meeting, the Final Act, the resolutions adopted by the Conference and the Convention. It also contains a complete index of the documents relevant to the proceedings of the Conference.

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The summary records of the plenary meetings of the Conference and of the meetings of the Committee of the Whole contained in volume I were originally circulated in mimeographed form as documents A/CONF.129/SR.1 to SR.8 and A/CONF.129/C.1/SR.1 to SR.30, respectively. They include the corrections to the provisional summary records that were requested by the delegations and such drafting and editorial changes as were considered necessary.

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## GENERAL ASSEMBLY RESOLUTIONS RELATIVE TO THE CONFERENCE

### 37/112. Convention on the Law of Treaties between States and International Organizations or between International Organizations

*The General Assembly,*

*Recalling* that, following consideration of a recommendation adopted by the United Nations Conference on the Law of Treaties, held at Vienna in 1968 and 1969, the General Assembly, by its resolution 2501 (XXIV) of 12 November 1969, recommended that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question,

*Noting* that, pursuant to General Assembly resolution 36/114 of 10 December 1981, the International Law Commission, taking into account the written comments of Governments and of principal international organizations as well as views expressed in debates in the Assembly, completed at its thirty-fourth session the second reading of the draft articles on the said question,<sup>1</sup>

*Noting* that, as reflected in paragraph 57 of the report of the International Law Commission on the work of its thirty-fourth session, the Commission decided to recommend that the General Assembly should convoke a conference to study the draft articles on the law of treaties between States and international organizations or between international organizations prepared by the Commission and to conclude a convention.

*Recalling* the adoption of the Vienna Convention on the Law of Treaties<sup>2</sup> of 23 May 1969, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character<sup>3</sup> of 14 March 1975 and the Vienna Convention on Succession of States in respect of Treaties<sup>4</sup> of 23 August 1978,

*Mindful* of Article 13, paragraph 1 a, of the Charter of the United Nations, which provides that the General

Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

*Believing* that the successful codification and progressive development of the rules of international law governing treaties between States and international organizations or between international organizations would contribute to the development of friendly relations and co-operation among States, irrespective of their differing constitutional and social systems, and would assist in promoting and implementing the purposes and principles set forth in Articles 1 and 2 of the Charter,

1. *Expresses its appreciation* to the International Law Commission for its valuable work on the law of treaties between States and international organizations or between international organizations and to the Special Rapporteur on the topic for his contribution to this work;

2. *Invites* States to submit, not later than 1 July 1983, their written comments and observations on the final draft articles on the law of treaties between States and international organizations or between international organizations, prepared by the International Law Commission, as well as on the questions referred to in paragraph 60 of the report of the Commission on the work of its thirty-fourth session;

3. *Invites also* the principal international intergovernmental organizations to submit within the same period their written comments and observations on the subject;

4. *Requests* the Secretary-General to circulate such comments so as to facilitate the discussion on the subject at the thirty-eighth session of the General Assembly;

5. *Decides* that an international convention shall be concluded on the basis of the draft articles adopted by the International Law Commission;

6. *Takes note* of the recommendation of the International Law Commission on the subject and agrees to decide at its thirty-eighth session upon the appropriate forum for the adoption of the convention in the light of the comments received in accordance with the present resolution;

7. *Decides* to include in the provisional agenda of its thirty-eighth session an item entitled "Convention on the Law of Treaties between States and International Organizations or between International Organizations".

<sup>1</sup> *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10 (A/37/10) chap. II, sect. D.*

<sup>2</sup> *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

<sup>3</sup> *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12), p. 207.

<sup>4</sup> *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), p. 185.

**38/139. United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations**

*The General Assembly,*

*Recalling* its resolution 37/112 of 16 December 1982, by which it decided that an international convention should be concluded on the basis of the draft articles on the law of treaties between States and international organizations or between international organizations, adopted by the International Law Commission at its thirty-fourth session,

*Recalling further* that, by its resolutions 37/112, it agreed to decide at its thirty-eighth session upon the appropriate forum for the adoption of the convention in the light of the comments received in accordance with that resolution,<sup>5</sup>

*Having received* the report of the Secretary-General which contains the comments and observations submitted by a number of States and principal international intergovernmental organizations, in accordance with General Assembly resolution 37/112, and having further received the statement adopted by the Administrative Committee on Co-ordination,<sup>6</sup>

1. *Decides* that the appropriate forum for the final consideration of the draft articles on the law of treaties between States and international organizations or between international organizations, adopted by the International Law Commission at its thirty-fourth session, shall be a conference of plenipotentiaries to be convened not earlier than 1985;

2. *Agrees* to decide at its thirty-ninth session upon the question of the date and place for the convening of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, as well as upon the question of participation in the Conference;

3. *Invites* States that have not already done so to submit, not later than 1 July 1984, their written comments and observations on the final draft articles on the law of treaties between States and international organizations or between international organizations prepared by the International Law Commission, as well as on the questions referred to in paragraph 60 of the report of the Commission on the work of its thirty-fourth session;

4. *Invites also* the principal international intergovernmental organizations that have not already done so to submit, within the same period, their written comments and observations on the subject;

5. *Requests* the Secretary-General to circulate such comments so as to facilitate the discussion on the subject at the thirty-ninth session of the General Assembly;

6. *Appeals* to potential participants in the Conference to undertake consultations on the draft articles concerned and other related questions prior to the thirty-ninth session of the General Assembly, in order

to facilitate the successful conclusion of the work of the Conference;

7. *Decides* to include in the provisional agenda of its thirty-ninth session an item entitled "United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations".

*101st plenary meeting  
19 December 1983*

**39/86. United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations**

*The General Assembly,*

*Recalling* its resolution 37/112 of 16 December 1982, by which it decided that an international convention should be concluded on the basis of the draft articles on the law of treaties between States and international organizations or between international organizations, adopted by the International Law Commission at its thirty-fourth session,<sup>1</sup>

*Recalling also* its resolution 38/139 of 19 December 1983, by which it decided that the appropriate forum for the final consideration of the draft articles should be a conference of plenipotentiaries to be convened not earlier than 1985 and agreed to decide at its thirty-ninth session upon the question of the date and place for the convening of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, as well as upon the question of participation in the Conference,

*Having received* the report of the Secretary-General,<sup>7</sup> which contains comments and observations submitted by States and principal international intergovernmental organizations, in accordance with General Assembly resolution 38/139,

*Recognizing* the importance of achieving a successful conclusion of the work of the Conference through the promotion of general agreement,

*Bearing in mind* the relationship between the law of treaties between States and the subject-matter to be dealt with by the Conference,

*Noting with appreciation* that an invitation has been extended by the Government of Austria to hold the Conference at Vienna,

1. *Decides* that the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations shall be held at Vienna from 18 February to 21 March 1986;

2. *Requests* the Secretary-General to invite:

(a) All States to participate in the Conference;

(b) Namibia, represented by the United Nations Council for Namibia, to participate in the Conference,

<sup>5</sup> A/38/145 and Corr.1 and Add.1.

<sup>6</sup> A/C.6/38/4, annex.

<sup>7</sup> A/39/491.

in accordance with paragraph 6 of General Assembly resolution 37/233 C of 20 December 1982;

(c) Representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices in the capacity of observers to participate in the Conference in that capacity, in accordance with General Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976;

(d) Representatives of the national liberation movements recognized in its region by the Organization of African Unity to participate in the Conference as observers, in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974;

(e) Representatives of international intergovernmental organizations that have traditionally been invited to participate as observers at legal codification conferences convened under the auspices of the United Nations to participate in the Conference in a capacity to be considered during the consultations referred to in paragraph 8 below and to be decided upon by the General Assembly at its fortieth session;

3. *Invites* the participants referred to in paragraph 2 above to include as far as possible among their representatives experts competent in the field to be considered;

4. *Decides* that the languages of the Conference shall be the official and working languages of the General Assembly, its committees and its sub-committees;

5. *Refers* to the Conference, as the basic proposal for its consideration, the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session;

6. *Requests* the Secretary-General to submit to the Conference all relevant documentation and recommendations relating to the rules of procedure and methods of work, taking into account the importance of promoting general agreement on the final results of the work of the Conference, and to arrange for the necessary staff, facilities and services which it will require, including the provision of summary records;

7. *Also requests* the Secretary-General to arrange for the presence at the Conference, as an expert, of the International Law Commission's Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations;

8. *Appeals* to participants in the Conference to organize consultations, primarily on the organization and methods of work of the Conference, including rules of procedure, and on major issues of substance, including final clauses and settlement of disputes, prior to the convening of the Conference in order to facilitate a successful conclusion of its work through the promotion of general agreement;

9. *Decides* to include in the provisional agenda of its fortieth session an item entitled "Preparation for the United Nations Conference on the Law of Treaties

between States and International Organizations or between International Organizations".

*99th plenary meeting  
13 December 1984*

**40/76. Preparation for the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations**

*The General Assembly,*

*Recalling* its resolution 37/112 of 16 December 1982, by which it decided that an international convention should be concluded on the basis of the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session,<sup>1</sup>

*Recalling also* its resolution 39/86 of 13 December 1984, by which it decided that the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations should be held at Vienna from 18 February to 21 March 1986, and referred to the Conference, as the basic proposal for its consideration, the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session,

*Recalling further* its appeal, in paragraph 8 of resolution 39/86, to participants in the Conference to organize consultations, primarily on the organization and methods of work of the Conference, including rules of procedure, and on major issues of substance, including final clauses and settlement of disputes, prior to the convening of the Conference in order to facilitate a successful conclusion of its work through the promotion of general agreement,

*Reiterating* the importance of enhancing the process of codification and progressive development of international law at a universal level,

1. *Considers* that the informal consultations held pursuant to paragraph 8 of resolution 39/86 have proved to be useful in enabling thorough preparation for successful conduct of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations;

2. *Expresses its satisfaction* with the successful outcome of the work of the informal consultations conducted by the co-Chairmen;

3. *Decides* that, in addition to the organization referred to in paragraph 2 (e) of resolution 39/86, the United Nations should participate in the Conference;

4. *Decides* to transmit to the Conference and to recommend that it adopt the draft rules of procedure for the Conference, worked out during the informal consultations and annexed to the present resolution as annex I, taking into account that those draft rules were drafted for the specific use of that Conference in view of its particular nature and the subject-matter to be considered by it;

5. *Decides further to transmit to the Conference for its consideration and action, as appropriate, a list of draft articles of the basic proposal, for which substantive consideration is deemed necessary and which are annexed to the present resolution as annex II;*

6. *Refers to the Conference for its consideration the draft final clauses presented by the co-Chairmen on which an exchange of views was held and which are annexed to the present resolution as annex III.*

*112th plenary meeting  
11 December 1985*

#### ANNEX I

**United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 18 February-21 March 1986)**

##### Draft rules of procedure

[For the text, see A/CONF.129/7 below.]

#### ANNEX II

##### List of draft articles of the basic proposal, for which substantive consideration is deemed necessary<sup>8</sup>

1. Article 2<sup>9</sup> "Use of terms"
2. Article 3 "International agreements not within the scope of the present articles"
3. Article 5 "Treaties constituting international organizations and treaties adopted within an international organization"
4. Article 6 "Capacity of international organizations to conclude treaties"
5. Article 7 "Full powers and powers"
6. Article 9 "Adoption of the text"
  - paragraph 2
7. Article 11 "Means of expressing consent to be bound by a treaty"
  - paragraph 2 (arts. 14.3, 16, 18 and 19.2 are closely related to this paragraph)
8. Article 19 "Formulation of reservations"
9. Article 20 "Acceptance of and objection to reservations"
10. Article 27 "Internal law of States, rules of international organizations and observance of treaties"
11. Article 30 "Application of successive treaties relating to the same subject-matter"
  - paragraph 6
12. Article 36 bis "Obligations and rights arising for States members of an international organization from a treaty to which it is a party"
13. Article 38 "Rules in a treaty becoming binding on third States or third organizations through international custom"
14. Article 45 "Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty"

<sup>8</sup> It is understood that if certain changes to the articles listed were approved by the Conference, consequential changes might have to be introduced in other draft articles.

<sup>9</sup> It is noted that since draft article 2 sets out definitions, its provisions should not be considered separately but in conjunction with the substantive consideration of other articles to which those definitions are closely related.

15. Article 46 "Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties"
  - paragraph 2
  - paragraph 3
  - paragraph 4
16. Article 56 "Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal"
17. Article 61 "Supervening impossibility of performance"
18. Article 62 "Fundamental change of circumstances"
19. Article 65 "Procedure to be followed with respect to invalidity, termination, withdrawal from or suspensions of the operation of a treaty"
  - paragraph 3
20. Article 66 "Procedures for arbitration and conciliation"
21. 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"
22. Article 75 "Case of an aggressor State"
23. Article 77 "Functions of depositaries"
24. Annex "Arbitration and conciliation procedures established in application of article 66"

#### ANNEX III

##### Draft final clauses

(Based on those of the 1969 Vienna Convention on the Law of Treaties<sup>2</sup>)

#### FINAL PROVISIONS

##### Article 81

##### SIGNATURE

The present Convention shall be open for signature . . . (date, month, year) at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until . . . (date, month, year), at the United Nations Headquarters, New York by:

- (a) All States;
- (b) Namibia, represented by the United Nations Council for Namibia;
- (c) International organizations invited to participate in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.

##### Article 82

##### RATIFICATION OR ACT OF FORMAL CONFIRMATION

The present Convention is subject to ratification by States and by Namibia, represented by the United Nations Council for Namibia, and to acts of formal confirmation by international organizations. The instruments of ratification and those relating to acts of formal confirmation shall be deposited with the Secretary-General of the United Nations.

##### Article 83

##### ACCESSION

1. The present Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by any international organization which has the capacity to conclude treaties.

2. An instrument of accession of an international organization shall contain a declaration that it has the capacity to conclude treaties.
3. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article 84***ENTRY INTO FORCE**

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the . . . instrument of ratification or accession by States or by Namibia, represented by the United Nations Council for Namibia.

2. For each State or for Namibia, represented by the United Nations Council for Namibia, ratifying or acceding to the Convention after the condition specified in paragraph 1 has been fulfilled, the Convention shall enter into force on the thirtieth day after deposit by such State or by Namibia of its instrument of ratification or accession.

3. For each international organization depositing an instrument relating to an act of formal confirmation or an instrument of accession, the Convention shall enter into force on the thirtieth day after such deposit, provided that it shall not so enter into force before the Convention enters into force pursuant to paragraph 1.

*Article 85***AUTHENTIC TEXTS**

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized by their respective Governments, and duly authorized representatives of the United Nations Council for Namibia and of international organizations have signed the present Convention.

DONE AT VIENNA this . . . day of . . . one thousand nine hundred and eighty-six.

## **OFFICERS OF THE CONFERENCE AND ITS COMMITTEES**

### **President of the Conference**

**Mr. Karl Zemanek (Austria).**

### **Vice-Presidents of the Conference**

The representatives of the following States: Bulgaria, Chile, Côte d'Ivoire, France, German Democratic Republic, Greece, Guatemala, India, Japan, Kuwait, Lebanon, Netherlands, Peru, Poland, Senegal, Sudan, Switzerland, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Zimbabwe.

### **General Committee of the Conference**

**President:** The President of the Conference.

**Members:** The President and the Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee.

### **Committee of the Whole**

**Chairman:** Mr. Mohamed El-Taher Shash (Egypt).

**Vice-Chairmen:** Mr. Geraldo Eulálio do Nascimento e Silva (Brazil); Mr. Zdeněk Pisk (Czechoslovakia).

**Rapporteur:** Mrs. Kuljit Thakore (India).

### **Drafting Committee**

**Chairman:** Mr. Awn Al-Khasawneh (Jordan).

**Members:** Algeria, Argentina, China, France, Italy, Japan, Jordan, Morocco, Nigeria, Romania, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela.

### **Credentials Committee**

**Chairman:** Mr. Jean-Paul Hubert (Canada).

**Members:** Brazil, Canada, China, Ecuador, Gabon, Thailand, Union of Soviet Socialist Republics, United States of America and Zambia.

### **Expert Consultant**

Mr. Paul Reuter (Special Rapporteur of the International Law Commission on the question of the law of treaties between States and international organizations or between international organizations).

## **SECRETARIAT OF THE CONFERENCE**

**Mr. Carl-August Fleischhauer, Under-Secretary-General, Legal Counsel  
(representing the Secretary-General of the United Nations).**

**Mr. Georgiy Kalinkin, Director of the Codification Division of the Office of  
Legal Affairs (*Executive Secretary of the Conference*).**

**Mr. John de Saran (*Assistant Executive Secretary and Secretary of the  
Credentials Committee*).**

**Miss Jacqueline Dauchy (*Secretary of the Committee of the Whole*).**

**Mr. Larry D. Johnson (*Secretary of the Drafting Committee*).**

**Mr. Igor Fominov (*Assistant Secretary of the Conference*).**

**Mr. Mpazi Sinjela (*Assistant Secretary of the Conference*).**

**Mr. Ricardo Gosalbo-Bono (*Assistant Secretary of the Conference*).**

## **AGENDA\***

**[Document A/CONF.129/1]**

1. Opening of the Conference.
2. Election of the President.
3. Adoption of the agenda.
4. Adoption of the rules of procedure.
5. Election of Vice-Presidents.
6. Election of the Chairman of the Committee of the Whole.
7. Election of the Chairman of the Drafting Committee.
8. Appointment of the Credentials Committee.
9. Appointment of other members of the Drafting Committee.
10. Organization of work.
11. Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985.
12. Adoption of a convention and other instruments deemed appropriate and of the Final Act of the Conference.
13. Signature of the Final Act and of the Convention and other instruments.

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\* Adopted by the Conference at its 1st plenary meeting.

## **RULES OF PROCEDURE\***

**[DOCUMENT A/CONF.129/7]**

### **CHAPTER I**

#### **Representation and credentials**

##### ***Rule 1. Composition of delegations***

The delegation of each State, Namibia, represented by the United Nations Council for Namibia and each organization referred to in rule 60 participating in the Conference shall consist of a head of delegation and such other representatives, alternate representatives and advisers as may be required.

##### ***Rule 2. Alternates and advisers***

The head of delegation may designate an alternate representative or an adviser to act as a representative.

##### ***Rule 3. Credentials, corresponding documents and notifications of delegations***

1. The credentials of representatives of States, the corresponding documents of the organizations mentioned in rule 60 as well as appropriate notifications, containing the names and titles of the members of each delegation referred to in rule 1 authorizing them to participate in the Conference shall be submitted early to the Executive Secretary of the Conference, and if possible not later than 24 hours after the opening of the Conference. Any subsequent change in the composition of delegations shall also be submitted to the Executive Secretary.

2. The credentials of representatives of States shall be issued by the head of State or Government or by the minister for foreign affairs.

3. The corresponding documents of organizations referred to in rule 60 shall be submitted to the Executive Secretary of the Conference together with a statement on behalf of the organization confirming that such document is issued in accordance with the internal rules and practices of the organization concerned.

##### ***Rule 4. Credentials Committee***

A Credentials Committee shall be appointed at the beginning of the Conference. It shall consist of nine members from among the representatives of participating States who shall be appointed by the Conference on the proposal of the President. It shall examine the credentials of representatives of States and report to the Conference without delay. The Credentials Committee shall also verify the corresponding documents sub-

mitted by representatives of the organizations referred to in rule 60 in accordance with rule 3 and report to the Conference on those documents.

##### ***Rule 5. Provisional participation in the Conference***

Pending a decision of the Conference on their credentials, representatives of States shall be entitled to participate provisionally in the Conference. Representatives of the organizations referred to in rule 60 shall likewise be entitled to participate provisionally in the Conference pending its decision on whether the documents submitted by them are in conformity with the requirements provided in rule 3.

### **CHAPTER II**

#### **Officers**

##### ***Rule 6. Elections***

The Conference shall elect from among the representatives of participating States the following officers: a President and twenty-two Vice-Presidents, as well as the Chairman of the Committee of the Whole provided for in rule 47 and the Chairman of the Drafting Committee provided for in rule 48. These officers shall be elected on the basis of ensuring the representative character of the General Committee. The Conference may also elect such other officers as it deems necessary for the performance of its functions.

##### ***Rule 7. General powers of the President***

1. In addition to exercising the powers conferred upon him elsewhere by these rules, the President shall preside at the plenary meetings of the Conference, declare the opening and closing of each meeting, direct the discussion, ensure observance of these rules, accord the right to speak, promote the achievement of general agreement, put questions to the vote and announce decisions reached by general agreement or taken by vote. The President shall rule on points of order and, subject to these rules, shall have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the closure of the list of speakers, a limitation on the time to be allowed to speakers and on the number of times each representative may speak on a question, the adjournment or the closure of the debate and the suspension or the adjournment of a meeting.

2. The President, in the exercise of his functions, remains under the authority of the Conference.

\* Adopted by the Conference at its 1st plenary meeting.

***Rule 8. Acting President***

1. If the President finds it necessary to be absent from a meeting or any part thereof, he shall designate a Vice-President to take his place.

2. A Vice-President acting as President shall have the powers and duties of the President.

***Rule 9. Replacement of the President***

If the President is unable to perform his functions, a new President shall be elected.

***Rule 10. The President shall not vote***

The President, or a Vice-President acting as President, shall not vote in the Conference, but may designate another member of his delegation to vote in his place.

**CHAPTER III****General Committee*****Rule 11. Composition***

There shall be a General Committee consisting of twenty-five members which shall comprise the President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee. The President of the Conference, or in his absence one of the Vice-Presidents designated by him, shall serve as Chairman of the General Committee.

***Rule 12. Substitute members***

If the President or a Vice-President of the Conference is to be absent during a meeting of the General Committee, he may designate a member of his delegation to sit and vote in the Committee. In case of absence, the Chairman of the Committee of the Whole shall designate the Vice-Chairman of that Committee as his substitute and the Chairman of the Drafting Committee shall designate a member of the Drafting Committee. When serving on the General Committee, the Vice-Chairman of the Committee of the Whole or member of the Drafting Committee shall not have the right to vote if he is of the same delegation as another member of the General Committee.

***Rule 13. Functions***

The General Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the co-ordination of its work. It shall also exercise powers conferred upon it by rule 63.

**CHAPTER IV****Secretariat*****Rule 14. Duties of the Secretary-General***

1. The Secretary-General of the United Nations shall be the Secretary-General of the Conference. He,

or his representative, shall act in that capacity in all meetings of the Conference and its committees.

2. The Secretary-General shall appoint an Executive Secretary of the Conference and shall provide and direct the staff required by the Conference and its committees.

***Rule 15. Duties of the secretariat***

The secretariat of the Conference shall in accordance with these rules:

- (a) Interpret speeches made at meetings;
- (b) Receive, translate, reproduce and distribute the documents of the Conference;
- (c) Publish and circulate the official documents of the Conference;
- (d) Prepare and circulate records of public meetings;
- (e) Make and arrange for the keeping of sound recording of meetings;
- (f) Arrange for the custody and preservation of the documents of the Conference in the archives of the United Nations;
- (g) Generally perform all other work that the Conference may require.

***Rule 16. Statements by the secretariat***

In the exercise of the duties referred to in rules 14 and 15, the Secretary-General or any other member of the staff designated for that purpose may, at any time, make either oral or written statements concerning any question under consideration.

**CHAPTER V****Conduct of business*****Rule 17. Quorum***

The President may declare a meeting open and permit the debate to proceed when representatives of at least one third of the States participating in the Conference are present. The presence of representatives of two thirds of the States so participating shall be required for any decision to be taken.

***Rule 18. Speeches***

1. No one may address the Conference without having previously obtained the permission of the President. Subject to rules 19, 20 and 23 to 25, the President shall call upon speakers in the order in which they signify their desire to speak. The secretariat shall be in charge of drawing up a list of such speakers. The President may call a speaker to order if his remarks are not relevant to the subject under discussion.

2. The Conference may limit the time allowed to each speaker and the number of times each representative may speak on a question. Before a decision is taken, two representatives may speak in favour of, and two against, a proposal to set such limits. When the

debate is limited and a speaker exceeds the allotted time, the President shall call him to order without delay.

#### *Rule 19. Precedence*

The chairman or rapporteur of a committee, or the representative of a sub-committee or working group, may be accorded precedence for the purpose of explaining the conclusions arrived at by his committee, sub-committee or working group.

#### *Rule 20. Points of order*

During the discussion of any matter, a representative of a participating State may at any time raise a point of order, which shall be decided immediately by the President in accordance with these rules. A representative of a participating State may appeal against the ruling of the President. The appeal shall be put to the vote immediately, and the President's ruling shall stand unless overruled by a majority of such representatives present and voting. A representative may not, in raising a point of order, speak on the substance of the matter under discussion.

#### *Rule 21. Closing of the list of speakers*

During the course of a debate the President may announce the list of speakers and, with the consent of the Conference, declare the list closed.

#### *Rule 22. Right of reply*

1. Notwithstanding rule 21, the President shall accord the right of reply to any delegation that requests it.

2. Replies made pursuant to the present rule shall be made at the end of the last meeting of the day, or at the conclusion of the consideration of the relevant issue if that is sooner.

3. The number of interventions in exercise of the right of reply for any delegation at a given meeting should be limited to two per issue.

4. The first intervention in the exercise of the right of reply, for any delegation on any issue at a given meeting, shall be limited to five minutes and the second intervention shall be limited to three minutes.

#### *Rule 23. Adjournment of debate*

During the discussion of any matter, a representative may move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion, two representatives may speak in favour of, and two against, the adjournment, after which the motion shall be put immediately to the vote.

#### *Rule 24. Closure of debate*

A representative may at any time move the closure of the debate on the question under discussion, whether or not any other representative has signified his wish to speak. Permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall be put immediately to the vote.

#### *Rule 25. Suspension or adjournment of the meeting*

During the discussion of any matter, a representative may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall be put immediately to the vote.

#### *Rule 26. Order of motions*

Subject to rule 20, the motions indicated below shall have precedence in the following order over all proposals or other motions before the meeting:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;
- (c) To adjourn the debate on the question under discussion;
- (d) To close the debate on the question under discussion.

#### *Rule 27. Basic proposal*

The draft articles on the law of treaties between States and international organizations or between international organizations, adopted by the International Law Commission, shall constitute the basic proposal for consideration by the Conference.

#### *Rule 28. Articles of the basic proposal requiring substantive consideration*

1. The Conference shall decide which of the draft articles of the basic proposal referred to in rule 27 require substantive consideration. These draft articles shall be referred to the Committee of the Whole and all other draft articles shall be referred directly to the Drafting Committee.

2. After such a decision is taken by the Conference:

(a) The Committee of the Whole may decide, at the request of a representative, to give substantive consideration to a particular article of the basic proposal that was referred directly to the Drafting Committee;

(b) The Drafting Committee itself may decide, where necessary, to transfer particular draft articles of the basic proposal to the Committee of the Whole for substantive consideration.

#### *Rule 29. Other proposals and amendments*

Other proposals and amendments thereto shall normally be submitted in writing to the Executive Secretary of the Conference, who shall circulate copies to all delegations. As a general rule, no proposal shall be considered at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The President may, however, permit the consideration of amendments, even though these amendments have not been circulated or have only been circulated on the same day.

***Rule 30. Decisions on competence***

Subject to rule 20, any motion calling for a decision on the competence of the Conference to discuss any matter or to adopt a proposal submitted to it shall be put to the vote before the matter is discussed or a decision is taken as to the proposal in question.

***Rule 31. Withdrawal of proposals and motions***

A proposal may be withdrawn by its proposer at any time before voting on it has commenced, provided that it has not been amended. A proposal or a motion that has thus been withdrawn may be reintroduced.

***Rule 32. Reconsideration of proposals***

When a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives of participating States present and voting, so decides. Permission to speak on the motion to reconsider shall be accorded only to two speakers from representatives of participating States opposing the motion, after which it shall be put immediately to the vote.

***Rule 33. Invitations to technical advisers***

The Conference may invite to one or more of its meetings any person whose technical advice it may consider useful for its work.

**CHAPTER VI****Decision-taking*****Rule 34. Decision-taking rights***

Decision-taking rights shall be exercised only by States participating in the Conference. In decision-taking by vote each State represented at the Conference shall have one vote.

***Rule 35. Majority required***

1. Decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the representatives present and voting.

2. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting.

3. If the question arises whether a matter is one of procedure or of substance, the President shall rule on the question. An appeal against this ruling shall be put to the vote immediately and the President's ruling shall stand unless overruled by a majority of the representatives present and voting.

***Rule 36. Meaning of the phrase "representatives present and voting"***

For the purposes of these rules, the phrase "representatives present and voting" means representatives present and casting an affirmative or negative vote.

Representatives who abstain from voting shall be considered as not voting.

***Rule 37. Method of voting***

Except as provided in rule 43, the Conference shall normally vote by show of hands or by standing, but any representative may request a roll-call. The roll-call shall be taken in the English alphabetical order of the names of the States participating in the Conference, beginning with the delegation whose name is drawn by lot by the President.

***Rule 38. Conduct during voting***

The President shall announce the commencement of voting, after which no representative shall be permitted to intervene until the result of the vote has been announced, except on a point of order in connection with the process of voting.

***Rule 39. Explanation of vote***

Representatives may make brief statements consisting solely of explanation of their votes, before the voting has commenced or after the voting has been completed. The representative of a State sponsoring a proposal or motion shall not speak in explanation of vote thereon, except if it has been amended.

***Rule 40. Division of proposals***

A representative of a participating State may move that parts of a proposal shall be voted on separately. If objection is made to the request for division, the motion for division shall be voted upon. If the motion for division is carried, those parts of the proposal that are subsequently approved shall be put to the vote as a whole. If all operative parts of the proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

***Rule 41. Voting on amendments***

When an amendment is moved to a proposal, the amendment shall be voted on first. When two or more amendments are moved to a proposal, the Conference shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom, and so on until all the amendments have been put to the vote. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon. A motion is considered an amendment to a proposal if it merely adds to, deletes from or revises part of the proposal. Unless specified otherwise, the word "proposal" in these rules shall be considered as including amendments.

***Rule 42. Voting on proposals***

If two or more proposals relate to the same question, the Conference shall, unless it decides otherwise, vote on the proposals in the order in which they have been

submitted. The Conference may, after each vote on a proposal, decide whether to vote on the next proposal.

#### *Rule 43. Elections*

All elections shall be held by secret ballot unless otherwise decided by the Conference.

#### *Rule 44*

1. If, when one person or one delegation of a participating State is to be elected, no candidate obtains in the first ballot a majority of the votes of the representatives present and voting, a second ballot restricted to the two candidates obtaining the largest number of votes shall be taken. If in the second ballot the votes are equally divided, the President shall decide between the candidates by drawing lots.

2. In the case of a tie in the first ballot among three or more candidates obtaining the largest number of votes, a second ballot shall be held. If a tie results among more than two candidates, the number shall be reduced to two by lot and the balloting, restricted to them, shall continue in accordance with the preceding paragraph.

#### *Rule 45*

When two or more elective places are to be filled at one time under the same conditions, those candidates, not exceeding the number of such places, obtaining in the first ballot a majority of the votes of the representatives present and voting shall be elected. If the number of candidates obtaining such majority is less than the number of persons or delegations to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled, provided that, after the third inconclusive ballot, votes may be cast for any eligible person or delegation. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to candidates who obtained the greatest number of votes in the third of the unrestricted ballots, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until all the places have been filled.

#### *Rule 46. Equally divided votes*

If a vote is equally divided on matters other than elections, the proposal or motion shall be regarded as rejected.

### CHAPTER VII

#### Committees

#### *Rule 47. Committee of the Whole*

The Conference shall establish a Committee of the Whole, which may set up sub-committees or working groups. The Committee of the Whole shall have as

its officers a Chairman, a Vice-Chairman and a Rapporteur.

#### *Rule 48. Drafting Committee*

1. The Conference shall establish a Drafting Committee consisting of fifteen members representing participating States, including its Chairman who shall be elected by the Conference in accordance with rule 6. The other fourteen members of the Committee shall be appointed by the Conference on the proposal of the General Committee. The Rapporteur of the Committee of the Whole participates *ex officio*, without a vote, in the work of the Drafting Committee.

2. The Drafting Committee shall consider draft articles of the basic proposal referred to it directly pursuant to paragraph 1 of rule 28. It shall also consider any draft articles referred to it by the Committee of the Whole after initial consideration by that Committee. The Drafting Committee shall furthermore prepare drafts and give advice on drafting as requested by the Conference or by the Committee of the Whole. It shall also co-ordinate and review the drafting of all texts adopted and shall report, as appropriate, either to the Conference or to the Committee of the Whole.

#### *Rule 49. Officers*

Except as otherwise provided in rule 6, each committee, sub-committee and working group shall elect its own officers from among representatives of participating States.

#### *Rule 50. Quorum*

1. The Chairman of the Committee of the Whole may declare a meeting open and permit the debate to proceed when representatives of at least one quarter of the States participating in the Conference are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken.

2. A majority of the representatives on the General, Drafting or Credentials Committees or any sub-committee or working group shall constitute a quorum.

#### *Rule 51. Officers, conduct of business and decision-taking*

The rules contained in chapters II, V (except rule 17) and VI above shall be applicable, *mutatis mutandis*, to the proceedings of committees, sub-committees and working groups, except that:

(a) The Chairmen of the General, Drafting and Credentials Committees and the chairman of any sub-committee or working group may exercise the right to vote;

(b) Decisions of committees, sub-committees and working groups shall be taken by a majority of the representatives of States present and voting, except that the reconsideration of a proposal or an amendment shall require the majority established by rule 32.

**CHAPTER VIII****Languages and records*****Rule 52. Languages of the Conference***

Arabic, Chinese, English, French, Russian and Spanish shall be the languages of the Conference.

***Rule 53. Interpretation***

1. Speeches made in a language of the Conference shall be interpreted into the other such languages.

2. A representative may speak in a language other than a language of the Conference if the delegation concerned provides for interpretation into one such language.

***Rule 54. Records and sound recordings of meetings***

1. Summary records of the plenary meetings of the Conference and of the meetings of the Committee of the Whole shall be kept in the languages of the Conference. As a general rule, they shall be circulated as soon as possible, simultaneously in all the languages of the Conference, to all representatives, who shall inform the secretariat within five working days after the circulation of the summary record of any changes they wish to have made.

2. The secretariat shall make sound recordings of meetings of the Conference, the Committee of the Whole and the Drafting Committee. Such recordings shall be made of meetings of other committees, sub-committees or working groups when the body concerned so decides.

***Rule 55. Languages of official documents***

Official documents shall be made available in the languages of the Conference.

**CHAPTER IX****Public and private meetings*****Rule 56. Plenary meetings and meetings of committees***

The plenary meetings of the Conference and the meetings of committees shall be held in public unless the body concerned decides otherwise. All decisions taken by the plenary of the Conference at a private meeting shall be announced at an early public meeting of the plenary.

***Rule 57. Meetings of sub-committees or working groups***

As a general rule, meetings of a sub-committee or working group shall be held in private.

***Rule 58. Communiqués on private meetings***

At the close of a private meeting, the chairman of the organ concerned may issue a communiqué to the press through the Executive Secretary.

**CHAPTER X****Other participants and observers*****Rule 59. Representatives of the United Nations Council for Namibia***

Representatives designated by the United Nations Council for Namibia may participate in the deliberations of the Conference, the Committee of the Whole and other committees, sub-committees or working groups, in accordance with the relevant resolutions and decisions of the General Assembly.

***Rule 60. Representatives of the United Nations and of the organizations that have received an invitation from the General Assembly in subparagraph 2 (e) of its resolution 39/86***

1. Except as otherwise provided in the present rules, representatives designated by the United Nations or by organizations referred to in subparagraph 2 (e) of General Assembly resolution 39/86, that have traditionally been invited to participate as observers at legal codification conferences convened under the auspices of the United Nations, shall participate in the Conference in the following capacity:

(a) To participate in public and private meetings of the Conference, the Committee of the Whole, sub-committees and working groups, as well as in the process leading to general agreement;

(b) To submit documents for circulation;

(c) To intervene in the debates;

—To exercise the right of reply in accordance with rule 22;

—To explain their positions on any matter on which a decision has been or is to be taken;

(d) To submit substantive proposals, which as such may only be put to the vote subject to rule 63 if a formal request is made by a State to that effect. If the proposal has been circulated in writing, the formal request shall be circulated in the same manner;

(e) To submit procedural motions, including those referred to in rules 23, 24 and 25, which may not be put to the vote unless supported by a State.

2. Representatives of the organizations participating in the Conference in accordance with paragraph 1 of this rule may not:

(a) Object to any procedural motion put forward by a representative of a participating State;

(b) Prevent on their own the achievement of general agreement or participate in any vote.

3. Delegations of the organizations referred to in paragraph 1 shall be seated in alphabetical order following the seating of delegations of States.

***Rule 61. Representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices in the capacity of observers in accordance***

*with General Assembly resolutions 3237 (XXIX) and 31/152*

Representatives designated by organizations that have received a standing invitation from the General Assembly in accordance with General Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976 to participate in the sessions and the work of all international conferences convened under its auspices have the right to participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and, as appropriate, other committees, sub-committees or working groups.

*Rule 62. Representatives of national liberation movements*

Representatives designated by national liberation movements invited to the Conference may participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and, as appropriate, other committees, sub-committees or working groups.

## CHAPTER XI

### Promotion of general agreement

*Rule 63. Promotion of general agreement*

1. The Conference shall, both at the plenary and at the Committee of the Whole stages, make every effort

to reach general agreement on matters of substance, particularly on the final results of the work of the Conference, and there shall be no voting on such matters until all efforts to that end have been exhausted.

2. In endeavouring to reach general agreement, all possible means shall be used. The officers of the Conference shall chair as appropriate, co-ordinate and supervise meetings with a view to enhancing the prospects of reaching general agreement.

3. If, in the consideration of any matter of substance, no general agreement appears to be attainable, the President of the Conference shall inform the General Committee that efforts to reach general agreement have failed. The General Committee shall thereupon consider the matter and may recommend that it be decided by a vote, indicating the date of the vote, and place the question before the plenary or the Committee of the Whole as the case may be.

## CHAPTER XII

### Amendments to the rules of procedure

*Rule 64. Method of amendment*

These rules of procedures may be amended by a decision of the Conference taken by a two-thirds majority of the representatives of participating States present and voting.

**SUMMARY RECORDS  
OF THE PLENARY MEETINGS**

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**1st TO 8th MEETINGS**

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## SUMMARY RECORDS OF THE PLENARY MEETINGS

### 1st plenary meeting

Tuesday, 18 February 1986, at 10.20 a.m.

*Acting President:* Mr. FLEISCHHAUER  
(Legal Counsel of the United Nations,  
representing the Secretary-General)

*President:* Mr. ZEMANEK (Austria)

#### Opening of the Conference

[Item 1 of the provisional agenda]

1. The ACTING PRESIDENT, speaking on behalf of the Secretary-General, welcomed Mr. Gerald Hinteregger, Permanent Representative of Austria to the United Nations at Vienna, representing the Federal President of the Republic of Austria, who was unable to attend because of illness. He welcomed also the Federal Minister of Justice of the Republic of Austria and the other distinguished guests.
2. On behalf of the Secretary-General, he declared the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations open and invited the participants to observe a minute's silence for prayer or meditation.

*The Conference observed a minute of silence.*

3. The ACTING PRESIDENT, speaking as the representative of the Secretary-General, said that all participants regretted that the Federal President had been prevented by illness from attending the meeting and wished him a speedy recovery. On behalf of all delegations, he wished to convey to the Federal President, the Government and people of Austria and the City of Vienna, deep appreciation for the hospitality and courtesy being once more extended to the United Nations.
4. The Conference was the seventh in a series of plenipotentiary legal conferences held in Vienna since 1961 in pursuit of the progressive development of international law and its codification. The area was one in which the United Nations had been particularly active and successful over the past 40 years. The process of codification of international law had been said to have started in the years 1814 and 1815 with the historic Congress of Vienna. It was, however, with the creation of the United Nations that the process had entered a new dynamic, institutional and permanent phase. Article 13, paragraph 1 (a), of the Charter conferred upon the General Assembly the specific task of contributing to the progressive development of international law and its codification. The International Law Commission had been set up in 1947 in implementation of that mandate and had become the core body in the codification

process, a function to which the United Nations had devoted continuing efforts and action.

5. Since 1947, the debate had centred on the substantive aspects of diplomatic codification rather than on the question of whether and how such codification should be conducted. The diplomatic character of the development and codification of international law through the United Nations had always to be borne in mind. It gave the measure both of the possibilities and of the limitations of the process. In the first place, the United Nations was not a super State, and the power to legislate in the field of international law remained ultimately vested in States. The role of the United Nations was to encourage, assist, harmonize and provide the necessary fora.

6. It was equally important to remember that the United Nations was not a centre for research into international law and for the advancement of legal science. The progressive development of international law through the United Nations was aimed at the fulfilment of the needs, political aspirations and interests of the States and of the international community as a whole.

7. Understood in that sense, the process corresponded to urgent needs. The constant modernization of international law served the maintenance of peace and international security. The constant adaptation of international law to changing conditions gave it enhanced importance in providing a structure and a basis for international relations and international co-operation. Last but by no means least, much of the change and adaptation in international law had been necessitated by the dramatic growth of the international community and the change in its character since 1945. That process had brought new actors to the international scene, with their own background, ideas, priorities, needs, principles and concepts.

8. The demand for codification and progressive development was such that United Nations activities had not been confined to the International Law Commission. Since 1966, a second core body, the United Nations Commission of International Trade Law, had been active in the harmonization of international trade law, and a number of other bodies had been entrusted by the General Assembly with law-making tasks, nota-

bly in the fields of human rights, outer space and maritime matters. The General Assembly itself had been active in the development of international law with the elaboration and adoption of the 1969 Convention on Special Missions, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the 1979 International Convention against the Taking of Hostages.<sup>1</sup>

9. The 1969 Vienna Convention on the Law of Treaties had been one of the highlights of the development and codification of international law through the United Nations. That Convention had been followed in 1978 by the Vienna Convention on the Succession of States with respect to Treaties. The purpose of the present Conference was to establish, in the form of a third international convention governing another important aspect of the law of treaties, the rules of international law applicable to treaties to which international organizations were parties.

10. It was therefore in the light of the general principles of the law of treaties, set out authoritatively in the 1969 Convention, that the present Conference must proceed. In so doing, it would have to preserve the provisions of the 1969 Convention and, in that connection, he cautioned that any other course of action would have disastrous consequences. The General Assembly had been conscious of that important consideration, and in the draft rules of procedure which it had transmitted and recommended to the Conference (A/CONF.129/7) had sought to ensure that there would be a dual procedure for reviewing, on the one hand, the provisions of those draft articles that were completely parallel to the 1969 Convention and, on the other hand, the provisions of the draft articles referring to the particular needs of treaty-making by and with international organizations.

11. He was grateful that Mr. Paul Reuter of France, the Rapporteur of the International Law Commission for the draft articles, had agreed to serve the Conference as Expert Consultant.

12. He invited the representative of the Federal President of the Republic of Austria to address the Conference.

#### **Address by the representative of the Federal President of the Republic of Austria**

13. Mr. HINTEREGGER, Permanent Representative of Austria to the United Nations at Vienna, representing the Federal President of the Republic of Austria, said that Mr. Rudolf Kirchschlaeger regretted his inability to attend and had asked him to read to the Conference the statement he had intended to make in person.

14. As head of State of the host country, the Federal President warmly welcomed all participants in the Conference, which continued the long-standing tradition of holding United Nations Conferences devoted to the codification of international law in the Austrian capital.

In view of its geographical position, its history and its status as a permanently neutral country, Austria was predestined to serve as a bridge between peoples, and its endeavours in that respect could hardly be better expressed than by hosting a conference to which all the members of the international community were invited to participate. Having regard to its subject, it was particularly appropriate that the present Conference should take place in Vienna, because international organizations were part of the city's everyday life, in particular as Vienna had become one of the Centres of the United Nations.

15. A quarter of a century earlier, as legal adviser to the Austrian Foreign Ministry, the Federal President had been entrusted with organizing the United Nations Conference on Diplomatic Intercourse and Immunities, which had resulted in the Vienna Convention on Diplomatic Relations, and had served as head of the Austrian Delegation. In 1963 he had acted in the same capacity at the Vienna Conference on Consular Relations, and had subsequently attended several United Nations codification conferences. He had always done so in the conviction that the fulfilment by the United Nations of its Charter responsibilities for the progressive development of international law and its codification was instrumental in making the world more peaceful.

16. The problems the Conference would deal with were not particularly easy ones, and as in all international conferences, a successful conclusion would require mutual understanding and the readiness also to make fair compromises. He was certain that all participants would use their best endeavours to codify a further important segment of international law and thereby lay down legal rules for another area of international relations.

#### **Election of the President**

[Item 2 of the provisional agenda]

17. Mr. SCHRICKE (France), supported by Mr. NASCIMENTO e SILVA (Brazil), nominated Mr. Karl Zemanek (Austria) as President of the Conference.

18. It was a pleasure for his delegation to present that candidature, in view of the long-standing historical relations between Austria and France and their close co-operation, especially in the legal field.

19. The Austrian Government was once again acting as host to a conference on the codification of international law, and his delegation wished to take the opportunity to thank the Austrian authorities for their generous hospitality.

20. In Mr. Zemanek the Conference would have as its President an eminent jurist particularly qualified in the subject matter of the Conference, who also had long experience of diplomatic forums, having participated in a number of codification conferences and having presided over the 1977-1978 United Nations Conference on the Succession of States in Respect of Treaties.

21. The task of the President would be facilitated by the quality of the preparatory work that had taken place

<sup>1</sup> General Assembly resolutions 2530 (XXIV), 3166 (XXVIII) and 34/146, respectively.

in the International Law Commission and in the consultations held in New York. Tribute should be paid to those who had organized those consultations and contributed to their success, and this practice should be encouraged.

22. Decisions now had to be made by the Conference, and Mr. Zemanek would contribute to ensuring its success.

*Mr. Karl Zemanek (Austria) was elected President by acclamation and took the Chair.*

23. The PRESIDENT said that he accepted with humility the responsibility conferred on him, seeing in it primarily a tribute to the Government and people of his country. The task before the Conference was undoubtedly a most difficult one; the topic to be covered was of great complexity. To agree on a single, uniform set of articles applicable to entities that were so diverse and to ensure that the product of its labour would not be still-born would require of the Conference a sense of proportion, common sense and goodwill. Twenty-five years had passed since the United Nations Conference on Diplomatic Intercourse and Immunities had laid the foundations of an impressive "Vienna tradition" of successful codification conferences. He would do his best, gladly and with dedication, to ensure that the present Conference lived up to that tradition.

24. Mr. PASCHKE (Federal Republic of Germany) congratulated the President on his election. He paid tribute to those who had inspired and directed the informal consultations in New York which had resulted in the draft rules of procedure of the Conference, and noted with satisfaction the presence of many members of the International Law Commission; Mr. Reuter, its Special Rapporteur and sometime President, was particularly welcome in the capacity of Expert Consultant.

25. Mr. CHUTASAMIT (Thailand), speaking as Acting Chairman of the group of Asian countries, congratulated the President on his election, paying tribute to his academic and diplomatic skills and experience and pledging the full co-operation of the Asian Group in the conduct of the Conference. The Group also wished to place on record its appreciation of the hospitality accorded by the host State.

#### **Adoption of the agenda [Item 3 of the provisional agenda]**

*The provisional agenda (A/CONF.129/1) was adopted.*

#### **Adoption of the rules of procedure [Agenda item 4]**

26. The PRESIDENT drew attention to the draft rules of procedure (A/CONF.129/7). Those rules were the outcome of lengthy consultations in New York and were recommended for adoption in General Assembly resolution 40/76, paragraph 4.

*The draft rules of procedure (A/CONF.129/7) were adopted.*

27. Mr. BERNAL (Mexico) said that his delegation favoured the active participation of international organ-

izations in the work of the Conference, and considered that the rules of procedure largely contained the provisions for such participation. He looked forward to the constructive participation of the international organizations in the preparation and adoption of the convention.

28. Mexico had always believed that States should be encouraged to work towards general agreement on the final text of conventions. However, although a text agreed by a large majority might be thought to be more widely acceptable than one adopted by a simple majority, that was not self-evident, and, whatever the form of voting, respect for the principle of sovereign equality of States and the democratic bases of every organization had to be retained. Complicating the rules of procedure would not necessarily lead to better results. The idea of general acceptance was, moreover, closely related to the political will of States to bind themselves at the international level. Thus, in his delegation's view, the problem of the codification and progressive development of international law was one not of procedural efficiency but of effectiveness and of political will. Without political will, rule 63, which was presumably intended to strengthen the process of negotiation and approval of the final text of the future convention, would not be effective.

29. Specifically, his delegation considered that rule 63 should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the informal consultations at which it had been prepared. The purpose of rule 63 was to ensure that efforts were made to adopt the final text of the convention by general, but not necessarily unanimous, agreement. Accordingly, the rule should not be interpreted as an obligation to arrive at unanimous agreement to adopt the convention. The so-called rule of consensus was the result of negotiation in good faith and not a form of voting, particularly since the term "general agreement" had not been defined in the rules of procedure and there was no clear understanding as to its meaning.

30. His delegation had accepted the wording of rules such as 63 and 34 in a spirit of compromise and in order not to obstruct the convening of the Conference. That did not, however, mean that the agreement reflected in rule 63 constituted a binding precedent for the adoption of resolutions and decisions of the United Nations and its organs, commissions and committees.

31. Lastly, paragraph 3 of rule 63 was not to be interpreted as a derogation of the exercise of the right to vote or to mean that the exercise of that sovereign right could be denied by the virtue of a procedure like that provided for under rule 63.

32. Subject to those observations, his delegation had approved the rules of procedure.

33. Mr. SHASH (Egypt) said that while his delegation was able to accept the rules of procedure, including rule 63, for the special purposes of the Conference, it considered that they should not be deemed to constitute a precedent for all international meetings.

34. Mr. ABDEL RAHMAN (Sudan) observed that considerable effort had been expended at the General

Assembly in arriving at the rules of procedure. He trusted that a similar spirit of conciliation would prevail at the Conference.

35. Mr. VOGHEL (Canada), speaking on behalf of the delegations of Canada, the Federal Republic of Germany, France, the United Kingdom and the United States of America, said that while those delegations had

joined in the consensus (on the rules of procedure), their acceptance of those arrangements should not be construed as a change in their position concerning the legal nature of the participation of Namibia as represented by the United Nations Council for Namibia.

*The meeting rose at 11.55 a.m.*

## 2nd plenary meeting

Wednesday, 19 February 1986, at 12.10 p.m.

*President: Mr. ZEMANEK (Austria)*

### Election of Vice-Presidents [Agenda item 5]

1. The PRESIDENT said that, in the light of rule 6 of the rules of procedure, the regional groups had met and had nominated the representatives of the following 22 States as Vice-Presidents of the Conference: Bulgaria, Chile, Côte d'Ivoire, France, German Democratic Republic, Greece, Guatemala, India, Japan, Kuwait, Lebanon, Netherlands, Peru, Poland, Senegal, Sudan, Switzerland, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Zimbabwe.

2. Mr. ALMODÓVAR (Cuba) said that his delegation rejected the nomination of a representative of Chile as a Vice-President. It had not been agreed by the Latin American group of countries.

3. Mr. PALOMO (Guatemala), speaking on behalf of the Latin American group of countries, said that they had held a series of meetings at which the nominations of Vice-Presidents from among the Latin American countries had been agreed. Unfortunately, the representative of Cuba had not been present at those meetings.

4. Mr. ALMODÓVAR (Cuba) said that his delegation could not agree that the representative of Chile should occupy a post of Vice-President. That had not been agreed by the Latin American group of countries, all of whose representatives knew that Cuba would not accept the election of Chile as a Vice-President, precisely because it was not the country most representative of Latin America. He did not propose to repeat the reasons for Cuba's refusal, which were well known to everyone. His delegation regretted that it had to make the matter public. It had been in the conference room since the building had opened for the Conference that morning, and at no time had its members seen any announcement about group meetings. It therefore reiterated emphatically its refusal to agree that a representative of the Government of Chile should occupy a post of Vice-President on behalf of the Latin American group of countries.

5. The PRESIDENT said that the statement of the representative of Cuba would be recorded in full in the summary record of the meeting. As he saw no other objections, he would take it that the Conference approved the election of the 22 Vice-Presidents nominated by the regional groups.

*It was so decided.*

### Election of the Chairman of the Committee of the Whole [Agenda item 6]

6. The PRESIDENT announced the nomination of Mr. Mohamed El-Taher Shash (Egypt) as Chairman of the Committee of the Whole.

*Mr. Mohamed El-Taher Shash (Egypt) was elected Chairman of the Committee of the Whole by acclamation.*

### Election of the Chairman of the Drafting Committee [Agenda item 7]

7. The PRESIDENT announced the nomination of Mr. Awn Al-Khasawneh (Jordan) as Chairman of the Drafting Committee.

*Mr. Awn Al-Khasawneh (Jordan) was elected Chairman of the Drafting Committee by acclamation.*

### Appointment of the Credentials Committee [Agenda item 8]

8. The PRESIDENT said that, in the light of rule 4 of the rules of procedure, he proposed that the representatives of the following nine States should be the members of the Credentials Committee: Brazil, Canada, China, Ecuador, Gabon, Thailand, Union of Soviet Socialist Republics, United States of America, Zambia.

*That proposal was adopted.*

*The meeting rose at 12.25 p.m.*

## 3rd plenary meeting

**Wednesday, 19 February 1986, at 4.35 p.m.**

**President:** Mr. ZEMANEK (Austria)

**Appointment of other members  
of the Drafting Committee**  
[Agenda item 9]

1. The PRESIDENT announced that the General Committee recommended the appointment of the representatives of the following States as members of the Drafting Committee, in addition to the Chairman: Algeria, Argentina, China, France, Italy, Japan, Morocco, Nigeria, Romania, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

*It was so decided.*

**Organization of work**  
[Agenda item 10]

2. The PRESIDENT, drawing attention to paragraph 31 of the Memorandum of the Secretary-General (A/CONF.129/3), said that he had been asked by the General Committee to inform the Conference that the Committee agreed that there should be no general debate either in plenary or in the Committee of the Whole. There would be ample opportunity to make statements of principle in relation to specific articles as and when they were considered. Turning to paragraph 40 of the Memorandum, he said that the weekly schedule would indicate the time available and the results expected for the week and should be a guide in deliberations and work within the individual organs of the Conference.

3. In the absence of objection he would take it that the Conference endorsed the suggestions in the Secretary-General's Memorandum, together with those two additional comments.

*It was so decided.*

4. Mr. JESUS (Cape Verde) observed that it might be advisable to decide on the schedule for the rest of the week so that delegates could make adequate preparation and actively participate in the deliberations.

5. Mr. KALINKIN (Executive Secretary of the Conference) said that it was the secretariat's understanding that when the Committee of the Whole and the Drafting Committee met for the first time they would start by considering the organization of work. It was for each committee to decide in which order the articles would be considered.

6. The PRESIDENT said that the secretariat could not anticipate such a decision. If the Committee of the Whole made its decision later in the day, the secretariat might be able to arrange a schedule. As the Drafting Committee would not be meeting until the following day, there might be time to draw up a provisional timetable for its consideration.

7. Mr. JESUS (Cape Verde) agreed that the programme would be better established by the individual committees than by the plenary. However, he felt that the Conference should decide at the present stage on the number of plenary meetings to be held during the current and following week and on the number of meetings to be held by the Committee of the Whole and the Drafting Committee during the same period.

8. The PRESIDENT replied that there would be no plenary meetings during that period unless a particular need arose, and both morning and afternoon sessions, between 10 a.m. and 1 p.m. and 3 p.m. and 6 p.m., would be taken up entirely by the Committee of the Whole. The Drafting Committee could meet any day between the hours of 9 a.m. and 10 a.m. and 6 p.m. and 7 p.m. if it wished to do so. Since the Drafting Committee should in principle work as speedily as possible, it would decide on its own meetings, and its progress would be assessed the following week.

9. Turning to the subject of the final clauses, he said that the General Committee proposed that the Conference should defer any decision as to how to handle the final clauses until the debate in the Committee of the Whole had started and the mood of the Conference could be interpreted. If there was no objection, he would take it that the Conference endorsed that proposal.

*It was so decided.*

10. The PRESIDENT, turning to the list of articles contained in the attachment to document A/CONF.129/8, said that it had been adopted by consensus in the consultations in New York and transmitted to the Conference for its consideration and action as appropriate.

11. Mr. SCHRICKE (France) said that his delegation had participated actively in the consultations which had led to the establishment of the list of draft articles of the basic proposal for which substantive consideration was deemed necessary. To distinguish between articles to be given substantive consideration and those to be referred directly to the Drafting Committee was a departure from the customary practice, which his delegation believed should be followed as a general rule, whereby all draft articles submitted to a diplomatic conference were given substantive consideration before being referred to the Drafting Committee. The distinction had resulted from a desire to maintain as close a parallel as possible between the present draft and the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> and had also influenced the draft articles prepared by the International Law Commission. While that approach might

<sup>1</sup> Official Records of the United Nations Conference on the Law of Treaties (United Nations publication, Sales No. E.70.V.5), p. 287.

be acceptable from the methodological point of view, it raised difficulties for his delegation. France had expressed its disagreement with some important provisions in the 1969 Convention, in particular those relating to *jus cogens*. That concept was still as nebulous as it had been in 1969, and his delegation therefore maintained the reservations and objections it had made with respect to those provisions at the 1968/1969 Conference,<sup>2</sup> and which had been the reason why France had not become party to that Convention. If similar provisions were to be included in the draft Convention now before the Conference, the outcome would be the same. Even if that were to be the case, the French delegation was nevertheless prepared to participate actively and constructively in the work of the Conference and, even though it might not become party to the Convention, it would not fail to take into account those provisions to which it could agree, as it and many other States had done in respect of the provisions of the 1969 Convention relating to customary international law.

12. The French delegation, in that spirit, could accept the principle underlying the preparation of the list in annex II of General Assembly resolution 40/76, and had not requested the inclusion in it of certain provisions to which it had serious objections. The direct referral of a large number of articles to the Drafting Committee could not therefore be construed as implying his delegation's approval of all the rules laid down in those articles.

13. The PRESIDENT said that the intention was that the articles in the list would be submitted for consideration to the Committee of the Whole and the other articles would be referred direct to the Drafting Committee. However, it would be up to the latter to refer any articles to the Committee of the Whole if, in the course of its work, it felt that more substantive consideration was justified.

14. In cases where only certain paragraphs of articles were referred to the Committee of the Whole and the

remainder of the article was referred directly to the Drafting Committee, there would be nothing to prevent delegates from using the remaining paragraphs in making points in respect of paragraphs under consideration in the Committee of the Whole. Furthermore, the Drafting Committee would not deal with any article until the Committee of the Whole had completed its consideration of the paragraphs referred to it. If there was no objection, he would take it that the Conference approved the list of articles and the working arrangements proposed by the General Committee.

*It was so decided.*

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

[Agenda item 11]

15. The PRESIDENT said that the only decision to be taken by the Conference at the present stage was to request the Committee of the Whole to consider the articles on the list on the understanding embodied in the working arrangements, and to refer the other articles to the Drafting Committee for consideration.

*It was so decided.*

16. The PRESIDENT said that he had received a letter from the Secretary-General drawing attention to the seriousness of the Organization's financial problems and asking for co-operation in the matter of holding down expenditure, first, by limiting the costs of meetings by restricting their number and duration to the greatest extent possible and reasonable, and second, by limiting documentation costs by restricting to the greatest extent possible and reasonable the documentation to be produced at the Conference. He was confident that everyone would co-operate fully in an effort to comply with those requests.

*The meeting rose at 5.05 p.m.*

<sup>2</sup> *Ibid.* (United Nations publication, Sales No. E.70.V.6), 19th plenary meeting, paras. 7 to 18.

## 4th plenary meeting

Thursday, 13 March 1986, at 3.20 p.m.

**President:** Mr. ZEMANEK (Austria)

### Organization of work [Agenda item 10]

1. The PRESIDENT said that when the Conference had allocated various provisions of the draft articles to the Committee of the Whole and others to the Drafting Committee, the question of the preamble and the final clauses had remained in abeyance. In the absence of any objections, he would take it that the Conference

agreed to entrust the preparation of the preamble and the final clauses to the Committee of the Whole.

*It was so decided.*

2. The PRESIDENT said that the Conference had also to adopt a final act. In the absence of any objections, he would take it that the Conference entrusted its preparation to the Drafting Committee.

*It was so decided.*

3. The PRESIDENT invited those delegations who wished to have specific points or ideas reflected in the preamble to submit their proposals in writing to the Committee of the Whole. Two such proposals had already been submitted and were reproduced in documents A/CONF.129/C.1/L.71 and L.72.

4. He wished to consult the Conference on the manner in which the Drafting Committee should report on the results of its work. The Chairman of the Committee of the Whole and the Chairman of the Drafting Commit-

tee agreed with him that the Drafting Committee should report directly to the Conference, both on the provisions which had been referred to the Drafting Committee directly and on those referred to it by the Committee of the Whole. That would make for an orderly procedure. In the absence of any objection, he would take it that the Conference agreed to that arrangement.

*It was so decided.*

*The meeting rose at 3.25 p.m.*

## 5th plenary meeting

Tuesday, 18 March 1986, at 3.50 p.m.

President: Mr. ZEMANEK (Austria)

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

[Agenda item 11] (*continued*)\*

**Adoption of a convention and other instruments deemed appropriate and of the Final Act of the Conference**

[Agenda item 12]

### TEXTS PROPOSED BY THE DRAFTING COMMITTEE

1. The PRESIDENT recalled that the articles proposed by the International Law Commission (A/CONF.129/4) for the new convention fell into two categories: first, those articles which the Conference had referred directly to the Drafting Committee, and secondly, the articles which it had referred to the Committee of the Whole for consideration and which that Committee had referred to the Drafting Committee after considering them. He further recalled that the Conference, in order to expedite its work, had decided that the Drafting Committee should report directly to the plenary of the Conference (4th plenary meeting, para. 4).

2. The Conference had before it the initial report of the Drafting Committee (A/CONF.129/11), setting out the titles of parts I to VII and sections thereof and the titles and texts of articles 1, 2, 4 to 34, 38, 40 to 44, 46 to 61, 63, 64, 67 to 72 and 74 to 81, which had been adopted by the Drafting Committee. He pointed out that draft article 66, the draft annex and the draft final provisions were still under consideration in the Committee of the Whole.

3. In the absence of objection, he would take it that the Conference agreed that after the Chairman of the Drafting Committee had completed his presentation of each article—or group of articles, where articles could

conveniently be grouped together—the Conference should proceed to consider and adopt the article or group of articles in question, it being understood that delegations would be entitled to make statements in connection with each article.

*It was so decided.*

4. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, introduced document A/CONF.129/11, which contained the titles and texts of the articles so far adopted by the Drafting Committee. He drew attention to the fact that the finalized texts of the preamble and a number of further articles were not yet submitted to the Conference, either because they had not yet been referred to the Drafting Committee or because they were still under consideration in that Committee. Should any decisions be taken by the Conference which affected the numbering of the articles, the Drafting Committee would make an appropriate recommendation in that regard.

5. At its previous meeting, the Conference had decided that the Drafting Committee should report on the results of its work directly to the Conference. He would accordingly report on the results of the Drafting Committee's work on those articles which had been referred directly to it as well as on those which had been referred to the Drafting Committee by the Committee of the Whole.

6. He wished to make at the outset a few general remarks. As was well known, the convention being elaborated at the present Conference contained many provisions parallel to those contained in the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup> In the Drafting Committee's work on the articles referred to it, some of its members had felt that certain terminological inconsistencies existed between the texts of the 1969 Convention in the various languages, or they had found some inaccuracies in the text in particular languages. The Drafting Committee had agreed, how-

<sup>1</sup> Official Records of the United Nations Conference on the Law of Treaties (United Nations publication, Sales No. E.70.V.5), p. 287.

\* Resumed from the 3rd plenary meeting.

ever, that as a general rule, texts of the 1969 Convention which had been transposed to the draft convention at present under consideration should not be tampered with. While it might perhaps be felt that certain provisions of the 1969 Convention in certain languages did not represent the most elegant use of the language in question, or that a reader comparing the texts in the different languages might believe that the use of other terms would achieve greater equivalence of meaning between the texts in the five languages, the Drafting Committee had nevertheless deemed it more prudent not to incorporate in one language version only any changes or departures from the language of the 1969 Convention. That had been done in order to maintain the stability of existing treaty relations between the parties to the 1969 Vienna Convention, all of which had agreed on the provisions of the instrument and had also agreed that the texts in the various languages were equally authentic (article 85 of the Convention) and had the same meaning in each authentic text (article 33, paragraph 3). If the signatory States and contracting States of the 1969 Convention agreed that the text contained errors, the procedure provided for in article 79 could be set in motion.

7. Following the example of the International Law Commission, which had achieved some simplification of its draft text between its first reading and its adoption of the final draft, the Drafting Committee had recommended simpler formulas in some draft articles, as well as the combining of paragraphs in certain draft articles. The Committee believed that simplification could be achieved in certain cases without loss of clarity and meaning, whereas in other cases it had felt it necessary to maintain the precision of the Commission's basic proposal, even if the drafting was somewhat cumbersome. When introducing the relevant draft articles, he would indicate where such simplifications were recommended.

8. He also wished to make a few general drafting points. Throughout the text of the draft articles referred to the Drafting Committee, the Committee had replaced the expression "present articles" by "present Convention" or simply "Convention", following the model of the 1969 Vienna Convention. He would refrain from pointing out that change when introducing the various draft articles separately.

9. The Drafting Committee had also examined the question of the use of "he" or "his" in the draft English text. While it might have been desirable to avoid that unfortunate reference to only one gender, the Drafting Committee had finally decided not to change the text, as that would have meant a departure from the 1969 Vienna Convention. It was clear that when the draft text referred to "he" or "his" it referred to a person, whether masculine or feminine.

10. Lastly, an attempt had been made to maintain the consistency established in the basic proposal with regard to the use of defined terms, such as "contracting organizations" and "negotiating organizations", as well as with regard to cases where the word "organization" should be qualified by "international".

11. Mr. BERMAN (United Kingdom) said that his delegation wished to make two general observations

before the formal adoption by the Conference of the draft convention.

12. The first concerned the rule of general agreement written into the rules of procedure of the Conference. He did not wish to enter into a debate about the applicability of such a rule elsewhere than in the present Conference; that would be a matter for discussion and analysis later, when scholars and practising diplomats looked back at the results of the Conference. As far as the Conference itself was concerned, the rule of general agreement had been an experiment and, he would venture to say, an experiment which had worked very well. Ensuring that result had nevertheless imposed a strain on the President, the Chairman of the Committees, the Secretariat and all the participating delegations. He wished to pay a tribute to all those concerned for the manner in which they had sought to fulfil the expectations of the General Assembly. He hoped that the same spirit would prevail until the end of the Conference.

13. His second point concerned those draft provisions the substance of which had been taken from corresponding provisions of the 1969 Vienna Convention in respect of which, at the United Nations Conference on the Law of Treaties, the United Kingdom delegation had stated its understanding, with the object of clarifying their meaning or interpretation. He did not propose to repeat those statements as the Conference considered the draft articles submitted or to be submitted to it by the Drafting Committee. He therefore wished it to be recorded that, in so far as such statements made by the United Kingdom delegation at the United Nations Conference on the Law of Treaties were relevant to the present draft articles, they should be taken as applying equally to them.

14. The PRESIDENT said that he fully shared the views of the United Kingdom representative regarding the admirable spirit of co-operation that had prevailed in the Conference and his hope that that spirit would continue.

15. He invited the Chairman of the Drafting Committee to introduce the draft texts proposed for adoption in document A/CONF.129/11 and the Conference to consider them.

#### *Article 1 (Scope of the present Convention)*

16. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 1 had been referred directly to the Drafting Committee. Except for two changes affecting the Arabic text only, the article had been adopted as drafted by the International Law Commission.

17. The changes affecting the Arabic text concerned not only article 1 but also other articles throughout the Convention. The first concerned the Arabic rendering of the word "applies"; the Arabic term originally used had been replaced by a more adequate one for stylistic reasons and in order to ensure consistency as between the various articles. The second change was the deletion from the Arabic text of a group of words meaning "which are concluded"; those words in the Arabic text were not only superfluous but could lead to misinterpretation. He would refrain from referring again to

those two changes when introducing subsequent draft articles in which they had also been made in the Arabic text.

*Article 1 was adopted without a vote.*

#### Article 2 (Use of terms)

18. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that the text referred to the Drafting Committee by the Committee of the Whole (A/CONF.129/DC/17) was a text worked out in the framework of consultations held under the chairmanship of the President of the Conference.

19. Typographical errors in the text in certain languages had been corrected, and in the English text of paragraph 1 (c) the word "and" appearing between the words "international organization" and "designating" had been deleted, since the inclusion of that word constituted an unnecessary departure from the 1969 Vienna Convention. That change affected the English text only.

20. The designations for subparagraphs (*b bis*) and (*b ter*) had been maintained. The Drafting Committee had considered whether or not to reletter those paragraphs in alphabetical order and had also considered combining subparagraphs (*b*), (*b bis*) and (*b ter*). It had finally decided to maintain the distinction between the terms in question by defining them in separate subparagraphs. In that way the parallel between the 1969 Vienna Convention and the present convention was maintained with respect to the seven subparagraphs which followed.

21. Lastly, in the Arabic text of the final part of paragraph 1, the word used to render the English term "instruments"—which was one commonly used in commercial and property law—had been replaced by one more appropriate to international law. That change had also been made in other draft articles; he would refrain from drawing attention to it in connection with the various articles in question.

*Article 2 was adopted without a vote.*

#### Article 4 (Non-retroactivity of the present Convention)

22. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 4 had been referred directly to the Drafting Committee. In order to align the text of the basic proposal with that of the 1969 Convention in the Spanish version, the words "*que se celebren*" had been replaced by "*que sean celebrados*". No other changes had been made in the text.

23. Mr. ALMODÓVAR (Cuba) said that as the present convention reproduced, with the same number, text and content, article 4 of the 1969 Vienna Convention on the Law of Treaties, and as no circumstance had arisen to justify any other course, his delegation now wishes to reiterate the position it had taken at the 30th plenary meeting of the United Nations Conference on the Law of Treaties,<sup>2</sup> held on 19 May 1969, in the vote on article 77 of that Convention, which was later renum-

bered 4 by the Drafting Committee, the numbers of the articles cited being altered as appropriate.

24. In amplification of that point, he wished it to be recorded that the Cuban delegation interpreted the exception in article 4 to the non-retroactivity of the present convention, referring to the application of any rules set forth therein "to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the Convention", as covering rules of international law established as being applicable to a treaty, as well as situations arising or existing when that treaty entered into force, if that took place after the entry into force of the present convention, even if the date on which the treaty was concluded or the situation originated was earlier.

25. The Cuban delegation wished to reaffirm that the peremptory rules codified in the present convention fully applied to all treaties in force, whatever the date of their entry into force, not only on purely logical grounds based on the principle of the hierarchy of rules, but also for reasons of substances directly related to the notion of what was just at a given moment for the international community, particularly with respect to the rules in articles 48 to 53, 62 and 64. Any treaty conflicting with those peremptory rules was both illegal and inadmissible; it was not permissible to question whether those peremptory norms were or were not part of international law before the entry into force of the convention, from which they derived indisputable authority.

*Article 4 was adopted without a vote.*

#### Article 5 (Treaties constituting international organizations and treaties adopted without an international organization)

26. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said the text of article 5 referred to the Drafting Committee by the Committee of the Whole was one which had been worked out in the framework of consultations held under the chairmanship of the President of the Conference (A/CONF.129/C.1/L.70).

27. The text now submitted to the Conference contained certain drafting adjustments. The original text had referred to "any treaty which is the constituent instrument of an international organization and to which States and international organizations are parties". In order to clarify that passage and make it more precise, it had been reworked to read "any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization".

28. It would be recalled that the Committee of the Whole (27th meeting) had agreed to delete the word "relevant" before "rules of the organization" in article 5, as well as in other articles. It had, however, been understood that if the Drafting Committee felt an imperative need to reintroduce the word "relevant" it could make a recommendation to that effect. The Committee in fact now made that recommendation with regard to article 5. As had been explained by the Expert Consultant, if the word "relevant" were to be left out, it

<sup>2</sup> *Ibid.* (United Nations publication, Sales No. E.70.V.6), 30th plenary meeting, paras. 9 to 16.

might be argued that virtually any rule of an organization could be invoked to allege the inapplicability of the present convention to the treaties which were the subject of article 5. In the context of article 5, the term "relevant" served the useful purpose of stressing that the rules involved must be those which were related to treaty-making or to the conclusion of the treaties in question. Moreover, the 1969 Vienna Convention had explicitly included in its article 5 a reference to "any relevant rules of the organization".

*Article 5 was adopted without a vote.*

**Article 6 (Capacity of international organizations to conclude treaties)**

29. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that in adopting the International Law Commission's text of the article for referral to the Drafting Committee, the Committee of the Whole had agreed to delete the word "relevant" (*ibid.*).

30. Some members of the Drafting Committee had felt that insertion of that word would be preferable; the Committee had, however, decided that to do so was not imperative, and thus did not recommend such inclusion. Consequently, with the exception of the deletion agreed by the Committee of the Whole, the text remained identical with the basic proposal.

*Article 6 was adopted without a vote.*

**Article 7 (Full powers)**

31. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, recalled that the Committee of the Whole had adopted the consolidated text of article 7 as proposed by that Committee's Working Group on article 7 (A/CONF.129/C.1/L.43), as orally revised. The text had been referred to the Drafting Committee before the question of the use of the term "powers" in the convention had been resolved. As a consequence of the later adoption by the Committee of the Whole of a text for article 2 which did not contain a definition of that term, the Drafting Committee had replaced in subparagraphs 3(a) and 3(b) of article 7 the term "powers" by the term "full powers".

32. In the English and Spanish versions of the article, subparagraph 1(a) followed the terminology of the 1969 Vienna Convention, while subparagraph 3(a) used the phrase "that person produces". In the French version, both subparagraphs contained the words "*si elle produit*", which referred back to the opening words of paragraph 3. In resolving those discrepancies, the Drafting Committee, desiring to avoid the unfortunate implications of the use of the strictly masculine "he" in English and at the same time to give greater precision to the texts in most of the other languages, had decided to use the words "that person" in both subparagraphs 1(a) and 3(a). In the French version, the words "*si elle produit*" had been replaced by "*si cette personne*". In the Spanish version, there was no need to insert "*la persona*" as the construction of the introductory part of the paragraph made it absolutely clear that the subject was "*una persona*".

33. In line with the new formulation of subparagraphs 1(b) and 2(b), which differed from that in

the 1969 Vienna Convention, minor language alignments had been made in those paragraphs, "concerned" having been rendered in the French version as "*concernés*" and in the Spanish version as "*de que se trate*".

34. In subparagraph 2(b), the expression "of States in which international organizations participate", found in the original text, had been omitted in the light of the text of paragraph 2 of article 9 referred to the Drafting Committee.

35. It had been decided that the text of subparagraph 3(b) might be lightened with no loss of clarity or meaning by the deletion of the phrase "or, as the case may be, of the international organizations concerned".

36. Finally, minor drafting adjustments had been made, as well as grammatical corrections to certain language versions.

*Article 7 was adopted without a vote.*

**Article 8 (Subsequent confirmation of an act performed without authorization)**

37. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that the article, referred directly to the Committee by the Conference, had undergone changes only in the Arabic version, where the word "authorization" had been rendered more precisely and a necessary deletion had been made.

*Article 8 was adopted without a vote.*

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

38. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that paragraph 1 of the article had been referred to the Drafting Committee directly by the Conference. No changes had been made in that paragraph.

39. Paragraph 2, on the other hand, had been referred to the Committee of the Whole for substantive consideration. Adopted by that body in a form worked out in the framework of informal consultations held under the chairmanship of the President of the Conference, it had then been referred to the Drafting Committee.

40. The text of the paragraph had subsequently undergone slight adjustments to bring out more clearly the intended meaning. It had been divided into two sentences, the second of which began "If, however, no agreement is reached on any such procedure, the adoption of the text shall take place . . .". No other changes had been made in paragraph 2.

*Article 9 was adopted without a vote.*

**Article 10 (Authentication of the text)**

41. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that the article had been referred directly to the Drafting Committee by the Conference. No change had been made in the article except for minor grammatical corrections made to the English version in order to align it with the other versions and with the 1969 Vienna Convention on the Law of Treaties.

*Article 10 was adopted without a vote.*

*Article 11 (Means of expressing consent to be bound by a treaty)*

42. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that paragraph 1 of the article had been referred directly to the Drafting Committee by the Conference. Paragraph 2 had been referred to the Committee of the Whole for substantive consideration, after which it had been referred to the Drafting Committee in the form in which it had appeared in the basic proposal.

43. The Drafting Committee had made no changes in either paragraph.

*Article 11 was adopted without a vote.*

*Article 12 (Consent to be bound by a treaty expressed by signature)**Article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty)**Article 14 (Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval)**Article 15 (Consent to be bound by a treaty expressed by accession)**Article 16 (Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession)**Article 17 (Consent to be bound by part of a treaty and choice of differing provisions)**Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force)*

44. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that draft articles 12 to 18 had been referred directly to the Drafting Committee by the Conference and had not been the subject of substantive consideration by the Committee of the Whole.

45. Article 12 had been simplified by the combination of paragraphs 1 and 2 in a single paragraph, as a result of the deletion of the term "powers" by the Committee of the Whole. Since "full powers" now applied to both representatives of States and representatives of international organizations, the same rule would have been stated in former paragraphs 1 and 2. It was thus only logical to combine the two paragraphs into one by simply referring to "the consent of a State or of an international organization", "that State or that organization", and "the State or organization". Finally, since the new combined paragraph referred to both categories of treaties, it was considered appropriate to use for subparagraph (b) the version appearing in the former subparagraph 2 (b), thus covering all possibilities.

46. In the text of subparagraph 2 (a) the words "of the treaty" had been inserted following "signature" in all language versions, in order to align the text with that of the 1969 Vienna Convention. A linguistic alignment had been made in the final part of subparagraph 2 (b) in the Spanish version, and some stylistic improvements had been made in the Arabic version.

47. Article 13 had remained basically unchanged, with the exception of the opening phrase, which had been lightened and now read "The consent of States or of international organizations . . .".

48. Article 14 had been changed in only one place: subparagraph 1 (d) now referred to "full powers". Grammatical and stylistic improvements had been made in the Arabic text.

49. Articles 15 and 16 had been maintained without change.

50. Article 17, as now submitted, reflected an attempt by the Drafting Committee to simplify the text, with no loss of substantive meaning, by combining paragraphs which contained the same rule and by adjusting the rather cumbersome formula which had been used in the original version of paragraph 1. The new version of the article comprised a combination in its paragraph 1 of former paragraphs 1 and 2, and in its paragraph 2, of former paragraphs 3 and 4. Paragraphs 1 and 2 now applied to both categories of treaties. In addition, the formula "the other contracting States and the contracting organizations or, as the case may be, the other contracting organizations and the contracting States" originally found in paragraph 1 of the International Law Commission's draft had been found not only burdensome but not altogether accurate, in view of the many possible combinations and permutations of treaty partners. In certain cases there might be no other contracting States or no other contracting organizations. In order to avoid those complexities and to make the text clearer, the Drafting Committee had agreed to refer simply to "the contracting States and contracting organizations or, as the case may be, the contracting organizations".

51. Finally, article 18 remained as drafted in the basic proposal.

*Articles 12 to 18 were adopted without a vote.*

*Article 19 (Formulation of reservations)*

52. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, recalled that the Committee of the Whole had adopted the text of the basic proposal for the article in an amended form and had referred to the Drafting Committee.

53. As referred, article 19 had comprised two paragraphs which provided for the same rule to apply when a State or international organization formulated a reservation on expressing its consent to be bound by a treaty.

54. In view of that fact, and in an effort to lighten the text, the Drafting Committee had agreed to combine the two paragraphs, so that the opening words now referred to "A State or an international organization" and "formally confirming" had been inserted following "ratifying". That change also aligned article 19 with other provisions of the draft convention which referred to the various means whereby a State or an organization expressed its consent to be bound.

55. Following remarks by Mr. KADIRI (Morocco) and Mr. RADY (Egypt), he said that the figure "1" should be deleted from the French and Arabic versions,

where the introductory paragraph had been inadvertently so numbered.

56. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that in the opinion of his delegation an international organization had no right to formulate a reservation, not only in cases where the reservation was incompatible with the object and purpose of the treaty to which it was a party but also in those cases where the reservation was incompatible with the constituent instrument of the organization or with other existing and legally binding instruments.

*Article 19 was adopted without a vote.*

**Article 20 (Acceptance of and objection to reservations)**

57. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that the article had been referred to the Drafting Committee as amended by the Committee of the Whole. In addition, the Drafting Committee had been requested to examine whether the inclusion in paragraph 2 of the words "the limited number of negotiating States and negotiating organizations or of negotiating organizations, as the case may be, and", which had been proposed in an amendment submitted in the Committee of the Whole (see A/CONF.129/C.1/L.33, para. 1), would improve the drafting. The Drafting Committee had felt that the insertion would indeed improve the text, bringing it closer into line with that of the 1969 Vienna Convention. Those words had consequently been inserted, duly adjusted to match similar expressions found in the aforementioned Convention and expressions found throughout the draft.

58. For reasons similar to those he had mentioned earlier, subparagraph 4 (c) had been slightly adjusted. The phrase "one other contracting State or one contracting organization or, as the case may be, one other contracting organization or one contracting State" had been replaced by the simple formula "one contracting State or one contracting organization".

59. Finally, it had been decided that some adjustments were needed in the English and Russian versions of subparagraph 4 (a), the end of which had consequently been changed in both languages to read "for the reserving State or organization and for the accepting State or organization".

60. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that, in the opinion of his delegation, paragraph 3 of article 30 unjustifiably limited the sovereign right of States to formulate reservations. Such reservations, moreover, could not be made subject to acceptance by any organ of an international organization. Furthermore, paragraph 4 unjustifiably extended the right of international organizations to object to reservations formulated by States. An international organization could object to a reservation only if to do so lay within its competence.

*Article 20 was adopted without a vote.*

**Article 21 (Legal effects of reservations and of objections to reservations)**

**Article 22 (Withdrawal of reservations and of objections to reservations)**

**Article 23 (Procedure regarding reservations)**

**Article 24 (Entry into force)**

**Article 25 (Provisional application)**

**Article 26 (*Pacta sunt servanda*)**

61. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 21 remained unchanged, with the exception of the replacement of the words "author of the reservation" in paragraph 3 of the English and Russian versions by the words "the reserving State or organization".

62. Subparagraph 3 (a) of article 22 had been changed slightly, for the reasons he had indicated earlier. Thus, the phrase "another contracting State or a contracting organization or, as the case may be, another contracting organization or a contracting State" had been changed to read simply "a contracting State or a contracting organization".

63. Article 23 remained unchanged, except for a correction in the English version of paragraph 2, where at the end of the first sentence, the words "by a treaty" had been replaced by "by the treaty".

64. No changes had been made in article 24, with the exception of a correction in the French version of the introductory words of paragraph 3, where the word "*autre*", erroneously inserted before "*organisation internationale*" in the basic proposal, had been removed.

65. The text of paragraph 1 of article 25 remained unchanged. Paragraph 2, however, had been adjusted for the reasons he had indicated previously. The introduction in the basic proposal of the complexities required by the attempt to cover all "other" treaty partner permutations had led to a heavy text which had not, in fact, covered all possible situations. As the text referred to treaty partners being notified, the clear and obvious meaning was that it referred to notifying "other" treaty partners. Thus, the original phrase in paragraph 2, "the other States and the organizations or, as the case may be, the other organizations and the States between which" had been changed to read simply "the States and organizations with regard to which".

66. Article 26 introduced part III of the convention and concerned *pacta sunt servanda*. No changes had been made in that all-important article.

67. Mr. CANÇADO TRINDADE (Brazil) said that, for the record and for the purpose of interpretation, his delegation wished to state that articles 24 and 25, as well as article 12, of both the 1969 Vienna Convention on the Law of Treaties and the present draft articles adopted by the Drafting Committee, as contained in document A/CONF.129/11, should in its view be considered, in respect of States, against the background of the general principle of parliamentary approval of treaties and of the practice ensuing therefrom; but that his delegation also recognized the residuary nature of those provisions of both the 1969 Convention and the present draft articles as adopted by the Drafting Committee.

*Articles 21 to 26 were adopted without a vote.*

**Article 27 (Internal law of States, rules of international organizations and observance of treaties)**

68. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 27 of the basic proposal had been considered substantively by the Committee of the Whole, adopted by it and referred to the Drafting Committee. The latter had made no changes in the text.

*Article 27 was adopted without a vote.*

**Article 28 (Non-retroactivity of treaties)****Article 29 (Territorial scope of treaties)**

69. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, recalled that articles 28 and 29 had been referred directly to the Drafting Committee by the Conference. No changes had been introduced in those articles.

70. Mr. ALMODÓVAR (Cuba) said that as the present convention reproduced, with the same number, text and content, article 28 of the 1969 Vienna Convention on the Law of Treaties, and as no circumstance had arisen to justify any other course, his delegation now wished to reiterate the position it had taken at the 13th plenary meeting of the United Nations Conference on the Law of Treaties on Tuesday, 6 May 1969,<sup>3</sup> in the vote on article 24 of that Convention, which was subsequently renumbered 28 by the Drafting Committee (the numbers of the articles cited being altered as appropriate).

71. In amplification of that point, he wished it to be recorded that it was the understanding of the delegation of Cuba that the rule contained in article 28 could be interpreted only in the sense that if an act or fact or situation which took place or arose prior to the entry into force of a treaty, including the present convention, continued to occur or exist after the entry into force of the treaty, it would be subject to its provisions. Therefore, the principle of non-retroactivity was never violated by the application of a treaty, including the present convention, to situations arising or existing when the treaty entered into force and subsequent to the entry into force of the treaty, including the present convention, even if they first began at an earlier date.

72. The delegation of Cuba interpreted the legal effect of article 28 as having the meaning and scope inferred from paragraph (3) of the International Law Commission's commentary to article 24—later 28—of the 1969 Vienna Convention,<sup>4</sup> which, in the present Convention, had the same number, text and content.

*Articles 28 and 29 were adopted without a vote.*

**Article 30 (Application of successive treaties relating to the same subject-matter)**

73. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, recalled that paragraphs 1 to 5 of article 30 had been referred directly to the Drafting Committee by the Conference. Paragraph 6, however, had

been substantively considered by the Committee of the Whole.

74. Concerning paragraph 6, the Committee of the Whole had approved the idea underlying the International Law Commission's draft and two amendments thereto (A/CONF.129/C.1/L.44 and L.45). All three texts had been referred to the Drafting Committee with the request that it examine the formulation and placement of the ideas contained therein.

75. The Drafting Committee had decided, in line with one of the amendments referred to it, that it was preferable to spell out the meaning of the reference in the Commission's text to Article 103 of the Charter of the United Nations. It had also been agreed that it would not be appropriate to include both a cross-reference to Article 103 and a paraphrase of its contents. Rather, its significance should be clearly set out, without cross-reference. The text now before the Conference had been drafted along the lines of one of the amendments referred to the Committee, but adjusted for purposes of clarity and precision. He pointed out that the use in most language versions of the words "the fact that" was in no way intended to lessen the solemn nature of the legal rule laid down in Article 103 of the Charter of the United Nations. Rather, it was intended to signify the existence of a legal rule, a legal obligation.

76. As to the placement of the provision, it had been thought that it would unduly overburden the text of paragraph 1 if added there. The Committee had therefore retained the provision as paragraph 6, it being clearly understood that its placement there could not be interpreted as detracting from the overriding importance of the provision.

77. In the case of the other five paragraphs of the article no changes had been made, with the exception of a lightening of the phrase at the end of paragraph 5, for reasons which he had already explained. The words "towards another State or an organization or, as the case may be, towards another organization or a State" had been replaced by "towards a State or an organization". In addition, the words "not party to that treaty" which also appeared at the end of paragraph 5 of the basic proposal but which did not appear in the 1969 Vienna Convention, had been deleted as constituting an unnecessary departure from that Convention.

78. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that, in the opinion of his delegation, article 30 did not reflect the full complexity of the situation that might arise in the application of successive treaties. With regard to paragraph 3, his delegation considered that if the operation of the earlier treaty was not terminated as a consequence of the conclusion of a new treaty on the same subject, the provisions of the earlier treaty must be applied to the extent that they created a régime no less—i.e., more—favourable than that established by the later treaty.

*Article 30 was adopted without a vote.*

**Article 31 (General rule of interpretation)****Article 32 (Supplementary means of interpretation)**

<sup>3</sup> *Ibid.*, 13th plenary meeting, paras. 41 to 47.

<sup>4</sup> *Ibid.* (United Nations publication, Sales No. E.70.V.5), p. 32.

*Article 33 (Interpretation of treaties authenticated in two or more languages)*

*Article 34 (General rule regarding third States and third organizations)*

79. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, recalled that articles 31 to 34 had been referred directly to the Drafting Committee by the Conference. No changes had been introduced in the texts.

*Articles 31 to 34 were adopted without a vote.*

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

80. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, recalled that article 38 had been considered substantively by the Committee of the Whole, which had adopted the International Law Commission's draft and had referred it to the Drafting Committee. The latter had made no changes in the text.

81. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that in the opinion of his delegation a customary rule of international law became binding on a State only in cases where that State recognized it as such. It was consequently not binding on a State which did not recognize it as binding.

*Article 38 was adopted without a vote.*

*Article 40 (Amendment of multilateral treaties)*

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

*Article 42 (Validity and continuance in force of treaties)*

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

*Article 44 (Separability of treaty provisions)*

82. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that articles 40 to 44 had been referred directly to the Drafting Committee by the Conference.

83. In article 40, the long phrase in paragraph 2 of the original proposal which read "to all the contracting States and contracting organizations or, as the case may be, to all the contracting organizations" had not been deemed necessary. It had been replaced by the simpler formula "to all the contracting States and all the contracting organizations". In paragraph 4, for the sake of clarity, the words "any party" at the beginning of that paragraph of the basic proposal had been replaced by the 1969 Vienna Convention wording "any State or international organization already a party".

84. The only change made in article 41 was the addition of commas in the appropriate places in certain language versions to bring those versions into line with the 1969 Vienna Convention.

85. Two members of the Drafting Committee had expressed reservations with regard to article 42 and

article 44, paragraph 5, because of their doubts concerning the concept of *jus cogens* in articles 53 and 64. One member had also voiced doubt concerning the use of the word "*terminación*" in the Spanish version of those articles and various other articles.

86. Mr. DELON (France), reiterating his delegation's reservation with regard to article 44 and particularly paragraph 5 thereof, said that if that paragraph were put to the vote his delegation would vote against it. It would not, however, oppose the adoption of article 44 by consensus, but would be unable to join in that consensus.

*Articles 40 to 44 were adopted without a vote.*

*Article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties)*

87. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 46 had received substantive consideration in the Committee of the Whole, which had adopted the International Law Commission's text and had referred it to the Drafting Committee together with two amendments (A/CONF.129/C.1/L.48/Rev.1 and L.52).

88. One issue raised by those amendments was whether to revert to the wording of article 46, paragraph 2, of the 1969 Vienna Convention in drafting paragraphs 2 and 4 of article 46 of the basic proposal, thus introducing the concept of conduct in accordance with normal practice and in good faith, which did not appear in the International Law Commission's draft, although several speakers had expressed doubt whether there could be said to exist a "normal practice of international organizations" in the matter. It had been recognized, however, that such a practice might well develop in the future and that such developments should not be precluded. A text had therefore been drafted which referred to "the normal practice of States and, where appropriate, of international organizations". It had then been decided to combine paragraphs 2 and 4 in one paragraph covering both States and international organizations, while redrafting them along the lines suggested in the amendments and also to take account of the reference to "normal practice" to which he had referred. Certain language versions had been brought even more closely into line with the wording of the 1969 Vienna Convention, and former paragraph 3 had been renumbered paragraph 2.

*Article 46 was adopted without a vote.*

*Article 47 (Specific restrictions on authority to express the consent of a State or an international organization)*

*Article 48 (Error)*

*Article 49 (Fraud)*

*Article 50 (Corruption of a representative of a State or of an international organization)*

*Article 51 (Coercion of a representative of a State or of an international organization)*

*Article 52 (Coercion of a State or of an international organization by the threat or use of force)*

*Article 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))*

*Article 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties)*

*Article 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)*

89. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that articles 47 to 55 had been referred directly to the Drafting Committee by the Conference, and certain changes had been made with a view to simplifying the text, in keeping with previous articles. Thus, the phrase at the end of article 47 reading: "to the other negotiating States and negotiating organizations or, as the case may be, to the other negotiating organizations and negotiating States", had been replaced by "to the negotiating States and negotiating organizations". Similarly, in article 54, paragraph (b), the phrase "with the other contracting States and the other contracting organizations or, as the case may be, with the other contracting organizations" had been replaced by "with the contracting States and contracting organizations".

90. Certain grammatical corrections had been made in some of the articles, such as article 48, where, in the Spanish text, the word "*dieran*" had been replaced by "*diera*".

91. The title of article 52 had been brought into line with the articles immediately preceding by the addition of the words "of a State or of an international organization", after "Coercion".

92. One member of the Drafting Committee had expressed reservations in respect of the contents of articles 48 to 51, while two members had expressed reservations with respect to the underlying concept of article 53 relating to *jus cogens*.

93. Mr. DELON (France) said that his delegation wished to reiterate the reservation it had expressed in the Drafting Committee with respect to article 53, which it opposed because it did not agree with the recognition that article gave to *jus cogens*. His delegation would not oppose a consensus on the article, but would not join in that consensus.

94. Mr. GÜNEY (Turkey), referring to article 53, said that *jus cogens* was still a highly controversial concept which raised the fundamental question of how to recognize the scope and content of a peremptory norm of general international law. It was not enough to say that such norms were recognized by the international community as a whole.

95. At the 1969 Vienna Conference his delegation had fully shared the concern which had been expressed regarding the imprecision of the concept of *jus cogens* and the interpretations to which it could give rise, and had entered serious reservations in that regard. The stability and certainty of treaty relations dictated that

any exception to the *pacta sunt servanda* rule should be formulated with care and in unambiguous and detailed terms. There had, however, been a divergence of views since 1969 regarding the nature of norms of *jus cogens*, which it had not been possible to define. The international community and international law had not reached the stage where a clear demarcation line could be drawn between peremptory and other norms. The 1969 Vienna Convention had failed in so far as it had not established the precise content of a peremptory norm of international law, a breach of which could have extremely serious effects, such as, for instance, rendering international agreements unlawful irrespective of the will of the parties which had concluded them.

96. As drafted, article 53 could be likened to an article in a penal code that provided for punishment but did not specify which acts would constitute offences. Consequently, while his delegation would not oppose any consensus or agreement that might be reached on article 53, it wished, for the reasons he had stated, to dissociate itself from any such consensus or agreement.

97. Mr. MÜTZELBURG (Federal Republic of Germany) said that his delegation was prepared to join in a consensus on article 53 on the clear understanding that its agreement to do so was inextricably linked with the finding by the Conference of a satisfactory solution to the problem of the peaceful settlement of disputes. If his delegation was incorrect in its assumption that such a solution could be found, the basis on which its acceptance had been founded would no longer exist and it would have to draw the necessary conclusions.

*Articles 47 to 55 were adopted without a vote.*

*Article 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal)*

98. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 56 had been considered substantively by the Committee of the Whole. The basic proposal for the article had been adopted and had been referred to the Drafting Committee (A/CONF.129/DC/10). The only change introduced by the Drafting Committee was the replacement of "*puede*" by "*pueda*" in paragraph 1 (b) of the Spanish text to bring the wording into line with that of the 1969 Vienna Convention.

99. Mr. RAMADAN (Egypt) said that his delegation wished to enter a reservation with respect to paragraph 1 (b) of the article.

100. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that in the opinion of his delegation, denunciation could take place only when the right of denunciation was stipulated in the treaty and only when recourse was had to it in accordance with the terms and conditions of the treaty. There was in fact no such thing as implicit denunciation.

*Article 56 was adopted without a vote.*

*Article 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties)*

*Article 58* (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only)

*Article 59* (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty)

*Article 60* (Termination or suspension of the operation of a treaty as a consequence of its breach)

101. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that articles 57 to 60 had been referred directly to the Drafting Committee by the Conference.

102. Article 57 had been lightened without loss of meaning by the replacement of the phrase in subpara-

graph (b) of the basic proposal reading “with the other contracting States and the other contracting organizations or, as the case may be, with the other contracting organizations” by “with the contracting States and contracting organizations”.

103. In the Spanish version of the three subparagraphs of paragraph 2 of article 60, the word “*autor*” following “*el estado*” had been deleted and the word “*autora*”, following “*organización internacional*” had been replaced by “*autor*”, in line with the text of article 20, subparagraphs 4 (a) and (b).

*Articles 57 to 60 were adopted without a vote.*

*The meeting rose at 5.10 p.m.*

## 6th plenary meeting

Wednesday, 19 March 1986, at 4.25 p.m.

*President:* Mr. ZEMANEK (Austria)

**Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/122 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)**

[Agenda item 11] (*continued*)

**Adoption of a convention and other instruments deemed appropriate and of the Final Act of the Conference**

[Agenda item 12] (*continued*)

**TEXTS PROPOSED BY THE DRAFTING COMMITTEE**  
(*continued*)

1. The PRESIDENT invited the Chairman of the Drafting Committee to continue his presentation of that Committee’s report (A/CONF.129/11 and Add.1) and the Conference to consider it.

*Article 61* (Supervening impossibility of performance)

2. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, referring to document A/CONF.129/11, said that the Committee of the Whole had considered article 61 substantively. It had adopted the text proposed by the International Law Commission (A/CONF.129/4) and had referred it to the Drafting Committee. The latter had made no change in the draft article.

*Article 61 was adopted without a vote.*

*Article 63* (Severance of diplomatic or consular relations)

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

3. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that articles 63 and 64 had been referred directly by the Conference to the Drafting Committee, which had recommended no changes in those draft articles. However, reservations previously made in connection with the concept of *jus cogens* had been reiterated with regard to article 64 by two members of the Drafting Committee.

4. Mr. DELON (France) said that his delegation wished to reiterate the reservation it had expressed in respect of article 53 in connection with the concept of *jus cogens* (5th plenary meeting). Although his delegation would not oppose the adoption of article 64 by consensus, it did not wish to be associated with that consensus.

5. Mr. GÜNEY (Turkey) said that his delegation wished to reiterate in respect of article 64 the reservation it had expressed previously in respect of article 53 in connection with the concept of *jus cogens* (*ibid.*), as the reservation applied to both articles. While his delegation would not oppose agreement in the Conference to adopt article 64 without a vote, it disassociated itself from such agreement.

*Articles 63 and 64 were adopted without a vote.*

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

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

*Article 69* (Consequences of the invalidity of a treaty)

*Article 70* (Consequences of the termination of a treaty)

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

**Article 72** (Consequences of the suspension of the operation of a treaty)

6. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that articles 67 to 72 had been referred to the Drafting Committee by the Conference.

7. In article 67, the final word of paragraph 2, "powers", had been replaced by "full powers", and a punctuation error in the English version of paragraph 2 had been corrected by the removal of the comma after "paragraph 2".

8. No change had been made to article 68.

9. In article 69, subparagraph 2 (a), the French version had been aligned with the French text of the 1969 Vienna Convention on the Law of Treaties<sup>1</sup> by adding the word "pour" after "d'établir".

10. In article 70, in the French version of subparagraph 1 (b) a comma had been inserted after "des parties" to align the text with that of the 1969 Vienna Convention.

11. No changes had been introduced in article 71. However, reservations had been expressed because of the references in that text to articles 53 and 64 dealing with the concept of *jus cogens*, and also in connection with the use of the word "terminación" in the Spanish version.

12. No change had been made in article 72, with the exception of the insertion in subparagraph 1 (a) of the English version of the definite article "the" before "suspension", in order to align the wording with that in the 1969 Vienna Convention.

13. Mr. DELON (France) said that, as article 71 was linked with articles 53 and 64, his delegation wished to reiterate with respect to article 71 the reservation which it had expressed at the previous meeting and this meeting in respect of articles 53 and 64. While his delegation would not oppose the adoption of article 71 by consensus, it could not join in such a consensus, for the reasons it had already given.

*Articles 67 to 72 were adopted without a vote.*

**Article 74** (Questions not prejudged by the present Convention)

14. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that the present article 74 had been referred to the Committee of the Whole for substantive consideration. The Committee of the Whole had amended paragraph 1 of the text of the basic proposal and had then adopted the article, as amended, and had referred it to the Drafting Committee. Subsequently, after the Committee of the Whole had agreed at its 28th meeting to delete article 36 bis, that Committee had agreed to include in former article 73, now

article 74, a paragraph 3 along the lines proposed in an amendment (A/CONF.129/C.1/L.65) submitted to that Committee, it being understood that the Drafting Committee would review the wording of the new paragraph 3, as well as the title of article 74.

15. The Drafting Committee had not altered the first two paragraphs of the article. However, as a result of oral suggestions made in the framework of the informal consultations held under the chairmanship of the President of the Conference, the Drafting Committee had modified the new paragraph 3 to make it read "... any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party".

16. Finally, the Drafting Committee had decided, in the light of the addition of paragraph 3, to avoid making an already long title even longer. It therefore recommended that the title of article 74 should read simply "Questions not prejudged by the present Convention".

17. Mr. PAWLAK (Poland) said that, in his delegation's view, paragraph 3 of article 74, which had been introduced into the article as a result of the amendment submitted by some international organizations as a form of substitute for the former draft article 36 bis proposed by the International Law Commission, which had now been deleted, should not be understood as allowing any possibility of a treaty concluded by an international organization producing any legal effects for States members of the organization which were not parties to the treaty, unless those States members expressly consented to accept the relevant provisions of the treaty.

*Article 74 was adopted without a vote.*

**Article 75** (Diplomatic and consular relations and the conclusion of treaties)

18. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 75 had been referred directly to the Drafting Committee by the Conference. It had not been modified except for a change in the Spanish version where, at the beginning of the second sentence, "La celebración de un tal tratado" had been replaced by "Tal celebración".

*Article 75 was adopted without a vote.*

**Article 76** (Case of an aggressor State)

19. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 76, the former article 75, had been the subject of substantive consideration by the Committee of the Whole, which had adopted the text proposed by the International Law Commission for that article and had referred it to the Drafting Committee. The Drafting Committee had made no changes in the text.

20. Mr. BOESEN (Federal Republic of Germany) said that his delegation had made a statement expressing its understanding of article 76 at the time of its consideration in the Committee of the Whole (23rd meeting). He did not propose to repeat that statement but, in drawing the attention of the Con-

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

ference to it, reaffirmed his delegation's understanding of the article.

*Article 76 was adopted without a vote.*

#### Article 77 (Depositaries of treaties)

21. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 77 had been referred directly to the Drafting Committee by the Conference. No changes had been made by the Committee, except for the correction of a typographical error in the Russian version.

*Article 77 was adopted without a vote.*

#### Article 78 (Functions of depositaries)

22. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that this article had been the subject of substantive consideration by the Committee of the Whole, which had adopted the International Law Commission's text for the article and had referred it to the Drafting Committee.

23. In subparagraph 1 (a), the reference to "powers" had been deleted and the phrase adjusted along the lines of the 1969 Vienna Convention. In subparagraphs 1 (b), 1 (e) and 1 (f), some simplification had been achieved by omitting the phrase "or, as the case may be, the organizations".

24. Finally, in subparagraph 2 (b) the adjective "international" had been inserted before "organizations" to make it clearer that the international organization concerned was the depositary, not the organization referred to in the opening words of the paragraph or in subparagraph 2 (a).

*Article 78 was adopted without a vote.*

#### Article 79 (Notifications and communications)

##### Article 80 (Correction of errors in texts or in certified copies of treaties)

##### Article 81 (Registration and publication of treaties)

25. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that articles 79, 80 and 81 had been referred directly to the Drafting Committee by the Conference.

26. Article 79 had been somewhat lightened in subparagraph (a) by replacing the phrase "to the States and organizations or, as the case may be, to the organizations" by the phrase "to the States and organizations". Some grammatical corrections had also been made in various language versions.

27. The only adjustment to article 80 was in the English version where, near the end of the introductory part of paragraph 1, the phrase "unless the said States and organizations" had been replaced by "unless those States and organizations". One member had expressed a reservation with respect to paragraph 5 of article 80.

28. No changes had been made in article 81. One member had expressed a reservation in respect of the contents of the article.

*Articles 79, 80 and 81 were adopted without a vote.*

#### *Titles of parts II to VII and sections thereof*

29. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that the Drafting Committee recommended the adoption of the titles to parts II to VII and the sections thereof as contained in the basic proposal by the International Law Commission.

*The titles of parts II to VII and the sections thereof were adopted without a vote.*

30. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, drew attention to the further recommendations of the Committee contained in document A/CONF.129/11/Add.1.

#### *Preamble*

31. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, recalled that the Committee of the Whole had been entrusted with the task of considering the preamble. It had adopted a text worked out in the framework of consultations held (A/CONF.129/C.1/L.77) and had referred that text to the Drafting Committee, requesting it to examine carefully the various paragraphs and the interrelationships between them and to consider the most appropriate ordering of the paragraphs.

32. The Committee had examined the draft referred to it with care, and had decided on a new ordering of the paragraphs in an attempt to set out in a logical and coherent fashion the various elements of the preamble. The order of the third and fourth paragraphs of the text as referred to the Committee had been reversed; what had previously been the fifteenth paragraph had been moved up to become the new sixth paragraph; the former eighth paragraph had been moved to its customary position as the last preambular paragraph; and the order of the former thirteenth and fourteenth paragraphs had been reversed.

33. As far as the drafting of the paragraphs was concerned, some changes had been made in order to align the texts with corresponding paragraphs of the 1969 Vienna Convention, while other changes had been made in order to align the various language versions. In some places the language had been made more precise, and minor grammatical corrections had also been introduced.

34. In order to save the time of the Conference, he would allude to only some of those changes. In the second preambular paragraph, in order to bring out more clearly the intended meaning, the phrase originally worded "Recognizing the ever increasing importance of treaties as a source of international law and their consensual nature" had been changed to "Recognizing the consensual nature of treaties and their ever-increasing importance as a source of international law".

35. In the fifth preambular paragraph, the opening phrase "Bearing in mind" had been replaced by "Believing that", to match a similar preambular paragraph in the 1969 Vienna Convention. The final phrase of that paragraph had also been modified. The original text, beginning "as a means of ensuring . . .", had been simplified and adjusted to give it a slightly wider ambit,

so that it read "are means of enhancing legal order in international relations and of serving the purposes of the United Nations".

36. In the Spanish version of the eleventh preambular paragraph, the word "*jurídica*" had been deleted in order to align the text with other language versions. Other minor grammatical adjustments had been made in various paragraphs of the Spanish version.

37. The eleventh preambular paragraph now referred, in all language versions except the Russian, to "international organizations", i.e., in the plural.

38. In the fourteenth preambular paragraph, the French and Spanish versions had been brought into line with the other language versions by the use of the words "*devraient*" and "*deberían*" respectively.

39. Mr. NETCHAEV (Union of Soviet Socialist Republics) asked whether the word "nations", as employed in the ninth preambular paragraph, was intended to signify States or peoples.

40. The PRESIDENT said it was his understanding that the word was used in the paragraph in the same sense as in the Charter of the United Nations.

41. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, concurred with that understanding.

42. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that notwithstanding that explanation, and his own delegation's understanding that for the purposes of the Charter the United Nations consisted of States, the word "nation" could be interpreted differently in English and in Russian. Provided, however, that other delegations agreed that in the present context the word was also synonymous with "States", he would not dwell further on the matter.

43. The PRESIDENT said he understood the wording adopted by the Drafting Committee to have originated in a proposal submitted in English by Czechoslovakia, the German Democratic Republic and the Ukrainian Soviet Socialist Republic (A/CONF.129/C.1/L.72), which had contained the phrase "peaceful co-operation among nations, whatever their constitutional and social systems".

44. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that in the eleventh preambular paragraph, in all language versions except the Russian, the text referred to "international organizations", i.e., in the plural, with a collective connotation. It was his recollection, however, that the discussion had brought out—in conformity with what was indeed the case—the distinctive, individualized nature of the capacity of international organizations to conclude treaties; the singular form used in the Russian version was intended to reflect that reality.

45. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that he did not understand the reference to international organizations in the plural as implying that their capacity to conclude treaties did not vary from one organization to another.

*The preamble was adopted without a vote.*

*Article 3 (International agreements not within the scope of the present Convention)*

46. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 3 had been considered substantively by the Committee of the Whole, which had adopted a text worked out in the framework of consultations held under the chairmanship of the President of the Conference (A/CONF.129/C.1/L.75) and had referred that text to the Drafting Committee.

47. Only minor changes had been made by the Drafting Committee. The standard change from "present articles" to "present Convention" or simply "Convention", depending upon the 1969 Vienna Convention model, had been introduced. Also, in the English version, the word "or" had been omitted from the conclusion of subparagraphs (i) and (ii) but inserted at the end of subparagraph (iii).

*Article 3 was adopted without a vote.*

*Article 35 (Treaties providing for obligations for third States or third organizations)*

*Article 36 (Treaties providing for rights for third States or third organizations)*

*Article 37 (Revocation or modification of obligations or rights of third States or third organizations)*

*Article 39 (General rule regarding the amendment of treaties)*

48. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that articles 35, 36, 37 and 39 had been referred directly to the Drafting Committee by the Conference. The drafting of two of those articles had been simplified. Article 35, initially composed of two paragraphs, had been made a single paragraph by the Drafting Committee, so that it now dealt, in a single provision, with obligations arising both for a third State and for a third organization. Similarly, in article 37, paragraphs 1 and 2 of the basic proposal had been combined in a single paragraph 1, and paragraphs 3 and 4 of the basic proposal in a single paragraph 2. Former paragraph 5 had been re-numbered paragraph 3 accordingly.

49. In the International Law Commission's basic proposal for all four articles the adjective "relevant" had qualified the expression "rules of the [or that] organization". The Committee of the Whole had decided, however, to delete the word "relevant" in those articles, leaving it open for the Drafting Committee to recommend the re-insertion of that word should it see an imperative necessity for doing so. Although some members of the Drafting Committee had thought it preferable to maintain the word "relevant", it had eventually been agreed that there existed no absolute need for its conclusion. Thus, in articles 35, 36, 37 and 39, the word "relevant" did not appear as qualifying "rules of the organization".

50. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that in the opinion of his delegation, arti-

cle 36 did not in any way affect the rights of States benefiting from a most-favoured-nation regime.

*Articles 35, 36, 37 and 39 were adopted without a vote.*

**Article 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)**

51. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 45 had been substantively considered by the Committee of the Whole, which had adopted the text proposed by the International Law Commission and had referred it to the Drafting Committee together with two amendments (A/CONF.129/C.1/L.46 and L.47).

52. The Drafting Committee had discussed the article and the proposed amendments exhaustively. Great efforts had been made to arrive at generally acceptable versions of the amendments, but it had unfortunately not been possible to reach any agreement on incorporation of the amendments in the draft article. The Committee had therefore considered that the wisest course was to adopt the text of the article as proposed by the International Law Commission. It was that text which was now before the Conference.

53. Mr. ALMODÓVAR (Cuba) said that, in view of the essential need for certainty in the expression of State consent, his delegation considered that a State could only be deemed to have acquiesced in the validity of a treaty or in its maintenance in force or in operation, as the case might be, if that State had expressly so agreed as provided in subparagraph 1 (a) of article 45. His delegation considered, moreover, that, in the context of the progressive development of international law, the practice set forth in subparagraph 1 (b) had not been sufficiently established to be included as a legal rule in that article.

*Article 45 was adopted without a vote.*

**Article 62 (Fundamental change of circumstances)**

54. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that article 62 had been considered substantively by the Committee of the Whole. That Committee had adopted the text of the basic proposal for the article and had referred it to the Drafting Committee, together with two drafting amendments (A/CONF.129/C.1/L.57 and L.59).

55. The Drafting Committee had examined the article and the two amendments in depth, and great efforts had been made to achieve a generally acceptable version of the amendments. Unfortunately, it had not proved possible to reach agreement on the question of incorporating the amendments in the text.

56. The Committee had therefore deemed it wisest to adopt the International Law Commission's text for article 62. The only change the Drafting Committee had made in the text was the deletion of a comma in paragraph 2. Two members of the Drafting Committee had expressed reservations concerning the article as adopted.

57. Mrs. OLIVEROS (Argentina) said that her delegation was not satisfied with the wording of article 62. It would have wished the stability of treaties to have been guaranteed only for those cases in which it was the States themselves which determined their boundaries. The language used in the draft convention was not clear, and the earlier commentaries by the International Law Commission favoured confusion in that connection. Her delegation had been surprised at the determined opposition encountered by its amendment, an opposition which defended anachronistic colonialist positions. Those out-of-date ideas and that absence of legal and political realism were incomprehensible.

58. Nevertheless, her delegation was glad to have had an opportunity to provoke an interesting debate and to hear statements at the present Conference to the effect that a boundary could exist only between States and could be established only by States. She wished the record to show that her delegation construed article 62 as referring exclusively to the boundaries of States determined by States.

59. Mr. AL JARMAN (United Arab Emirates) confirmed his delegation's previous statement concerning article 62 in the Committee of the Whole (22nd meeting), and placed on record his delegation's understanding that the treaties referred to in the article were those establishing boundaries between at least two States and that, if any international organizations were parties to them, that would of course not be as organizations establishing those boundaries.

60. Mr. CRUZ FABRES (Chile) said that his delegation would not oppose the adoption of article 62 by consensus. It wished to state, however, that it could not associate itself with such a consensus, because to do so would be incompatible with the reservation formulated by Chile concerning article 62 of the 1969 Vienna Convention on the Law of Treaties.<sup>2</sup>

61. Mr. MORELLI (Peru) said that his delegation would join the consensus on article 62 on the clear understanding that the reference to boundaries in that article was to boundaries between States and to boundaries determined by States.

62. Mr. NETCHAEV (Union of Soviet Socialist Republics) declared his delegation's understanding that article 62 referred to boundaries between States established by States alone; international organizations had no role to play in that regard.

*Article 62 was adopted without a vote.*

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

63. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that paragraphs 1 and 2, and 4 to 6 of article 65 had been referred directly to the Drafting Committee. Paragraph 3, however, had been the subject of substantive consideration by the Committee of the Whole, which had adopted the International Law

<sup>2</sup> *Ibid.* (United Nations publication, Sales No. E.70.V.6), 96th meeting, paras. 23 to 32.

Commission's text with an amendment and had referred it to the Drafting Committee.

64. The only change made by the Drafting Committee to paragraph 3 had been the alignment of the various language versions with the corresponding provisions of the 1969 Vienna Convention. Thus, in Spanish "*no obstante*" had been replaced by "*por el contrario*".

65. As for the five paragraphs referred directly to the Drafting Committee, the only change made in them was in paragraph 4, where the word "relevant" had been deleted in accordance with the decision taken on that question by the Committee of the Whole.

66. Mr. HERRON (Australia) recalled his delegation's statement in the Committee of the Whole during the latter's consideration of draft article 65 (*ibid.*) and the fact that his delegation had favoured adoption of the International Law Commission's draft without amendment.

67. In accepting article 65 as now recommended by the Drafting Committee, his delegation wished to place on record its understanding regarding the meaning of paragraph 3, namely that any other party could at any time object to the invocation by a party of 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. Such other party was not limited, as to the time for making objection, to the period referred to in paragraph 2. In consequence, the means indicated in Article 33 of the Charter of the United Nations for peaceful settlement of disputes could be triggered at any time, consistently with the priority of obligations contained in the Charter. Furthermore, the liberty of action of the Security Council under Article 33, paragraph 2, of the Charter remained unaffected by any provision of article 65 of the present convention.

68. Mr. NETCHAEV (Union of Soviet Socialist Republics) drew attention to a typing error in the Russian version of article 65, an error which he assumed would be corrected by the Secretariat.

69. The PRESIDENT thanked the Soviet Union representative and assured him that the necessary correction would be made by the Secretariat.

*Article 65 was adopted without a vote.*

#### *Article 73 (Relationship to the Vienna Convention on the Law of Treaties)*

70. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that the Committee of the Whole had referred to the Drafting Committee two proposals for the inclusion in the draft convention of a new article concerning the relationship between the Convention and the 1969 Vienna Convention, with a view to the preparation by the Drafting Committee of a consolidated text. That text was now before the Conference. The Drafting Committee considered that the most appropriate place for the new article would be as the first article in part VI, "Miscellaneous Provisions", which would entail only a minimal departure from the numbering of the articles in the 1969 Vienna Convention. As a consequential amendment, articles 73 to 80 should be

renumbered 74 to 81, with the cross-reference in former article 78 being modified accordingly.

71. Mr. ALMODÓVAR (Cuba) said that, in accepting the reference to the 1969 Vienna Convention in article 73 and elsewhere in the new convention, his delegation wished to reiterate in their entirety—with appropriate adjustment of article numbers to refer to those of that convention—the statements made by the delegation of Cuba at the 30th plenary meeting of the United Nations Conference on the Law of Treaties, held on 19 May 1969, regarding article 77 (later article 4) and at the 13th plenary meeting of the same Conference, held on 6 May 1969, regarding article 24 (later article 28) of the 1969 Convention, statements which it had reiterated at the present Conference during the consideration of draft articles 4 and 28 (5th meeting).

*Article 73 was adopted without a vote.*

#### *Title of the Convention*

72. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, said that the Drafting Committee recommended that the title of the Convention should be: "Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations".

*That recommendation was adopted without a vote.*

73. Mr. AL JARMAN (United Arab Emirates) observed that certain expressions used in the Arabic version of document A/CONF.129/11/Add.1 did not accord with the wording adopted in the English version. He proposed to submit his comments in that regard to the Secretariat with a view to the necessary changes being made.

74. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, assured the Conference that the necessary changes would be made.

#### *Report of the Credentials Committee*

75. The PRESIDENT invited the Chairman of the Credentials Committee to introduce the report of the Credentials Committee (A/CONF.129/10 and Corr.1).

76. Mr. HUBERT, Chairman of the Credentials Committee, said that the report of the Credentials Committee required no explanation. However, certain changes needed to be made in it in order to bring it up to date, changes which were found in document A/CONF.129/10/Corr.1.

77. Paragraph 10 of the report contained a draft resolution which the Credentials Committee recommended for adoption by the Conference.

78. Mr. JOMARD (Iraq) said that he wished to enter a reservation on behalf of the States members of the Arab League represented at the Conference regarding the credentials submitted by Israel. Those States did not recognize the so-called State of Israel, and the credentials of Israel, moreover, had been issued in the City of Jerusalem, which was under military occupation by the Israeli entity. The United Nations had condemned Israel's efforts to transform occupied Jerusalem into its own capital in violation of the Charter of the United

Nations and the rules of international law. Accordingly, any act issued and signed by Israel in Jerusalem, including the credentials it had submitted to the Conference, was to be regarded as unlawful.

79. MR. SHASH (Egypt) said that Egypt regarded the Israeli occupation of Arab territories in the West Bank, East Jerusalem, the Gaza Strip, the Golan Heights and the Lebanese territories as unlawful and a breach of the norms of international law and of the Charter and resolutions of the United Nations. It did not recognize the annexation of those occupied Arab territories.

80. Mrs. GOLAN (Israel) said that the credentials of Israel had been duly examined by the Credentials Committee in accordance with the rules of procedure of the Conference and had been accepted by that Committee. Her delegation had been invited to attend the Con-

ference by the Secretary-General of the United Nations in the same way as the delegation of any other State, and its credentials, having been approved by the Credentials Committee, could not now be questioned by other delegations. As to the other remarks which had been made, they were in the nature of political innuendo and had no place at the Conference.

81. The PRESIDENT said that, in the absence of a further comment, he would take it that the plenary wished to adopt the report of the Credentials Committee (A/CONF.129/10 and Corr.1), together with the resolution submitted in paragraph 10 thereof.

*It was so decided.*

*The meeting rose at 5.40 p.m.*

## 7th plenary meeting

Thursday, 20 March 1986, at 11.05 a.m.

*President:* Mr. ZEMANEK (Austria)

**Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4 and A/CONF.129/9)**

[Agenda item 11] (*continued*)

**Adoption of a convention and other instruments deemed appropriate and of the Final Act of the Conference**

[Agenda item 12] (*continued*)

**TEXTS PROPOSED BY THE DRAFTING COMMITTEE**  
(*continued*)

1. The PRESIDENT invited the Chairman of the Drafting Committee to introduce the final parts of that Committee's report (A/CONF.129/11/Add.2 and Add.3) and the Conference to consider them.

### *Final provisions*

2. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, recalled that the Committee of the Whole had adopted the text of the final provisions appearing in document A/CONF.129/C.1/L.79, as orally revised, and had referred them to the Drafting Committee.

3. As a result of the decision taken by the Conference at its 6th meeting to include a new article 73 in the convention, the articles following it had been renumbered. The blank spaces in the former article 81—which was numbered 82 in the document before the Conference—had been filled in the customary manner. The convention would thus be open for signature until 31 December 1986 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1987, at United Nations Headquarters.

4. Article 85—formally article 84—had been amended by the Drafting Committee in order to bring out more clearly the intended meaning. The wording of the final phrase of paragraph 3 had been changed to read “or at the date the Convention enters into force pursuant to paragraph 1, whichever is later.”

5. With regard to the final testamentary paragraph, the indication of the date of signature of the convention would be completed once the Conference had taken a decision on that matter.

6. In conclusion, he said that the Drafting Committee had decided that the heading “Part VIII” and the title “Final provisions” should precede article 82, following the model of the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup>

7. Mr. TEPAVICHAROV (Bulgaria), speaking on behalf of the Eastern European group of countries, said that their delegations took the view that international organizations participating in the Conference, as secondary subjects of international law did not have the right to sign the convention. However, they could accede to the convention if their competent organs so decided. The question was important, in that the text before the Conference altered well-established international practice. His own delegation could not participate in any consensus on draft articles 82 to 86, and would make its views on the matter clear at meetings of the competent organs of the international organizations of which Bulgaria was a member.

8. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation agreed with the representative of Bulgaria that delegations with observer status did not have the right to sign the convention.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

9. Mr. ALMODÓVAR (Cuba) said that international organizations invited to the Conference would not be parties to the convention in the full sense of the term, and that a contradiction would arise if they were accorded the right to sign the instrument.

10. Mr. VOGHEL (Canada), speaking on behalf of the delegations of France, the Federal Republic of Germany, the United Kingdom, the United States of America and his own delegation, said that, while those delegations joined in the consensus on the final provisions of the convention, their acceptance of those clauses should not be construed as a change in their position concerning the legal nature of the participation of Namibia, as represented by the United Nations Council for Namibia.

*Articles 82 to 86 and the title of part VIII were adopted without a vote.*

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

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

11. Mr. AL-KHASAWNEH, Chairman of the Drafting Committee, introducing document A/CONF.129/11/Add.3, containing the title and text of article 66 and the text of the annex, said that draft article 66 had been the subject of considerable substantive discussion in the Committee of the Whole. At its 30th meeting, that Committee had adopted the text of the article as contained in document A/CONF.129/C.1/L.69/Rev.2 and had referred it to the Drafting Committee.

12. The Drafting Committee had made a number of changes in the text of the article. First, "present articles" had been replaced by "present Convention", a change which had also been made in the annex. Secondly, at the end of subparagraph 2 (b), the final phrase had been adjusted to reflect more clearly the relevant provisions of the Charter of the United Nations and the Statute of the International Court of Justice, as well as to clarify the original expression "the organization concerned". The phrase "the organization concerned to request an advisory opinion of the Court in accordance with Article 96 of the Charter of the United Nations" had been altered to read "an international organization, which is a party to the dispute and is authorized in accordance with Article 96 of the Charter of the United Nations, to request an advisory opinion of the International Court of Justice in accordance with Article 65 of the Statute of the Court". Having made that change, the Committee had brought the final words of subparagraph 2 (c) into line with the new closing words of subparagraph 2 (b).

13. Certain changes had also been made in some of the language versions. For example, in the former English version of subparagraph 2 (b), the word "ask" had been used. That had been replaced by "request". At the beginning of subparagraph 2 (f) in the Spanish version, the word "deniega" had been replaced by "rechaza". Some necessary changes had also been made in the Arabic version of paragraph 2, subparagraphs (b), (c) and (d). Lastly, the title of the article had been changed to bring it into line with that of the corresponding article

of the 1969 Vienna Convention, since the article now provided procedures for judicial settlement.

14. The annex had been considered substantively by the Committee of the Whole and was linked to the provisions of article 66. At its 30th meeting, that Committee had adopted the text of the annex as it appeared in the basic proposal and had referred it to the Drafting Committee, together with amendments proposed by the Soviet Union (A/CONF.129/C.1/L.61) and the Netherlands (A/CONF.129/C.1/L.67).

15. As a consequence of the adoption of the text of article 66, certain consequential changes in the text of the annex had been required. At the beginning of paragraph 2, in place of the reference to "article 66, paragraph (a)" the new text before the Conference now read "article 66, paragraph 2, subparagraph (f), or agreement on the procedure in the present annex has been reached under paragraph 3". A similar change had been required in another paragraph included under paragraph 2. As a further consequential change, the reference in the second sentence of paragraph 2 to "article 66, paragraph (b)" had been changed to "article 66, paragraph 4".

16. In paragraph 1, the second sentence had been changed to reflect more appropriately the final provisions of the present convention. The phrase "or a State party to the present articles and any international organization to which the present articles have become applicable" had been modified to read simply "and every party to the present Convention". Also in paragraph 1, at the beginning of the third sentence, the word "term" had been clarified to read "term of office".

17. In the introductory part of paragraph 2 it had been thought useful to be precise in order to avoid any possible lacuna. The opening words of the paragraph, which originally had read "The States and international organizations" now read "The States, international organizations or, as the case may be, the States and organizations". The same adjustment had been made to the opening words of the paragraph following subparagraph 2 (b).

18. With regard to subparagraph 2 (b) itself, one amendment referred to the Drafting Committee had called for an addition to the subparagraph. The Drafting Committee had felt that one of the concerns addressed by the amendment, namely to exclude the possibility that a dispute between an international organization and any State would be considered by nationals of that State only, did not require to be dealt with in the text. As for the other concern addressed in the amendment, namely to exclude the possibility of a dispute between two international organizations being considered by nationals of one and the same State, it was agreed that that concern, though a highly theoretical possibility, could best be met by the inclusion of appropriate language at the end of subparagraph 2 (b). The clause in question began with the word "provided" and, in the English version, now referred to "nationals" rather than "citizens".

19. In section II of the annex, in the English version of paragraph 5 the second sentence had been amended to read "In the event of an equality of votes, the vote of

the Chairman shall be decisive'', which brought the text more closely into line with the other language versions and eliminated an element of ambiguity.

20. A further amendment referred to the Drafting Committee had concerned the addition of a paragraph to section III of the annex which would have provided that the Conciliation Commission would decide in the event of a disagreement as to whether the Commission acting under that section had competence. The Drafting Committee had finally decided not to incorporate that provision in the text, bearing in mind that it did not appear in the corresponding section of the annex to the 1969 Vienna Convention. Had it appeared in the present convention, a discrepancy between the two conventions might have led to *a contrario* arguments that a conciliation commission established under the 1969 Vienna Convention could not decide on its competence. However, he wished to make it clear that the omission of such a provision in the present context should not be taken to mean that a conciliation commission established under the present convention could not decide on its own competence.

21. Minor grammatical or stylistic changes had also been made in the annex wherever necessary.

22. In concluding his presentation of the report of the Drafting Committee, he expressed thanks to all those who had contributed to the success of the Committee's work.

23. The PRESIDENT said that the General Committee had recommended that a roll-call vote should be taken on article 66. In the absence of objection, he would take it that the General Committee's recommendation was adopted.

*It was so decided.*

24. Mr. TEPAVICHAROV (Bulgaria), speaking in explanation of vote before the vote, said that his delegation would vote against article 66 for a number of reasons. Firstly, a mere quarter of the States in the international community adhered to the notion enshrined in the text of the article, and some only with reservations. Secondly, the text was at variance with the practice of the majority of States and with the trend towards free choice of means of settlement of disputes. Thirdly, article 66 as drafted would be virtually inapplicable, in that it provided for the possibility of seeking an advisory opinion from the International Court of Justice through an international organization which had the right to ask for such an opinion at the request of any State which was a member of that organization. The practical result of such a provision would be that, under subparagraph 2 (b), the General Assembly, the Security Council or the "competent organ" of an international organization, at the request of a member State, would have to discuss on its merits any request for an advisory opinion on matters of *jus cogens*. His delegation did not consider it appropriate or advisable for the Conference to adopt provisions that would affect the work of the principal organs of the international community without first obtaining their consent. Thus, a Member of the United Nations could find itself involved, at the request of another Member, in the consideration of an issue relating to *jus cogens* even if the requesting Member

was not a party to the dispute in question. Such a situation would be highly unsatisfactory, especially as the General Assembly or the Security Council might, by a vote, decide not to seek an advisory opinion on the issue.

25. The adoption of the provision in article 66 as now proposed would compel any State which was a Member of the United Nations, or a member of the many other international organizations, to express a clear view as to whether it was advisable for those bodies of which it was a member to become parties to the present convention. His delegation would vote against article 66 because it believed that its adoption would prejudice acceptance of the convention. The problems involved were not so much practical as conceptual, but they were of such magnitude as to prevent the convention from becoming operative for many years.

26. Regarding the annex, his delegation felt that paragraphs 9 and 14 should be deleted, and it therefore requested that those two paragraphs should be voted upon separately. The expenses of the tribunal or of the commission referred to in the annex should be borne not by the United Nations but by the parties to the dispute.

27. Mr. BERMAN (United Kingdom) said that, although his delegation had not sponsored the proposal which had led to the recommendation of the Committee of the Whole and the proposals of the Drafting Committee which were before the Conference, it proposed to vote in favour of the text in document A/CN.129/11/Add.3 because it considered it to be a reasonable approximation, given the somewhat different current circumstances, of the text which had been adopted, agreed and included in the 1969 Vienna Convention on the Law of Treaties, to which the United Kingdom was a party. Inasmuch as the present text constituted a reasonable approximation of something that had been considered at a prior codification conference by jurists of great knowledge, expertise and repute, and had been the subject of extensive negotiation there, the United Kingdom delegation regarded it as a text which had a clear international precedent, and therefore one which was entirely appropriate for adoption by the present Conference in a convention which in many respects was the successor convention to the 1969 Vienna Convention. The present text of article 66 had at times been wrongly presented as if it related to the question of the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of its Statute, sometimes known as the optional clause. That was not true. The present case came within the provisions of Article 36, paragraph 1, under which the jurisdiction of the Court extended to cases covered by treaties and conventions in force. That particular paragraph of the Court's Statute had been recognized and observed in many treaties of a multilateral, restricted multilateral or bilateral nature, and in that sense it was a practice to which the overwhelming majority of the States members of the international community had subscribed in one manner or another in their own particular treaties. The United Kingdom delegation found the proposed article 66 to be an appropriate solution, and would vote in its favour.

28. Mr. MIMOUNI (Algeria) said that article 66 as amended established a complex system for the settlement of disputes which his delegation found unacceptable: firstly, because it did not require the consent of States before reference of a dispute to the International Court of Justice; secondly, because it introduced a dangerous innovation with regard to the advisory opinion of the Court by making it "decisive", which did not correspond to the normal concept of an opinion. Having regard to the fact that international organizations could not go to the International Court as parties to a dispute and that the International Law Commission, in paragraph (4) of its commentary to the article, had rejected the advisory opinion procedure because of its "imperfections and uncertainties" (see A/CONF.129/4), the desire of some delegations to reintroduce such a system, while qualifying it as decisive, was quite understandable. The Algerian delegation considered that such a system was an indirect way of enabling all international organizations to have recourse to the International Court of Justice. It therefore believed that the text before the Conference was far from being the result of a compromise. For those reasons, and because the concern of many delegations that the principle of the consent of States should be maintained had not been taken into account, his delegation would vote against article 66 as proposed.

29. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation would be voting against article 66 as proposed. Provisions such as it contained could not be imposed on States. In fact, the majority of States did not recognize the compulsory jurisdiction of the International Court of Justice, and many of the 40 States which had done so had expressed reservations. In the past, States had refused to recognize decisions of the Court for political reasons. Furthermore, the provisions of the proposed article had not yet been discussed with the majority of international organizations, and the Conference was not in a position to impose such provisions on them unless they had been included in the convention by consensus. The situation would therefore be that States members of international organizations would object unilaterally within those organizations and would turn to the competent organ for a decision in order to settle disputes. The Conference should therefore consider all the elements of that important issue as they were in reality, and divorced from theoretical considerations.

30. Mr. COSTANZO (Uruguay) said that at the Second Hague Peace Conference in 1907, the great Uruguayan statesman José Batlle y Ordóñez had made two proposals which had resulted in considerable progress. The first proposal had called for the establishment of an international organization to promote world peace; that had been an essential precedent for the founding of the League of Nations. The second, expanded in 1921, had recognized in broad terms the compulsory jurisdiction of the Permanent Court of International Justice. Those ideas had been enshrined in the Uruguayan Constitution, which provided that in all international treaties concluded by it the Republic would include a clause calling for all disputes between the contracting parties to be settled by arbitration. Uruguay therefore had a long tradition in the matter, as well as a constitutional

rule in force. For those reasons his delegation intended to vote in favour of article 66.

31. The PRESIDENT invited the Conference to vote on article 66 as proposed by the Drafting Committee (A/CONF.129/11/Add.3).

*The vote was taken by roll-call.*

*Indonesia, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Australia, Austria, Bangladesh, Barbados, Belgium, Brazil, Cameroon, Canada, Chile, Colombia, Cyprus, Denmark, Finland, Germany, Federal Republic of, Greece, Holy See, Iceland, India, Iraq, Ireland, Italy, Japan, Jordan, Kenya, Kuwait, Lebanon, Lesotho, Liechtenstein, Luxembourg, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Portugal, Republic of Korea, Saudi Arabia, Spain, Sudan, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia, Zambia.

*Against:* Algeria, Angola, Bulgaria, Byelorussian Soviet Socialist Republic, China, Cuba, Czechoslovakia, Democratic People's Republic of Korea, Egypt, German Democratic Republic, Hungary, Indonesia, Iran (Islamic Republic of), Madagascar, Peru, Poland, Romania, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Viet Nam.

*Abstaining:* Argentina, Bahrain, Burkina Faso, Congo, Côte d'Ivoire, Ecuador, France, Gabon, Guatemala, Israel, Malta, Morocco, Nicaragua, Oman, Panama, Philippines, Qatar, Senegal, Thailand, United Arab Emirates, Zaire.

*Article 66 was adopted by 47 votes to 23, with 21 abstentions.*

32. Mr. SZEKELY (Mexico), speaking in explanation of vote, said that his delegation had voted in favour of article 66 as a demonstration of Mexico's faith in international law. For countries such as Mexico, international law was the only weapon in the diplomatic arsenal for the assertion of their international rights. International law was in fact a central component of the foreign policy of his country, which did not accept the existence of a crisis of multilateralism. Nor did his country have any fear of international law and international justice. Mexico's vote in favour of article 66 was also a response to the appeal made by the President of the International Court of Justice at the fortieth session of the United Nations General Assembly and was consistent with the statement made by Mexico's Minister for Foreign Affairs at that same session. Both had called on the international community to strengthen the International Court of Justice, and thereby, the United Nations.

33. Mr. MORELLI (Peru) recalled his delegation's explanation of its vote on the eight-Power amendment (A/CONF.129/C.1/L.69/Rev.2) to article 66 in the Committee of the Whole (30th meeting). His delegation was both surprised and concerned that an article such as article 66 had been included in a codification convention. The International Law Commission's draft of that article had given rise to substantive differences which

had never been resolved subsequently in spite of extensive discussion. That was proved by the small margin by which the article had been approved. The vote just taken did not suggest that there was widespread international support for the mandatory application of particular machinery for the settlement of disputes on matters so important and yet so vaguely defined as those relating to *jus cogens*. The eight-Power amendment to the original text of article 66 introduced the substantive and unjustified innovation of making the advisory opinions of the International Court of Justice decisive, thus changing their very nature. Insufficient attention had been paid to other compromise proposals, such as the three-Power amendment (A/CONF.129/C.1/L.68) and other possible solutions such as an additional protocol to the convention binding only those parties prepared to abide by predetermined methods of dispute settlement which were not acceptable to the international community as a whole.

34. Mr. CORREIA (Angola) said that his delegation had voted against the adoption of article 66 for the reasons it had already given during the discussion of that article in the Committee of the Whole (28th meeting). In its international relations, Angola categorically rejected mandatory recourse to any particular means of settling disputes. It accepted all the methods set out in the Charter of the United Nations and other international instruments, subject to the prior consent of the parties concerned.

35. Mr. GÜNEY (Turkey) said that his delegation had cast a negative vote on article 66 for the reasons which it had previously expressed in the Committee of the Whole (26th meeting). The article had been adopted by the Conference in spite of the opposition of a considerable number of delegations, and the approach taken in its provisions conflicted with the principle embodied in article 66 of the 1969 Vienna Convention on the Law of Treaties. Those two factors made it likely that the article would be the subject of reservations which, in the understanding of his delegation, would not be incompatible with the object and purpose of the draft convention, under article 19, subparagraph (c), of the 1969 Vienna Convention. Turkey would act on that premise if it decided eventually to become a party to the future convention.

36. Mr. RASOOL (Pakistan) said that his delegation had voted in favour of article 66. Nevertheless he wished to refer the Conference to the statement concerning the jurisdiction of the International Court of Justice which his delegation had made in the Committee of the Whole (27th meeting).

37. Mr. FOROUTAN (Islamic Republic of Iran) said that in his statement in the Committee of the Whole concerning article 66 and the various amendments thereto (*ibid.*) he had stressed the need for strict procedural safeguards because of the unfortunate lack of adequate administrative machinery in many developing countries, including his own. It was regrettable that the same binding procedure as in the 1969 Vienna Convention had now been approved by a majority which represented less than one third of the membership of the United Nations. His delegation had voted against article 66 because it did not constitute an ac-

ceptable norm for international relations and did not reflect contemporary realities. While the Government of the Islamic Republic of Iran fully endorsed the concept of the settlement of all international disputes by peaceful means and recognized the need to settle in an atmosphere of mutual understanding issues relating to the interpretation and application of the proposed new convention, it had great difficulty in associating itself with the binding provisions set forth in the present text of article 66, and it reserved its position in that regard. Freedom of choice to resort to any means for the settlement of disputes was a basic criterion, and the consent of all parties concerned was essential in every case.

38. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that his country recognized the importance of arbitration and judicial decision as appropriate, but not exclusive, methods of settlement of international legal disputes. The principle of the free choice of means by the parties concerned was recognized by the international community and it was reflected in practice and in international legal theory and case law. The most recent practice showed that direct negotiations and recourse to non-binding mechanisms for the settlement of international disputes, irrespective of their nature, were effective methods and produced results acceptable to all the parties involved. As shown by the example of the 1969 Vienna Convention, the imposition of mandatory arbitration and judicial settlement, which ran counter to the principle of State sovereignty, hindered the formulation of truly universal international instruments. The possibility under the present draft convention that a State or an international organization might unilaterally bring another State, against its will, before a predetermined judicial body, thus limiting recourse to other equally effective mechanisms, was an even more negative factor. The imposition of intervention by third parties in the development of peremptory norms of general international law, which were collectively ill-defined, was contrary to international practice and to specific agreements, and was prejudicial to the logical development of such norms irrespective of their relative force.

39. With regard to the qualification "decisive" as applied to advisory opinions of the International Court of Justice, his delegation did not consider that it implied any binding force. The incorporation of additional compulsory mechanisms did violence to the substance and spirit of Article 33 of the Charter of the United Nations, which was the outcome of a practical compromise reflecting the reality of contemporary international relations. The incorporation in the convention of the procedures provided for in article 66 would adversely affect the instrument's universal character and did not answer the need to codify and progressively develop international law in order to strengthen the rule of law in international relations.

40. Mr. WANG Houli (China) said that his delegation had on several occasions expressed its views on the original draft article 66 and, together with Algeria and Tunisia, had submitted an amendment to that text (A/CONF.129/C.1/L.68). The settlement of international disputes, including those involving *jus cogens*,

must be based on free choice of means of settlement by the parties involved. His delegation had voted against article 66, which in its present form would create more problems than the original draft article would have done. It would increase the number of countries that would have difficulty in accepting the future convention.

41. Mr. KHARMA (Lebanon) said that his delegation had voted in favour of article 66. However, it wished to reiterate the reservation in respect of subparagraph 2 (e) which it had expressed in its statement in the Committee of the Whole (30th meeting).

42. Mr. ALMODÓVAR (Cuba) said that his delegation had already made its position known on article 66 and the annex, and he would merely add that its views would remain unchanged. His delegation could accept such procedures only in the event that it was agreed that their application resulted from the explicit written consent of the parties to a dispute. His delegation would not accept any formula of supranational general mandatory jurisdiction whereby decisions might be imposed in disputes whose content and scope could not be foreseen. The delegation of Cuba therefore wished to place on record its objection to article 66 and the annex.

43. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation had voted against article 66. In its view, recourse to the various means for the peaceful settlement of disputes could be had only with the common consent of the parties to the dispute in question. A further argument against binding arbitration was that there was no precedent in international practice of an international organization resorting to arbitration, and even less of agreement in advance by any international organization to accept binding arbitration. There was also no precedent for conciliation procedures between international organizations. His delegation therefore considered article 66 both politically unacceptable and legally unjustified. The adoption of the article meant that the views of the minority of governments that recognized binding arbitration were being forced upon a majority of States and organizations.

44. Mr. PALOMO (Guatemala) said that for constitutional, and above all for historical reasons, his country had expressed reservations regarding article 66 and the annex. Owing to Guatemala's long-standing dispute over the territory of Belize, those provisions would always cause it difficulties of interpretation as well as practical difficulties. Nevertheless, its abstention in the vote just taken had not been intended to frustrate the wishes of the majority of delegations, and it trusted that the principle and the machinery which had been adopted might in the future help in resolving Guatemala's long-standing dispute with the United Kingdom.

45. Mr. GILL (India) said that his delegation wished to reiterate the statement it had made in the Committee of the Whole (30th meeting) on India's position with regard to mandatory procedures for the settlement of disputes.

46. Mr. PAWLAK (Poland) said that his delegation had voted against the adoption of draft article 66 as it had been amended. Poland believed that the submission of any issue to arbitration should be on the basis of

agreement by all the parties to the dispute involved. It further considered the adoption of the article by so small a majority to be unfair and unacceptable.

47. The PRESIDENT recalled that the representative of Bulgaria had requested a separate vote on paragraphs 9 and 14 of the annex to the convention. He suggested that the two paragraphs should be voted on simultaneously.

*Paragraphs 9 and 14 of the annex to the convention were adopted by 48 votes to 17, with 22 abstentions.*

*The annex as a whole was adopted without a vote.*

48. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that this delegation had not opposed the adoption of the annex to the convention by consensus. However, it had not been a part of that consensus. In its view, the expenses of proceedings under paragraph 9 of the annex should be borne by the parties to the dispute. Furthermore, the appointment by the Secretary-General of a fifth arbitrator or conciliator should be effected with the agreement of the parties to the dispute.

49. Mr. FLEISCHHAUER (Legal Counsel) said that paragraphs 9 and 14 of the annex just adopted by the Conference provided that the expenses of any arbitral tribunal or conciliation commission as provided for in the annex should be borne by the United Nations. Those provisions were similar to that in paragraph 7 of the annex to the 1969 Vienna Convention. Since paragraphs 9 and 14 of the present annex might have financial implications and involve the Organization in expenditure, the General Assembly was required to consider them and give its view on them. The Conference might therefore wish to decide to ask the General Assembly to consider those paragraphs and take the appropriate measures. At the 1969 Vienna Conference and other similar international conferences, the corresponding decision had taken the form of a brief resolution drawing the attention of the General Assembly to the provisions which had been adopted. He believed that the representative of the United Nations was in a position to propose a similar draft resolution for consideration by the Conference.

50. The PRESIDENT said he understood that a draft resolution submitted by Japan (A/CONF.129/L.3) would also be circulated. He urged any other delegations which wished to submit resolutions to do so immediately in order that they might be considered as soon as possible.

51. Mr. TEPAVICHAROV (Bulgaria) requested that a vote should be taken on any draft resolutions submitted to the Conference.

#### **Adoption of the Convention on the Law of Treaties between States and International Organizations or between International Organizations**

52. The PRESIDENT said that the representative of Bulgaria had requested that a vote should be taken on the convention as a whole.

*The Convention as a whole was adopted by 67 votes to 1, with 23 abstentions.*

*The meeting rose at 12.55 p.m.*

## 8th plenary meeting

Thursday, 20 March 1986, at 3.45 p.m.

*President: Mr. ZEMANEK (Austria)*

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

[Agenda item 11] (*concluded*)

**Adoption of a convention and other instruments deemed appropriate and of the Final Act of the Conference**

[Agenda item 12] (*concluded*)

### STATEMENTS IN EXPLANATION OF VOTE

1. The PRESIDENT said he understood that a number of delegations wished to explain their vote on the adoption of the Convention. He invited them to do so.

2. Mr. ABDENNADHEUR (Tunisia) said that his delegation regretted that the Convention had not been adopted by the Conference by consensus. It had voted in favour of the Convention in accordance with the policy Tunisia had followed since its independence—that of ensuring the realization of the purposes and principles of the Charter of the United Nations. In that connection, Tunisia attached special importance to the codification and progressive development of international law.

3. In acceding to the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> Tunisia had formulated a reservation to article 66, subparagraph (a), for it took the view that recourse to the International Court of Justice required the express consent of the parties to the dispute. It adhered to the rules laid down in Article 33 of the Charter of the United Nations regarding the peaceful settlement of disputes and considered that States should have a free choice of means so as to enable them to negotiate the settlement of any disputes that might arise in the application or interpretation of treaties. In the negotiation of a settlement, all due despatch and the will of the parties to settle the dispute were essential. States parties to a dispute should also be able to avail themselves of any other means for the peaceful settlement of disputes, including arbitration or judicial settlement, provided that all the parties to the dispute consented to it. That would make for a negotiated settlement and allow the parties to choose the most appropriate means of settlement freely and in common accord.

4. Mr. ULLRICH (German Democratic Republic) said that his delegation had abstained from voting on the Convention as a whole since it believed that the

spirit of compromise had not prevailed throughout its preparation.

5. With regard to the actual text of the Convention, his delegation had agreed to the preamble on the understanding that it had a special function to fulfil in the interpretation of the Convention and in particular of article 2, subparagraph 1 (j) and articles 11, 19 and 20. That represented one area on which a compromise had been reached.

6. Widely differing positions had been expressed on article 66. His own delegation believed that on no account could disputes involving *jus cogens* be settled by means of a compulsory arbitration procedure. Decisions regarding *jus cogens* could not be left to so-called neutral bodies because of its highly legal and political nature. That was a further reason why his delegation had abstained from voting on the Convention as a whole, and the reason why it had voted against the proposal submitted by the Drafting Committee with regard to article 66.

7. His delegation regretted that the Soviet proposal for the final clauses (A/CONF.129/C.1/L.76 and Corr.1) had not received the necessary support.

8. Mr. MONNIER (Switzerland) said that, although his delegation had voted for the adoption of the Convention, it would not sign it immediately because Switzerland was not yet a party to the 1969 Vienna Convention, which it had not signed either. The question of Switzerland's participation in both Conventions would be considered shortly by the competent Swiss federal authorities.

9. Mr. PÉREZ GIRALDA (Spain) said that his delegation had voted in favour of the adoption of the Convention. The broad consensus which the Convention represented would serve to consolidate the rules of international law that had been codified in the 1969 Vienna Convention. In providing for the position of international organizations, the new Convention recognized the important contribution which they made to international relations in many areas of activity, including the codification and progressive development of international law.

10. Mr. WANG Houli (China) said that his delegation had abstained from voting on the Convention as a whole. It had participated in the work of the Conference in a constructive spirit, and many of the provisions of the Convention had been adopted following consultations in which it had participated. Regrettably, however, article 66 of the Convention was a departure from recognized principles of international law and was not in keeping with the spirit of the Charter of the United Nations. It could therefore not be applied in practice, and that would inevitably detract from the force and universal character of the new Convention.

<sup>1</sup> United Nations Conference on the Law of Treaties (United Nations publication, Sales No. E.70.V.5), p. 287.

11. Mr. TARCICI (Yemen) said that his delegation had voted in favour of the Convention because of its flexible and universal character, which would facilitate interpretation of its terms. Also, negotiation and arbitration necessarily involved a fairly lengthy procedure which would enable further solutions to be achieved.

12. Mr. GÜNEY (Turkey) said that his delegation had abstained in the vote on the Convention, in the first place because of the serious reservations it had concerning articles 53 and 64 relating to *jus cogens*, and secondly, because of its position on article 66 regarding judicial settlement, arbitration and conciliation, which it had explained in the Committee of the Whole (26th meeting) and confirmed at the 6th and 7th plenary meetings of the Conference.

13. Mr. SHASH (Egypt) said that his delegation had voted in favour of the Convention because of the importance which Egypt attached to the codification of rules of international law in the area dealt with by the Conference. It was, however, bound to enter a reservation to article 66 on settlement of disputes which, as drafted, would prevent many countries from supporting the Convention.

14. Mr. AL-MUBARAKY (Kuwait) said that his country had voted in favour of the Convention and welcomed its adoption. The Convention as a whole, together with article 66, represented a step forward in the codification and progressive development of international law.

15. Mr. CANÇADO TRINDADE (Brazil) said that, while his delegation had voted in favour of the Convention, it would have preferred the two key provisions regarding the treaty-making power of international organizations and the rules of the organization (article 6 and article 2, subparagraph 1 (j)) to have been considered jointly in a methodology distinct from the one followed at the present Conference, although it supported the wording finally adopted for those provisions.

16. His delegation supported the recognition given in the Convention to the treaty-making capacity of international organizations, which maintained the necessary parallelism with the 1969 Vienna Convention while wisely leaving open the question of the status of international organizations in international law. It supported in particular the provision to the effect that the treaty-making capacity of international organizations was governed by the rules of each international organization, such rules including the constituent instruments of the organizations and decisions and resolutions adopted in accordance with those instruments, as well as their established practice, on the understanding that occurred or was so by virtue of a general rule of international law under which international organizations were vested, as subjects of international law as distinct from States, with treaty-making capacity.

17. As was clear from the discussion which had taken place on article 2, subparagraph 1 (j), articles 20, 36 bis and 46 and also the preamble, the references made in the Convention not simply to practice but to established practice would prove highly important in the future interpretation of the provisions of the instrument. International organizations are likely to refer

to their "autonomous" established practice for the very interpretation of their constituent instruments. The wealth of relevant case law which existed contrasted with the silence of the 1969 Vienna Convention on that question and with the methodology followed at the present Conference, which had not left much opportunity for detailed consideration of the matter. There seemed to be no absolute parallelism among the international organizations themselves regarding the extent of the role of established practice and the interpretation of the powers conferred upon them or their organs.

18. On the question of settlement of disputes, the Brazilian delegation referred to the statement it had made in the Committee of the Whole (27th meeting).

19. Mr. DELON (France) said that his country had neither signed nor ratified the 1969 Vienna Convention on the Law of Treaties because that instrument contained provisions stipulating the invalidity of treaties which conflicted with a peremptory norm of general international law, *jus cogens*. His delegation wished to pay tribute to the work accomplished by the International Law Commission, and particularly its Special Rapporteur, and it fully supported many of the provisions of the Convention prepared by the present Conference. It welcomed the desire to develop the codification of international law in an area not lacking in pitfalls. However, it regretted that all the provisions concerning the obligations and rights of States members of an international organization deriving from a treaty to which the organization was a party had been deleted. In its view, the International Law Commission's proposal on the subject had the merit of clarifying what might prove to be a very complex legal situation.

20. Unfortunately, the concern to achieve the closest possible parallel with the 1969 Vienna Convention had led the Conference to produce a text containing provisions relating to *jus cogens* very similar to those which had led France to vote against that Convention. Cases in point were articles 53 and 64.

21. In the view of his delegation, the content of *jus cogens*, the manner in which its rules were formed and its effects all remained uncertain. The International Law Commission, in its commentary to articles 53 and 64, failed to clarify the matter and merely noted that those articles repeated the wording already used in the 1969 Vienna Convention. As far as his delegation was aware, a simple criterion for recognizing that a general rule of international law derived from *jus cogens* had still not been established. Article 53 of the new Convention defined *jus cogens* as the collection of rules "accepted and recognized by the international community of States as a whole" and "from which no derogation is permitted". But did that mean that the unanimous consent of the States forming the international community was required for the formation of such rules, or did a simple majority of them suffice? Clearly, such a system had to have a dispute settlement mechanism, for without that it would either be ineffective or have the effect of destabilizing treaty relations. However, the mechanism provided for in article 66 of the present Convention posed a number of problems. It did not settle the question of access of all international organizations to the International Court of Justice. Fur-

thermore, it had the effect of changing the nature of the advisory opinions of the Court by terming them "decisive". Finally, there was a general feeling that the rule *pacta sunt servanda* which had been so happily restated in the preamble of the Convention might be breached by the uncontrolled and improper invocation of so-called rules of *jus cogens*. Clearly, thus to admit conflict into a field where certainty should reign meant acceptance of a reduction in the effectiveness of treaties and the introduction of uncertainty into international relations. For all those reasons, the French delegation had voted against the adoption of the Convention.

22. Count de la BARRE D'ERQUELINNES (Belgium) said that his delegation would not be in a position to sign the Convention immediately, since the question of his country's accession to the 1969 Vienna Convention on the Law of Treaties was still being examined by the competent authorities, who proposed to consider that Convention and the new Convention together. He wished to add that his delegation recognized the importance of the new Convention for international organizations, which were playing an increasingly important role in international relations.

23. Mr. MIMOUNI (Algeria) said that his delegation had been hoping for the adoption of a widely acceptable convention which would make a positive contribution to the progressive development of international law. It regretted that, in the end, it had not been possible for the Conference to adopt the Convention by consensus. His delegation had been unable to vote in favour of adoption of the Convention, since its provisions did not reflect the views held by many delegations on the question of settlement of disputes. His delegation had therefore abstained in the vote.

24. Mr. TEPAVICHAROV (Bulgaria) said that his delegation had abstained in the vote on the Convention because it had strong reservations concerning article 66 and the final provisions. The reasons for those reservations had already been fully explained at the previous meeting and at the 27th and 30th meetings of the Committee of the Whole. He did not propose to elaborate on his delegation's reservations relating to other articles, having expressed Bulgaria's reservation concerning the Convention as a whole.

25. Mr. NETCHAEV (Union of Soviet Socialist Republics) welcomed the Convention just adopted by the Conference as an example and an extension of the process of progressive codification of international law, reflecting such instruments as the Charter of the United Nations and the 1969 Vienna Convention on the Law of Treaties. The Convention contained legal norms reflecting the specific nature of international organizations. The practice of such organizations in concluding treaties had to conform to their constituent instruments, and the Convention rightly confirmed that international organizations, as subjects of international law, had specific legal responsibility and capacity.

26. His delegation regretted, however, the inclusion in the Convention of provisions which it found unsatisfactory. The procedure for the settlement of disputes provided for in article 66 did not correspond with actual practice, and contradicted the principle of the so-

vereign equality of States and the right of States to select the means of settling disputes. The article therefore constituted a retrograde step in international law and would reduce the effectiveness of the future Convention.

27. His delegation did not agree with the final provisions, which allowed States and international organizations to participate in the Convention on an equal footing. In his delegation's view, the conclusion of a codification convention was a matter for States alone; international organizations could participate only as observers. It was premature at the present stage of the development of international law to permit international organizations to sign such conventions. For those reasons his delegation had abstained in the vote on the adoption of the Convention.

28. Mr. LÊ BÁ CÁP (Viet Nam) said that his delegation had abstained in the vote because in its view article 66 and the annex to the Convention were not consistent with the spirit of promoting the peaceful settlement of disputes. Article 66 detracted from the principle of the sovereignty of States. His delegation also found subparagraphs 1 (b) and 2 (b) of article 45 unsatisfactory, as it considered that in all cases acceptance should be formal and specific.

29. Mr. HARDY (European Economic Community) said that the Convention just adopted by the Conference was the result of a long and sustained effort. It was the culmination of a codification process undertaken by the international community which had involved many stages. His delegation was gratified to note that it had been possible to reach general agreement on the great majority of the articles considered. It would study the Convention carefully and determine its position accordingly.

30. In connection with article 2, his delegation was pleased to note that there was agreement on the use of the term "full powers" for instruments issued both by organizations and by States, since that reflected current practice. He regretted that the phrase "acts of formal confirmation" relating to the conclusion of treaties by international organizations had not been deleted, since it introduced an unnecessary complication without any advantage, particularly as it had been agreed in the text that there was no legal difference between an act of ratification by a State and an act of formal confirmation by an organization. Indeed, an act of formal confirmation might be termed a "ratification". That was, in fact, the practice in the European Economic Community, which would continue to use that term, where appropriate, in the future.

31. His delegation accepted the definition of "rules of the organization" in article 2, subparagraph 1 (j) and felt that the term covered all sources of community law. He wished to reiterate that it was the responsibility of the organization concerned to interpret and apply its rules in accordance with its own procedures. As had been pointed out, it was not possible through adoption of an instrument such as the one before the Conference to seek to modify arrangements made under an earlier treaty or treaties setting up an international organization, with its own procedures and methods of opera-

tion. In that connection, he drew attention to the reference in the thirteenth paragraph of the preamble to relations between an international organization and its members. His delegation considered that paragraph to mean that relations between an organization and its members were always governed by the rules of the organization, it being understood however that when an organization concluded a treaty with one of its members, the provisions of the present Convention might apply. It was also the responsibility of each organization to determine which were its "competent organs" or "organs" and their respective roles.

32. In the view of his delegation, paragraph 2 of article 9 was consistent with paragraph 1 of the article. Consequently, international organizations and States were treated on an equal footing as participants in an international conference and for the adoption of a treaty text. His delegation found the provisions on reservations, which closely reflected the language of the 1969 Vienna Convention, satisfactory. International organizations were fully entitled to formulate reservations or to object to them on the same basis as States, subject only to the wording of the articles adopted by the present Conference.

#### REPORT OF THE COMMITTEE OF THE WHOLE

33. The PRESIDENT invited the Conference to consider the report of the Committee of the Whole (A/CONF.129/13). In the absence of objections, he would take it that the Conference wished to take note of the report of the Committee of the Whole.

*It was so decided.*

#### CONSIDERATION OF THE DRAFT FINAL ACT AND ANNEXED RESOLUTIONS

34. The PRESIDENT invited the Conference to consider the draft Final Act, which had been prepared by the Drafting Committee (A/CONF.129/12). He drew attention to the three customary resolutions in the annex to the draft text, the first paying tribute to the Expert Consultant, the second to the International Law Commission and the third to the People and to the Federal Government of Austria. He suggested that the Conference might wish to adopt those three resolutions without a vote.

*The three resolutions in the annex to the draft Final Act (A/CONF.129/12) were adopted without a vote.*

#### DRAFT RESOLUTION PROPOSED BY THAILAND

35. Mr. CHUTASAMIT (Thailand), speaking on behalf of the group of Asian countries, said that the three resolutions just adopted were most appropriate. However that group considered it appropriate also to pay tribute to the great negotiating skill and the leadership of the President of the Conference, whose wisdom and guidance had contributed so much to the successful conclusion of the Conference's work. A tribute was also due, they felt, to the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee. He therefore proposed that the Conference should adopt the following draft resolution entitled "Tribute to

the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee":

*"The United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations,*

*"Having adopted the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,*

*"Expresses its appreciation and thanks to Mr. Karl Zemanek, President of the Conference, Mr. Mohamed El-Taher Shash, Chairman of the Committee of the Whole, and Mr. Awn Shawkat Al-Khasawneh, Chairman of the Drafting Committee, who, through their great knowledge, successful efforts and wisdom in steering the work of the Conference, contributed greatly to the fruitful work which made the Conference successful."*

36. Mr. SZEKELY (Mexico) said that his delegation wholeheartedly supported the draft resolution proposed by the representative of Thailand on behalf of the group of Asian countries, as it called appropriate attention to the President's invaluable contribution to the Conference and his successful guidance of its deliberations to a successful conclusion.

37. Mr. PALOMO (Guatemala), speaking on behalf of the group of Latin American countries, said that they wished to congratulate the President on his great contribution to the work of the Conference. They also wished to pay tribute to the Chairman of the Committee of the Whole, the Chairman of the Drafting Committee, the Vice-Presidents, the Expert Consultant and the secretariat of the Conference. On behalf of the group of Latin American countries, he supported the draft resolution proposed by the representative of Thailand.

38. Mr. ABDENNADHEUR (Tunisia), speaking on behalf of the African delegations, said that they wished to be associated with the draft resolution read out by the representative of Thailand. They wished to express their sincere gratitude and appreciation to the President for having presided with impartiality and success over the work of the Conference. They also wished to thank the Chairman of the Committee of the Whole, the Chairman of the Drafting Committee, the members of the General Committee and the secretariat for their contributions to the success of the Conference.

39. Mr. BERMAN (United Kingdom) said that his delegation wished to associate itself with the sentiments expressed by the representative of Thailand and echoed by the representatives of other delegations and groups. The success of a complex conference depended on the efforts of all its officers, its secretariat and the participating delegations.

*The draft resolution proposed by Thailand was adopted by acclamation.*

#### DRAFT RESOLUTION SUBMITTED BY JAPAN

40. The PRESIDENT invited the Conference to consider the draft resolution submitted by Japan, relating to article 66 of the Convention.

41. Mr. HAYASHI (Japan), introducing the draft resolution submitted by his delegation (A/CONF.129/L.3), said that the Conference having adopted the Convention as a whole, including the new text of article 66, his delegation wished to draw attention to the provisions of paragraph 2, subparagraphs (b) and (d), of that article, which allowed States parties or certain international organizations parties to a dispute to ask the General Assembly or the Security Council of the United Nations to request an advisory opinion of the International Court of Justice. The draft resolution submitted by Japan was intended to facilitate the implementation of those provisions.

42. He expressed regret at the fact that the draft resolution had been submitted only that morning. There had been no intention of taking other delegations by surprise; the Japanese delegation had simply had no alternative, having had to await the adoption of the text of article 66 by the Conference before making its proposal.

43. In essence, the draft resolution would request the General Assembly and the Security Council to adopt appropriate procedures for responding promptly to requests which might be made for seeking an advisory opinion of the International Court of Justice.

44. Mr. TEPAVICHAROV (Bulgaria) said that, in view of late submission of the Japanese draft resolution, his delegation could make only preliminary comments on that text. It was clear that it embodied in effect a substantive proposal, and could therefore not be submitted to the Conference in the form of a draft resolution. The Conference had been convened in order to adopt a convention on the law of treaties between States and international organizations or between international organizations. It had no mandate to adopt decisions requesting the General Assembly or the Security Council to take action in connection with those matters. In order to address those bodies, the proper procedure would have been to consult the General Assembly and the Security Council beforehand. His delegation considered that the draft resolution was not admissible at the present Conference. He would be grateful if the Legal Counsel of the United Nations would advise the Conference on that question of admissibility.

45. Mr. FLEISCHHAUER (Legal Counsel) said that he did not share the Bulgarian representative's doubts regarding the procedural receivability or admissibility of the draft resolution submitted by Japan. The present Conference was a conference of plenipotentiaries of States and, as such, it could address questions relating to its subject matter to the United Nations without having to consult other international fora.

46. As for the content of the draft resolution, he felt that it did not introduce an entirely new subject; it was connected with the operation of the provisions of article 66, paragraph 2, of the Convention.

47. Mr. SHASH (Egypt) asked, for purposes of clarification, whether a similar resolution had been adopted by the United Nations Conference on the Law of Treaties.

48. Mr. FLEISCHHAUER (Legal Counsel) said that no similar resolution had been adopted by the United Nations Conference on the Law of Treaties. It should be borne in mind, however, that the problem dealt with in the draft resolution submitted by Japan arose from a specific situation which occurred only in relation to international organizations. The 1969 Vienna Convention on the Law of Treaties had excluded from its scope the treaties concluded by international organizations. The two situations were therefore not comparable.

49. Mr. SHASH (Egypt) asked whether it was really necessary for the Conference to adopt a draft resolution such as the one proposed. If the United Nations, as an international organization, became a party to the Convention, it would be bound by all the provisions of the Convention. He accordingly appealed to the delegation of Japan not to press its draft resolution, bearing in mind the fact that many delegations which had voted in favour of adoption of the Convention were reluctant to adopt the draft resolution.

50. Mr. HAYASHI (Japan) said that there appeared to be a misunderstanding with regard to the implications of his country's draft resolution. The question whether the United Nations became a party to the new Convention or not was not relevant in the context of the proposal. There was no need for the United Nations to be a party to the Convention for it to receive the type of request envisaged in article 66, paragraph 2, subparagraphs (b) and (d).

51. The sole purpose of the draft resolution was to facilitate the operation of the provisions of article 66, paragraph 2, which referred to the possibility of asking the General Assembly or the Security Council to request an advisory opinion from the International Court of Justice.

52. He drew attention, finally, to the fact that the advisory opinion in question could be requested by a State, and not solely by an international organization, in the cases envisaged in article 66, paragraph 2.

53. Mr. PAWLAK (Poland) joined in the Egyptian representative's appeal to the Japanese delegation to withdraw its draft resolution, which was out of place at the present Conference. It was also very premature, since it would be a long time before the Convention just concluded came into force. The draft resolution was not really necessary and, if pressed, would lead to needless confrontation.

54. Mr. RASOOL (Pakistan) said that his delegation also joined in the Egyptian representative's appeal. The draft resolution would create difficulties for many delegations which had voted in favour of article 66 at the previous meeting. Unlike the Legal Counsel, he felt that problems were likely to arise if the Conference adopted a resolution addressed to the General Assembly and the Security Council of the United Nations.

55. Mr. HAYASHI (Japan) said that because of the unavoidable delay in the submission of the draft resolution it had not been possible for him to explain it in advance to delegations as he would have wished.

56. Taking into consideration the concern which had been voiced by certain delegations and in order to avoid

further confusion, he withdrew his delegation's draft resolution.

57. The PRESIDENT thanked the Japanese representative and noted that the draft resolution in document A/CONF.129/L.3 was withdrawn.

**DRAFT RESOLUTION SUBMITTED BY  
THE UNITED NATIONS**

58. The PRESIDENT invited the Conference to consider the draft resolution submitted by the United Nations (A/CONF.129/L.4), which related to the annex to the Convention adopted by the Conference.

59. Mr. TEPAVICHAROV (Bulgaria) said that his delegation had expressed its views on the question of paragraphs 9 and 14 of the annex to the Convention at the previous meeting. The provisions of rule 60, subparagraph 1 (d), of the rules of procedure had not been satisfied; he therefore considered the draft resolution inadmissible.

60. The PRESIDENT suggested that the Conference might, if it so wished, adopt without a vote a proposal by the United Nations, in which case the rule referred to by the representative of Bulgaria would not apply. It would be virtually impossible at the present late stage of the Conference to comply with the provisions of the rule in question governing requests that proposals be put to a vote.

61. Mr. BERMAN (United Kingdom) said that his delegation was far from convinced that the provisions of the rule referred to were applicable to the proposal before the Conference, which could not reasonably be regarded as substantive. Surely it related rather to consequential action—which in any normal circumstances would be regarded as inevitable—based on decisions already taken by the Conference by a vote.

62. The United Kingdom delegation also had some doubts as to whether document A/CONF.129/L.4 should be construed as being a draft resolution submitted by the United Nations. It was his recollection that the Legal Counsel had pointed out at the previous meeting that it would be normal and necessary for the Conference to take a decision along the lines indicated in the present proposal, and that, if necessary, the representative of the United Nations could produce a text. He further understood it to have been decided that such a text would be drafted as part of a technical operation linked to the fulfilment of what the Conference had agreed was necessary.

63. However, to the extent that a different view might be taken, his delegation was fully prepared to make whatever formal request might be necessary in order to ensure that the Conference could indeed decide to act on the proposal before it.

64. Mr. TEPAVICHAROV (Bulgaria) said that the Bulgarian delegation had a different understanding of the rule to which he had referred. However, he considered that to embark on a procedural discussion was not as important for his delegation as to reiterate its views on the substance of the issue. A draft resolution had been submitted by the United Nations. As a Member of the United Nations, Bulgaria, at the previous

meeting, had expressed its views on the question dealt with in that draft resolution. In the terms of the draft resolution, the General Assembly was requested to take note of and approve provisions of the Annex to the Convention which had financial implications. He wished only to point out that a representative participating in the present Conference might in due course have to justify, in the Fifth Committee of the General Assembly of the United Nations, the request for approval proposed in the draft resolution.

65. His delegation requested that a vote be taken by roll-call on draft resolution A/CONF.129/L.4.

*A vote was taken by roll-call.*

*Nigeria, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Australia, Austria, Bangladesh, Barbados, Belgium, Burkina Faso, Cameroon, Canada, Chile, Colombia, Cyprus, Denmark, Finland, Germany, Federal Republic of, Greece, India, Ireland, Italy, Japan, Jordan, Kenya, Kuwait, Lebanon, Lesotho, Luxembourg, Malta, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Portugal, Republic of Korea, Senegal, Spain, Sudan, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia, Zambia.

*Against:* Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Viet Nam.

*Abstaining:* Algeria, Angola, Argentina, Bahrain, Brazil, China, Congo, Côte d'Ivoire, Democratic People's Republic of Korea, Egypt, France, Gabon, Guatemala, Iran (Islamic Republic of), Iraq, Israel, Liechtenstein, Madagascar, Mozambique, Nicaragua, Oman, Panama, Peru, Philippines, Switzerland, Tunisia, Turkey, United Arab Emirates, Venezuela, Yemen, Zaire.

*The draft resolution was adopted by 44 votes to 11, with 31 abstentions.*

**ADOPTION OF THE FINAL ACT OF THE CONFERENCE**

66. The PRESIDENT invited the Conference to proceed to the adoption of the Final Act of the Conference (A/CONF.129/12), it being understood that the appropriate dates or references would be entered by the secretariat in the blank spaces in paragraphs 18, 19 and 21 of the document.

67. Mr. HERRON (Australia) observed that the first sentence of paragraph 17 dealt with the referral to the Committee of the Whole of those draft articles which had required substantive consideration, and of the preamble and the final provisions of the draft convention; the second sentence alluded to the draft articles referred directly to the Drafting Committee. He drew attention to the fact that several proposals concerning new articles, one of which had been incorporated in the Convention as adopted, had also been considered by the Conference initially in the Committee of the Whole. In order to ensure greater accuracy he suggested that

the beginning of the second sentence of paragraph 17 should be modified to read: "It referred all other draft articles of the basic proposal directly to the Drafting Committee . . .".

68. The PRESIDENT concurred with that suggestion and said that the change would be made.

*The Final Act was adopted without a vote.*

**Signature of the Final Act and of the Convention and other instruments**

[Agenda item 13]

69. In reply to a question from Mr. NEGREIROS (Peru), Mr. KALINKIN (Executive Secretary of the Conference) said that the texts of the Convention and of the Final Act were expected to be ready for signature in the early afternoon of Friday, 21 March 1986. He announced the details of the ceremony of signature.

**Closure of the Conference**

70. Mr. TEPAVICHAROV (Bulgaria) said that, while his delegation might not have always given that impression during the final stages of the Conference, it had constantly endeavoured to be helpful and consistent and to act with that sense of fairness to which another delegation had alluded.

71. On behalf of the Eastern European group of countries and other socialist countries, he expressed deep appreciation of the manner in which the President had conducted the deliberations of the Conference, and of the facilities which had been provided for the Conference by the host country. The Chairman and Vice-Chairmen of the Committee of the Whole were to be commended for their tireless efforts, and thanks were also due to the secretariat of the Conference for their assistance in the difficult task of elaborating a generally acceptable text on the law of treaties between States and international organizations or between international organizations. The result of all those efforts was now before the Conference. A debt of gratitude was owed to all who had contributed to the successful drafting of those provisions, which expressed a generally acceptable compromise.

72. The PRESIDENT said that it would have indeed been a great success had the Conference been able to proceed to the very end of its business in the manner which had characterized the major part of its work. Although the final day of the Conference's deliberations had brought frustration and disappointment for some, it should not be forgotten that the substantive articles of the Convention, in other words the body of the substantive law to be applied to the treaty relations between States and international organizations or between international organizations, had been accepted by general agreement.

73. Such a result could not have been brought about without the faithful and loyal assistance of a number of persons to whom he felt deeply obliged. They included, in particular, the Chairman and Vice-Chairmen of the Committee of the Whole, who had assisted him in numerous difficult negotiating tasks; the Chairman of the Drafting Committee, to whom he had already paid tribute; the Chairmen of the different regional groups; the Chairman of the Task Force of the Group of 77; and a number of delegations which had provided invaluable assistance during the negotiations.

74. It was customary, and might thus be considered as merely traditional, to thank the members of the secretariat. On the present occasion, however, in a context of great innovation, the burdens on the secretariat had been particularly heavy and the demands for adaptation considerable. Not the least of its achievements would be to have completed the preparations for the signature of the Convention on time, for that was not always the case; an expression of special gratitude was therefore in order.

75. Lastly, it was to the participants in the Conference —so generous in their appreciation of his and the other presiding officers' contribution—that he addressed his gratitude; without the co-operation of all of them the results obtained would have been impossible. A body of substantive rules had, he repeated, been adopted with general agreement, and that was no mean achievement.

76. He declared closed the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.

*The meeting rose at 5.45 p.m.*

**SUMMARY RECORDS  
OF THE MEETINGS OF THE COMMITTEE OF  
THE WHOLE**

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**1st TO 30th MEETINGS**

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## SUMMARY RECORDS OF THE MEETINGS OF THE COMMITTEE OF THE WHOLE

### 1st meeting

Wednesday, 19 February 1986, at 5.25 p.m.

*Chairman:* Mr. SHASH (Egypt)

#### Election of Vice-Chairmen

1. The CHAIRMAN said that, for the reason given by the President of the Conference at its 2nd plenary meeting, the Committee of the Whole should elect two Vice-Chairmen. He understood there was general agreement to elect Mr. Geraldo Eulalio do Nascimento e Silva (Brazil) and Mr. Zdeněk Pisk (Czechoslovakia) as Vice-Chairmen.

*Mr. Geraldo Eulalio do Nascimento e Silva (Brazil) and Mr. Zdeněk Pisk (Czechoslovakia) were elected Vice-Chairmen of the Committee of the Whole by acclamation.*

#### Election of the Rapporteur

2. The CHAIRMAN said that he understood there was general agreement that Mrs. Kuljit Thakore (India), who had acted as Rapporteur at several previous codification conferences, should be elected to the office of Rapporteur of the Committee. If there was no objection, he would take it that the Committee wished to elect Mrs. Thakore to that post.

*Mrs. Kuljit Thakore (India) was elected Rapporteur of the Committee of the Whole by acclamation.*

#### Organization of work

3. The CHAIRMAN said that at its 3rd plenary meeting the Conference had referred to the Committee for substantive consideration the draft articles listed in the attachment to the Secretary-General's note (A/CONF.129/8), namely, articles 2, 3, 5, 6, 7, 9 (paragraph 2), 11 (paragraph 2), 19, 20, 27, 30 (paragraph 6), 36 bis, 38, 45, 46 (paragraphs 2, 3 and 4), 56, 61, 62, 65 (paragraph 3), 66, 73, 75, 77 and the annex entitled "Arbitration and conciliation procedures established in application of article 66".

4. The first of those provisions was article 2, "Use of terms". It had been the practice at previous codification conferences not to decide on definitions until the corresponding substantive articles had been discussed. He therefore suggested the Committee should discuss draft article 2 briefly, so as to identify points of agreement or disagreement on its various elements, but defer a decision on the article as a whole until it had dealt with the other articles which the Conference had referred to it.

5. Mr. JESUS (Cape Verde) asked whether the Committee intended to discuss the draft articles in the order in which they appeared in the attachment to document A/CONF.129/8. If not, it should draw up a weekly programme of work indicating which draft articles would come up for consideration in a given week.

6. The Committee should arrive at a consensus on the use of terms; agreement on article 5, for example, was entirely dependent on prior agreement on the terms used in article 2. If article 2 was agreed, it would be possible to adopt other draft articles without leaving them subject to the proviso of agreement on article 2.

7. Mr. SCHRICKE (France) said that it would be possible to discuss article 2 with a view to ascertaining those points on which there was general agreement. Any terms which gave rise to reservations could then be discussed in connection with the other draft articles.

8. The CHAIRMAN said that if he heard no objection he would assume that the Committee wished to consider article 2 on a preliminary basis in order to determine which terms in it were generally acceptable.

*It was so decided.*

**Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.190/4)**

[Agenda item 11]

#### Article 2 (Use of terms)

9. The CHAIRMAN invited the Committee to consider, as succinctly as possible, the title of draft article 2 and the terms "treaty", "ratification" and "act of formal confirmation".

10. Mr. HAYASHI (Japan) said that his delegation doubted the necessity of introducing new terminology such as the expression "act of formal confirmation". The term "ratification" was well established. He would raise the matter again during the consideration of later articles.

11. Mr. RAMADAN (Egypt) said that the term "ratification" should be reserved for States. It had long been

accepted, and still was, as denoting an act emanating from the highest organs of a State, and there were no corresponding organs in international organizations. His delegation therefore approved the use of the words "act of formal confirmation" as corresponding in the case of international organizations to the procedure adopted by States.

12. Mr. HARDY (European Economic Community) said that his organization would state its views on the term in detail when the matters touched on in article 2 came up in the relevant substantive articles. For the time being, he would simply say that the term "ratification" was currently used by international organizations, including his own, in connection with multilateral agreements.

13. Mr. SANG HOON CHO (Republic of Korea) said that his delegation endorsed the view expressed by Japan and the observations made by the United Nations in its written comments (A/CONF.129/5, p. 105). It would be preferable to use the single term "acceptance" with respect to international organizations.

14. Mr. JESUS (Cape Verde) said that the term "act of formal confirmation" was an innovation and should be discussed in some detail. In dealing with definitions, the content was the important question. The International Law Commission had proposed the term in order to establish a difference of treatment between international organizations and States; its recommendation should be followed, particularly since there was a precedent for the use of the term in a major international legal instrument, namely, the United Nations Convention on the Law of the Sea. With regard to the point made by the representative of the European Economic Community, it should be remembered that paragraph 2 of the article stated that the provisions regarding the use of terms were without prejudice to the meaning which might be given to them in the rules of any international organization.

15. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) said that it was unnecessary to draw an explicit parallel between acceptance of a treaty by an

international organization and ratification of a treaty by a State. The phrase "corresponding to that of ratification by a State" in subparagraph 1 (b bis) should therefore be deleted.

16. Mr. NASCIMENTO e SILVA (Brazil) said that the substance of ratification would be dealt with under article 11 and should not be discussed at the present stage.

17. Mr. BERNAL (Mexico) said that his delegation would support the formulation recommended by the International Law Commission. The term "act of formal confirmation" was not an invention but an expression well known in the usage of States and in international law.

18. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation found the term wholly acceptable. It enabled international organizations to take a flexible approach to establishing consent to be bound by a treaty.

19. Mr. WANG Houli (China) said that, while it was appropriate that the text should use different terms to denote the obligations and rights of the representatives of States and those of the representatives of international organizations, there was no need to make a distinction between the terms "powers" and "full powers". He would revert to that point in greater detail when those terms were discussed in connection with article 7.

20. Mr. FLEISCHHAUER (United Nations) said that his organization had some misgivings about the use of the term "act of formal confirmation" and had set them out in detail in its written comments.

21. Mr. CRUZ FABRES (Chile) said that he would comment on the substance of the question of ratification in connection with article 11. He endorsed the view that it was appropriate to draw a distinction between ratification by a State and establishment by an international organization of consent to be bound by a treaty.

*The meeting rose at 6.10 p.m.*

## 2nd meeting

Thursday, 20 February 1986, at 10.30 a.m.

Chairman: Mr. SHASH (Egypt)

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

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

[Agenda item 11] (continued)

Article 2 (Use of terms) (continued)

Subparagraphs 1 (b) and (b bis)

1. Mr. VIGNES (World Health Organization), speaking also on behalf of the International Labour Office, said that the World Health Organization considered it unnecessary to make a distinction in article 2 that was not always justified in the case of international organizations. It shared the view expressed by the United Nations representative at the previous meeting. Specifically, it considered that subparagraph 1 (b bis)

could be omitted from article 2. It considered that the distinction made in subparagraph 1 (*c bis*) could also be omitted if subparagraph (c) was amended in appropriate terms.

2. Mrs. THAKORE (India) said that it might be confusing to use the term "ratification" in the case of international organizations, in view of the fact that it could mean both ratification on the international plane and referral to constitutional processes in the case of States. That did not apply to international organizations, regardless of the procedure followed by the organization to give formal consent to be bound by a treaty. The internal procedures of international organizations differed from those of States. A more general term should be used.

3. Mr. ABDEL RAHMAN (Sudan) urged acceptance of subparagraph 1 (*b bis*) as drafted and observed that the commentary of the International Law Commission (see A/CONF.129/4) made it abundantly clear why the distinction had been thought necessary. At the previous meeting, Mr. Fleischhauer had explained the United Nations' concern in not retaining the provision. Although the United Nations was the leader of international organizations, his Government thought it was wrong for it to advocate deletion. Subparagraph 1 (*b bis*) formed part of the basic proposal, and the convention as a whole would be weakened if it were deleted and international organizations were equated with States.

4. Mr. TUERK (Austria) said that ratification was nothing less than an act of formal confirmation by a State to be bound by a treaty, and he saw no contradiction between the two. In State practice, an act of formal confirmation very often did not take the form of ratification but merely of an exchange of notes, for instance. Consequently, rather than making a formal distinction between ratification and an act of formal confirmation in a new convention, he would favour a flexible approach whereby it would be left to the States and international organizations concerned to decide which term to use. While he appreciated the significance of the inclusion of the term "act of formal confirmation" in the United Nations Convention on the Law of the Sea, he did not think that such an act should be treated as something quite distinct from ratification. Possibly, the matter would be simplified if subparagraphs 1 (*b*), (*b bis*) and (*b ter*) were merged and amended to read:

"‘ratification’ or ‘act of formal confirmation’, ‘acceptance’, ‘approval’ and ‘accession’ mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty".

*Mr. Shash (Egypt) took the chair.*

5. Mr. RASOOL (Pakistan) noted that the term "act of formal confirmation", had been proposed by the International Law Commission after lengthy debate and used in the United Nations Convention on the Law of the Sea. As that Convention had been signed by 159 States, the term in question could be said to enjoy virtually universal acceptance.

6. He noted also that the term "ratification" had been hallowed by time, and denoted the internal processes of a State such as acts of parliament or of a head of State. Such high-level acts could not be bracketed with the decisions of an international organization. For that reason, he favoured the retention of the term "act of formal confirmation".

7. Mr. ROCHE (Food and Agriculture Organization of the United Nations) agreed with the World Health Organization representative. In his view, the distinction introduced into the terminology was artificial and could not be supported simply because it had been used in the Convention on the Law of the Sea. Furthermore, whereas the Vienna Convention on the Law of Treaties<sup>1</sup> codified the secular practice of States, the draft articles sought to develop international law on the basis of a practice of international organizations, which was far shorter than that of States. If an intergovernmental organization could signify its consent to be bound in the form of acceptance, approval or accession, just like a State, it seemed somewhat illogical that, in another case by which it so signified its consent, a different term had to be used.

8. Mr. ABDEL RAHMAN (Sudan) said that logic dictated that the term "act of formal confirmation" should be retained. The term was not really new, and a real difference was involved.

9. Mr. PASCHKE (Federal Republic of Germany) said that his delegation supported the Austrian proposal, which avoided the problem of subjective appreciation of the definition in the article.

10. Mr. SHIHATA (World Bank) said that, as an organization that concluded more agreements annually than any other international organization and more than most States, the World Bank had a clear interest in the outcome of the Committee's deliberations and was anxious that sufficient flexibility was guaranteed to meet the varied requirements of the different international organizations. It strongly favoured the Austrian proposal to combine all the terms used in one provision.

11. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that the terminology before the Committee had been arrived at following a lengthy and detailed examination by the International Law Commission. That terminology was, moreover, logical in historical terms, inasmuch as "ratification" involved an act by the highest body of a State and could not be applied to international organizations. He had misgivings about the Austrian suggestion. There was a logical distinction between subparagraph 1 (*b*), which provided for ratification by the highest authority in a State, and subparagraph 1 (*b bis*), which provided for an act of formal confirmation by the highest administrative authority in an international organization. The functions of a State could not be transferred to an international organization. Subparagraph 1 (*b ter*), for its part, pertained to acts performed by both States and international organizations. In the circumstances, he would urge the Com-

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

mittee to abide by the formula evolved by the Commission.

12. Mr. CANÇADO TRINDADE (Brazil) said that when the Brazilian delegation had considered the expressions "ratification" and "act of formal confirmation" in the Sixth Committee of the General Assembly in the mid-1970s in its review of the work of the International Law Commission, it had indicated, on the one hand, the then innovation of the expression "act of formal confirmation", and, on the other hand, the difficulties of an extension of the term "ratification" to international organizations which would arise from the fact that it might be taken to mean that texts could not be adopted prior to a two-stage approval by a complex consultative mechanism involving organs of distinct ranks. He thought that the Austrian representative's suggestion might provide a flexible solution.

13. Mr. LEHMANN (Denmark) said that he understood the international organizations' concern that there should be flexibility in the terms of the convention. Such flexibility would leave open the possibility of developing international law in that sphere. His delegation welcomed the Austrian representative's proposal.

14. The CHAIRMAN noted that subparagraph 1 (b) would be fully discussed in connection with the relevant articles.

*Subparagraphs 1 (c) and (c bis)*

15. Mr. EHLERMANN (European Economic Community) said that the use of the terms "full powers" for States and "powers" for international organizations suggested a distinction which was not in keeping with the practice of the EEC in the making of treaties. His delegation would have further comments to make on that subject when the Committee considered the relevant articles, especially article 7.

16. Mr. HAYASHI (Japan) said his delegation had doubts regarding the necessity or usefulness of distinguishing between "powers" and "full powers". He saw no practical merit in distinguishing between the two terms, and felt that the Convention should follow as closely as possible the 1969 Vienna Convention. The introduction of artificial distinctions would make an already complex text more complicated. He would prefer to apply the term "full powers" to States and international organizations alike.

17. Mr. CASTROVIEJO (Spain) said that distinctions of terminology should be limited as far as possible. It was not logical in that case to reserve the terms "full powers" for States alone, since the "full" referred not to the capacity of the subject (whether organization or State) but to the capacity of the person carrying out the act related to the treaty to represent the subject. In both cases the powers of the representative must be full.

18. Mr. UNAL (Turkey) said that the capacity of an international organization to conclude treaties was not as full as that of States, since the former could conclude treaties only within its competence. However, where the international organization did have that competence its representative had the same "full powers" as a State. His delegation therefore saw no need to distinguish between "full powers" and "powers".

19. Mr. JESUS (Cape Verde) said that the rationale for distinguishing between "full powers" and "powers" was that it had been the intention during consideration of the matter in the Sixth Committee of the General Assembly that a distinction should be made between States and international organizations. That had been taken into consideration by the International Law Commission when it made the distinction between "full powers" and "powers". If the history of the concept of "full powers" were taken into account, it could be better understood why the term was not applied to international organizations, and why the Commission wished to introduce a new concept applicable to international organizations.

20. Mr. SHIHATA (World Bank) said that subparagraphs 1 (c) and 1 (c bis) did not relate to the question of capacity to conclude treaties, but defined the documents which established the status of a representative of the State or international organization. To imply that the powers of a representative of an international organization were less than full could not be accurate. Such was not the practice of international organizations, particularly the World Bank. His delegation supported the use of a single term which was simple, accurate and defensible.

21. Mr. RAMADAN (Egypt) said that his delegation supported the use of a single term. The document emanating from an international organization designating a person or persons to represent the organization for the purposes set out in subparagraph 1 (c bis) was similar to the corresponding document emanating from a State. Recognizing that the capability of international organizations was not as complete as that of States, the documents concerned did not refer to the competence of the organization but to that of its employees and its other representatives. It was thus better to use one term only.

22. Mr. ABDEL RAHMAN (Sudan) said that he was in favour of retaining subparagraphs 1 (c) and 1 (c bis) as well as subparagraphs 1 (b) and 1 (b bis) for reasons which he would explain in detail when the relevant articles were discussed subsequently.

23. Mr. DALTON (United States of America) said that his country's experience as a depositary showed that in practical terms there was never a problem over the distinction between "full powers" and "powers".

24. Mr. FLEISCHHAUER (United Nations) said his delegation was not convinced of the need to distinguish between "full powers" and "powers". The question at issue was not the capacity of international organizations but the powers of officers and agents of international organizations acting as negotiators.

25. Mr. BARRETO (Portugal) reiterated his delegation's view that article 2 should be discussed in depth at the end of the meeting. If the flexible approach to subparagraphs 1 (b), (b bis), (b ter) suggested by the Austrian representative were developed, a similar approach should be taken in subparagraphs 1 (c) and (c bis). His delegation was in favour of having one term applying to both States and international organizations.

26. Mr. WOKALEK (Federal Republic of Germany) said that a flexible approach was required. He pointed

out that the terms "full powers" and "powers" could not be distinguished in German.

27. Mr. SATELER (Chile) said that the two terms "full powers" and "powers" should be retained for the reasons set out in paragraph (10) of the International Law Commission's commentary to article 2. Although there was no problem in practice, it was important that the differences between States and international organizations should be reflected in the terminology.

28. Mr. PISK (Czechoslovakia) said that his delegation fully supported the views in paragraph (10) of the Commission's commentary to article 2. He believed that further discussion of the matter should be reserved until consideration of article 7.

29. Mr. AL-KHASAWNEH (Jordan) said that he agreed with the Spanish representative that unnecessary distinctions of terminology should be avoided. The matter under consideration was not the capacity of international organizations to conclude treaties, but the powers of their representatives. He agreed with the World Bank and United Nations representatives that an attempt to distinguish between "full powers" and "powers" was likely to result in confusion. There would be no loss if the distinction between "full powers" and "powers" was abolished.

30. Mr. PAWLAK (Poland) said that the two schools of thought related not to substantive issues but to the philosophy underlying the draft convention. It was a matter of giving names or labels to documents produced by representatives empowered to sign treaties on behalf of States or international organizations. While the designation of the documents was not in itself important, different types of entity were being represented, and it was therefore better to follow the International Law Commission draft for the reasons set out in paragraph (10) of the commentary to article 2.

31. Mr. SCHRICKE (France) agreed with the Polish representative that the matter was less one of substance than of labels. The use of different terms had no bearing on the scope of the "powers" given to representatives or the capacity of those representatives to bind the international organizations or States that they represented. His delegation felt that the terms proposed by the International Law Commission should be retained.

32. Mr. KERROUAZ (Algeria) said that the establishment of a distinction between the powers of States and international organizations in their capacity to conclude treaties was fundamental. He asked whether the Austrian representative intended to put forward a formal proposal for merging subparagraphs 1 (b), (b bis) and (b ter) or whether his delegation would accept the current draft if the Committee generally favoured its retention.

33. Mr. TUERK (Austria) replied that his delegation would discuss its suggestion with other delegations before making a formal proposal.

34. Mr. RASOOL (Pakistan) said that he agreed with the Polish representative that there was a philosophical background to the arguments in favour or against retaining the distinction between "full powers" and "powers". In that connection, it was necessary to bear

in mind the provisions of subparagraph 2 (a) of article 7 (Full powers and powers) specifying that Heads of State, Heads of Government and Ministers for Foreign Affairs were considered as having full powers "in virtue of their functions and without having to produce" any full powers in writing. That provision emphasized the distinction between the full powers of the representative of a State (which could be implied) and the powers of a person representing an international organization.

35. He suggested that the discussion on subparagraphs 1 (c) and 1 (c bis) should be postponed for the time being.

36. Mr. SZÉNÁSI (Hungary) said that there was general agreement on the need to draw a clear distinction between States and international organizations with regard to legal personality and to the capacity to conclude treaties. There was nothing in the development of contemporary international law to suggest that that distinction had been blurred in any way. The International Law Commission's draft articles had been based on that distinction, and the terminology used in the various articles was the logical consequence of that existing distinction. He urged that the distinction be maintained.

#### *Subparagraph 1 (d)*

*There were no comments.*

#### *Subparagraph 1 (e)*

*There were no comments.*

#### *Subparagraph 1 (f)*

*There were no comments.*

#### *Subparagraph 1 (g)*

*There were no comments.*

#### *Subparagraph 1 (h)*

*There were no comments.*

#### *Subparagraph 1 (i)*

37. Mr. JESUS (Cape Verde) said the use of the term "international organization" set forth in subparagraph 1 (i) was a well-established one. It was in fact identical with that in the corresponding provision of the 1969 Vienna Convention on the Law of Treaties. He reserved the right to revert to the matter, in particular when the Committee came to discuss draft article 5.

38. Mr. ECONOMIDES (Greece) pointed out that, for purposes of the draft convention now under discussion, it was not sufficient to define an "international organization" merely as an "intergovernmental organization". It was necessary to bring out also some of the essential features of such an organization. As he saw it, there were three such basic features. The first was that the organization's objectives were in the interests of its member States. The second was that the organization possessed international personality and the capacity to conclude international agreements. The third was that its international capacity was exercised by its own organs at the international plane.

39. Of those three elements, there was at least one which he felt must be included in the definition in subparagraph (i), namely, the capacity to conclude treaties. He suggested that the subparagraph be reworded on the following lines: “‘international organization’ means an intergovernmental organization having the capacity to conclude treaties governed by international law within the meaning of the present articles.”

40. Mr. RAMADAN (Egypt) remarked that the draft convention was intended to regulate the régime of the treaties to which one or more organizations were parties, not the status of international organizations.

41. That being said, it was his understanding that the expression used in subparagraph (i) covered intergovernmental organizations some of which included members that were not yet States.

42. Mr. ROMAN (Romania) said that his delegation was not entirely satisfied with the paragraph. It was not enough to say that an international organization was an intergovernmental organization; it was necessary to add that the organization had the capacity to conclude treaties. That would confine the scope of application of the draft convention to those organizations which had international legal personality and were subjects of international law.

43. The clarification he suggested was the more necessary in that an intergovernmental organization did not necessarily and automatically have the capacity to conclude treaties. It had to be empowered to do so by its constituent instrument or the other rules of the organization.

44. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that the definition in subparagraph (i) was unduly general. Greater precision was needed. As the draft convention under discussion was concerned with the treaties of international organizations, that definition must include the essential element of the capacity of international organizations to conclude international treaties. In any case, the problem of the definition of an international organization would have to be explored further when the Committee discussed draft articles, in particular articles 5 and 6.

45. Mr. VOGHEL (Canada) supported the Greek and Romanian representatives' suggestion that the definition should include a reference to the capacity to conclude treaties.

46. Mr. ULLRICH (German Democratic Republic) agreed with the comments of the representatives of Greece, Romania and the Ukrainian SSR. For the purposes of the draft convention under discussion, only intergovernmental organizations with the capacity to conclude treaties in accordance with their constituent instruments could be taken into account.

47. Mr. ALMOÓVAR (Cuba) said that although the definition was to be found in both the 1969 Vienna Convention on the Law of Treaties and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, he endorsed the suggestions by the representatives of Greece, Romania and the Ukrainian SSR.

48. Mr. WALDEN (Israel) said that his delegation saw no particular point in trying to amend the perfectly satisfactory definition provided by the International Law Commission. He reserved his further comments until a later stage.

49. Mr. JESUS (Cape Verde) said that the purpose of the paragraph under discussion was to define the limits of application of the draft articles and to specify which international organizations were to be taken into consideration for purposes of the draft convention under discussion. Paragraph (19) of the International Law Commission's commentary indicated that three types of organizations could fall within the scope of the draft articles. The first was that of international organizations consisting exclusively of States. The second was that of organizations which, in addition to States, counted one or more other international organizations as members. The third category was that of organizations whose membership consisted exclusively of other international organizations. The question therefore arose whether all three categories were to be covered. The Commission appeared to have worked on the assumption that only the first category—i.e., that of organizations consisting entirely of States—was covered by the articles.

50. In the circumstances, it seemed to him dangerous to try to frame a different definition of an international organization. Such an exercise would affect a great many articles of the draft. It was desirable to retain the definition formulated by the International Law Commission.

51. Mr. ROCHE (Food and Agriculture Organization of the United Nations) said that the International Law Commission's commentary appeared to indicate that the definition in subparagraph (i) included the three categories mentioned by the previous speaker.

52. The wording of subparagraph (i) was not self-explanatory for purposes of future negotiations. As regards the treaty-making capacity of international organizations, to which some representatives had referred, he reserved his organization's position until the Committee examined draft article 6.

53. Mr. TREVES (Italy) said that the wording of subparagraph (i), which was identical with the corresponding provision of the 1969 Vienna Convention, was intended to distinguish between intergovernmental organizations and non-governmental organizations; it did not exclude international organizations whose membership included other organizations.

54. The inclusion of a reference to the capacity to conclude treaties would introduce a controversial legal point into the definition. The question of the capacity to conclude treaties should be left to the internal law of the organization concerned and to general international law. He reserved his right to revert to the matter during the discussion of draft article 6.

55. Mr. MONNIER (Switzerland) agreed that it would serve no useful purpose to include a reference to the question of the capacity to conclude treaties. That question would be discussed in connection with later articles, in particular articles 5 and 6.

56. Mr. ZANNAD (Tunisia) supported the view that it would be unproductive to go into the substance of the question of the capacity to conclude treaties at the present stage.

57. Mr. RASOOL (Pakistan) reserved his right to revert to the question when the Committee considered article 6.

58. Mrs. THAKORE (India) asked the Greek and Canadian representatives whether an international organization whose constituent instrument was silent on the question of concluding treaties would not be regarded as an "international organization" for the purposes of the draft articles if a reference to the capacity to conclude treaties was introduced.

59. Mr. SHIHATA (World Bank) welcomed those comments. The constituent instruments of most international organizations did not contain explicit provisions on the capacity to conclude treaties. That was true of many organizations which had concluded a large number of treaties. The inclusion in the present definition of any reference to the capacity of an organization to conclude treaties would have the effect of restricting the application of the draft articles to a very small number of organizations.

60. Mr. KOECK (Holy See) doubted the wisdom of attempting a more detailed definition of an "international organization". In the first place, the draft articles were not intended to deal with international organizations as such but rather with the treaties concluded by them. There was therefore no need for an exhaustive definition of an international organization, a concept which was well known in international doctrine and practice.

61. Moreover, the insertion of the phrase "having the capacity to conclude treaties", as suggested by the representative of Greece, would in some way prejudice article 6, which dealt with the capacity of international organizations to conclude treaties and covered adequately the problem under discussion.

62. Mr. SZÉNÁSI (Hungary) agreed that the Committee was not called upon to draw up an exhaustive definition of an international organization but thought that the terms of subparagraph (i) should be made more precise. He associated himself with the Greek representative's suggestion.

63. Mr. ECONOMIDES (Greece), replying to the Indian representative's question, drew attention to the definition of "treaty" in subparagraph 1 (a) of article 2. Subparagraph 1 (i) had to be construed in the light of that paragraph. The reference to an intergovernmental organization was clearly intended to apply only to those organizations with the capacity to conclude treaties.

64. Mr. ABDEL RAHMAN (Sudan) believed that a restrictive definition would be undesirable. The elastic definition in the International Law Commission's text of subparagraph 1 (i) should be retained.

#### *Subparagraph 1 (j)*

65. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation would address itself in

detail to the provision in subparagraph (j), which in its view required further clarification, at a later stage.

66. Mr. TUERK (Austria) said that it would certainly be undesirable to freeze practice—which obviously played an important role in the activities of international organizations, including treaty-making activities—at any point in time, for example at the moment of entry into force of the projected convention. He was not altogether convinced by the argument put forward by the International Law Commission to justify the use of the adjective "established", especially its reference to the ruling out of disputed practice. That seemed to be another issue altogether. Nor would it be easy to determine when the practice of newly created organizations could be considered "established". For those reasons, he favoured the deletion of the adjective from the draft.

67. On the other hand, and although he also had doubts as to its utility, he could agree to maintenance of the qualification "relevant" in connection with "decisions and resolutions", and would merely suggest that it be applied to "practices" as well.

68. Mr. ECONOMIDES (Greece) observed that although "relevant rules" were mentioned in several of the draft articles before the Committee, nowhere was the term "relevant" defined. With the aim of making good that deficiency and avoiding possible misconceptions, his delegation had circulated a proposal (A/CONF.129/C.1/L.1), in accordance with which subparagraph 1 (j) would be amended by the addition of the following sentence:

"'relevant rules' means those rules of the organization that are applicable within the scope of the articles containing this term".

69. Mr. ULLRICH (German Democratic Republic) said that although the draft convention tabled by the International Law Commission provided a solid foundation for negotiations, the text required some revision, particularly in so far as a clear distinction between States and the status of international organizations was to be made.

70. It was indefensible to accord international intergovernmental organizations the same status as States. While the latter, by virtue of their sovereignty, were full subjects of international law, the former were only subjects of international law derived from States, their special status being determined by their member States. His delegation considered that to be the basic or key issue facing participants in the Conference in their codification work.

71. Since the term "rules of the organization" in the subsequent articles of the draft convention was of far-reaching substantive significance, it could not be considered in separation from its definition, as set out in subparagraph (j). The delegation of the German Democratic Republic could not accept the definition as drafted, and had submitted a proposal for amendment, which had unfortunately not yet been circulated.<sup>2</sup>

72. In the view of his delegation, the definition of "rules of the organization" constituted the core of arti-

<sup>2</sup> Subsequently circulated as document A/CONF.129/C.1/L.2.

cle 2 and was of essential importance for the further use of the term, which, throughout the text of the convention, concerned both the legal status of the contractual relations between States and international organizations and the relationship between the contractual rights and obligations of international organizations and those of their member States.

73. It was the legal consequences of the use of the term that made it necessary to exercise a great deal of care where the definition itself was concerned. In that connection, it should be borne in mind that the draft before the Committee dealt not only with universal organizations but also with a great number of regional organizations. There could be no doubt that, as regards the latter, the consent of all States concerned was required for adopting or amending the rules of the organization. However, the proposed draft did not take due account of that.

74. In his delegation's view, it was the task of the Conference to obtain a clarification concerning the conditions under which an international organization was entitled or qualified to conclude treaties under international law. The present definition did not meet that requirement to the necessary extent. In particular, the terms "resolutions" and "practice" were employed in the draft convention separately from the constituent instruments of a given organization. It was the view of his delegation that the constituent instruments of an organization were (or legally binding acts equal to them under certain preconditions could be) the decisive criteria for judging an international organization as having capacity and competence to conclude treaties. In his delegation's opinion, the practice of an organization could be used as a criterion only in so far as that practice was in accordance with the constituent instruments.

75. Those reflections had been taken into account by the amendment submitted by his delegation. He hoped it would receive the Committee's support.

76. Mr. FLEISCHHAUER (United Nations) concurred with the Austrian representative that the adjective "established" might be deleted; its maintenance could have the effect of preventing the further development of organizations' treaty-making practice and inhibit adaptation to future needs.

77. Mr. BERNAL (Mexico) also believed that the term "rules" required further clarification, since it might appear not to encompass provisions at the highest level of the international organizations' "internal law". It might indeed be preferable to replace the term by one more appropriate, such as "norms".

78. His delegation understood the term "practice" to signify practice backed up by *opinio juris*, and not merely precedents suddenly invoked in deciding a particular case.

79. Lastly, in view of the fact that international organizations had varied structures, and in some cases incorporated organs that were virtually autonomous, he believed that the provision might indicate that, where appropriate, the rules referred to were those of the organs as well.

80. Mr. EHLERMANN (European Economic Community) said that it was important to ensure that any

definition covered all the legally relevant rules. That was especially true in the case of the Community, whose rules included, *inter alia*, decisions of the European Court of Justice, which had made a major contribution to its treaty-making powers. The matter, including the use in later articles of the adjective "relevant", obviously required the most careful consideration.

81. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) observed that the term under discussion had a special bearing on the determination of the capacity of international organizations to conclude treaties (article 6), and concurred with the German Democratic Republic representative that further clarification was called for. His delegation would address itself in detail to the subject in due course.

82. Mr. JESUS (Cape Verde), invoking rule 29 of the rules of procedure, declined to comment in detail on the proposal by the Greek delegation.

83. Recapitulating the reasoning which had led the International Law Commission to draft the proposal under consideration, he described as wise the decision to derive both a precedent and an *ipsis verbis* text from the Convention on the Representation of States in their Relations with International Organizations, although that instrument was not in force. He could not agree with those speakers who had advocated the deletion of the adjective "established", which figured prominently and significantly in United Nations usage. He further believed that the concern expressed by the representative of the European Economic Community was covered by the qualification "relevant" applied to the resolutions and decisions referred to. There could be little difficulty in determining that a decision by the European Court of Justice amounted to a decision by the Community.

84. For those reasons, and in the absence of any better alternative, he favoured acceptance of the text prepared by the International Law Commission.

85. Mr. ROMAN (Romania) agreed with other speakers that the provision under consideration required further clarification and amplification. He stressed in particular that the practice referred to must itself be based on the rules or constituent instruments of the organization or arise from its decisions and resolutions.

86. Mr. ABDEL RAHMAN (Sudan) said that since form, structure, powers and functions, together with the amount, extent and significance of practice, varied greatly from organization to organization, some measure of qualification seemed desirable where the reference to the latter was concerned. He consequently favoured maintenance of the word "established". More generally, he considered that subparagraph (j) reflected the veracity that should be the objective of the convention.

87. Mr. MONNIER (Switzerland) noted that the International Law Commission had opted for a descriptive, enumerative approach in its definition, rather than one of synthesis or generalization. However, although the term "decisions and resolutions" might indeed correspond exactly with the technical designations of actions taken by the more important international or-

ganizations, there were other actions taken by many other organizations that could not, technically, be described as such. He consequently wondered whether in a multilateral convention of the type envisaged, it might not be wiser to seek a more comprehensive formulation, such as ‘‘precepts established by’’, which the International Law Commission had itself employed in its commentary; the term “decision” might also be used, provided that it was taken to signify the expression of the will of the organization in question.

88. Concerning the adjective “relevant”, he said that while such a qualification was perfectly apposite in the articles dealing with specifics (articles 5 and 6, for example), it seemed to have no significance in the provision under consideration. He favoured its deletion.

89. He agreed with the Austrian and the United Nations representatives that it would be useful to delete the adjective “established”. Organizations did, or did not, have practice. To seek to determine whether such practice was “established” might lead to difficulties.

90. Finally, he suggested that if the rules of an organization were to be quite comprehensively defined as its constituent instruments, decisions and practice, the qualification “in particular” would be unnecessary.

91. Mr. SCHRICKE (France) said that his remarks would be of a preliminary nature. Those who had participated in the drafting of the Convention on the Representation of States would recall that the definition reproduced therefrom had been proposed by the delegation of his country, and adopted unanimously. Obviously, therefore, he favoured the text submitted by the International Law Commission and—although he could consider further improvements—would oppose any proposals that deformed its intended scope. Thus, he could not countenance deletion of the adjective “relevant”. As the Special Rapporteur had told the Commission, the adjective was indispensable for ensuring that only those decisions and resolutions would be considered which had legal consequences and as such formed part of the organization’s “internal law”. Nor could he accept deletion of the adjective “established” which, since practice could indeed be hesitant, confused or disputed, offered a necessary legal safeguard.

92. The CHAIRMAN said that since the present discussion was of a preliminary nature, and in the absence of any objections, he proposed to invoke the provisions of the final sentence of rule 29 of the Rules of Procedure concerning the consideration of amendments.

*The meeting rose at 1.05 p.m.*

## 3rd meeting

Thursday, 20 February 1986, at 4 p.m.

Chairman: Mr. SHASH (Egypt)

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

[Agenda item 11] (*continued*)

**Article 2 (Use of terms) (*continued*)**

**Subparagraph 1 (j) (*continued*)**

1. Mr. AENA (Iraq) said that subparagraph (j) needed to be simpler and clearer. It should not go into unnecessary details which might cause problems concerning the legal personality of an international organization or its status as a subject of international law. The word “international” might be inserted before the word “organization” in order to make the meaning clearer, but he had doubts about any wording which appeared to put decisions and resolutions on the same footing as constituent instruments. The proposal by the Byelorussian Soviet Socialist Republic, the German Democratic Republic, Poland, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics (A/CONF.129/C.1/L.2) had merits, but the phrase “legally binding instruments based on them” might unduly

limit the functions and rules of procedure of international organizations. The original approach was much broader.

2. Mr. RASOOL (Pakistan) asked the Expert Consultant what the Commission had understood by the term “decision”. Since it preceded the word “resolutions”, which were usually adopted by the political organ of an international organization, his delegation had assumed that it too referred to an act of the political organ, but some speakers had indicated that it might include a decision by the judicial organ of an international organization. The wording proposed in the five-Power amendment might have a very limiting effect, since it did not take into account the practice of the United Nations, whose political organ had made decisions and passed resolutions on certain international agreements.

3. He could accept the amendment proposed by Greece (A/CONF.129/C.1/L.1).

4. Mr. ALBANESE (Council of Europe) said that his organization favoured a very general provision in view of the variety of situations obtaining in international organizations. In the case of the Council of Europe, regard must be had not only to its Statute, which was not very explicit on the subject of treaty-making, but also to the decisions of the Committee of Ministers, which were not always couched in the form of resolu-

tions, and above all to practice. Any attempt to be too precise would create difficulties; for example, the term "legally binding instruments" could not cover the situation within the Council of Europe. His organization preferred the original text of the subparagraph. Like the International Law Commission, it understood the adjective "relevant" to refer to rules which had a bearing on the subject-matter of the draft articles.

5. Mr. PISK (Czechoslovakia) said that the subparagraph would benefit from amendment. It was true that the Commission had taken the wording from the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,<sup>1</sup> but in his view the term "rules of the organization" had a larger significance in the draft articles and its definition therefore warranted careful attention. The constituent instruments of international organizations were of crucial importance, since they represented international treaties in which States had laid down the purposes and functions of such organizations as well as their powers, including their capacity to conclude treaties. The constituent instrument should therefore take priority over any rules, decisions or resolutions adopted by the competent bodies of the organization. His delegation supported the wording proposed by the five Powers, because it placed due emphasis on the constituent instrument and replaced the ambiguous and controversial expression "decisions and resolutions" by the more precise term "legally binding instruments".

6. Mr. SHIHATA (World Bank) said that subparagraph (j) was not a definition of the term "rules of the organization" and merely offered examples of them. The list of examples might be prefaced by wording such as: "'rules of the organization' means the norms governing the conduct of the organization, including in particular . . .".

7. Mrs. THAKORE (India) said that the definition of the expression "rules of the organization" was intended to cover the whole of the law of international organizations. It included a reference to established practice, which was an essential source of such law. In their comments on the definition, some international organizations had indicated that the term "established practice" might deter innovation, but in its commentary the International Law Commission had disclaimed any wish that such should be the case. The use of the phrase "in particular" gave the provision the requisite flexibility. Her delegation found the Commission's definition acceptable and endorsed the comments made about it by the French and Cape Verde representatives at the previous meeting. It was unable to support the wording proposed by the five Powers, because it was restrictive and would create problems of interpretation.

8. Mr. GILLET BEBIN (Chile) said there was some justification for using a definition which differed from that in the 1975 Vienna Convention. It was of supreme importance that the conduct of international organizations should be fully consistent with their constituent

instruments. The competence of international organizations was essentially limited by the will of their member States and was laid down in their constituent instruments. His delegation felt strongly that any wording tending to erode the mandatory force of a constituent instrument should be avoided. That was also the foundation of the legal position of most States in the Western hemisphere. Recently, in fact, the Organization of American States had adopted an amendment to article 1 of its Charter to the effect that the Organization had no powers other than those expressly conferred upon it by the Charter.

9. His delegation had serious doubts about the definition of the term "rules of organizations" proposed by the International Law Commission, since it placed the constituent instrument and established practice on an equal footing. The constituent instrument was an internationally binding legal act, and if established practice was not subordinated to it there would be a violation of that act. Article 1 of the OAS Charter expressly indicated the obligation of the organization to conduct itself in accordance with its constituent instrument. That obligation applied to all international organizations regardless of whether it was expressly stated in their statutes. A constituent instrument might in fact be called the constitutional law of an international organization, and no derogation from it, including the pretext of established practice, was acceptable.

10. Mr. WANG Houli (China) said that the language of the definition should be more precise. The treaty-making capacity of an international organization depended on the will of its member States, and that will was primarily reflected in the constituent instrument of the organization. The definition should therefore take account of the capacity of international organizations to make treaties by virtue of their own resolutions, decisions and established practice, and to do so only in conformity with the goals and purposes laid down in their constituent instruments. The Chinese delegation understood the definition in that way and therefore opposed the idea that the words "relevant" and "established" should be deleted as proposed at the previous meeting by the representatives of Switzerland and Austria, respectively.

11. Mrs. DIAGO (Cuba) said that since the convention would apply to all international organizations, both universal and regional, the Conference did not have to keep to rules adopted in conventions such as the 1975 Vienna Convention. She agreed that the expression "rules of the organization" should be carefully analysed. Her delegation supported the proposal of the five Powers. It took the view that the practice of an organization should be based on its constituent instrument and that the expression "rules of the organization" meant the constituent instrument and other provisions and practices adopted by the organization in keeping with that instrument.

12. Mr. SZÉNÁSI (Hungary) said that his delegation favoured a more precise definition of the term "rules of the organization" that would eliminate any uncertainty aroused by the words "in particular" and "resolutions and decisions". It therefore supported the more comprehensive and unambiguous wording proposed by the five Powers.

<sup>1</sup> See *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12), p. 207.

13. Mr. VIGNES (World Health Organization) said that his organization approved the text proposed by the International Law Commission, since it took fully into account all the rules of an organization. If, however, the proposal of the five Powers found favour, it would be advisable to amend it by substituting the words "formal acts" for "legally binding instruments", so as to take account of the fact that, even though some resolutions or decisions of an organization could be considered as not legally binding, they were none the less rules in the broad sense, at least for the secretariat of the organization, which was usually the organ called upon to negotiate treaties.

14. Mr. TALALAEV (Union of Soviet Socialist Republics) said that while the definition of the term "rules of the organization" proposed by the International Law Commission had been acceptable for the purposes of the 1975 Vienna Convention, it had two obvious shortcomings as far as the present draft convention was concerned. First, it took no account of the paramount role of the constituent instrument in the system of sources of capacity of international organizations, and secondly, it paved the way for international organizations, through the adoption of resolutions and decisions and through other acts and practices, to depart from the requirements of their constituent instruments which in particular regulated their capacity to conclude treaties. The proposal co-sponsored by his delegation was intended to eliminate those shortcomings by stressing the significance of the constituent instrument of an international organization as the main source of its rights and capacity to conclude treaties, and by eliminating the possibility of it adopting resolutions, decisions or practices that might be a departure from the requirements of the constituent instrument in that area. Consequently, any resolution or decision which conflicted with the provisions of the constituent instrument would be legally invalid.

15. Cases involving invalid resolutions or decisions regrettably had occurred in the past, and needed to be prevented in the future. Furthermore, the proposal was consistent with the approach recommended by Switzerland at the previous meeting, namely, to keep to general terms. The Conference was drawing up a legal convention which would be a source of international law and should therefore possess legal rather than moral force and consequently be based on legally binding rules. Lastly, the proposal upheld the concept of established practice, which must correspond to the constituent instrument of the organization.

16. Mr. BARRETO (Portugal) said that he would welcome the opinion of the Expert Consultant with regard to the words "constituent instruments, relevant decisions and resolutions".

17. Mr. PASCHKE (Federal Republic of Germany) said that his delegation strongly supported the text proposed by the International Law Commission. The words "relevant" and "established" provided safeguards which should meet the concerns of all delegations.

18. Mr. REUTER (Expert Consultant) said that the Commission had drawn the words "relevant decisions

and resolutions" verbatim from the 1975 Vienna Convention, which had been given the seal of approval by the duly empowered delegations of Governments. Interpretation of the term "rules of the organization" was accordingly a matter for Governments themselves.

19. The three elements of the definition—constituent instruments, relevant decisions and resolutions—derived both from written documents and from the established practice of organizations. In addition, the order in which they appeared in the text was not arbitrary, but indicated a certain progression. It was important to remember that the status of "decisions and resolutions" varied from one organization to another, and that whereas "decisions" were categorical and binding, "resolutions" were less categorical and not necessarily binding. Thus, while it might be objected that the formulation in the basic proposal created uncertainty, it none the less conferred some measure of flexibility on the draft: hence its adoption by the International Law Commission.

20. It was questionable whether the Conference had competence to determine what the rules of an organization should be in absolute terms, since each organization was an individual case. However, he doubted whether any organization would exclude established practice as a source of its internal law. It was for the Conference to decide whether the existing wording, which was admittedly clumsy, was not after all the best.

21. Mr. ECONOMIDES (Greece) said that the sheer variety of terms used to denote instruments and acts—statutes, conclusions, agreements, proposals, opinions, measures, regulations and decrees, to mention only a few—was such that the best solution would perhaps be to follow the suggestion made at the previous meeting to replace the term "relevant decisions and resolutions" by "relevant acts" and to delete the words "in particular".

22. Mr. REUTER (Expert Consultant) said that he felt it would be best for changes of that kind to be discussed in the Drafting Committee.

23. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee referred the wording of the subparagraph to the Drafting Committee.

*It was so decided.*

#### *Paragraph 2*

24. Mr. HAYES (Ireland) said that the representative of Poland at the previous meeting, had rightly pointed to the fact that the terms used in paragraph 1 were effectively "labels". Like them, the introductory wording of paragraph 1 was intended to facilitate the formulation of subsequent articles, and that intention was reinforced by paragraph 2. The criterion to be borne in mind in the Committee's deliberations was the adequacy of the terms used in article 2 for the purposes of the articles as a whole, rather than any extraneous considerations.

*The meeting rose at 5.15 p.m.*

## 4th meeting

Friday, 21 February 1986, at 3.25 p.m.

*Chairman: Mr. SHASH (Egypt)*

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

[Agenda item 11] (*continued*)

**Article 2 (Use of terms) (*continued*)**

**Subparagraph 1 (j) (*concluded*)**

1. Mr. WANG Houli (China) said that the central point of subparagraph 1 (j) was that the treaty-making capacity of an international organization could come only from the will of its member States as reflected in its constituent instruments; the term "rules of the organization" therefore meant not only the constituent instruments but also such relevant decisions, resolutions and established practice as were in conformity with the objectives and purposes specified in the constituent instruments. While the wording proposed in document A/CONF.129/C.1/L.2 was an improvement on the original subparagraph, it did not make it sufficiently clear that established practice too must conform to the constituent instruments. Also, as other representatives had indicated, the term "legally binding instruments" in the amendment was not wholly adequate, since legally binding acts were not confined to instruments. His delegation therefore suggested the following wording for the subparagraph: "(j) 'rules of the organization' means the constituent instruments of the organization and its relevant acts and established practice based on the constituent instruments". It was not necessary to specify that the term "relevant acts" included all relevant decisions and resolutions and similar acts of an international organization.

**Article 3 (International agreements not within the scope of the present articles)**

2. Mr. JESUS (Cape Verde) said that there was a lacuna in the text proposed by the International Law Commission, namely, in regard to international agreements between subjects of international law other than States and international organizations. His delegation had submitted a proposal to remedy that shortcoming (A/CONF.129/C.1/L.5 and Corr.1) and suggested that the new subparagraph which it had recommended should be placed after the existing subparagraph (ii) and become subparagraph (iii), with the present subparagraph (iii) becoming subparagraph (iv).

3. Mr. SCHRICKE (France), introducing the amendment proposed by his delegation (A/CONF.129/C.1/L.11), said that article 3 was at best of doubtful utility and at worst a possible source of confusion.

4. The scope of application of the draft articles as a whole was clearly defined in article 1 and further elaborated in article 2. Those two articles made it clear that the future convention could have no legal effect on international agreements other than those governed by international law and concluded in writing between one or more States and one or more international organizations or between international organizations. In 1968 the French delegation to the United Nations Conference on the Law of Treaties had pointed out, in connection with the text of article 3 of the draft articles on the law of treaties proposed by the International Law Commission, that article 3 merely restated the situation created by articles 1 and 2.<sup>1</sup> Thus article 3 would in any event be of little use. It could of course be said that since that Conference had nevertheless decided to include such an article in the Convention it approved in 1969, and since the present draft articles were intended to parallel that Convention, it would be appropriate to include a similar provision in it, amended as necessary to suit the different scope of the new articles.

5. The analogy, however, was deceptive. The purpose of the draft articles considered in 1968 had been more ambitious than that of the present draft, and indeed than the text finally adopted by the Conference. The goal of the draft articles on the law of treaties had been to establish the rules of the law of treaties in general, whether concluded by States or by other subjects of international law. It had therefore seemed sensible to specify that the text, despite its very broad scope of application, did not claim to be exhaustive or to impair either the validity of agreements outside its scope of application or the application of rules of international law other than those deriving from the Convention. In the event, the Conference had decided to restrict the scope of the 1969 Convention to treaties between States and had drafted article 3 to take that into account, making it clear that the provisions of the Convention would apply to the relations of States as between themselves under international agreements to which other subjects of international law were also parties.

6. The position at the present Conference was entirely different. The draft articles were an adaptation to a particular category of treaties of the rules set forth in the 1969 Convention. The grounds for dealing with the situation addressed by article 3 of that Convention were no longer present.

7. The fact that the present draft article 3 was of little use would not be sufficient justification for deleting it, if

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<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.68.V.7), Summary records of the Committee of the Whole, 7th meeting, para. 56.

the article did not present the additional disadvantage of being a possible source of confusion. Its wording was indeed very complex, and undoubtedly it could hardly be otherwise; unlike article 3 of the 1969 Convention, it had to take into account not only the existence of international agreements other than the treaties covered by the draft articles but also the provisions of the 1969 Convention itself. It might prove very difficult, not to say controversial, to interpret, particularly in regard to its relationship with the 1969 Convention. Moreover, there was always the risk that, by seeking to list all the kinds of agreements that fell outside the scope of application of the proposed convention, the article might overlook one or more. The amendment proposed by the delegation of Cape Verde was an illustration of the kind of negative approach whereby the article sought to define what the scope of application was not, rather than what it was. As a positive approach to the situation, his delegation thus proposed that the article should be deleted.

8. Mr. HAYASHI (Japan) said that article 3 enumerated certain categories of international agreement to which the proposed convention would not apply, and safeguarded their legal force. While his delegation had no argument with the general thrust of the article, which it believed could be useful in the same way as article 3 of the 1969 Vienna Convention, it had some difficulty with the drafting of the first half of the article. The enumeration of the types of international agreement which would not be affected was not exhaustive and constituted a clear departure from article 3 of the Vienna Convention. As it stood, the text left out agreements between States, international agreements between States and subjects of international law other than States and international organizations, and international agreements between such other subjects of international law. It was clearly not the intention of the International Law Commission to deny protection to those agreements, and the gap should therefore be filled by making a change in the drafting. One way of doing that would be to follow the Commission's approach and try to expand the list of categories of agreement suitably, but the resulting text would be very cumbersome. An acceptable alternative to attempting to list all conceivable categories of agreement would be to refer to "certain international agreements", as suggested in the proposal put forward by his delegation in document A/CONF.129/C.1/L.9; that would considerably shorten and simplify article 3 without changing the Commission's intention or the substance of its text. He hoped that the new text would commend itself to the Committee as a compromise.

9. Mr. CASTROVIEJO (Spain) said that his delegation did not think article 3 was either superfluous or badly drafted. It was true that it was somewhat lengthy and detailed, but the topic required a series of distinctions and clarifications, without which its application to international agreements between States and international organizations could not be properly understood. He appreciated that some of those aspects might not seem appropriate to some delegations, including the reference in the final subparagraph of the article to "other subjects of international law". His delegation nevertheless considered that the reference was not out

of place in the article, and it urged that the text should be retained as it stood, as being the outcome of a compromise in the International Law Commission.

10. Mrs. THAKORE (India) said that her delegation had no difficulty with article 3 as adopted by the Commission. The article had the merit of clarity, although the wording was cumbersome. In view of the increasingly frequent conclusion of unwritten agreements, it was necessary to specify that the draft articles sought to govern only agreements in written form. The substitution of "subjects of international law" for the term "entities" had been an improvement, as the latter might have given rise to problems. The expression "subjects of international law" had, moreover, been used in the 1969 Vienna Convention. The requirement of the generally recognized principle that international agreements could only be concluded between subjects of international law had thus been met. Her delegation did not share the view that, since the scope of the draft articles as a whole was clearly indicated in article 1, article 3 could simply state that the articles did not apply to treaties to which one or more subjects of international law other than States or international organizations were parties. As her delegation found article 3 acceptable in its present form, she could not support the French proposal. The amendments proposed by Japan and Cape Verde might be referred to the Drafting Committee.

11. Mr. GAJA (Italy) said that his delegation had some misgivings about article 3. Although the text appeared to follow the corresponding article of the 1969 Vienna Convention closely and could thus be read as confirming that Convention, in fact it conveyed the impression that the draft articles were intended to provide a text on the law of treaties that would have a wider scope of application than the 1969 Vienna Convention. A safeguard clause of the magnitude of draft article 3 might appear to be appropriate in a convention covering the law of treaties in general, but it was less so in a convention with a more limited purpose. The reproduction of article 3 of the 1969 Convention could be a disservice to the earlier instrument, since it might be taken to indicate that the draft articles constituted a new version of that Convention. It might be wiser simply to express directly and clearly the idea underlying subparagraph (c), namely, that the draft convention was not intended to govern treaty relations between States but only relations between States and international organizations or between international organizations. That could be done either through a drafting change in article 1 or through wording added at the beginning or the end of the draft articles.

12. Mr. RASOOL (Pakistan) said he was aware of the danger of non-exhaustive lists which both the Cape Verde and the Japanese amendments sought to remedy. However, the Japanese amendment created the same uncertainty that it intended to remove, since the words "certain international agreements" gave rise to the question, which agreements? His delegation favoured the Cape Verde amendment, but opposed the French proposal to delete the article, which, as the Spanish representative had explained, had its value.

13. Mr. RIPHAGEN (Netherlands) said that the Commission's draft of article 3 had negative and positive elements. The negative part sought to enumerate those agreements which were not covered by the draft articles: since article 2, subparagraph 1 (a), set out the agreements which the draft articles did cover, other agreements must, by definition, fall outside its scope; consequently, that part of article 3 was technically superfluous. Subparagraphs (a) and (b) were useful but not strictly necessary; the words "if any" might be added to subparagraph (a) to avoid giving the impression that agreements not covered by the draft articles were no agreements at all. Subparagraph (b) simply meant that such agreements were governed by customary international law. The positive element in article 3 was subparagraph (c). If it was assumed that the only possible subjects of international law were States and international organizations, that subparagraph did not make sense, but at present, and perhaps increasingly in the future, there might be subjects of international law which were neither States nor international organizations. The World Bank, for example, had treaties with one or more States and entities other than States or international organizations. Such treaties were not covered by the present draft articles, but the relations between the States and international organizations which they involved were so covered. Article 3 was not therefore redundant, but it required redrafting. The Japanese amendment offered a possible solution to the problem.

14. Mr. PAWLAK (Poland) said that it would be better to redraft the article, despite its difficulties, than to delete it, since it was a useful provision.

15. Mr. MONNIER (Switzerland) agreed that the article was useful. Its positive element was not only subparagraph (c), since that was reinforced by subparagraphs (a) and (b). Paragraph (1) of the International Law Commission's commentary to the article (see A/CONF.129/4) had rightly mentioned, among the international agreements not covered by the draft articles, those involving entities such as the International Committee of the Red Cross (ICRC), which were neither States nor international organizations in the sense in which that term was used in the draft articles. ICRC concluded agreements with States to determine the status of Red Cross delegations in countries where they were active—an arrangement comparable with the headquarters agreement of an international organization—and to implement Red Cross activities in accordance with the 1949 Geneva Conventions and the Additional Protocols to those Conventions. It also concluded agreements with international organizations which were subjects of international law under the draft articles. It therefore seemed important to retain the positive elements in article 3, either in their present form or in a slightly simplified form as proposed in the Japanese amendment.

16. Sir John FREELAND (United Kingdom) said that the rationale and scope of article 3 of the Vienna Convention on the Law of Treaties were clear enough, but the situation was different in the present draft articles. He was not persuaded that such an article was needed at all. Certainly the text, both in the Commission's draft

and in the form which the Cape Verde amendment would give it, was too complicated. He would prefer something simpler and clearer along the lines of the Japanese proposal. There was also the question of the relationship between the 1969 Convention and the present draft articles. The clear intention of article 3 (c) of the former was that if one or more international organizations became parties to a treaty between States, that in no way affected the primacy of the relationship between the States parties. That situation should be preserved. His delegation was consulting with others with a view to tabling a fresh proposal for article 3.

17. Mr. ABDEL RAHMAN (Sudan) said that the present draft of article 3 was long and unwieldy, but everyone must be concerned with the principles it embodied. Such an article might avert future controversy, and consequently he could not agree to its deletion. The Japanese proposal would over-simplify the text. The Cape Verde amendment was more attractive, but he hoped that the efforts of the United Kingdom delegation might produce a constructive proposal acceptable to all.

18. Mr. MBAYE (Senegal) said he had experienced no particular difficulty in understanding the Commission's draft of article 3. The article was useful and took account of the evolution of the international community. However, the text might usefully be supplemented by the wording proposed by Cape Verde or something along those lines.

19. Mr. HAYES (Ireland) said that article 3 of the 1969 Vienna Convention was a safeguard clause designed to ensure that international agreements not covered by that Convention did not lose their validity on its entry into force. It was highly desirable that the draft articles should contain a similar clause, although it was more difficult to draft than the corresponding article of the 1969 Convention because it required detailed formulation. In attempting to identify specific kinds of agreements, the International Law Commission had incurred the risk of not being exhaustive. The Japanese proposal provided the most promising basis on which to achieve a shorter text; the words "certain international agreements", read in conjunction with article 2, did not suffer from uncertainty. His delegation could, however, support the Commission's draft, which it should be possible to improve.

20. Mr. BARRETO (Portugal) said that he could not agree to the deletion of article 3, which was very important. He could accept the Commission's draft, but its text was unwieldy and the same purpose could be achieved by more flexible wording such as that proposed by Japan.

21. Mr. TUERK (Austria) said he would welcome article 3 if it was improved. It should not define the area to which it did not apply or strive to provide an exhaustive list of international agreements, and it should lay stress on what was in the second half of the present text.

22. He could support the Japanese proposal were it not for the fact that the words "certain international agreements" lacked precision. He therefore suggested that the introductory wording of that proposed text

should be redrafted to read: "The fact that international agreements do not fall within the scope of the present articles shall not affect . . .".

23. Mr. HERRON (Australia) said that his delegation saw the need for a saving clause along the lines of the draft proposed by the International Law Commission, its purpose being to preserve the legal force and applicability of all international agreements not covered by article 2, subparagraph 1 (a) of the draft convention. However, the Commission's draft was cumbersome and not as comprehensive as it might be. The Japanese text covered the same ground more simply, but had been criticized for being uncertain. The change suggested by the representative of Austria might produce a misleading text. He therefore suggested that the introductory wording of the draft article proposed by Japan should read: "The fact that the present articles do not apply to international agreements other than international treaties referred to in article 2, subparagraph 1 (a), shall not affect . . .". That would result in the article having the same substance and effect as the text submitted by the International Law Commission.

24. Mr. ROSENSTOCK (United States of America) said that the Commission's idea of having a safeguard provision of the kind represented by draft article 3 was correct, and his delegation would support an article which had that effect. With Cape Verde's proposed addition, the article would have seven numbered sections and would be so complex as to make a subsequent explanation to parliamentarians extremely difficult. Japan's approach was simple and more suitable; if the wording it had proposed was insufficiently precise, it could be improved by the Drafting Committee.

25. Mr. NASCIMENTO e SILVA (Brazil) said he understood the difficulty in understanding article 3 as drafted by the International Law Commission. However, he hesitated to support the French proposal despite the excellent arguments in favour of it which the representative of France had put forward. In his view it might be better to eliminate the negative elements in the Commission's draft, but a majority of delegations seemed to consider that they should be included. If the Committee should prefer the Commission's draft, it might be improved by the insertion of the words "*inter alia*" after the words "do not apply". His delegation could also accept the Japanese amendment. At all events, the Drafting Committee, taking into account the comments made by the representatives of Austria and Australia, should be able to reword the Japanese text satisfactorily.

26. Mrs. DIAGO (Cuba) said that, although her delegation appreciated the arguments put forward by the International Law Commission in the commentary to the article, the wording of the article was unclear. It would best be improved in the way proposed by Cape Verde, whose amendment should be referred to the Drafting Committee.

27. Mr. AENA (Iraq) said that he was not in favour of deleting the whole of article 3. The Conference should try to clarify the Commission's text, particularly in order to take account of the subtle differences in legal status of international organizations, and make the arti-

cle speak more clearly about the link between it and other rules of international law which defined agreements not within the scope of the draft articles. The problem was essentially a drafting one, and in solving it care should be taken to avoid excessive detail and to simplify the two parts of the article.

28. Mr. JESUS (Cape Verde) said that his delegation could not support the proposal by France to delete the article altogether; that would create difficulties which would jeopardize the interpretation and application of the future convention. Nor could it support the wording proposed by Japan, because that text, despite its many merits, represented a major change in the approach to the subject from the one taken by the International Law Commission. The draft articles, for the first time in an international instrument laying down general rules of international law, recognized subjects of international law other than States and international organizations. The Japanese proposal, by removing that recognition, would jeopardize a major achievement of the Commission and the interests of an overwhelmingly large sector of the international community.

29. Mr. RUIZ CASTILLO (Nicaragua) said that his delegation approved the International Law Commission's draft of the article even though it was not readily understandable. It could not accept the French proposal. The Japanese proposal had the defect of not enumerating the kinds of international agreements involved. His delegation therefore considered that the Drafting Committee should be asked to redraft article 3 on the basis of the Commission's text and Cape Verde's proposal.

30. Mr. MORELLI (Peru) said that the Commission's text would be acceptable if it was made clearer and easier to read. The proposal by Japan provided an interesting formulation for the article, which the Drafting Committee should consider. In doing so, it should take care not to eliminate from the article any of the existing component parts, bearing in mind in particular the present subparagraph (c), to the importance of which the Netherlands representative had drawn attention.

31. Mr. RAMADAN (Egypt) said that his delegation approved, in principle, the Commission's text. However, the article did not include other international agreements which were subject to international law. As the International Law Commission stated in paragraph (1) of its commentary to article 3, "The development of world humanitarian law and its extension for the benefit of entities which have not yet been constituted as States will provide further examples of this kind, and there will even be agreements between one or more international organizations, one or more States and one or more entities which are neither States nor international organizations." The best way to fill the gap in the Commission's text was to expand its scope in the way proposed by the delegation of Cape Verde, and he suggested that that amendment be referred to the Drafting Committee.

32. Mr. HAYASHI (Japan) disagreed with the representative of Cape Verde that the wording proposed by the Japanese delegation removed recognition from subjects of international law other than States and inter-

national organizations. In any event, as all delegations would undoubtedly agree, the present Conference was not the appropriate forum in which to discuss the question of what constituted a subject of international law. The merit of Cape Verde's proposal was that it reinforced the Commission's approach to the matter, but the suggested new subparagraph would still not make the list of international agreements complete. At least two more categories would need to be added: agreements concluded between States, and those concluded between States and subjects of international law other than States and international organizations. That would make six categories, and the first half of the article would thus become extremely cumbersome. The Japanese delegation had therefore taken an alternative approach to the formulation of the article, which had resulted in the proposal in document A/CONF.129/C.1/L.9.

33. Mr. TEPAVICHAROV (Bulgaria) expressed support for the International Law Commission's text but at the same time agreed that the first half of the article was not exhaustive. However, rather than attempting to make the article more comprehensive by adding new categories of agreements, the Committee should seek to clarify it by means of small drafting changes, such as the insertion of the words "*inter alia*" suggested by Brazil.

34. Mr. CRUZ FABRES (Chile) said that the Committee should approve article 3 as drafted by the Commission, in view of its legal complexity. A safeguard clause was needed to prevent conflicts of application in cases where States had concluded treaties with international organizations such as the International Committee of the Red Cross, which was a non-governmental organization. The Swiss representative had rightly drawn attention to the situation of that organization.

35. Mr. JESUS (Cape Verde) said that the point he had wished to make about the Japanese proposal was that it excluded the reference which the International Law Commission, by using the words "subjects of international law other than States or organizations", seemed to be making in the draft articles to an important group of countries in the international community. That reference was of great value to his delegation. He was certainly aware that the Conference was not the place to settle the question of what a subject of international law was.

36. The Japanese representative had indicated that the Commission's analytical formulation, to which Cape Verde proposed the addition of a subparagraph which would make it even more analytical, left out two other categories of agreement that should be included if the list was to be exhaustive. If that were so, he would prefer those two categories to be mentioned rather than accept a general formula of the type Japan had suggested. However, having examined the categories of agreement which might fall within the purview of article 3, he had found none which were not mentioned in the Commission's text or his delegation's amendment. While fully agreeing with Japan's intentions, therefore, he could not support its proposal.

37. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation associated itself with

those speakers who had been unable to support the French proposal, and agreed that the Commission's draft article was cumbersome and difficult to understand. However, his delegation found no substantive difficulties in the Commission's text. He shared the view that the drafting problems it presented could be solved by the Drafting Committee, which should aim at streamlining the text of the article.

38. Mr. SCHRICKE (France) said that, although article 3 had been designed as a safeguard clause, its effect would, paradoxically, be to jeopardize some international agreements. It was unlikely that any consensus could be achieved on the list of agreements to which the articles would not apply, and consequently, left as it was, the draft article would be a dangerous one. That was one of the reasons why his delegation had proposed its deletion. He did not believe that the text could be rescued by adding the words "in particular" at the beginning of the article; such an approach was unhelpful in that it would accord priority to some agreements over others.

39. Mr. BEN SOLTANE (Tunisia) said that article 3 was both useful and necessary and should be retained. The Japanese proposal had the demerit of being vague and would give rise to many difficulties. He therefore supported the amendment submitted by the representative of Cape Verde, but considered that the subparagraph it proposed should be placed after the existing subparagraph (iii).

40. Mr. FOROUTAN (Islamic Republic of Iran) said that, while article 3 was undoubtedly cumbersome and difficult to understand on a first reading, he could see advantages in retaining it. He associated his delegation with the views put forward by the representative of Cape Verde.

41. Mr. KERROUAZ (Algeria) said that article 3 was certainly restrictive and incomplete, yet he fully sympathized with the Commission's decision to include it in the draft as a safeguard clause. He was therefore unable to accept the proposal to delete it. Nor was the Japanese suggestion acceptable, since its effect would be to destroy the analytical formulation of the article. The best approach seemed to be the one advocated by the representative of Cape Verde. Like the representative of Tunisia, he believed that the proposed additional subparagraph should be placed after the existing subparagraph (iii).

42. Mr. VAN TONDER (Lesotho) said that his delegation did not agree that article 3 should be deleted. If the text was cumbersome or insufficiently exhaustive it should be improved, perhaps on the lines suggested by the representative of Cape Verde. Whatever improvements were made, the reference to subjects of international law should be retained.

43. Mr. HAYASHI (Japan) suggested that the proposals made by his own delegation and that of Cape Verde should be referred to the Drafting Committee.

44. Mr. OLUMOKU (Nigeria) said that the comments made in the course of the discussion and the arguments advanced in the International Law Commission's commentary to the article had convinced him of the need to retain the article. The change proposed by

Cape Verde would not give his delegation any difficulties.

45. Mr. REUTER (Expert Consultant) said that in drafting the article the Commission had been guided by the principle of strict adherence to the 1969 Vienna Convention, but its members would be quite content to see the existing text improved, streamlined or even deleted, if that was the wish of the Conference.

46. Several speakers had drawn attention to the last subparagraph of article 3. One problem which the Commission had not addressed was that article 3 of the 1969 Vienna Convention, by safeguarding the application of the rules of that instrument to relations between States parties to a treaty to which other subjects of international law were also parties, implied that there were two sets of rules on treaty law: general ones and the rules of the Vienna Convention. Draft article 3 introduced a third series of rules, those of the draft convention itself. Some representatives believed that problems might arise from that situation because of uncertainty as to the rules applying to relations between States when States and other entities were involved in treaties covered by the Convention. In such a case, States parties to the Vienna Convention would be bound by the provisions of that Convention. The draft convention would therefore need a provision stating clearly that for States parties to the 1969 Convention the provisions of that Convention would apply to the relations between them arising out of treaties falling within the scope of the draft convention. The problem, though unlikely to occur frequently, would arise in one

specific circumstance, namely if in the draft under discussion it was decided to introduce procedures for the settlement of disputes which were different from those in the Vienna Convention. Although the Commission had been aware of the issue, which was very complex, it had felt it best not to tackle it because of the risk of the draft articles being incompatible with the Vienna Convention. It was for the Conference to seek a solution to the problem.

47. The CHAIRMAN summarized the discussion on article 3 and asked the French delegation if, in the light of that discussion, it wished to uphold its request for deletion of the article.

48. Mr. SCHRICKE (France) said that, although his delegation held to its view that it would be best to delete article 3, it did not wish to obstruct the work of the Committee by insisting on its proposal. He hoped that his delegation's concerns would be duly taken into account by the Drafting Committee.

49. Mr. JESUS (Cape Verde) said that the Japanese amendment introduced questions which were not simply matters of drafting. Regarding his own amendment, it would be useful if a decision could be postponed until he had consulted with other delegations on the issue.

50. The CHAIRMAN said that, if he heard no objection, he would assume that the Committee wished to postpone a decision on article 3.

*It was so decided.*

*The meeting rose at 5.55 p.m.*

## 5th meeting

Monday, 24 February 1986, at 10.20 a.m.

Chairman: Mr. SHASH (Egypt)

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

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

[Agenda item 11] (continued)

**Article 3 (International agreements not within the scope of the present articles) (continued)**

1. Mr. WANG Houli (China) commended the Japanese delegation's concern to simplify article 3, but noted that its amendment (A/CONF.129/C.1/L.9) had not met with general approval and that, as a matter of principle, precision should have precedence over brevity. He believed that the Japanese proposal, as well as others made during the discussion, were in fact insufficiently precise. He could not accept deletions which

had also been proposed, and considered that the best course would be to invite the Drafting Committee to look into the possibility of simplifying the article.

2. Mr. ECONOMIDES (Greece) observed that, notwithstanding the Cape Verde amendment (A/CONF.129/C.1/L.5 and Corr.1), subparagraphs (i) to (iii) of article 3, which were already complex, did not take account of all eventualities. He referred in that connection to agreements between States, which were to be the subject of a special provision at the end of the projected convention establishing the relationship to the 1969 Vienna Convention on the Law of Treaties<sup>1</sup> and agreements between States and subjects of international law other than States or international organizations.

3. He wondered whether the Japanese proposal could not be amended to cover agreements not covered by the present text, such as agreements concluded by subjects of international law other than States or international

<sup>1</sup> Official Records of the United Nations Conference on the Law of Treaties (United Nations publication, Sales No. E.70.V.5), p. 287.

organizations, as well as verbal agreements between States and international organizations or between international organizations. It might for example be specified that the phrase "certain international agreements" in that proposal included agreements concluded by subjects of international law or other international entities, either among themselves or with States or international organizations.

4. The CHAIRMAN, having ascertained from the representatives of Cape Verde that his consultations with the Group of 77 about the article were expected to be completed before the afternoon meeting, pointed out that several proposals were still before the Committee of the Whole. In the quest for general agreement, it might prove procedurally necessary to refer the matter to the President of the Conference for his deliberation.

*Article 5 (Treaties constituting international organizations and treaties adopted within an international organization)*

5. Mr. REUTER (Expert Consultant) recalled that in its first reading the International Law Commission had considered that there was no need for a provision paralleling article 5 of the Vienna Convention on the Law of Treaties, but on reviewing the question had decided that such a provision might be useful.

6. Symmetry between article 5 of the Vienna Convention and article 5 of the projected convention would require that the constituent instrument referred to in the latter should be that of an international organization to which another international organization was also a party. The Commission had initially considered that such instances were so rare as to be safely left out of account, but on second reading had favoured a broader view taking account of the virtually countless economic organizations set up by the developing countries and related by agreement with each other, with banks and with aid-providing agencies.

7. As regarded treaties adopted within an international organization, further reflection had convinced the Commission that besides the case of international organizations with one or more international organizations as members there was the case of international organizations composed entirely of States, which adopted texts that were open to adhesion by international organizations. The decision to take that possibility into account had been made for substantive rather than "architectural" reasons of symmetry with the 1969 Vienna Convention.

8. It might be useful to recall that the Commission had been of the view that even if an international organization included as fully participating members one or two development planning organizations composed, for example, of States and international banks, that organization would still be fundamentally intergovernmental in nature, firstly, as a subject under international law, and secondly, because an international organization was in the last analysis merely a "technical device" designed to enable governments to act together.

9. Mr. JESUS (Cape Verde), introducing his amendment (A/CONF.129/C.1/L.10) proposing the deletion of

article 5, said the article expanded article 1, which defined the scope of the projected convention in a manner analogous to the corresponding article of the Vienna Convention. He believed that the article could have been left out of that Convention without giving rise to difficulties of interpretation or application and considered that it should be deleted from the present draft for reasons both of logic and expediency. There could be no doubt that the treaties referred to in article 1 comprised all treaties, irrespective of their category, content or manner and place of adoption, between States and international organizations or between international organizations.

10. In the light of the definition of "international organization" in article 2, subparagraph 1 (i), and the comments of the Expert Consultant, it was clear that the constituent instruments of such organizations fell totally within the purview of article 5 of the Vienna Convention. They were to be considered as treaties between States. On the other hand, if the Conference considered, as his delegation did, that the legal régime to be established in the projected convention should apply to organizations of mixed membership (which is acknowledged as a current trend in the commentary of the International Law Commission) as well as to purely intergovernmental organizations, the maintenance of article 5 must be made subject to two conditions. The definition of "international organization" in article 2 would have to be amended to include an international organization essentially but not exclusively composed of States, and the first part of article 5 would have to be reworded to show that the convention applied also to treaties that were constituent instruments of international organizations of which States and international organizations were members. He would not oppose changes on those lines, but the deletion of article 5 seemed a far more straightforward solution.

11. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) favoured the deletion of article 5, which did not reflect current practice in international organizations and had no place in the present draft. The International Law Commission's arguments were unconvincing. There was no reason to transfer provisions quasi-automatically from the Vienna Convention to the new draft. Nor were there grounds for believing that the instances alluded to as a reason for including the article could be other than very exceptional. In his delegation's view, they certainly did not justify the Commission's proposal for an article 5 which could only further complicate matters that were already complex.

12. Mr. RAMADAN (Egypt) said that the justification for the inclusion of article 5 in the 1969 Convention was presumably that that Convention was the first of its kind, and under article 1 applied only to treaties between States. Under article 3, treaties to which international organizations were party were indeed excluded. In the circumstances, it was natural that the 1968-1969 United Nations Conference on the Law of Treaties should have agreed to specify that the constituent instrument of an international organization and all treaties adopted within international organizations should not be subject to the Convention. In the case of the present draft, those considerations did not apply. It

would be helpful if the Expert Consultant could provide further clarification regarding the reasons for the inclusion of such an article.

13. Article 5 covered two types of treaty: the constituent instrument of an international organization and any treaty adopted within an international organization. There were in turn three types of constituent instrument, the first being a constituent instrument the parties to which were States and which, as a convention adopted by States, would be governed by the 1969 Convention, not the draft convention. The second type was a constituent instrument of an international organization that would bind member States and an international organization which under article 1 (a) would be subject to the draft convention. The third type of instrument was a constituent instrument adopted and endorsed by international organizations alone, which under article 1 (b) would be subject to the draft convention, without any need to have recourse to article 5. His delegation saw no reason for repeating what was provided for under article 1, particularly since the justification for the inclusion of the article in the 1969 Convention no longer applied.

14. Mr. ALBANESE (Council of Europe) said that his delegation considered the second part of draft article 5 absolutely essential. Many treaties among member States were concluded within the Council of Europe, and the application of special rules in that respect had been ensured under article 5 of the 1969 Vienna Convention. Certain of those treaties explicitly provided for the European Economic Community (EEC) to become a party. With others, concluded initially among States only, that result was achieved by means of an additional protocol to the treaty. There had been about 10 treaties providing for accession by the EEC already, and their number was expected to increase.

15. If article 5 were deleted, a somewhat paradoxical situation would arise. If a convention was not open for accession by the EEC, the internal rules of the Council of Europe would apply under article 5 of the 1969 Vienna Convention on the Law of Treaties. If, however, the new convention was open for accession by the EEC, those rules would no longer apply. The omission of article 5 could thus give rise to an *a contrario* argument based on the existence of article 5 of the 1969 Convention and the absence of a similar provision in the present convention.

16. In his delegation's view, article 5, as drafted, was indispensable if difficulties and misunderstandings were to be avoided.

17. Mr. WOKALEK (Federal Republic of Germany) favoured the retention of the article and considered that parallelism with the 1969 Convention was sometimes relevant, if only to avoid arguments of the *a contrario* type. The Commission's draft, to which much thought had been given, should be followed so far as possible. It was important also that the proposed convention should be flexible enough to take account of future developments.

18. Mrs. THAKORE (India) believed that the article should be retained, and was not persuaded by the argument that it should be deleted or limited to treaties

adopted within an international organization. The future convention should be as complete as possible and should even cover special, albeit rare, cases. The Expert Consultant's explanation and the arguments of the representative of the Council of Europe had further convinced her delegation of the need for a provision along the lines of the draft article.

19. Mr. KOECK (Holy See) observed that since international practice and doctrine made it abundantly clear that international organizations could be members of international organizations, his delegation believed that article 5 should be retained. He had the impression from the discussion that some of the support for the Cape Verde amendment was intended to limit the term and even the notion of "international organizations" to mere communities of States. That was completely unacceptable to his delegation, which would be unable to support the Cape Verde proposal.

20. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that, despite the Expert Consultant's explanation, many aspects of the article were still unclear. Article 5 reproduced the text of article 5 of the 1969 Vienna Convention, whose inclusion had been fully justified by the need to cover two types of instrument: the constituent instruments of international organizations and treaties between States resulting from an agreement within an international organization. Such treaties could be regarded as *sui generis*. The proposed convention, however, differed from the 1969 Convention in that it was designed to govern treaties concluded exclusively between international organizations. Thus there might be situations in which the constituent instrument of an international organization was created exclusively by international organizations.

21. Although the Commission had not foreseen the possibility of an international organization all of whose members were international organizations, the establishment of such an international organization was theoretically possible. Such a possibility arose from the provisions of article 5, which opened the way to the establishment by international organizations of supraregional structures not under the control of States. Modern general international law lacked norms to provide for such a possibility. It was no accident that the constituent instruments of modern international organizations did not provide for the powers to establish any such organizations, States retaining for themselves the exclusive prerogative of establishing international organizations.

22. Having examined other draft articles in the light of article 5, his delegation had concluded that laying down in article 5 a concept of international organization different from that set out in article 2 would necessitate a major change in the definition of international organization and consequently was fraught with serious complications. For all those reasons, it would be preferable to omit article 5.

23. Mr. HARDY (European Economic Community) said that the reasons which had persuaded the Commission to include article 5 had lost none of their force since 1982 and would not do so in the future. The EEC was party to the constituent instrument of various inter-

national organizations, particularly in the matter of commodities and fishing arrangements, and also to international treaties adopted within other international organizations, including, but not limited to, the case of the Council of Europe. Since the practice did in fact exist, there seemed to be no reason to exclude the provision, and his delegation favoured its retention. If it were omitted, greater confusion would arise as to the status of international organizations and their participation in the treaties in question. If the article was retained, the definition of international organization would possibly require re-examination, although the EEC had no specific change to propose.

24. With regard to the term "relevant rules" the EEC interpreted it to mean that each organization could determine what those rules were in the given case. Since the term "relevant rules" also appeared in a number of other articles, including articles 6, 35, 36, 37, 39 and 65, his remark applied in each of those cases.

25. Mr. LUKASIK (Poland) said that his delegation saw merit in the Cape Verde proposal, since the article raised a number of questions, one of which concerned the term "relevant rules".

26. In his delegation's view, the main reason for including the article had been that it existed in the 1969 Vienna Convention. Although it was intended to apply to two specific cases, other cases should perhaps also be taken into account. As had been mentioned earlier, two or more international organizations might create a supra-international organization that would not be controlled by States parties to the international organizations. It was perhaps necessary to consider that possibility. It might, however, be better to omit the question from the draft convention until it could be considered in terms of codification rather than of the creation of rules that did not correspond to the reality of international practice.

27. He agreed with most of what the representatives of Cape Verde, the Byelorussian SSR and the Ukrainian SSR had said, particularly in regard to the need to amend the definition of "international organization" if the article were retained. He considered that the constituent instrument of an international organization was *sui generis* and governed by a somewhat different legal régime from the law of treaties.

28. For all those reasons, he favoured the deletion of the article.

29. Mr. KANDIE (Kenya) considered that the proposed convention should solve, not create problems and accordingly supported the proposal to delete the article. His delegation was particularly concerned that the article seemed to conflict with the succinct and lucid definition of the term "international organization" in article 2, 1 (i). If article 5 was retained, changes would have to be introduced into the definition, and that might be neither desirable nor helpful.

30. Although it appeared from the International Law Commission's commentary that the article was intended to cover unusual situations, his delegation was concerned at the possible ramifications. It was necessary to strike a balance between the need for a convention that reflected the state of development of the law of

treaties and the need to provide for rare situations. Any innovation should be tempered by recognition that it should be reasonable and not out of place in the general régime of the convention.

31. Mr. MBAYE (Senegal) said that the first part of the article was unnecessary and should be deleted or reworded. He agreed with the Commission's view that there was no reason not to provide for the case of a treaty that was a constituent instrument of an international organization to which another international organization was also party. The possibility was however covered by article 1 (a).

32. The second part of article 5 might be relevant in that, in maintaining a treaty adopted within an international organization in the field of application of the draft convention under discussion, it did not exclude the possibility of that organization applying other provisions to that treaty. However, that second part could be reformulated.

33. Mr. SCHRICKE (France) thought there was a misunderstanding about the real purpose of the article, perhaps because of the ambiguity of its text, which reproduced that of article 5 of the 1969 Vienna Convention.

34. It had been argued that the article simply elucidated the scope of the proposed convention as stated in article 1 and the definitions in article 2. However, in his delegation's opinion, which was based on the *travaux préparatoires* of the 1969 Convention, the nub of article 5 was the last phrase, which provided that the proposed convention would apply "without prejudice to any relevant rules of the [international] organization", thus subordinating the convention to the particular rules of the organization.

35. To understand the purpose of this provision, the first question to consider was whether there were, or could be, international organizations whose membership included other international organizations. Such indeed was the case. It was then necessary to ask what the effect of deleting article 5 would be in cases where the rules of an international organization were inconsistent with the provisions of the draft convention. If the convention were non-mandatory, there would be nothing to prevent parties to a treaty applying different rules, in which case the article was superfluous. If on the other hand the convention were prescriptive, the article would have to be retained to preserve the ability to apply any relevant rules of an international organization.

36. He wished to ask the Expert Consultant whether the draft articles were intended to be prescriptive or to allow exceptions, particularly where the relevant rules of an international organization were inconsistent with certain provisions of the proposed convention.

37. Mr. JESUS (Cape Verde), commenting on the remarks of the representative of the Holy See, said that he did not contend that the membership of international organizations covered by the proposed convention must be exclusively intergovernmental. The definition in article 2 and the first part of article 5 could be amended to cover international organizations whose membership was essentially intergovernmental but also

included international organizations as well as purely intergovernmental organizations. The deletion of the article would broaden the scope of the convention, not restrict it. The scope of the convention was laid down in article 1, and since article 5 qualified article 1, it constituted a restriction on the scope of the convention, not, as some delegations appeared to feel, the reverse.

38. Mr. SIEV (Ireland) was convinced that the article should be retained. Any problems and disadvantages arising from its retention would not be greater than those caused by its deletion. In his delegation's view, the article would be useful now and even more useful in the future.

39. Mr. GÜNEY (Turkey) agreed with the Expert Consultant that an international organization was a technical device to enable States to act together. He also agreed with the Council of Europe representative's arguments, and accordingly opposed the deletion of the article.

40. Sir John FREELAND (United Kingdom) said that there was no clear case for automatic parallelism with the 1969 Vienna Convention. The International Law Commission had considered the issue carefully in the light of the realities of contemporary international life. Examples had been given of international organizations where other international organizations were party to the constituent instruments, particularly in matters of economic development. There were also many treaties adopted within international organizations to which international organizations were parties. His delegation thought that it was sensible for the present draft articles to contain provisions along the lines of those in article 5. Without such provisions, difficulties might arise in practice from the fact that the articles would differ from the 1969 Vienna Convention.

41. He did not accept the view that the article should be deleted to avoid difficulties over the definition in article 2. The definitions in article 2 were ancillary to the substantive provisions. There was no need to change the definition of international organizations in article 2.

42. Mr. ECONOMIDES (Greece) said that article 5 clearly applied only to the constituent instruments of an international organization or a treaty adopted within an international organization. The interest of the article lay in the last phrase, "without prejudice to any relevant rules of the organization", since that constituted an exception and a safeguard for international organizations.

43. His delegation opposed deletion of the article for three reasons. First, it would be illogical to have a general provision in the 1969 Vienna Convention but not in the present one. Secondly, it would be an unacceptable discrimination to permit international organizations to prevent the application of the 1969 Convention by invoking article 5 of that Convention but not to prevent the application of the present draft convention. Thirdly, deletion of the article would create a distinction between the 1969 Convention and the draft convention before the Conference making the first residual and the second prescriptive.

44. Mr. BARRETO (Portugal) believed the article should be retained in the interests of consistency with the 1969 Vienna Convention and because it allowed for the development of international law. The Drafting Committee might be requested to improve the text along the lines suggested by the Senegalese representative. He personally had doubts about the use of the word "relevant".

45. Mr. NEUMANN (United Nations Industrial Development Organization) remarked that UNIDO had been unable to submit comments on the draft articles, as it had only recently become a specialized agency.

46. The reference in article 5 to the rules of the organization was related to the definition in article 2, 1 (j). UNIDO's Constitution provided in its article 26, 2 that the rules of UNIDO as a United Nations organ would continue to apply to UNIDO as a specialized agency. Among these rules were those referred to in article 2, 1 (j), and therefore UNIDO wished to confirm generally the United Nations comments on the draft articles. He was in favour of retaining the article for the reasons set out in the commentary.

47. Mr. PISK (Czechoslovakia) said that his delegation was impressed by the arguments in favour of deleting the article. He had serious misgivings about the phrase "without prejudice to any relevant rules of the organization", which would permit exclusion of the provisions of the draft articles. Either the article should be deleted, or its first part amended.

48. Ms. LUHULIMA (Indonesia) said her delegation was in favour of retaining the article, which reflected general practice where international organizations were members of other international organizations or treaties were adopted within international organizations. If the article was retained, the definition of international organizations in article 2 should be amended.

49. Mr. FOROUTAN (Islamic Republic of Iran) said that having heard the arguments for and against the inclusion of the article, he favoured its deletion. Article 1 sufficiently defined the proposed convention's scope, and article 5 might cause confusion.

50. Mr. MONNIER (Switzerland) said that the article should be considered in the light of its usefulness. Fears that the deletion of article 5 might give rise to arguments *a contrario* would be justified if its omission left a void and legal uncertainty, but that would not in fact be the case, since the situations covered by the article were already provided for in article 1. His delegation believed that two apparently conflicting principles were relevant to the drafting of the convention. One was the need to apply common sense, and not to attempt to deal with every hypothetical and rare occurrence. The other was the need to retain provisions that left the way open to future development of the law. He supported the retention of the article, despite the fact that its practical application might for the time being be limited.

51. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that the EEC representative's comments had not convinced him that there were any important examples of international organizations which were parties to the constituent instruments of other inter-

national organizations. Rules of general international law could not be based on only a very few precedents.

52. It should be noted that article 5 conflicted with the wording of article 1 and the relevant definition in article 2. That was an additional reason for deleting the article, whose practical significance was minimal.

53. Mr. ROSENSTOCK (United States of America) noted that the Expert Consultant's explanation had shown that the International Law Commission had taken into account a number of treaties within the ambit of article 5 when it had adopted the article, on second reading. Since that time, further treaties had been adopted within international organizations to which other international organizations had become parties. One was the Convention for the Protection and Development of the Wider Caribbean Region, which was open to accession by certain regional organizations.

54. The draft article embodied a rule which would last well into the future, and its deletion would leave a gap in the proposed convention.

55. He agreed that consideration should be given to amendment of the definition of "international organization" in article 2.

56. Mr. PASZKOWSKI (United Nations Educational, Scientific and Cultural Organization) said that UNESCO believed that the article should be retained, perhaps with some drafting changes. The central issue was whether an international organization could be a member of another international organization. The answer to that question was in the affirmative. UNESCO, for example, was a member of another international organization, the Intergovernmental Bureau for Informatics, which was itself an intergovernmental organization.

57. In UNESCO and other organizations, special rules applied to treaties constituting international organizations and to treaties adopted within international organizations. The purpose of the article was to make it clear that the relevant rules of the international organization would continue to apply and that the proposed convention would be without prejudice to them.

58. If the article was deleted, it would be difficult, if not impossible, for international organizations to accede to the proposed convention.

59. Mr. TEPAVICHAROV (Bulgaria) stressed that article 5 of the 1969 Vienna Convention was a useful provision. The scope of the concluding proviso, "without prejudice to any relevant rules of the organization", was clear and created no difficulties of interpretation in the context of that Convention.

60. The position was altogether different with regard to draft article 5. The article dealt with hypothetical cases and did not constitute codification of international law, but rather progressive development based on a projection of future trends. In the context of the draft articles, the concluding proviso would lead to confusion and misunderstanding, bearing in mind in particular that the concept of "relevant rules of the organization" had not yet been defined. In the circumstances, his delegation supported the Cape Verde proposal to delete the article, and was not convinced by the

argument in the International Law Commission's commentary. The deletion of article 5 would not exclude the possibility of a constituent instrument of an international organization being open for signature by other international organizations.

61. Mr. ULLRICH (German Democratic Republic) sympathized with the proposal to delete the article. Article 5 had been appropriately included in the 1969 Convention, but the text had no place in the present draft articles. Although the text was taken word for word from the 1969 Convention, the content of the present article was new and unacceptable to his delegation.

62. Article 1 of the draft articles satisfactorily defined the scope of the proposed convention. He therefore favoured deleting draft article 5.

63. Mr. KOECK (Holy See) said that he wished to clarify a passage in his earlier statement which had obviously been misconstrued.

64. He had not said that the Cape Verde amendment was intended to limit the scope of the draft articles. He had said that some of the support the Cape Verde amendment had so far received from other delegations was actually intended to restrict unduly the notion of international organizations. He had not implied that that was the intention of the Cape Verde amendment, but that it was lending itself to undesirable interpretation.

65. Mr. LEHMANN (Denmark) remarked that codification conferences were infrequent, and that advantage should be taken of the present conference to cover as much as possible of the subject matter.

66. It was apparent from statements during the discussion that many international organizations had concluded treaties falling under the terms of article 5, and that a practice existed, in particular with regard to the treaties dealt with in the second part of the article. It was also apparent that practice in the matter would develop further in the future.

67. It had been suggested that retention of the article might require rewording of the definition of "international organization" in article 2. In that connection, he stressed that it was the substantive provisions which governed the definitions and not the definitions which governed the substantive provisions. The problem of the definition of "international organization" should be dealt with after a decision on article 5.

68. Mr. SANG HOON CHO (Republic of Korea) believed the article should be retained. Its deletion would create legal confusion, particularly in regard to the situation of international organizations which were members of other international organizations. He agreed that the definition of "international organization" might have to be amended.

69. Mr. ABDEL RAHMAN (Sudan) said that advocates of the deletion of the article appeared to have lost sight of the purpose of the draft under discussion. The article was concerned with a very rare situation, but it should be remembered that the draft was intended to regulate the régime of treaties to which one or more international organizations were parties.

70. The article was based on existing practice. Moreover, the proposed convention should make provision for future developments. The article should be retained with an eye to the future, although some redrafting might be desirable.

71. Mr. REUTER (Expert Consultant), answering questions raised during the discussion, said that the States Parties to the 1969 Vienna Convention had included article 5 in the Convention for various reasons. One had been the fact that all the international organizations without exception, and in particular those of the United Nations family, had expressed a very strong feeling that the Convention must take into account the "relevant rules of the organization" and not depart from them.

72. There was another reason for the inclusion of article 5 in the 1969 Vienna Convention. An international organization was constituted by a treaty concluded by States. The constituent instruments of international organizations were special treaties that could not be affected by a general treaty. In that connection, he wished to draw attention to article 34 (General rule regarding third States) of the 1969 Convention, which specified that a treaty did not create either obligations or rights for a third State without its consent. It was of the essence of an international treaty that its effect was relative and that it could bind only the parties. In adopting article 5 of that Convention, the States Parties

had had in mind that fundamental rule of treaty law, and had not wished to affect treaties already concluded.

73. A second question was that of the manner in which the provisions of the future convention would become applicable to international organizations. Was there in fact any means—possibly indirect means—whereby such provisions could be made to enter into the practice of international organizations? The question had been raised whether those provisions might not become applicable by some direct means, and, in that connection, the French representative had enquired whether the Conference was not attempting to draw up imperative rules. His answer was that the proposed convention would, if adopted, be a treaty like any other. As such, it would only be binding on an international organization if the organization became a party to it. The International Law Commission had not envisaged any derogation to the rule in article 34 of the 1969 Vienna Convention whereby a treaty did not create either obligations or rights for third parties.

74. Mr. JESUS (Cape Verde) suggested that the decision on article 5 should be deferred to enable him to find common ground with certain other delegations. After those consultations, he hoped it would be possible to put forward a generally acceptable suggestion for the amendment of the article and adjustment of the definition of "international organization" in article 2.

*The meeting rose at 12.58 p.m.*

## 6th meeting

Monday, 24 February 1986, at 3.25 p.m.

Chairman: Mr. SHASH (Egypt)

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

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

[Item 11] (continued)

**Article 5 (Treaties constituting international organizations and treaties adopted within an international organization) (continued)**

1. The CHAIRMAN said that a new proposal had been submitted by Cape Verde for article 5 A/CONF.129/C.1/L.21). He suggested that the Committee should postpone a decision on the article until it had considered the proposal.

*It was so decided.*

**Article 6 (Capacity of international organizations to conclude treaties)**

2. Mr. TUERK (Austria), introducing his amendment (A/CONF.129/C.1/L.3), said that his delegation's problem with the wording proposed by the International Law Commission was that it referred only to the capacity of international organizations to conclude treaties. It was important not to overlook cases in which States might become parties to the new convention but not to the 1969 Vienna Convention on the Law of Treaties, article 6 of which stated that "Every State possesses capacity to conclude treaties".<sup>1</sup> There was good reason to incorporate an identical provision in the draft convention in order to ensure the closest possible correlation between the two texts, particularly in view of the fact that other paragraphs of the draft referred separately to States and to international organizations.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

3. Mr. BERNAL (Mexico), introducing his amendment (A/CONF.129/C.1/L.7), said that it was a corollary to his delegation's proposal for article 2, subparagraph 1 (j) (A/CONF.129/C.1/L.6). The final wording of article 6 would largely depend on the form taken by the definition of the term "rules of the organization" in that article. The amendment to article 6 was based on two premises: first, that the question of the legal personality of international organizations was not an issue for consideration at the Conference; and secondly, that while the treaty-making capacity of an international organization was a general rule of international law, its exercise was subject to the restrictions expressed in its constituent instrument. It would be seen that the amendment left aside theoretical issues such as the legal personality of international organizations, which the Commission had discussed at length. The principal objective of the amendment was to eliminate certain ambiguities in the language.

4. His delegation was open to suggestions and changes that would clarify the difficult problem of the capacity of international organizations.

5. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that article 6 was a key element in the draft convention. In view of the primary importance of the question of the capacity of international organizations to conclude treaties, and owing to the specificity of the character of that capacity, article 6 should have been formulated more precisely. However, his delegation could accept the Commission's wording for it on the understanding that an international organization had the capacity to conclude treaties to the extent necessary for implementing the purposes and functions provided for in its constituent instrument.

6. That interpretation of the capacity of an international organization followed from article 6, which referred to the rules of the organization, among which the constituent instrument was paramount. That instrument defined the purposes and functions of the organization and outlined the framework of its competence, on the basis of which the extent and specificity of the capacity of the organization to conclude treaties could be defined.

7. An analysis of the constituent instruments of organizations such as the United Nations, the International Monetary Fund, the United Nations Industrial Development Organization, the Council for Mutual Economic Assistance and many others showed convincingly that their capacity to conclude treaties was determined by the functions and purposes set out in those instruments. The draft convention was called on to regulate the procedures governing the concluding of treaties the parties to which were both States—principal subjects of international law with a universal capacity to conclude treaties—and international organizations, with their special capacity in that regard. It would therefore be appropriate for article 6 to define the treaty capacity of both States and international organizations. That seemed to be the intention of the Austrian amendment, which his delegation could support. The Mexican amendment aimed at providing a clearer definition of the capacity of an international organization to conclude treaties, taking into account the dif-

ferences between the capacity enjoyed by international organizations and that of States, but it presented certain difficulties for his delegation and could be improved.

8. Although his delegation had no major objections to the existing wording of article 6, in the light of the interpretation of subparagraph 1 (j) of article 2 rendered in the amendment proposed by the Byelorussian Soviet Socialist Republic, the German Democratic Republic, Poland, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics (A/CONF.129/C.1/L.2), it still favoured a more concrete delineation of the capacity of international organizations to conclude treaties, taking into consideration the specific character of such capacity.

9. Mr. ECONOMIDES (Greece) said that article 6 seemed incomplete: it referred to the relevant rules of the organization but did not deal with the case in which they were silent on the question of capacity to conclude treaties, as often happened in practice. Was it to be concluded that the international organization was denied that capacity? Or, if it had already concluded treaties, were those treaties invalid because the organization did not have the right under the relevant rules to conclude them?

10. In his delegation's view, when the relevant rules were silent on the capacity to conclude treaties, reference must be made to general international law; accordingly, any organization, once it had been endowed with international personality, had an automatic right to conclude treaties provided those treaties conformed to the aims and functions of that organization. It was therefore regrettable that article 6 did not contain a reference to the general rules of international law.

11. His delegation could not accept the wording proposed by Mexico, which was even more restrictive than the existing text of article 6. It could agree to the Austrian amendment, but felt that its inclusion in the article was not really necessary.

12. Mr. ROMAN (Romania) said that article 6 was acceptable to his delegation but its wording was not ideal. Romania could not subscribe to the view that international law laid down the principle of an organization's capacity to conclude treaties as an ordinary law rule which could only be modified by express restrictive provisions of constituent instruments. On the contrary, an international organization's capacity to conclude treaties depended solely on the organization's rules. He agreed with the International Law Commission that every organization had its distinctive legal image, which was recognizable in an individual form of capacity. Accordingly, each organization's contractual capacity was the one conferred upon it by its member States, not by general international law.

13. The aim of the Commission's wording was to leave aside the question of the status of international organizations in international law. That approach, however, had not yielded the clarity which the provision needed. The reference to "rules" of the organization did not offer a solution to the problem without a satisfactory definition of that term in article 2. There were thus two options open to the Conference: the first was to define the term "rules of the organization" in the

manner proposed in document A/CONF.129/C.1/L.2; the second was to introduce elements of the definition into article 6 so as to explain what form of capacity was intended.

14. His delegation welcomed the Austrian amendment on the ground that it was appropriate to reiterate the rule, stated in the 1969 Vienna Convention, that every State possessed the capacity to conclude treaties. That was particularly so in view of the need to draw a distinction between the legal capacity of a State and that of an international organization.

15. Mr. PISK (Czechoslovakia) said that article 6 was one of the key articles in the present work of codification. His delegation found the Commission's wording acceptable. In deciding on it, the Commission had recognized that every organization had its own legal image, which was reflected in its individualized capacity to conclude treaties. The constituent instruments of perhaps the majority of international organizations did not have a provision covering capacity to conclude treaties, but the treaty practice of the organization, based on the tacit agreement of its member States, could be regarded as complementary to the constituent instrument. The treaties thus concluded, however, must not conflict with the constituent instruments of the organization or with the fundamental principles of international law, including those enshrined in the Charter of the United Nations.

16. While his delegation could support the Austrian amendment, it believed that the restatement of the rule expressed in article 6 of the 1969 Convention was unnecessary and that the draft article should concentrate on the case of international organizations. The Mexican proposal correctly emphasized constituent instruments but ignored the capacity of international organizations to conclude treaties with subjects of international law other than States and international organizations. Although his delegation could accept the article either as it stood or with the Austrian amendment, it believed that the wording would ultimately depend on the definition of the term "rules of the organization" in article 2.

17. Mr. ULLRICH (German Democratic Republic) said that his delegation would have no objection to the present wording of article 6 or the wording proposed by Mexico if article 2 was amended to contain an acceptable definition of the term "rules of the organization". His and four other delegations had made a proposal to that effect (A/CONF.129/C.1/L.2), and the discussion on article 6 showed that the idea underlying the proposal enjoyed considerable support.

18. The wording of subparagraph 1 (j) of article 2 proposed by the International Law Commission was borrowed verbatim from article 1, paragraph (34), of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>2</sup>

19. The capacity of an international organization to conclude treaties was related to its status under inter-

national law and was therefore to be derived from its constituent instruments. It was therefore insufficient to define "rules of the organization" by the formula used in the 1975 Convention, which related merely to relations between States and universal organizations. When the question of the status of international organizations had been discussed at the Conference which had adopted the 1975 Convention, it had been pointed out that the draft submitted by the International Law Commission contained no provision in that regard. The Conference had accepted the Commission's view that the definition of an international organization might give rise to theoretical questions concerning its personality and capacity. It had therefore confined itself to the formula used in article 1, paragraph (34) of the 1975 Convention, which was the one which appeared in article 2, paragraph 1 (j) of the present draft.

20. The proposal in document A/CONF.129/C.1/L.2 took up the three elements contained in article 2 but emphasized the dominant position of the constituent instruments. The other two elements, legally binding acts and practice, could only be recognized as rules of the organization if they were based on the constituent instruments. Since the term "rules of the organization" occurred throughout the draft and was therefore a corner-stone of the proposed convention, its definition must be formulated with great caution.

21. Mr. WANG Houli (China) approved the addition to article 6 proposed by Austria. His delegation could also support the Mexican proposal, since it emphasized the role of the constituent instruments of international organizations. The basic question, however, was the definition of the term "rules of the organization" offered by article 2. He could therefore accept either of the solutions proposed by the Romanian delegation.

22. Mrs. DIAGO (Cuba) said that article 6 was of special importance. Her delegation found the Austrian proposal acceptable as a useful supplement to the International Law Commission's text. The most important point, however, was that the content of article 6 should be in keeping with the definition of the term "rules of the organization" in article 2. The decision on article 6 must therefore await agreement on the wording of that definition.

23. Mrs. VLASOVA (Byelorussian Soviet Socialist Republic) endorsed the view that the effectiveness of the Committee's work on article 6 depended on speedy agreement on the wording of article 2, subparagraph 1 (j). She believed that a basis for that could be found in the proposal in document A/CONF.129/C.1/L.2; it retained the principle underlying the definition of the term "rules of the organization" proposed by the International Law Commission, left unchanged the sources which together constituted those rules, and contained the reference needed for a proper correlation with international treaty-making.

24. The overriding importance of the norms of constituent instruments was a universally recognized principle of international law and should be enshrined in the proposed convention. Some representatives had objected to the expression "legally binding instruments" in the proposal; its purpose was to emphasize,

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

among a large number of documents, those which were of legally binding character. That was justified, since the documents which determined the rules of an organization must necessarily be legally binding on all its members and organs. The adoption of the proposal would greatly simplify the problem of determining the source of international treaty-making capacity. Because of the direct correlation between article 6 and article 2, subparagraph 1 (j), the Conference must harmonize its decisions on those two provisions. If the proposal in document A/CONF.129/C.1/L.2 was adopted, her delegation would be able to support the wording of article 6 proposed by the International Law Commission.

25. Mr. LI BAE HYON (Democratic People's Republic of Korea) said that, provided agreement was reached on a suitable definition of the term "rules of the organization" in article 2, the legal basis of the capacity of international organizations to conclude treaties would be well expressed by the present wording of article 6. However, he found the use of the term "relevant" confusing, and suggested that, for the sake of clarity and consistency, the expression "rules of the organization" should be used throughout the draft articles.

26. Mrs. THAKORE (India) said that article 6 was of fundamental importance. Its aim was to indicate, for the sole purposes of the legal régime governing treaties to which international organizations were parties, the rules by which treaty-making capacity was to be assessed. Since international organizations could not be subjected to a uniform rule and confined within an unduly rigid framework which might hamper their future activities, the draft article provided that such capacity should be governed by the "relevant rules" of the organization, which included, according to article 2, subparagraph 1 (j), the organization's constituent instruments and established practice. The addition of the adjective "relevant" made it clear that article 6 concerned only those rules which were relevant in determining the question of the treaty-making capacity of the international organization.

27. The Commission's wording was flexible and also neutral, in the sense that it did not prejudge the various doctrines concerning the basis of the capacity of international organizations to conclude treaties. It took full account of the advisory opinion of the International Court of Justice, handed down in 1949, in the matter of Reparation for injuries suffered in the service of the United Nations<sup>3</sup> to the effect that whereas a State possessed the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the United Nations must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.

28. The wording of article 6 was the result of a compromise between the conflicting points of view that had been expressed both in the International Law Commission and in the comments of Governments. Her delegation found it fully acceptable, since it respected the

faculty of international organizations to develop a practice, a matter to which they attached great importance.

29. Her delegation had no strong views on the Austrian amendment and could accept it if it commanded general support. It could not, however, accept the Mexican proposal because of its restrictive formulation.

30. Mr. FOROUTAN (Islamic Republic of Iran) said that the International Law Commission's approach to article 6—that the capacity of an organization to conclude treaties was defined solely by the rules of that organization—was unsatisfactory. What would happen in cases where the rules of an organization did not give it that capacity? It seemed that the Commission had found it very difficult to resolve the issue and had therefore confined itself to proposing an article which avoided it. The Austrian proposal added an unnecessary paragraph which would only weaken the force of article 6. He agreed with the representative of Greece that the wording proposed by Mexico was more restrictive than the Commission's draft.

31. Mr. DALTON (United States of America) said that his delegation would not object to the Austrian amendment, although it found it unnecessary. The Mexican proposal, on the other hand, risked complicating the article, as well as the life of international organizations and those required to deal with them in the future. A decision on article 2, subparagraph 1 (j), would affect article 6, but the matter should be settled in the light of several articles, not of article 6 alone, at the end of the consideration of the draft articles.

32. Mr. BARRETO (Portugal), referring to the Austrian amendment, said that the draft convention was not a mere protocol to the 1969 Vienna Convention, and therefore the capacity of States to conclude treaties should be defined in the new instrument as well. In the future a State might be a party to the convention under discussion but not to the earlier one, and might then seek in the former a provision governing the capacity of States to conclude treaties. The Austrian amendment should therefore be adopted. His delegation felt considerable sympathy for the Mexican proposal, in so far as it sought to provide precise rules on the capacity of international organizations to conclude treaties. However, the wording of the proposal was closely connected with the one in document A/CONF.129/C.1/L.2 for article 2, subparagraph 1 (j), and therefore its effect was still uncertain. It was clear that the rules of the organization must determine the capacity of an international organization to conclude treaties, but did those rules consist only of the constituent instruments or include elements such as practice too? Because of those doubts, his delegation preferred the International Law Commission's text. But the word "relevant" might cause difficulties; either it should be removed or the notion it conveyed should be made more precise. That was probably a matter for the Drafting Committee.

33. Mr. ANGHEL (United Nations Council for Namibia) said that, if the Conference approved the addition proposed by Austria to article 6, the article would become an exhaustive list of subjects of international law whose capacity to conclude international treaties

<sup>3</sup> *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174.

was recognized, but one which omitted the United Nations Council for Namibia. He therefore proposed that, in order to make the Council's position clear, the article should also contain, after the paragraph proposed by Austria, a paragraph stating that the United Nations Council for Namibia possessed the capacity to conclude treaties in accordance with the relevant resolutions and decisions of the General Assembly.

34. Mr. WOKALEK (Federal Republic of Germany) observed that article 6 merely reflected international practice. The point about the competence of an international organization being derived from its purposes and functions was already covered under the expression "rules of that organization" and therefore need not be specified. However, he agreed that article 6 must be read in conjunction with article 2, subparagraph 1 (j). When the problem of drafting the latter had been solved, the problem of article 6 would be solved also. But a further question might arise in connection with the settlement of disputes, namely, who could define whether an act of an organization was within the scope of its rules or not? Such a matter could not be easily determined from outside the organization.

35. His delegation regarded the Mexican proposal as imposing an unnecessary limitation on the capacity of an international organization. As far as the addition proposed by Austria was concerned, paragraph (7) of the Commission's commentary to the article (see A/CONF.129/4) seemed to make it unnecessary, but his delegation was flexible on the matter.

36. Mr. CRUZ FABRES (Chile) said that there was a difference in legal status between States and organizations. He therefore supported the Austrian proposal, which would make the matter plain by spelling out the difference in separate paragraphs. It was important also that the draft should make it clear that the term "relevant rules" referred to the constituent instrument rather than the practice of international organizations. The practice of an international organization could not exceed the terms of its constituent instrument, and that instrument could never be modified by practice.

37. Mr. GÜNEY (Turkey) also supported the Austrian amendment, which was useful as a reminder. If it was accepted, the title of article 6 should be altered to read: "Capacity of States and international organizations to conclude treaties". He did not think that the Mexican proposal would be an improvement on the existing text.

38. Mr. HARDY (European Economic Community) said that at present the conclusion of treaties by international organizations was an established fact. The Commission had wisely not considered it necessary to determine either the foundation of their capacity to conclude treaties or the limits of that capacity. It had left the question to be decided in accordance with the meaning of the words "rules of that organization". The word "governed" was the key word in its draft of article 6. Those rules should be defined in article 2, subparagraph 1 (j), in a wide and flexible way. The need for that could be illustrated from the practice of the European Community. The European Coal and Steel and Atomic Energy Communities had general treaty-

making powers in their constituent instruments. The European Economic Community had treaty-making powers in specific articles of its constituent instrument. The Court of Justice of the European Communities had adopted a series of decisions on the subject; the principle underlying them was that the competence of the Communities exercised internally brought about an external competence. Those principles were based on deductions made from the constituent instruments, as well as on provisions which those instruments contained.

39. The Commission's text of article 6 was satisfactory. The wording proposed by Mexico was too restrictive, and its use of the expression "other rules" was not clear.

40. Mr. JESUS (Cape Verde) observed that the right of sovereign States to enter into treaties was an essential attribute of their sovereignty, whether it was stated in a legal instrument or not. Article 6 of the Vienna Convention on the Law of Treaties merely recorded a rule of customary international law. Accordingly, the Commission, in drafting the corresponding article 6, had omitted to mention the capacity of States. The Austrian amendment proposed to repair that omission in order to retain the parallelism between the draft articles and the 1969 Convention. It was unnecessary, but his delegation could accept it. He assumed that the intention of the term "relevant rules" was to echo the definition in article 2, subparagraph 1 (j). If so, the word "relevant" should be deleted so that article 6 correctly reflected that definition.

41. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that the Commission's formulation of article 6 was an accurate reflection of the characteristics of an international organization's treaty-making capacity. Only an intergovernmental organization had the right to conclude treaties, and that right derived from its rules. The attitude of many Governments towards article 6 would be determined by the formulation adopted for article 2, subparagraph 1 (j). The proposal for that subparagraph in document A/CONF.129/C.1/L.2 was clearer than the Commission's definition, since it referred to legally binding instruments and practice based on the organization's constituent instruments. If that proposal was adopted, article 6 could be approved as formulated by the Commission, provided that the word "relevant" was deleted from it in order to bring it into line with the new definition.

42. His delegation had no objection to the Austrian amendment. He asked himself what the consequences would be if an international organization concluded a treaty in violation of its constituent instrument. There was no provision about such a contingency in the draft articles, but the Conference should consider the possibility of inserting one and the place it might occupy among the articles.

43. Mr. MONNIER (Switzerland) referred to the statement in paragraph (2) of the Commission's commentary that article 6 indicated by what rules the capacity of international organizations to conclude treaties should be assessed. In the event of the rules of an international organization providing no clear indi-

cation in that respect, their silence or lack of clarity should not be interpreted as depriving the organization of that capacity. In such cases, when treaty-making was appropriate for the implementation of the purposes for which the international organization had been set up, its capacity to conclude treaties would derive from the powers which international organizations implicitly possessed under international law to discharge their functions. Considerable practice bore witness to the truth of that proposition. His delegation could not accept the Mexican proposal and would support the existing text of article 6.

44. Mr. RAMADAN (Egypt) said that the treaty-making capacity of international organizations flowed from international law and from the purposes for which they had been established. That capacity need not be expressly mentioned in the constituent instrument, but States could withhold it from an organization of which they were members or could determine it on a case by case basis. His delegation approved the existing wording of article 6.

45. Mrs. OLIVEROS (Argentina) said that the Commission's text of article 6 was clear, but depended on the definition to be given in article 2, subparagraph 1 (j). The word "relevant" should be deleted. Her delegation could support the Austrian amendment; it was not redundant to devote a paragraph to the treaty-making capacity of States, since the draft articles were not an appendage to the Vienna Convention on the Law of Treaties and a State might be a party to one convention and not the other. If the Austrian amendment was adopted, the title of article 6 should be amended to read: "Capacity of the parties to conclude treaties". The term "party" was defined in article 2, subparagraph 1 (g).

46. Mr. CASTROVIEJO (Spain) said that, in settling the discussion between those who thought that the capacity of international organizations to conclude treaties derived from general international law and those who thought that it derived solely from the will of States as expressed in the constituent instruments, the Commission's draft article constituted a judgement of Solomon. Although it did not completely satisfy his delegation, it was perhaps the best wording to adopt and had the merit of being short and clear. He understood the word "relevant" to refer to the contents of article 2, subparagraph 1 (j). Any other explanation would raise the question whether practice was a source of the rules from which capacity to conclude treaties flowed.

47. He did not consider that the Austrian amendment simplified or clarified the text. The Mexican proposal sought to draft the article in more restrictive terms, thus imposing a measure of inflexibility on its interpretation which would hamper the development of international practice and tend to confuse the distinction between States and international organizations in the matter of treaty-making.

48. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that international organizations had treaty-making capacity both as subjects of international law and by virtue of their rules, which constituted an expression of

the will of the States establishing them. That did not preclude recognition of an implicit competence exercised in pursuance of the purposes of the international organization as set out in its constituent instrument.

49. The Commission's draft of article 6 was incomplete, and the Mexican proposal sought to remedy that defect by basing it on the general rules on treaty-making capacity laid down in the 1969 Vienna Convention. However, the wording proposed by Mexico would expressly deny the capacity of international organizations to conclude treaties with subjects of international law other than States or international organizations and limit their competence to what was in their rules and to the powers implicitly conferred on them by international law. If the Mexican proposal was amended to cover those points, his delegation would find it acceptable.

50. Mr. KERROUAZ (Algeria) said that the Commission's proposal for article 6 was acceptable but must be read in conjunction with article 2, subparagraph 1 (j). The Drafting Committee should ensure that the definition of the term "rules of the organization" in article 2 was intelligible. The Austrian amendment was redundant, since the capacity of States to conclude treaties was an attribute of State sovereignty and consequently had not been mentioned in the draft article. However, he had no objection to the Austrian proposal being referred to the Drafting Committee, which should consider it in conjunction with the oral amendment submitted by the United Nations Council for Namibia.

51. Mr. SKIBSTED (Denmark) said that the International Law Commission's draft struck a satisfactory balance between different schools of thought and should be approved as it stood.

52. Mr. SIEV (Ireland) observed that the Commission's text of article 6 was a compromise, as paragraph (2) of its commentary explained. He agreed with the representative of the European Economic Community that the key word in the text was "governed". The wording proposed by Mexico was more restrictive than the existing text through its reference to "constituent instruments". His delegation did not support the addition proposed by Austria, which according to paragraph (7) of the commentary was unnecessary. The Commission's text of article 6 was balanced, and his delegation was in favour of its adoption.

53. Mr. SANG HOON CHO (Republic of Korea) said that his delegation believed that the rule embodied in article 6 was the cornerstone of the draft articles, since it dealt with the source of the capacity of international organizations to conclude treaties. In principle the Republic of Korea was in favour of the Commission's text, which represented a compromise between the two different schools of thought which existed on that subject. The Mexican proposal was too restrictive in scope, but Austria's amendment was acceptable because, as some speakers had indicated, the subject-matter of the 1969 Vienna Convention was different from that of the draft convention.

54. Mr. VIGNES (World Health Organization) said that the draft article raised two issues: the capacity of international organizations to conclude treaties and the

limits of that capacity. As far as the first was concerned, the Committee needed to take a realistic approach to the matter and consider whether it could reasonably be claimed that such capacity had to be provided for in an organization's rules in order to exist; after all, organizations had been concluding treaties for many years, and it could not now be held that they had no right to do so if their constituent instruments did not so provide. The rules of the World Health Organization (WHO) were silent on the matter, yet the organization did conclude treaties, like many other universal international organizations, and its capacity to do so had never been challenged. Quite recently the International Court of Justice had interpreted an agreement concluded between WHO and Egypt, and in doing so had never questioned the capacity of WHO to conclude it. That capacity therefore flowed from the implied powers of the organization, which were necessary to enable it to attain its purposes and objectives.

55. With regard to the limits of an organization's treaty-making capacity, one must also take a realistic approach. An organization, in concluding treaties, did so having regard to certain provisions of international law and to the rules of the organization, where such rules existed. His organization considered that the Commission's text achieved the necessary balance and flexibility, without too much detail, and that it reflected the present state of international law with regard to international organizations. It had the full support of WHO and, he was authorized to say, of the International Labour Organisation. They could accept the Austrian amendment, but considered Mexico's proposal to be too restrictive.

56. Mr. ROCHE (Food and Agriculture Organization of the United Nations) placed particular emphasis on the need for article 6 to be realistic. Organizations had to be in a position to conclude treaties of some kind; it was inconceivable that an intergovernmental organization should not be able to conclude some form of treaty where it needed to do so in order to discharge its constitutional mandate. The treaty which most organizations needed to conclude was a headquarters agreement with the host State, and therefore it was virtually implicit in the constituent instrument of all intergovernmental organizations, if not expressly stated, that it had the capacity to conclude a treaty. The constituent instrument, the rules of the organization and its practice determined the extent of the treaty-making capacity, since no organization would claim to have the same treaty-making power as a State. The formulation adopted by the International Law Commission for article 6 was therefore reasonable and, if interpreted pragmatically, was acceptable to his organization.

57. Mr. HERRON (Australia) expressed support for the Commission's draft of article 6. It was a judicious compromise which did not purport to be comprehensive or exhaustive. It was not necessary to add Austria's amendment to the article, although given its substance, his delegation could not oppose it. However, to place Austria's statement on the capacity of States alongside the Commission's text on the capacity of international organizations would invite comparisons about the respective scopes of the two statements that

were not necessarily wholly valid. Mexico's proposal was somewhat vague and was therefore unacceptable to his delegation.

58. Mr. GOHO-BAH (Côte d'Ivoire) said that his delegation had no difficulties with Austria's amendment to the Commission's text and would support it if it proved acceptable to the Committee. It considered that subparagraph 1 (j) of article 2 had a decisive influence on article 6; consequently, a precise definition in that subparagraph should provide a solution to the problem posed by article 6 with regard to the capacity of international organizations to conclude treaties.

59. Mr. NEUMANN (United Nations Industrial Development Organization), speaking also on behalf of the United Nations Educational, Scientific and Cultural Organization (UNESCO), said that as he understood it, the Austrian amendment, if adopted, would mean that it would be added to the Commission's draft merely to express a generally accepted rule of international public law. Both UNESCO and the United Nations Industrial Development Organization preferred the Commission's text to that of Mexico, since the notion of the rules of the organization appeared in several articles of the draft and would be defined precisely in article 2. Also, Mexico's proposal would have the effect of restricting the treaty-making capacity of international organizations to the conclusion of treaties with States or with other international organizations, whereas international agreements were often concluded between international organizations and other entities. That effect was undoubtedly unintended and the Drafting Committee should be able to eliminate it by co-ordinating the formulation of article 6 with that of article 3 and article 1 (b).

60. Mr. SZÉNÁSI (Hungary) said that his delegation could support the Commission's draft provided that the wording of article 2, subparagraph 1 (j), was amended in accordance with the proposal in document A/CONF.129/C.1/L.2 and that the word "relevant" was deleted from article 6.

61. It had no major difficulty in accepting the Austrian proposal.

62. Mr. ALBANESE (Council of Europe) said that his organization's view of the article was identical to that of Greece and Switzerland. It believed that the capacity of an international organization to conclude treaties proceeded from international law, and that the internal rules of an organization merely set the limits and conditions for its exercise. In determining those limits and conditions all the rules of an organization were important: not merely the constituent instrument but the purposes of the organization, the acts of its decision-making organs and its practice. Consequently, his organization believed that article 6 was not indispensable, but if an article on the capacity of international organizations was necessary, the Council of Europe would support the reasonable compromise represented by the International Law Commission's text of the article.

63. Mr. CAMINOS (Organization of American States) said that the Commission's text reflected existing international law with regard to the capacity of

international organizations to conclude treaties. The limits of that capacity, as the representative of the World Health Organization had implied, were determined by article 2, subparagraph 1 (j), and the definition which it gave was acceptable. Any wording that tended to restrict existing law which in the past had caused no inconvenience to the work of international organizations in their relations with States or other international organizations might give rise to difficulties for the future functioning of those organizations.

64. Mr. NAWAZ (International Fund for Agricultural Development) said that article 6, as it stood, was flexible enough to accommodate the various types of situation which might arise. However, the definition of the term "rules of the organization" in article 2, subparagraph 1 (j), and Mexico's proposal would create problems for his organization and for other international financial institutions involved in development work. If they had to determine their treaty-making capacity on the basis of an express provision in their charters, they would find it difficult. In the past they had interpreted provisions in their constitutions giving them international legal capacity as giving them authority to enter into treaties. It might therefore be necessary to define the rules to which article 6 referred in such a way that the draft articles did not create difficulties for those institutions.

65. Mr. POURCELET (International Civil Aviation Organization) endorsed the views expressed by the representatives of other organizations, in particular the Food and Agriculture Organization of the United Nations and the World Health Organization, with regard to the scope and content of article 6 and the capacity of international organizations to conclude treaties. His

own organization's constitution made no specific mention of its capacity to conclude treaties. However, it had been doing so for over 40 years, and it considered the Commission's text to be acceptable as it stood.

66. Mr. BERNAL (Mexico) said that the discussion had shown that his delegation's proposal would not result in a clearer text, and he therefore withdrew it. His delegation would support the Commission's text.

67. Mr. TUERK (Austria) said that his delegation realized that a considerable number of delegations found its amendment unnecessary and preferred to accept the reasoning of the International Law Commission. It therefore withdrew its amendment and hoped that in so doing it would contribute to a consensus on article 6.

68. Mr. ANGHEL (United Nations Council for Namibia) said that the withdrawal of the Austrian amendment removed all justification for his own proposal, which he therefore withdrew as well.

69. The CHAIRMAN said that the Committee seemed prepared to accept the text of article 6 submitted by the International Law Commission on the understanding that if it decided to give article 2, subparagraph 1 (j), a different wording from that proposed by the Commission it would have to make consequential changes in article 6 and other articles. Those changes might be made by the Drafting Committee. Unless he heard any objection, he would take it that the Committee referred article 6 to the Drafting Committee on that understanding.

*It was so decided.*

*The meeting rose at 6 p.m.*

## 7th meeting

Tuesday, 25 February 1986, at 10.10 a.m.

Chairman: Mr. SHASH (Egypt)

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

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

[Agenda item 11] (continued)

### Article 7 (Full powers and powers)

1. The CHAIRMAN invited the Expert Consultant to explain how the International Law Commission came to the conclusion embodied in article 7.

2. Mr. REUTER (Expert Consultant) said that the article was a compromise between two tendencies or

attitudes, both legitimate. The many amendments submitted showed that the two tendencies were strongly represented in the Conference.

3. Beginning in the title, the terminology used in regard to States and international organizations was different. The term "full powers" was applied to the credentials of representatives of States and the term "powers" to the credentials of representatives of international organizations.

4. From a strictly legal point of view, the terms "full powers" and "powers" had exactly the same content, as was the case with the terms "ratification" and "act of formal confirmation". The terms were both used in State practice, but not in the same manner by all States. The differences arose largely because the terms were taken from internal law. It was of course important to remember that the adjective "full" did not relate to the extent of the powers or of the mandate of the

representative but rather to the rank of the authority conferring the powers. A representative holding "full powers" did not have any greater powers than a representative holding "powers". Regardless of the label, the extent of a representative's powers depended on the terms of his credentials.

5. That being so, it might be asked why the same term was not applied to credentials issued by a State and credentials issued by an international organization. The answer was that the terms used had a past and would no doubt have a future. The term "full powers" belonged to the tradition of Foreign Ministries and went back to the time when the person holding full powers had represented a monarch. In view of that tradition, one school of thought in the Commission had felt that the term "full powers" could only be associated with a State. In the compromise reached in the Commission, a concession had been made on the question of terminology, which did not materially affect the substance.

6. There had, however, been another tendency in the Commission which stressed the importance of international organizations as an element in the progress of international law. Reflecting that tendency, the Commission had recognized the need for some flexibility for international organizations. That flexibility, however, did not mean complete freedom.

7. Referring to the proposals for the deletion of subparagraph 4 (b), he explained that its provisions were based on the practice of international organizations. The provision permitted a person to be considered as representing an international organization for the purpose of expressing the organization's consent to be bound by a treaty if the practice of the organization's competent organs or other circumstances indicated that that person could represent the organization without having to produce powers. That element of flexibility did not leave complete freedom to the organization in the matter, since reference was made to the practice of the organization's competent organs. The practice of those competent organs was the practice of the member States expressed through them.

8. The Commission was concerned to ensure that international organizations should be enabled to live and survive. In that spirit it had adopted the compromise text in article 7.

9. The CHAIRMAN invited the Committee to consider the article and proposed amendments to it.

10. Mr. TUERK (Austria), introducing his delegation's amendment (A/CONF.129/C.1/L.4), explained that the replacement in subparagraphs 2 (b) and 2 (c) of the term "heads of delegations of States" by the words "representatives accredited by States" would bring the text into line with article 7 of the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> from which there was no valid reason to depart.

11. A similar explanation applied to the proposal to replace the concluding words of subparagraph 2 (c), "for the purpose of adopting the text of a treaty within that organization", by the words "for the purpose of

adopting the text of a treaty in that organization or organ".

12. In paragraph (4) of its commentary to article 7 (see A/CONF.129/4), the Commission explained that the language in article 7 (which differed from that of the 1969 Vienna Convention) was based on article 44 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>2</sup> However, that article 44 dealt with the credentials of the head of delegation "and of other delegates". The position was altogether different in subparagraph 2 (c) of article 7, the provisions of which were limited to heads of delegations.

13. There were practical reasons for going back to the 1969 Vienna Convention formula. When a draft convention was discussed in an international conference, it was not feasible at the time of the final vote on the adoption of the text to try to verify whether the person then acting for a delegation was actually its head.

14. Lastly, his delegation saw no good reason for the Commission's having replaced the 1969 formula, "to an international organization or one of its organs", by the words "to an organ of an international organization" in subparagraph 2 (c). His delegation accordingly proposed the reintroduction of the 1969 wording.

15. Mr. BEN SOLTANE (Tunisia), speaking also on behalf of the Mexican delegation, introduced the Mexican and Tunisian amendments to delete subparagraph 4 (b) (A/CONF.129/C.1/L.8 and L.13). He drew attention to article 11 (Means of expressing consent to be bound by a treaty), which stated that consent might be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, "or by any other means if so agreed". That article introduced a high degree of flexibility and left great freedom to an international organization. Subparagraph 4 (b) was therefore redundant and should be dropped.

16. Mr. WANG Houli (China), introducing his delegation's proposal (A/CONF.129/C.1/L.16) to delete the words "and powers" in the title and replace the word "powers" by "full powers" throughout the texts of paragraphs 3 and 4, said that no terminological distinction should be made between the powers of the representative of a State and those of a representative of an international organization. Scholars were agreed that there was no significant difference in substance between the powers of the two categories of representatives.

17. The capacity of an international organization to conclude treaties was of course not the same as that of a State. An international organization's capacity was always limited. That fact, however, had no bearing on the powers of the representative of an organization in the conclusion of a treaty. Even if the organization's capacity was limited, the powers of its representatives could still be "full powers".

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

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

18. Mr. SCHRICKE (France), introducing his delegation's proposal to delete subparagraph 2 (e) (A/CONF.129/C.1/L.20), noted that similar amendments had been proposed by Cuba (A/CONF.129/C.1/L.25) and the Union of Soviet Socialist Republics (A/CONF.129/C.1/L.29).

19. Subparagraph 2 (e) was a departure from the 1969 Vienna Convention. In paragraph (6) of its commentary to the article (see A/CONF.129/4), the Commission said that the provision was based on article 12 of the Convention on the Representation of States. Subparagraph 2 (e) did not, however, reproduce the wording of that article.

20. It was neither desirable nor in conformity with current practice to dispense the head of permanent mission from producing full powers. Even if the intention had been to introduce a measure of flexibility so as to take into account the practice of some States, subparagraph 2 (e) would be unnecessary, since subparagraph 1 (b) already provided that a person was considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by such a treaty if it appeared from practice that that person was considered as representing the State for such purposes "without having to produce full powers". Subparagraph 2 (e) should thus be dropped. Moreover, the Expert Consultant's explanation of the reasons which had led the International Law Commission to use the terms "full powers" and "powers" had persuaded his delegation of the validity of that terminological distinction.

21. Mr. ALMODÓVAR (Cuba) said that paragraph 1 of his delegation's amendment (A/CONF.129/C.1/L.25) proposed to replace the present text of subparagraph 1 (b) by a more precise text in line with the corresponding provision of the 1969 Vienna Convention.

22. With regard to paragraph 2 of the amendment, his delegation supported the proposal to delete subparagraph 2 (e) of the article but considered that more precise language as proposed in his delegation's amendment should be used if the subparagraph was retained.

23. His position was similar with regard to subparagraph 3 (b). He would prefer to see it deleted, since there was no corresponding provision in the 1969 Vienna Convention, but considered that it should be reworded in the manner proposed in his delegation's amendment if it was retained.

24. Paragraph 4 of his delegation's amendment called for the deletion of subparagraph 4 (b), as proposed by Mexico and Tunisia.

25. Sir John FREELAND (United Kingdom), introducing the amendment proposed by Japan and the United Kingdom (A/CONF.129/C.1/L.26), said that the first part of the amendment was designed to align the text more closely with that of article 7 in the 1969 Vienna Convention by reintroducing the notion of intention as an element to be taken into account in cases where full powers were not produced. The presence of that notion in subparagraph 1 (b) of article 7 of the Vienna Convention had the effect of making the matter

less one of ostensibly general rules than one for the parties to a negotiation in a particular case to determine. The sponsors considered that situations of the type envisaged in subparagraphs 1 (b), 3 (b) and 4 (b) of article 7 were not the proper subject of a general rule, but should be regulated by the intentions of the negotiators in particular cases. The Commission had indicated that such intentions could be judged by past practice and other circumstances. In the first part of their proposed amendment, which concerned subparagraph 1 (b), the delegations of Japan and the United Kingdom sought to give expression to that view.

26. They did not propose a similar amendment to subparagraph 2 (e) because proposals for the deletion of that subparagraph had been circulated.

27. The two delegations noted with interest that the delegations of Cuba and of the Soviet Union also took up the question of intention in their proposed amendments. It appeared to them, however, that the former delegation (and perhaps the latter) sought to introduce the notion of unilateral, rather than joint, intention, and that seemed to suggest an important and substantive departure from the régime of the 1969 Vienna Convention. They would welcome clarifications on the subject. If the matter proved to be merely one of wording, harmonization of the proposals might be left to the Drafting Committee.

28. The text could not be wholly aligned with the provisions of the Vienna Convention, as the Commission had for various reasons modified the reference to practice in the new draft and offered a somewhat puzzling difference in formulation in subparagraphs 3 (b) and 4 (b). In the second part of their amendment, the delegations of Japan and the United Kingdom proposed an amalgamation of the two subparagraphs, in which the simpler of the Commission's formulations was retained.

29. In the joint proposal, only the term "full powers" was used. If the proposal was adopted, a consequential change in the title of article 7 would be required. The reasons for that simplification had been set out by the representative of China, whose statement he commended to the Committee.

30. The United Kingdom delegation supported the Austrian amendments to subparagraphs 2 (b) and (c), but could not accept the Mexican, Tunisian, Cuban and Soviet proposals for the deletion of subparagraph 4 (b), which would have the effect of requiring that an international organization wishing to express its consent to be bound by a treaty would have to provide a formal document of authorization in every case. That was in contradiction with established, well-accepted and well-understood international practice, particularly within the United Nations system. On the other hand, he concurred with the French proposal for the deletion of subparagraph 2 (e).

31. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that, as a matter of principle, draft provisions of the projected convention should whenever possible correspond to their counterparts in the 1969 Vienna Convention. In the present case, the differences were both substantial and unjustified.

32. Article 7, paragraph 2, of the 1969 Vienna Convention established three categories of persons who were entitled to perform various acts related to treaties in virtue of their functions and without having to produce full powers. Comparing those provisions with the contents of article 7, subparagraph 2(c), he showed that the latter, which proposed conditions under which heads of permanent missions to an international organization would not be required to produce full powers, was not only at variance with current practice but also tended to place heads of diplomatic missions (i.e., ambassadors) in an invidious position. Why should the latter have to produce full powers for the purposes of signing a treaty, if heads of permanent missions need not? For those reasons, his delegation proposed the deletion of the subparagraph.

33. The text of subparagraph 4 (b) presented a similar difficulty. He knew of no treaties where the presentation of full powers (with the exceptions set out in article 7, paragraph 2, of the Vienna Convention) was not an obligation on all the parties. Consistency required that in the cases under consideration the same conditions should apply to representatives of States and of international organizations alike. His delegation consequently proposed the deletion of the subparagraph.

34. Mr. MOUSSAVOU-MOUSSAVOU (Gabon), referring to the statement by the Chinese representative, remarked that the distinction between "full powers" and "powers" was undoubtedly a source of present and potential confusion. Current practice was not clear, and representatives of States might receive either full powers or powers. Unless one of the results of adopting article 7 was to encourage States to harmonize their practices and issue uniform, full powers to their representatives, the distinction would be hard to establish.

35. Turning to specific proposals for amendment, he said that subparagraph 4 (b) as drafted appeared to introduce an unjustifiable distinction between practice as referring to the competent organs and as referring to the international organization itself. Moreover, as organs were the means of action of an organization, the former could hardly have practices which the latter would disavow. His delegation favoured the deletion of the subparagraph or its absorption in a new wording, as proposed by Japan and the United Kingdom.

36. With regard to subparagraph 2 (b), he wondered whether it was wise or practicable to dispense with the requirement that heads of delegations of States to an international conference produce full powers. On what other criteria could their authority reasonably be established? Nor could he accept the replacement of "heads of delegations of States" in the original draft by "representatives accredited by States", as Austria proposed. Lastly, and although he believed that as drafted, subparagraph 2 (e) was ambiguous and might require some modification, he would require further justification before agreeing with the French proposal for its deletion.

37. Turning to subparagraph 3 (b), he asked again what criterion, other than the presentation of appropriate powers, could reasonably be invoked in considering a person as representing an organization which

had no practice. He considered that the provisions of the subparagraph might give rise to confusion at a time when international organizations were proliferating, and therefore favoured its rewording or deletion.

38. Mr. PASZKOWSKI (United Nations Educational, Scientific and Cultural Organization) recalled that, in connection with article 2, subparagraph 1 (c), UNESCO had commented in writing (see A/CONF.129/5, p. 105) that the distinction between "full powers" and "powers" did not seem necessary. In fact, the full powers of representatives of States were rarely "full" in the strict sense of that word, while the powers of representatives of international organizations were generally sufficient for their intended purpose. UNESCO would prefer that the term "full powers" be used in both cases, as an accepted formulation in international relations. Should the Committee consider, however, that a distinction should indeed be made, it would advocate the replacement of the word "powers" by "authorization".

39. Noting that article 7 of the 1969 Vienna Convention referred to "Ministers for Foreign Affairs" and the draft under consideration to "Ministers of Foreign Affairs", he wished to share with the Drafting Committee his belief that the former expression was the more correct.

40. Mr. TUERK (Austria) signified his delegation's approval of the various proposals to incorporate the notion of intention in subparagraph 1 (b). He believed that any differences in those proposals were not substantive and could be resolved by the Drafting Committee.

41. He also supported the proposal for the deletion of subparagraph 2 (e). The subparagraph was in contradiction with practice and established an illogical and unacceptable distinction between the heads of permanent missions to international organizations and the heads of bilateral diplomatic missions as far as the signing, or signing *ad referendum*, of a treaty was concerned.

42. In connection with the Chinese delegation's proposal, which he supported, he agreed that "full powers" was a historical term employed as such in the 1969 Vienna Convention but no longer corresponding, in the strict sense, to present realities, where the same act could be performed with "full powers" or with "powers".

43. He opposed the deletion of subparagraph 4 (b). Subparagraph 2 (a) of article 7 in both the Vienna Convention and the draft before the Committee listed certain categories of persons, which did not include, for example, heads of international organizations, of whom full powers were not required. Thus, in cases such as that of a treaty between a State and an international organization, the former could be represented by its Foreign Minister, who did not have to produce full powers, and the latter by its Director-General, who did. Subparagraph 4 (b) was designed to take account of that situation. If the Committee none the less decided that it should be deleted, the Austrian delegation would introduce a specific provision to the effect that the administrative heads of international organizations were not required to produce powers for the purpose of

expressing the consent of that organization to be bound by a treaty.

44. Mr. TREVES (Italy) supported the Austrian proposal. However, the expression "an international conference of States in which international organizations participate" was awkward and likely to give rise to difficulty.

45. He did not agree with the proposal to delete subparagraph 4 (b) put forward by the Mexican and other delegations for the cogent reasons advanced by the Austrian representative. The joint Japanese–United Kingdom proposal, however, offered a useful compromise which his delegation could accept.

46. He fully agreed with the Chinese proposal to eliminate the distinction between "powers" and "full powers". The Expert Consultant had made it quite clear that the legal content of the two terms was the same, and it would be preferable to use one term, rather than two, to cover the same concept.

47. He also agreed on the need to restore the concept of the intention of States, as contained in a number of amendments, and with the Japanese–United Kingdom proposal to combine paragraphs 3 and 4.

48. Mr. HAYASHI (Japan) said that he fully supported the Chinese proposal and the views expressed by the Chinese representative regarding the terms "powers" and "full powers". The Expert Consultant's explanation had further convinced him that any distinction between those terms was unnecessary.

49. His delegation supported the Austrian proposals and the proposals to delete subparagraph 2 (e) made by France and the Soviet Union.

50. Mr. RASOOL (Pakistan) said that, while he had no strong views on the proposals put forward by Austria, he would prefer on the whole to retain the terminology used by the Commission.

51. The proposal by Mexico and other countries to delete subparagraph 4 (b) was very sweeping in scope and effect. There was a considerable body of international practice whereby heads not only of international organizations but also of the subsidiary organs of those organizations had entered into treaties without formally producing powers or full powers. While he appreciated the concern of those who proposed the deletion of subparagraph 4 (b), it might be preferable to redraft it to meet their concern and at the same time to reflect existing international practice in the matter.

52. With regard to the Chinese proposal, his delegation supported the distinction between "powers" and "full powers" and considered that it should be maintained for the reasons it had already stated in connection with article 2. Those reasons had been confirmed by the Expert Consultant. It had been said that full powers had only a historical background, but history had its own significance and should not be done away with at a stroke.

53. With regard to the French proposal, it seemed to him that subparagraph 2 (e), if considered in the light of subparagraph 1 (b), was superfluous and could be deleted.

54. Mr. ROMAN (Romania) said that his delegation favoured the Commission's text and considered that the distinction made between States and international organizations should be retained. It believed that both terms, "full powers" for States and "powers" for international organizations, should be maintained.

55. His delegation was prepared to support the proposals to delete subparagraph 4 (b) and had no difficulty in accepting the proposal to replace certain expressions used in article 7. It could also accept the French proposal to delete subparagraph 2 (e).

56. Mr. SANYAOLU (Nigeria), stressing the need for a distinction between powers and full powers, said that historically States had had powers to enter into treaties by virtue of their sovereignty. Such treaties had generally been concluded by the sovereign himself, but where delegation had been necessary, full powers had been required. In the case of international organizations, the power to conclude treaties derived from the constituent instrument. His delegation considered that the historical distinction should be maintained, and therefore preferred the Commission's draft.

57. While his delegation had no strong views about the proposal to delete subparagraph 2 (e), it considered that subparagraph 4 (b) should be retained, since it appeared to provide for what was known as ostensible authority. Moreover, a similar provision was to be found in the 1969 Vienna Convention, and deletion of the provision might prevent international organizations from concluding treaties.

58. Mr. ALBANESE (Council of Europe) said that subparagraph 4 (b) reflected a very wide practice followed in the international organizations for many years and relating mainly to the heads of secretariat of international organizations. There were two main reasons why the Secretary-General was not required to produce full powers. In the first place, to do so would be a mere formality, since the Secretary-General would in fact be signing a document for himself. Secondly, since many agreements, including those concluded between international organizations, took the form of an exchange of letters, it would be a complication to ask the two parties to produce full powers. What mattered was the intention of the parties, for that was what generally regulated all the problems that might arise as to the way in which the intention to be bound was reflected. His delegation therefore considered that that practice, as reflected in subparagraph 4 (b), should be retained, and supported the joint Japanese–United Kingdom proposal.

59. Mr. RAMADAN (Egypt) expressed his support for the Austrian, Chinese and French proposals. He agreed with the Mexican and Tunisian proposals to delete subparagraph 4 (b).

60. Since, however, there were cases in which the representative of an international organization was not required to produce powers, he would propose that paragraph 4 should be replaced by the following:

"The chief administrative officer of an international organization is considered as representing that organization for the purpose of expressing the consent of that organization to be bound by a treaty without having to produce powers".

61. He further proposed that a new paragraph 5 should be added, reading:

"A person is considered as representing an international organization for the purpose of expressing the consent of that organization to be bound by a treaty if he produces appropriate powers".

62. Mr. ECONOMIDES (Greece) said that the Chinese proposal was implicit in the Japanese–United Kingdom proposal. Since the same situation was involved, the question was simply one of choice of term, and, in his delegation's view, the better-known term "full powers" should be chosen. Any distinction would be quite artificial.

63. He fully agreed with the Austrian proposal to amend the wording of subparagraphs 2 (b) and (c) so as to bring it into line with the wording of the 1969 Vienna Convention, but was surprised at the expression "international conference of States", which was illogical.

64. For the reasons already stated by the French, Chinese and other representatives, he whole-heartedly supported the proposals to delete subparagraph 2 (e), since its dispositions were quite contrary to Greek practice.

65. He was completely opposed to the proposals to delete subparagraph 4 (b). Even if there were no parallelism with the 1969 Vienna Convention, there was an identity of inspiration, and the balance achieved in the Commission's draft should not be disturbed.

66. With regard to the Cuban amendment, while he agreed in principle with the introduction of the notion of "intention", the intention seemed to be of a unilateral nature.

67. In the Japanese–United Kingdom proposal, on the other hand, the notion involved a bilateral element, which might perhaps satisfy the delegations that had proposed the deletion of subparagraph 4 (b) and thus provide a compromise solution. In his view, the combination of paragraphs 3 and 4 proposed by those two countries was a matter that should be dealt with by the Drafting Committee.

68. Mr. FLEISCHHAUER (United Nations) said that he could have seen some merit in the proposals to delete subparagraph 4 (b) had the Conference been starting from scratch to draft provisions to regulate treaty-making by and with international organizations. It was, however, doing so against a background of some forty years of such treaty-making, and during those years a practice had been formally established which was reflected in subparagraph 4 (b). That practice was in full harmony with the constituent instruments of the international organizations concerned and with their purposes and principles. In many cases it had grown up as a result of the need to conclude standard agreements expeditiously. Certain types of agreement concluded without the production of full powers were known to the United Nations. They included, for instance, 90 standard technical assistance agreements concluded by the United Nations Development Programme, and in the 1950s a number of Special Fund agreements which had been concluded with many of the countries whose delegations had spoken for the deletion of the

subparagraph. The list included assistance agreements concluded by the United Nations Children's Fund as well as agreements dealing with the organization of United Nations seminars and workshops. If, therefore, the draft convention was to reflect current practice, subparagraph 4 (b) should be retained as drafted.

69. With regard to powers and full powers, he had already voiced doubts about the advisability of a distinction between the two, and he would ask the Expert Consultant whether the Commission had considered how such a distinction would work in practice. Assuming, for example, that the distinction provided for under the draft articles was adopted, and assuming that a delegation to a conference submitted a power termed full powers, would that power be rejected or recognized?

70. Mr. ABDEL RAHMAN (Sudan) said that his delegation had not been persuaded by the arguments in favour of many of the amendments to the draft article. With regard to the Japanese–United Kingdom amendment in particular, he doubted whether the introduction of the notion of intention was warranted and preferred the existing draft for the reasons given in the Commission's commentary. His delegation would, however, favour the deletion of subparagraph 2 (e) proposed by France and the Soviet Union, since that would be consistent with practice in his country.

71. Mr. POEGGEL (German Democratic Republic) said his delegation was in general agreement with the substance of most of article 7, but thought the article should perhaps be redrafted to bring it closer to the text of the 1969 Vienna Convention.

72. His delegation supported the Soviet Union proposal to delete subparagraphs 2 (e) and 4 (b).

73. His delegation sympathized with the Chinese proposal to eliminate the distinction between "full powers" and "powers", since it was difficult to differentiate between the two terms in the German language, but he understood the Commission's intention in making such a distinction. His delegation could accept the existing draft on that point. An alternative solution might be the UNESCO representative's proposal for the use of a different term.

74. He considered that the Austrian proposal to replace the words "heads of delegations of States" by the words "representatives accredited by States" in subparagraph 2 (b) was inadvisable, since it extended the category of persons not required to produce full powers. On the other hand, he welcomed the proposal in the second part of the Austrian amendment to replace the words in paragraph 2 (c) "to an organ of an international organization" by the words "to an international organization or one of its organs", and the words "within that organization" by the words "in that organization or organ", since the change tended to stress the organization as a whole rather than its individual organs.

75. His delegation could not accept the first part of the Japanese–United Kingdom amendment, and although the second part appeared to have merit, he preferred the Soviet amendment.

76. Mr. FOROUTAN (Islamic Republic of Iran) considered that a distinction should be made between the

representation of States and that of international organizations when concluding a treaty. To give full powers to representatives of international organizations might suggest that those representatives enjoyed unlimited powers which the organizations themselves did not enjoy. Basically his delegation endorsed the present draft, although it favoured the Austrian amendment since other representatives were accredited in addition to heads of organizations. He opposed the deletion of subparagraph 4 (b). The result might be a situation where international organizations were required to produce full powers on every occasion, which might well cause difficulty. His delegation supported the proposals by France and the Soviet Union to delete subparagraph 2 (e), since heads of mission should always enjoy full powers in any undertaking. His delegation did not support the Chinese amendment or the Japanese–United Kingdom amendment. The Cuban amendment appeared to be close to the Commission's draft, and he would support its submission to the Drafting Committee.

77. Mr. CASTROVIEJO (Spain), speaking on a point of order, asked whether, in accordance with rule 18 of the rules of procedure, the Expert Consultant should not have been called upon to answer the question put by the United Nations representative immediately following the question. His delegation would be grateful if the question could be clarified.

78. The CHAIRMAN invited the Expert Consultant to answer the question. In accordance with his practice at earlier meetings, he had been waiting for further requests for clarification so that they could be dealt with together.

79. Mr. REUTER (Expert Consultant) said that the United Nations representative had asked what the situation would be if the "powers" submitted by an international organization, the United Nations, for example, in accreditation of its representative were described in the credentials as "full powers". If the United Nations was neither a party to the proposed convention nor directly bound by it, the Organization would have the right to assign whatever title it wished to the document of accreditation. Otherwise there would be two documents. One would be the document of accreditation giving "full powers" to the representative. The second would be a letter explaining to the other parties or the Conference that the term "full powers" was, for the purposes of that particular act, used as the equivalent of "powers" as contained in article 7 of the convention.

80. Mr. MONNIER (Switzerland) said that his delegation supported the Austrian amendment, since the Commission's commentary was neither convincing nor accurate. He also supported the elimination of the distinction between "full powers" and "powers" for three reasons. First, as the German Democratic Republic representative had pointed out, the distinction between the two terms could not easily be made in the German language, which was sufficient reason in itself to avoid making the distinction. Secondly, as the Expert Consultant had said, the expression "full powers" was a traditional one which served as a label for the powers or authority required for specific acts; but in no sense did the term "full" have literal meaning.

Thirdly, if it had been the general practice to distinguish between powers there would have been a justification in the draft convention for making such a distinction, but that was not in fact the case. His delegation therefore supported the Chinese amendment.

81. His delegation was in favour of the first part of the amendment proposed by Japan and the United Kingdom and believe that the "intention" of the parties was relevant. Finally, his delegation also supported the amendments to subparagraphs 2 (e) proposed by France and by the Soviet Union, since there was no general reason to give permanent missions to international organizations special privileges greater than those accorded to bilateral missions.

82. The CHAIRMAN said that it was his impression that as a result of the division of opinion on the terminological distinction between "full powers" and "powers" a vote would be needed. A compromise seemed unlikely. He accordingly requested delegations not to raise the issue again unless they had new arguments to put forward.

83. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that the distinction between "full powers" and "powers" was intended to emphasize that States had powers in the broadest sense in regard to the adoption of treaties or in any other matter, whereas international organizations were limited by their constituent instruments. His view, based on his experience as a member of the Credentials Committee of the International Atomic Energy Agency, was that the members of any credentials committee would be concerned less with the form of the credentials presented than with the underlying substance. The content of the powers was the basic point, not what they were called.

84. The deletion of subparagraph 4 (b) proposed by his delegation would permit any person, and not only the Secretary-General of an international organization, to act without powers. He saw no loss of prestige to the Secretary-General if he were required to produce powers, which in any case would not be drawn up by himself but by an organ of the international organization.

85. With regard to the supposed difficulty of having to produce powers in respect of agreements contained in letters or notes, many treaties covered by the 1969 Vienna Convention were concluded by exchange of letters, for which powers had been drawn up by States in each instance. He saw no reason why international organizations could not do the same. On the other hand, if the Secretary-General alone signed an agreement with a State member of an organization and failed to inform the other States members or organs of the international organization, the latter would be unaware of the treaty. It was therefore appropriate that the Secretary-General should be required to produce powers, and not be automatically and *ex officio* exempt. The subparagraph should be deleted.

86. Mr. VIGNES (World Health Organization) said that the representatives of the Council of Europe and the United Nations had presented the basic arguments against the deletion of subparagraph 4 (b). For his organization, the subparagraph's deletion would create

practical difficulties, since the organization's sovereign organ responsible for conferring powers met but rarely. That deletion would also create an illogical situation, certain parties being dispensed from a formality while others were obliged to adhere to it. It would also be utterly contrary to established international practice. He therefore supported the solution proposed in the present draft.

87. Mr. BARRETO (Portugal) supported the Austrian amendment and favoured the deletion of subparagraph 2 (e), as proposed by France and the Soviet Union. He agreed that subparagraph 1 (b) should incorporate the notion of "intention", and accordingly supported the first part of the amendment proposed by Japan and the United Kingdom. He also supported the combination of paragraphs 3 and 4 proposed in that joint amendment.

88. Mr. VAN TONDER (Lesotho) hoped there would be no need for a vote on the question of "full powers" and "powers". His delegation supported the amendment proposed by China, since it considered that the distinction between "full powers" and "powers" was legally meaningless. His delegation also supported the joint Japanese–United Kingdom amendment, since the act of adopting a text was an executive act requiring "intention" to be clearly manifested, not merely inferred. His delegation saw subparagraph 2 (e) as a restatement of existing practice and believed that it should not be deleted.

89. Mr. HARDY (European Economic Community) said that the point of article 7 was to provide for the representative quality of the person empowered to perform official acts in relation to the treaty. The question of official authorization was a separate question from the organization's capacity to conclude treaties, and there was no difference of substance between States and international organizations in regard to official representative quality.

90. He believed the proposals of China and of Japan and the United Kingdom had considerable merit and were in accord with established practice. The instruments issued by the EEC were the appropriate full powers. It would simplify the Conference's task and make the future application of the draft articles easier if one term were used.

91. He believed the deletion of subparagraph 4 (b) would be undesirable for the reasons stated by the Council of Europe and the United Nations representatives.

92. By way of explanation of EEC treaty practice, he stated that, in the case of the EEC, treaties were concluded by a formal act of the Council of Ministers. Full powers were issued to the person or persons authorized to deposit the act expressing the consent of the Community to be bound by the treaty.

93. Regarding the reference to "competent organs" in subparagraph 4 (b), it was his delegation's understanding that it was for the organization itself to determine which were its competent organs and their roles. This was an internal matter. In the framework of the EEC, the organs principally concerned in the treaty-making process were the Commission and the Council. The Commission alone was competent to negotiate international agreements. The Council alone was competent to take the formal decision to conclude, on the basis of a proposal by the Commission. Other organs might also be involved in the EEC treaty-making process, by virtue either of the constituent instrument or of established practice; this was notably the case with regard to the European Parliament.

94. His comments also applied to all the other articles where the expression "competent organ" appeared, namely, article 2, subparagraph 1 (c bis), article 20, paragraph 3, and article 45, subparagraph 2 (b).

*The meeting rose at 1 p.m.*

## 8th meeting

Tuesday, 25 February 1986, at 3.10 p.m.

Chairman: Mr. SHASH (Egypt)

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

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

[Agenda item 11] (continued)

Article 7 (Full powers and powers) (continued)

1. Mr. HAMID (Indonesia) said that his delegation had no strong feelings about distinction between pow-

ers and full powers being removed, as proposed in the Chinese amendment (A/CONF.129/C.1/L.16). It fully supported the introduction of the notion of intention suggested by the United Kingdom and Japan in document A/CONF.129/C.1/L.26. It was not in favour of deleting subparagraph 4 (b), but could accept the proposals made by Austria (A/CONF.129/C.1/L.4). His delegation fully supported proposals by France (A/CONF.129/C.1/L.20) and the Soviet Union (A/CONF.129/C.1/L.29) to delete subparagraph 2 (e) for the reasons given by the sponsors.

2. Mr. LUKASIK (Poland) said that, in the discussion of article 2, subparagraphs 1 (c) and 1 (c bis), his delegation had stated (2nd meeting) its preference for maintaining the International Law Commission's dis-

tinction between "powers" and "full powers" for the reasons given in paragraph (10) of the commentary to that article (see A/CONF.129/4). It shared the view that it was inappropriate to use the expression "full powers" in the case of an organization, since the capacity of such a body to bind itself internationally was always of a secondary nature, and thus never unlimited as was that of sovereign States.

3. His delegation was in favour of introducing into paragraph 1 the notion of intention, which appeared in article 7 of the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup> The simplest proposal put forward to achieve that was the change suggested by the Soviet Union in paragraph 2 of document A/CONF.129/C.1/L.29, but his delegation had no objection to the Cuban proposal (A/CONF.129/C.1/L.25). Nor did it object to the joint proposal by Japan and the United Kingdom, apart from the fact that it saw no reason to insert in subparagraph 1 (b) a reference to international organizations, since paragraph 1 dealt with States only.

4. Poland supported Austria's proposal and also the proposals to delete subparagraph 2 (e). There seemed to be no reason to differentiate between heads of bilateral and multilateral missions; moreover, the provision in that subparagraph conflicted with Poland's constitutional law.

5. His delegation supported the idea of introducing the notion of intention into paragraph 3, as proposed by the Soviet Union and Cuba. To some extent it also agreed with the idea underlying paragraph 2 of the Japanese and United Kingdom proposal, but it could not approve the formulation those delegations suggested since it would conflict with the proposal to delete subparagraph 4 (b). The idea of merging paragraphs 3 and 4 would be acceptable only if it could be reconciled with the suggestion to delete subparagraph 4 (b), but at present that was not feasible. The point about that subparagraph was that, while a treaty could be negotiated only by physical persons, the final expression of consent by international organizations to be bound by a treaty could be made by a collegiate intergovernmental organ of the organization through the adoption of an appropriate decision, thus eliminating the need for a physical person to act as an intermediary between the States concerned and the international organization except in respect of the physical transmission of the will of the organization. While, therefore, subparagraph 3 (b) was essential, subparagraph 4 (b) was not. However, if it was the wish of the majority to retain subparagraph 4 (b), his delegation would like the text to use the verb "to communicate", which implied that consent could be given by an organ, instead of the verb "to express".

6. Mr. CAMINOS (Organization of American States) said that, for the reasons stated by speakers at the previous meeting, among them the representatives of Austria and the United Nations, his organization was in favour of retaining subparagraph 4 (b) since it reflected the uniform practice of the Organization, whose origins

went back almost a century. At the regional level, the Organization's experience of concluding treaties was similar to that of the United Nations at world level. If, therefore, one of the essential tasks of the Conference was to codify existing customary international law, subparagraph 4 (b) ought to go into the draft convention. His organization supported the Chinese proposal to remove the distinction between "powers" and "full powers".

7. Mr. HERRON (Australia) said that in essence article 7 was simpler than article 7 of the 1969 Vienna Convention. The tendency to avoid subjective notions in treaty practice might partly explain the omission of a reference to intention from the International Law Commission's draft. That was acceptable, but his delegation could also agree to the restoration of some of the terminology and substance of the 1969 Vienna Convention along the lines proposed by Austria and by Japan and the United Kingdom. If a reference to intention was restored, it should be the joint intention of the parties concerned, as proposed by Japan and the United Kingdom, rather than the unilateral intention of a single State, which the Cuban proposal recommended. His delegation fully understood the reasons why the Commission had maintained the distinction between powers and full powers in the draft articles, but it would prefer it to be eliminated because it was artificial rather than functional and could be confusing.

8. His delegation could accept the deletion of subparagraph 2 (e). Paragraphs 3 and 4 should emphasize the practice of organizations in adopting or authenticating the text of a treaty and in being represented for the purpose of expressing their intention to be bound by a treaty. In his region there was a fast-developing body of regional treaty practice whose procedures were characterized by a large degree of informality, so much so that it had become known as the "Pacific way". His delegation would like the draft convention to provide scope for procedures of that kind to expand, particularly in the case of organizations. It therefore opposed the proposals to delete subparagraph 4 (b) and approved the simple drafting and uniform substance of the formulation of paragraphs 3 and 4 proposed by Japan and the United Kingdom.

9. Mr. ROSENSTOCK (United States of America) welcomed the general support being expressed for the International Law Commission's text. A number of delegations had proposed drafting amendments which, on the whole, would improve it. His delegation supported the Austrian proposal, which brought the text closer to that of article 7 of the 1969 Vienna Convention. The impressive evidence adduced by representatives of international organizations about their practice in respect of the expression of consent to be bound by a treaty suggested that the Commission had rightly adopted subparagraph 4 (b). Accordingly, his delegation could not support the proposals to delete it.

10. His Government's practice as a depositary to some extent led it to support the Chinese proposal. One of the conventions for which the United States was a depositary was the Food Aid Convention, 1980, to which both States and international organizations might become parties. Having had the duty of exa-

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

mining documents submitted in regard to that Convention by representatives of Governments and of an international organization, he had taken a practical approach similar to that described by the representative of the Soviet Union at the previous meeting: he had simply looked at them to see whether the person presenting the document was authorized to act on behalf of the State or organization which he or she purported to represent, because it was the substance of the document rather than its title which determined its legal effect. That was true in domestic law too.

11. His delegation also supported the proposals to delete subparagraph 2 (e), which did not represent customary practice. The proposal by Japan and the United Kingdom to merge articles 3 and 4 brought the text closer to the 1969 Vienna Convention, and therefore had the full support of his delegation.

12. Mr. SKIBSTED (Denmark) said that the Commission's formulation of subparagraphs 3 (b) and 4 (b) was appropriate, both on account of its flexibility and because the competence of administrative officers of international organizations to conclude treaties often derived from the practice of the organization in question and not from explicit full powers. His delegation therefore opposed the proposals to delete subparagraph 4 (b). China's proposal to eliminate the distinction between powers and full powers was well founded and, in the light of the observations made by the Expert Consultant at the previous meeting, should be supported. The proposal by Japan and the United Kingdom to combine articles 3 and 4 was equally acceptable to his delegation. It also approved Austria's proposal. Proposals which were really drafting ones should of course be referred to the Drafting Committee. Noting what Lesotho had said at the previous meeting about subparagraph 2 (e), his delegation would welcome an explanation by the Expert Consultant of the background to its inclusion in the draft and some indication whether or not it should be deleted.

13. Mrs. THAKORE (India) said that her delegation approved the Commission's wording of subparagraphs 2 (b) and 2 (c); it was more precise than the wording proposed by Austria, which reverted to the language of the 1969 Vienna Convention, and it was in keeping with the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>2</sup> Her delegation could not accept the proposals to delete subparagraph 4 (b). The explanation given by the Expert Consultant and the numerous examples cited by the representative of the United Nations at the previous meeting had convinced it of the usefulness of retaining that subparagraph as it stood, since it conformed fully to international practice. As the representatives of the World Health Organization and other international organizations had stated at that meeting, its deletion would create difficulties. The representative of the International Atomic Energy Agency had suggested, the

replacement of the words "the practice of the competent organ of the organization" by a broader expression such as "the relevant rules of the organization" (see A/CONF.129/5, p. 126), but her delegation preferred the existing wording, which was more specific.

14. Her delegation had no strong views about the Chinese proposal to use the term "full powers" for both the representatives of States and those of international organizations, or on that aspect of the amendment proposed by Japan and the United Kingdom. It could not support the proposals to delete subparagraph 2 (e). It considered that the heads of permanent missions to international organizations should be competent, either through practice or other circumstances, only to sign *ad referendum* the text of a treaty between the accrediting States and the organization concerned.

15. With regard to the Japanese and United Kingdom proposal to reintroduce the notion of intention embodied in the 1969 Vienna Convention, and to combine paragraphs 3 and 4, there were no good reasons why the Conference should not follow the more recent rule on the subject in the 1975 Vienna Convention on the Representation of States. Her delegation therefore preferred the Commission's text, which might be improved where necessary by drafting changes.

16. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that his delegation was in favour of maintaining the distinction between the "full powers" of representatives of States and the "appropriate powers" of representatives of international organizations. A real difference existed between the two types of representative on account of the differing capacities of the subjects of international law which they represented. His delegation therefore opposed China's proposal, which would eliminate that distinction.

17. Subparagraph 4 (b), the deletion of which was proposed by a number of delegations, was unnecessarily wide-ranging; but his own delegation believed that to limit the action of representatives of international organizations by deleting it might hinder the functioning of the organizations. The Conference should seek formulation for the subparagraph which took account of the practice and objectives of the organization concerned and offered a moderate degree of flexibility. His delegation had no difficulty in accepting Cuba's proposal, which would introduce into the draft the notion of intention contained in the 1969 Vienna Convention.

18. Mr. NEGREIROS (Peru) said that some matters dealt with in article 7 appeared to relate to formal questions but in fact involved matters of substance. States and international organizations could not really be considered as comparable entities from the point of view of their characteristics, rules, functions, structure, representation and powers. States were well defined entities; international organizations were more abstract and possessed a rather imprecise and still evolving capacity. It was therefore appropriate to distinguish between States and international organizations in regard to functions, rules, prerogatives, procedures and the capacities of their representatives, as problems might arise with general authorizations issued in a rush to establish an hypothetical equivalence between inter-

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

national organizations and States. His delegation was therefore in favour of maintaining the Commission's distinction between full powers and powers.

19. It supported the proposals of Mexico and Tunisia to delete subparagraph 4 (b), as well as the Soviet Union's proposed new wording for subparagraphs 1 (b) and 3 (b).

20. Mr. JESUS (Cape Verde) said that his delegation wished to reaffirm the position it had expressed in the discussion on article 2 (2nd meeting). The Commission's distinction between "full powers" and "powers" was valid, and unless there was a major difference of views on the matter or a major gap to be filled, it should be retained. What mattered was the content of the article, not its title.

21. As to the substantive provisions of article 7, his delegation could support the amendment submitted by Japan and the United Kingdom in regard to subparagraph 1 (b). It also approved the Austrian amendment to subparagraph 2 (b) for the reason given by the sponsor of the proposal at the previous meeting.

22. Subparagraph 2 (c) dealt with bilateral agreements signed by States and an international organization: in such cases there was no precedent for a representative other than the head of a permanent mission signing such an agreement on behalf of his country. It would therefore be better to adhere to the Commission's wording for subparagraph 2 (c) and to reject the Austrian suggestion for it.

23. As a justification for the French proposal to delete subparagraph 2 (e), it had been maintained that it was not the practice of the international community to grant the heads of permanent missions the authority to sign a treaty without having to produce full powers. That view seemed to be contradicted by article 12, paragraph 2, of the 1975 Convention on the Representation of States. Since that Convention dealt specifically with the question of representation, it should not be derogated from in the draft convention. However, if the question was understood to have been taken care of by subparagraph 1 (a) of the article, his delegation would not oppose the deletion of subparagraph 2 (e).

24. His delegation could support the rewording of paragraphs 3 and 4 proposed by Japan and the United Kingdom, but not the proposals to delete subparagraph 4 (b). The Japanese and United Kingdom proposal modified subparagraph 4 (b) in a manner which should prove acceptable.

25. Mr. KANDIE (Kenya) said that it was clear that the various amendments proposed did not fundamentally alter article 7. His delegation would therefore prefer to keep to the text drafted by the Commission. After reading paragraph (9) of the Commission's commentary and listening to the Expert Consultant's explanation at the previous meeting concerning "powers" and "full powers", he had concluded that the distinction between those terms should be maintained, but not at the expense of flexibility. His delegation approved the proposals to delete subparagraph 2 (e), since it believed that heads of permanent missions should not have the right to sign treaties without having to produce full powers. It opposed the proposals to delete subpara-

graph 4 (b) for the reasons given by the representatives of Nigeria, Austria and the Council of Europe.

26. His delegation agreed with the proposal by Japan and the United Kingdom to introduce the principle of intention into subparagraph 1 (b), in keeping with the 1969 Convention, but it would find difficulty in approving their suggestion to combine paragraphs 3 and 4.

27. Mr. GÜNEY (Turkey) said that the proliferation of amendments to article 7 showed that the International Law Commission's text could be improved. His delegation supported the Austrian amendment and the Chinese proposal to eliminate references to "powers" as distinguished from "full powers": there was no need to depart from the precedent set by article 7 of the 1969 Convention in that regard. His delegation could support the proposals made by France and the Soviet Union to delete subparagraph 2 (e). The Cuban amendment introduced a unilateral concept of intention which, he felt, would give rise to difficulties. The proposal put forward by Japan and the United Kingdom was more satisfactory, in that it was based on the concept of joint intention.

28. Mr. CASTROVIEJO (Spain) said that the Expert Consultant's explanation concerning the distinction between "full powers" and "powers" and the arguments put forward during the discussion had persuaded his delegation that the distinction did not have any real content and did not justify the departure which it represented from the 1969 Convention. The amendment proposed by China should therefore be adopted.

29. With regard to subparagraphs 2 (b) and (c), he considered that the change proposed by Austria would benefit practice in treaty-making relations between States and international organizations and would not affect either validity of representation or capacity in the matter of adoption of texts. His delegation supported the proposals to delete subparagraph 2 (e). As to the deletion of subparagraph 4 (b), the representatives of Austria and the World Health Organization had given pertinent examples of the difficulties which that would cause. The proposal submitted by Japan and the United Kingdom was a worthwhile attempt to obviate the problems posed by the existing text and might be used by the Drafting Committee as a basis for a generally acceptable wording.

30. Mr. TEPAVICHAROV (Bulgaria) said that article 7 as drafted by the International Law Commission, with its distinction between "full powers" for the representative of a State and "powers" for the representative of an international organization, was acceptable to his delegation. The distinction, although it could not be drawn in all languages, served to emphasize the difference between the legal basis of the treaty-making capacity of States on the one hand and that of international organizations on the other. His delegation shared the view of the Expert Consultant that the distinction did not relate to the mandates of representatives.

31. He had noted with satisfaction that several of the proposals before the Committee were intended to align the text of the draft convention more closely with that of article 7 of the 1969 Vienna Convention or article 12 of the 1975 Vienna Convention. There must, however,

be a slight difference in the wording of the three conventions in one respect: while article 7, subparagraph 1 (a), of the 1969 Convention spoke of "appropriate full powers", article 12, paragraph 1, of the 1975 Convention referred to "full powers", and in his opinion it was the latter term which should be used for States in the draft convention as well. But his delegation would insist on the use of the word "appropriate" in subparagraph 4 (a). In the light of the explanation given at the previous meeting by the representative of Austria, his delegation could support the amendment submitted by the Austrian delegation.

32. The proposals to delete subparagraph 4 (b) were acceptable, since the Commission's wording of the provision was too broad and did not fully reflect established practice. Neither the representative of a State nor the representative of an international organization was acting as an individual when expressing consent to be bound by a treaty; he was called a representative because he acted on behalf of an entity, which defined the scope and purpose of his representation. Normally, in the case of an international organization the chief administrative officer, when negotiating a treaty with a State, either fulfilled a duty imposed on him by the rules of the organization or executed a decision taken by a competent organ of that organization with the consent of its members. There was thus no difficulty in requiring a chief administrative officer of an organization to present full powers: the legal effect of such a document was to certify that the representative of the international organization had been duly authorized by the competent organs, in conformity with the rules of that organization, to enter into a contractual relationship or to consent to a treaty. The existing wording of subparagraph 4 (b) was therefore unacceptable to his delegation.

33. He could support the proposals to delete subparagraph 2 (e), since the text proposed by the Commission introduced an innovation which was not based on the generally accepted practice, namely, that the head of a permanent mission normally produced full powers. It should be left to each State to determine the rule; under Bulgarian law full powers were required for the purpose contemplated in subparagraph 2 (e).

34. The proposals by Japan and the United Kingdom and by Cuba and the proposal in paragraph 2 of the Soviet Union amendment were of a similar nature. The Cuban amendment was based on unilateral intention, and that would enable his delegation to support it. There was no ground for introducing the notion of joint intention into subparagraphs 1 (b) and 3 (b) as proposed by the United Kingdom and Japan. Representation was a matter of sovereignty or discretionary power governed by the internal law of the State or the rules of the organization concerned. The Soviet proposal to replace the word "considered" in those subparagraphs by the words "intended to be considered" would improve the text without making major changes in it.

35. The problems raised by article 7 were not of a drafting nature, and consequently the article should not be referred to the Drafting Committee without clear guidelines from the Committee of the Whole.

36. Mr. BERNAL (Mexico) said that his delegation could accept the Commission's text of article 7 in the light of the Expert Consultant's explanation of the distinction between "full powers" and "powers". At the same time, he welcomed the proposals for amending subparagraphs 1 (b), 2 (b) and 2 (c). It might of course be possible to eliminate subparagraph 2 (c) if the majority of the Conference agreed that heads of permanent missions should be included in the category of those representatives required to produce full powers.

37. His delegation's proposal that subparagraph 4 (b) should be deleted (A/CONF.129/C.1/L.8) did not overlook the practice of international organizations, but was based on the view that such practice was not yet a customary norm of international law. The proposal to fuse paragraphs 3 and 4 as currently drafted, as advocated by Japan and the United Kingdom, would not be acceptable to his delegation. A possible way of catering for the practice of organizations might be a compromise: to delete the subparagraph but to introduce into the draft article a provision along the lines suggested at the previous meeting by the Egyptian representative (para. 60) and by the Austrian representative in his second statement (para. 43).

38. Mr. MBAYE (Senegal) said that his delegation opposed the Chinese proposal. The distinction between "full powers" for the representatives of States and "powers" for those of international organizations should be maintained; it in no way lessened the powers of those representatives or hampered organizations in their relations with other subjects of international law. Regarding the changes proposed by Austria, his delegation would prefer to retain the term "heads of delegations of States". The functions of the head of a delegation were different from those of its other members, and the exemption from the production of full powers should not be extended to all the members of a delegation. His delegation could, however, accept the proposed substitution of the words "to an international organization or one of its organs" for the words "to an organ of an international organization".

39. His delegation had no objection in principle to the deletion of subparagraph 4 (b), but the Committee must take account of the fact that international organizations, particularly those of a universal character, were increasingly active in international life. It must not hamper their work by approving a requirement that their representatives should produce formal powers in all circumstances. On the whole, therefore, his delegation was in favour of the retention of the subparagraph.

40. It could support the joint amendment by the United Kingdom and Japan to combine paragraphs 3 and 4. With regard to their proposed wording for subparagraph 1 (b), it would be better to follow article 7 of the 1969 Vienna Convention more closely. He therefore suggested that the words "the intention of the States and international organizations concerned" should be replaced by the words "the practice of the States and international organizations concerned", which were more objective.

41. His delegation approved the proposal of France to delete subparagraph 2 (e).

42. Mr. ALMODÓVAR (Cuba) said that the Commission's wording for article 7 seemed more precise than that proposed by Austria, but his delegation could accept the latter if delegations as a whole favoured it.

43. Regarding the proposals to delete subparagraph 4 (b), Cuba's position was that international organizations were the creation of States and should be treated as such. The article should therefore be worded so as to ensure that the person or representative concerned would be required to present appropriate documents.

44. As to the amendment proposed by China, his delegation had listened with interest to the explanation by the Expert Consultant at the previous meeting and was prepared to accept either the wording proposed by the International Law Commission or the Chinese proposal.

45. There were a number of similarities between the proposal by the United Kingdom and Japan and his delegation's own proposal. The latter conveyed the same idea as paragraph 2 of the proposal by the Soviet Union. His delegation supported the proposals to delete subparagraph 2 (e), but if the subparagraph was retained it would prefer the wording of its own proposal for subparagraphs 1 (b) and 3 (b) to that of the Soviet Union proposal.

46. Mr. ROZOQI (Kuwait) said that his delegation found it difficult to accept subparagraphs 2 (e) and 4 (b) as drafted by the International Law Commission because they were ambiguous. It would therefore support the proposals to delete both subparagraphs. It did not think it was necessary to establish a distinction between "full powers" and "powers", and it could therefore support the Chinese amendment.

47. Mr. KRUMREI (Federal Republic of Germany) said that the question of the distinction between "powers" and "full powers" might be left aside until a decision was taken on article 2. In his delegation's view there was no difference of substance between the two terms, and it therefore supported the Chinese amendment. Representatives of international organizations had said that the formulation of subparagraph 4 (b) described established practice, which the draft convention should not limit, either for the present or for the future. The proposal to merge paragraphs 3 and 4 of the article was an excellent one, and his delegation would support it.

48. Mr. ROCHE (Food and Agriculture Organization of the United Nations), commenting on the proposal to delete subparagraph 4 (b), said the Committee should bear in mind that many international organizations concluded a considerable number of instruments every year that would be covered by the draft articles. The great majority of those instruments were concluded in accordance with procedures of a relatively informal and, above all, practical character. The practice of his organization over its more than 40 years of existence had been not to issue full treaty-signing powers either to its executive head, the Director-General, or to officials to whom the function had been delegated. Nor were full powers produced by the States or organizations that were parties to the treaties concluded with it. The del-

ection of the subparagraph would contradict that practice, which had stood the test of time. Moreover, to require "appropriate powers" in subparagraph 4 (a) would be to introduce an onerous and seemingly unnecessary formality that would hinder both organizations and States dealing with them. If the signatories of all treaties which provided for assistance to his organization's member countries were to require full powers, delay in concluding them would be inevitable. In cases of emergency assistance to developing countries, for example, the formality would be both impractical and counterproductive. His organization therefore urged the Committee to view the proposal to delete subparagraph 4 (b) in the light of the effect it would have on the efficacy of international organizations. The retention of the subparagraph would not, of course, mean that organizations would never have to produce full powers; in some cases, such as the conclusion of a very formal instrument or compliance with the rules of procedure of a particular conference, they might well be required as an exception to the general rule. He expressed his organization's support for the many delegations that had already supported the idea of deleting the distinction between "full powers" and "powers".

49. Mr. EIRIKSSON (Iceland) said that his delegation would support the Chinese proposal, the Austrian proposal and the proposals by France and the Soviet Union to delete subparagraph 2 (e). It also agreed with the idea of incorporating the notion of intention in the draft article, as recommended in the Japanese and United Kingdom proposal and in those of Cuba and the Soviet Union. The differences between those three proposals might be resolved as a drafting matter. His delegation regarded it as desirable that the article should refer to the intention of all the parties concerned. It favoured the retention of subparagraph 4 (b) in the form of the merger of paragraphs 3 and 4 proposed by Japan and the United Kingdom.

50. Mr. HALTTUNEN (Finland) said that his delegation could support the Austrian amendment, which would bring subparagraphs 2 (b) and 2 (c) of article 7 into line with the corresponding article of the 1969 Vienna Convention, but it would like the words "an international conference of States and international organizations" to be used in subparagraph 2 (b). A decision on that point might be left to the Drafting Committee.

51. His delegation had doubts regarding the proposal to delete subparagraph 4 (b). The representative of the United Nations at the previous meeting had provided some important information about the established treaty-making practice of the most important and universal of all intergovernmental organizations. In the light of that, his delegation would prefer the subparagraph to be retained in the form proposed by the International Law Commission.

52. On the question of "full powers" and "powers", it felt some sympathy with the Chinese amendment. There was, in practice, no substantive difference between the two terms, and the Finnish language, like the German, made no such distinction.

53. The proposal of France and the Soviet Union to delete subparagraph 2 (e) was acceptable because sub-

paragraph 1 (b) covered the same point. The Japanese and United Kingdom amendment, which combined paragraphs 3 and 4, was also acceptable to his delegation and would make the draft article more compact.

54. Mr. RIPHAGEN (Netherlands) said it was not really necessary to retain the distinction between "full powers" and "powers". Furthermore, the "powers", even of representatives of States, were never in fact "full".

55. There were some slight differences of wording between article 7 of the 1969 Vienna Convention and the International Law Commission's draft. Subparagraph 1 (b) of the former contemplated both the practice and the intention of the States concerned. The Commission's draft was less clear in that respect, since it spoke of "practice" but did not specify the entities whose practice was contemplated. The reference to "practice" in subparagraph 4 (b) of the draft was linked only with "the competent organs of the organization" and was thus one-sided.

56. In the Cuban proposal for subparagraph 3 (b), both "practice" and "intention" related only to international organizations. The Japanese and United Kingdom amendment, on the other hand, was closer to the formulation in the 1969 Convention. That approach seemed preferable, since two sides were involved and each should know that they were dealing with the right person. The circumstances were, of course, important; every negotiation had its own procedure. Both the 1969 Vienna Convention and the Commission's draft article 7 offered flexibility in regard to that procedure, and that characteristic should be preserved in the final text.

57. He could not agree that the difference between the amendment proposed by Cuba and the Japanese and United Kingdom proposal was merely one of drafting. He favoured the retention of subparagraph 4 (b) in the manner suggested in the latter proposal, which provided the desired flexibility. His delegation therefore approved that proposal, as well as the changes proposed by Austria.

58. Mr. WANG Houli (China) said that he was gratified by the amount of support that had been expressed for his delegation's amendment. The discussion had made it abundantly clear that there was no substantive difference between the terms "full powers" and "powers". The Committee need take no decision on the matter until it reverted to article 2.

59. Regarding the other proposals, his delegation could agree to the deletion of subparagraph 2 (e) and to the changes proposed by Austria.

60. Mr. SANG HOON CHO (Republic of Korea) said that his delegation would support the Austrian amendment for the practical reasons explained by the sponsor.

61. It was in favour of deleting subparagraph 2 (e), which covered the same ground as subparagraph 1 (b), but not subparagraph 4 (b), a provision which the representative of the United Nations had convinced him was necessary.

62. The Japanese and United Kingdom proposal to combine paragraphs 3 and 4 conveyed the content of the International Law Commission's subparagraph 4 (b) in an appropriate manner. His delegation supported the deletion of the term "powers" recommended in that amendment and in the proposal by China.

63. Mr. REUTER (Expert Consultant) said he had been asked to explain why the International Law Commission had inserted subparagraph 2 (d) in the draft. The Commission had not envisaged such a provision in its initial draft, but having regard to the text of the 1975 Convention, it considered it advisable to suggest it to Governments. If the Committee considered that it was inappropriate to include subparagraph 2 (d) in the draft convention, Governments could make it known that such was their view, either for reasons which concerned only themselves or in respect of a particular organization. The deletion of that subparagraph would leave open the possibility of certain practices being adopted by virtue of the remainder of the paragraph.

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

##### *Paragraph 1*

64. The CHAIRMAN said that the Conference had decided that only paragraph 2 of article 9 required substantive consideration by the Committee of the Whole. However, the World Bank had submitted an amendment to paragraph 1 of that article (A/CONF.129/C.1/L.23). Under rule 28, subparagraph 2 (a), of the rules of procedure, the Committee might decide, at the request of a representative, to give substantive consideration to a particular article of the basic proposal that had been referred directly to the Drafting Committee.

65. After a procedural discussion in which Mr. SCHRICKE (France), Mr. ROCHE (Food and Agriculture Organization of the United Nations) and Sir John FREELAND (United Kingdom) took part, the CHAIRMAN suggested that the World Bank representative should call attention to any changes he considered desirable in article 9, paragraph 1, after the Committee had established a definitive text for article 5, with which the paragraph was closely linked.

*It was so decided.*

##### *Paragraph 2*

66. Mr. WANG Houli (China), introducing the amendment in document A/CONF.129/C.1/L.17, said that international conferences in which international organizations participated differed from those attended by States only. Accordingly, the provision in paragraph 2, which placed international organizations on an equal footing with States in the matter of voting, might not always be suitable. That rule was not being applied at the present Conference, for example, where only representatives of States could vote. It was not advisable to lay down inflexible rules on that subject. Admittedly, in paragraph (4) of its commentary the International Law Commission had disclaimed any intention that paragraph 2 should impair the autonomy of international conferences in adopting their own rules of procedure or in filling any gaps in those rules, but his

delegation considered it was desirable to remove all ambiguity on the subject.

67. Mr. FLEISCHHAUER (United Nations), speaking also on behalf of the Council of Europe, the Food and Agriculture Organization of the United Nations, the International Atomic Energy Agency, the International Civil Aviation Organization, the Organization of American States, the United Nations Industrial Development Organization and the World Health Organization, introduced the amendment in document A/CONF.129/C.1/L.22, which sought to extend the rule in paragraph 2 to conferences in which only international organizations participated. Such conferences dealt with common institutional concerns, such as the international civil service, public information and technical assistance. The sponsors of the amendment did not share the view expressed by the International Law Commission in paragraph (3) of the commentary that such a conference would fall under article 9, paragraph 1, so that it would have to adopt a treaty by unanimity and not by a two-thirds majority. There was no need for the unanimity rule in that case, since no international organization could be bound without its consent merely by participating in the conference.

68. Mr. SCHRICKE (France), introducing the proposal in document A/CONF.129/C.1/L.28, said that, like the Chinese amendment, it aimed at making the paragraph a flexible provision which would meet all cases. It did not limit article 9, paragraph 2, to treaties concluded between States and international organizations; the paragraph would apply to all treaties falling within the scope of the draft articles. It thus would also meet the point raised by the representative of the United Nations, among others. By using the word "participants", which covered both States and international organizations, it did not prejudice any decision which might be taken about voting rights and it was applicable also to conferences attended by international organizations only. It was a matter of extending the scope of paragraph 2 by demonstrating its flexibility. The proposals of the Soviet Union and Egypt, on the other hand, limited that scope and thus could not enjoy the support of the French delegation.

69. Mr. NETCHAEV (Union of Soviet Socialist Republics), introducing the proposal in document A/CONF.129/C.1/L.30, said he did not agree that the French proposal would make the paragraph flexible; it proceeded from the premise that all conferences would

adhere to the rule suggested by France. Conferences in which only international organizations participated had the sovereign right to adopt the rules they wished. The same was true for conferences in which States participated. Each conference adopted rules of procedure to suit its subject-matter and objectives, as the present Conference had done. An attempt was being made to innovate in international law in respect both of participation and voting. The Chinese representative had put the matter in its proper perspective. International organizations did not possess rights equal to those of States. In a particular case, the number of States casting an affirmative vote might be less than two-thirds of the entities present and voting, and there would then be a danger of international organizations imposing their will on sovereign States. That would be completely incorrect. There had been no example in practice of a large international conference in which States and international organizations had been placed on an equal footing; voting rights had always been confined to States.

70. Mr. RAMADAN (Egypt), introducing the proposal in document A/CONF.129/C.1/L.31, said that most delegations attached importance to distinguishing between States and international organizations in the matter of concluding treaties. It was the distinction between the creators and the created. States were sovereign; international organizations could not be placed on terms of equality with them with regard to voting, although organizations might express an opinion on the drafting of texts. That position, which was reflected in rule 34 of the rules of procedure of the present Conference, was the established practice of all international law conferences. His delegation's proposal would make the paragraph sufficiently flexible to cover all cases, since the paragraph would still contain the proviso "unless by the same majority, they shall decide to apply a different rule".

71. With regard to the United Nations proposal, he felt that a two-thirds majority rule on the adoption of a treaty at a conference of international organizations dealing with technical matters would be inappropriate, since the text of the treaty would have to be applied by all the organizations concerned. If the representatives of international organizations insisted on that amendment, it could be included in the text of a separate paragraph.

*The meeting rose at 6 p.m.*

## 9th meeting

**Wednesday, 26 February 1986, at 10.15 a.m.**

*Chairman:* Mr. SHASH (Egypt)

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

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

[Agenda item 11] (*continued*)

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

**Paragraph 2 (*continued*)**

1. Mr. POEGGEL (German Democratic Republic) had serious doubts about paragraph 2 of article 9. It was his understanding that the Conference had no mandate to dictate to future conferences in which international organizations were participants how they should adopt treaties. Of the interesting proposals submitted, he preferred the Soviet Union amendment (A/CONF.129/C.1/L.30), under which the procedure for the adoption of a treaty would be agreed by the participants in the conference concerned. The Chinese amendment (A/CONF.129/C.1/L.17) had the disadvantage of paragraph 2 unchanged.

2. Mr. LUKASIK (Poland) said that his delegation believed that paragraph 2 should be flexible. While all the amendments submitted appeared to have the same general purpose, his delegation greatly preferred the Soviet Union amendment, since it best served the objective of flexibility.

3. Mr. FOROUTAN (Islamic Republic of Iran) said that his delegation had difficulty in accepting the idea that international organizations could participate in international conferences on an equal footing with States. International organizations could participate in consultations and deliberations, but decision-making was the prerogative of States. He could not support the French amendment (A/CONF.129/C.1/L.28), because it did not specify the type of treaty involved. Nor did it deal with the main point, that international conferences were composed of States and that the participation of international organizations was secondary. In the amendment submitted by eight international organizations (A/CONF.129/C.1/L.22) he could not support the deletion proposed in point (a) for the reasons he had already stated. He had no objection to point (b), and in regard to point (c), he preferred the original text. He had no objection to the new paragraph 3 proposed by China, which would permit an international conference to adopt an alternative procedure if it wished. He supported the Soviet Union amendment for the same reason. He also supported the Egyptian amend-

ment (A/CONF.129/C.1/L.31), which fully reflected his delegation's thinking.

4. Mr. ROMAN (Romania) said that his delegation endorsed the International Law Commission's commentary to the article (see A/CONF.129/4) and could therefore accept paragraph 2. He was unable to support the French amendment and the eight-organization amendment, which would basically change the content of the article.

5. His delegation was attracted by the amendments proposed by the Soviet Union, China and Egypt. The Chinese and Soviet Union amendments were both concerned with the freedom of States to establish a different procedure for the adoption of the text of a treaty. The Egyptian amendment went further, and deserved special attention. He believed that the Egyptian amendment could furnish an amended paragraph 2 and that the Chinese and Soviet Union amendments could be combined in a new paragraph 3, thus providing a comprehensive and balanced solution.

6. Mr. DUFEK (Czechoslovakia) considered that the type and character of the treaty contemplated in paragraph 2 should be specified. A treaty might be between States, or between States and international organizations or even between international organizations only, and might be general or regional in character. The type of international conference contemplated was also important. In that connection, he agreed with the assumption in paragraph (1) of the International Law Commission's commentary and believed that the international conference envisaged would be a relatively open and general conference between States in which one or more international organizations participated for the purposes of adopting the text of a treaty between States and international organizations. His delegation was sympathetic to the Egyptian amendment, which recognized the role of governments while not ruling out the adoption of other rules for the adoption of treaties between States and international organizations.

7. He noted that the French amendment and the amendment by eight international organizations both provided that where international organizations participated, a two-thirds majority of the States and international organizations would be required for the adoption of the text of a treaty or of a different rule. The adoption of the text of a treaty between international organizations alone raised other difficulties. Paragraph 1 would presumably apply. A solution offering the needed flexibility was provided by the Soviet Union amendment, which should satisfy everyone. The Chinese amendment would be acceptable for similar reasons.

8. Mr. AL-JUMARAD (Iraq) said that his delegation considered that international organizations should not

automatically have the right to vote in the matter of the adoption of treaties and could not therefore support the French amendment. He could accept the Chinese and Soviet Union amendments, because they were broadly based and would enable each conference to decide whether international organizations should vote or not.

9. Commenting on the Egyptian amendment, he pointed out that by voting in a conference in which States were participants, international organizations might take positions in conflict with those of some States members of their own organization. That amendment did not give international organizations an established right to vote, but allowed for the possibility that they might vote if two-thirds of the States present and voting so decided. His delegation favoured flexibility and accordingly supported the amendment.

10. Mr. RASOOL (Pakistan) said that his delegation had no difficulty with the draft article but welcomed any attempt to improve it. He noted that, although all the amendments were directed towards increased flexibility, some of them might result in over-rigidity. In the light of the sponsor's introductory statement, the Soviet Union amendment might have that effect. The Egyptian amendment also appeared to introduce some rigidity.

11. His delegation's preference was for the Chinese amendment, which increased flexibility without disturbing the Commission's text. The French amendment also attempted to increase flexibility. His delegation was not opposed to the eight-organization amendment, which was designed to fill a gap in the text.

12. Mr. HORVATH (Hungary) agreed with the International Law Commission's view that paragraph 2 should not be interpreted as impairing the autonomy of international conferences to adopt their own rules of procedure. The Commission's text was not fully appropriate where States and international organizations participated in an international conference convened to adopt a treaty. The procedure proposed in the Soviet Union amendment took into account a variety of possibilities and offered a flexible solution. He supported the amendment.

13. Mr. ECONOMIDES (Greece) took issue with the contention that States as creators of international organizations could not be treated in the same manner as the international organizations they created. His delegation agreed that States created international organizations. International organizations were created by the will of States, and had only the special and limited rights needed to fulfil their functions. The fact remained that when a State agreed to conclude a treaty with an international organization in an international conference, States and international organizations must be on a strictly equal footing. That was a general principle of the international law of treaties.

14. He could not accept the Egyptian amendment because it did not recognize the right of international organizations to participate in negotiating a treaty, despite the definition in article 2, subparagraph 1 (e). It was also inconsistent with article 9, paragraph 1, under which the adoption of the text of a treaty required the

consent of all the States and international organizations participating in its elaboration.

15. He could not accept the Soviet Union amendment, because it was vague and incomplete. The proposal that the procedure should be agreed by the participants by consensus would in effect give a right of veto to all participants.

16. The Chinese amendment was unclear and unnecessary. An international conference could always adopt a different procedure by unanimity or consensus, and paragraph 2 already provided for a different procedure to be adopted by a two-thirds majority.

17. Despite its ambiguities, he could accept the French amendment if the words "between States and international organizations or between international organizations" were inserted after "international conference".

18. He favoured the amendment submitted by eight international organizations, because it was comprehensive and in conformity with the provisions of the draft articles. If it was not acceptable to a majority of delegations, his delegation would support the Commission's draft.

19. Mr. KOECK (Holy See) said that the discussion centred on two issues. The first was whether international organizations should be permitted to participate at all in international conferences for the elaboration of treaties on an equal footing with States. The amendments submitted showed how reluctant some States still were to recognize the international legal personality of international organizations when it came to the consequences of that legal personality. There was a mistaken idea, which was dying hard, that States, and only States, could legitimately be the subjects of international law. He would have thought that that narrow concept of international legal personality had finally died with the advisory opinion of the International Court of Justice in the case concerning reparation for injuries suffered in the service of the United Nations,<sup>1</sup> nearly 40 years ago. The Court had ruled that the subjects of international law were not necessarily identical in their nature and that the extent of their legal personality, in other words their international rights and duties, depended on the need of the international community.

20. His delegation believed it only logical that an international organization destined to become a party to an international treaty on an equal footing with States should have the same say as States in the negotiations leading to the elaboration of the text and in its formal adoption. His delegation supported the present text of article 9.

21. The second issue was whether a general rule should be laid down as to the majority needed for the adoption of a treaty by an international conference. His delegation had no great preference, but as the two-thirds majority seemed to have become a standing practice and was included in the 1969 Vienna Convention on

<sup>1</sup> See *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174.

the Law of Treaties, he saw no point in departing from that already codified practice.

22. The wording of the article could still be improved, and his delegation would be willing to support the Chinese amendment.

23. Mr. TUERK (Austria) said his delegation was in principle quite satisfied with the Commission's text. There was, however, an omission in paragraph 2, which did not cover the case of a treaty between international organizations elaborated and concluded in a conference consisting only of international organizations. There was no reason to make such treaties subject to the unanimity rule in paragraph 1 of the article. That gap could be filled by adopting the amendment proposed by eight international organizations.

24. He saw merit in the French amendment, particularly in so far as it specified a two-thirds majority of the participants "present and voting".

25. The question had been raised why an international organization should be given the right to vote under article 9, in connection with the adoption of the text of a treaty. The example of the present Conference, at which only States could vote, had been cited. The comparison was not valid, because the present Conference was a law-making conference and States were the only law-makers under international law. Paragraph 2 of article 9 dealt with a different situation. The paragraph related to the elaboration of a treaty between States and international organizations. In that situation, international organizations should be given decision-making powers with regard to the negotiation and adoption of the text. If they were not, they would simply not attend the conference.

26. His delegation was attracted by the Chinese amendment, which would make for flexibility in the future and would therefore be helpful.

27. The existing two-thirds majority rule had been questioned by some speakers, who wished to replace it by the rule of consensus. His delegation welcomed the development of consensus and would like to see it adopted wherever possible. The fact remained that in order to work by consensus it was necessary to have consensus in the first place.

28. Mr. JESUS (Cape Verde) said that his own feeling was that article 9 should be dropped, because it created conflicts with well established practice. To begin with, the unanimity rule set forth in paragraph 1 was not followed in practice. In that connection, he drew attention to the concluding proviso of article 5, "without prejudice to any relevant rules of the organization". That proviso expressed the existing practice. When the General Assembly drew up a treaty, it applied its own rules of procedure, not article 9 of the 1969 Vienna Convention.

29. If paragraph 1 were retained, it should be regarded as containing an indicative, not a compulsory, rule. If five States held a conference among themselves to draw up a treaty and agreed that decisions would be taken by a four-fifths majority, there could be no question of imposing upon them the unanimity rule in paragraph 1 of article 9. As sovereign States, they were free to adopt

their own rules for purposes of the adoption of the text of a treaty.

30. Paragraph 2 was also at variance with existing practice. There was already a well-established practice for conferences of States. It was to be found in the rules of procedure of United Nations conferences like the present Conference.

31. His delegation preferred the Soviet Union amendment, which would introduce the greatest measure of flexibility by enabling international conferences to adopt the procedure they preferred. The Egyptian amendment would not allow international organizations to vote on the adoption of the text of a treaty. That approach was correct only in certain cases. Everything depended on the subject-matter of the treaty concerned. It would not be proper for international organizations to vote on the adoption of the text of a treaty which laid down general rules of international law. In other cases the participants in a conference might well agree that certain international organizations should have the right to vote on the adoption of the text, and the draft articles should not preclude that possibility. The matter should be decided in the rules of procedure of the conference, as the Soviet Union suggested.

32. His delegation would be prepared to accept the article with the Soviet Union amendment, and suggested, as a sub-amendment, that the concluding words, "in accordance with a procedure agreed by the participants in that conference", should read: "in accordance with the rules of procedure of that conference".

33. Mr. WOKALEK (Federal Republic of Germany) said the discussion raised the sensitive issue of how a treaty was agreed upon and who had a say in the matter. As he saw it, the parties in the negotiation of a treaty must all have equal standing in the negotiations. If that equality was not respected, it would not be a negotiation between a State and an international organization but rather a diktat on the part of the State. The present Conference was concerned with working out rules for the conclusion of treaties to which international organizations were parties. It would be unthinkable to exclude international organizations from the process.

34. Efforts should be made to avoid the ordeal which had preceded the present Conference, when three preparatory sessions in New York had been needed to prepare the rules of procedure. The question of the participation of organizations should be settled once and for all. The article under discussion covered all the necessary points, and paragraph 2 was very similar to the corresponding provision of the 1969 Vienna Convention, subject to the insertion of the reference to "international organizations".

35. His delegation supported the eight-organization amendment, in the interests of clarity. The Chinese amendment, he thought, would introduce an element of ambiguity, and the French amendment seemed somewhat too open. The Soviet Union amendment had the major drawback of requiring a consensus before a conference could start. Lastly, with regard to the Egyptian amendment, he concurred in the Greek representa-

tive's criticism that it would deprive international organizations of treaty-making power.

36. Mr. HARDY (European Economic Community) stressed that conferences held for the adoption of treaties were of many and varied kinds, ranging from general law-making conferences like the present one to highly technical ones. Their scale varied from three participants to a hundred or more. In some, only States participated, although that could scarcely be the case dealt with in article 9, paragraph 2. In others, international organizations took part on an equal footing with States or participated in some other way in the Conference.

37. The European Community, for its part, could participate in conferences on the same basis as States in cases where it had received exclusive competence in the area in question. In other instances, the Community could take part in conferences together with its member States in cases which concerned the competence of the Community as well as that of its member States. The Community would therefore prefer to retain the International Law Commission's text of paragraph 2, though it had some difficulty with the wording. The phrase "at an international conference of States in which organizations participate" gave an unbalanced presentation of the principle of the equality of the treaty participants.

38. He could not support the Egyptian amendment, which would drastically limit decision-making at conferences so as to exclude international organizations in the case of a treaty which, *ex hypothesi*, was to be a treaty between States and international organizations, or even between international organizations alone. The fundamental principle was that of the equality of the parties to a treaty, which was to be found in paragraph 1 of the article.

39. In conclusion, his preference would be for the Commission's text, but he could accept the eight-organization and French amendments. Consideration might also be given to the oral amendment suggested by Greece (see para. 17 above) and supported by Austria. The Egyptian amendment was unduly rigid, and therefore unacceptable.

40. Mr. BARRETO (Portugal) said that in dealing with paragraph 2 there were two philosophical approaches. One maintained that States and international organizations could not be placed on the same footing. The other accorded international organizations the same rights as States. His delegation favoured the second approach and could not therefore accept the Egyptian amendment.

41. The Soviet Union amendment appeared to offer a good basis of discussion, but had a drawback. How could the procedure for the conference be unanimously agreed? That drawback detracted from the flexibility which that amendment, like the Chinese amendment, was intended to provide.

42. His delegation was prepared to accept the article as it stood, and could accept the French amendment. His delegation would have no difficulty in approving the eight-organization amendment for the reasons stated at the previous meeting by the United Nations representative.

43. Mr. KHVOSTOV (Byelorussian Soviet Socialist Republic) said that the present draft of paragraph 2 was unacceptable. His delegation believed as a matter of principle that international organizations could not enjoy equal rights with States where the adoption of the text of a treaty by means of a vote was concerned. Moreover, the draft ignored established practice, whereby it was for the States participating in an international conference to establish its rules of procedure, including those governing the adoption of the text of any treaty. It laid down a hard and fast rule which unnecessarily restricted the independence of future international conferences in determining whatever procedure they deemed suitable.

44. His delegation supported the Soviet Union amendment, which both took account of past practice and allowed for a flexible approach in the future. It could not agree with the eight-organization amendment or with the French amendment, which in essence duplicated the provisions he had objected to in the present draft.

45. Mr. SANG HOON CHO (Republic of Korea) said that the basic issue seemed to be how much flexibility should be allowed in the adoption of the text of a treaty between States and international organizations at an international conference. All the amendments were designed to meet the need for flexibility. At the same time, it was necessary to comply with the framework that had been largely stabilized through the 1969 Vienna Convention. Any substantive departure from the latter's provisions might result in virtually two sets of procedures for the adoption of treaties at international conferences, a state of affairs that would be prejudicial to the binding force of the instruments in question. His delegation believed that the basic position established in the Commission's draft, which simultaneously respected the provisions of the 1969 Vienna Convention and made them more flexible, should be adhered to as far as possible.

46. Some drafting changes might be envisaged. The possibility might, for instance, be explored of allowing for exceptional cases where participants other than international organizations constituted most or all of the two-thirds majority, or vice versa. At all events, a sharp division of interests between participating States and international organizations should not be permitted. If separate criteria could be established for calculating the two-thirds majority for States and international organizations, the paragraph could be applied on a more rational basis without prejudice to the intention of the 1969 Convention.

47. Mr. AL-JARMAN (United Arab Emirates) said that his delegation respected the principle of nominal equality between States and international organizations but believed that some distinction must be made between them, for example, in the adoption of treaties. It would be difficult to lay down hard and fast rules. Every international conference had its specific nature and characteristics, and each should be allowed to determine the manner of adoption in accordance with its own rules.

48. If a two-thirds majority rule was accepted, it was not inconceivable, given the proliferation of interna-

tional organizations, that the latter might impose their will on States by an overwhelming majority.

49. Turning to the various proposals for amendment, he said that his delegation found it difficult to accept the French amendment, but was sympathetically inclined towards the Chinese proposal, which had the virtue of being more pragmatic. It could not accept the Egyptian proposal, which would deny international organizations the right to participate in the adoption of a text, thus overturning the principle of nominal equality to which he had referred.

50. Mr. TARCICI (Yemen) said that representatives who had spoken since he had placed his name on the list of speakers had set out the views he would have expressed. He would therefore refrain from making the statement he had prepared.

51. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that the Cape Verde representative had convincingly demonstrated the practice of international organizations and shown the need for an amendment that would remove the two-thirds majority provision from the centre of attention.

52. He considered the allusion by an earlier speaker to diktats to have been both ill-chosen and inapposite, suggesting as it did confrontational situations between States and international organizations. Such situations were surely inconceivable. It would certainly not be in the interests of the State concerned to seek to impose its will on international organizations in any way.

53. The Portuguese representative had argued that the requirement of unanimous agreement would make it difficult to decide on the procedure to be followed at an international conference of States in which international organizations participated. That was not the case if the interests of all the participants coincided.

54. The Austrian representative had alluded to various categories of international conferences and the different procedures adopted. The list might include law-making conferences such as the present one (at which procedure was determined and decision-taking rights were exercised by States, although international organizations might participate and enjoy certain other rights); international conferences of a universal character or international conferences convened by States (where again the practice was that decisions were taken by States); conferences with the participation of States and international organizations with coincident and equal interests (the representative of the European Economic Community had spoken of such conferences, which were conceivable on a larger scale, devoted to a specific subject, such as copyright); and the admittedly hypothetical category of conferences with only international organizations as participants. The Soviet Union amendment could be applied to all the categories and took account of all the interests that might be involved. The participants in any conference would have the sovereign right to decide on the procedure they deemed appropriate, including the procedure for adoption of the text of a treaty. It seemed obvious that they would do so in the mutual interest of all concerned.

55. Mr. MONNIER (Switzerland) said that, although the hypothesis was at the moment of an exceptional nature, it might be wise to make provision for conferences where all the participants were international organizations and where the provisions of article 9, paragraph 1, did not apply. The amendment submitted by eight international organizations was pertinent in that connection.

56. Much had been said about the need for flexibility in any rules that might be decided upon concerning the adoption of texts. Certainly a flexible rule was necessary, but there must at least be a rule. Mere reference to a conference's rules of procedure did not constitute a rule. The text proposed by the International Law Commission in article 9, paragraph 2, had the merit of providing for the rule of a two-thirds majority for the adoption of the text of a treaty. That rule corresponded to practice. In that realm, the present Conference could not benefit from precedence, for it was a codification conference elaborating a treaty on treaties. The object of article 9, paragraph 2, was different; it envisaged a conference at which States and international organizations participated on an equal footing in order to adopt the text of a treaty. Consequently, the Commission's text as amended by the eight-organization proposal was acceptable.

57. The Swiss delegation could also entertain the Chinese proposal for an additional paragraph, which would introduce flexibility and take account of the views of States which did not want the text to prejudice the rules of procedure of such conferences.

58. Mr. KRISAFI (Albania) considered that article 9 allowed for the necessary flexibility. As was pointed out in paragraph (4) of the Commission's commentary, there was no intention of "impairing the autonomy of international conferences in the adoption of their own rules of procedure, which might prescribe a different rule for the adoption of the text of a treaty, or in filling any gaps in their rules of procedure on the subject".

59. His delegation took the view that States and international organizations were not equal subjects of international law. It therefore favoured the Egyptian amendment, which retained the Commission's provision for participation by organizations but reasonably restricted voting rights.

60. Mr. GÜNEY (Turkey) said that those who were reluctant to admit the principle of strict equality between contracting parties for the purposes of paragraph 2 should at least admit equitable treatment as a compromise. In other words, organizations participating in an international conference of States and international organizations should enjoy certain rights at the time of adoption of the text of a treaty. On the basis of that consideration, his delegation supported the Chinese amendment as well as the eight-organization amendment. It would have difficulty in accepting the French and Soviet Union proposals, and could not support the Egyptian amendment, which ran counter to that principle and recognized no right on the part of the organizations concerned.

61. Mr. ROSENSTOCK (United States of America) said that the great advantage of paragraph 2 as it stood

was its inclusion of a residual rule, in the absence of which every international conference attended by States and international organizations might be characterized by lengthy reaffirmations of States' positions on the matter. Because the Soviet Union amendment abandoned that residual rule it was unacceptable to his delegation. The other amendments might result in slight improvements to the original text, but his delegation was inclined to favour the latter.

62. Mr. ABDEL RAHMAN (Sudan) suggested that the basic issue was the choice between rigidity, in other words possible restrictions on future action, and flexibility. Setting his assessment of the various proposals against that background, he could not agree to the Egyptian amendment, which would have the restrictive effect of virtually excluding international organizations from participating in the process of treaty adoption. He found that the French proposal and the eight-organization amendment accorded a status to international organizations which he could not accept. He was inclined to favour the Chinese and Soviet Union amendments, which aimed at the desired flexibility. If they could be merged in a single text, he would support it.

63. Mr. BERNAL (Mexico) said he considered that the Chinese proposal offered the best basis for an acceptable solution. He also favoured the eight-organization amendment, which rightly called attention to the eventuality of conferences composed solely of international organizations.

64. Mr. TEPAVICHAROV (Bulgaria) said that the spate of amendments to paragraph 2 of article 9 was an indication of dissatisfaction with the existing draft.

65. There should be no parallel between draft article 9 and article 9 of the 1969 Vienna Convention. Although the problem was the same, the solution to it should not be, for the draft convention was designed to cover conferences at which international organizations participated both in the adoption and the drafting of the treaty. Furthermore, since paragraph 2 could apply to an international conference at which there were very few participants and where an international organization and a State were on an equal footing, he would like to know whether the two-thirds majority vote provided for would apply cumulatively and jointly to States and international organizations. In his view, it should not do so, and to that extent the article was defective. The Chinese and Soviet Union amendments deserved close attention in that connection, with a view to reproducing the established rule whereby each conference was master of its own procedure.

66. As to the desirability of conferring upon international organizations the right to vote and to adopt the text of a treaty, he considered that it would be premature to take a position on the issue at that stage.

67. He agreed with the Cape Verde representative and considered that paragraph 1 might be unnecessary if the Soviet Union amendment were adopted. That amendment would also cover the case of a conference in which only international organizations participated. In that connection, the Soviet representative might wish to take account of the eight-organization proposal to add the words "or between international organ-

izations" after "international organizations" in paragraph 2.

68. Mr. ABADA (Algeria) said that his delegation was unable to support the French proposal, as it took no account of the fact that the desire for greater flexibility should not cloud the need for more precision in the wording of the draft articles. The Egyptian amendment was unduly restrictive, since it might not even allow international organizations to express their consent. His delegation would, however, have no difficulty in accepting the Chinese amendment and had no objection to the Soviet Union amendment, which was along similar lines but clearer. The two proposals might, he thought, be merged.

69. Mr. ROCHE (Food and Agriculture Organization of the United Nations) said that, for the reasons stated by the United Nations and other representatives, his delegation considered that the Commission's draft was too restrictive so far as the role of international organizations at international conferences was concerned, and therefore preferred the text put forward in the eight-organization amendment. The Food and Agriculture Organization of the United Nations could, however, live with any text that provided suitable flexibility. Conferences were very likely to vary considerably in their composition, purposes and procedures in the future, and the rules and principles laid down in the draft convention would apply for many years to come. The aim, therefore, should be to adopt provisions that would not inhibit the development of international law.

70. It had been said that conferences in which only international organizations took part could take place only in accordance with the principles laid down in article 9, paragraph 1. In his view, such conferences would certainly fall under paragraph 2. Indeed, if he had understood correctly, the Soviet representative had envisaged that possibility when he had enumerated the various hypothetical types of conferences that could be held in the future.

71. Ms. LUHULIMA (Indonesia) said her delegation considered that in certain cases international organizations should be regarded as treaty partners on an equal footing with States. It could not therefore accept the Egyptian amendment, which closed the door to participation by international organizations in decision-making. It favoured a measure of flexibility whereby international conferences would be enabled to decide on the rules of procedure to be followed for the adoption of treaties between States and international organizations and between international organizations.

72. The amendments put forward by China, eight organizations, France and the Soviet Union were concerned with flexibility, but her delegation would prefer the Commission's draft if it was modified to cover international conferences between international organizations.

73. Associating her delegation with the Austrian representative's remarks regarding a two-thirds majority, she noted that there was a general trend towards the taking of decisions by consensus. That point could, however, be taken care of by the last clause of paragraph 2.

74. Mr. LI JONG PIL (Democratic People's Republic of Korea) said that he was in favour of greater flexibility in paragraph 2. A flexible approach in the matter of international conferences would cope with all eventualities in future treaty-making. On that basis, the Chinese and Soviet Union amendments were acceptable to his delegation, since they had a common denominator and provided ample opportunity for a decision to be taken regarding the procedures of international conferences in the light of developments.

75. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that, as formulated, paragraph 2 was unsatisfactory and equated States with international organizations for the purpose of adopting the texts of treaties. Other situations, quite apart from the one envisaged in paragraph 2, could, however, be visualized. He had in mind, for instance, the case of a treaty concluded between many States with the participation of one or more international organizations, or of a treaty concluded between an equal number of States and international organizations, or again of a treaty concluded at an international conference where the majority of participants were international organizations and there were only one or two States. There was also the case where a treaty was concluded and adopted between international organizations alone. It was not possible to find a solution for each one of the manifold combinations of those four basic variants under the present, or indeed any other, draft convention. Paragraph 2 should therefore be modified to provide for the maximum flexibility. His delegation believed that the Soviet Union proposal provided an appropriate solution, and would consider it appropriate if a third paragraph were added to the article to cover the case of the text of treaties drawn up at international conferences in which only international organizations took part.

76. Mr. SKIBSTED (Denmark) said his delegation supported the article as drafted, since it served the objective of ensuring that international organizations should be placed on the same footing as States when treaties between States and international organizations were being drawn up. It also laid down a flexible rule that would help to prevent international conferences

from failing because of procedural disagreements. There was some risk of that happening with the Soviet Union proposal, and the amendment was therefore unacceptable to his delegation. The eight-organization amendment would add a positive element to the Commission's draft, and his delegation would have no difficulty in supporting it.

77. Mr. RIPHAGEN (Netherlands) said that, according to his reading of the Commission's draft, its purpose was not to confer the right to participate in a given conference on any State or international organization. Indeed, there was no general rule that established such a right. Further, as he understood them, the words "participating in its drawing up" in paragraph 1 signified that an international organization had the right to put proposals to the conference and to vote on proposals, while paragraph 2, read in the light of paragraph 1, merely provided that, if a State or international organization participated in that way, it should also take part in deciding how the text was to be adopted, in other words, in adopting the rules of procedure. That seemed to be only logical. On that basis, therefore, the Commission's draft was acceptable to his delegation.

78. Referring to the proposed amendments, he said that his delegation was willing to support the eight-organization amendment, which was mainly concerned with a point of drafting. It did, however, provide for the possibility of a conference composed of international organizations alone, such as, for instance, one convened with a view to conferring a uniform status on international civil servants. The Commission's draft did not exclude such a possibility, but the amendment would make the position absolutely clear.

79. The French amendment was also concerned with a point of drafting and did not say anything different from the Commission's draft. In that connection, he considered that the Conference should not try to introduce more into article 9 than the Commission intended. The question of the composition of international conferences, for instance, was best left to international practice.

*The meeting rose at 12.55 p.m.*

## 10th meeting

Wednesday, 26 February 1986, at 3.20 p.m.

Chairman: Mr. SHASH (Egypt)

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

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

[Agenda item 11] (continued)

Article 7 (Powers and full powers) (continued)\*

1. The CHAIRMAN suggested that the Committee should establish a working group on article 7, composed of the sponsors of the amendments and of specially interested delegations, and chaired by Mr. Pisk (Czechoslovakia). A similar procedure might be adopted with other articles to be considered by the

\* Resumed from the 8th meeting.

Committee. If he saw no objection, he would take it that the Committee accepted his suggestion.

*It was so agreed.*

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

**Paragraph 2 (continued)**

2. Mr. GILL (India) said that his delegation had no difficulty with the International Law Commission's draft of paragraph 2, which contained a useful residual rule in the form of the proviso safeguarding the autonomy of international conferences. It therefore covered the substance of the Chinese and Soviet Union proposals (A/CONF.129/C.1/L.17 and A/CONF.129/C.1/L.30). His delegation could accept the changes proposed by the Council of Europe and other international organizations in document A/CONF.129/C.1/L.22, which filled a gap in the existing text, as well as the World Bank amendment to paragraph 1 of the article (A/CONF.129/C.1/L.23), which took account of practice. The Conference must look to the future and adopt a practical approach to the subject-matter of the draft convention.

3. With regard to the question raised by the Bulgarian representative at the previous meeting, he thought that the two-thirds majority for which the paragraph provided meant two-thirds of the aggregate of States and international organizations present and voting.

4. Mr. HAYASHI (Japan) said his delegation was convinced that the wisest course was to adopt the Commission's text, which, as the United States had said at the previous meeting, had the merit of containing a residual rule. Also, the text did not exclude the possibility of other rules being adopted, including a consensus requirement. The difference between the French proposal (A/CONF.129/C.1/L.28) and the Commission's text was a matter of drafting, and both texts should be referred to the Drafting Committee.

5. Mr. CORREIA (Angola) said his delegation had no great difficulty in accepting the original text: the rules it embodied were not new, but they were being applied to a new category of entities, namely, international organizations. However, the formulation of the paragraph was not sufficiently clear. In regard to conferences in which both States and international organizations participated, it was best to maintain the distinction between them in regard to their status and allow States to decide whether the international organizations should participate in the conference on an equal footing.

6. His delegation could support the Soviet Union proposal and also the Chinese amendment, provided the Commission's text was given the formulation he had recommended. In substance, the difference between the Soviet Union and Chinese proposals was simply a question of form.

7. Mr. HALTTUNEN (Finland) said that paragraph 2, as drafted by the Commission, was of a procedural nature in that it concerned the majority required for the adoption of a treaty between States and international organizations at an international conference. However, that was not the problem in practice. At such a conference the States taking part might be

members of an international organization also participating; if that organization became a party to the treaty but some of its member States did not, those States would be third parties to the treaty, although as member States of the organization it might give them rights or obligations. The matter would require consideration in connection with part IV of the draft articles on the amendment and modification of treaties. His delegation saw some merit in the amendment proposed by eight international organizations, which spelt out a basic rule.

8. Mr. NEGREIROS (Peru) said that an article regulating the participation of States and international organizations in the adoption of the text of a treaty required careful study, especially as far as adoption at an international conference was concerned. An international conference was a negotiating process, in which the viewpoints of the participants had of necessity to undergo modification. Accordingly, the different way in which decisions were taken by States and international organizations had to be borne in mind. A State had an Executive Power in which decision-making was concentrated, but no organ of an international organization possessing similar competence had yet been defined. Representatives of international organizations might therefore find it difficult to obtain instructions which would allow them to accept the suggestions which were bound to emerge during the negotiating process, particularly if the organ with competence to instruct them was a collegiate body which only met periodically.

9. For these reasons it would be advisable to make provisions that, without necessarily being rigid, would avoid the adopting of articles in this respect which would be inoperable. His delegation therefore supported the Chinese amendment; it understood it as meeting the same concern as the Soviet Union proposal, which it likewise considered appropriate.

10. Mr. ALMODÓVAR (Cuba) said that representatives of States had expressed concern that the International Law Commission's text of paragraph 2 might allow international organizations to vote on the adoption of the text of a treaty on an equal footing with States. That concern was justified, since international organizations were created by States; even if a group of international organizations was to meet and create another international organization, it would be on the basis of powers given them by States. Mention had been made of the paradox that, at a conference, a group of States which had set up an international organization which also participated in the conference might not vote in the same way as the representative of that organization. That was the point of the amendment proposed by Egypt (A/CONF.129/C.1/L.31). Also, concern had been expressed by some delegations that, in default of other rules, conferences would have to fall back on the unanimity rule set out in paragraph 1 of article 9. The article needed to be formulated in such a way that it did not create an embarrassing situation for States, which were the principal subjects of international law.

11. The Chinese amendment might seem acceptable in principle, but, viewed in its broadest sense, it could

permit a situation in which a conference of international organizations could establish a procedure which the participating States found unacceptable. The Soviet Union proposal seemed a more flexible solution to the problem, and it might be possible to reconcile it with the Chinese amendment.

12. Mr. VOGHEL (Canada) said that his delegation considered the most acceptable course would be to approve the Commission's draft, which was precise but left the participants the option of adopting what rules they pleased, thereby giving the paragraph the flexibility sought by the various amendments. His delegation could also accept the French proposal, but considered the Commission's draft a better text.

13. Mr. EIRIKSSON (Iceland) said that his delegation supported the French proposal.

14. Mr. CASTROVIEJO (Spain) said that his delegation had difficulty in understanding how an international conference concerned with the adoption of a treaty between States and international organizations could limit the participation of those organizations in the conference. The most satisfactory proposal for altering the article was the one submitted by eight international organizations, and his delegation supported it.

15. Mr. REUTER (Expert Consultant) said that he was sufficiently optimistic to hope that everyone would agree, if not on the text of the paragraph, at least on the Commission's intention in proposing it. Its antecedent, article 9, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> had originated in a simple question posed by the eminent lawyer Sir Gerald Fitzmaurice in one of the Commission's early reports on the topic of the law of treaties: when international conferences met, worked out their rules of procedure and decided on a particular majority for the adoption of treaties, what was the legal rule by which they decided what that majority should be? There must be, in fact, a rule about how to adopt a rule. The one incorporated in the 1969 Convention, and inspired by United Nations practice, was that the decision of a conference on the treaty-adoption majority required a two-thirds majority itself. That gave the conference considerable latitude and was also a matter of common sense, since, when a large number of States were involved in negotiations, as at a conference, the traditional unanimity rule for the adoption of treaties became inappropriate.

16. But the paragraph did not answer the fundamental question, what was a conference? If a meeting was not a conference, the unanimity rule held. A frivolous answer might be that a meeting became a conference when it was not possible to accommodate all the participants around a table, but a proper reply was yet to be found.

17. The next point was that it would normally be States which decided what organization or what organizations, probably only few in number, would be invited to a conference in which both States and organizations participated, and whether they wished that organiza-

tion or organizations to participate in the treaty. It was that characteristic—the fact that the initiative in such matters normally rested with States, that the decision to invite was a political one—which had led the Commission to include in the draft articles a paragraph modelled on article 9, paragraph 2, of the 1969 Convention. He did not feel that the paragraph, looked at from that point of view, placed organizations on the same footing as States. The Commission had not taken a stand on the highly political question whether it was the right of an international organization to participate in international conferences, nor did he feel that the Conference had to consider it. What it had done, however, was to express in the article the idea that, once an entity was required to be a party to a treaty, there had to be a certain equality between all the parties to it; otherwise the words "convention" and "treaty" would become meaningless. That was the sole intention of the text: he acknowledged that the wording was not entirely clear, but at least its meaning was explained in the International Law Commission's commentary to the article (see A/CONF.129/4).

18. Mr. SCHRICKE (France) said that the first point was whether the rule in article 9, paragraph 2, should be extended to conferences involving only international organizations. The Commission had not tackled the question, for the reasons given in the commentary, but a large number of international organizations appeared to consider that extension desirable and had consequently proposed the amendment in document A/CONF.129/C.1/L.22.

19. With paragraph 2 as it stood, the adoption of treaties between international organizations would be governed by the unanimity rule in paragraph 1, which would not satisfy the international organizations and which was, after all, illogical. Accordingly, the French delegation saw no reasons why the draft should not contain the two-thirds majority rule. The French proposal followed that line. By referring simply to "a treaty", it should meet the concerns of those delegations which wanted the text to be applicable to both types of treaties, as well as to both types of conferences.

20. Regarding the rights of international organizations, his delegation did not wish to take a position on the general question—which, as the Expert Consultant had said, was not before the Conference—whether international organizations were entitled generally to participate in international conferences, or what their status was. It did, however, consider that article 9 should settle the question whether international organizations had voting rights when they participated in conferences. The French proposal settled it implicitly by making the required voting majority two-thirds of the participants present and voting, instead of the States and organizations present and voting.

21. His delegation had certain difficulties with the Chinese amendment in that it was superimposed on paragraphs 1 and 2. Paragraph 1 stated the principle of unanimity; paragraph 2 established an exception to that principle for international conferences, namely the two-thirds majority rule, and made it possible to derogate from that exception by a decision taken by the

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

same majority. Thus the Chinese amendment posed a problem in that it provided an exception both to the principle itself and to the exception. That might create a practical difficulty; for example, an international treaty-making conference might have rules of procedure less precise than those of the present conference, perhaps not specifying by what majority the treaty should be adopted. If so, according to paragraph 2 of the Commission's text, a two-thirds majority would be required, but under the proposed paragraph 3 it could be argued that unanimity was required. The conference would consequently have the difficult task of choosing between two conflicting rules.

22. Unlike the Commission's draft and the French proposal, both of which set a two-thirds majority, the proposal by the Soviet Union did not define the conditions according to which participants in a conference should adopt the text of a treaty. It left the matter open; if paragraph 1 was applied, it might be thought that unanimity was required.

23. Mr. WANG Houli (China) said that the desire for a flexible text, something called for by many delegations, had prompted his delegation's proposal. It was intended to cover international conferences in which States and international organizations participated on an equal footing as well as those at which they participated with a different status, such as at the present conference. It also covered international conferences at which the participants were exclusively international organizations. In that sense, there were some similarities between the proposal by the Soviet Union and the Chinese proposal. However, the Chinese proposal had maintained paragraph 2 of the article, and therefore it might be acceptable to more delegations. His delegation was ready to consult other interested delegations informally with a view to finding a satisfactory formulation for the article.

24. Mr. RAMADAN (Egypt) said that his delegation was certainly among those which believed that international organizations had the capacity under international law to participate in the preparation of treaties and be parties to them. Furthermore, it did not rule out the idea that at certain conferences international organizations should be allowed to vote on the adoption of a treaty.

25. The representatives of Austria and Cape Verde had indicated at the previous meeting that there were some conferences at which voting on the adoption of a treaty had to be restricted to States, and others where international organizations might participate in the vote. The present Conference was an example of the former. For the latter, the possibility remained open, under the last part of the Egyptian proposal, for the State or States initiating the conference to decide that the organizations might vote on the adoption of the treaty.

26. International organizations, as the Expert Consultant had indicated, constituted the technical means whereby States members of those organizations could realize their interests; any treaty signed at a conference held under the auspices of such organizations would bind members who voted against it as well as those who voted in favour of it. The Egyptian proposal therefore

stated, as the basic rule, that States had the right to vote on the adoption of a treaty and, as an exception to that rule, that international organizations could have that right. His delegation was nevertheless prepared to co-operate with other interested delegations in seeking a generally acceptable formulation for article 9, paragraph 2. The last part of the Egyptian proposal was similar in effect to the Chinese amendment. In regard to the proposal made by eight international organizations, he suggested that, in order to cover international conferences at which the participants were international organizations only, a provision might be inserted in the paragraph as it stood.

27. Mr. ECONOMIDES (Greece) said that, under the provision proposed by Egypt, States could certainly make treaties drawn up by States open to accession by organizations. Nevertheless, in his view, the Egyptian proposal would have the effect of depriving international organizations of the possibility of being a party to treaty negotiations and of participating in the preparation and adoption of treaties as defined in article 2 of the draft. For if an organization which had participated in a conference had no right to vote on the adoption of the treaty, in reality its capacity to be a party to the negotiations was not acknowledged, which was contrary to the draft convention. His delegation continued to believe that an organization which participated in a conference to conclude a convention between States and international organizations had to be placed on a strictly equal footing with States, because if that were not the case, there would, to echo the words of the Expert Consultant, be neither convention nor treaty, nor even a treaty procedure.

28. The CHAIRMAN said that the changes proposed to article 9, paragraph 2, were aimed at providing a flexible rule which would leave room for the future development of international law. However, the discussion had shown that some of the formulations suggested would permit only a very rigid interpretation, while others were so flexible that they might scarcely be said to embody a rule at all.

29. The issue in article 9 was linked to the larger question of the treaty-making capacity of international organizations and their participation in treaty-making conferences. The amendment submitted by eight international organizations dealt explicitly with the adoption of a treaty between international organizations, a matter which was implicit in the French proposal as well.

30. If the Committee agreed that international organizations could hold conferences with the authority to adopt treaties, that situation could be catered for in the draft with relatively minor changes.

31. The Expert Consultant had drawn attention to the question of who was to adopt the rules of procedure of international conferences, a matter on which article 9, paragraph 2, had a considerable bearing. The problem might have arisen, for example, in respect of rule 63 of the rules of procedure of the present Conference. As had been said, the rule in that paragraph was intended to be residual. He suggested that the paragraph and the various proposals for it should be referred to the working group chaired by Mr. Pisk (Czechoslovakia).

*It was so agreed.*

**Article 11 (Means of expressing consent to be bound by a treaty)**

**Paragraph 2**

32. Mr. ROSENSTOCK (United States of America) said that the issue raised by paragraph 2 had already been considered in connection with the definition in article 2, subparagraph 1 (*b bis*), of an "act of formal confirmation". He therefore questioned the need for a further detailed discussion on the matter. In other respects the paragraph posed no problems.

33. Mr. ULLRICH (German Democratic Republic), introducing his delegation's amendment (A/CONF.129/C.1/L.12), said that the Commission's text correctly enumerated the technical possibilities of expressing the consent of an international organization to be bound by a treaty. However, in proposing its amendment, his delegation had been guided by the notion that the consent had far-reaching legal consequences; the intention of the amendment was therefore to make it clear that an international organization's consent to be bound by a treaty would only take effect if the consent was expressed in terms compatible with the rules of that organization as defined in article 2, subparagraph 1 (*j*). The amendment was also linked with article 6, on the capacity of international organizations to conclude treaties, and was based on the assumption that an acceptable definition of "rules of the organization" could be formulated. In short, the proposed additional sentence was designed to establish a logical relationship between the rules of the organization, the capacity of international organizations to conclude treaties, and the consent of an international organization to be bound by a treaty.

34. Mr. GAJA (Italy) said that, if there was such a notion as the rules of an organization, those rules must surely apply to the way in which the consent of an international organization to be bound by a treaty was expressed. As it stood, the amendment seemed to be at variance with the provisions of article 46. Article 11, paragraph 2, should be examined in that light.

35. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that the paragraph as drafted by the Commission was acceptable, but that he also saw merit in the amendment proposed by the German Democratic Republic. The issue it raised was not complex and could usefully be referred to the Drafting Committee.

36. The CHAIRMAN said that one way of dealing with the issue might be to add the words "in accordance with the rules of that organization" after the words "may be expressed".

37. Mr. JESUS (Cape Verde) agreed with the United States representative that the Committee should not discuss the questions raised by the paragraph unnecessarily. His delegation felt that the point at issue in the amendment by the German Democratic Republic was taken care of in article 6, since the capacity of international organizations to conclude treaties surely included signature and the deposit of instruments of ratification or formal confirmation. It would be best to adhere to the Commission's text, with the proviso that the wording should be amended in accordance with

whatever decision was finally taken regarding the use of the terms "ratification" and "act of formal confirmation".

38. Mr. CRUZ FABRES (Chile) said that, since the subject had arisen in the discussion on earlier articles, it would be best to refer paragraph 2 to the Drafting Committee.

39. Mr. HAFNER (Austria) agreed, and pointed out that the structure of article 11 was closely linked with that of article 2, subparagraphs 1 (*b*) and (*b bis*). His delegation had suggested (2nd meeting) that those two subparagraphs should be merged, and that suggestion should be kept in mind in considering the structure of article 11.

40. Mr. DEVLIN (World Health Organization) said that he was less certain than some other speakers that the point raised by the proposed amendment to paragraph 2 was purely a matter of drafting, since the amendment was open to several interpretations. One possible interpretation was that the means of expressing consent should be in accordance with the rules of the organization concerned. However, it was unlikely that the rules of an international organization would cover the specific question of the means of expressing consent.

41. Mr. RASOOL (Pakistan) said that his delegation had no problem with the Commission's text. Discussion of the amendment should be postponed until the term "rules of the organization" was considered. He agreed with earlier speakers that the article should be referred to the Drafting Committee.

42. Mr. HARDY (European Economic Community) said that the International Law Commission's wording of article 11 was acceptable, but that the words "formal confirmation" would require further discussion.

43. The amendment proposed by the delegation of the German Democratic Republic raised issues which fell more properly within the scope of article 6. He had commented on the interpretation of the term "rules of the organization" in an earlier statement (6th meeting). In his view, it was for the international organization itself to determine how its rules were to be applied. The question was not solely one of drafting and the consideration of the amendment should be deferred until article 46 was discussed.

44. Mrs. DIAGO (Cuba) said that both the paragraph and the amendment should be sent to the Drafting Committee.

45. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that the amendment was a substantive improvement on the Commission's text. The fact that article 46 raised a related issue, as the representative of Italy had pointed out, should not deter the Committee from trying to improve article 11. He therefore agreed with the representative of Cuba that the Drafting Committee should examine the article and the amendment.

46. The attachment to the Secretary-General's note (A/CONF.129/8) indicated that paragraph 2 of article 11 was closely linked with article 14, paragraph 3, and articles 16, 18 and 19, paragraph 2. The Drafting Committee should bear that in mind when discussing it.

47. The CHAIRMAN suggested that article 11, paragraph 2, and the amendment should be referred to the Drafting Committee on the understanding that the latter would refer them back to the Committee of the Whole if it considered that a question of substance was involved.

48. Mr. ECONOMIDES (Greece) said that article 11 provided how consent to be bound by a treaty should be expressed. Such means as signature, ratification and approval were generally regulated by general international law, not by the rules of the organization. His delegation therefore proposed that the words "and the rules of general international law" should be inserted in the German Democratic Republic's amendment after the words "in accordance with the rules of that organization". If that was done, his delegation would have no objection to the amendment being referred to the Drafting Committee.

49. Mr. MONNIER (Switzerland) said that the discussion showed that the amendment was not merely a drafting matter. His delegation would oppose any change which sought to accommodate the idea underlying the amendment.

50. Mr. RIPHAGEN (Netherlands) said that the text proposed by the German Democratic Republic raised a substantive issue. If the paragraph and the amendment were referred to the Drafting Committee on the understanding that the amendment was a drafting matter, his delegation would have to reserve its position on them. There was no agreement yet on the substance of the amendment, or even on whether it involved a question of substance.

51. Mr. PISK (Czechoslovakia) supported the suggestion that article 11, paragraph 2, and the amendment by the German Democratic Republic be referred to the Drafting Committee.

52. Mr. JESUS (Cape Verde) said that his delegation was one which believed that the amendment made a substantive change in the draft article. Furthermore, the concluding words of the sentence it proposed affected other articles, in particular article 46. The amendment should be discussed thoroughly in the Committee of the Whole.

53. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) supported the Chairman's suggestion that article 11, paragraph 2, and the amendment by the German Democratic Republic should be referred to the Drafting Committee.

54. Mr. WOKALEK (Federal Republic of Germany) suggested that the Committee of the Whole should postpone the discussion until it took up article 46.

55. Mr. RAMADAN (Egypt) said that the amendment was certainly related to article 46.

56. Mr. NORDENFELT (Sweden) opposed the suggestion that the amendment should be referred to the Drafting Committee. In his opinion, it was of a substantive nature and concerned not only articles 2 and 46 but also article 27, paragraph 2.

57. Mr. RIPHAGEN (Netherlands) said that the Committee of the Whole, if it referred the amendment to the Drafting Committee, should ask it to decide whether the amendment necessitated an addition of a

drafting nature to article 2. He felt sure that the Drafting Committee would see the amendment as a matter of substance and refer it back to the Committee of the Whole.

58. Mr. AL-KHASAWNEH (Jordan) said that the matter was one of substance. Speaking as the Chairman of the Drafting Committee, he too believed that the Drafting Committee would return the amendment to the Committee of the Whole.

59. Mr. ECONOMIDES (Greece), expanding on the point he had raised earlier, said that article 11, paragraph 2, determined and enumerated the ways in which an international organization expressed its consent to be bound by a treaty. He would take as an example the case of an international organization which expressed its consent to a treaty by an act of formal confirmation. The Committee had heard that at present such an act was provided for in only a very small number of organizations and seldom formed part even of their practice. That being so, he would like the representative of the German Democratic Republic to consider the following situation: the consenting organization might be told that it had expressed its consent in a manner not in keeping with its rules and therefore invalidly; it might then reply that, since it possessed the right to enter into a treaty of the kind in question and was a party to the draft convention, it had chosen to consent to it by an act of formal confirmation instead of by some other means, despite the fact that, *stricto sensu*, such an act was not in conformity with its rules. It was to cover that situation that he had proposed an addition to the sentence suggested by the German Democratic Republic, to the effect that consent should be expressed in accordance not only with the rules of the organization but also with international law in general.

60. Mr. HERRON (Australia) said that the amendment of the German Democratic Republic had been clearly identified as raising a point of substance. If its proposer and supporters insisted on dealing with it under article 11, the Committee of the Whole had no option but to consider the point immediately. It might, however, refer the paragraph and the amendment to the Drafting Committee for a decision whether, in the light of the structure of the entire draft, it was appropriate to deal with the amendment under article 11 or elsewhere. If the Drafting Committee decided that the amendment should be dealt with elsewhere, it would be able to consider article 11 and refer the amendment back to the Committee of the Whole as a matter of substance.

61. Mr. TEPAVICHAROV (Bulgaria) said that the Committee did not seem to be making any progress in its discussion of article 11, paragraph 2. He therefore proposed the adjournment of the meeting under rule 25 of the rules of procedure in order to give delegations an opportunity to engage in consultations.

62. The CHAIRMAN said that under that rule the Bulgarian motion could not be debated. He would therefore assume, unless he heard any objection, that the Committee agreed to adjourn the meeting.

*It was so decided.*

*The meeting rose at 5.55 p.m.*

## 11th meeting

**Thursday, 27 February 1986, at 11.25 a.m.**

*Chairman: Mr. SHASH (Egypt)*

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

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

[Item 11] (*continued*)

**Article 11 (Means of expressing consent to be bound by a treaty) (*continued*)**

**Paragraph 2 (*continued*)**

1. Mr. ULLRICH (German Democratic Republic) said that, as several points of substance had been raised with regard to the amendment introduced by his delegation at the previous meeting (A/CONF.129/C.1/L.12), he would propose, with a view to expediting matters, that further discussion on it should be deferred until the Committee took up articles 27 or 46.

*It was so decided.*

**Article 19 (Formulation of reservations)**

2. Mr. JESUS (Cape Verde), introducing the amendment proposed by his delegation (A/CONF.129/C.1/L.34), said that if a reservation was to be prohibited, that should be done in express terms and in the treaty itself. The first part of his proposal, therefore, was that subparagraph 2 (a) should be reworded to read simply "the reservation is prohibited by the treaty", the remainder of the subparagraph being deleted. That would be in line with article 19 (a) of the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup> He noted, in that connection, that the Commission's commentary to the article (see A/CONF.129/4) gave no explanation of the reason for the additions to subparagraphs 1 (a) and 2 (a).

3. The new subparagraph 2 (d) proposed in the second part of the amendment covered the case of treaties between States in which international organizations could participate but only to the extent of the competence conferred upon them. The Convention on the Law of the Sea was a case in point. An international organization could be a party to a treaty without having competence for all matters dealt with in it. Obviously, in such cases it should not be able to enter a reservation concerning a provision in respect of which it lacked competence.

4. Mr. ABED (Tunisia) said that his delegation had joined Austria, Italy and Japan in sponsoring the amendment in A/CONF.129/C.1/L.36 and had withdrawn its own amendment (A/CONF.129/C.1/L.14).

5. Stressing the importance of reservations in the application of a treaty, he said that it was essential that the wording of article 19 should not give rise to differences of interpretation capable of delaying the entry into force of treaties. The sponsors wished to have a clear, precise and unequivocal text.

6. Draft article 19, which repeated the terms of article 19 of the 1969 Vienna Convention, incorporated a number of new provisions. Under the latter, reservations could not be formulated if it was established that the negotiating States and organizations were agreed that the reservation was prohibited. It might be asked what purpose was served by a provision on those lines if the reservation could be expressly prohibited in the treaty itself. Moreover, vague expressions like "is otherwise established" and "the States and organizations or the organizations were agreed" could lead to differences between the parties if it was necessary to prove it had been established they "were agreed" that the reservation was prohibited. These differences essentially had to do with determining the body empowered to prove that such an agreement had been reached. The question would arise as to whether the matter should be determined by a body empowered for the purpose or by the parties to the treaty.

7. There were so many questions that in his delegation's view the terms used in subparagraph (a) of paragraphs 1 and 2 might depart from the goal sought, which was to codify precisely and efficiently the law of treaties between States and international organizations or between international organizations. These new provisions should be deleted from subparagraph (a), as they were unnecessary and were not even mentioned in the International Law Commission's commentary. That was the object of amendment A/CONF.129/C.1/L.36, which sought to retain the prohibition of the reservation only if it was provided for in the treaty, and of course in the instances described in subparagraphs (b) and (c) of paragraphs 1 and 2 of the article, similarly to what was retained at the 1969 Vienna Conference.

8. Mr. TALALAEV (Union of Soviet Socialist Republics), introducing his delegation's amendment (A/CONF.129/C.1/L.38), said that his delegation supported the amendments submitted which removed obscurities in the article and were closer to the text of the 1969 Vienna Convention.

9. His delegation considered that sovereign States had a broad right to enter reservations or object to reservations. International organizations in contrast

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

did not have sovereign rights and their right to enter reservations depended on the scope of their functions and the purpose of the treaty in question. His delegation's amendment was intended to establish that a reservation formulated by an international organization could be effective only if it was compatible with the purposes of the treaty and the constituent instruments of the organization.

10. Mr. ULLRICH (German Democratic Republic), introducing his delegation's amendment to paragraph 2 of the article (A/CONF.129/C.1/L.40), agreed that international organizations should have the right to formulate reservations to treaties, but said that the right could only extend to parts or provisions of a treaty which were of direct concern to the international organization and within its competence as defined by its constituent instrument and rules. The amendment sought to make it clear that an international organization could not enter reservations to treaties with States unless the provisions affected its competence. As the other amendments submitted appeared to have the same or similar aims, it might be useful to invite the sponsors to try to work out an agreed amendment.

11. Mr. LUKASIK (Poland) said that the formulation of reservations raised complex and difficult problems which the 1969 Vienna Convention had not fully resolved, particularly in relation to reservations to treaties which were the constituent instruments of international organizations. In the present draft the difficulties were increased, because the formulation of reservations by international organizations raised many issues.

12. His delegation agreed that the deletions proposed in the Cape Verde and four-Power amendments were necessary. He also agreed with the Soviet Union representative that the right of international organizations to enter reservations depended on the powers and functions of the international organization and the purposes and objectives of the treaty. There could be no right to enter a reservation on an unrelated matter. In limiting the rights of international organizations in that respect, the guidelines would be their constituent instruments. Those points were covered in the Soviet Union amendment and the German Democratic Republic's amendment.

13. His delegation believed that the amendments submitted should be transmitted to the Drafting Committee to be combined in an appropriate manner.

14. Mr. PISK (Czechoslovakia) said that the question of reservations to international treaties by international organizations was complex, because there was little practice to provide guidance. The question was whether international organizations should be able to formulate reservations subject only to the same restrictions as States. There was a need to strike a balance between the sovereignty of States and the restricted capacities of international organizations, which could only function in accordance with their constituent instruments, on the one hand, and on the other, the contractual nature of the relationship between the parties to a treaty. Where the parties to a treaty did not have identical status, as in the case of States and inter-

national organizations, a complex system of relationships came into being.

15. His delegation believed that an international organization could not make a reservation incompatible with its constituent instrument or its functions, and accordingly supported the amendments proposed by the Soviet Union, the German Democratic Republic and Cape Verde, as well as the four-Power amendment. All should be referred to the Drafting Committee.

16. Mr. BERMAN (United Kingdom) said that all but one of the proposals put forward would further complicate the difficult question of reservations and were therefore unacceptable to his delegation. His delegation could support the first part of the Cape Verde amendment and the four-Power amendment.

17. His delegation could not support the second part of the Cape Verde amendment, which appeared to be attempting to derive a general rule from the particular case where an international organization was a party to a treaty but its competence related only to certain provisions. He believed that if an international organization was competent in regard to certain provisions only, it would not in practice enter reservations to other provisions. He noted that the definition of "reservation" in article 2 spoke of the exclusion or modification of the legal effects of treaty provisions "in their application" to the State or organization concerned. The Cape Verde representative might perhaps consider it unnecessary to pursue that aspect.

18. Turning to the Soviet Union amendment, he wondered whether a reservation by an international organization incompatible with its constituent instruments was likely to arise in practice. In a situation where an international organization wished to be a party to a treaty and its capacity was valid in every respect, it was unlikely that it would enter a reservation incompatible with its constituent instruments. In his view, the Committee should adopt a working understanding that there was an expectation that international organizations would, as a matter of course, operate in accordance with their constituent instruments. Otherwise, to avoid difficulties of interpretation it would be necessary to include a reference to compatibility with the constituent instruments of international organizations throughout the text of the Convention. If that were done, the text would become unnecessarily heavy and impractical. In his view, the German Democratic Republic's amendment seemed to differ from the aim expressed by the German Democratic Republic representative in his introductory statement.

19. It was important to bear in mind the principle that reservations affected the external relations between contracting parties, not the internal relations between international organizations and their own member States. The proposed amendments seemed to assume the latter and were therefore unacceptable to his delegation. They should not, he believed, be referred to the Drafting Committee.

20. Mr. TUERK (Austria) said that the four-Power amendment, of which his delegation was a sponsor, had been ably introduced by the Tunisian representative.

21. The draft article differed from the corresponding text of the 1969 Vienna Convention in that a further restriction to reservations had been introduced, embodied in the formula "or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" at the end of subparagraph 1 (a) and the somewhat similar language at the end of subparagraph 2 (a). The introduction of that second criterion made for ambiguity and legal uncertainty. The fact of the matter was that, if any agreement existed between the negotiating parties to the effect that a reservation was prohibited, that agreement would become a part of the treaty itself. For those reasons, the four-Power amendment called for the deletion of the two passages in question so that subparagraphs 1 (a) and 2 (a) would read (thus reverting to the language of the 1969 Vienna Convention): "the reservation is prohibited by the treaty".

22. In that connection, he referred to his oral suggestion at the 2nd meeting to combine subparagraphs 1 (b) and 1 (b bis) of article 2, on "ratification" and "act of formal confirmation", respectively. Adoption of that suggestion would make it possible to simplify article 19 and reduce it to a single paragraph.

23. Mr. ALBANESE (Council of Europe) said that his delegation could not support the second point in the Cape Verde amendment or the Soviet Union and German Democratic Republic amendments, because they purported to restrict the power of international organizations to formulate reservations.

24. His first objection was general. He could accept the view that there were important differences between States and international organizations, but he observed that, in the area currently under consideration, which was the contractual field, if one wished to respect the spirit of the matter dealt with one must affirm the principle of the contractual equality of the parties, which should be fully recognized and respected at all stages of the life of a treaty: its negotiation, the adoption of its text, the expression of the will to be bound by the treaty and the formulation of reservations.

25. Any attempt to create a distinction in the matter between the rights and powers of various parties constituted a contradiction in terms and a denial of the synallagmatic character of treaties.

26. Furthermore, his delegation opposed the amendments for another reason, which was more specific to the Council of Europe but which might perhaps apply to other organizations as well. In the Council of Europe, the adoption of the text of a treaty and, where appropriate, the formulation of reservations were decided by the Committee of Ministers, in which all the member States were represented. It was for them to ensure that the treaty, and, on occasion, the reservation, did not conflict with the rules of the organization.

27. His delegation accordingly feared that adoption of the amendments in question might open the door to States not members of the Council of Europe to take a position on the conformity or otherwise of a reservation with the constituent instrument of the organization or on the question whether a provision which was the subject of a reservation affected or did not affect the

interests of the organization. The result would be unacceptable interference in the internal constitutional affairs of the organization. His delegation thus could not support the amendments mentioned, and supported the adoption of the draft article.

28. Mr. SANYAOLU (Nigeria) asked the Expert Consultant for an explanation of the formulation of subparagraphs 1 (a) and 2 (a). The International Law Commission's commentary was silent on that point.

29. Mr. REUTER (Expert Consultant) said it was true that the Commission's commentary did not explain the reason for departing from the 1969 Vienna Convention text and inserting the formula "or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" in subparagraph 1 (a) and a similar formula in subparagraph 2 (a).

30. At the 1968/1969 Vienna Conference, conflicting views had been expressed with regard to the freedom to make reservations. The view which had prevailed, and which was embodied in article 19 of the 1969 Vienna Convention, had been in favour of the freedom to make reservations. Since 1969, that position had been accepted in a number of judicial decisions, some of them relating to treaties to which the 1969 Vienna Convention was not applicable.

31. The passages inserted in subparagraphs 1 (a) and 2 (a) of the article embodied a slight limitation to that freedom to make reservations. The reason was that the treaties of international organizations were considered as having a somewhat delicate character. Because of their particular nature, it was felt desirable to avoid opening the door too widely to reservations.

32. That being said, it was his feeling that deletion of the two passages would do no harm. The rule they embodied went without saying, since there was nothing to prevent the parties to a treaty from agreeing among themselves subsequent to the adoption of a treaty that a particular reservation would be prohibited.

33. Lastly, he recalled that at the 1968 session of the Law of Treaties Conference the question had arisen of adopting provisions governing the treaties of international organizations. Some delegations had been in favour of drafting rules in the matter at that Conference, and one type of treaty which had attracted particular attention in that connection had been the safeguards treaties of the International Atomic Energy Agency (IAEA). Those important treaties were of a tripartite character, in that the international organization concerned was involved at the request of the two interested States. He drew attention to that situation because the solution which would be adopted must not have the effect of preventing an organization like the IAEA from exercising its control functions.

34. Mr. NEUMANN (United Nations Industrial Development Organization), referring to the first part of the Cape Verde amendment, said that it was undesirable to introduce a distinction between the States and the organizations which negotiated a multilateral treaty and to state that certain reservations would be permitted to one category of negotiating parties but not to the other. The second part of the amendment related

to a problem which could only arise at a later stage. It could not be dealt with appropriately in the present context.

35. His delegation could not accept the Soviet Union amendment, which would create a special category of prohibited reservations applicable only to international organizations. It had a similar difficulty with regard to the German Democratic Republic's amendment, which would have the effect of allowing an international organization to make reservations only with regard to provisions that affected its competence. It was undesirable to introduce that restriction into the organization's right to make reservations.

36. Mr. REIMANN (Switzerland) said that the Soviet Union and German Democratic Republic amendments called for three observations. First, article 19 should reflect the principle of the equality of parties to a treaty. Secondly, and in view of that equality, any reference to the rules of an international organization was uncalled for. Thirdly, care should be taken with the terms employed in the draft. The reference in the German Democratic Republic's amendment to an organization's "competence" seemed inadvisable. On the basis of those considerations, his delegation believed that the amendments should not be transmitted to the Drafting Committee.

37. The same remarks applied to the second part of the Cape Verde amendment. His delegation would wish to consider the text of any subsequent variant before agreeing that it should go to the Drafting Committee.

38. With regard to the four-Power amendment, he noted that a consensus seemed to be emerging in favour of its acceptance and transmission to the Drafting Committee. His delegation would not oppose that step, but regretted that the member of the sentence in subparagraph (a) of paragraphs 1 and 2 following "treaty", would vanish, because it had its *raison d'être*, as borne out by the examples given by the Expert Consultant as well as, in another context, by article 60, paragraph 5, of the 1969 Vienna Convention.

39. He had noted with interest the example of agreements of a certain type cited by the Expert Consultant.

40. Mr. HARDY (European Economic Community) considered that it was up to the international organization to decide whether to make reservations, within the same limits as States. It was not for others to attempt via the proposed convention to determine whether it was entitled under its own powers and procedures to do so. If an organization made a reservation, the other party, whether a State or an organization, might accept or object in accordance with article 20.

41. Some of the amendments submitted would lead to confusion. The German Democratic Republic's amendment, for example, apparently envisaged a further stage distinct from the article 20 procedure.

42. The basic principle of the Commission's draft was that treaties were concluded on a contractual basis, and in his view it was not possible to distinguish between the rights of the parties. Suppose, for example, there was an agreement to which States and the Community were parties in the commercial field. It would not be

possible for a State party to be able to make more extensive reservations than the Community, or to raise questions regarding its right to make reservations on the same basis. As the United Kingdom representative had said, the assumption must be that international organizations did indeed act within the scope of their powers.

43. The International Law Commission's text was basically acceptable because it reflected the equality of the parties, a principle that would be undermined by some of the amendments. The four-Power amendment and the first part of the Cape Verde amendment were acceptable. The Soviet Union and German Democratic Republic amendments and the second part of the Cape Verde amendment were unacceptable to the Community for the reasons he had indicated. Sufficient safeguards for the interests of other parties were, he believed, contained in other provisions of the draft articles.

44. Mr. SANG HOON CHO (Republic of Korea) shared the view that the provision in the second part of subparagraph 1 (a) should be deleted. Having heard the Expert Consultant and the Austrian representative, he believed that the type of situation envisaged by that provision could be reflected, as required, in specific treaties.

45. His delegation could not accept the various amendments seeking differential treatment of international organizations in the matter of reservations through the provisions of paragraph 2. The safeguard provided in subparagraph 2 (c) appeared to be adequate.

46. MR. ROMAN (Romania) said that his delegation had no difficulty with the draft article. It had doubts about those proposals which seemed to amend the two paragraphs in a way that enlarged the scope for the formulation of reservations by States. He agreed with the argument that whenever negotiating States and negotiating organizations were agreed, not in the treaty but elsewhere, that reservations were prohibited, the possibility of formulating reservations should be excluded.

47. His delegation supported the Cape Verde, Soviet Union and German Democratic Republic amendments. International organizations should only be able to make reservations on matters, within their fields of activity. They should not be able to make reservations whose consequences would affect contracting States. He hoped the three amendments could be combined and incorporated in the article.

48. Mr. ECONOMIDES (Greece) said that his delegation was in favour of the provision which the four-Power amendment and the first part of the Cape Verde amendment sought to delete. It saw virtue in a provision that would have the effect of making the tacit formulation of reservations impossible. He believed that, as far as States were concerned, there were gaps in the 1969 Convention. He would not, however, oppose transmission of the amendments to the Drafting Committee if the great majority of the Committee so wished.

49. The Soviet Union amendment proposed to insert a clause providing that an international organization

should not formulate a reservation incompatible with its constituent instrument. But that surely was self-evident. International organizations must in all cases act in conformity with their own constituent instruments and rules. Moreover, application of such a provision would prove difficult, indeed impossible, because no constituent instrument determined expressly or implicitly what possible reservations would be incompatible with an organization's constitution. It was up to the organization itself to ensure that reservations were in conformity with its law. In any case, article 6 already implicitly contained the notion embodied in the proposed amendment, the adoption of which, as the United Kingdom representative had remarked, could result in further complications.

50. The second part of the Cape Verde amendment and the German Democratic Republic amendment seemed to address themselves to the same concern, that an international organization should not enter res-

ervations concerning provisions that were not applicable to it. Again, that seemed to go without saying: Why should an organization enter a reservation to exclude the application of a provision not applicable to itself? But if the question proved to be more than academic, and a reservation of the type envisaged was made, what would be the legal consequences? The effect would merely be to double the inapplicability of the provisions in question to the organization concerned.

51. The CHAIRMAN suggested that the Cape Verde, German Democratic Republic and Soviet Union representatives should consult together with a view to merging their proposals for paragraph 2, which could not be referred to the Drafting Committee since they involved matters of substance, in a single text for further consideration by the Committee of the Whole.

*The meeting rose at 1.05 p.m.*

## 12th meeting

Thursday, 27 February 1986, at 3.25 p.m.

*Chairman: Mr. SHASH (Egypt)*

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

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

[Agenda item 11] (*continued*)

**Article 19 (Formulation of reservations) (*continued*)**

1. Mr. NAGY (Hungary) said that his delegation shared the views of the sponsors of the amendments concerning the special limitations to which the capacity of international organizations to formulate reservations was subject proposed by Cape Verde (A/CONF.129/C.1/L.34), the Union of Soviet Socialist Republics (A/CONF.129/C.1/L.38) and the German Democratic Republic (A/CONF.129/C.1/L.40). It was clear from the discussions in the International Law Commission on the whole process of treaty-making that the capacity of international organizations to formulate reservations to a treaty could not be greater than their capacity to conclude the treaty itself. The amendments reinforced that well-established principle by defining the capacity of international organizations to formulate reservations. His delegation would, however, prefer a more general expression to cover the sources of that capacity than that used in the Soviet Union amendment. Accordingly, it suggested that "constituent instrument of the international organization" should be replaced

by "rules of the organization", an expression defined in article 2, subparagraph 1 (j).

2. Mr. VAN TONDER (Lesotho) said that his delegation considered the International Law Commission's draft of article 19 satisfactory, since it allowed for investigation of the intention of the negotiators of a treaty, through reference to considerations such as the preparatory documents, in the absence of any clear provision in the treaty itself. The latter parts of subparagraphs 1 (a) and 2 (a) provided that essential flexibility which existed in the general rules concerning the interpretation of treaties. Paragraph 2 of the Cape Verde amendment was difficult to understand, since international organizations would obviously not formulate reservations to treaty provisions that did not affect them. Even if an organization were to do so, the action would be without legal significance, since the organization would remain unaffected.

3. Regarding the amendments put forward by the Soviet Union and the German Democratic Republic, his delegation believed that it was absurd to provide that international organizations should have the capacity to negotiate a treaty but no right or capacity to formulate a reservation in regard to certain parts of that treaty, if the treaty permitted reservations. Any restrictions on the formulation of reservations should be those imposed by the treaty itself. If an international organization agreed to a treaty which forbade it to formulate reservations, it would of course be bound by it. On the other hand, if a treaty provided for reservations, an international organization, as a negotiator of equal status, should have the same right as the other parties to formulate reservations if it so desired. As the repre-

sentative of the European Economic Community had pointed out at the previous meeting, the Committee was discussing a contractual relationship voluntarily negotiated and entered into, and if one of the parties felt that it was being shortchanged it would not agree to the provision in question. The provision would thus be ignored and the question would become academic at best, as the representative of Greece and the Expert Consultant had noted at the previous meeting.

4. His delegation was unable to support any of the proposed amendments. It would endorse the draft proposed by the International Law Commission, on the understanding that the problem regarding the words "formally confirming" in paragraph 2 would be resolved.

5. Mr. CANÇADO TRINDADE (Brazil) said that it would be helpful if a single formulation could perhaps be found for the amendments introduced by Cape Verde, the Soviet Union and the German Democratic Republic, all of which were intended to qualify the freedom of international organizations to formulate reservations. He regretted that it had not yet been possible for those delegations to submit a joint amendment. With regard to the amendment of the Soviet Union, he found it difficult to envisage the likelihood of an international organization—or, more precisely, one of its organs—formulating a reservation that was not compatible with its constituent instrument, or with its rules or established practice. The amendment proposed by the delegations of Austria, Italy, Japan and Tunisia (A/CONF.129/C.1/L.36), which, for the sake of clarity and precision reverted to the formula in the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> was acceptable. He noted that there appeared to be no strong opposition to that proposal.

6. Mr. FOROUTAN (Islamic Republic of Iran) said that his delegation fully supported the draft article proposed by the International Law Commission, as it was clear, precise and unambiguous. The four-Power amendment proposed that the latter part of subparagraph 1 (a) should be deleted in order to make it clear that, for the purposes of the subparagraph, reservations were strictly prohibited. There might be circumstances in which reservations were not explicitly prohibited, but there might be an understanding to that effect among the negotiating States and international organizations. He would have difficulty, therefore, in supporting the joint amendment or paragraph 1 of the amendment of Cape Verde. However, if there was a consensus in the Committee of the Whole to send those amendments to the Drafting Committee, his delegation would not object.

7. He fully supported the objective of the second part of the amendment of Cape Verde, but the proposed subparagraph needed to be clarified and brought into harmony with the rest of the article. The formulation in the Soviet Union amendment corresponded more closely to the preceding subparagraphs of the article, but it did not cover the whole scope of the amendment

of Cape Verde. His delegation could, however, support both of those amendments.

8. Mr. CAMINOS (Organization of American States) said that his organization could not support those amendments which tended to restrict the capacity of international organizations to formulate reservations to multilateral treaties to which they were parties or to enter objections to reservations formulated by other parties. As the Expert Consultant had pointed out at the previous meeting, such restrictions impaired the equality of legal status that should exist between all parties to a treaty. His organization shared the views expressed at the previous meeting by the representatives of Austria, the Council of Europe and the European Economic Community regarding the proposed amendments to article 19. In particular, it wished to express its concern regarding the difficulties that might arise from the incorporation into the convention of the criterion of compatibility of reservations with the constituent instruments of international organizations. In sum, it supported the text proposed by the International Law Commission.

9. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that a number of delegations appeared to object to the amendments proposed by the Soviet Union, the German Democratic Republic and Cape Verde. They stressed the need to preserve equality between States and international organizations in the matter of formulating reservations. In their view, the amendments proposed would prevent international organizations from exercising their right to make reservations. However, that was a somewhat simplistic and unilateral approach.

10. During the discussion of articles 2, 5 and 6, all delegations had recognized that international organizations were a derivative subject of international law with a special treaty-making capacity, that of concluding treaties which fell within the scope of their aims and functions. An important element of that capacity was the right to formulate reservations. That was a concrete right which must be implemented, but within the scope necessary for the pursuit of their aims and the exercise of their functions, and not on an equal footing with States. That was the fundamental difference between them.

11. A distinction should be drawn between the material and the procedural aspects of the problem. On the procedural plane, as parties to a treaty international organizations and States were truly equal. On the material plane, however, that equality was not present. States enjoyed a broad universal right under international law to enter reservations. Since international organizations could formulate only such reservations as were compatible with their field of competence and their constituent instrument, that situation should be reflected in the article. The amendments attempted to do that and to draw a clear distinction between the powers of States and those of international organizations.

12. The representative of the United Kingdom had said at the previous meeting that he knew of no cases in which international organizations had formulated reservations outside the framework of their functions and

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

contrary to their respective charters. While such cases might not yet have arisen, there were established cases in which international organizations had acted counter to the provisions of their constituent instruments. To proceed on the presumption of the absolute innocence of international organizations took no account of reality. The merit of the amendments of the Soviet Union and the German Democratic Republic was that they were a means of preventing international organizations from formulating reservations that went beyond their field of competence and contravened their constituent instruments. He hoped that it might be possible to combine the proposals and to present a consolidated amendment to article 19 which would not limit the right of international organizations to formulate reservations but would take due account of their special status in regard to such reservations.

13. Mr. JESUS (Cape Verde) said that he would try to answer the questions raised in connection with his delegation's proposed addition of a new subparagraph to article 19. The representative of the United Kingdom had said that a special case could not serve as a basis for drawing up a general rule. He believed that the case he had posited was not a special case but one that did occur, and that a provision should therefore be drawn up to cover it. If that was not done, difficult problems of interpretation could arise. The representative of the United Kingdom had also said that the good faith of international organizations could be relied on not to formulate reservations to provisions which did not apply to them. The same could be said to apply to States, but language must, nevertheless, be provided to take care of such situations.

14. He believed that the proposed addition of the subparagraph was useful, particularly with regard to the possible effect of article 20, paragraph 5. If there was an explicit provision saying that an international organization could not formulate a reservation to a provision that did not apply to it, States would not have to decide whether to accept or reject the reservation, and the tacit acceptance effect of paragraph 5 would be neutralized.

15. Other amendments had been proposed which sought to deal with the matter through different language. His delegation would not favour any wording which made the formulation of reservations dependent on conformity with the rules of the organization or its constituent instruments. In his view, the capacity to formulate reservations should be measured not against the rules of an international organization or its constituent instruments but against the applicability to that entity of the provision which was the object of the reservation. His delegation's proposal would apply only to treaties between States and international organizations, and not to those between international organizations. The case he had in mind could occur, and although he was ready to compromise, he felt that there was a place in the convention for his delegation's language.

16. Mr. VIGNES (World Health Organization) said that he understood the effect of the amendments proposed by the Soviet Union and the German Democratic Republic to be that an organization would be unable to

formulate reservations if it was unconstitutional for it to do so. As a number of representatives had pointed out, that would not in practice make a significant difference. It was highly unlikely that his own organization would formulate any reservations at all to treaties to which it was a party, and that it would do so in violation of its Constitution was inconceivable. The substance of both amendments could be understood as expressing a lack of confidence in international organizations. As far as the World Health Organization was concerned, that would be tantamount to expressing a lack of confidence in its Assembly, consisting of 160 sovereign States, which would presumably be the organ deciding on a reservation.

17. A further aspect that should be considered was the state of uncertainty that could arise, theoretically at least. Normally, questions concerning the invalidity of a reservation under the other provisions of article 19 would be raised promptly by the depositary or by another party. Article 20 also imposed certain limitations on objections to reservations. However, compatibility with the constitution of an international organization could depend on complex legal interpretations. The question of unconstitutionality might be raised only after a number of years, when the international organization might already have invested much time and effort in performing its obligations, for example under a technical co-operation agreement, and a host of bilateral agreements might then have been concluded within the framework of the technical co-operation agreement. It was not clear what the legal consequences would be if the reservation was suddenly invalid after such a lapse of time.

18. Mr. RASOOL (Pakistan) said that, in his delegation's view, the amendments of Cape Verde, the Soviet Union and the German Democratic Republic did not seek to place new limitations on the right of international organizations to formulate reservations or to lower the status of such organizations. It felt that the status and the equality of international organizations would not be adversely affected by the amendments. There was, however, a fundamental difference between article 6 of the 1969 Vienna Convention and article 6 of the present draft: the latter contained an encumbrance absent from the former. That encumbrance might be regarded by international organizations, and by some States, as an evil, but it was an unavoidable evil which ran through a number of situations that had already been covered and some that still remained. Whenever an international organization negotiated a treaty or became a party to a treaty, it was subject to that encumbrance, in other words, to conformity with its own rules.

19. The amendments he had mentioned issued a reminder to international organizations of their own status and limitations, namely, the requirement of conformity to their rules. Their approach might seem to be over-cautious and to display a certain suspicion that was disliked by some delegations, but his delegation would have no insurmountable difficulty in accepting those amendments, particularly with the drafting improvements which, at the previous meeting, the representative of the German Democratic Republic had

offered to make. He noted, however, that the amendments had a bearing, however remote, on the question of the settlement of disputes and on article 20, paragraph 5.

20. On the whole, his delegation favoured the International Law Commission's draft. It was, however, prepared to accept the substance of the three amendments, possibly in the form of a combined and redrafted text.

21. Mrs. THAKORE (India) said that article 19 dealt with a very difficult but important matter which had given rise to widely divergent opinions in the Sixth Committee of the United Nations General Assembly and in the written observations of governments and international organizations. It had also been the subject of lengthy debate in the International Law Commission. The compromise text finally adopted by the Commission adopted a liberal approach that granted international organizations, as the contracting parties to a treaty, the same rights as were enjoyed by States.

22. Her delegation was therefore unable to accept the amendments of Cape Verde, the Soviet Union and the German Democratic Republic, which tended to impose undesirable restrictions on the power of international organizations to formulate reservations, restrictions that would not only give rise to insurmountable difficulties but also reflected a lack of confidence in international organizations. Her delegation, like that of the United Kingdom, found it difficult to conceive of a situation in which an international organization would formulate reservations that were incompatible with its constituent instrument, which was fundamental in nature and constituted the organization's supreme law. It therefore supported the present text of article 19 of the Commission's draft, as modified by paragraph 1 of the Cape Verde amendment, and the four-Power amendment to subparagraphs 1 (a) and 2 (a) of the article.

23. Ms. KASHUMBA (Zambia) said that amendments such as those of the Soviet Union and the German Democratic Republic could create problems of interpretation: an international organization became a party to a treaty in accordance with the rules of its constituent instrument. It would be monotonous to refer to those rules every time the question of the organization's competence arose. In her view, the matter was adequately covered in article 6. Her delegation was therefore unable to support those two amendments.

24. Mr. DALTON (United States of America) said that if language similar to that proposed in the Cape Verde amendment for subparagraph 2 (d) was inserted into paragraph 1, the provision would become patently ridiculous; no State would formulate a reservation on a provision which did not apply to it. The hypothesis was equally absurd in the case of an international organization, and the wording proposed was therefore inappropriate in an international convention.

25. The amendments of the Soviet Union and the German Democratic Republic were on the common theme of reservations incompatible with the constituent instrument of an international organization. Such wording would compel the States party to a treaty to form a judgement as to whether or not reservations

formulated by international organizations which were also parties were in conformity with their constituent instruments. National legal advisers on treaty matters did not have the knowledge to address that task. Such amendments were mischievous and should be rejected.

26. Mr. RIPHAGEN (Netherlands) said that he could accept the four-Power amendment, which returned to the formulation used in the Vienna Convention on the Law of Treaties, provided there was also a return in article 20, paragraph 2, to the formulation in the corresponding article 20, paragraph 2, of that Convention, as the two provisions were linked.

27. On the matter of reservations, he referred the Committee to the definition in article 2, subparagraph 1 (d), which described a reservation as "a unilateral statement . . . made by a State or by an international organization . . . whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State or organization". That meant that a reservation could be made only in respect of a party's own obligations. It was impossible to make distinction between States and international organizations in the matter, and he was opposed to any amendment which sought to do so.

28. Mr. MORELLI (Peru) said that the International Law Commission's draft of article 19 tended to equate the legal position of States and international organizations with respect to the formulation of reservations. However, without prejudice to the rule concerning the contractual equality of parties to treaties, the Commission's draft in several other places did take account of the differences between international organizations and States. While his delegation did not wish to comment specifically on any of the amendments to article 19, it would be glad if the Drafting Committee were to give thought to means of differentiating between the full sovereign powers of States and the possibly limited competence of international organizations with respect to the formulation of reservations.

29. Mr. RAMADAN (Egypt) asked whether it was conceivable, in the case of a State formulating reservations to a treaty, that other States would attempt to argue that the reservations were incompatible with that State's constitution. Such conduct would be regarded as interference in its internal affairs. If States and international organizations were equal partners in treaty-making, it was illogical to have a provision stating that reservations by international organizations must be compatible with their constituent instruments. The point was adequately covered by article 6, and any reiteration showed mistrust of the good faith of international organizations and was tantamount to imposing an external censorship on their decision-making.

30. Mr. KHVOSTOV (Byelorussian Soviet Socialist Republic) said that some delegations had expressed concern that the changes proposed in paragraph 1 of the Cape Verde amendment and in the Soviet Union and German Democratic Republic amendments were designed to impair the capacity of international organizations to conclude treaties. Those amendments should not be understood as restricting the right of interna-

tional organizations to formulate reservations. That right was secured in article 19, paragraph 2, and no one would call it into question.

31. Cases in which international organizations could not formulate reservations were not fully taken into consideration in subparagraphs (a), (b) and (c) of article 19, paragraph 2. The amendments he had just cited filled that gap and indicated another important case: when a reservation was incompatible with the constituent instrument of an international organization.

32. During the discussion of article 6 an understanding had been reached that the treaty-making capacity of an international organization was determined by its rules. The rule on formulating reservations was one of the elements of that general treaty-making capacity, as sometimes reservations put forward could have serious legal consequences, for example, in differing with the intentions of parties to a treaty or in departing from the international organization's framework of competence.

33. His delegation considered it logical for article 19, paragraph 2, to maintain the provision reflecting the need for the substance of reservations to be in conformity with the provisions of the constituent instrument of the international organizations.

34. Mr. ALMODÓVAR (Cuba) proposed to pass over in approving silence the changes proposed in paragraph 1 of the Cape Verde amendment and in the four-Power amendment. With regard to the proposed changes in paragraph 2 of the Cape Verde amendment and the Soviet Union and German Democratic Republic amendments, he shared the view of their sponsors that a limit should be placed in the draft articles on the capacity of international organizations. If a group of States or even a group of international organizations set up an international organization and gave it a constituent instrument conferring on it the widest powers under international law, including that of treaty-making, it was clear that the other contracting parties to any treaty to which that organization was also a party would have to acknowledge its powers. What was excessive was that the International Law Commission should propose by means of a general rule to confer such powers on all the international organizations so far established.

35. Mr. WOKALEK (Federal Republic of Germany) said that his delegation could not accept the amendments of the Soviet Union and the German Democratic Republic, which introduced a discriminatory element. The proposed convention was intended to provide a treaty-making environment for States and international organizations, and it was unfair to limit the powers of one of the two categories of entities. Furthermore, there was no practical reason for attempting to do so, and he fully endorsed the comments of the United Kingdom representative on the subject at the previous meeting. His delegation could support the modification proposed in paragraph 1 of the Cape Verde amendment.

36. Mr. AL-JUMARAD (Iraq) said that he had no difficulty with the International Law Commission's text and could accept the four-Power amendment for the reasons already given by previous speakers.

37. Mr. WANG Houli (China) said that the Commission's text was acceptable to his delegation. With regard to paragraph 1 of the Cape Verde amendment and the four-Power amendment, he understood from the explanation given by the Expert Consultant at the previous meeting that no harm would be caused by the deletions in subparagraph (a) of paragraph 1 and 2 of article 19 which both those amendments proposed. His delegation was therefore prepared to accept them. He had no strong objection to the amendments of the Soviet Union and the German Democratic Republic, but he felt that the reference to the constituent instrument of an organization was unnecessary.

38. Mr. SKIBSTED (Denmark) said that the International Law Commission's draft, perhaps amended as proposed in the four-Power amendment, would ensure a reasonable balance between States and international organizations by establishing approximate equality in the formulation of reservations. The amendments of the Soviet Union and the German Democratic Republic seemed to involve undesirable restrictions on the powers of international organizations. For the reasons already stated by the United Kingdom representative, those amendments were not acceptable to his delegation.

39. Mr. KANDIE (Kenya) supported the proposed reformulation in paragraph 1 of the Cape Verde amendment. His delegation had no quarrel with the view that for purposes of treaty-making, States and international organizations had of necessity to be treated on an equal basis. However, he wondered whether there should not be different rules for international organizations on the question of formulation of reservations and on other matters if there was agreement in a conference on the codification of international law that decision-making powers should be vested only in States.

40. On the question of the formulation of reservations, his delegation had some sympathy with the International Law Commission's draft, for reasons which had been well explained by the United Kingdom representative. The likelihood of an international organization formulating a reservation of the type that the amendments of the Soviet Union and the German Democratic Republic were designed to prevent seemed very remote. If that did occur, articles 20, 21, 22 and 23, dealing with objections to reservations, could resolve the problem.

41. Mr. GERVÁS (Spain) said that his delegation merely wished to reiterate its support for uniform terminology for both States and international organizations, particularly with regard to the ratification of treaties. It also supported the proposals submitted in paragraph 1 of the Cape Verde amendment and in the four-Power amendment.

42. Mr. KOTSEV (Bulgaria) said that the issue of formulation of reservations by international organizations was a new one. The text adopted must be sufficiently broad to cover a variety of cases. A distinction had to be made between States and international organizations because their capacity to formulate reservations was not equal. A State could formulate or refrain from formulating reservations for political, economic

or social reasons. An international organization, on the other hand, had no such choice, since its grounds for the formulation of reservations were based on its rules and limited by its competence. As the representative of Greece had pointed out at the previous meeting, the amendments of the Soviet Union and the German Democratic Republic dealt, in fact, with a self-evident situation. He failed to understand why there was such opposition to inserting a provision which stated the obvious. The wording proposed in the Soviet amendment was in his view sufficiently flexible. He would support some compromise formulation between that text and those in paragraph 2 of the Cape Verde amendment and in the German Democratic Republic amendment.

43. The CHAIRMAN, summing up, said that there appeared to be general acceptance of the amendment proposed by Austria, Italy, Japan and Tunisia and of paragraph 1 of Cape Verde's proposal, while the few delegations which had been somewhat reluctant to abandon the Commission's draft had made it clear that their position would not hamper the Committee's approval of the amendments. On that understanding, therefore, he proposed that those amendments, as revised, should be considered accepted and referred to the Drafting Committee, together with the Commission's draft of article 19 up to and including subparagraph 2 (c). The proposed new subparagraph 2 (d) was a matter of substance, and the decision on it should be postponed to allow the delegations of Cape Verde, the Soviet Union and the German Democratic Republic time to explore ways of embodying the basic idea of their amendments into a single text which could be discussed later by the Committee. That text should take the form of an overall rule which would apply throughout the draft article.

*It was so decided.*

44. The CHAIRMAN said he believed the Committee should also bear in mind the observation made by the representative of the Netherlands that article 20 should be brought into line with article 19. He suggested that the representative of the Netherlands should submit a specific proposal in that regard.

#### *Article 20 (Acceptance of and objection to reservations)*

45. Mr. WANG Houli (China), introducing the amendment proposed by his delegation (A/CONF.129/C.1/L.18), said that it had been submitted in an effort to provide an equal and reasonable time-limit for the objections of States and international organizations to reservations.

46. Paragraph 5 of article 20 established a 12-month time-limit for objections by States but made no provision for objections by international organizations, even though paragraph 2 of the article stated that "a reservation requires acceptance by all the parties". If a time-limit were not established for international organizations, then treaties to which international organizations were parties would be left in a state of perpetual uncertainty. Such a defect would give international organizations the privilege of raising objections at any time they wished, and was not conducive to the proper

observance of treaties. The Chinese delegation therefore considered that States and international organizations should be given the same time-limit for raising objections to reservations.

47. Since the organs of international organizations competent to accept reservations might not meet every year, and since the practice in any case varied from one international organization to another, a 12-month time-limit might not be sufficient for some. The Chinese delegation had therefore proposed an 18-month time-limit for both States and international organizations alike. If the competent organs of an international organization did not meet in that period, then a standing body could be empowered to deal with the matter.

48. Mr. HERRON (Australia), introducing his delegation's amendment (A/CONF.129/C.1/L.32), said that its purpose was to fill a gap consciously but unacceptably left open in the draft text by the International Law Commission. Since the proposal dealt only with paragraph 5 of article 20, it followed that Australia found the other paragraphs of the Commission's draft satisfactory.

49. The Commission in paragraph 5 had reproduced paragraph 5 of article 20 of the 1969 Vienna Convention on the Law of Treaties, and his delegation wished to keep that rule intact for States within the present draft convention. The Commission had not, however, formulated a parallel rule for international organizations, the principal reason for not doing so being concern at the administrative difficulty some organizations might have in organizing responses to reservations within one year.

50. The administrative difficulties for organizations were indeed real, particularly for those which were scrupulous in submitting questions of treaty obligations for decision to their competent organs but which could do so only infrequently because of extended periods between meetings of those organs.

51. The Australian delegation did not regard administrative difficulties as a sufficient reason for not placing organizations on the same footing as States with regard to tacit acceptance of reservations. Not to treat organizations equivalently was to leave them in a favoured situation compared with States, and was a departure from the principle of accountability of organizations.

52. The adjectival rule in paragraph 5 of article 20 of the 1969 Vienna Convention had greatly simplified the management of reservations for the treaty departments of Foreign Offices and for depositaries, and had made the extent of substantive obligations more certain. A like provision for organizations would also be useful. That view appeared to be generally held by a number of States and organizations, as was shown by comments submitted to the International Law Commission and other proposals relating to paragraph 5. Some of those proposals were simpler and more direct than Australia's. China's proposal did not appeal to his delegation, however, as it prescribed a different period for tacit acceptance of reservations by States than obtained for them under the 1969 Vienna Convention.

53. Australia would favour a simple, direct solution, provided it was convinced that the solution was a prac-

tical one. Because it was not yet convinced of the practicality of fixed-term solutions, it had proposed a more elaborate scheme under which organizations, like States, should have 12 months in any case in which to object to a reservation and, like States, should have the full period to the date when they expressed consent to be bound by the treaty, which might be a date later than 12 months from when they were notified of the reservation. Additionally, to obviate administrative difficulties entirely, an organization would have a period of up to one month after the next meeting of its competent organ after notification of the reservation in which to raise objection to the latter. That period could in some cases be longer than 12 months and in others end after the date on which the organization expressed consent to be bound by the treaty. In all cases, however, there would be adequate opportunity for the competent organ to deal with a reservation, and the position of the organization would be made certain either by its objection or by consent implied by expiry of the relevant period. Furthermore, although the maximum period involved would vary from organization to organization, it would be a simple matter in the case of any organization to establish whether a given reservation had been accepted tacitly, by verifying the date of the last meeting of the competent organ.

54. One small improvement to the Australian proposal had been suggested privately, namely, the deletion of the word "plenary" from its subparagraph 5 (b) (ii). The intended meaning was adequately established by the reference to "competent" organ. For some organizations the organ competent to deal with treaty questions would not be the plenary organ, and use of the adjective might cause confusion. The amendment should therefore be modified accordingly.

55. The Australian delegation was well aware that its proposal was an elaborate one, but it regarded the solution as practical and believed it was the only one before the Committee that was practicable for all organizations. In that regard, the views of the organizations participating in the Conference should be taken into account. If their needs could be met by a simpler rule acceptable to the Committee, the Australian delegation would be only too pleased to withdraw its proposal.

56. Mr. TUERK (Austria), introducing his delegation's amendment (A/CONF.129/C.1/L.33), said that apart from paragraphs 2 and 5 of article 20, Austria found the Commission's draft satisfactory. With regard to paragraph 2, whereas the Commission's draft referred only to the object and purpose of the treaty, the same paragraph in the 1969 Vienna Convention referred also to a limited number of negotiating States. His delegation saw no reason to modify the rule laid down in the 1969 Vienna Convention to enlarge the scope of paragraph 2. On the contrary, it considered that the two texts should be harmonized as far as possible.

57. The Austrian delegation saw no reason to make a distinction between States and international organizations in paragraph 5, notwithstanding the practical difficulties which might be involved where international organizations were concerned. A 12-month period could also be applied to international organizations, since all of them had organs of limited composi-

tion which were empowered to act on behalf of the organization in such matters and were convened at least once a year.

58. Mr. JESUS (Cape Verde) said that his delegation's proposal (A/CONF.129/C.1/L.35) had been submitted for reasons similar to those given by Austria. The article should be based on the principle of reciprocity. If after 12 months acceptance of a reservation by a State was implicit, the same period should also apply in the case of international organizations, notwithstanding possible internal difficulties. His delegation could therefore support the Austrian proposal.

59. The Chinese and Australian proposals were in some degree similar, but the open-ended period suggested by Australia was unacceptable. If the Conference were to accept the proposed 18-month period, it should provide a safeguard clause such as that suggested by his delegation whereby the present draft convention would not prevail over the 1969 Vienna Convention, because, when it came to relations between States, the two periods would conflict.

60. Mr. ULLRICH (German Democratic Republic) said that his delegation's amendment (A/CONF.129/C.1/L.41) was a logical consequence of its amendment to paragraph 2 of article 19. The fundamental conclusion should also be valid *mutatis mutandis*, and to the same degree, for acceptance of and objection to reservations by international organizations. The differentiation was not made clear enough in article 20, and his delegation's two proposals were designed to eliminate any uncertainty or doubt. The purpose of the proposed addition was to make clear that what was required was acceptance of the reservation by all States and by all affected organizations, according to paragraph 2 of article 19. The same consideration had prompted his delegation to propose an amendment to paragraph 4, subparagraph (b). Since throughout the draft convention the provisions relating to States and those relating to international organizations were generally kept separate, his delegation deemed it appropriate from the standpoint of both substance and form to deal separately with objections by States and objections by international organizations. The second part of his delegation's amendment was of a drafting nature and might be referred to the Drafting Committee.

61. The CHAIRMAN said that the Committee would have to decide whether the phrase "pursuant to the rules of those organizations" in the amendment proposed by the German Democratic Republic should be included in article 19. If it did so decide, the phrase would automatically be included in article 20. If the Committee decided not to include it in article 19, then it would not appear in article 20. He therefore suggested that the Committee, in the course of its debate, should not touch upon that issue for the time being.

62. Mr. MORAWECKI (Poland) said that the issues dealt with in article 20 were highly controversial. In the 1969 Vienna Convention the corresponding article 20 on acceptance of and objection to reservations was in some respects less complex. His delegation therefore had no wish to raise unnecessary difficulties, but it had, in particular, doubts regarding the text of subpara-

graph 4 (c) and the wisdom of retaining in paragraph 3 the exact wording of the 1969 Vienna Convention. Despite those misgivings, it would not, however, insist on any changes.

63. Most of the amendments submitted concentrated on paragraph 5 of the article and reflected a common concern to establish time-limits within which an international organization might raise objections to reservations. His delegation shared that concern, and was inclined, after careful consideration, to support the amendments of Cape Verde and Austria, which established a time-limit of 12 months applicable both to States and to international organizations.

64. In the case of paragraph 2, the Austrian amendment and that of the German Democratic Republic had the common and unexceptionable aim of bringing the text more closely into line with that of the 1969 Vienna Convention. The proposal of the German Democratic Republic deserved particular attention in that it reaffirmed the crucial principle that an international organization should strictly observe its own rules and act within its competence as affirmed by the consent of its member States. Adherence to that principle should not be seen as lack of confidence in international organizations, but as recognition of the need to establish limits to their freedom of action. The proposal to include a safeguard provision was an attempt to contribute to confidence-building between the organization and its member States. In that connection, he drew attention to the fact that some delegations which were insisting on the need to "trust" international organizations represented Governments which had threatened to withdraw from certain international organizations.

65. Mr. BERMAN (United Kingdom) said that he would refrain from commenting on the question of trust between international organizations and member States except to say that those who made a fetish of the principle of sovereignty of States were often the first to express criticism of an international organization for abuse of that trust.

66. On the question of paragraph 5 of article 20, he agreed with previous speakers that the omission of international organizations from the text was unfortunate, but he recognized the practical problems involved in drafting a rule that would provide for tacit consent within a specific time-limit. He accordingly agreed with the view expressed by the Commission in its commentary to paragraph 5 of the article.

67. After careful examination of the proposals submitted by China, Austria and Cape Verde, his delegation had concluded that it would be best to apply the same time-limit to States and to international organizations, with the proviso that it should always be possible for an international organization to enter a precautionary objection to a reservation. That objection could be withdrawn subsequently if the governing body of the organization found it undesirable. In general, his delegation favoured a 12-month time-limit, that being the rule established in the 1969 Convention and in international practice.

68. He could not concur with the Chairman's view that acceptance of the amendment to article 19 sub-

mitted by the German Democratic Republic implied acceptance of its proposal to change article 20; the two issues were not identical, and it was up to the Committee of the Whole to work out a satisfactory solution. In both instances, it would be useful if the delegation of the German Democratic Republic could clarify the wording of its amendments, which in their present form fell short of their intended purpose.

69. Mr. ADEDE (International Atomic Energy Agency) said that the acceptance of objections to reservations was an area in which international organizations had relatively little experience, since there had been few occasions on which an organization had had to respond to reservations formulated in respect of a multilateral treaty. In general, he felt that the Commission's approach, which did not establish a time-limit for acceptance by an international organization of reservations, was the correct one, although his own organization, the International Atomic Energy Agency, would have no difficulty with the 12-month period which some delegations had proposed as the time-limit for both States and international organizations. If there were to be such a rule, however, he felt that the Australian proposal would provide the necessary flexibility for those organizations whose policy-making organs would be unable to act within a 12-month period.

70. Mr. SCHRICKE (France) said that article 20 was broadly acceptable to his delegation in the form submitted by the International Law Commission. However, both article 20 and article 19 gave rise to the same technical difficulties as had arisen in connection with the corresponding articles of the 1969 Vienna Convention. Those difficulties derived from the fact that the text did not differentiate between the legal effect of a reservation to which there were objections and a reservation with no objections. If, however, it was generally agreed that such a differentiation was implicit in the 1969 Convention, his delegation would not seek to raise the issue at the present Conference.

71. Virtually all the amendments proposed modification of paragraph 5, on which his delegation had no very strong opinions. As formulated by the International Law Commission, the article did not exclude customary rules, so that there was perhaps no need to impose on an international organization a specific time-limit for acceptance of or objection to reservations.

72. Mr. NEUMANN (United Nations Industrial Development Organization) said that he largely agreed with the comments made by the representative of the International Atomic Energy Agency, but felt that, even if the text were left in its present form, there must be an implicit time-limit within which an international organization could raise an objection to a reservation if it were not to be considered as having acquiesced in that reservation. The lack of a specific time-limit could give rise to legal uncertainties, but in establishing a rule, account must be taken of the constituent instruments of the various organizations. In the case of the United Nations Industrial Development Organization, for example, the competent organ was the General Conference, which normally met every two years, although it could hold special sessions. The difficulty it would have in complying with a 12-month time-limit would be

shared by other organizations of the United Nations system. Accordingly, he favoured the flexible time-limit proposed by Australia in its amendment.

73. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said his delegation supported the German Democratic Republic's amendment, which developed the reasonable concept set out in that country's amendment to article 19 (A/CONF.129/C.1/L.40). Those amendments did not discriminate against international organizations and in no way restricted their freedom to formulate and accept reservations and to object to them. They only stated on a general plane the existing situation, in which each international organization could formulate and accept reservations and object to them only to the extent that they were in accordance with the aims and functions established in its constituent instrument.

74. Equalizing, or creating a balance in, the competence of international organizations and States with regard to reservations, as representatives of several countries and international organizations had called for, would lead to an artificial and unwarranted leveling of the status of the subjects of international law, so different in their nature. Such an approach would contradict the declarations already made by delegations on the inadmissibility of equalizing the international personality of States and international organizations.

75. Under that approach, international organizations would be granted abnormally wide competence. Any international organization could participate in the

elaboration of any international treaty, formulate reservations to it and accept or object to reservations. Thus international organizations, the number of which far exceeded the number of States, could block the efforts of States in the process of the creation of international norms.

76. The concept of equalizing the competence of States and international organizations with regard to reservations contradicted the provision generally acknowledged by general international law that a specific international organization was competent to participate only in those treaties necessary for its own aims and functions as defined in its constituent instrument, while a State possessed, on the strength of its sovereignty, a legally unrestricted treaty-making capacity and decided independently questions as to when, how and with which subjects of international law, and on which issues, to conclude international treaties.

77. In the light of all this and in view of the efforts already made in the Conference to equalize the status of international organizations and States with regard to reservations, which was fraught with very dangerous practical consequences, the German Democratic Republic's amendment to article 20 was especially valuable and timely. It fixed in a particularly economical, precise and clear way the existing general norm, reflecting the specific right of international organizations on acceptance of and objections to reservations.

*The meeting rose at 6.05 p.m.*

## 13th meeting

Friday, 28 February 1986, at 11.20 a.m.

Chairman: Mr. SHASH (Egypt)

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

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

[Agenda item 11] (continued)

**Article 20 (Acceptance of and objection to reservations) (continued)**

1. Mr. BARRETO (Portugal) said that a firm belief in the principles of equality, non-discrimination and reciprocity prompted his delegation to view with sympathy any attempt to secure identical treatment for States and international organizations in regard to the acceptance of reservations. That being said, he recalled that certain international organizations had stated that for structural reasons they might have dif-

ficulty in taking a position on a reservation even within the reasonable time-limits proposed in the amendments of China (A/CONF.129/C.1/L.18) and Austria (A/CONF.129/C.1/L.33) to paragraph 5 of the article. The more flexible proposal by Australia on that point (A/CONF.129/C.1/L.32) seemed to leave a number of problems unsolved and might make the régime too rigid, and thus impracticable to apply. His delegation therefore tended to favour the International Law Commission's draft of paragraph 5.

2. The other part of the Austrian proposal sought to introduce into paragraph 2 of the article, and in keeping with the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> a reference to a limited number of negotiating parties. The Austrian representative had made an interesting statement on the matter at the previous meeting, whereas the Commission's position was confined to a gloss on paragraph (2) of its commentary to the article

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

(see A/CONF.129/4, footnote 88), which the Portuguese delegation considered insufficient. The Expert Consultant's observations on the question would be welcome.

3. Mr. ZIMMERLI (International Maritime Organization) said, with regard to paragraph 5, that his organization tended to favour the Australian proposal, which would permit its Secretary General to seek the advice of the Assembly as and when necessary. On the other hand, it saw merit in the flexibility of interpretation allowed for in the International Law Commission's draft.

4. It had been argued that States and international organizations should be treated uniformly. If that principle were adopted it would appear desirable, for the purposes of legal certainty and clarity, to make the time-limits for acceptance or objection reasonably short. His organization was fortunate that its executive body, the Council, was empowered to take virtually all decisions between sessions of the Assembly, and would have no difficulty with either a 12-month or an 18-month period.

5. Mr. SANG HOON CHO (Republic of Korea) said that the omission of a reference to international organizations from paragraph 5 would have the effect of treating them more favourably than States as far as determining their position on a specific reservation was concerned. Moreover, a number of major international organizations had commented in writing or verbally that a 12-month time-limit neither posed serious difficulties for them nor seemed inappropriate. It should be possible to develop practice that would take account of the problems faced by particular organizations. His delegation therefore favoured the inclusion of the words "or an international organization" in paragraph 5, as proposed by Austria and Cape Verde (A/CONF.129/C.1/L.35). It preferred the International Law Commission's draft for the remainder of the text.

6. Mr. HARDY (European Economic Community) said that the Community would find the International Law Commission's draft generally acceptable if a reference to international organizations was inserted in paragraph 5, as proposed. Of the various proposals on the time-limit and procedure involved, the Australian amendment went into the greatest amount of detail, but on balance it might be preferable to establish an identical pattern for States and international organizations. The Community would agree to whichever of the proposals to that effect commanded the greatest support.

7. The amendment proposed by the German Democratic Republic (A/CONF.129/C.1/L.41) referred not only to the rules of international organizations, an issue already discussed in connection with article 19, but also to their competence. The Community believed that such matters should be handled in the context of the definitions clause; whether or not they should be reflected in other articles was a matter of substance requiring examination on its own merits.

8. Mr. KALANDA NGUAYILA (Zaire) said that the inclusion of a reference to international organizations in paragraph 5, as proposed by Austria and Cape Verde, would make the International Law Commission's draft

comprehensive, balanced and equitable. Since the other proposals tended to complicate rather than improve the article, especially by sharpening the distinction between States and international organizations, with regard to the time-limit for formulating reservations, his delegation would have difficulty in accepting them.

9. Mrs. THAKORE (India), noting the Austrian proposal for the inclusion of a reference to a limited number of negotiating parties in paragraph 2, said she found it difficult to understand why the International Law Commission had considered such a reference unnecessary. The Expert Consultant's views on that would be helpful.

10. The Commission had also refrained from addressing in paragraph 5, to quote its commentary to the article (see A/CONF.129/4, para. (6)), "the problems raised by the protracted absence of any objection by an international organization to a reservation formulated by one of its partners"; it had added that "practice would have no great difficulty in producing remedies for the prolongation of a situation whose drawbacks should not be exaggerated". That did, nevertheless, leave a lacuna in the text, which various proposals before the Committee sought to fill.

11. Her delegation had noted with interest the view expressed by international organizations in their written observations (see A/CONF.129/5) that there was no reason to assume that organizations would not normally be in a position to act as promptly as States; in their view, a rule of tacit acceptance of a reservation upon the expiry of a specific period should be equally valid for international organizations. Some, however, considered that in certain cases the period of 12 months accorded to States to object would be too short for organizations. With those considerations in mind, her delegation was inclined to favour the Australian amendment, which would allow a flexible approach to the matter.

12. Mr. REIMANN (Switzerland) observed that article 20 lay at the very heart of the legal régime of reservations. Although the text before the Committee was not altogether satisfactory—especially, as the representative of France had pointed out at the previous meeting, with regard to the legal consequences of objections—its kinship with the 1969 Vienna Convention on the Law of Treaties seemed to preclude its being modified at the present Conference. His delegation's concern would therefore be to assist the Committee in arriving at the least unsatisfactory draft under the circumstances. Like those delegations which had tabled formal amendments, it believed that paragraph 5 should establish a time-limit within which an international organization might formulate objections to reservations; to establish such a limit would be to provide a useful legal safeguard.

13. On the basis of the 1969 Vienna Convention, the limit might be set at 12 months; however, since such a short period might encourage organizations to lodge precautionary objections, it might be wise to extend it, perhaps to 18 months, as China proposed in its amendment. He would have no objection to the provision

being more detailed, as suggested in the Australian amendment. The proposed subparagraph (b) (ii) might, however, lead to the creation of a separate régime.

14. Concerning paragraph 2 of the article, his delegation warmly welcomed the Austrian amendment.

15. Turning to the amendment proposed by the German Democratic Republic, he said that its adoption could lead to situations where an organization would be unable to object to a reservation or, worse still, to accept one, despite its being a party to the treaty in question. The explanations offered at the previous meeting by the representative of the Ukrainian Soviet Socialist Republic, though comprehensible in themselves, hardly seemed applicable in the case under discussion. The Conference was an exercise in codification and quite distinct from any future negotiations between States and international organizations, or between international organizations, that might lead to a treaty. That being so, his delegation did not take the view that an amendment to article 19 necessarily entailed an amendment to article 20.

16. Mr. WANG Houli (China) said that all the proposals to paragraph 5 of the article set a time-limit for international organizations to raise objections to reservations. Given the special characteristics of international organizations, his own delegation had proposed a time-limit of 18 months. If, however, a majority of delegations considered that 12 months would suffice, it would not object.

17. With regard to the Australian amendment, his delegation considered, first, that the time-limit should not be too long, and secondly, that it should be definite. The proposal, which provided a flexible approach to the subject, would therefore be improved if it set a definite time-limit, say, of 18 months.

18. It would assist the Committee in arriving at a decision on article 20 if the Expert Consultant could give his views on paragraph 2 of the article and on the corresponding provision of the 1969 Vienna Convention.

19. Mr. ECONOMIDES (Greece) said that his delegation favoured the Commission's draft, which best suited the needs of international organizations. The only amendment it could support was the one submitted by Austria to paragraph 2, which concerned the will of the parties to apply treaties in their entirety. It agreed that the corresponding provision of the 1969 Vienna Convention should be followed in that respect, and that it would be a mistake to treat international organizations as though they corresponded to the sum of their States; each one was a separate legal entity and a separate subject of international law. Although his delegation could not support the other amendments, its position on article 20 was flexible.

20. The amendment submitted by the German Democratic Republic was very similar to the amendments which it had submitted to articles 11 and 19 and also to certain amendments submitted by the Soviet Union. They all emphasized the special nature of international organizations and, in particular, the functional character of their capacity to enter into contracts, and stressed the need for each international organization to conform

to its constituent instruments and other rules. Perhaps that general idea could be incorporated in the preamble to the future convention, thus providing a key, as it were, to the construction of its provisions.

21. Mr. DENG (Sudan) said that, while he supported the Commission's draft, he would not object to the amendments submitted by Austria and Cape Verde, which served to clarify the wording of the article. He would like to hear the views of international organizations regarding the time-limits to be accorded to them for raising an objection to a reservation. His delegation would then take a definite position on the matter.

22. Mr. GÜNEY (Turkey) observed that the purpose of the right to raise an objection to a reservation was to protect the fundamental right of an entity that was to become a party to a treaty; that right was closely linked to its status as a contracting party. An objection to a reservation in no way affected the relations between a State which was the author of the reservation and a State which accepted it.

23. All the amendments before the Committee expressed the rule that a certain period of silence amounted to tacit acceptance. That rule had arisen out of the wish to preserve the integrity of multilateral treaties and to prevent them from being reduced to a series of bilateral agreements.

24. In the light of those remarks, his delegation was in favour of a 12-month time-limit being specified in paragraph 5, which was a residual provision, and it supported the amendments to that effect. It had difficulty, however, in approving subparagraph (b) (ii) of the wording proposed by Australia in its amendment, since it, as orally sub-amended by its sponsor at the previous meeting, spoke of the "next meeting" of the competent organ of the international organization in question and could give rise to confusion in practice.

25. Mr. DE CEGLIE (Food and Agriculture Organization of the United Nations) said that many delegations had alluded to the principle of reciprocity, or non-discrimination between States and international organizations; it was certainly of paramount importance in a convention that dealt with agreements between various subjects of international law. However, it would be unrealistic to apply it mechanically, without due attention to the very real differences that existed in the nature and functioning of States and international organizations and without seeking to evaluate the various aspects of intercourse between the different subjects of modern international law, with a view to establishing a treaty-making régime that accorded with reality.

26. While a 12-month period would generally be sufficient to enable States to decide whether to lodge an objection to a reservation, that was not so in the case of certain international organizations. The Conference of the Food and Agriculture Organization of the United Nations, for example, met once every two years; consequently, the inclusion in article 20, paragraph 5, of a provision embodying a shorter time-limit might therefore be inappropriate.

27. The Commission's draft was acceptable to his delegation; but if an amendment to the article was to be

adopted in regard to paragraph 5, certainly the Australian one best suited its needs. However, his delegation kept an open mind and trusted that a suitable compromise solution could be found, perhaps along the lines of the Chinese amendment.

28. Mr. PASZKOWSKI (United Nations Educational, Scientific and Cultural Organization) said that his delegation could accept both the original text of paragraph 5, with its intentional lacuna, and also the 12-month or 18-month period proposed in some of the amendments. The Executive Board of his organization, which was competent in the matter, met twice a year, so that either period would allow ample time for it to consider a matter falling under paragraph 5. The statement of the representative of the International Atomic Energy Agency at the previous meeting nevertheless showed that some other organizations were in a more difficult position because their competent organs did not meet so frequently. The Australian amendment catered for the situations of individual organizations in that respect.

29. Mr. HALTTUNEN (Finland) said that the legal institution of reservations had been codified as a rule of general international law in the 1969 Vienna Convention. The capacity of international organizations to enter reservations to treaties was to be codified at the present Conference. The International Law Commission had given several examples of the practice of reservations by intergovernmental organizations. It was in fact their practice which justified the view that international organizations possessed the capacity to make reservations. However, the draft convention, by laying down the rules which were to apply to their reservations, might create practical difficulties, because international organizations were composed of States. On occasion a State might, with regard to a particular treaty, have a reservation or objection differing from that of an international organization of which it was a member, in which case two or more concurring reservations might exist for the same parties to a treaty; also, the member States of an organization could hardly be seen as third parties to a treaty which involved both the States and the organization. The same considerations applied to all the draft articles dealing with reservations.

30. His delegation supported the amendments proposed by Austria and Cape Verde, since they aimed at bringing the future convention into line with the 1969 Vienna Convention.

31. Mr. NEMOTO (Asian-African Legal Consultative Committee) said that, as far as the period for raising objections was concerned, the amendment proposed by Australia favoured international organizations, but that formulation might lead to delays and uncertainty in the legal effect of treaties. The Asian-African Legal Consultative Committee could accept a period of either 12 or 18 months, since its ruling body met every year. The statements made by the representatives of other international organizations suggested that a period of 18 months, as proposed by China, would be preferable.

32. Mr. RASOOL (Pakistan) said that his delegation could support the proposals by Austria and Cape Verde regarding paragraph 5 of article 20 for the reasons which

had been given by previous speakers. Concerning the amendment proposed by Austria to paragraph 2, his delegation preferred the simple formula employed in the International Law Commission's draft to the Austrian wording, whose primary aim seemed to be to repeat the language of the 1969 Vienna Convention. It reserved its position on the wording for paragraph 2 of the article proposed by the German Democratic Republic in paragraph 1 of its amendment, which it considered to be largely a corollary to the similar proposal for article 19. His delegation did not favour the wording proposed in paragraph 2 of that amendment, to which it preferred the Commission's draft.

33. Mr. NORDENFELT (Sweden) said that his delegation was in favour of putting States and international organizations on an equal footing in the matter of drawing up and adopting treaties. It took the same view when it came to the question of reservations and objections. However, the time-limit of 18 months proposed by China in its amendment in regard to objections seemed to create a doubt as to whether the rules of the 1969 Vienna Convention or those of the future convention would apply to States which were parties to both instruments. He therefore supported the 12-month period proposed by Austria and Cape Verde.

34. Mr. MAJDI (Morocco) said that his delegation found it difficult to understand why the International Law Commission had been silent on the matter of objections raised by international organizations to reservations. He could not accept a régime which created uncertainty between contracting parties. While in certain instances international organizations might have difficulty in taking a decision on a reservation within a given period of time, it was inappropriate to generalize from that. Moreover, international organizations were legal persons and subjects of international law and, as such, must be obliged to establish their position under the same conditions as States.

35. Mr. KANDIE (Kenya) said that his delegation agreed with the International Law Commission with respect to paragraphs 1 to 4 of the article. Paragraph 5 expressed a limitation which should apply only to States. Since several speakers had mentioned the need for legal equality between States and international organizations as parties to a treaty, his delegation expected support to be forthcoming for the idea embodied in the amendments proposed by China, Austria and Cape Verde, all of which sought to set a deadline for a tacit acceptance of reservations that was the same for international organizations as for States.

36. His delegation commended the proposal by Australia for its flexibility, but could not support it because it did not contain the same limitation period for States as for international organizations. His delegation would prefer the limitation period to be 12 months, as provided in the 1969 Vienna Convention. It preferred the Commission's draft to the amendment proposed by Austria, but would like an explanation from the Expert Consultant before commenting on paragraph 2 of the article.

37. In response to the argument that some international organizations would not be able to meet the 12-month time-limit, it was the view of his delegation

that the limit would have the salutary effect of encouraging international organizations to adapt their practices to the rule, the advantage of which would be more certainty for the future.

38. Mr. MBAYE (Senegal) said that the amendment proposed by Austria to paragraph 2 complemented the International Law Commission's draft, and his delegation could approve it if the drafting was improved. It was not persuaded by the Commission's argument that the case of there being a limited number of parties could not arise in regard to treaties to which one or more organizations were parties. As subjects of international law, international organizations had a personality distinct from that of their member States, even if that personality was derivative and thus limited. They participated in all aspects of the preparation and adoption of treaties with the same status as States, and that applied to the entering of reservations or objections as well.

39. His delegation approved the amendments to paragraph 5 proposed by China, Australia and Cape Verde, which seemed to offer convergent solutions to the problem of the time-limit for tacit acceptance of reservations. The amendment proposed by Australia seemed to take account of the difficulties best, but contained a weakness in its failure to fix a time-limit. If the wording proposed by Australia was amended to provide that the time-limit could not exceed a specified period, for example 18 months, his delegation could accept it. The text could then be sent to the Drafting Committee.

40. Mr. SANYAOLU (Nigeria) said that some changes were needed in paragraph 5. His delegation recognized the administrative difficulties that international organizations might face regarding tacit acceptance of reservations if the time-limit was 12 months for them, as for States. On the other hand, it considered it paramount not to overlook the problems which might arise if international organizations were permitted to prolong a situation of uncertainty concerning the substance of treaty obligations. Paragraph 5 therefore concerned a case where States and international organizations must be placed on the same footing.

41. His delegation supported the amendment proposed by Australia, which appeared to provide an acceptable solution to the problem. Subparagraph (b) (ii) of the Australian wording dealt with the fear expressed by the International Law Commission that international organizations might face administrative difficulties if their bodies competent to accept reservations did not hold annual sessions. However, the wording would need some drafting amendments in order to make the conditions listed in subparagraph (b) apply as alternatives.

42. Mr. KOECK (Holy See) said that he associated himself with those representatives, in particular that of Portugal, who had urged that there should be no discrimination between States and international organizations. His delegation accordingly supported the amendment submitted by Cape Verde and the proposal in paragraph 2 of the amendment submitted by Austria, which expressed that idea in regard to the acceptance

and rejection of reservations to a treaty to which States as well as organizations were parties.

43. His delegation had no strong feelings with regard to the Chinese proposal to extend from 12 to 18 months the time-limit on the expiry of which a reservation was deemed to have been accepted, although, as a general rule, it preferred the draft convention not to depart from the provisions of the 1969 Vienna Convention.

44. The amendment submitted by the German Democratic Republic might bring restrictions to bear on international organizations which were to become parties to a treaty and which were considering raising an objection to a reservation made by another party. If that was the case, his delegation would oppose that amendment.

45. The Australian amendment would be acceptable to his delegation, although it believed that the new element which subparagraph (b) (ii) introduced would further complicate the task of future depositaries in keeping their records correctly up to date.

46. Mr. KOLOMA (Mozambique) said that his delegation felt some sympathy for the concern expressed by certain international organizations that a 12-month time-limit for the tacit acceptance of reservations might, for practical reasons, prove too short for them. However, equally for practical reasons and especially for the purpose of the early entry into force of the treaty, it was essential to lay down a time-limit. No persuasive evidence had been put forward to show that an international organization would not be able to react as promptly as a State in the face of a reservation. For those reasons, his delegation supported the Cape Verde amendment.

47. Mr. RAMADAN (Egypt) supported the Australian proposal as orally amended by its sponsor. It had the merit of taking due account of the differences between States and international organizations with regard to both their legal nature and their functions.

48. His delegation also supported the Austrian amendment to paragraph 2, which had the merit of introducing the notion of a limited number of negotiating parties which was present in the corresponding provision of the 1969 Vienna Convention. His delegation failed to see why the International Law Commission had omitted that useful element from article 20.

49. Mr. AL-HADDAD (Bahrain) said that his delegation found the Commission's text of article 20 acceptable, since it covered the subject adequately. It therefore did not oppose the Cape Verde amendment to paragraph 5 or the Austrian amendment to paragraph 2.

50. Mr. CAMINOS (Organization of American States) said that his organization had no difficulty with article 20 as proposed by the International Law Commission. His organization steadfastly believed in the principle of legal equality of the parties to a treaty, and therefore urged that the time-limit set in paragraph 5 should be the same for States as for international organizations. The period chosen should be such as to obviate the very real difficulties which certain international organizations would face because of the provisions of their constituent instruments.

51. Mr. RODRÍGUEZ CEDEÑO (Venezuela) supported the International Law Commission's text for article 20, which was based on the corresponding provision of the 1969 Vienna Convention. As for the time-limit set in paragraph 5, it should be the same for States as for international organizations. The internal difficulties faced by certain organizations should not be a reason for establishing a different time-limit for organizations. His delegation favoured a time-limit of 12 months, which was to be found in the corresponding provision of the 1969 Vienna Convention. It supported

the Australian amendment and the second part of the Austrian amendment, which improved the text of the article.

52. Mr. DROUSHIOTIS (Cyprus) said that his delegation was quite satisfied with the Commission's text for draft article 20, but it could accept the amendments by Australia, Cape Verde and China if the majority considered them as improvements.

*The meeting rose at 12.55 p.m.*

## 14th meeting

Friday, 28 February 1986, at 3.25 p.m.

Chairman: Mr. SHASH (Egypt)

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

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

[Agenda item 11] (*continued*)

**Article 20 (Acceptance of and objection to reservations) (*continued*)**

1. Mr. TEPAVICHAROV (Bulgaria) said that in the discussion of article 20 a number of speakers had stressed the need for equal treatment of States and international organizations. However, equality of capacity could apply only in certain specific areas, since, as subjects of international law, States and international organizations differed both in status and raison d'être. The applicable rules did not refer to any context other than international conferences on multilateral treaties.

2. The issue raised by paragraph 5 was procedural. If guidelines were required, the time-limits suggested by Australia (A/CONF.129/C.1/L.32) were appropriate, as they applied to both States and international organizations. The provisions of the paragraph proposed had the merit of being short, clear and comprehensive.

3. The Austrian amendment to paragraph 2 (A/CONF.129/C.1/L.33) had the effect of adding a further criterion to those proposed by the International Law Commission and of restricting the application of the rule requiring acceptance of the reservation by all the parties to the treaty. His delegation approved that amendment.

4. It also supported the amendment submitted by the German Democratic Republic (A/CONF.129/C.1/L.41). Whether or not the wording proposed for paragraph 2 would prove acceptable in other articles, it was

undoubtedly quite satisfactory in the context of articles 19 and 20. The new wording proposed for paragraph 4 clarified the text and made it more comprehensive. In addition, paragraph 4 (*b bis*) would ensure greater stability in the contractual relations between States and international organizations parties to the same treaty, thus closely reflecting existing legal realities.

5. Mr. MORALES (Cuba) stressed the importance of article 20 and outlined the differences between States and international organizations under international law. He said that his delegation approved the Chinese amendment (A/CONF.129/C.1/L.18), the Australian amendment and the proposal by Cape Verde (A/CONF.129/C.1/L.35).

6. His delegation was also in favour of the amendments proposed by the German Democratic Republic and approved the inclusion of the words "pursuant to the rules of . . .".

7. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the final version of article 20 proposed by the International Law Commission presented a number of important shortcomings when compared with the corresponding provisions adopted by the Commission in first reading. States and international organizations were now placed on an equal footing with regard to objections to reservations, an approach with which his delegation could not agree. For a State, the formulation of objections to reservations was a matter of sovereign right. He took the statement made by the representative of the United States at the 12th meeting of the Committee to mean that, if the amendment of the German Democratic Republic were accepted, that would imply that States should also be subject to certain limitations in the matter of objection to reservations; i.e., they could object only to reservations which concerned them. That implication was incorrect: all reservations were of relevance to States, since they possessed sovereignty and not mere capacity. International organizations, on the other hand, were secondary subjects of international law, and therefore enjoyed only the limited capacity of objecting to reservations on matters

within their competence as established by their sovereign member States. It was precisely that situation which was reflected in the proposal submitted by the German Democratic Republic. It was regrettable that the Commission's article 20 went so far as to give some precedence to international organizations in the matter of reservations: in particular, its paragraph 3, which was taken in its entirety from the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> was unacceptable, because it limited the sovereign right of a State to formulate a reservation to a treaty with an international organization in connection with the constituent instrument of that organization.

8. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation wished also to refer to the question of time-limits. The representative of one international organization had stated that his organization's competent organ met once every two years. In view of the difficulties that would arise with regard to acceptance of and objection to reservations in such a case, the delegation of the Soviet Union would favour the adoption of a flexible but realistic time-limit.

9. A number of delegations had referred to the "equality" of States and international organizations, but he considered the notion of equality inapposite, not only in paragraph 5 but in all the paragraphs of article 20. In paragraph 5, amendments that would tend to equate the status of States and international organizations would give rise to practical difficulties in the case of tacit acceptance of a reservation. A case might arise in which the competent organ of an international organization was considering a particular reservation. If certain States represented in that organ were in favour of the reservation while others opposed it, the organ would be unable to reach a decision, with the result that the organ's silence could be interpreted as tacit acceptance. Since that was obviously inadmissible, there was a need to provide in paragraph 5 that an international organization must state its acceptance of or objection to a reservation.

10. Mr. GOHO-BAH (Côte d'Ivoire) said that his delegation supported the concept of non-discrimination between States and international organizations which were parties to the same treaty. It would therefore support any solution designed to provide in paragraph 5 for equality of treatment both between States and international organizations and between international organizations themselves, even though the latter were secondary subjects of international law, and it would accordingly support a text based on the amendments to that paragraph proposed by Cape Verde and Austria, without, however, rejecting any other time-limit that would be acceptable to both States and international organizations. The Australian amendment was certainly ingenious, but it would have the unacceptable effect of introducing legal uncertainties.

11. Mr. VOGHEL (Canada) said that his delegation approved the Austrian amendment to paragraph 2. It was, however, totally opposed to the German Demo-

catic Republic's amendments to paragraphs 2 and 4 because of their general tendency to restrict the right of international organizations to formulate objections to reservations.

12. All proposals for specific time-limits in paragraph 5 should take into account the possibility of tacit acceptance of a reservation or of an objection to a reservation. His delegation would prefer a time-limit of approximately 12 months, but would not oppose a longer period of up to 18 months, or even two years, if that were thought necessary. In that connection there was no reason to limit in any way the prerogatives of international organizations, which, as parties to a treaty, must enjoy equality of rights with the other parties.

13. Mr. DEVLIN (World Health Organization) said that information had been requested from individual international organizations on suitable time-limits. In the case of his own organization, the World Health Assembly met annually but would have difficulty in reaching a decision if a reservation was notified only a few months before its session. He believed that a time-limit of 18 months, as proposed by China, would be sufficient.

14. Mr. CANÇADO TRINDADE (Brazil) said that, in his delegation's view, as the treaty-making power of international organizations was not always expressly mentioned in their constituent instruments themselves, in view of the apparent absence of constitutional limitations and the little practice so far on that particular point, their organs could adapt their practice to the rule in article 20, paragraph 5.

15. His delegation could endorse the amendments proposed by Cape Verde and Austria providing for equality of treatment of States and international organizations in this particular respect.

16. His delegation also supported a common time-limit for raising objections to reservations, for both States and international organizations.

17. Mr. MIMOUNI (Algeria) said that his delegation found the text of article 20 as proposed by the International Law Commission satisfactory. However, it supported the idea of inserting the words "or an international organization" in paragraph 5, as proposed by the delegations of Cape Verde, China and Austria.

18. With regard to the period to be allowed for raising an objection to a reservation, his delegation preferred a balance between States and international organizations. A 12-month period could be relatively short for some international organizations and could raise practical problems. Nevertheless, his delegation favoured the period of 12 months referred to in the Commission's text.

19. The Australian amendment allowed some flexibility, but did not call for equal treatment of States and international organizations. His delegation therefore preferred the Commission's text.

20. Mr. WOKALEK (Federal Republic of Germany) said that his delegation welcomed the amendments of Austria and Cape Verde because of the new clarity they introduced into the text.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

21. It might be best to retain the time-limits laid down in the 1969 Vienna Convention, but there was much to be said for the flexibility that would be introduced by adoption of the Australian proposal. The Committee might perhaps even examine the possibility of allowing an international organization to establish its own time-limit.
22. With regard to the amendment of the German Democratic Republic, that proposal gave rise to difficulties similar to those created by the same delegation's proposal (A/CONF.129/C.1/L.40) for amendment of article 19.
23. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that there was no question of introducing inequality of rights between international organizations and States where equality was appropriate. His delegation was not, for example, opposed to the participation of international organizations together with States in conferences directly related to the interests of both parties, or to the participation of those organizations in voting at such conferences.
24. In the context of article 20, however, to speak of equality of rights would give rise to difficulties at the international level, particularly for the depositary. If there was no consensus in the competent organ of an international organization on a particular reservation, and the 12-month period were to elapse, the depositary, one of whose functions was to communicate all relevant documentation received by him to the parties to the treaty, would be unable to fulfil that obligation. Thus silence would be held to indicate the tacit consent of the international organization to the reservation formulated. He asked all delegations to take that particular example into account in considering the issue of "equality" between States and international organizations in the context of article 20.
25. The CHAIRMAN, summing up, said that, while international organizations were naturally concerned to secure equality of treatment in the matter of time-limits, they were not seeking positive discrimination on their own behalf. Most delegations had expressed a willingness to be flexible in the matter, whatever their individual preferences. One representative of an international organization had pointed out that most such organizations had as yet had little experience of having to react to reservations formulated by States to multilateral treaties. He drew attention to the fact that the rule established in article 20 would only enter into effect in some five or six years, when the convention had received the necessary ratifications. Consequently there was ample time for the international organizations to express their views regarding any time-limit laid down in the convention.
26. The constituent instruments of international organizations generally included no specific provision concerning acceptance of or objection to reservations. It had been pointed out that, while the circumstances were different, in the context of the 1969 Vienna Convention States too might have difficulties in that regard. It was clear, however, that in the case of multilateral treaties some time-limit should be imposed; in his opinion, the Committee accepted the 12-month period.
27. The new wording for paragraph 2 which was proposed in the Austrian amendment appeared to enjoy considerable support, and the Drafting Committee should therefore be asked to determine whether it improved the text or not. In the former case it could recommend adoption of the amendment by the Committee of the Whole; otherwise, it should be rejected.
28. The German Democratic Republic's amendments clearly involved a matter of substance, which should not be prejudged, in view of its close links to articles 11 and 19. It would therefore be preferable to postpone taking a decision on those amendments until the wording of those two articles could be agreed upon.
29. As for the various time-limits which had been proposed, he insisted that all of them seemed to be acceptable, but there appeared to be a tendency in favour of adoption of a 12-month period in order to avoid any discrimination and to simplify the work of the depositary. The Drafting Committee could be asked to indicate whether in its view specification of a 12-month time-limit would present any difficulties, on the understanding that the matter could be considered further at a later stage in the Committee of the Whole.
30. Mr. HERRON (Australia) said that when he had introduced his delegation's amendment (12th meeting), he had said that a simpler solution than that text would be preferable if one could be found. It now seemed that that would be possible, and he therefore withdrew the amendment. He expressed his delegation's gratitude for the support the amendment had received.
31. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that he would not object to reference of the amendments to the Drafting Committee, on the understanding that his delegation's comments would be taken into account. He feared that if the Austrian amendment was accepted, the convention would be stillborn. Several delegations were unable to accept that amendment because of the problems that would arise for the depositary if there was emphasis on the principle of equality between States and international organizations. Real equality of status was not what was at stake in the context of article 20.
32. The CHAIRMAN said that, in the absence of objection, the amendments would be referred to the Drafting Committee together with his own comments and those of delegations.

*It was so decided.*

#### *Article 7 (Full powers and powers) (concluded)\**

33. Mr. PISK (Czechoslovakia), speaking as Chairman of the Working Group on Article 7, said that, owing to the constructive spirit of co-operation which had prevailed in the Working Group and the spirit of compromise displayed by the sponsors of the amendments to the article, it had been possible to draw up a consolidated text of article 7 (A/CONF.129/C.1/L.43). That text was not a new proposal but was rather a procedural solution, based on the specific proposals put forward by Austria, Cuba, Japan and the United Kingdom, and

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\* Resumed from the 10th meeting.

the Soviet Union. It also took account of some other suggestions and of the trend of the discussion which had taken place in the Committee of the Whole. The sponsors of the amendments had agreed that all differences of a substantive nature should be referred to the Drafting Committee. That agreement did not solve the problems of the title of the article and the use of terms, questions which would, however, be resolved within the framework of article 22.

34. He endorsed the Chairman's appeal to the sponsors of different amendments to the same article to initiate negotiations with the aim of combining their various proposals, if possible, in a compromise text. That was one of the most effective ways of speedily dealing with those articles which gave rise to problems, and would avoid the necessity of recourse to voting. It would enable the Conference to adopt a convention enjoying general support, or at least the support of the overwhelming majority of the participants, and thus an instrument of greater value.

35. In conclusion, he drew attention to two small linguistic changes to be made, on the recommendation of the representative of the United Kingdom, in subparagraph 3 (b) of the consolidated text. The word "the" should be inserted before the word "circumstances" and the phrase "in conformity with the rules of the organization" should be replaced by "in accordance with the rules of the organization".

36. The CHAIRMAN thanked the Working Group for its most useful work. In the absence of objection, he would take it that the Committee approved the consolidated text proposed by the Working Group and decided to refer it to the Drafting Committee.

*It was so decided.*

*Mr. Pisk (Czechoslovakia), Vice-Chairman, took the Chair.*

#### *Article 27 (Internal law of States, rules of international organizations and observance of treaties)*

37. Mr. GOLITSYN (United Nations), introducing his organization's proposal for amendment of paragraph 2 (A/CONF.129/C.1/L.37), said that, while the United Nations appreciated the extensive consideration given by the International Law Commission to paragraph 2 of article 27, as described in its commentary (see A/CONF.129/4), it was not entirely satisfied that the provision, though analogous to paragraph 1 of the same article and to the corresponding provision of the 1969 Vienna Convention, adequately took account of the difference between subordinating ordinary domestic law to a treaty and subordinating one treaty to another, as would be the case under paragraph 2. That applied particularly in the case of the United Nations, whose constituent treaty, the Charter, had been generally recognized as having pre-eminent status. That status was specifically mentioned in Article 103 of the Charter, which applied not only to treaties concluded by States Members of the Organization but also, in his delegation's understanding, to those concluded by international organizations, and from which they could not derogate. His delegation had therefore found it necessary to propose an amendment to draft article 27

calling for the insertion of the words "Without prejudice to Article 103 of the Charter of the United Nations" at the beginning of paragraph 2.

38. He noted that there were precedents for such reference to Articles of the Charter of the United Nations. Article 30, paragraph 1, of the 1969 Vienna Convention referred to Article 103 of the Charter, as did also article 30, paragraph 6, of the International Law Commission's text which was before the Conference.

39. Mr. TALALAEV (Union of Soviet Socialist Republics), introducing his delegation's amendment to article 27 (A/CONF.129/C.1/L.39), said that that article did not make it clear that international organizations entering into commitments under treaties must do so in the light of their constituent instrument. The answer to the question whether an international organization could require modification of its rules in order to carry out an obligation assumed under a treaty lay in the different legal contexts of the foundation of an organization and the internal laws of a State. As had frequently been pointed out, States possessed unlimited rights as sovereign entities, and their status as participants in an international treaty was unchanged even if the treaty conflicted with and required changes in their internal law. On the proposal of Pakistan, supported by the Soviet Union, an appropriate correction had been made to what was then draft article 27 of the 1969 Vienna Convention. The position of international organizations was different, and recognizing a similar norm for them would run counter to the limitations placed on them by earlier articles.

40. An international organization simply could not conclude an agreement or treaty which was contrary to its constituent instrument. If it did enter into such a treaty, the latter could not be performed and the organization's obligations under it could not be fulfilled. It was no accident, therefore, that, in first reading, the International Law Commission had adopted a different text, as was indicated in paragraph (3) of its commentary to article 27. That text, which had reflected more concretely the special position of international organizations, had unfortunately been abandoned in second reading. As a result, under the present draft article 27 an international organization could not invoke its constituent instrument as justification for its failure to perform a treaty. Yet, an organization's mandate derived precisely from its constituent instrument, which established its legal status and its authority to conclude treaties. In principle, therefore, an international organization could not act in violation of its constituent instrument and adopt a position that was contrary to it. International organizations nevertheless entered into dozens of international commitments every day, and unforeseen conflicts might well arise, even though the organizations had acted in good faith. It must be clearly stated, therefore, that if an international organization's commitment under a treaty was in conflict with its constituent instrument, the latter had priority. Any treaties concluded by an international organization must be secondary to the primary document from which the latter derived its mandate. It was agreed that in any hierarchy of international agreements, the norms of the Charter of the United Nations, must take precedence

over all of the treaties. The amendment proposed by the United Nations was therefore a useful one. It could perhaps be combined with the Soviet amendment, although that was narrower in scope.

41. Mr. RIPHAGEN (Netherlands) said that Article 103 of the Charter of the United Nations was a very special provision: it dealt not with the hierarchy of treaties but with the hierarchy of international obligations. If a treaty could not be performed without contravening Article 103, the treaty itself could not be performed, not because of the relationship between treaties but because of the relationship between the obligations arising from treaties. All States Members of the United Nations were bound by Article 103 of the Charter, but it was not clear where a reminder of the importance of that Article should be placed in the convention. He did not think that article 27 was the right place. As he saw it, Article 103 was no more the purely internal law of the United Nations than, for instance, the prohibition of aggression, which was also enunciated in the Charter but would never be advanced as an internal law of the Organization. Article 103 was a rule of general international law.

42. He was afraid that the United Nations amendment might create confusion as to the sense and character of Article 103, making it appear to be simply an internal rule of the Organization, a confusion which was to a certain extent aggravated by the Soviet Union amendment. While in the case of the United Nations some confusion of the Organization's internal law with the rules of general international law might be possible, that body being a universal organization of a very special character, the same could not be said of other international organizations, particularly regional organizations. He failed to see how a regional organization could invoke one of the rules of its constituent instrument against a third party which was not a member of the organization but with which the organization had concluded an international treaty.

43. He recognized the importance of including in the convention a general rule precluding derogation from Article 103 of the Charter, but he believed that article 27 was not the right place for it.

44. Mr. DEVLIN (World Health Organization) said that the substance of the Soviet Union amendment appeared to be wholly justified as far as treaties concluded between an international organization and one of its member States were concerned. However, account should be taken of the comment of the Netherlands representative regarding treaties between international organizations and non-member States. Good faith seemed to call for some qualification of the International Law Commission's draft of article 27, paragraph 2. If a State party to a treaty which was also a member of an organization sought to force that organization to act in violation of the obligations imposed by its constituent instrument, to which the State had assented, it would be acting in bad faith towards the other States members of the organization.

45. The World Health Organization delegation also supported the United Nations amendment to article 27.

46. Mr. ECONOMIDES (Greece) said that he supported the article proposed by the International Law Commission. He could not approve the Soviet Union amendment, which would be contrary to article 46, paragraph 3, under which an international organization could invoke only manifest violations of an important rule to free itself from contractual obligations towards a State or another international organization. The question of responsibility for an international organization's becoming improperly party to a treaty would have to be settled within the organization itself, and not at the expense of a third party acting in good faith. That was a basic rule of the 1969 Vienna Convention as far as States were concerned. The importance of safeguarding treaty obligations took precedence over other considerations unless it involved a manifest violation of an internal law of fundamental importance. He approved the United Nations amendment in principle, but had doubts as to its proper place in the draft articles. The amendment should be referred to the Drafting Committee for consideration.

47. Mr. RAMADAN (Egypt) said that the problem was to decide where Article 103 of the Charter of the United Nations, an important principle of international law, should be referred to in the draft articles. One possibility was a general reference in the preamble.

48. The International Law Commission had placed a proviso relating to Article 103 of the Charter in article 30, paragraph 6, but that provision was in deliberately ambiguous terms. His delegation accepted the argument that Article 103 did apply to international organizations, because it was inconceivable that in their collective action States should be free of constraints to which they were subject individually.

49. His delegation could not accept the Soviet amendment, as it appeared to be inconsistent with article 27, paragraph 1. Furthermore, a similar and more explicit safeguard, modelled on the 1969 Vienna Convention, appeared in article 46, paragraph 3. In his view the purpose of the Soviet amendment would be achieved by incorporation of a reference to Article 103 of the Charter of the United Nations at an appropriate place in the draft articles.

*Mr. Nascimento e Silva (Brazil), Vice-Chairman, resumed the Chair.*

50. Mr. ULLRICH (German Democratic Republic) said that his delegation had no objection in principle to the draft article 27 proposed by the International Law Commission and it approved the addition to paragraph 2 proposed by the United Nations.

51. The Soviet amendment constituted an important addition to paragraph 2, because it covered cases where there was a possibility of a conflict of views.

52. In the view of his delegation, article 27 should be examined in conjunction with the definition of "rules of the organization" in article 2, subparagraph 1 (j).

53. Mr. RASOOL (Pakistan) supported the International Law Commission's draft. The United Nations amendment would, in his view, misplace the reference to Article 103 of the Charter of the United Nations, whose proper place was in article 30. Similarly, the

appropriate place for the text proposed in the Soviet amendment was in the safeguard clause in article 46.

54. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that the Commission's wording of article 27 took account of the need for parallelism, but the formulation was nevertheless unsatisfactory because it did not establish a clear distinction between States, the primary subjects of international law, and international organizations, the secondary subjects. As a result, the difference between the internal law of a State and the rules of an international organization was blurred. A State, being sovereign, created its own internal law and could unilaterally amend the provisions of that law. That was why the corresponding article in the 1969 Vienna Convention had been universally accepted. The constituent instrument of an international organization, on the other hand, its highest law, could not be amended by the international organization itself; the instrument was an international agreement concluded between the organization's member States. Accordingly, an international organization could not enter into treaties conflicting with its obligations under that instrument. The Soviet amendment did not change the text of article 27, paragraph 2; it merely added an essential element to it.

55. Mr. MOSTAFAVI (Islamic Republic of Iran) endorsed the Netherlands representative's remarks concerning Article 103 of the Charter of the United Nations. He had no objection to the Soviet amendment if it found sufficient support, but he preferred the existing text of the draft article.

56. Mr. HARDY (European Economic Community) said that article 27 was an important provision which should be considered in conjunction with article 46. There was no reason why States and international organizations should be accorded different treatment. Indeed, uncertainty and insecurity would be caused if parallel treatment were not accorded to international organizations. The text proposed by the International Law Commission should therefore be adopted in its present form.

57. Mrs. OLIVEROS (Argentina) considered it undesirable to refer to articles of one treaty in another; cross-references of that nature were always dangerous where the practical implementation of the treaties was involved. She agreed with the comments of the Netherlands representative concerning Article 103 of the Charter of the United Nations: article 30, paragraph 6, was a more appropriate place for a reference to that Article, or it might be mentioned in some general article. She supported the International Law Commission's text of article 27.

58. Mrs. THAKORE (India), said that her delegation approved the text of article 27 proposed by the Commission, which dealt with an extremely sensitive issue.

59. As to amendments submitted to that article, she stated that no one doubted the pre-eminent status of the United Nations in terms of Article 103 of its Charter, from which neither States nor international organizations could derogate. However, her delegation had doubts concerning the placing in article 27 of the amendment proposed by the United Nations, and it

fully agreed with the comments made by the representative of the Netherlands in that regard. In her view, the substance of the Soviet amendment was covered by article 46.

60. Mr. HERRON (Australia) said that the Soviet amendment ran counter to the provisions of article 27, paragraph 2, as proposed by the International Law Commission, and should therefore not be added to that paragraph. It dealt with the question of invalidity, and should therefore be incorporated elsewhere in the convention. His delegation had some difficulty with the United Nations amendment which, it seemed, would be of benefit only to the United Nations itself, Article 103 of the latter's Charter being part of the Organization's rules. In his view, paragraph 2 was intended, in parallel with paragraph 1, to refer to all international organizations. Furthermore, he did not see how even the United Nations could invoke Article 103 as a safeguard clause in the context of article 27 of the draft articles, which dealt with the question of conflict between the internal law of States or the rules of international organizations and treaty obligations. Article 103 of the Charter dealt specifically with the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, and provided that their obligations under the former should prevail in case of any conflict.

61. Mr. DUFÉK (Czechoslovakia) said that paragraph 2 dealt not with the question of the validity of a treaty but with the implementation of a treaty in force, a treaty concluded by duly authorized representatives of organizations and approved by the organization in accordance with its rules.

62. In examining the rule in article 27, paragraph 2, one must bear in mind that the relation of a State to its internal law is not the same as that of an international organization to its rules.

63. The rules of the organization, as defined in article 2, meant the constituent instruments, relevant decisions and resolutions and established practice—in other words, on one hand, rules of procedure—and, on the other, standards and rules of international law and constituent documents representing international agreements and international law as such. The rules of an organization therefore should not be compared with the internal law of a State. Furthermore, international organizations should not enjoy a more favourable position than States.

64. Article 27 developed the principle of *pacta sunt servanda* established in article 26. His delegation therefore could support the International Law Commission's text of paragraph 2.

65. The amendment proposed by the Soviet Union pointed out an important problem and might usefully be combined with the amendment of the United Nations, since they were very similar in content.

66. Mr. DALTON (United States of America) said that his delegation had no objection to a reference to Article 103 of the Charter of the United Nations in an appropriate place in the convention. However, it believed that article 27 was not the appropriate place, for

the reasons given by the representative of the Netherlands and other speakers.

67. The proposal of the Soviet Union involved enunciation of a new rule which the sponsor had indicated was a corollary to the rule of *pacta sunt servanda*. In his delegation's view, the proposed wording set forth an exception which did not belong in a section of the draft dealing with the observance of treaties. The United States supported the view expressed by a number of delegations that the Commission's text should be approved as it stood.

68. Mr. EIRIKSSON (Iceland) said that his delegation approved the text of article 27 as drafted by the International Law Commission.

69. Mr. BIN DAAER (United Arab Emirates) said that it was his delegation's understanding that Article 103 of the Charter of the United Nations, in referring to the obligations of the Members of the United Nations, concerned only States and not international organizations. Any reference to that Article in a paragraph dealing with international organizations was therefore inappropriate. For that reason his delegation could not accept either the United Nations amendment or that of the Soviet Union, and preferred the Commission's draft as it stood.

70. Mr. VAN TONDER (Lesotho) said that his delegation found it difficult to support the amendments proposed by the United Nations and the Soviet Union for the reasons given by previous speakers, particularly the representatives of the Netherlands, Pakistan and Greece. His delegation preferred the Commission's draft of article 27.

71. Mr. SANG HOON CHO (Republic of Korea) said that his delegation did not favour a broad escape clause which would allow an international organization to excuse itself for its failure to perform a treaty. However, the problem was basically one of interpretation, and the Commission's draft, which left the matter to be solved in accordance with articles 31 and 33, provided the best solution.

72. Mr. ABDEL RAHMAN (Sudan) expressed support for the Commission's draft of article 27. While his delegation appreciated the concern of their sponsors, it could not support the proposed amendments, since they would be inappropriate in article 27.

73. Mr. SKIBSTED (Denmark) said that he favoured retention of the International Law Commission's text in its present form for the reasons given by the representative of the Netherlands. The amendments to article 27 which had been submitted were not acceptable to his delegation.

74. Mr. WOKALEK (Federal Republic of Germany) expressed support for the Commission's text of the article. Like the representative of the Netherlands, his delegation had no objection to including the United Nations amendment as a proviso elsewhere in the Convention, either as a preambular paragraph or in a new article. The amendment submitted by the Soviet Union created problems, particularly in relation to paragraph 3 of article 46, and it would give undue advantage and privilege to international organizations.

75. The CHAIRMAN, summing up, said that while at the beginning of the discussion he had noted a certain hesitation on the part of speakers to take issue with the representatives of the United Nations and the Soviet Union, the more recent speakers had all given full support to the International Law Commission's draft. As had been pointed out in respect of the United Nations amendment, there was some danger in cross-referencing, and in any event a reference to Article 103 of the Charter of the United Nations already appeared in article 30. A number of speakers had expressed the view that article 46 would be the correct place for the amendment proposed by the Soviet Union. He invited the sponsors of the two amendments to comment on the discussion.

76. Mr. TALALAEV (Union of Soviet Socialist Republics) said that his delegation's intentions must have been misunderstood. Its amendment did not deal with the validity or invalidity but with the application of a treaty.

77. Mr. GOLITSYN (United Nations) said that he could not share the views expressed by the representative of the Netherlands and other speakers. Article 103 of the Charter of the United Nations was a reference to that Organization's generally recognized pre-eminent status. Treaties concluded not only by States but also by the Organization could not ignore it. That had been the reason for the proposal to include a reference to that Article at the beginning of paragraph 2. However, since such inclusion raised the question whether Article 103 of the Charter overrode all the draft articles, it might be advisable to postpone a decision on the United Nations amendment at least until article 30 was considered.

78. Mr. TALALAEV (Union of Soviet Socialist Republics) said that article 46 was in part V, section 2, of the draft articles, which dealt with the invalidity of treaties, whereas his delegation's amendment dealt with the question of application of treaties and the obligations involved. It might therefore be advisable to postpone further discussion of the amendment until article 46 was considered, and to consider in the meantime what other place might be appropriate for the Soviet amendment.

79. The CHAIRMAN said that in the light of those statements the Committee would postpone all further discussion of the United Nations amendment until it considered article 30, and would also postpone its decision on the amendment by the Soviet Union for the time being. Article 27 could not therefore be referred to the Drafting Committee, even though the majority of speakers appeared to be in favour of the International Law Commission's draft.

#### *Proposals for a new article*

80. The CHAIRMAN said that the proposals for a new article (A/CONF.129/C.1/L.19/Rev.1, L.27 and L.42) which had been submitted were concerned with the relationship between the 1969 Vienna Convention and the draft articles before the Conference. He did not propose to open the discussion of those texts at the present stage, because negotiations were in progress with a view to producing a single text and because there

were links between the question they dealt with and various existing provisions of the draft articles. The sponsors might, however, wish to introduce their proposals.

81. Ms. WILMSHURST (United Kingdom) said that since consultations were still in progress between the United Kingdom and Italian delegations, it would be preferable not to introduce the United Kingdom pro-

posal (A/CONF.129/C.1/L.27) until those consultations had reached a satisfactory conclusion.

82. Mr. GAJA (Italy) said that his delegation would also prefer to postpone the presentation of its amendment (A/CONF.129/C.1/L.42), in the hope that a joint text would be elaborated.

*The meeting rose at 5.55 p.m.*

## 15th meeting

Monday, 3 March 1986, at 11.10 a.m.

*Chairman:* Mr. SHASH (Egypt)

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

### Tribute to the memory of Mr. Olof Palme, Prime Minister of Sweden

1. The CHAIRMAN asked the Committee to observe a minute of silence in tribute to the memory of Mr. Olof Palme, Prime Minister of Sweden, who had been assassinated on Friday, 28 February 1986. Olof Palme had been a very distinguished statesman and had been entrusted with very important responsibilities by the United Nations in the course of his exceptional career.
2. He requested the representative of Sweden to convey the heartfelt condolences of the Conference to the family of Olof Palme and to the Swedish Government and people.

*The members of the Committee observed a minute of silence in tribute to the memory of Mr. Olof Palme.*

3. Mr. KRONHOLM (Sweden) expressed his sincere gratitude for the message of sympathy, which he would convey to the family of Olof Palme and to the Government and people of his country.

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

[Agenda item 11] (*continued*)

**Article 30 (Application of successive treaties relating to the same subject-matter)**

### Paragraph 6

4. The CHAIRMAN invited the Committee to consider paragraph 6 of article 30 and the amendments to it by Argentina and by Australia and Canada, together with the United Nations amendment to article 27 (A/CONF.129/C.1/L.37), which its sponsor had suggested should be discussed in connection with that paragraph.

5. Mrs. OLIVEROS (Argentina), introducing her delegation's amendment (A/CONF.129/C.1/L.44), said that treaty interpretation was one of the most important and difficult tasks of Ministries for Foreign Affairs. Their sole guide must be the actual text of the treaty, for attempts to interpret it according to the intention of the parties or the object and purpose of the treaty usually led to unnecessary controversy. Her delegation believed that in the interests of clarity, the text of a treaty should not contain cross-references to another instrument. Where it was desirable to refer to a provision of another text, that provision should be reproduced in full.

6. The International Law Commission's draft of article 30, paragraph 6, mentioned Article 103 of the Charter of the United Nations, which read: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The term "Members of the United Nations" meant, in accordance with Article 4 of the Charter, the States which accepted the obligations which the Charter contained. The reference to Article 103 of the Charter was thus exclusively to States, and not to international organizations, which were not Members of the United Nations.

7. Accordingly, if article 30, paragraph 6, was left as it stood, the important rule which it laid down would apply only to the States and not to the organizations which ratified the future convention. Her delegation's amendment sought to remedy that defect by replacing the present text of paragraph 6 by language which reproduced in full the rule embodied in Article 103 of the Charter of the United Nations, thus making it clear that the rule applied both to States and to international organizations.

8. Mr. HERRON (Australia), introducing the amendment in document A/CONF.129/C.1/L.45 on behalf of his own delegation and that of Canada, said that only paragraph 6 of article 30 was before the Committee. However, given the connection between the proposal to delete that paragraph and the suggested addition to paragraph 1 of the article, he trusted that the Committee would be willing to consider the amendment as a whole.

9. The purpose of the amendment was to remove a provision which the International Law Commission had described in paragraph (1) of its commentary to the article (see A/CONF.129/4) as "deliberately ambiguous", and to insert in the article a saving clause identical to the one in article 30 of the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup>

10. There had been uncertainty in the Commission whether the application of Article 103 of the Charter of the United Nations could be extended to international organizations. While the view of the amendment's sponsors was that the Article was binding on the United Nations itself, the main ground for their proposal was structural, namely, that if there was to be a saving clause, it should be at the beginning of paragraph 1, as in the 1969 Vienna Convention. It would thus clearly have the same application to the rights and obligations of States as it had in that Convention, and it might or might not apply to international organizations, depending on how the law on the subject was interpreted.

11. The Australian delegation, for its part, wished paragraph 6 to be deleted regardless of the decision taken about paragraph 1. It was not convinced that article 30 needed to refer to Article 103 of the Charter at all.

12. Mr. BERNAL (Mexico) said that the International Law Commission's commentary acknowledged the fact that the Commission had failed to solve a difficult problem. The hierarchical supremacy of the Charter of the United Nations over all other treaty obligations of Member States was a basic principle which had been clearly recognized in the 1969 Vienna Convention. Consequently, the obligations imposed by the Charter took precedence over any other obligation arising from a subsequent treaty, regardless of the subjects of international law which were parties to that treaty. The purpose of the two amendments before the Committee was the same, namely, to establish that in the event of conflict between the provisions of a subsequent treaty and those of the Charter of the United Nations the latter would prevail. The amendment by Australia and Canada had the merit of placing the saving clause in the most appropriate place, while the Argentine proposal was more explicit. The two proposals might conveniently be merged.

13. Mr. BOUCETTA (Morocco) wondered whether any failure to mention Article 103 of the Charter in article 30 would allow international organizations to conclude treaties without taking into account the provisions of the Charter. Such a situation would obviously be unacceptable. States had conferred primacy in their relations as individual entities on the obligations imposed on them by the Charter of the United Nations; it would therefore be paradoxical if they permitted themselves the possibility, when acting collectively through international organizations, of disregarding those obligations. His delegation therefore supported the proposal to introduce a proviso con-

cerning Article 103 of the Charter into article 30, paragraph 1.

14. Mr. RASOOL (Pakistan) said that the intentional ambiguity underlying paragraph 6 resulted mainly from a controversy over the application of the principles of the Charter of the United Nations to the treaties concluded by international organizations. The present position was that States, through an international organization, might be able to avoid their obligations under the Charter. His delegation therefore opposed paragraph 6 as it stood. It would prefer the Argentine proposal for amending it, among other things because the text proposed by Argentina avoided a cross-reference.

15. Mr. KOLOMA (Mozambique) said that Article 103 of the Charter of the United Nations applied to Members of the United Nations, which were unequivocally defined in Articles 3 and 4 as States; consequently, the article could not be said to apply to international organizations. Nevertheless, his delegation felt strongly that the content of Article 103 of the Charter, suitably adapted, should be embodied in the draft convention, either as a general article or as a separate paragraph of article 30. Of the different proposals put forward to that effect, it favoured the Argentine amendment.

16. Mr. DALTON (United States of America) said that in his view the reference by the International Law Commission in paragraph (1) of the commentary to article 30 to what it said were "deliberately ambiguous terms" was—to say the least—infelicitous. While he realized that it was impossible to draft a text on the highly complex subject of treaty law in such a way as to solve every conceivable problem in advance, the text must establish adequate guidelines that should make it possible to deal with foreseen and unforeseen difficulties if and when they occurred. He believed that in the present instance to speak of a possible conflict between the obligations existing under a treaty and those existing under the Charter of the United Nations, rather than between their provisions, would probably be as much as the text could do, as well as being a prudent course in the circumstances. It would avoid the risks inherent in treating the entire Charter as *jus cogens*, which it was not, and thereby opening the way to a great number of possible problems. He therefore suggested that the word "provisions" in the text proposed by Argentina should be replaced by the word "obligations". If the delegation of Argentina could accept that, paragraph 6 and the amended proposal might be referred to the Drafting Committee.

17. Mr. RIPHAGEN (Netherlands) pointed out that Article 103 of the Charter of the United Nations—which he believed should apply to international organizations—did in fact contemplate conflicts of "obligations", not of "provisions". That should be fully understood if any reference was made to the Article. As to the siting of such a reference, its proper place was perhaps not in article 30 but in a separate article, whereby it would have more general application. The article would establish a rule that in all cases of conflict between the obligations of international organizations parties to the treaty and those arising under the Charter of the United Nations, the latter would prevail.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

18. The reticence of the International Law Commission to pronounce on the applicability of Article 103 of the Charter to international organizations reflected its traditional attitude towards matters concerning the content of the Charter. But the Conference was entitled to pronounce on the subject, and should do so explicitly. Once it had decided on the substance of the matter, the rest would be a matter of drafting.

19. Mr. TUERK (Austria) agreed that Article 103 of the Charter of the United Nations should apply to international organizations. It was inconceivable that States should be able at law to form an international organization under conditions that relieved them of their obligations under the Charter. He believed that, of the proposals before the Committee concerning article 30, paragraph 6, the amendment by Australia and Canada dealt with the question of Article 103 in the most appropriate place.

20. He had sympathy for the explanation given in support of the Argentine proposal, but felt that if the text contained no direct reference to Article 103, it would stray too far from the Vienna Convention on the Law of Treaties. Were the Argentine proposal nevertheless considered acceptable, it should be amended as suggested by the United States. The Austrian delegation would have no objection to the matter being treated in a separate article.

21. Mrs. OLIVEROS (Argentina) said that her delegation accepted the change suggested by the United States. It could agree to the amended wording of its proposal being included in the draft as a separate article.

22. Mr. BARRETO (Portugal) supported the wording proposed by Argentina, which, for the reasons given by the Netherlands representative, should form a separate article.

23. Mrs. THAKORE (India) said that the Argentine proposal had the merit of being clearer than the proposal by Australia and Canada, and was improved by the change made by the United States. It should be referred to the Drafting Committee together with the Netherlands suggestion for a separate article concerning Article 103 of the Charter.

24. Mr. YIN Yubiao (China) observed that the proposals by Australia and Canada and by Argentina dealt with the same matter, and both deserved support. He believed that Article 103 of the Charter should apply to international organizations, which were instruments for collective action by States, and that the Conference should state so explicitly. He suggested that both the amendments should be referred to the Drafting Committee.

25. Mr. CRUZ FABRES (Chile) supported the Argentine proposal as amended by the United States. In view of the importance of the principle involved, the matter might well form the subject of a separate article.

26. Mr. SZASZ (United Nations) said that a reference to Article 103 of the Charter was perhaps even more important in article 30 of the draft convention than in the corresponding article of the 1969 Convention. It had a bearing not only on the question of successive treaties

but also on the recurrent issue of the relations between the constituent instruments of international organizations and the treaties they concluded. Although the International Law Commission might have explained its action as to Article 103 of the Charter in somewhat unfortunate terms, the fact that it occupied a paragraph of its own in the Commission's draft seemed to reflect that the latter shared the view of the importance of this matter.

27. In its written comments on paragraph 6 of the draft article, the United Nations had pointed out that Article 103 of the Charter could also have a bearing on other articles of the draft;<sup>2</sup> that still seemed true as far as articles 27 and 46 were concerned, for example. The suggestion by the Netherlands that a reference to Article 103 of the Charter might form the subject of a separate article therefore seemed very pertinent. Yet if that course was adopted, and if the new article indicated that all the other provisions of the draft were subject to Article 103 of the Charter of the United Nations, the future convention would be unique; the incorrect and unacceptable inference might be drawn from it that other treaties not containing a similar reference to Article 103 of the Charter were not so limited. Such an inference was less likely to be drawn were the reference to Article 103 attached to a specific article or articles in the draft convention; then it could be argued that the reference had been included *pro memoria*—purely as a reminder of the rightful pre-eminence that should be accorded to the Charter.

28. One solution to the problem might be to incorporate the reference to Article 103 in the preamble which in all likelihood would be prefixed to the future convention. The final preambular paragraph of the 1969 Convention seemed to offer a suitable model as far as wording and context were concerned.

29. If neither that solution nor the one put forward by the Netherlands was found acceptable, the United Nations would continue to believe that a reference to Article 103 of the Charter should appear in article 30—perhaps in the manner proposed by Australia and Canada, thereby ensuring reasonable conformity with the 1969 Vienna Convention—as well as in articles 27 and 46.

30. Mr. REIMANN (Switzerland) said his delegation considered that the application of the future convention must not lead to a violation of Article 103 of the Charter of the United Nations. The provision in that Article might usefully find reflection in the text of the instrument. His delegation had been particularly impressed by the very explicit Argentine proposal, and welcomed its sponsor's agreement that it should refer to possible conflicts of obligations and not of provisions. In regard to the place in the draft at which Article 103 of the Charter would be reflected, his delegation was open to suggestions, including the interesting one advanced by the representative of the United Nations that a suitable place for it might be the preamble to the draft convention.

<sup>2</sup> See *Yearbook of the International Law Commission, 1981*, vol. II, Part II (United Nations publication, Sales No. E.82.V.4 (Part II)), p. 198.

31. Mr. SOMDA (Burkina Faso) said that in his delegation's view, inasmuch as international organizations were not parties to the Charter of the United Nations, the question at issue could not be fully solved by the Australian and Canadian amendment. The amended Argentine proposal had the merit of being more explicit, and would prevent differences of interpretation arising in the future. His delegation therefore supported it and would have no objection to its forming the subject of a separate article.

32. Mr. SUCRE FIGARELLA (Venezuela) said that a general reference in the draft convention to the Charter of the United Nations as the higher-ranking legal instrument would be more appropriate than a specific reference to Article 103 of the Charter, and would cover international organizations as well as States. His delegation therefore supported the amended Argentine proposal; it introduced a necessary clarification into the draft. The amended wording could either be embodied in article 30 itself or form the subject of a separate article.

33. Mr. STEFANINI (France) said that the issue underlying article 30, paragraph 6, was extremely complex. Although his delegation had not objected to article 30 of the 1969 Vienna Convention, its position in regard to the present draft article was somewhat different. It was inclined to agree that, since international organizations were instruments of collective action by States, the latter should not be able to escape obligations imposed on them by the Charter through treaties concluded by international organizations of which they were members. But it did not think the Conference should embark on a discussion of that issue. The best solution, his delegation felt, would be to adopt the International Law Commission's text, in which the reference to Article 103 of the Charter appeared in a separate paragraph, but it would not object to the amendments proposed to paragraph 6 being referred to the Drafting Committee.

34. Mr. DROUSHIOTIS (Cyprus) said that his delegation supported the proposals by Argentina and by Australia and Canada, for the reasons stated by their sponsors.

35. Mr. GERVÁS (Spain) said that he approved the amended Argentine proposal, since it was clearer and more explicit than the Australian and Canadian amendment while being identical with it in content. He endorsed the Venezuelan representative's view of the Argentine proposal. He considered, however, that it would be advisable to refer both amendments to the Drafting Committee.

36. Mrs. DIAGO (Cuba) said that the Charter of the United Nations, by virtue of its Article 103, applied to States; that was reflected in paragraph 6 of article 30 of the Draft convention. His delegation too supported the Argentine proposal, since it would make the paragraph a provision of a general nature and thus applicable to the draft as a whole. He would have no objection if the provision formed the subject of a separate paragraph.

37. Mr. NEGREIROS (Peru) said it was clear from Article 103 of the Charter that the Charter applied to Members of the United Nations and not to international

organizations. In order to avoid differences of interpretation, not only about contractual obligations but also as to which of the instruments concerned should take precedence over the other, the rule in article 30, paragraph 6, should be stated in clear and categorical terms. It was not enough to refer solely to Article 103 of the Charter, and he therefore supported the amended Argentine proposal.

38. Mr. RESTREPO PIEDRARÍTA (Colombia) expressed his delegation's support for the Argentine proposal as orally amended by the United States. He would like the basic rule which it set out to take the form of a separate article. It was a rule of the utmost importance in regard to what was known as the hierarchy of norms in the international legal order.

39. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation favoured the inclusion in article 30 of a reference to the Charter of the United Nations. The amended Argentine proposal and the Australian and Canadian amendment should be referred to the Drafting Committee.

40. Mr. BOHTE (Yugoslavia) said that, while his delegation appreciated the International Law Commission's cautious approach to paragraph 6, it endorsed the attempts which the amended Argentine proposal and the Australian and Canadian proposal made to improve the paragraph. It found the former proposal the more precise of the two. Nevertheless, it considered that both proposals should be referred to the Drafting Committee, along with the suggestion made by the United Nations representative.

41. The CHAIRMAN suggested that the Argentine proposal, as amended orally by the United States, and the proposal by Australia and Canada should be referred to the Drafting Committee with a view to formulating the substance of article 30, paragraph 6, in an appropriate manner and deciding on the precise place of the new formulation in the draft convention.

*It was so decided.*

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

42. The CHAIRMAN said that no amendments had been proposed to article 38. He invited the Committee to consider the article.

43. Mr. STEFANINI (France) said that, in the discussion of the matter at the 1968-1969 United Nations Conference on the Law of Treaties, the French delegation had indicated that the reference in the text to the process of the development of customary law seemed injudicious in a legal instrument concerned with treaties between States.<sup>3</sup> The inclusion of a like article in the present text in regard to treaties between States and international organizations or between international organizations likewise seemed to add nothing to the clarity or balance of the text, and might cause confusion.

<sup>3</sup> See *Official Records of the United Nations Conference on the Law of Treaties*, (United Nations publication, Sales No. E.68.V.7), Summary records of the meetings of the Committee of the Whole, 35th meeting, para. 82.

It seemed particularly inappropriate that the draft convention should prejudice the way in which custom might affect the functioning of an international organization. His delegation did not believe that rules concerned with the institutional procedures of a particular international organization could, as a result of article 38, become generally applicable to other organizations. It continued to maintain that relations between an international organization and its member States did not generally lend themselves to the development of customary rules. However, his delegation would not oppose the adoption of article 38, since it had accepted the corresponding provision in the 1969 Vienna Convention.

44. Mr. CANÇADO TRINDADE (Brazil) said his delegation felt it necessary to distinguish three points in relation to article 38. The first was the question of the process whereby customary law was formulated, a matter not covered by article 38 but not unrelated to it. If by custom was meant the generalization of the practice of States accepted as law, evidence of custom was a relative matter. That was because some States publicized their national practice in international law in the form of digests or repertoires of international law, and thus might be regarded as having influenced the development of customary law more than those that did not. If the same definition of custom was applied to international organizations a similar phenomenon would be found. Organizations such as the United Nations or the Organization of American States, whose practice was widely publicized through repertoires and whose functions and powers were very widespread, might come to be regarded as influencing the development of customary law far more than a small technical organization engaged in specific operational activities in circumscribed sectors. However, that first point should not be confused with the purpose of article 38.

45. The second point concerned the interaction between treaties and customary law. For many years doctrine had conceded that treaties, as evidence of customary international law, might exert effects on non-parties, thus recognizing that treaty law could pass into customary law. The case law of the International Court of Justice contained examples of the interaction between treaties and custom: in the hostages case be-

tween the United States of America and Iran in 1980,<sup>4</sup> both treaties in force and general international law had been taken into account simultaneously; and in the Gulf of Maine case between the United States and Canada in 1984,<sup>5</sup> judicial recognition had been given to the view that signed but unratified codification conventions might contribute to the formation of customary law. In the latter case, the Court had had in mind certain portions of the United Nations Convention on the Law of the Sea.

46. His delegation's third and last point was the nature of the reservation embodied in article 38. After considerable discussion, the 1968-1969 United Nations Conference on the Law of Treaties had adopted, as the provision corresponding to the present draft article, the quite precise rule that for a norm to bind a third State as a customary norm of international law it ought to be "recognized as such". That requirement was maintained in the present draft. The point had been made at the 1968-1969 Conference that the provision simply endorsed the legitimacy of the process whereby rules expressed in treaties might become binding on non-parties through being recognized as customary rules. That did not mean, however, that treaties had legal effects in regard to third States or, by the same token, international organizations, for the source of the binding rules contained in them was custom, not the treaties themselves. Although article 38 did not, as he had already indicated, affect the process of formulation of customary law, that did not preclude the possibility that the effects of that process might extend to international organizations. His delegation could therefore support the text of article 38 as proposed by the International Law Commission.

47. The CHAIRMAN said that the Committee seemed prepared to accept the text of article 38 submitted by the Commission. Unless he heard any objection, he would take it that the Committee referred the text to the Drafting Committee.

*It was so decided.*

*The meeting rose at 12.40 p.m.*

<sup>4</sup> *United States Diplomatic and Consular Staff in Teheran, Judgment, I.C.J. Reports 1980*, p. 3.

<sup>5</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246.

## 16th meeting

Monday, 3 March 1986, at 3.30 p.m.

*Chairman: Mr. SHASH (Egypt)*

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

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

[Agenda item 11] (*continued*)

*Proposals for a new article (continued)\**

1. The CHAIRMAN said that two of the proposals submitted for a new article had many points in common. Since negotiations were still in progress between the sponsors of the proposals and other delegations, he would not press the sponsors to make a formal introduction. However, a short introduction would give other delegations an insight into the matter and perhaps also inspire suggestions that could lead to a common text.

2. Ms. WILMSHURST (United Kingdom), introducing her delegation's proposal (A/CONF.129/C.1/L.27) said that it concerned the relationship between the draft articles now before the Committee and the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup> In the debate on article 3, the United Kingdom delegation had pointed out (4th meeting) that the relationship between the two conventions was a matter that had been left unregulated by that article. On the same occasion the Expert Consultant had suggested that the Conference should consider the possibility of adding to the final clauses an article dealing with the relationship between the two conventions, an article which, the Expert Consultant had felt, should give the 1969 Vienna Convention priority.

3. The United Kingdom proposal had been made in the light of that statement by the Expert Consultant and of consultations with other delegations. The new article proposed was designed to safeguard the application of the 1969 Vienna Convention to relations between States parties to that Convention.

4. It might be thought that the scope of the draft articles, as defined in article 1, was clear enough. However, the problem with the draft articles as they stood was that article 1 might be read as having the effect that where there was a multilateral treaty to which a large number of States were parties and an international or-

ganization became a party to it, perhaps many years after the entry into force of that treaty, the régime which previously applied to the treaty, that of the 1969 Vienna Convention, would, upon the organization's becoming a party, be converted into the régime of the new convention. In the view of the United Kingdom delegation, the relations between States under such a treaty should be governed by the 1969 Vienna Convention if its States parties were also parties to that Convention. Its amendment would therefore safeguard the application of the 1969 Vienna Convention in every case where it would apply but for the entry into force of the convention now under consideration.

5. Some 70 States, most of which were represented at the present Conference, were either signatory or party to the 1969 Vienna Convention. States which were not parties to that Convention would not be affected by the proposal.

6. The United Kingdom delegation had no strong views on where the text it proposed should be placed in the convention. Should the Committee agree on the principle of safeguarding the application of the 1969 Vienna Convention, her delegation would be content to leave it to the Drafting Committee to decide where a new article or provision on the subject should be placed.

7. The United Kingdom delegation was engaged in consultations with the Italian delegation in an effort to produce a single text and thus avoid having two competing proposals designed to deal with the same problem in different ways. The Italian proposal went further than the United Kingdom one, in that it would remove from the scope of application of the draft convention all treaty relations between States, whereas the United Kingdom proposal would remove only those relationships between States which were parties to the 1969 Vienna Convention.

8. She recognized that many varied and complex legal issues arose from consideration of the web of treaty relations existing under the present draft convention and under the 1969 Vienna Convention. Having thus briefly introduced its own proposal, the United Kingdom delegation reserved the right, when the Committee took up the matter, to revert in greater detail to some of those issues.

9. Mr. GAJA (Italy), introducing this delegation's proposal for a new article (A/CONF.129/C.1/L.42), said that it represented an attempt to resolve a problem which had not been dealt with in the draft articles prepared by the International Law Commission. The Commission had deliberately refrained from considering the question of the relations between the draft convention and the 1969 Vienna Convention. Nor had the Commission stated whether relations of States un-

\* Resumed from the 14th meeting.

<sup>1</sup> Official Records of the United Nations Conference on the Law of Treaties (United Nations publication, Sales No. E.70.V.5), p. 287.

der a treaty as between themselves were covered by the draft convention under consideration. Although it might be concluded that such relations were in fact covered by the existing articles, his delegation felt that it would be better for the Conference to address the problem through a clear and specific provision.

10. Such a provision could state either that relations of States under a treaty as between themselves were also covered by the draft convention, or that such relations were not so covered. One reason why his delegation had opted for the latter solution was that a codification conference on the law of treaties between States had already been held.

11. The 1969 Vienna Convention expressly specified in its article 3, paragraph (c), that the Convention applied "to the relations of States as between themselves under international agreements to which other subjects of international law are also parties". Thus, according to that Convention, the relations of States under treaty as between themselves were also covered, and there was therefore no need to codify the rules further. The relations between States parties to that Convention and States which were not parties to it were governed by customary international law. Indeed, the rules laid down by the 1969 Vienna Convention might in many respects be considered as a codification of existing customary law on the subject.

12. The purpose for which the present Conference had been convened was to deal with, first, the relations between States on the one hand and international organizations on the other, and secondly, with the relations of international organizations as between themselves.

13. It was not necessary that treaty relations among States parties to a treaty to which an international organization was also a party should be governed by the new convention. In a multilateral convention, relations between the parties were almost invariably regulated by a variety of rules, if only because some States were parties to codification conventions.

14. His delegation had sought to represent the situation in the form of a chart, which had been circulated to the Committee, showing that relations under even one treaty were highly complex and that various régimes applied. The issue before the Conference was whether the relations between States which were parties to the 1969 Vienna Convention were regulated by the draft convention. He noted that the effect of the texts pro-

posed by Cape Verde (A/CONF.129/C.1/L.19/Rev.1) and the United Kingdom would be to leave the relations between States parties to the 1969 Vienna Convention outside the scope of the new convention. The additional effect of his delegation's amendment would be to exclude from the scope of the draft convention the relations between a State party to both conventions and a State party only to the draft convention.

15. It would add a considerable element of complication to make the draft convention applicable to the relations of States as between themselves. In the case of the United Nations Convention on the Law of the Sea, for example, the relations of States as between themselves would be subject to the 1969 Vienna Convention or to customary rules until an international organization acceded to the Law of the Sea Convention. The application of the 1969 Vienna Convention and the customary rules would then be superseded by the new convention, which would obviously not apply to all States. The new convention would thus be under a different régime in time, and that régime would change once again if the organization decided to withdraw from the Law of the Sea Convention. In that case the new convention would cease to apply, and the régime governing the relations of States as between themselves would revert to that of the 1969 Vienna Convention and customary rules. Thus, the applicability of rules to relations of States as between themselves would depend on the attitude taken by an international organization under the multilateral treaty. Moreover, application of the new convention to relations between States would produce the rather startling result that, while it would not even mention treaties between States in its title, it would in fact become the text governing relations of States under a treaty as between themselves with regard to many important multilateral conventions.

16. In conclusion, he said that the purpose of his delegation's amendment was to make it clear that the 1969 Vienna Convention and the customary rules which were developed on the basis of that Convention remained the legal rules governing the relations of States under a treaty as between themselves.

17. The CHAIRMAN expressed the hope that the Italian and United Kingdom delegations would be able to agree on a single proposal, as that would simplify the Committee's work.

*The meeting rose at 4 p.m.*

## 17th meeting

Tuesday, 4 March 1986, at 10.15 a.m.

*Chairman: Mr. SHASH (Egypt)*

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

[Agenda item 11] (*continued*)

**Article 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)**

1. Mr. WANG Houli (China), introducing his delegation's amendment to article 45 (A/CONF.129/C.1/L.46), said that the article as drafted by the International Law Commission made a distinction between States and international organizations.

2. Firstly, it placed international organizations in a more favourable position than States, since loss of a right through renunciation, as applied to international organizations, involved a positive act, while acquiescence, as applied to States, was passive and negative. That would create inequality between States and international organizations as parties to a treaty and, in the view of his delegation, was unnecessary, because while it was a fact that the structures of international organizations differed from those of States, their standing organs of authority were always in place.

3. Secondly, the Commission's commentary to its draft article 45 (see A/CONF.129/4, para. (6)) explained that the Commission had wished to avoid the passivity implied by the use of the word "acquiesces" in subparagraph 2 (b). However, the term "acquiesced" would have the same connotation in subparagraph 1 (b) when applied to States, and should also be avoided in that case.

4. Thirdly, his delegation was of the view that there might be circumstances in which the distinction between States and international organizations might not protect the latter. Where an international organization acquiesced in the validity of a treaty and subsequently changed its opinion and produced a ground for invalidating the treaty, it would have to take responsibility for any damage caused to other parties to the treaty. To avoid such a situation, his delegation believed that States and international organizations should enjoy equal treatment in the matter of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. However, to take account of the fact that international organizations differed in their structure from States, the conduct of an organization should be defined as the conduct of its competent organ. The term "competent organ" should therefore be retained in the article. In the view of his delegation, the questions he had raised

could be answered by combining the two paragraphs of article 45 as proposed in his delegation's amendment.

5. Mr. BERNAL (Mexico), introducing his delegation's amendment to article 45 (A/CONF.129/C.1/L.47), said that the proposal to delete the reference in subparagraph 2 (b) of the article to the "competent organ" of the organization was intended simply to bring the text into line with the drafting of previous articles which had been debated and approved in principle. In the course of discussion of article 2, subparagraph 1 (j), it had been widely held that the word "organization" certainly included all of the entity's organs. The same view had been maintained in the discussion of article 7, subparagraph 4 (b). While his delegation was aware of the points made by the International Law Commission in its commentary, it believed that, for the sake of consistency with earlier articles, the words "the competent organ" should be deleted from article 45.

6. Mr. SOLTANE (Tunisia) said that his delegation had no difficulty in accepting article 45 as drafted by the International Law Commission, since it reflected the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup> Nevertheless, his delegation found it difficult to understand the reasoning of the Commission in replacing "acquiesced" by "renounced" in subparagraph 2 (b). He could not agree that acquiescence was necessarily passive, since there could well be occasions when it expressed deliberate choice or will.

7. With regard to the term "competent organ", since the reason for its inclusion in article 45 was stated by the International Law Commission to be the same as for its inclusion in article 7 and as the term had now been deleted from article 7, he wondered whether it was logical to retain it in article 45. While his delegation was aware of the difficulties raised by paragraph 2 of article 45 and thought that the treatment of international organizations should be different from that of States, subparagraph 2 (b) seemed to satisfy the particular requirements of the structure of international organizations.

8. His delegation felt that the reference to "competent organs" should be deleted, as had been proposed by Mexico, in order to achieve harmony with article 7 as redrafted.

9. Mr. PISK (Czechoslovakia) said that his delegation could accept the Commission's draft article as it stood. Having two separate paragraphs relating to the conduct of States and international organizations respectively was consistent with the overall pattern of the Commission's draft.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

10. Both the Chinese and Mexican amendments contained some interesting ideas, and they might therefore be sent to the Drafting Committee for consideration, although his delegation would prefer to see the words "the competent organ" retained.

11. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation favoured approval of article 45 as drafted by the International Law Commission. Its position on subparagraph 2 (b) was that there must be a reference to the "competent organ". There were unfortunately occasions when decisions which had not in fact been adopted by the competent organ of an organization were nevertheless alleged to constitute official acts of the organization concerned. The amendment calling for deletion of the reference to the "competent organ" was therefore unacceptable.

12. Mr. GAUTIER (France) said that article 45, paragraph 1, which was similar to the corresponding provision of the 1969 Vienna Convention, was a specific application of the rule of general international law under which the continuing absence of protest by a State in respect of a legal circumstance concerning it constituted acceptance on its part. His delegation had no fundamental objection to that rule as contained in article 45, paragraph 1, but wished to point out that the article seemed implicitly to exclude loss of the right to invoke violation of a rule of *jus cogens* as a ground for invalidating a treaty. His delegation therefore felt obliged to express a reservation in respect of that provision, which, in its view, would extend the application of article 53 of the draft convention, which was unacceptable to his delegation.

13. With regard to the two subparagraphs of paragraph 2, he felt that the distinction made by the International Law Commission between acquiescence and renunciation was a wise one and should be maintained. The silence of an international organization might, because of the complexity of the organization's structure, be due to factors quite other than the competent organ's implicit assent. For that reason, his delegation would at present have great difficulty in supporting an amendment such as that proposed by Mexico which sought to delete the term "competent".

14. The Chinese amendment, by combining the two subparagraphs of paragraph 2, simplified the draft convention. His delegation could accept such an amendment if necessary. However, it would prefer to keep to the text proposed by the International Law Commission.

15. Mr. MIMOUNI (Algeria) said that article 45 covered two forms of renunciation of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. One was explicit acceptance, the other acquiescence. Those grounds should apply equally to States and international organizations, and that was the aim of the amendment proposed by Mexico.

16. With regard to the use of the term "competent organ", that term had been included by the International Law Commission only in second reading, in connection with article 7, paragraph 4. As the term did not appear in article 7, it would be logical to exclude it also

from article 45, subparagraph 2 (b). His delegation believed that the words "*ou ce motif*" should perhaps be added at the end of the French version of the Mexican amendment.

17. Mr. ROMAN (Romania) said that his delegation found the International Law Commission's draft satisfactory. The Commission had rightly noted that there were fundamental structural differences between States and international organizations which required the establishment of special rules in respect of the latter. That was why paragraph 2 should exclude the case, referred to in article 46, of invalidation of the consent of an international organization to be bound by a treaty because of violation of a rule of the organization concerning its competence to conclude treaties. An organization which, in its conduct, was governed by its relevant rules must be considered as having renounced the right to invoke a manifest violation of a rule concerning its competence. In his delegation's view, the differences between States and international organizations fully justified the formulation in subparagraph 2 (b) using the terms "competent organ" and "renounced".

18. While his delegation would have no particular difficulty in accepting the amendments that had been proposed, it nevertheless preferred the draft prepared by the Commission.

19. Mr. ULLRICH (German Democratic Republic) said that his delegation supported the International Law Commission's draft of article 45. The amendment proposed by China involved, in his view, simply a matter of drafting. His delegation would prefer to see the two separate paragraphs of the article retained.

20. Mr. ECONOMIDES (Greece) said that his delegation supported article 45 as drafted by the Commission. However it would not object to the amendment proposed by Mexico, since that text reflected the legal position of an international organization as an entity subject to international law and obligations. The amendment proposed by China was, in the view of his delegation, a matter for the Drafting Committee.

21. Mr. DENG (Sudan) said that his delegation supported the text prepared by the International Law Commission, but would like to see the Mexican amendment adopted for the sake of consistency with article 7, as amended. With regard to the amendment proposed by China, his delegation considered that the two-paragraph form of the article was preferable.

22. Mr. BARRETO (Portugal) said that his delegation was aware of the difficulties presented by article 45, but could nevertheless accept the draft proposed by the International Law Commission. However, his delegation could also accept the amendment proposed by Mexico, for the sake of consistency with article 7. He agreed with the Algerian representative's observation concerning the omission of the words "*ou ce motif*" at the end of subparagraph 2 (b) in the French version of that amendment, and he wondered if the representative of Mexico could explain the reason for that omission. In his view the amendment proposed by China was a matter for the Drafting Committee.

23. Mr. NGUYEN TIEN CUC (Viet Nam) said that in the view of his delegation the agreement referred to

in subparagraphs 1 (a) and 2 (a) should be explicitly expressed by both States and international organizations, recognizing the fact that in both cases that would be done through the competent organs. His delegation therefore could not accept subparagraphs 1 (b) and 2 (b). He agreed that the amendments proposed by China and Mexico should be referred to the Drafting Committee.

24. Mr. ALMODÓVAR (Cuba) said that, although his delegation was generally in favour of the draft article proposed by the International Law Commission, it had some reservations regarding subparagraph 1 (b). His delegation found it unacceptable that a sovereign State, by virtue of remaining silent, should be considered to have consented to the validity of a treaty. In the view of his delegation, such consent required an express act. He felt that the amendment proposed by China was simply a matter for the Drafting Committee. While his delegation might have been inclined not to accept subparagraph 2 (b), it found the wording proposed in the Mexican amendment acceptable. As both versions of the paragraph had some merit, he agreed that the amendment should be sent to the Drafting Committee.

25. Mr. GÜNEY (Turkey) said that his delegation found the International Law Commission's draft of article 45 quite satisfactory. However, the amendments proposed by China and Mexico might remove ambiguities, without affecting the substance of the original draft. They should therefore be referred to the Drafting Committee together with the suggestion made by the representative of Algeria, concerning the words "*ou ce motif*".

26. Mrs. THAKORE (India) said that it was necessary to consider whether an international organization might renounce its right to invoke a ground for invalidating a treaty under the circumstances envisaged in article 45 by express agreement, as provided in subparagraph 1 (a), or by acquiescence by reason of conduct, as provided in subparagraph 1 (b), in the same way as a State. While it might be desirable, as proposed in the Chinese amendment, to avoid inequalities between States and international organizations, significant structural differences between the two suggested that, on balance, it would be preferable to maintain the distinctions envisaged in the text prepared by the International Law Commission. The Mexican amendment, the substance of which had already been agreed to in regard to article 7, could be referred to the Drafting Committee.

27. Mr. RIPHAGEN (Netherlands) said that his delegation was in sympathy with the amendment proposed by Mexico because, in respect of conduct which might be considered as constituting renunciation of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty, there was no difference between States and international organizations. For the conduct to be that of the international organization, it had to be imputable to that organization. That was not the same as the conduct of the competent organ. Indeed, there might be doubts about the area of competence of organs, for example with regard to competence to conclude a treaty, to renounce a right or to perform any other act. If the

conduct was imputable, there was no reason to distinguish between international organizations and States.

28. Referring to the example given by the International Law Commission in paragraph (7) of its commentary to article 45, he pointed out that the conclusion of a treaty by the organ of an international organization competent to conclude treaties might be followed by the allocation of funds by the organ competent in financial or budgetary matters. The fact of allocating funds might be considered as conduct of a competent organ renouncing the right to invoke the ground for invalidating the treaty, despite the fact that the organ in question was not competent in the matter of concluding treaties. His delegation therefore felt that from the legal standpoint it was preferable to make no distinction between States and international organizations, and that there was a sound legal basis for the amendment proposed by Mexico.

29. Mr. RASOOL (Pakistan) said that his delegation would have favoured the amendment proposed by China if it had concerned a drafting matter only, but the use of the word "acquiesced" in relation to both States and international organizations was a substantive change.

30. His delegation could support the amendment proposed by Mexico, since it not only maintained consistency with articles previously approved but also avoided problems that might result from a reference to the "competent organ".

31. Mr. OGISO (Japan) said that his delegation supported the Chinese proposal to merge paragraphs 1 and 2 of article 45, since it would considerably simplify the text. The proposal should be sent to the Drafting Committee for further consideration. His delegation was also in favour of the amendment submitted by Mexico, since it gave consistency with the new text of article 7 approved by the Committee.

32. Mrs. OLIVEROS (Argentina) said that in the opinion of her delegation the amendments submitted by China and Mexico were not of a drafting nature. It was therefore inappropriate to leave their consideration to the Drafting Committee.

33. Her delegation supported the Mexican proposal to omit the reference to the "competent organ" from subparagraph 2 (b). Clearly, the conduct of an international organization could result from the act of any of its organs, and not only from those that were competent to conclude treaties.

34. As for the Chinese amendment, although it had the merit of simplifying the drafting of article 45, it had the drawback of departing from the basic philosophy of distinguishing between States and international organizations.

35. Mr. DROUSHIOTIS (Cyprus) expressed support for the Mexican amendment, which he felt would improve the text of article 45.

36. As for the amendment by China, it was of a drafting nature and could be referred to the Drafting Committee.

37. Mr. MOTSIK (Ukrainian Soviet Socialist Republic) said that the International Law Commission's text

of article 45 was acceptable to his delegation. The two amendments which had been submitted did not, in his view, constitute improvements. In particular, he urged that the reference to the "competent organ" of an international organization should be retained in subparagraph 2 (b).

38. Mr. CASTROVIEJO (Spain) said that his delegation could accept the Commission's text, but nevertheless found attractive the two amendments which had been proposed. The Mexican amendment had the merit of simplifying the text of subparagraph 2 (b), the Chinese amendment that of a more compact drafting.

39. His delegation favoured referring the two amendments to the Drafting Committee.

40. Mr. MONNIER (Switzerland) said that his delegation had been at first inclined to accept article 45 as it stood but, on reflection, it found that the Mexican amendment constituted a welcome improvement. That was not only because of the Committee of the Whole's decision to eliminate the reference to "the competent organ" of an international organization in article 7, subparagraph 4 (b), but because that reference was an interference in the internal distribution of powers within the organization concerned. The reference to "the competent organ" of the organization, if retained, might therefore give rise to difficulties, particularly since the conduct in question might well not be that of the organ of the organization which was competent to conclude treaties. For those reasons, his delegation supported the Mexican amendment.

41. Mr. SIEV (Ireland) said that his delegation favoured the International Law Commission's text but had no objection to the Chinese amendment being referred to the Drafting Committee for consideration, since it had the merit of simplifying the wording.

42. His delegation also favoured referring to the Drafting Committee the Mexican amendment, which called for elimination of the reference to the "competent organ", since the decision had already been taken to omit those words in article 7, subparagraph 4 (b).

43. Mr. DALTON (United States of America) urged that the amendment by China be referred to the Drafting Committee; it had the merit of bringing draft article 45 closer to the corresponding provision of the 1969 Vienna Convention on the Law of Treaties.

44. The Mexican amendment also improved the draft article, especially in view of the decision already taken not to mention the "competent organ" in article 7, subparagraph 4 (b). That amendment, too, should be referred to the Drafting Committee.

45. Mr. LUKASIK (Poland) said that his first impression had been that the Chinese and Mexican amendments were simply drafting proposals, and that they could therefore easily be referred to the Drafting Committee. The discussion which had taken place, however, had made it perfectly clear that those amendments were not simply matters of drafting. Both amendments, if adopted, could destroy the delicate balance achieved by the International Law Commission after its long consideration of the article. The text adopted by the Commission was based on the existence of struc-

tural differences between States and international organizations. It was because of those differences that different conditions were specified in paragraphs 1 and 2 respectively of article 45. His delegation believed that the distinction drawn by the Commission in that article was fully justified, and accordingly urged that the text of the article should be left unchanged.

46. Mr. SANYAOLU (Nigeria) said that his delegation favoured adoption of the Mexican amendment, which was consistent with the decision already taken to include no reference to the "competent organ" in subparagraph 4 (b) of article 7.

47. The amendment submitted by China, which included such a reference, should not, he felt, be adopted in its present form.

48. Mr. NGUAYILA (Zaire) said that his delegation supported the International Law Commission's text. As for the amendments submitted by China and Mexico, they had certain merits and could be referred to the Drafting Committee if the majority so desired.

49. Mr. EIRIKSSON (Iceland) said that his delegation supported the Chinese amendment, subject to deletion of the reference to the "competent organ" as proposed in the Mexican amendment.

50. Mr. SANG HOON CHO (Republic of Korea) said that his delegation found the Commission's draft acceptable in principle. He agreed with those speakers who considered the two amendments to have merit. Regarding the Chinese amendment, he had some doubts as to the advisability of combining in one paragraph the two separate provisions relating to States and to international organizations. He could, however, support the Mexican amendment.

51. Mr. KRISAFI (Albania) considered that the two amendments were definitely not of a purely drafting nature. His delegation preferred the International Law Commission's text for article 45.

52. The CHAIRMAN noted that certain delegations were of the opinion that the two amendments contained elements of substance. Nevertheless, the general view had been in favour of referring article 45 to the Drafting Committee with those two amendments. In the absence of objection, he would take it that the Committee agreed to refer draft article 45, together with the amendments contained in documents A/CONF.129/C.1/L.46 and L.47, to the Drafting Committee.

*It was so decided.*

#### **Article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties)**

##### **Paragraphs 2, 3 and 4**

53. Mr. TUERK (Austria), introducing on behalf of Austria and Japan an amendment to article 46 (A/CONF.129/C.1/L.48/Rev.1), said that in the corresponding article 46 of the 1969 Vienna Convention, two requirements were laid down for invoking violation of a provision of internal law regarding competence to conclude treaties. The first was that the violation should be manifest and the second was that it should concern a

rule "of fundamental importance". In the draft article 46 before the Committee, those two requirements were specified both for States and for international organizations. There was, however, a significant departure from the 1969 formula as far as international organizations were concerned.

54. The 1969 provision had been based on the objective theory, thereby departing from the subjective theories held before 1969. In the present draft article, the objective approach was retained in paragraph 2, where States were concerned, but a subjective approach was adopted for the case of violation of the rules of an international organization. In accordance with paragraph 4, a violation was stated to be manifest if "it is or ought to be within the knowledge of any contracting State or any contracting organization".

55. The objective criterion adopted in 1969—and retained for the case of States in paragraph 2 of article 46—was based on the concepts of good faith and of the "normal practice of States". The International Law Commission had departed from that criterion with regard to international organizations on the ground that the concept of "normal practice" did not apply to organizations. His delegation was not at all convinced by that reasoning. It believed that a practice, if not a normal practice, of international organizations could well be said to exist. It was for those reasons that his delegation and that of Japan had submitted their proposal to amend paragraphs 2 and 4 of article 46 so as to bring them into line with the language and the approach of the 1969 Vienna Convention.

56. Mr. RAMADAN (Egypt), introducing his delegation's amendment (A/CONF.129/C.1/L.52), said that the International Law Commission had arrived at the conclusion that there did not exist any normal practice of international organizations regarding the person or organ competent to express its will to be bound by a treaty. In the case of States, the head of State, the head of Government and the foreign minister were, in accordance with normal State practice, recognized as competent in the matter, but where international organizations were concerned, the officials in charge of external relations differed greatly from one organization to another.

57. Relying on those considerations, the Commission had decided that it had no model on which to base the determination of who was entitled to express the consent of an international organization to be bound by a treaty. It had accordingly adopted a new approach, namely that of relying on the criterion of awareness of the violation. It should, however, be clear to all that that criterion could be based only on the essential principle of good faith, which was the basic principle of international relations.

58. The International Law Commission's commentary, and in particular its paragraph (7) (see A/CONF.129/4), was significant in that regard. It stated that if the international organization's treaty partners were "aware of the violation, the organization will be able to invoke it against them as a ground for the invalidity of its consent in accordance with the principle of good faith, which applies both to States and to organizations". He stressed the Commission's con-

clusion that, in such a case, the international organization would be able to invoke the violation as a ground for invalidating its consent.

59. The purpose of the Egyptian amendment was therefore precisely to introduce into paragraph 4 that basic principle of good faith, eliminating at the same time the concept of awareness embodied in the words "if it is or ought to be within the knowledge". Apart from any other consideration, language such as "ought to be within the knowledge" could only give rise to doubts and to difficulties of interpretation.

60. In conclusion, he stressed that his delegation's amendment would bring article 46 into line with the corresponding provision of the 1969 Vienna Convention and would introduce into paragraph 4 the objective criterion which was already present in paragraph 2 of the draft article.

61. Mr. ABDENNADHEUR (Tunisia) introducing his delegation's amendment (A/CONF.129/C.1/L.54), said that article 46 involved the problem of the security to which the parties to a treaty were entitled. His delegation would agree that, contrary to States, international organizations did not have a well-established practice. It therefore accepted that, with regard to the question under discussion, the treatment of international organizations should be different. His delegation could not, however, accept that for purposes of defining the manifest character of a violation of a rule of fundamental importance ambiguous criteria should be chosen, such as those set forth in paragraph 4 of article 46, for that would open the door to divergent interpretations.

62. The provisions of paragraph 4 had the further drawback of offering the international organizations a whole range of opportunities for disputing treaties concluded by them by alleging defects of consent, while States remained always bound by the objective criterion laid down in paragraphs 1 and 2. The treaty partners of international organizations would thus be placed at a disadvantage, since the organizations would be better protected by paragraphs 1 and 2 of article 46 than the States by paragraphs 3 and 4.

63. The fact that international organizations did not have a "normal practice" might perhaps justify some adjustment with regard to the defects of consent which could be invoked by them, but it should not lead to creating paradoxical situations or codifying ambiguity. The problem was that of determining how something "came to the knowledge" or "ought to be within the knowledge" of a contracting State. That formula introduced an element of subjectivity—a subjectivity which would not help to solve the problem, but would certainly undermine the security of the treaty partners.

64. For those reasons his delegation had submitted its amendment, the effect of which would be to retain the idea of a violation being considered manifest if it was within the knowledge of any contracting State or any contracting organization. The words "ought to be within the knowledge", however, would be replaced by "should normally have been within the knowledge". The issue of whether such knowledge existed had to be determined objectively by verifying whether the treaty

partners, bearing in mind their position in relation to the international organization, were in a position to know of the violation.

65. The adoption of any other criteria of a subjective nature would lead to treaty insecurity, bearing in mind in particular that the international organizations did not have a "normal practice" and did not have identical legal systems. The matter was one of importance to treaty partners of international organizations; they could not be made to bear the burden of investigating the extensive documentation of an international organization in order to ascertain its important rules.

66. Mr. SZASZ (United Nations), introducing the amendment proposed by the International Atomic Energy Agency, the International Maritime Organization, the International Monetary Fund and the United Nations (A/CONF.129/C.1/L.55), remarked that the matter concerned one of the asymmetries between States and international organizations that lay at the heart of the Conference's work.

67. It was clear that the internal law of a State, including even its most important constituent instrument, its Constitution, was truly internal—and in no sense comprised international law binding on or even necessarily known to international entities. That could not be said in the case of international organizations, whose member States were privy to all their internal rules, to their decisions and resolutions and to their practice. In particular, the constituent instruments of international organizations, which were for the most part included in international treaties of which States as parties were obviously aware, were duly registered in accordance with Article 102 of the Charter of the United Nations.

68. According to the terms of article 46, paragraph 3, as drafted by the International Law Commission, an international organization would not be able to invoke the violation even of its constituent instruments in order to vitiate its consent to be bound by a treaty; did that not imply the sanctioning of possible violation of those instruments? If a treaty were entered into in violation of a constituent instrument, that would presumably constitute a violation of that treaty.

69. The four-organization amendment sought to remedy such a potential state of affairs by excepting—solely for the purposes of paragraph 3 of article 46—the constituent instruments of an organization from its rules as defined in draft article 2, subparagraph 1 (j); from another point of view, it sought to indicate that any provision of a constituent instrument was, as a treaty, "a rule of fundamental importance" for the purposes of paragraph 3 of article 46.

70. It should be pointed out that the issue of Article 103 of the Charter of the United Nations, raised and discussed during the Committee's earlier deliberations on articles 27 and 30, was also of some relevance to the question now under discussion. Like any other constituent instrument, the Charter of the United Nations was, so to speak, hidden in the background of the International Law Commission's draft of paragraph 3, and at risk in the manner he had described; but the case of the Charter was special, in that Article 103 provided that the Charter should always be superior to other treaties. However, the sponsors of the four-organiza-

tion amendment and the other international organizations which had been consulted had determined not to build their proposal around that particular case, but rather to seek the broadest possible formulation of their concerns, which would be those of all international organizations whose constituent instruments were treaties.

71. Mr. ULLRICH (German Democratic Republic) expressed his delegation's strong support for the basic idea underlying article 46. It also supported the four-organization amendment to paragraph 3, but it would prefer the word "including" in the final phrase to be replaced by "in particular".

72. The Commission's draft of paragraphs 2 and 4 did not entirely satisfy his delegation, which was not happy with the subjective formulation "if it is or ought to be within the knowledge". The amendment by Austria and Japan had the merit of providing identical wording for each of those paragraphs and of referring to less subjective, and thus more acceptable, criteria.

73. His delegation believed that the draft article, together with the Austrian-Japanese amendment and the Egyptian amendment, which tended in the same direction, could be transmitted to the Drafting Committee.

74. Mr. OGISO (Japan) said that as a co-sponsor of the amendment already introduced by the representative of Austria he merely wished to suggest to the Drafting Committee the possibility of combining the separate provisions in a single paragraph.

75. The Egyptian amendment, in omitting from the provisions relating to international organizations any reference to the criterion of normal practice, established a difference in the treatment of organizations and States that was unacceptable to the Japanese delegation.

76. Mrs. VLASOVA (Byelorussian Soviet Socialist Republic) said that her delegation approved the International Law Commission's draft in principle, but believed that it would be improved by the incorporation of some of the proposed amendments. In particular, the four-organization amendment very rationally sought to include a reference to constituent instruments in paragraph 3; she believed that it should appear in the text before the reference to rules of fundamental importance. The Austrian-Japanese amendment, and the similarly intentioned Egyptian amendment, also deserved support. She considered that all the proposals, together with the Commission's draft, could be referred to the Drafting Committee.

77. Mr. FISCHER (Holy See) pointed to the connection between article 46—which his delegation considered to be of the utmost importance—and article 27. Both reflected the relationship between international and municipal law; they established that the former was the prevailing system *vis-à-vis* national rules, the only exception being in regard to the conclusion of treaties; there, internal law mattered, but only if the internal rule violated was of fundamental importance and if the violation was manifest.

78. Since it would patently be a step backwards in the development of international law if an exception were

made in favour of treaty obligations entered into by international organizations, the International Law Commission had determined in article 27 that the principle of *pacta sunt servanda* should, with the reservations expressed in article 46, prevail over any conflicting internal rules of international organizations.

79. He submitted, with all due respect for the special position of those bodies, that they lived, once established, in the world of international law, which in turn was based on good faith and the security of treaty relations. Any attempt, therefore, to accord priority to their internal rules over their treaty obligations would constitute a serious threat to the security of legal relations between them and their treaty partners.

80. His delegation deplored the fact that in paragraph 4 the definition of the "manifest" character of a violation lacked any reference to an objective criterion, and that the reference to the principle of good faith envisaged during the first reading had now been omitted. The Austrian-Japanese amendment appeared to overcome those defects by replacing a purely subjective criterion with a more objective one, as well as by reintroducing the principle of good faith. A similar improvement was offered by the Egyptian amendment. His delegation could therefore support those proposals. It had reservations, however, with regard to the Tunisian amendment, which omitted any reference to the principle of good faith.

81. Mr. RIPHAGEN (Netherlands) observed that while paragraphs 1 to 3 of article 46 quite clearly harked back to the 1969 Vienna Convention on the Law of Treaties, and the Austrian-Japanese proposal concerning paragraph 4 also obviously returned to that Convention, the difference introduced in the Commission's draft of paragraph 4 was a matter of drafting only; it introduced no unacceptably subjective criterion: to refer to what "ought to be" known was to refer to some norm of knowledge that must be considered objective.

82. With respect to international organizations, on the basis of its belief that they lacked "normal practice" the Commission had evidently been concerned to depart from the formula used in the 1969 Vienna Convention with respect to States. However, its draft did not abandon the objective element; it simply introduced another factor, to be linked with normal practice and good faith where the application of paragraph 4 was concerned. He considered that the International Law Commission's text, together with the Austrian-Japanese and the Egyptian amendments, could be referred to the Drafting Committee. On the other hand, he had some difficulties with the Tunisian amendment, particularly because it omitted any reference to good faith, which was, after all, a tenet of international law in relations between States.

83. The four-organization amendment posed problems for the Netherlands delegation. While the International Law Commission, after lengthy discussion and consideration of other drafts, had decided—rightly, he believed—to deal in principle with States and international organizations in the same way when making a distinction between internal rules and internal rules "of fundamental importance", the sponsors of the amend-

ment appeared to be suggesting that any rule contained in a constituent instrument was of fundamental importance. That was manifestly not the case, when all the organizations and rules involved were taken into account. The proposal seemed to alter considerably the substance of everything contained in the draft articles. His delegation would therefore have to oppose acceptance of that amendment.

84. Mr. STEFANINI (France) said that his delegation found the International Law Commission's draft of the article, which dealt with a particular application of the principle of good faith, to be generally satisfactory. It considered that the words "*devrait être objectivement évidente*" in the French version of paragraph 2 should—in conformity with the juridically and grammatically more correct wording of article 46, paragraph 2, of the Vienna Convention—be replaced by "*est objectivement évidente*". In paragraph 3, the term "rule of fundamental importance" lacked precision; it would doubtless be impossible, however, to find a better or clearer term.

85. In the light of those considerations, his delegation was unable to support the amendments which had been proposed.

86. Mr. RASOOL (Pakistan) said that his delegation supported the Austrian-Japanese amendment, which followed closely the formulation in the 1969 Vienna Convention, established symmetry and avoided the risk of problems resulting from conflicting interpretations. His delegation would also have fully approved the Egyptian amendment for the same reasons had it not omitted the reference to normal practice, for reasons that, if understandable, were not altogether convincing. It believed that a combination of the criteria of practice and good faith would take care of all situations. The Tunisian amendment, by introducing the qualification "normally", appeared to create a problem similar to that which it sought to solve.

87. His delegation believed that all the amendments proposed, being inspired by the same intention, might be referred to the Drafting Committee.

88. Mr. HOLDER (International Monetary Fund), making, first of all, some comments of a general nature, noted the balance struck in the draft articles between a fairly considerable amount of prescription in specific provisions, and flexibility. It was important to take account of the fact that the practice of international organizations was developing and not to inhibit its development, having regard to the diversity of the organizations themselves and the desires of the parties to international agreements, whether organizations or States. Stability of expectations—*pacta sunt servanda*—was a major general objective to which, for obvious reasons, organizations such as the International Monetary Fund and the World Bank attached the utmost importance. The integrity of the organizations and their legal and financial credibility must be maintained, in accordance with their charters and in the interest of their members.

89. A goal of the present Conference should be to produce a treaty of practical use to the international organizations. While the objective appeared to be that

the draft articles under consideration should constitute residual rules (that was what the International Law Commission had indicated in 1982), the draft articles clearly contained general prescriptions that would have considerable, even constitutional, impact on international organizations. The Fund anticipated, on the basis of the rules of procedure of the Conference and subject to the final clauses adopted, that international organizations would have the option of acceding to the new convention. It was therefore most important that the latter be compatible both with their constituent instruments and with their practice.

90. Against that background, and as a co-sponsor of the amendment to article 46 in document A/CONF.129/C.1/L.55, he endorsed the comments by the representative of the United Nations. The Commission's text contained no criterion for determining objectively what constituted a "rule of fundamental importance". That was in contrast with the treatment accorded to the concept of what was "manifest". The legal adviser of an international organization would doubtless be inclined to consider that the rules contained in its constituent instrument were indeed of fundamental importance—especially if that instrument dealt with general principles. In a sense, therefore, the four-organization amendment merely sought to elucidate that point. He believed that the proposal was in the spirit of the International Law Commission's commentary, particularly that in its 1982 report.

91. Mr. ADEDE (International Atomic Energy Agency), speaking as a sponsor of the four organizations' amendment, said that the rationale of the proposal had already been explained. Basically, the sponsors considered that, since no attempt had been made to define the term "a rule of fundamental importance", it would be useful to make it quite clear that the constituent instrument of an international organization could contain such a rule. His delegation had also sponsored the amendment because it considered it essential to give international organizations the right to invoke their constituent instruments, where appropriate, in order to achieve the purposes of article 46, paragraph 3.

92. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation supported in principle the amendment proposed by the four organizations, but would suggest that the last part of paragraph 3, as thus amended, should be reworded to read "... unless that violation was manifest and concerned constituent instruments or any other rule of fundamental importance". The Drafting Committee might wish to consider that suggestion. His delegation could also accept the Austrian-Japanese amendment and the Egyptian amendment.

93. Mrs. DIAGO (Cuba) said that her delegation could support the amendments proposed by Austria and Japan, Egypt and the four organizations, all of which aimed at improving and amplifying the Commission's text, although it considered that the Austrian-Japanese amendment was most in keeping with the purposes of the 1969 Vienna Convention.

94. Mr. BERNHARD (Denmark) said that his delegation could have accepted the draft article as proposed

by the International Law Commission, but found merit in the attempts of Austria, Japan and Egypt to bring that text more into line with the corresponding provisions of the 1969 Vienna Convention. It therefore supported the amendments proposed by those countries and agreed that they should be referred to the Drafting Committee.

95. The four-organization amendment, however, was too far-reaching, and his delegation would therefore not recommend its adoption.

96. Mr. AL-JUMARAD (Iraq) said that his delegation approved the first three paragraphs of the text proposed by the International Law Commission. It was unable to accept the four-organization amendment, which gave rise to the problems to which the Netherlands representative had referred.

97. With regard to article 46, paragraph 4, it noted that the Tunisian amendment took account of one aspect which had been disregarded in the text submitted by the Commission, and that the Egyptian amendment provided that good faith should be the main consideration. Since those two amendments were complementary, the Committee might wish to refer them to the Drafting Committee.

98. He had certain reservations concerning the Austrian-Japanese amendment, particularly in regard to its reference to the normal practice of international organizations, since, in his delegation's view, such practice was not established and could not therefore be invoked.

99. Mr. SANYAOLU (Nigeria) said that his delegation favoured an objective test, such as had been adopted for the 1969 Vienna Convention, rather than a subjective one, such as that in the Commission's draft, and it saw no reason to introduce different criteria in the present text. It therefore supported the amendments proposed by Austria and Japan, Egypt and Tunisia, all of which aimed at substituting an objective for a subjective test. In its view, those amendments should be referred to the Drafting Committee.

100. While his delegation sympathized with the views expressed by the international organizations sponsors of their amendment, it pointed out that the definition of the term "rules of the organization" in article 2, subparagraph 1 (j), included constituent instruments. It would therefore have difficulty in supporting that amendment.

101. Mr. ECONOMIDES (Greece) said that his difficulty with article 46 arose from the difference in régime between paragraphs 2 and 4. Whereas the former provided that, in order to establish that a violation was manifest, the test should be an objective one based on the criteria of good faith and the normal practice of States, the latter provided for the single criterion of knowledge. That difference of approach—*in abstracto* versus *in concreto*—was not justified, in his view, and paragraph 4 should therefore be amplified and improved.

102. Referring to the amendments before the Committee, he said that he regarded the introduction of the word "normally", as proposed in the Tunisian amendment, as an improvement, since it underlined the objective nature of paragraph 4. So far as the rest of the

amendment was concerned, however, he had the same difficulties as with paragraph 4 of the Commission's draft. The Egyptian amendment was better, but was still not altogether satisfactory since it made no mention of practice. The Austrian-Japanese amendment, on the other hand, had his delegation's full support, since it provided for an identical régime in the case of both international organizations and States.

103. He was unable to support the amendment of the four organizations, which seemed both unnecessary and illogical. In his view, the expression "the rules of the organization regarding competence to include treaties" covered the rules contained in constituent instruments, and he was therefore surprised to see constituent instruments treated as though they were something different from the rules of the organization, particularly given the definition of "rules of the organization" in article 2, subparagraph 1 (j).

104. Mr. WANG Houli (China) said that his delegation supported the Austrian-Japanese amendment and the Egyptian amendment, and agreed that they should be referred to the Drafting Committee.

105. Mr. DENG (Sudan) said that, for the reasons already indicated by the representatives of the Holy See and the Netherlands, both the Austrian-Japanese amendment and the Egyptian proposal clarified the International Law Commission's text and removed the subjective test. Those two amendments could therefore be referred to the Drafting Committee. The amendments of Tunisia and the four organizations were, however, unacceptable to his delegation, as they did not seek to remove the element of subjectivity.

106. Mr. ABDENNADHEUR (Tunisia) observed, with reference to his delegation's amendment, that if a contracting State or a contracting organization was aware of a violation it would be able to invoke that violation in accordance with the principle of good faith, as was pointed out in the International Law Commission's commentary to article 46.

107. Mr. CASTROVIEJO (Spain) said that the main thrust of draft article 46 was acceptable to his delegation. However, the Austrian-Japanese amendment had the merit of offering homogeneous wording and of being close to the corresponding provision of the 1969

Vienna Convention. It therefore had his delegation's support. The subject of the four-organization amendment to paragraph 3 was already dealt with in article 2, subparagraph 1 (j).

108. Mr. MONNIER (Switzerland) said that the difference between paragraphs 2 and 4 of draft article 46, which dealt with imperfect ratifications, stemmed from the fact that while, according to the International Law Commission, there was a normal practice of States in the matter of a manifest violation of their internal laws or rules regarding competence to conclude treaties, there was no such normal practice of organizations. That statement, however, required qualification: the normal practice of States was the same for all States in its broad lines, but there were also some differences. For instance, in some countries, under their constitutions, certain treaties had to be submitted for approval not only by parliament but also by the people, which was a further obstacle to be surmounted before the authorities concerned could express the consent of the State to be bound.

109. While it could be said that in the case of international organizations there was no general practice comparable to that of States, there was the normal practice of each individual organization which must be known to the contracting parties concerned. Accordingly, although there was a difference between States and international organizations in the matter of practice, it was not as clear-cut as article 46 would suggest.

110. With that in mind, and so far as paragraph 2 of article 46 was concerned, he did not think it would be advisable to depart from the text of the corresponding provision of the 1969 Vienna Convention, and his delegation therefore supported the Austrian-Japanese amendment. The terms of paragraph 4 did not differ basically from those of paragraph 2, but there was a subjective element in the latter which could be a source of uncertainty, and hence of difficulty. The Austrian-Japanese amendment therefore constituted a welcome improvement.

111. His delegation also supported the Egyptian amendment.

*The meeting rose at 1.05 p.m.*

## 18th meeting

Tuesday, 4 March 1986, at 3.20 p.m.

Chairman: Mr. SHASH (Egypt)

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

[Agenda item 11] (continued)

Article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties) (concluded)

Paragraphs 2, 3 and 4 (concluded)

1. Mr. HERRON (Australia) said that paragraph 3, modelled by the International Law Commission on paragraph 1 of article 46 of the 1969 Vienna Convention

on the Law of Treaties,<sup>1</sup> was to be welcomed to the extent that it ensured consistency and stability in the procedural rules whereby an international organization could invoke a violation of its rules as invalidating its consent to be bound by treaty. However, on the issue of when such a violation was manifest, paragraph 4, in specifying that it "ought to be within the knowledge" of any contracting party, departed from the language of the 1969 Vienna Convention and introduced an unacceptable element of subjectivity and uncertainty; moreover, it suggested that the circumstances in which the rule might be invoked were different for international organizations.

2. As far as possible, the rule for international organizations should be the same as for States. For many States, especially developing States and States which were not members of the international organization seeking to invoke the rule, the rules of the organization regarding competence to conclude treaties might not be readily available, i.e., be "manifest". It would hardly be acceptable for the organization to rejoin that they "ought" to have been. Objections had been expressed in the International Law Commission to the notion of normal practice in relation to international organizations on the ground that there was no practice common to all organizations. However, his delegation did not regard that as an insuperable obstacle to the inclusion of the term "normal practice" in paragraph 4 as had been proposed by Austria and Japan in their amendment (A/CONF.129/C.1/L.48/Rev.1), since the word "normal" could be interpreted flexibly and be considered in the light of the organization seeking to invoke the rule.

3. His delegation would have difficulty in agreeing with the subjective formulation proposed for article 46, paragraph 4, by Tunisia (A/CONF.129/C.1/L.54). It would have less trouble with the Egyptian proposal for that paragraph (A/CONF.129/C.1/L.52), since it was an improvement on the Commission's text and did contain an objective element. However, its language was not parallel to that of the corresponding paragraph in article 46 of the 1969 Convention. All in all, therefore, his delegation supported the proposal by Austria and Japan, which brought both paragraph 4 and paragraph 2 of articles 46 into line with the corresponding article of the 1969 Vienna Convention. If that proposal was adopted, the Drafting Committee should be able to reduce the two paragraphs to a single paragraph qualifying the term "violation" in both of the other paragraphs of the article.

4. With regard to the proposal by four international organizations to amend article 46, paragraph 3 (A/CONF.129/C.1/L.55), he was not convinced that the addition which they suggested was necessary; also, it might have the effect of giving some provisions of constituent instruments a status which they did not have. However, his delegation would not oppose the change if it was generally acceptable to the Committee.

5. Mr. LUKASIK (Poland) said that the use of the terms "manifest" and "fundamental" gave rise to sub-

jective interpretations. That was even more the case when those terms were applied to international organizations, since violations of their rules might be assessed differently by different member States. There was in fact no way to equate the internal law of a State with the rules of an international organization. His delegation supported the Austrian-Japanese amendment to paragraph 2 and the Egyptian amendment to paragraph 4. The term "normal practice" in the Austrian-Japanese proposal for paragraph 4 was troublesome.

6. His delegation approved in principle the addition to paragraph 3 proposed by four organizations, but would like the paragraph to be worded along the lines suggested at the previous meeting by the German Democratic Republic and the Union of Soviet Socialist Republics. He did not share the view that the constituent instrument did not always contain rules of fundamental importance; he could not conceive of any other rules being more important. Furthermore, references made at the previous meeting to the "internal" rules of international organizations were inaccurate: their constituent instruments were rules of international law.

7. Mrs. GOLAN (Israel) said that although there was an understandable tendency to model the draft convention on the 1969 Vienna Convention, a clear difference existed between international organizations and States, and therefore different criteria might have to be applied to their relations. Article 46 should embody the principle of good faith, as well as both a subjective and an objective criterion for determining the manifest character of a violation, according to the case. Her delegation was therefore satisfied with the International Law Commission's wording of paragraph 4. In view of the various amendments which had been submitted to stress the objective criterion, she suggested that paragraph 4 should be referred to the Drafting Committee to ensure that both types of criteria were clearly brought out. Her delegation supported the amendment proposed by the four organizations to paragraph 3.

8. Mr. WOKALEK (Federal Republic of Germany) said that his delegation was basically in favour of the Commission's text of article 46. The amendments proposed by Austria and Japan, Egypt and Tunisia were mainly of a drafting nature. He had some preference for the Austrian-Japanese proposal, although he had difficulty with the term "normal practice", which seemed to imply practice that was the same for all international organizations. The amendment of the four organizations caused his delegation some concern. The text of article 46 must endeavour to maintain a balance between legal security for those negotiating in good faith with an international organization and the rules of that organization. The term "fundamental importance" in paragraph 3 was sufficiently comprehensive, and encompassed the organization's constituent instrument. If the amendment to paragraph 3 was adopted, a constituent instrument might be a source of power to invalidate a treaty, which was in the nature of *jus cogens*. That would confer undue privilege on international organizations.

9. Mrs. THAKORE (India) said that the Commission's text of article 46 would be improved by the

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

Austrian-Japanese amendment and brought into line with the corresponding text of the 1969 Vienna Convention. That proposal should be referred to the Drafting Committee, together with the Egyptian amendment, which also contained constructive ideas. The wording proposed by Tunisia might create difficulties. With regard to paragraph 3 of the article, she endorsed the view expressed by the Greek representative at the previous meeting that the amendment by the international organizations was superfluous in view of the definition of the expression "rules of the organization" in article 2, subparagraph 1 (j).

10. Mr. SANG HOON CHO (Republic of Korea) agreed with the observation in paragraph (5) of the International Law Commission's commentary to article 46 (see A/CONF.129/4) that, if account was taken of the presence of one or more organizations in treaty relations, different wording from that of the 1969 Vienna Convention should be adopted, and that it was the normal practice of States which served as the basis to which the other parties to the treaties were entitled to refer. In the case of international organizations, it was appropriate that the "manifest" character of a violation should be determined by the criterion of knowledge. Although criticism had been levelled at the subjectivity of such a criterion, he considered that an objective assessment would always be feasible if regard was had to the circumstances which ought to enable any contracting party to obtain the knowledge in question. His delegation suggested that the Austrian-Japanese and Egyptian amendments to paragraphs 2 and 4 should be referred to the Drafting Committee together with the original draft, because essentially they proposed the same criteria. It approved the Commission's text for paragraph 3 of the article.

11. Mrs. JONZY (European Economic Community) said that the International Law Commission had decided against including a reference to the normal practice of international organizations in the definition of "manifest violation" in article 46, paragraph 4, because it considered that, in view of their diversity, there were "no general guidelines or standards by which the basis for the conduct of the treaty partners of an organization may be defined", as it said in paragraph (6) of its commentary to article 46. However, it might be wondered whether that position was not somewhat too categorical, since the Commission had recognized in paragraph (7) of its commentary to article 7 (*ibid.*) that the highest-ranking official of an organization was usually considered in practice as its representative for the purposes of expressing consent to be bound by a treaty. In the case of the Community, the constituent treaties contained very specific rules about treaty-making procedure, from which an established practice had been developed. The Community therefore considered that its practice in the matter could be regarded as similar to that of a State. It therefore supported the Austrian-Japanese amendment.

12. Mr. ALMEIDA LIMA (Portugal) said that in principle his delegation approved the International Law Commission's text, which took a positive approach to the subject-matter of article 46. It might nevertheless be improved through the adoption of the Austrian-

Japanese amendment. The Egyptian amendment was similar in effect but did not refer to practice, and that was needed for an adequate definition of a manifest violation in the case of an international organization. The Tunisian proposal lacked a reference to good faith, which was an essential element of the rule to be expressed in paragraph 4 of the article. His delegation had difficulty with the amendment to paragraph 3 proposed by the international organizations, because not all the provisions of the constituent instruments of international organizations could be regarded as rules of fundamental importance. He suggested that the amendments by Austria and Japan and by Tunisia should be referred to the Drafting Committee with the Commission's text.

13. Mr. KOURULA (Finland) recalled that in its advisory opinion of 20 July 1962,<sup>2</sup> the International Court of Justice had expressed the view that, if it was agreed that action by the Organization was within the scope of the functions of the Organization, but alleged that the action in question had not been carried out in conformity with the division of functions which the Charter of the United Nations prescribed, it was irregular as a matter of the internal structure of the Organization; and that both national and international law contemplated cases in which a body might be bound as to third parties by the *ultra vires* act of an agent. The same opinion had been brought out by the International Law Commission in paragraphs 3 and 4 of article 46. His delegation considered that the rules of an organization were externally relevant in a negative sense, i.e., if they contained restrictions on the capacity of the organization. Accordingly, under paragraph 3 international organizations were, in cases of manifest violations, allowed to refer only to those rules of fundamental importance of such a character that they limited the treaty-making capacity of such organizations *vis-à-vis* third States. His delegation therefore found it difficult to regard the amendment of the international organizations as an improvement on the existing text. It had no difficulty in supporting the Austrian-Japanese proposal.

14. Mr. EIRIKSSON (Iceland) said that he supported the International Law Commission's text as amended by the Austrian-Japanese proposal.

15. Mr. TUERK (Austria) said that his delegation approved the Commission's text of paragraph 3, which was consistent with that of paragraph 1. Although in principle it was ready to accept the idea underlying the amendment of the international organizations, he wondered whether the reference in it to constituent instruments was not too rigid. Was every provision in a constituent instrument really a rule of fundamental importance? The constituent instrument of an international organization was comparable to the constitution of a State. Certainly, rules of fundamental importance were enshrined in a constitution, but not all its norms were of fundamental importance in the sense of paragraph 3. If the Committee wished to include a reference to constituent instruments in that paragraph, it

<sup>2</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p. 151.

would be best if the concluding part of the paragraph read: "... rule of fundamental importance, including in particular those contained in the constituent instruments . . .".

16. Mr. TEPAVICHAROV (Bulgaria) said that even in article 46 it must be borne in mind that States and international organizations were not equal. Parallelism with the corresponding provision of the 1969 Vienna Convention was necessary in paragraph 1, but paragraph 3 was correctly asymmetrical. He supported the four-organization amendment to that paragraph, which was intended to clarify the notion of rules of fundamental importance by reference to the constituent instruments of the organization. Although it might be conceded that, as the Austrian representative had said, not all the provisions of constituent instruments were of fundamental importance, it was equally true that all the rules of fundamental importance were to be found in those instruments. His delegation could support the Austrian-Japanese amendment to paragraph 2, but it preferred the Egyptian proposal in regard to paragraph 4; the notion of normal practice was difficult to define in respect of international organizations, because each organization had its own practice. The amendment proposed by Tunisia was inappropriate.

17. Mr. UNAL (Turkey) said that, while his delegation had no difficulties with the Commission's text, it could support the joint proposal by Austria and Japan, which sought to establish a parallel between the 1969 Vienna Convention and the draft articles. The Egyptian proposal had similar intentions and substantially improved the text. Both proposals might therefore be referred to the Drafting Committee. His delegation fully understood the idea underlying the Tunisian proposal, but wished to point out that it related only to paragraph 4 of the article and dealt only with international organizations which, in the context, should be treated like States. His delegation took the view that the addition proposed in the amendment of the international organizations would create difficulties, and it therefore could not support it.

18. Mr. VASSILENKO (Ukrainian Soviet Socialist Republic) said that in the opinion of his delegation the provisions in article 46 were properly balanced in principle. They proceeded from the particularities and distinctive characteristics of the special provisions of the internal law of States, on the one hand, and the special provisions of the rules of international organizations, on the other. They were precisely the criteria for assessing situations in which treaties—concluded by subjects of international law so different in their nature—should be recognized as legally valid or invalid.

19. The amendment of the international organizations, which contributed to a more specific reflection of the particularities of the provisions in the rules of international organizations as compared to the provisions of the internal law of States, merited particular attention in this connection. The fact that the concept of "rules of the organization" had still not been defined could not serve as a convincing argument against that amendment, since the main element in any definition of such rules would be the constituent instrument of the organization.

20. The amendment of Austria and Japan could serve for editorial improvements in paragraph 2 of article 46, while the amendment of Egypt could serve for improving paragraph 4 of that article. Along with these editorial improvements it should be pointed out that the use of a term in the Austria-Japan amendment was not clear, as it could be given different interpretations, in the Russian language, to mean: "customary practice" (*pratique coutumière*), "usual practice" (*pratique habituelle*) or "normal practice" (*pratique normale*). To prevent a misunderstanding, it would be better to use the term "established practice".

21. Mr. SZÉNÁSI (Hungary) expressed support for the proposal by Austria and Japan and for that of Egypt. Criticism had been voiced about the amendment submitted by the international organizations, but, as his delegation understood it, that proposal did not imply that every provision of a constituent instrument was of fundamental importance. The scope of article 46, as reflected in its title, was confined to rules concerning the treaty-making competence of an international organization; consequently, the reference to the rules of the organization in paragraph 3 did not embrace all the rules of an international organization, as did article 2, subparagraph 1 (j), but only those which regulated competence to conclude treaties. The international organizations' amendment did not therefore involve the constituent instrument as a whole. It merely stated that those provisions of the constituent instrument which concerned competence to conclude a treaty were of fundamental importance. Since the constituent instruments of international organizations were rarely explicit about competence to conclude treaties, a reference to all the rules which they contained should not cause any difficulty. His delegation supported the oral proposal made by the Soviet Union at the previous meeting; the suggested change of word order for the concluding part of paragraph 3 appropriately reflected the idea underlying the paragraph. On the whole, his delegation considered that all the proposals submitted for article 46 should be referred to the Drafting Committee.

22. Mr. DUFEK (Czechoslovakia) said that the Commission's draft was a satisfactory solution to the question of the relationship between the invalidity of treaties, the internal law of States, the rules of international organizations and their competence to conclude treaties; it also expressed the view that there was no "normal practice" of organizations. The proposal by Austria and Japan would not interfere with the development of practice in international organizations. That amendment was therefore acceptable, and might be referred to the Drafting Committee. The proposal by Egypt deserved attention, but the Committee would need to consider how the criterion of good faith should be established. His delegation could support the amendment submitted by the international organizations, which might also be referred to the Drafting Committee. However, it might be desirable to clarify paragraph 3 further along the lines suggested by the representative of the Byelorussian Soviet Socialist Republic at the previous meeting.

23. Mr. SATELER (Chile) said that his delegation attached special importance to the provisions of arti-

cle 46, particularly when those provisions were taken in conjunction with article 27, in emphasizing the supremacy of international law in regard to the law of treaties and international responsibility. The Commission's draft was a balanced one and deserved support. However, some of the amendments to it might improve the text, particularly the proposal by Austria and Japan. In the light of the observations made by the representative of the Netherlands at the previous meeting, that amendment, together with the proposal by Egypt, might usefully be referred to the Drafting Committee, since neither involved a question of substance. The points made by the representative of the United Nations in introducing the amendment proposed by the international organizations were persuasive. However, it must be borne in mind that, unlike the internal law of States, the constituent instruments of international organizations were international agreements which were legally binding under international law. In that respect, the article should not provide a basis for interpretations which ignored the place of the fundamental principle of respect for and observance in good faith of international agreements. His delegation could therefore support the Commission's draft as well as the amendments of the international organizations, Egypt, and Austria and Japan.

24. Mr. DALTON (United States of America) expressed his delegation's support for the amendment proposed by Austria and Japan, which established an objective standard of determining when article 46 should apply. In developing the corresponding article of the 1969 Vienna Convention, the International Law Commission had indicated that the objective of an article such as article 46 was the establishment of a reasonable provision for the security of legal relations between treaty partners. Austria and Japan's proposal met that standard. The proposal made by the international organizations did not, and consequently his delegation could not support it: it widened the number of provisions on which an international organization might seek to rely in asserting the invalidity of its consent to be bound by a treaty and would weaken the security of legal relations under treaties concluded by international organizations. Some speakers had said that the scope of the additional words in that amendment "including the constituent instruments of the organization" would not broaden in a major way the rule in article 46. However, constituent instruments of international organizations were frequently not labelled in such a way that it became easy for a negotiating State to identify precisely which articles of the constituent instrument authorized treaty-making. For example, where an agreement with the United Nations was concerned, what Article or Articles of the Charter would be considered in determining whether it contained a rule on invalidity of consent that would be relevant if the United Nations wished to allege that the provisions of the Charter relating to the conclusion of treaties had not been complied with? The problem was even more difficult under the charters of many other international organizations, which were more complicated and more detailed than the Charter of the United Nations. For example, the treaty establishing the European Economic Community had several hundred articles, some

of which dealt with treaty-making capacity and were clearly labelled as such, whereas others which might be the source of treaty power were not so labelled. The proposal by the international organizations would therefore put a greater burden on States negotiating with them in trying to determine what the treaty-making capacity of the organization was, and would increase the possibility for weakening the stability of treaty relations. For that reason his delegation could not support it.

25. Ms. WILMSHURST (United Kingdom) said that in considering article 46, her delegation had started from the obvious fact that the Commission's draft laid down some basic rules on competence to conclude treaties. It felt that the same basic exception in paragraphs 1 and 3, and accordingly the description of that exception in paragraphs 2 and 4, should be stipulated for States as for international organizations. However, it had some difficulty with the wording of paragraph 4, which gave no guidance as to how to interpret whether a violation ought to be within the knowledge of a State or an organization. With that in mind, her delegation supported the amendment proposed by Austria and Japan, particularly in respect of paragraph 2, which aligned the present draft article with that of the 1969 Vienna Convention. The amendment proposed by the international organizations, with or without the Soviet Union's oral amendment, caused considerable concern to her delegation, which shared the views expressed on the subject by the representative of the Netherlands. The debate on the same article in the 1968-1969 United Nations Conference on the Law of Treaties had been difficult and delicate. The article concerned the invalidity of treaties, and had therefore to be handled with great care. It was not sufficient to refer to all aspects of the constituent instruments of an organization and to say that all of those aspects concerned a rule of fundamental importance. It was possible to envisage procedural rules about the competence or capacity to conclude treaties which would not be rules of fundamental importance. Her delegation was therefore unable to support the amendment proposed by the international organizations, and expressed the hope that it would not be referred to the Drafting Committee.

26. Mr. WIBOWO (Indonesia) said that all the proposed amendments aimed at changing the element of subjectivity present in the draft article into a criterion of objectivity. His delegation had difficulty with the phrase "ought to be within the knowledge" in paragraph 4 of the Commission's draft and was in favour of removing all possibility of differences of interpretation. It therefore agreed with the amendments proposed by Austria and Japan and Egypt. It could not support either the Tunisian proposal, since it omitted the element of good faith, or the amendment proposed by the international organizations, which for the reasons explained by the representative of the Netherlands at the previous meeting it found unnecessary.

27. Mr. SZASZ (United Nations) said that it had not escaped the international organizations that had sponsored an amendment that most delegations which had spoken had not expressed support for it. On the other hand, the representatives of the international organ-

izations had not been totally convinced by the opposing arguments. In view of the divergent opinions expressed, the best solution might be to add, after the words "rule of fundamental importance" the words "including, in particular, those contained in the constituent instruments of those organizations". Such wording would be in line with a number of suggestions made during the discussion.

28. The CHAIRMAN suggested that the amendment of the international organizations, as orally revised by the representative of the United Nations, might remain in abeyance until the Committee resumed its discussion of article 2, subparagraph 1 (j), with which it was closely linked.

29. Most delegations had indicated that they had no basic difficulty with the Commission's text for article 46, and a substantial number of them had expressed the view that the amendments by Austria and Japan and by Egypt would improve the drafting. He assumed that the representative of Tunisia would not insist that the Committee take a decision on his delegation's amendment, since it had given rise to doubts on the part of a number of delegations. He therefore suggested that the Committee should approve the Commission's text for article 46 and refer it to the Drafting Committee, together with the amendments of Austria and Japan and of Egypt.

*It was so decided.*

**Article 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal)**

30. Mr. RAMADAN (Egypt), introducing his delegation's amendment (A/CONF.129/C.1/L.53), said that its aim was to eliminate the element of obscurity to which subparagraph 1 (b) of article 56 gave rise. In its commentary to the article (see A/CONF.129/4), the International Law Commission had admitted that difficulties of application of treaties between States had arisen in connection with the corresponding provision of the 1969 Vienna Convention and had indicated that similar problems could result from the Commission's wording of the subparagraph in the present draft. In view of the difficulty of defining the nature of those treaties for which denunciation or withdrawal would be admissible, and in view of the fact that, under international law, States or international organizations could not abrogate commitments arising from an international treaty unless the parties to that treaty approved, it would be better to delete subparagraph 1 (b).

31. Mr. STEFANINI (France) said that, in asking for the inclusion of article 56 in the list of articles to be discussed by the Committee, his delegation had been guided by two considerations. In the first place, it would have been inappropriate for the Committee to pass over a question which was closely linked with that of article 27, since both articles dealt with observance of treaties in relation to the internal law of States and the rules of organizations. In substance, but with two exceptions relating to the intention of the contracting parties and to the nature of the agreement, article 56 affirmed a general principle prohibiting the denuncia-

tion of a treaty which did not make provision for denunciation. In practice, cases could be imagined in which the inflexibility of the rule as worded would render that principle largely inoperative.

32. His delegation's second concern was that if there was uncertainty as to which treaties between States could or could not be denounced, that uncertainty would be the greater in the case of treaties to which international organizations were parties. He accordingly shared the doubts that had been expressed by the International Law Commission with regard to the applicability of subparagraph 1 (b) of the article (*ibid.*)

33. Those doubts would not, however, lead his delegation to support the Egyptian proposal to delete the subparagraph; though imprecise in its formulation, the principle it affirmed was valid, and he therefore considered that the Commission's version of the draft article could be retained.

34. Mr. VOGHEL (Canada) said that he opposed the deletion of subparagraph 1 (b) because the corresponding article of the 1969 Vienna Convention had been expressly added to it by the Conference which had adopted that Convention. His delegation had supported that decision at the time, and believed that the provision was equally essential to the present convention.

35. Mr. RIPHAGEN (Netherlands) said that he agreed with the two previous speakers. It was clear that a situation in which a right of denunciation or withdrawal could be considered as implied by a treaty could give rise to controversy, but the article should be read in the context of the introductory wording to paragraph 1 of article 56. That wording was highly categorical, and provision must obviously be made for exceptions to it, including implied exceptions, as had been recognized by the Commission in its commentary to the article. Also, there was no reason to suppose that treaties concluded with an international organization were substantively different from other treaties concluded by States. The provision inserted in the 1969 Convention should accordingly be retained in the present draft.

36. Mr. MÜTZELBURG (Federal Republic of Germany) said that, although he shared the concern expressed by the Egyptian delegation about the obscurity to which subparagraph 1 (b) gave rise, he was not convinced by the arguments advanced by that delegation for deleting it. The task of the present Conference was not to renegotiate the 1969 Convention but to establish whether it was necessary to introduce into the new convention a provision different from the one adopted in 1969. In his view, no such departure was required, and consequently he could not support the Egyptian proposal.

37. Mr. MONNIER (Switzerland) said that his delegation could not go along with the Egyptian proposal to delete subparagraph 1 (b). The lack of a provision corresponding to the one in the 1969 Convention would create difficulties and uncertainties; furthermore, it was just as difficult to establish intention, contemplated in subparagraph 1 (a), as to determine the nature of treaties in which the right of denunciation was implied, under subparagraph 1 (b).

38. Mr. HERRON (Australia) endorsed the remarks made by previous speakers in support of the International Law Commission's draft. In addition, in regard to treaties between international organizations, treaties relating to the exchange of information and documents might fall into the category to which subparagraph 1 (b) applied. The Commission's commentary to the article expressed the view that headquarters agreements concluded between a State and an international organization might be of such a nature that a right of denunciation or withdrawal could be implied from them. Consequently, subparagraph 1 (b) might well have a practical application. His delegation therefore regretted that it could not support the Egyptian amendment. It preferred the Commission's draft as it stood.

39. Mr. SANYAOLU (Nigeria) said that, for the reasons advanced by other speakers, his delegation too preferred the International Law Commission's text, which would contribute to the progressive development of international law.

40. Mrs. DIAGO (Cuba) said that draft article 56 was taken word for word from the 1969 Vienna Convention. Her delegation agreed with previous speakers regarding the problems that would result from the deletion of subparagraph 1 (b), and it had no difficulty with the text as it stood. The subparagraph set forth a principle that could perfectly well be applied to treaties to which international organizations were parties. Her delegation would therefore be unable to support the Egyptian amendment.

41. Mrs. THAKORE (India) said that article 56 stated the conditions under which a party could denounce a treaty that contained no explicit provision regarding denunciation. It reproduced without change article 56 of the 1969 Vienna Convention. According to subpara-

graph 1 (b) of the article, the right of denunciation or withdrawal could be implied by the nature of the treaty. It was true that the corresponding provision of the 1969 Vienna Convention, as the International Law Commission itself admitted, had given rise to difficulties of application. Her delegation was also aware that there were very few examples of treaties that were by their nature denounceable. Nevertheless, it could not support such a radical solution as the deletion of the subparagraph.

42. Mr. SIEV (Ireland) said that his delegation believed that, wherever possible, the draft convention should be worded in the same way as the 1969 Vienna Convention. Notwithstanding the fact that the wording in the present case was particularly difficult and created vagueness and uncertainty, his delegation would support the Commission's draft, and regretted that it could not endorse the Egyptian proposal.

43. Mr. RAMADAN (Egypt) said that his delegation had expected to hear the argument that the text of the 1969 Vienna Convention should be retained. Therefore it had cited, on presenting its proposal, that part of the commentary by the International Law Commission in which the Commission indicated the possibility of departing from that text. Since his delegation's proposal had elicited a number of objections, and since its views on the matter would be on record, he would not insist on the proposal.

44. The CHAIRMAN said that there seemed to be general agreement that subparagraph 1 (b) of article 56 should not be deleted. He would take it, therefore, that the Committee wished to refer the article to the Drafting Committee as it stood.

*It was so decided.*

*The meeting rose at 5 p.m.*

## 19th meeting

Wednesday, 5 March 1986, at 11.25 a.m.

*Chairman:* Mr. SHASH (Egypt)

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

[Agenda item 11] (continued)

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

1. The CHAIRMAN invited the Committee of the Whole to consider article 36 bis and the amendments thereto.

2. Mr. HAFNER (Austria) introduced the amendment submitted by Austria and Brazil (A/CONF.129/C.1/L.49), which proposed the deletion of article 36 bis.

3. As the International Law Commission had noted in its commentary to the article (see A/CONF.129/4), the article was unquestionably the one that had given rise to most difficulty. The difference of views as to the need for that article stemmed from the fact that, as further noted by the Commission in its commentary, the text would cover only rare cases.

4. The Austrian and Brazilian delegations took the view that it was unnecessary to burden the draft convention with an article that could give rise to a number of difficulties. Quite apart from the limited scope of its application, article 36 bis contemplated a fairly com-

plicated legal situation, as was clear from the fact that it established a legal régime which constituted a special case in relation to articles 35 and 36. At the same time, it left unresolved certain legal problems that were closely connected with the article. For instance, although the article sought to regulate the cases when obligations or rights arose for the States members of an international organization, it laid down no rule to govern the revocation or modification of such obligations or rights. An additional provision would therefore be required to cover that and other problems.

5. One such problem related to headquarters agreements, which, in his delegation's view, would be covered by the article. Unquestionably, rights and obligations arose for member States under such agreements even though the latter were concluded bilaterally between the host State and the international organization concerned, and, inasmuch as article 36 *bis* referred expressly to such cases, it could be concluded that, whatever the intent of the authors, its legal régime applied to headquarters agreements.

6. The article thus acquired a new dimension, giving rise to further problems. One consequence of the text would be that the unanimity rule under subparagraph (a) would apply to the conclusion of headquarters agreements and, in the absence of any other rule, also to the modification and termination of such agreements. As a result, under the terms of the article as drafted, a single member of an international organization could, regardless of the rules of that organization, prevent a headquarters agreement from being concluded or modified. That would hardly be conducive to the harmonious development of treaty relations between the host State and international organization concerned and was unlikely to be acceptable to a host country such as his own.

7. His delegation had earlier proposed that article 36 *bis* should be redrafted or a new article added, but it had now come to the conclusion that it would be preferable to delete the article in its entirety and to leave the matter to be regulated by practice. If that was not acceptable to the Committee, his delegation would not object to negotiations with a view to reformulating the article along the lines proposed in the amendments of the Netherlands and Switzerland.

8. Mr. RIPHAGEN (Netherlands), introducing his delegation's amendment to article 36 *bis* (A/CONF.129/C.1/L.50), said that articles 35, 36 and 36 *bis* could be fully understood only by reference to the various types of treaties between States that were covered by the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup> There was, first, the typical bilateral treaty designed solely to provide for an exchange of performance between States. Then there was the treaty, generally a multilateral one, that served to fulfil the purpose of international legislation in the international community. In between there were several other types of treaty, one typical example being a treaty that created rights and obligations for States that were not parties to it. Arti-

cles 35 and 36 had been included in the 1969 Vienna Convention to cover that category of treaty.

9. So far as multilateral treaties having a legislative function were concerned, special provisions were embodied in the 1969 Vienna Convention. For instance, article 40 provided that every State party to a multilateral treaty had the right to participate in the negotiation and conclusion of any agreement for the amendment of the treaty, while article 41 prohibited to some extent any departure from a multilateral treaty by two or more parties to it under an agreement *inter se*.

10. Articles 35 to 37 of the 1969 Vienna Convention dealt with another type of intermediate situation involving the rights and obligations of non-parties to the treaty. In that case, the principle was that such rights and obligations could not arise except with the assent or written consent of the individual third party. That did not, however, make it a party to the Convention, and it could not normally object to any revocation or modification of the treaty as between the actual parties.

11. There was yet another type of situation: the case of treaties between an international organization and a non-member State or another international organization. In that case, the States members of the international organization were third States in law but not in fact.

12. The problem therefore was how to deal with that situation. Articles 35 and 36 could, of course, be applied to each member State individually, but what was in fact involved was a collective position of member States arising from their capacity as members of an international organization, in contradistinction to the individual position provided for under articles 35 and 36.

13. The only new element, therefore, which article 36 *bis* introduced in addition to articles 34 to 36 was the possibility for the States members of an international organization to express their assent or consent collectively, and possibly even before the conclusion of the treaty between an international organization and an outside entity.

14. How could the States members of an international organization express their consent or assent to be bound by the provisions of such a treaty if they so wished? The first means of doing so, as provided in subparagraph (a) of article 36 *bis*, was through the constituent instrument of the international organization. That instrument could provide that, if the competent organ of the organization concluded a treaty which was also intended to confer rights and obligations, that purpose could be achieved without the individual assent or consent of each individual member State. The second possibility was for the member States to express their collective consent to be bound by virtue of the constituent instrument or in application of the other rules of the organization, for which reason the Commission's draft deliberately used the words "by virtue of the constituent instrument".

15. There was also a third possibility: for the States members of an international organization to express their consent to be bound by a unanimous decision, which was why the words "unanimously" and "or otherwise" appeared in the Commission's draft.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

16. In virtually all international organizations there was a residual rule whereby legally relevant unanimous decisions were recognized if the constituent instrument and other rules of the organization provided for nothing else. That, however, could be regarded as already covered by the more general definition of the term "rules of the organization", which included established practice.

17. Viewed in that light, there was nothing revolutionary about the proposed text of article 36 *bis*. It simply provided a further possibility, in addition to articles 35 and 36, of creating rights and obligations of third States which were members of an international organization, if and when they wished to avail themselves of that possibility, and always provided that it was in keeping with the intent of the treaty concluded between the international organization and the other entity. As was clear from subparagraph (b) of article 36 *bis*, there was no question of taking anybody by surprise, and no State or international organization was forced to make use of that additional possibility.

18. The only question that remained was whether article 36 *bis* was sufficiently clearly drafted to express the Commission's intent. His delegation had submitted its amendment for purposes of clarification and in order to remove certain misunderstandings regarding the International Law Commission's commentary to the article.

19. Mr. MONNIER (Switzerland), introducing his delegation's amendment to article 36 *bis* (A/CONF.129/C.1/L.51), said that that proposal was, of course, conditional on the article's being retained. The amendment proposed by the Netherlands was, he thought, similar in intent, although its approach was different. Article 36 *bis* related to two major categories of conditions under which a treaty entered into by an international organization bound its member States directly. The first related to their relations with parties to the treaty, and the second to the organization itself. A provision in subparagraph (a) of the article stating that, in order to be bound by a treaty, member States must by virtue of the constituent instrument of that organization or otherwise have unanimously so agreed might be interpreted as meaning that the rule of unanimity was of general application.

20. He wondered whether such a rule, which required that all States members must accept to be bound, was appropriate, bearing in mind the diversity of international organizations, which might be universal, regional, political or technical. His delegation felt that, in order to take account of that diversity now and in the future, an express reference to the rules of the organization was required. In supposing that a headquarters agreement had direct effects on the member States, article 36 *bis* as at present drafted would lead to a situation where even minor modifications of the headquarters agreement would require the unanimous consent of the member States, which would be absurd. It had therefore seemed necessary in the view of his delegation, if article 36 *bis* were retained, to make it more flexible by including a reference to the rules of the international organization in question. Such a reference would not change the substance of the article.

21. Ms. MORGENSTERN (International Labour Organisation), introducing the amendment proposed

by the International Labour Organisation, the International Monetary Fund and the United Nations, (A/CONF.129/C.1/L.56), said that article 36 *bis* was of particular importance for international organizations because it touched on the vast and complex subject of relationships between organizations and member States.

22. The situation where a treaty entered into by an international organization specifically created rights and obligations for its member States could not be entirely divorced from the question of rights and obligations arising for them otherwise. Practical difficulties might arise, such as whether a State had an obligation under general international law not to interfere with the performance of a treaty entered into by an international organization. As an example, she referred to a case in the United Nations in 1963 where the question arose as to whether a State Member of the Organization was, as an individual State, in good faith bound not to request the extradition of a person from a host country, when the host country was bound to grant facilities to that person by virtue of its agreement with the Organization.<sup>2</sup>

23. She also wished to underline the diversity of structures and rules between the different international organizations. It would be difficult to lay down a general rule to cover such diversity in a single article. Moreover, there was very little positive law in that complex area. The International Labour Organisation itself had no rules dealing with the subject, and its practice was limited to its headquarters agreement and agreements with other host countries. She believed, therefore, that the subject was one which was not suitable for codification. The sponsors of the three-organization amendment would be happy to see article 36 *bis* deleted, provided its substance was not dealt with in another provision, but not if the facility to depart from articles 35 and 36 was lost, thus making the position less flexible. However, as a safeguard if the Conference decided that the article should be retained, the reference to the rules and practice of international organizations should be retained.

24. She wondered whether the matter could be considered later, perhaps in the context of article 73. The amendment proposed by Switzerland seemed to have a similar purpose. The sponsors of the three-organization amendment had sought to base their proposal on the International Law Commission's draft of article 36 *bis*, but had found it difficult to achieve sufficient flexibility. If the Committee decided that article 36 *bis* should be retained, they would appreciate an opportunity to collaborate with the delegations of Switzerland and the Netherlands with a view to developing a common text.

25. Mrs. THAKORE (India) said that article 36 *bis* dealt with a relatively new type of situation which had given rise to delicate political problems. The International Law Commission had successfully resolved the question of the rights and obligations arising for States members of an international organization as a

<sup>2</sup> See *United Nations Juridical Yearbook, 1963*, document ST/LEG/SER.C/1, pp. 164-165.

result of a treaty to which the organization was a party. Such rights and obligations could arise for States members only by their explicit consent, which under subparagraph (a) could be given in advance in the constituent instrument of the organization. However, the States members might consent "otherwise", in other words by means of a separate agreement. Subparagraph (b) required the consent of those States members to have been brought to the knowledge of States and international organizations which had participated in negotiation of the treaty.

26. In the view of her delegation, article 36 bis as now drafted was satisfactory. It was universal in scope, it dispelled ambiguities and it avoided the obstacles inherent in earlier drafts. It had not been anticipated that it would cover all possible situations. Her delegation was therefore prepared to support it. For the same reasons, it was unable to support the proposal of Austria and Brazil to delete the article.

27. Her delegation had an open mind with regard to the amendments aimed at flexibility, such as that submitted by the Netherlands, except for the proposal to delete the word "unanimously", which would be a substantive change. The new paragraph 2 proposed by Switzerland also aimed at flexibility and deserved consideration. Finally, her delegation viewed with extreme caution the amendment proposed by three international organizations, since it appeared to be an over-simplification and removed the safeguards contained in the International Law Commission's draft.

28. Ms. WILMSHURST (United Kingdom) welcomed the Netherlands representative's valuable explanation of the background of and justification for article 36 bis. In articles 34, 35 and 36, the present draft instrument took up and applied to treaties between States and international organizations the rules of the 1969 Vienna Convention regarding the rights and duties of third States. Those articles indicated that third States had rights and obligations only in limited and strictly defined circumstances.

29. The question was whether the rules in those articles were suitable as they stood for application to treaties with international organizations. Article 2, subparagraph 1 (h), defined the term "third State" in the same manner as the corresponding provision in the 1969 Vienna Convention. The effect of that definition was that the States members of an international organization were regarded as third States when the organization concluded a treaty. That result could well be regarded as strange, but it was clear that the International Law Commission had recognized the need to deal with the problem which thus undoubtedly arose.

30. The present article 36 bis, which was the outcome of that work, constituted a carefully worded and well-thought-out compromise between differing points of view. That compromise text had considerable merit and care should be taken not to tamper with its delicately balanced structure. Her delegation did not favour undertaking any prolonged attempts to reword the draft article, but it could support the Netherlands amendment, which preserved the structure and purpose of the Commission's draft and appeared to resolve some of

the problems perceived by the delegations of Austria and Brazil in the original draft.

31. On the other hand, her delegation could not support the amendment submitted by three international organizations. Nor could it associate itself with the comments of those delegations which considered that article 36 bis presented a problem with regard to headquarters agreements. The United Kingdom was host country to a large number of international organizations and had concluded agreements with them which had not given rise to any particular problem. It did not consider the article as specifically directed to such agreements. Depending on whether the conditions specified in article 36 bis applied or not, its provisions could apply to a host country agreement or not. If they did not, the situation was then governed by the normal general rules set forth in articles 34, 35 and 36. The fact that a new possibility was provided for in article 36 bis did not in any way affect the provisions of articles 34 to 36.

32. Her delegation recognized that the implications of article 36 bis had been, and might continue to be, the subject of considerable debate, and it would therefore give careful consideration to the proposal to delete that text. It was, however, reluctant to engage in attempts radically to revise it, and hoped that the Committee would concentrate on deciding whether or not to retain the article, subject only to its amendment as proposed by the Netherlands.

33. Mr. ROMAN (Romania) said that it was essential to include in the proposed convention a provision dealing with the subject-matter of article 36 bis. It was necessary to bear in mind that in practice certain international organizations sometimes had to conclude treaties which gave rise to obligations for their member States. The 1969 Vienna Convention had envisaged that situation, and a provision on the subject was all the more necessary in the present draft. His delegation accordingly opposed the proposal of Austria and Brazil to delete article 36 bis.

34. His delegation considered the text of the article satisfactory on the whole, but it wished to suggest some drafting improvements in order to introduce greater clarity and precision. In the French version of the introductory paragraph, the formula "*entendent, au moyen de ces dispositions . . .*" ("intend those provisions to be the means of . . .") was ambiguous and more suited to a literary than to a legal text. In subparagraph (a) also there was ambiguous and confusing language: "or otherwise, have unanimously agreed to be bound . . .". Those two passages could, he felt, become a source of misunderstanding and difficulties in the application of the future convention.

35. His delegation favoured the adoption of language which would make it clear that the treaties concluded by international organizations could create obligations for their member States only when the member States concerned accepted those obligations expressly and without ambiguity. He therefore suggested that the words "intend those provisions to be the means of establishing" should be replaced by wording such as: "express by those provisions their intention of"

(“expriment leur volonté par ces dispositions”). He further suggested that in subparagraph (a) the words “or otherwise, have unanimously agreed” should be replaced by a formula such as: “by a separate agreement” (“par un accord séparé”). Those suggestions being of a purely drafting nature, he suggested that they should be referred to the Drafting Committee.

36. The Romanian delegation supported the amendments proposed by the Netherlands and Switzerland, which would introduce useful improvements into the text of the article.

37. The CHAIRMAN said that the delegation of the Soviet Union wished to present an amendment which had not yet been circulated. Subject to the agreement of the Committee, and with the understanding that no precedent would be created thereby, he proposed to permit its consideration in accordance with the final provision of rule 29 of the rules of procedure, and to invite the Soviet representative to present it orally, pending circulation of the text.<sup>3</sup>

*It was so agreed.*

38. Mr. SHATROV (Union of Soviet Socialist Republics) said that under his delegation’s amendment the present text of subparagraph (a) of article 36 bis would be replaced by a provision to the effect that the States members of the organization, *ad hoc* and specifically, must have expressed their consent to be bound by the provisions of the treaty.

39. The Soviet delegation proposed such an amendment because it would prefer a situation in which each State member of an international organization might express its view concerning acceptance of the obligations under a treaty to which the organization was a party, in each specific instance. In other words, practice in the matter would not be established *a priori*: States, as sovereign subjects of international law, would be able to express on each separate occasion their attitude with regard to agreements entered into by international organizations of which they were members.

40. Should the Committee favour the proposal for deletion of article 36 bis, the Soviet delegation would not object to it; it would decide at that time whether or not to pursue the concern reflected in its amendment.

41. Mr. PASZKOWSKI (United Nations Educational, Scientific and Cultural Organization) observed that the “comment, controversy and difficulty” to which the International Law Commission had alluded in paragraph (1) of its commentary to article 36 bis seemed to persist, notwithstanding the explanations which had been provided and the number and nature of the amendments submitted. It might well be that the subject-matter of the draft article, although important, was not yet ripe for codification on a universal basis.

42. An international organization of universal character could hardly be expected to accept, without any reservation whatsoever, a text which did not appear consonant with its constituent instrument, relevant resolutions and decisions, and established practice.

43. In so far as the organization he represented was concerned, practice regarding at least one category of agreement—namely, so-called “host country” or “conference” agreements, which had never been called in question by any State—was certainly not consonant with the contents of article 36 bis.

44. His delegation appreciated the efforts of those delegations which had sought by their amendments to improve the original draft, but it feared that those proposals would only result in further difficulties. In the circumstances, it believed that it might be preferable to delete the article altogether and to allow practice to provide a more precise and more conclusive solution.

45. Mr. BARRETO (Portugal) said that his delegation tended to favour the International Law Commission’s article as a good compromise text. At the same time it felt that the Netherlands and Swiss amendments would bring added objectivity, specificity and clarity. It would have difficulty in accepting the three-organization amendment, as its terms were very restrictive as far as States members of international organizations were concerned. It had not yet formed an opinion concerning the orally submitted Soviet amendment. On the whole, its position remained flexible; it would be able to concur, albeit reluctantly, with any move towards deletion of the article for the reasons developed by the representative of Austria, in which case the draft convention might be less rich but would still respond to the requirements which were its *raison d'être*.

46. Mr. WOUM (Cameroon) said that his delegation’s doubts concerning article 36 bis had not been entirely dispelled by the Netherlands representative’s detailed explanations. Those doubts concerned not so much the article itself as the fact that its effect appeared to depend on so many factors that one might well ask whether the intention was to establish a new rule entailing obligations and rights or to give expression to the idea that obligations and rights might arise.

47. Nor had the doubts been resolved by the various amendments. The Netherlands proposal gave added precision to the text, but made no substantive change; the Swiss amendment, which seemed to imply that recourse to the provisions of the draft convention would become exceptional, the rules of the organization constituting the principle, also appeared to add nothing new; the three-organization amendment seemed to introduce considerations which would not have an immediate legal effect on States which might sign the draft convention, since it implied that the extent and manner in which the obligations and rights referred to might arise would not be determined by the convention itself.

48. With reference to the conditions on which—it seemed—the effect of the article, as drafted, would depend, his delegation considered that four conditions must be satisfied for obligations and rights to arise for States members of an international organization from a treaty to which it was a party. First, the parties must explicitly intend to create such obligations and rights. Secondly, they must explicitly define the conditions and effects of those rights. Thirdly, they must explicitly (whether unanimously or not) be of subsidiary impor-

<sup>3</sup> Subsequently circulated as document A/CONF.129/C.1/L.62.

tance) consent to be bound by the obligations. And finally, their assent must be brought to the knowledge of the negotiating States and negotiating organizations.

49. As he had already remarked, all those conditions seemed rather to contain the idea that obligations and rights might arise under the circumstances that were the subject of the article than to crystallize rules, rather to beg the question than to codify. If that was the case, might not those concerns be presented either in the form of a declaration to which States might wish to subscribe at the conclusion of the Conference, or in the form of an optional clause which States from regions where practice was consonant with its terms—for that was not everywhere the case—might wish to sign? Failing acceptance of one or other of those suggestions, the delegation of Cameroon would submit that the matter was not yet ripe for codification.

50. Mr. DEVADDER (Belgium) expressed approval of the philosophy embodied in article 36 *bis*, which should be read in conjunction with articles 35 and 36, to the provisions of which it merely added the possibility of prior acceptance of obligations and rights. The key words there were "possibility" and "prior".

51. The Belgian delegation supported the Netherlands amendment as providing additional clarification, and it believed that the Swiss and three-organization amendments might also be referred to the Drafting Committee. It could not yet comment on the Soviet delegation's amendment.

52. Mr. BUGUICCHIO (Council of Europe) said that his organization was unable to accept article 36 *bis* in the form in which it had been drafted.

53. Regarding the first part of the article, which laid down rules relating to obligations and rights arising for States members of an international organization from a treaty to which the organization was a party, the Coun-

cil of Europe considered that it did not need such rules, but would not oppose their adoption.

54. On the other hand, the second, more procedural part of the article sought to establish rules governing the process of decision-making and the communication of decisions to negotiating States and negotiating organizations. Those rules, because of the requirement for unanimity, would entail substantial modification of the legal system of the Council of Europe, which therefore found them unacceptable.

55. Desirous of preserving its internal law, the Council of Europe would not object to the deletion of article 36 *bis*, as proposed in the Austrian-Brazilian amendment. The Council's concerns were taken into account in the three-organization amendment and in the Netherlands and Swiss amendments. The Council therefore could support those last two amendments and, if necessary, agree to a possible merging of those amendments—which were closer to the original text—in a single draft.

56. Mr. MORELLI (Peru) said that his delegation found the International Law Commission's draft well-balanced, and consequently acceptable. It could also support the Netherlands amendment.

57. Mr. RASOOL (Pakistan) agreed with those representatives who had found article 36 *bis* highly complicated and controversial in nature. He was grateful to the representative of the Netherlands for the admirable and comprehensive explanation he had given of the International Law Commission's text.

58. Notwithstanding that explanation, he believed that it would help to expedite the Committee's work if further consideration of the draft article were postponed until it was possible to hear the Expert Consultant's views on that subject.

*The meeting rose at 1 p.m.*

## 20th meeting

Wednesday, 5 March 1986, at 3.15 p.m.

*Chairman:* Mr. SHASH (Egypt)

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

[Agenda item 11] (*continued*)

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

1. Mr. MBAYE (Senegal), speaking on a point of order, asked what had been decided concerning the

request made by the delegation of Pakistan at the previous meeting.

2. Mr. RASOOL (Pakistan) recalled that his delegation had requested, in view of the absence of the Expert Consultant, who would have been able to give the Committee of the Whole an authoritative explanation of article 36 *bis*, that further discussion of the text should be postponed until the Expert Consultant could be present.

3. The CHAIRMAN said that after the Committee had heard all those delegations whose names were on the list of speakers, he would adjourn the discussion. The latter would be resumed after the arrival of the Expert Consultant.

4. Mr. ECONOMIDES (Greece) said that article 36 *bis* could be a very useful part of the draft convention. It aimed to deal with a case that certainly merited special treatment, that of States members of international organizations which were granted rights or assumed obligations under treaties that had been concluded by international organizations alone with third parties, either States or other international organizations. Those member States were not parties to the treaty, but neither were they quite third parties in the classic sense, since they were direct or indirect participants in the preparation of the treaty and in its implementation, as the representative of the Netherlands had noted at the previous meeting. That specific case, therefore, merited a special régime, but the régime provided for in article 36 *bis* was expressed in such strict terms and with such rigorous conditions that it was likely in practice to create more problems than it would solve.

5. The amendments proposed by the delegations of Switzerland (A/CONF.129/C.1/L.51) and the Netherlands (A/CONF.129/C.1/L.50) sought to make the article more flexible by removing, *inter alia*, the provision for unanimity from subparagraph (a) when the rules of the organization provided a more flexible system than unanimity for binding member States. His delegation would therefore support both amendments. However, for the reasons stated by the representative of India at the previous meeting, it could not support the three international organizations' amendment (A/CONF.129/C.1/L.56), which took an approach very different from that of the International Law Commission's draft. He reserved the right to comment on the amendment proposed by the Soviet Union (A/CONF.129/C.1/L.62) after having studied it. If the amendments of Switzerland and the Netherlands were not accepted, his delegation would support the proposal of Austria and Brazil (A/CONF.129/C.1/L.49) to delete the draft article.

6. Mr. HERRON (Australia) supported the International Law Commission's draft of article 36 *bis*. He wished to acknowledge the helpfulness to his delegation of the very enlightening introduction to the article by the representative of the Netherlands at the previous meeting and the value of the Commission's commentary (see A/CONF.129/4). The article constituted an intelligent response to the lessons learned from the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup> It was wholly based on the principle of consent, was modest in scope and had been the object of unanimous agreement in the Commission.

7. Australia had experience of situations in which the rules set out in draft article 36 *bis* would have facilitated the establishment of binding and enforceable treaty relations with an organization and its member States. One instance in which the rules would have allayed political and legal concern would have been in the determination of the conditions of Australia's contribution to the Multilateral Force and Observers arrangement in the Sinai Peninsula.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

8. The rules could also facilitate the relations of "outsider" States dealing with associations of States for economic, trade and other purposes, as in the case of the relations between the European Economic Community and the Council for Mutual Economic Assistance.

9. His delegation did not accept that the article would routinely apply to headquarters agreements. It might, of course, be availed of in establishing rights and obligations enforceable by member States directly against a host State, but expressed in a single headquarters agreement to which the parties were the host State and the international organization. More normally, rights and obligations enforceable by beneficiary States would not be established by headquarters agreements. An illustration of that point was the pattern whereby privileges and immunities agreements between international organizations and their members paralleled in some provisions the substance of headquarters agreements between international organizations and host States.

10. Excessive modification of the text of the article should, he felt, be avoided. His delegation recognized and endorsed the common intention of the Netherlands and Swiss amendments, but preferred the form of the Netherlands proposal. It did not support the Austrian and Brazilian proposal to delete the article or the three-organization proposal.

11. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) said that, of all the articles, article 36 *bis* had given rise to the largest number of difficulties and objections, both in the International Law Commission and in the written comments submitted by States and international organizations. His delegation took the view that that text was not indispensable. It contained a number of highly controversial provisions, especially the requirement of unanimous agreement of the member States to be bound and the possibility that such agreement could be entered into by States beforehand by virtue of an organization's constituent instrument. Why should the obligations and rules applicable to the international organization itself as a party to an international treaty be imposed on a State which was not a party to that treaty? His delegation considered that the obligations of States flowed directly from a treaty with an international organization to which they were parties. As an independent subject of international law, an international organization must bear the responsibility for a treaty concluded with another international organization, and should not transfer the burden to its member States, which were, in effect, third parties.

12. Article 36 *bis* was unacceptable to his delegation as it stood. Not only did it contradict articles 34, 35 and 36, but it contained a provision that was in principle incompatible with the purpose of the draft convention under consideration. His delegation would therefore support the proposal to delete it. If that proposal was not adopted, additional work would have to be done on the article, in which the amendment proposed by the Soviet Union should be borne in mind.

13. Mrs. OLIVEROS (Argentina) said that the obligations that could arise for States members of an international organization were subject to the prior written

assent of the members, specifying the scope in their regard of the obligations contracted by the international organization. The international organization was then acting not as a subject of international law, but as a mandatary of the States which had conferred the powers in question on it. Thus, States which entered into a treaty with an international organization did so not with an entity that was a subject of international law, but with the mandatary of a group of States.

14. After listening to the discussion and studying the amendments, her delegation believed that the subject was not yet ripe for inclusion in the proposed convention. Adoption of any of the amendments proposed might crystallize the situation and create difficulties as far as development of the question was concerned. Her delegation endorsed the arguments that had been put forward by the United Nations Educational, Scientific and Cultural Organization at the previous meeting in that regard. It would therefore support the proposal of Austria and Brazil to delete the article, as it felt that it was better to leave the question out altogether than to deal with it only partly.

15. Mr. GAJA (Italy) said that article 36 *bis* was based on three essential elements: first, the will of all the contracting States and contracting international organizations; second, the will of the international organization whose member States felt the effects of the treaty; and third, the will of the member States that those effects should be produced. If all those elements were in agreement, it was difficult to see what should prevent the States or international organizations concerned from acting in such a way that an agreement entered into by the international organization should produce effects for its member States.

16. The amendment proposed by the Soviet delegation aimed to restrict the possibility that such legal effects might arise. According to that amendment, States would have to express their agreement to be bound *ad hoc* and in a definite manner. His delegation did not feel that such a provision was justified. Why could not member States of an organization, if they so wished, express their consent to be bound by a treaty concluded by the organization of which they were members?

17. The situation involved a form of representation: the organization concluded a treaty that also produced effects for its member States. Representation could, of course, also exist in relations between States: a State could, for example, conclude an agreement with another State that produced effects only for, or also for, a third State that had previously given its consent. The case was rare, but it was not ruled out by the 1969 Vienna Convention, although that instrument did not deal with the question of representation. The situation might occur more frequently in the case of treaties concluded by international organizations. Article 36 *bis* did not go very far towards regulating the situation, which would of course arise differently for each organization. Moreover, the conditions were indicated very flexibly in the article, which could give rise to the hypothesis of presumed consent, thus opening the door to many difficulties as the discussion had shown.

18. His delegation endorsed the view expressed by Austria that the question of revocation or modification of the effects also needed to be regulated, a matter which would inevitably cause difficulties. Provided it remained clear that recourse to that form of representation was not ruled out in international relations the deletion of the article might be the simplest solution.

19. Ms. MARABE (Lesotho) said that, in her delegation's opinion, article 36 *bis* aimed to confer obligations and rights on States through a treaty to which those States were not parties. That was tantamount to giving international organizations a mandate or authority to create obligations for States through the back door, as it were, a situation which her delegation regarded as untenable. Moreover, the rarity of the cases intended to be covered did not justify their codification. Her delegation would prefer to allow the principle to crystallize through international practice. Otherwise, the Conference would be legislating rather than codifying a rule of international law. Her delegation would support the proposal to delete the article.

20. Mr. FOROUTAN (Islamic Republic of Iran) said that his delegation found it difficult to accept article 36 *bis* as it stood. In its view, accepting that a treaty concluded by an international organization should have legal effects for a State member of the organization that was not a party to the treaty was a derogation from the principle embodied in article 34 that a treaty bound only the parties to it. A treaty to which an international organization was a party created rights and obligations for the organization only, and not for its members. The concept of the article was particularly unfair to developing countries, which, although members of international organizations, frequently did not play a real part in their decision-making.

21. Subparagraph (a) laid down two conditions for the establishment of obligations under a treaty of the kind in question. The first concerned the constituent instrument of the organization, and the second the unanimous agreement of the States members to be bound. His delegation did not consider it advisable for such matters to be stipulated in an organization's constituent instrument. Moreover, if such a condition was stipulated, a State which wished to become a member of the organization might not necessarily accept the provision. An attempt to obtain unanimous agreement could also become a source of disputes. By seeking to transfer the responsibilities and obligations of international organizations under treaties concluded by them to individual member States, the Conference would be derogating from the main purpose of the draft convention.

22. His delegation therefore favoured the deletion of the article, as proposed by the delegations of Austria and Brazil. It could not support the Netherlands amendment because it would base the consent of member States on the rules of the organization, while under the International Law Commission's text, consent could be obtained in other ways. The article at least required the unanimous consent of member States before recognizing any obligation for them. His delegation was also unable to support the Swiss amendment and the three-organization amendment. The amendment proposed by the Soviet Union, which would re-

quire an express, *ad hoc* agreement by the States members of an organization to be bound by the provisions of a treaty, seemed closer to his own delegation's position.

23. Mr. DE CEGLIE (Food and Agriculture Organization of the United Nations) said that, in the opinion of his organization, article 36 *bis* might give rise to serious difficulties for international organizations, particularly those with a very large membership. Sub-paragraph (a) provided, in substance, that in order for rights and obligations to be created for States members of an international organization by a treaty to which the international organization was a party, those States must have "unanimously agreed" to be bound by the provisions of the treaty. That requirement would mean in many practical cases that one member State could render the treaty inoperative by withholding its consent, even where the supreme body of the organization concerned had voted in favour of concluding the treaty by the majority required under the rules of that organization. Moreover, even if there was unanimity among the States present and voting, it would be necessary, if the paragraph was to have full effect, to devise procedures for obtaining, if possible, the concurrence of member States which had not been present or had not voted. It might well be virtually impossible to make the provision—which would seem to apply to headquarters agreements and similar types of treaty—operative in practice.

24. His organization would therefore greatly prefer the outright deletion of the article, or at the least its modification on the lines proposed by the delegations of the Netherlands and Switzerland. The latter proposal took into account the need to introduce an element of flexibility into article 36 *bis* by referring to the rules of the organization concerned, which was also the purpose of the amendment proposed by the three international organizations.

25. Mr. RIPHAGEN (Netherlands) said that there still appeared to be some misunderstanding regarding the International Law Commission's text. Those delegations which favoured the deletion of article 36 *bis* had argued that for some agreements, such as headquarters agreements, it might not be possible to secure the unanimous consent of all the member States of an international organization. He wished to point out, however, that if the article was deleted, the States members of an international organization would become third States and articles 35 and 36 would be applicable. That would mean that every State would have to give its consent to the agreement in writing.

26. Mr. HARDY (European Economic Community) said that, under article 228, paragraph 2, of the Community Treaty, when the Community became a party to a treaty, the member States were bound in every case. No formal act on their part was required, and, if the treaty laid obligations on them, they had to discharge them. The other parties to the treaty had to address themselves to the Community and to it alone on all matters concerned with the performance of the agreement and, *a fortiori*, on all questions of responsibility in the event of non-performance. The Community's co-contractors received rights and obligations only from

the Community, and they were bound only *vis-à-vis* the Community.

27. The system proposed in article 36 *bis* differed considerably from the Community system, in which the conclusion of a treaty by the Community had the effect of binding all its member States. In the framework of article 36 *bis*, obligations and rights arose for States members of an international organization from the provisions of a treaty to which that organization was a party only when a certain number of conditions were fulfilled, including the intention of the parties to the treaty and the unanimous consent of the member States, which conditions, furthermore, must have been made known to the co-contracting party. In that arrangement there was nothing automatic about the creation of rights and obligations for the States members of the organization. It was a purely voluntary system, as emphasized by the representative of the Netherlands at the previous meeting.

28. Article 36 *bis* clearly was not intended to govern relations between the Community and its member States. Indeed, it was clear from the explanations given by the International Law Commission that the draft articles could not have the effect of changing or imposing changes on the internal systems of international organizations. Furthermore, article 5 stated that the draft articles applied to the constituent instrument of an international organization "without prejudice to any relevant rules of the organization".

29. The relations between the Community and its member States in respect of treaties concluded by the Community derived from a provision, article 228, of its constituent instrument. The Community therefore did not consider itself as directly concerned by the provisions of article 365 *bis*. Nevertheless, it understood from the Commission's commentary that the purpose of the article was to give international organizations in general certain options additional to the mechanisms referred to in articles 35 and 36. The Community therefore had no objection to the retention of article 36 *bis* as it stood. It would be regrettable, however, in its view, if that article could be interpreted by certain international organizations not as affording them additional possibilities, but as harmful to their established practice in cases where that practice was not based on an express provision of their constituent instrument. Consequently, the Community thought that some of the amendments aimed at solving that problem, for example, the Netherlands amendment, should be considered by the Conference.

30. Mr. MÜTZELBURG (Federal Republic of Germany) said that when an article presented difficulties there was a temptation to choose the easy way out by deleting it. However, the easiest solution was not always the best way of dealing with a problem. He wondered whether the interests of international organizations would in fact be served by the deletion of article 36 *bis*. The member States of such organizations were not really third States in the strict sense.

31. Some speakers had assumed that in certain cases—for example, in the case of headquarters or customs agreements—member States would be bound. There

had also been discussion as to whether or not the possibility of member States of an international organization being directly bound by the act of that organization was an internal matter of concern only to the organization and its member States. Such was not the case, since other parties to the treaty would assume that the States members of the organization were involved.

32. In fact, an article 36 *bis* in some form could not easily be omitted. The article referred to a number of elements which were required in order to protect both the negotiating powers of international organizations and their member States. The Committee should therefore endeavour to arrive at a compromise text. The main problem with the International Law Commission's text was its inclusion of the word "unanimously" in subparagraph (a). However, it had not been the intention of the Commission to apply that condition in all situations. There were in fact three types of situation. The first was where the consent of the member States was secured prior to treaty negotiations by the international organization because it was contained in the constituent instrument. The second was where prior consent had been expressed in other rules of the international organization. The third was where member States agreed *ad hoc* to assume certain obligations. In that case, their collective will had to be expressed in a unanimous fashion. That interpretation of the existing article 36 *bis* would be better brought out if in subparagraph (a) the words ". . . or otherwise, have unanimously agreed . . ." were replaced by ". . . or otherwise unanimously, have agreed . . .".

33. The problem was dealt with in the Netherlands and Swiss amendments to the article. His delegation could accept either of those amendments, but it preferred the Swiss amendment, which retained the original structure of the Commission's text. The Soviet amendment dealt only with *ad hoc* situations.

34. With regard to procedure, he wished to state that, since consultations were in progress among members of the Committee, his delegation would have no objection to considering any further amendments which might be submitted, and might itself wish to submit an amendment.

35. The CHAIRMAN said that the submission of an amendment after the time-limit for their acceptance should be very exceptional. He would leave it to the Committee to decide whether to accept such an amendment, if the case arose.

36. Mr. DENG (Sudan) said that the relatively novel idea underlying article 36 *bis* was both complex and controversial. While the International Law Commission's aim might have been praiseworthy, he felt that the area of obligation and rights which the article sought to codify was far from clear in the light of international practice. It involved the transmission of obligations and rights to States which were not directly parties to a treaty and which had not assumed those obligations and rights in the manner set out in articles 35 and 36. His delegation therefore found it very difficult to support the Netherlands and Swiss amendments, and would be prepared to support the joint Austrian-Brazilian proposal to delete the article. It did not favour the

three-organization amendment for the reasons given by previous speakers, and it reserved its position on the amendment proposed by the Soviet Union. However, his delegation had not yet adopted a final position, and was prepared to support any wording for the draft article that constituted an improvement.

37. Mr. NGUYEN TIEN CUC (Viet Nam) said that, as drafted by the International Law Commission, article 36 *bis* was not sufficiently clear. The acceptance by a State of obligations under a treaty was the result of a decision-making process involving considerations relating to its internal policy and external relations, and any relevant decision would be subject to the constitutional rules of each State. Unless those rules were passed on to an international organization specified in the treaty, the State remained master of its international commitments and obligations; in other words, the participation of an international organization in a treaty did not *ipso facto* bind all States members of that organization. In specific areas, such participation might be considered advantageous for the international community in the application of a treaty. However, the possibility of an international organization becoming a party to a treaty should not prevent each State member of the organization from indicating whether or not it wished to accept the obligations deriving from that instrument. In other words, an international organization was not authorized to accept obligations in the name and on behalf of a State without the latter's formal consent in accordance with its constitutional procedures. Accordingly, his delegation was in favour of the amendment proposed by the Soviet Union and could, if necessary, support the proposal by Austria and Brazil to delete the article.

38. Mr. WANG Houli (China) said that the Committee appeared to be experiencing the same difficulties as the International Law Commission in its consideration of article 36 *bis*. The major idea underlying the article was that States members of an international organization should not have to assume obligations to which they did not give their consent. In his delegation's view, that approach was correct. The fact that a State was a member of an international organization usually meant that it agreed to give that organization the right to conclude treaties on specific matters. That did not imply a delegation of sovereignty. As far as the question of the entire membership of an international organization enjoying the rights and assuming the obligations arising from a treaty concluded by that organization was concerned, the requirement in article 36 *bis* of the unanimous consent of the entire membership was necessary. The way in which the entire membership of an international organization would give its unanimous consent to such rights and obligations could be established in the organization's constituent instrument.

39. Article 36 *bis* was closely related to articles 35 and 36, and could in fact be said to provide a balance between them. If no unanimous agreement of the membership of an international organization was possible, then those members wishing to enjoy the rights and assume the obligations established by a treaty concluded by the organization could do so in accordance with the provisions of articles 35 and 36. Article 36 *bis*

would not therefore prejudice the right of an international organization to conclude treaties, nor would it impede the development of international co-operation.

40. The Chinese delegation therefore believed that the article might be retained, and in principle it favoured the Commission's text. However, it was not opposed to some amendment of the text, provided it did not affect the substance of the article.

41. Mr. BERNAL (Mexico) said that his delegation favoured retention of the International Law Commission's draft of article 36 *bis*, which it saw as complementing articles 34, 35 and 36. In its view, the content of article 36 *bis* could not be separated from the traditional notion of the express consent of a State to assume the obligations of a treaty. The Commission's text appeared, however, to have led to a number of problems of interpretation, which had resulted in two positions, the first favouring deletion of the article, and the other favouring amendment in order to improve its formulation, to which end four proposals had been submitted. His delegation could, on the whole, support the proposals by the Netherlands and Switzerland, which were similar and would improve the text. The proposal by the Soviet Union seemed immediately acceptable because of its emphasis on the need for express and unequivocal consent. His delegation considered that point important, as it was concerned about the constitutional problems of internal law and the granting of a general authorization to conclude treaties. It believed that a State should follow its relevant internal processes on a case-by-case basis. It could not agree with some of the arguments put forward in favour of deleting the article entirely, particularly those relating to headquarters agreements. However, it was prepared to discuss the matter, and might go so far as to accept deletion as the simplest, although not the best, solution.

42. Mr. NEUMANN (United Nations Industrial Development Organization) said that there appeared to be some difference between the position taken by the organizations of the United Nations system and that taken by the European Economic Community. In the case of the latter organization, the constituent instrument appeared to include specific rules concerning the manner in which the Community might under certain circumstances bind its member States through a treaty, just as there were rules regarding the instances in which only the Community itself was bound. However, there were no such specific rules in the constituent instruments of the United Nations and the organizations of the United Nations system. Hence, the question whether, for instance, headquarters agreements or conference agreements concluded by those universal organizations were directly binding on member States had to be decided on the basis of established practice, not on the basis of an express rule in the constituent instrument.

43. It therefore seemed that while, as far as members of the European Economic Community were concerned, article 36 *bis* might be said to have a voluntary element, the same was not true for the other organizations to which he had referred. If, as proposed by Austria and Brazil in their amendment, article 36 *bis* were deleted, it would not necessarily follow that arti-

cles 35 and 36 would be applicable to such agreements as headquarters and conference agreements concluded by the latter organizations. One delegation in favour of the Netherlands amendment had indicated that it did not necessarily feel that those types of agreement were contemplated by article 36 *bis*. In fact, it would appear from the wording of article 5 of the 1969 Vienna Convention and article 5 of the present draft convention that that category of agreement would be governed by the rules of the organization concerned. It therefore seemed preferable simply to delete article 36 *bis*. The United Nations Industrial Development Organization supported that proposal for the reasons which had been given by its sponsors. As a universal organization with 139 member States, it would face the same difficulty in securing the express consent of each member State as had been mentioned by the representative of the United Nations Food and Agriculture Organization. If the article were deleted, that would mean that certain particularly difficult questions would be left unregulated by the present draft convention. In view of the widely differing positions taken by delegations on those questions, however, that might facilitate the widest possible acceptance of the draft convention.

44. Mr. DROUSHIOTIS (Cyprus) said that his delegation was satisfied with the Commission's article 36 *bis*, the Netherlands representative's explanation of which it had appreciated. The article addressed a special situation created by the draft convention in a voluntary and flexible way.

45. His delegation could support the amendments by the Netherlands and Switzerland, but, as it was disinclined to have the considerable controversy to which the article still gave rise injected into the work of the Conference, it would prefer to resort to the radical solution advocated by Austria and Brazil, namely, the deletion of the article. It proposed to comment later on the proposal of the Soviet Union.

46. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that in submitting its amendment, his delegation had aimed to settle the problems raised by article 36 *bis* in a way that might be satisfactory both for those who favoured the idea enshrined in the article and for those who considered it unacceptable and favoured its deletion.

47. The article's approach was based upon the practice of one regional organization. However, there were other organizations, such as, for example, the Council for Mutual Economic Assistance, where decisions concerning participation in treaties concluded by the organization were adopted in each individual case by the member States. That was the most democratic way of taking decisions. If a member State did not wish to become a party to a treaty concluded by the organization, it merely had to declare that it did not wish to be bound by it and it did not participate in any work involving the instrument. In other words, the full protection of sovereignty was possible and available. In order therefore to eliminate any permanent *a priori* obligation for a State arising from a treaty concluded by an international organization, and since there was no practice to fall back on, each organization having its own methods, it seemed desirable to find a formula

whereby a State accepted such an obligation only through an express indication of consent. The manner of expression of consent would depend on the organization's particular system. Such a formula should not prejudice the interests of an international organization such as the European Economic Community, where the member countries took decisions in their own way, nor those of the Council for Mutual Economic Assistance, which had a different procedure for the assumption of obligations; nor should it prejudice the obligations or responsibilities of other international organizations. If such a solution could be found, his delegation would support the idea underlying the article. If a compromise was not possible, it would support the proposal for deletion.

48. Mr. ZIMMERLI (International Maritime Organization), speaking on behalf of the International Civil Aviation Organization, said that the International Law Commission's article 36 *bis* would cause that organization difficulty, because it was not sufficiently flexible to allow the conclusion of such instruments as headquarters agreements or agreements to secure rights for member States when regional meetings were held outside the headquarters of an organization. Subparagraphs (a) and (b) imposed on international organizations the requirement of the unanimous consent of all member States for the conclusion of a treaty. That was a departure from the International Civil Aviation Organization's rules of procedure and its established practice, which had been followed without giving rise to any difficulty in the negotiation of agreements binding upon all parties. The article would have the effect of slowing down its treaty-making process, and it would in any case not be practicable in view of the types of agreement concluded by the Organization. Consequently, the International Civil Aviation Organization would be in favour of the deletion of article 36 *bis*.

49. Mr. RESTREPO (Colombia) said that the most convincing arguments in the debate had been those stressing the serious problems implicit in article 36 *bis*. That did not mean that the arguments of those in favour of the Commission's text were without foundation, but the complex aetiology of the article and the doubts and reservations which it had aroused persuaded his delegation to support the proposal by Austria and Brazil for deletion of the text.

50. Mr. DUFEK (Czechoslovakia) said that the Commission's article 36 *bis* was the result of a compromise, and it did not fully preclude the possibility of emergence of concrete problems of interpretation. The basic problem was that States members of an international organization might be faced with obligations arising from treaties concluded by that body. Their consent to assume such obligations was therefore necessary. That was a positive element of the International Law Commission's draft. A member State could not be considered bound by the obligations arising from a treaty simply because in the course of its negotiation it had expressed approval of the text subsequently signed by the international organization of which it was a member. Moreover, States members of an organization became third parties to a treaty concluded by the organization as a legal consequence of the personality of the

organization. However, States not members of that organization were in a situation somewhat different than that of member States in respect of treaties concluded by an international organization. That was another positive element.

51. His delegation found the text insufficiently clear in indicating how the various problems related to international practice could be solved by its formula. States might express in different ways their agreement to be bound, although the article made specific reference to the constituent instrument as being the paramount element. It did not, however, take account of the fact that applicability of that instrument would arise only in rare cases. Moreover, the reference to unanimous agreement to be bound by the provisions of a treaty was not clear. For all those reasons, therefore, his delegation supported the proposal for deletion made by Austria and Brazil.

52. If the majority wished to retain article 36 *bis*, his delegation would support the Soviet amendment, which referred to a definite expression of the agreement by States and not to the form of that expression of agreement. His delegation would also be prepared to consider the Netherlands amendment, which would eliminate doubts, eliminate the need for unanimity and improve the formulation of the text in its reference to the other rules of an organization.

53. Mr. HUBERT (Canada) said that while he appreciated the efforts which had been made to arrive at a solution satisfactory to the majority of delegations and reflecting the current legal situation, difficulties remained concerning the question of unanimous agreement, which limited the capacity of international organizations to conclude treaties and was thus contrary to the aim of the draft convention.

54. The representative of the Federal Republic of Germany had suggested that the deletion of article 36 *bis* was simply an easy way out, but he felt that its elimination might be prudent from the standpoint of codification. The speaker accordingly favoured the action proposed by Austria and Brazil. If, however, there was a consensus in favour of the retention of the article, he could accept the Netherlands amendment, which would attenuate the requirement of unanimity. He could not, for that reason, support the amendment of Switzerland, which would keep the requirement for unanimous agreement in subparagraph (a) substantially intact.

55. Mr. ALMODÓVAR (Cuba) said that cogent arguments for deletion of article 36 *bis* had been put forward during the discussion, but that equally serious efforts had been made, particularly by the delegations of the Netherlands, Switzerland and the Soviet Union, to rescue the text. His delegation would refrain from comment until the Committee had heard the Expert Consultant's comments on the article.

56. Mr. GÜNEY (Turkey) said that the number of proposals to amend or delete article 36 *bis* testified to the complexity of the article and the importance of its subject-matter, which was closely linked to that of articles 35 and 36. Any decision on article 36 *bis* would affect the precarious balance between those two arti-

cles. His delegation therefore felt that while the best course might be to delete the article in view of the difficulties to which it might give rise, it might be possible to amend it on the lines proposed by the Netherlands and Switzerland. The amendment proposed by the Soviet Union also represented a laudable effort to improve the text and should be given careful consideration. He agreed that the Committee's decision should be postponed until the Expert Consultant's explanation of the text had been heard.

57. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that article 36 *bis* dealt with a new and complex legal situation which had been the subject of prolonged debate in the International Law Commission. International practice did not provide sufficient guidance in the matter, and it would be difficult to establish a general rule that would be applicable to all international organizations. He agreed with those representatives who had suggested that, as drafted by the Commission, article 36 *bis* might create difficulties in connection with the legal relations between States, and he therefore favoured the proposal of Austria and Brazil to delete the article.

58. Mr. KANDIE (Kenya) said that there seemed to be no middle ground between those who wished to see article 36 *bis* deleted and those who believed it could be improved. He had initially favoured the proposal for deletion, but, after hearing the arguments put forward during the discussion, and particularly those of the Netherlands and the United Kingdom, and, bearing in mind the fact that the International Law Commission had adopted the text unanimously, he was no longer convinced that deletion was the right approach. He reserved the right to comment further once he had heard the Expert Consultant's explanation of the article, and he hoped that some means could be found of accommodating the valid ideas contained in the text.

59. Mr. DALTON (United States of America) said that, in his delegation's view, article 36 *bis* dealt with only one aspect of the problems raised when an international organization composed of member States entered into treaties with States which were not members of that organization. The full range of problems that would need to be regulated in such instances was illustrated by the United Nations Convention on the Law of the sea,<sup>2</sup> which devoted a separate annex (annex IX) to the problem of participation in that treaty by an international organization constituted by States to which member States had transferred treaty-making capacity in respect of matters dealt with in that Convention. That annex contained eight articles stating precisely the rights of treaty partners which were not members of

the organization; that aspect was not covered by article 36 *bis* at present before the Committee.

60. In order to make it satisfactory, article 36 *bis* would have to be amended substantially. He doubted whether the Conference had time to carry out such a complex exercise, which would in any case run the risk of distorting the International Law Commission's text and its relationship to the 1969 Vienna Convention.

61. His delegation had formulated the views he had just expressed before hearing the observations made by the representative of the International Labour Organisation at the previous meeting in introducing the amendment of three international organizations. Although her explanation had not persuaded his delegation to support that amendment, it had convinced it that the law relating to treaties as dealt with in article 36 *bis* was not sufficiently ripe for codification in all its aspects. In view of the lack of firmly established international practice, it therefore appeared best to delete the draft article, as was proposed in the amendment of Austria and Brazil.

62. Mr. STEFANINI (France) said that, although he agreed with those who had favoured postponing a decision on article 36 *bis* until the Expert Consultant's comments on that text had been heard, he wished to state his delegation's belief that the article, as drafted by the Commission, was satisfactory, inasmuch as it dealt in the best possible manner with a very complex issue and was the result of laborious negotiations in which many, if not all, States represented at the Conference had taken part. Accordingly, his delegation could not approve the amendments of the three international organizations and the Soviet Union and had doubts regarding the usefulness of the amendments proposed by the Netherlands and Switzerland, however praiseworthy their object. Although he would prefer to retain the article as it stood, he was prepared to accept the proposal put forward by Austria and Brazil for its deletion. In any case, it would be desirable to hear what the Expert Consultant had to say on the subject.

63. The CHAIRMAN said that, in the absence of objection, he would take it that the Committee decided to postpone any decision on article 36 *bis* until it had heard the Expert Consultant.

*It was so decided.*

#### *Article 61 (Supervening impossibility of performance)*

64. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished to adopt the text of article 61 as drafted by the International Law Commission, and that it would refer the article to the Drafting Committee.

*It was so decided.*

*The meeting rose at 5.25 p.m.*

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

## 21st meeting

Thursday, 6 March 1986, at 11.25 a.m.

*Chairman: Mr. SHASH (Egypt)*

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

[Agenda item 11] (*continued*)

**Article 62 (Fundamental change of circumstances)**

1. Mrs. OLIVEROS (Argentina), introducing her delegation's amendment (A/CONF.129/C.1/L.57), said that, in the introductory wording of the document, the words "replace the existing text of paragraph 2" should be corrected to read "replace the existing text of paragraphs 2 and 3".

2. Article 62 dealt with one of the most difficult problems of international law, namely, that of the *rebus sic stantibus* doctrine or principle. The problem of terminating or withdrawing from a treaty on the grounds of a fundamental change of circumstances was as old as the law of nations itself. As Macchiavelli put it, a prince "must not honour his word when it places him at a disadvantage and when the reasons for which he made his promise no longer exist". There had been a long history of attempts to place legal limitations on the non-fulfilment of international agreements on the ground of a fundamental change of circumstances. Article 62 of the 1969 Vienna Convention on the Law of Treaties<sup>1</sup> had achieved a delicate balance between the need to respect the binding character of treaties and that of permitting termination or withdrawal.

3. The International Law Commission had not hesitated to include a provision on fundamental change of circumstances in the form of article 62. It had established two exceptions to the basic rule: that of boundary treaties, set forth in paragraph 2, and the case where the fundamental change was the result of a breach by the party invoking it, set forth in paragraph 3.

4. The first purpose of her delegation's amendment was to merge paragraphs 2 and 3, so as to give the article the same presentation as it had in the 1969 Vienna Convention. That formulation was much clearer and avoided the confusion which paragraph 3 of the draft article created through its repetitiveness and the fact that it did not mention the subject of the right in question. The second purpose of the amendment was to deal with the problem of determining the meaning of the expression "if the treaty establishes a boundary". The use of the term "boundary" without any qualification meant that the expression covered not only treaties of

mere delimitation of land territory but also treaties of cession or, in more general terms, treaties establishing or modifying the territory of States. Moreover, although the notion of "boundary" customarily denoted a land limit, it could also be taken more broadly to designate the spatial limits of the exercise of different powers, such as customs lines, the limits of the territorial sea, continental shelf and exclusive economic zone, and also certain armistice lines.

5. The present Conference was not called upon to define what was meant by a boundary, but it could examine whether international organizations could have boundaries. It could not properly be asserted that international organizations could have a territory. That being said, a second question arose, namely, whether an international organization could establish the boundary of a territory; the answer to that question was undoubtedly in the affirmative. Article 62 of the 1969 Vienna Convention had been worded from the traditional standpoint that only States could possess a territory and that only delimitations of territories of States constituted boundaries. The importance of defending the physical integrity of States and their survival as States, notwithstanding any fundamental change of circumstances, explained the emergence in international law of a rule which excluded the termination of treaties establishing a boundary.

6. In the commentary to article 62 (see A/CONF.129/4), the Commission had indicated the possibility that an international organization could have a territory. The delegation of Argentina believed it was conceivable for an international organization to possess a territory, but its position would be totally different from that of a State enjoying sovereignty over it; in particular, it would not be empowered to conclude treaties establishing boundaries for that territory. The present draft left open the possibility of an international organization party to a treaty establishing the boundaries of a territory acting in the name of that territory, in which case it did not seem appropriate for that treaty to enjoy the privilege of irremovability granted by article 62.

7. The considerations she had mentioned led to the conclusion that an international organization should not enjoy the same privileges as a State in the event of a fundamental change of circumstances. In order to make that clear, her delegation's amendment sought to introduce into the article the words "of a State" after the words "establishes a boundary". There would thus be no doubt that the boundaries to which article 62 referred were those intended by the letter and spirit of the corresponding provision of the 1969 Vienna Convention.

8. Mr. AVAKOV (Union of Soviet Socialist Republics), introducing his delegation's amendment

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

(A/CONF.129/C.1/L.59), said that article 62 was a particularly complicated and delicate provision. It reflected the clash between two principles: the fundamental rule of treaty law *pacta sunt servanda* and the important exception to it represented by the *rebus sic stantibus* principle, which made it possible to depart from that basic legal norm on the ground of a fundamental change of circumstances. The *rebus sic stantibus* principle had the merit of recognizing that economic and social developments could justify the unilateral repudiation of a *status quo*. It thus tended to make legal norms flexible, and from that point of view was a positive element.

9. He stressed that, in the context of the rule embodied in article 62, it would be mistaken to think only in terms of terminating or withdrawing from a treaty. The fundamental change of circumstances could have more limited results, such as a revision of the treaty or its adaptation to the new circumstances.

10. He recalled that at the 1968-1969 Vienna Conference on the Law of Treaties there had been considerable controversy between the adherents of the *pacta sunt servanda* rule and those of the *rebus sic stantibus* principle. In actual fact there was no real contradiction between the two principles, because they were different in nature. The *pacta sunt servanda* rule was an inalienable principle of international law, whereas the *rebus sic stantibus* principle was an exception which related only to rare cases. The difficulty which arose was that of determining the cases to which the exception applied. As his delegation saw it, the *rebus sic stantibus* principle constituted a strong medicine which should only be used in homoeopathic doses; if abused, it could have undesirable consequences.

11. At the 1968-1969 Conference his delegation had therefore supported article 62 as a well-balanced article which reflected the practice that had developed in the matter. Paragraph 2 of the article was particularly important because it related to the integrity of boundaries. While the wording of the present article 62 was acceptable to his delegation, it had submitted its proposal to amend it by replacing the words "if the treaty establishes a boundary" at the end of paragraph 2 by the words "if the States parties to the treaty establish a boundary on the basis of the treaty". That change of wording would, it believed, improve the article by excluding the possibility of interpreting paragraph 2 as enabling an international organization to be a full-fledged party to a boundary treaty. It would also make it clear that paragraph 2 dealt with State boundaries. His delegation attached great importance to article 62, which dealt with matters of both practical and theoretical interest.

12. Mr. RAMADAN (Egypt) said that article 62 was a delicate and important article. Its provisions were based on the corresponding article 62 of the 1969 Vienna Convention. Paragraph 1 contained the main rule, but his delegation felt that its wording was not sufficiently clear. Paragraph 4 dealt with the possibility of suspending the operation of a treaty in the event of a fundamental change of circumstances. The party invoking that suspension could then endeavour to establish a new balance by renegotiating the treaty with

its partners, and this weakened the argument about the objectivity of the rule as a cause of termination of treaties.

13. Paragraph 2 of article 62 contained a new element by comparison with the 1969 text in that it referred to international organizations as well as to States. The text of the paragraph needed to be modified so as to rule out any idea that an international organization could have the capacity to establish boundaries for States. Obviously, an international organization could not exercise sovereign rights over the territory of States; the International Law Commission pointed out in paragraph (8) of its commentary to the article that not a single example could yet be given of such a situation. Clearly, only States could establish boundaries, and the only treaties to which paragraph 2 of the article could refer were those which established a boundary between at least two States.

14. That being so, the question arose whether a treaty establishing a boundary should be excluded from the operation of the *rebus sic stantibus* principle. Two situations could arise. The first was that of a treaty establishing a boundary between States and covered by the 1969 Vienna Convention on the Law of Treaties. In that connection, he reminded the Committee that Egypt had ratified the Convention without making any reservation to article 62.

15. The second case was that of a treaty establishing a boundary between States to which an international organization was a party because the treaty contained provisions concerning functions which the organization was to perform, such as guaranteeing a boundary or performing certain duties in boundary areas. He could think of the example of a war or a frontier dispute between two States; such a conflict might be terminated by a treaty establishing a boundary and containing provisions on a guarantee or inspection of the boundary by an international organization. It might afterwards happen that the organization ran into budgetary difficulties and its competent organs refused to vote the necessary appropriations to meet those commitments, and, at the same time, that a fundamental change of circumstances occurred in that relations between the signatory States improved. Could it be said that the international organization was not entitled to invoke that fundamental change of circumstances in order to withdraw from the treaty? In his delegation's view it should be able to do so.

16. The Egyptian delegation would be grateful if the Expert Consultant would furnish a reply to that question. His own feeling was that the reply would be in the affirmative. It therefore seemed important to amend paragraph 2 of article 62 in order to make it clear that it concerned only the rights and obligations actually related to establishing boundaries between States.

17. The Expert Consultant's opinion would also be welcome on the following hypothesis: a number of States members of a customs union might each yield part of its territory to the union for the purpose of certain operations, and a subsequent change of political circumstances might necessitate the withdrawal of one of those States from the union. Would the exception provided for in article 62, paragraph 2, have the effect

of preventing the State in question from regaining jurisdiction over that part of its territory?

18. In the light of what he had said, the Egyptian delegation, while appreciating the purpose of the Argentine amendment, found difficulty in supporting it because it would permit an international organization to enter into a treaty with only one State which established a boundary of a State. He likewise sympathized with the intention underlying the Soviet amendment, but considered that its wording should be reviewed and clarified, as it opened the way to confusing the boundaries of States and boundaries in the wider sense of limits of place for exercising authority. Furthermore, it did not avoid his delegation's criticism of paragraph 2 of the same article.

19. Mr. CRUZ FABRES (Chile) called attention to the risks to the stability of treaty relations inherent in the doctrine of *rebus sic stantibus*, which, in the opinion of most jurists, should be treated with particular caution. His delegation was especially concerned at the absence of a binding system for the settlement of treaty disputes. Chile had therefore entered a reservation directly affecting article 62 of the Vienna Convention on the Law of Treaties at the time of ratifying the Convention. His comments on the present draft should be understood as being without prejudice to that reservation.

20. The International Law Commission's Special Rapporteur on the topic had explained in his ninth report why it had not been possible to duplicate in the present text the provisions of article 62, subparagraph 2 (a), of the 1969 Vienna Convention. To have done so would have been to imply what was unacceptable, namely, that international organizations could dispose of territory. It was the Chilean delegation's view that the Argentine amendment was unacceptable for the same reason. On the other hand, the Commission's present draft of paragraph 2 reflected situations where, for purposes other than that of establishing the boundary itself, international organizations might be parties to a treaty between States establishing a boundary. The term "boundary" should be understood as having exactly the same significance in the present draft as it did in the Vienna Convention.

21. Mr. SOMDA (Burkina Faso) said that, notwithstanding the useful clarification provided by the International Law Commission's commentary to article 62, there still seemed room for improvement in paragraph 2 of the draft, which failed to establish clearly which bodies were entitled to conclude the treaties in question and what boundaries were involved.

22. The Argentine amendment could be said to provide some additional precision in so far as it specified, in subparagraph 2 (a), that the boundary in question must be that of a State; on the other hand, the provisions of subparagraph 2 (b) of the amendment reintroduced uncertainty by being open to different interpretations. His delegation considered that it posed more questions than it solved, and therefore should not be accepted.

23. The Soviet Union proposal seemed to take better account of the Commission's idea, besides making two

points clear rather than one: first, that it was States which were entitled to conclude treaties establishing boundaries; and secondly, that the boundaries in question were those established between States.

24. His delegation supported that amendment. If it was not adopted, it could approve the Commission's draft provided that the words "of a State" were added at the end of paragraph 2.

25. Mr. GAUTIER (France) said that the issue of fundamental change of circumstances should be considered in close connection with that of supervening impossibility of performance—the subject of article 61, which had been accepted without debate.

26. Paragraph 2 of the International Law Commission's text perhaps suffered from the consequences of attempting both to deal with existing situations and to foresee others that might occur with the evolution of the law related to international organizations. It was based on the traditional concept that only States disposed of territory and that only the limits of territories constituted boundaries. His delegation approved the Commission's approach. The paragraph applied basically to treaties between States to which international organizations might, because they were attributed certain functions, also become parties. The Commission had not wished, however, to prejudge the future, and had expressed in very general terms the notion of establishment of boundaries by treaty. Under the circumstances it might be wise to leave well alone. His delegation therefore preferred the text presented by the Commission to the versions which would result from either of the amendments.

27. Mr. ULLRICH (German Democratic Republic) expressed his delegation's acceptance of article 62 in principle; the Soviet Union amendment reflected international practice and seemed likely to make the text clearer, although the English version of the wording of that amendment might be improved. The Argentine amendment had the merit of reflecting the wording used in the Vienna Convention on the Law of Treaties. He suggested that the Committee should approve the Commission's draft in one of two forms: either as amended by the Soviet Union proposal, or as amended along the lines proposed by Argentina, with a modification which took account of the Soviet Union proposal. As far as the Argentine amendment was concerned, he assumed that the conclusion of a treaty establishing a boundary would be performed by at least two States. His delegation would not object to the draft article being transmitted to the Drafting Committee with the two amendments.

28. Mr. FOROUTAN (Islamic Republic of Iran) concurred with the International Law Commission's view, expressed in paragraph (1) of the commentary to article 62, that article 62 of the 1969 Vienna Convention achieved "a delicate balance . . . between respect for the binding force of treaties and the need to terminate or withdraw from treaties which have become inapplicable as a result of a radical change in the circumstances which existed when they were concluded". The article was to be welcomed for its division of the wording of article 62, paragraph 2, of the 1969 Vienna

Convention into two separate paragraphs. His delegation approved the text presented by the Commission, but would have no objection if the words "of a State" were added at the end of paragraph 2, or, alternatively, if the concluding clause read "... if the treaty establishes a State boundary".

29. Mr. SANYAOLU (Nigeria) emphasized the importance for the law of treaties of the principle of *rebus sic stantibus*. The question before the Committee was whether a provision on the subject similar to that in the 1969 Vienna Convention should be made in respect of international organizations. In the Nigerian delegation's view, the answer to that question was in the affirmative.

30. The International Law Commission had pointed out that much consideration had been given to the issue of the capacity of international organizations to be parties to treaties establishing boundaries. The outcome of its deliberations was reflected in the wording of paragraph 2 of the article. His delegation agreed with the Commission that it was possible for an organization to be a party to a treaty establishing a boundary between two or more States. For example, if the United Nations was empowered to administer a territory, it might participate in the conclusion of a treaty with two or more States to delimit the boundary of such a territory.

31. It was his delegation's reading of the amendments by Argentina and the Soviet Union that they excluded such a possibility. It consequently found them unacceptable, and would favour the adoption of the International Law Commission's draft.

32. Mrs. THAKORE (India) said that draft article 62 followed article 62 of the 1969 Vienna Convention in defining strictly the conditions in which recourse could properly be had to the principle of fundamental change of circumstances. Paragraph 2 of the draft article had been worded to express the idea that only States could possess territory and that only a delimitation of territory between States constituted a boundary. Thus, the rule in subparagraph 2 (a) of article 62 of the 1969 Convention would apply solely to treaties that established the boundary between at least two States to which one or more international organizations were parties. The International Law Commission had interpreted the word "boundary" in a broad sense as including maritime boundaries.

33. Notwithstanding the doubts expressed regarding the utility of paragraph 2, her delegation considered that it could apply to certain situations that had arisen as a result of the new concepts that had emerged at the Third United Nations Conference on the Law of the Sea. For instance, the International Sea-Bed Authority might be required to conclude agreements establishing lines, some of which might be treated as boundaries. If it did, in addition to boundaries between States there would be boundaries between States and international organizations—in the case in point, between States and the International Sea-Bed Authority. In such a case, paragraph 2 of the article could prove useful.

34. With regard to the Argentine amendment to the article, the addition of the words "of a State" in its subparagraph 2 (a) involved a substantive change and would give rise to difficulties; she was therefore unable

to accept it. The Soviet Union amendment did not clarify the article to any appreciable extent. She therefore supported the Commission's draft of paragraph 2 of article 62, subject to such drafting changes as might be required.

35. Mr. TEPAVICHAROV (Bulgaria) observed that paragraph 1 of article 62 was sufficiently flexible to accommodate a situation that might arise in the future, since the rule it stated was based on the practice of States. He noted, however, that although the text of the 1969 Vienna Convention had been adapted to suit the requirements of the draft, there were substantial differences in regard to the scope of application of the draft article by States on the one hand and international organizations on the other. That difference stemmed from the distinction that existed between States and international organizations as subjects of international law, and involved three elements of particular importance: the difference in the extent to which the responsibility of an international organization could be engaged without engaging the responsibility of its member States; the capacity of an international organization to be a party to a treaty establishing boundaries; and the practice of international organizations.

36. He agreed with the view that an international organization did not have territory and could not negotiate treaties establishing boundaries, and that it was not for the Conference, but for States, to define what was a boundary. As matters stood, an international organization could delineate a boundary if so requested and empowered by the States concerned, but it could not establish one. Admittedly, as the International Law Commission had pointed out in the commentary to the article, practice in the matter was not conclusive; however, what was needed in the case of article 62 was clarity. His delegation therefore understood the rule stated in paragraph 2 to apply only to treaties establishing boundaries between at least two States to which one or more international organizations were parties. For that reason, it could support the Commission's draft if it was amended in accordance with the Soviet Union proposal and if the English version of the wording proposed by the Soviet Union was corrected to read: "if the States parties have established a boundary by this treaty". His delegation could not support the Argentine amendment because the words "a treaty between one or more States and one or more international organizations" seemed to contemplate a situation in which a State and an international organization could conclude a treaty concerning boundaries.

37. Mr. PISK (Czechoslovakia) said that paragraph 2 of article 62 expressed the principle embodied in the 1969 Vienna Convention that a fundamental change of circumstances could not be invoked in the case of a treaty establishing a boundary. His delegation approved the transposition of that principle to the draft articles. He noted that article 62 had been worded to take account of the traditional view that only States possessed territory and that only a delimitation of the territory of States constituted a boundary. Thus, the only treaties to which the rule laid down in paragraph 2 could apply were treaties establishing boundaries between at least two States where the parties to the treaty

included one or more international organizations. The paragraph implied that an international organization could be a party to such a treaty if it was empowered under the treaty to perform certain functions.

38. A more complex question was whether, given developments in international law, the term "boundary" should be interpreted more broadly than before. On that point it was necessary to proceed on the basis of general consideration about the nature of the principle concerning a fundamental change of circumstances. The exceptions to that basic principle had been defined narrowly because, if a fundamental change of circumstances could be invoked too broadly as a ground for invalidating a treaty, the principle *pacta sunt servanda* would be directly contradicted and the security of treaty relations would be endangered. The exceptional nature of the rule about a fundamental change of circumstances was emphasized by the negative formulation of article 62: "a fundamental change of circumstances . . . may not be invoked . . . unless . . .". The stabilizing effect, and the object, of article 62, paragraph 2, called for adherence to what the 1969 Vienna Convention meant by the term "boundary". In his delegation's view, therefore, it would not be appropriate to extend that term to include, for example, the limits of the continental shelf or the exclusive economic zone.

39. The fact that the exception established in article 62, paragraph 2, applied to treaties in which States established boundaries between themselves would be spelt out more emphatically if it was expressed clearly in the wording of the paragraph. His delegation therefore supported the Soviet Union proposal, which was in keeping with the intention underlying paragraph 2 of the Commission's draft. The condition for the conclusion of the treaty establishing the boundary was that the parties should be at least two States.

40. As to the paragraph 2 proposed by Argentina, the words "a treaty between one or more States and one or more international organizations", taken in conjunction with the proposed subparagraph (a), implied that an international organization could participate in establishing the boundaries of a State in a treaty. Accordingly, for the article as a whole, his delegation supported the Commission's wording as amended by the Soviet Union proposal.

41. Ms. WILMSHURST (United Kingdom) said that her delegation approved the International Law Commission's text. Paragraph 1 stated the general principle of *rebus sic stantibus*, while paragraph 2 provided the exception concerning boundaries. The Commission had used wording modelled precisely on that of article 62, subparagraph 2 (a), of the 1969 Vienna Convention, and in her delegation's view the Conference should leave it as it was. Her delegation therefore opposed both the Argentine amendment and the Soviet Union proposal.

42. Mr. MONNIER (Switzerland) said that his delegation too approved the International Law Commission's draft. With regard to the amendments of Argent-

tina and the Soviet Union, the concept of boundaries was well established in international law and signified solely political boundaries which delimited the territory of a State. A boundary was a line that determined the geographic area over which the State exercised sovereignty. Thus, the term "boundary" could not denote customs boundaries nor could it apply to maritime limits beyond the territorial sea, such as the continental shelf or economic zone. Within such areas, the riparian State had only certain sovereign powers. The term used in that regard was not "boundary", but rather "outer limits". Consequently, a boundary could only be one between States and established by States. The fact that one or more organizations could be parties to a treaty between States establishing a boundary and conferring on those organizations certain supervisory or other functions altered nothing. Furthermore, the term "boundary" could not apply to the "territory" of an international organization, for international organizations did not have territory as such. That was why an international organization had to establish itself on the territory of a State and conclude a treaty with that State in order to regulate its legal status.

43. In his delegation's view, therefore, the proposal by Argentina to add the words "of a State" after the word "boundary" was unnecessary, as was the Soviet Union proposal. As the *rebus sic stantibus* rule could be invoked only in exceptional cases, as provided in the 1969 Vienna Convention and in the draft article itself, similarly the term "boundary" should be understood as expressing the concept that was traditionally and generally recognized. However, the rearrangement of wording which the Argentine amendment proposed might be referred to the Drafting Committee.

44. Mr. HERRON (Australia) said that his delegation could have accepted a broader reference in paragraph 2 of article 62 to a treaty relating to the status of territory, rather than the existing reference to a treaty establishing a boundary. It saw no need to adopt a restrictive approach to paragraph 2, and could accept the International Law Commission's draft. The Commission had advisedly imported into paragraph 2 a reference to two or more States and one or more international organizations: the reference to two or more States made it sufficiently clear that what was involved were boundaries between States, while the reference to international organizations was appropriate because, in a treaty between States establishing a boundary, functions could conceivably be assigned to an international organization with respect to that boundary or other aspects of the relationship between the States. For instance, the International Sea-Bed Authority, the United Nations Council for Namibia or a body associated with the Antarctic Treaty régime might well be involved in such a treaty. His delegation therefore considered that the Commission's text of paragraph 2 was entirely appropriate, and it did not support either of the amendments.

*The meeting rose at 1.05 p.m.*

## 22nd meeting

**Thursday, 6 March 1986, at 3.20 p.m.**

*Chairman: Mr. SHASH (Egypt)*

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

[Agenda item 11]

**Article 62 (Fundamental change of circumstances) (concluded)**

1. Mr. LUKASIK (Poland) said that his delegation attached the greatest importance to the principle established in article 62 of the 1969 Vienna Convention on the Law of Treaties<sup>1</sup> that no fundamental change of circumstance might be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary between States. He believed it might be concluded from the draft article prepared by the International Law Commission, and even more from the comments of some delegations, that treaties of a similar nature could be concluded between States and international organizations, or even between international organizations.

2. His delegation rejected the idea of allowing international organizations to establish boundaries, not only because they did not possess territory but because such a right was solely the attribute of sovereign States. Unfortunately, the possibility that international organizations might have the same right was envisaged in article 62. If, as had been suggested, the intention of the Commission had been to refer to agreements concluded by international organizations concerning other types of boundary, such as the limit of the continental shelf, economic zones, outer space, then the choice of the term "boundary", transplanted from the 1969 Vienna Convention, was misleading and subject to different interpretations. While his delegation rejected the idea that international organizations could conclude treaties establishing State boundaries, it had no objection to their concluding treaties concerned with the delimitation of areas other than State territories. In the latter case, it would perhaps be better to allow both States and international organizations to avail themselves of the right to invoke fundamental change of circumstances as a ground for termination or withdrawal from a treaty, since such changes often occurred in respect of non-State territories of the type he had mentioned. Such a possibility should, however, never be allowed in respect of State boundaries.

3. His delegation therefore considered both the proposed amendments very useful. The proposal by the

Union of Soviet Socialist Republics (A/CONF.129/C.1/L.59) was a simpler one, and, if adopted as suggested by the representative of the German Democratic Republic at the previous meeting to read "if the States parties establish a boundary in this treaty", could remove different interpretations of the word "boundary". While his delegation did not accept the view that an international organization could participate in a treaty establishing a boundary on equal footing with States, it nevertheless felt that such an organization might be entrusted with a specific role with respect to boundaries thus established. The situation would in any case be fully governed by the relevant provisions of article 62.

4. Mrs. OLIVEROS (Argentina) said she believed there was a consensus in favour of maintaining the situation whereby a fundamental change of circumstance could not be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary between States. However, there had been no response to her delegation's proposal that paragraphs 2 and 3 of the International Law Commission's article should be combined (see A/CONF.129/C.1/L.57 as orally revised). Her delegation could thus reduce its proposed amendment to only one point—based on its understanding that there was a consensus that in the present context "boundaries" meant the boundaries of States only—namely, that States alone, and not international organizations, could fix boundaries for themselves. Her delegation's revised amendment would thus involve simply adding the words "of a State" at the end of paragraph 2 of article 62.

5. Mr. RASOOL (Pakistan) said that the revised amendment just proposed by the representative of Argentina represented a substantive change. While stressing that at the present time boundaries could in practice be established only between States, the International Law Commission had left open the possibility that at some time in the future two States might conclude a treaty establishing an international organization under which that organization was given a separate territory. Thus, the possibility of future development of the law was retained, which was not the case under the Argentine amendment.

6. His delegation felt that the amendment of the Soviet Union introduced an element of contradiction. The article proposed by the Commission envisaged a treaty where both States and international organizations were equal parties in establishing a boundary, which was understood to be that of a State. By retaining the first part of paragraph 2, the Soviet amendment envisaged international organizations as parties to such a treaty, but with the question of the establishment of a boundary being left to the States. It appeared that in such a case an international organization would participate in the negotiations, thus becoming a party to the treaty,

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

but its sole purpose would be decided by others. In the light of those considerations, his delegation supported article 62 as drafted by the Commission.

7. Mr. NEGREIROS (Peru) said that in his delegation's view the purpose of the present Conference was not to create new international legal institutions or to reform existing ones, but to adopt an instrument complementing the work of codification carried out in the 1969 Vienna Convention. His delegation therefore considered it dangerous to apply excessive innovative zeal only a decade and a half after that Convention had established a basis for relations between States, now that international organizations were being included in the ambit of those relations. The Conference was seeking to improve the involvement of international organizations in international affairs by granting them certain rights, but without making them entities comparable with States. While his delegation favoured the involvement of international organizations in inter-State affairs, it emphasized that they were not States or equivalent entities and must conform strictly to the rules governing relations between States. For those reasons, the new convention should keep as close as possible to the 1969 Vienna Convention. He thought that the revised form of the Argentine amendment was appropriate, since it would avoid future problems of interpretation.

8. Mr. SWINNEN (Belgium) said that his delegation had no difficulty with the International Law Commission's article 62. The doubts and reservations reflected in the amendments proposed by Argentina and the Soviet Union were, he felt, satisfactorily answered in the Commission's commentary to its text (see A/CONF.129/4). The draft article was in his view sufficiently precise, and he was afraid that modifications aimed at ensuring greater precision were not only superfluous but might lead to confusion or undermine established principles of general international law. The term "boundaries" could refer only to State boundaries. Only States, as subjects of international law, had the capacity to establish boundaries. His delegation therefore gave its full support to article 62 as drafted by the Commission. However, it was not opposed to that text and the proposed amendments being referred to the Drafting Committee.

9. Mr. BOUCETTA (Morocco) said that it was generally accepted in the practice of States that a fundamental change of circumstances was a ground for terminating or withdrawing from a treaty, subject to certain exceptions, such as illicit or unequal treaties or those based on a *fait accompli* or acquired rights. The International Law Commission had attached great importance in its work on the 1969 Vienna Convention to the need strictly to define the circumstances in which it was permissible to terminate or withdraw from a treaty. That was underlined by the negative formulation of article 62, paragraph 1, of that instrument. Paragraph 2 of that article indicated two cases where the article did not apply, the first relating to treaties establishing a boundary between States, an exclusion which the Commission had considered necessary in order to avoid a dangerous source of friction. The second exception, which was the subject also of paragraph 3 of the draft

article, contained the impossibility of invoking a fundamental change of circumstances resulting from a breach by the party invoking it.

10. His delegation took the view that an international organization clearly could not establish State boundaries, let alone its own, although situations might arise where States parties to a treaty establishing a boundary between them desired the participation of an international organization for certain limited and defined functions. However, in no circumstances could an international organization conclude a treaty establishing a boundary on behalf of a State.

11. His delegation was in favour of maintaining article 62 in the form proposed by the International Law Commission. It might, however, wish to comment on the matter again after hearing the Expert Consultant's explanation of that text.

12. Mr. CORREIA (Angola) said that his delegation had no difficulty in accepting the Commission's draft, but believed it was necessary to make it clear that the term "boundary" meant only State boundaries and that only States had the capacity to conclude treaties establishing boundaries. It therefore had certain reservations in respect of paragraph 2. The term "boundary" was perhaps insufficiently clear, and the amendments proposed by Argentina, as orally revised, and the Soviet Union provided a basis for improving the paragraph. Those amendments, together with the text of the article proposed by the Commission, should therefore be referred to the Drafting Committee.

13. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that, as the International Law Commission had pointed out in paragraph (1) of its commentary to the text, article 62 established a delicate balance between respect for the binding nature of treaties and the need to be able to terminate or withdraw from them in the case of a fundamental change of circumstances. Under the 1969 Vienna Convention, fundamental change of circumstances was not a ground for so doing where the treaty was one establishing a boundary or where the change was due to a breach by the State invoking it. The fact that the basic subject of the present draft convention was relations between States and international organizations had led to the expression of certain reservations related to the differences between the present situation and that of the earlier Convention. His delegation was concerned about the rather hypothetical capacity of an organization to participate in a treaty for the establishment of a "boundary", a term which was already defined in international law and closely linked to States and their powers. Under such a hypothesis, the activities involved would be those arising from boundary-related questions rather than the actual establishment of boundaries. A codification which had regard to the future should certainly take account of those situations which, although unlikely, were nevertheless possible, but the hypothesis that a boundary could be established by a subject of international law which was not a State was an impossible one, since the term "boundary" itself was defined as relating exclusively to States. Although to his delegation it seemed superfluous, the precision contained in the amendment proposed by Argentina, as orally revised, might never-

theless be acceptable. A similar precision was contained in the Soviet Union amendment, which could probably be combined with the Argentine amendment. In the view of his delegation, both amendments should be referred to the Drafting Committee.

14. Mr. WANG Houli (China) said that while his delegation could accept the Commission's article 62, there was some problem of understanding. A border in international law determined the boundary line between States, and, traditionally, the decision to establish such a line was a matter between States. International organizations had no territory and therefore did not have to decide on their boundaries. However, the slight possibility of such an organization becoming a party to a treaty dealing with a boundary could not be excluded. On that understanding, his delegation could support paragraph 2 of the article as drafted, but it could not agree that "boundary" in that context also included the limit of economic zones or of the continental shelf. The amendments of the Soviet Union and Argentina were intended to clarify the content of the article, and his delegation did not object to their being referred to the Drafting Committee.

15. Mr. MIMOUNI (Algeria) said that the International Law Commission's draft, which was largely based on the 1969 Vienna Convention, raised two basic issues: the capacity of international organizations to conclude treaties establishing boundaries or to dispose of territory, and the concept of a boundary. The article had been drafted in accordance with the traditional idea that only States had territories and consequently only the delimitations of the territories of States were boundaries. The Commission in its commentary had indicated that the rule in paragraph 2 applied only to treaties establishing boundaries between at least two States to which one or more international organizations were parties. The Algerian delegation believed that only States could conclude treaties establishing boundaries and that international organizations could exercise only specific functions in that connection. It therefore could not support the first subparagraph in the amendment proposed by Argentina. While not objecting to the remainder of that proposal, it believed that the addition of the words "of a State" at the end of paragraph 2 was unnecessary, as the word "boundary", as used in that paragraph, referred to the boundary of a State. For these same reasons, and even if the Soviet amendment did try to bring in greater precision, the Algerian delegation preferred not to depart too much from the wording of the 1969 Vienna Convention. In conclusion, therefore, the Algerian delegation preferred the Commission's draft.

16. Mr. AL JARMAN (United Arab Emirates) said that, in his delegation's view, international organizations could not deal with matters of sovereignty, which were the domain of States. States alone were competent to determine the boundaries between them, and the treaties referred to in article 62 were those establishing boundaries between at least two States. International organizations could only be parties, but not determining parties to those treaties. The wording used by the International Law Commission was very general, and his delegation interpreted the reference to

boundaries as meaning the boundaries of the entire State, including territorial waters, economic zones and the continental shelf. The original amendment proposed by Argentina was somewhat narrow in scope, since it referred only to territorial or State boundaries, and was therefore a fundamental departure from the Commission's draft. His delegation had not yet been able to study the revised version of the Argentine amendment. The Soviet proposal did not basically change the Commission's draft, which his delegation preferred as it stood.

17. Mr. ALMODÓVAR (Cuba) said that it appeared, in principle, unnecessary to introduce an exception to the rule in article 62. However, the International Law Commission had provided detailed explanations, and in paragraph (6) of its commentary had even gone so far as to make disclaimers concerning interpretation of the 1969 Vienna Convention and the Convention on the Law of the Sea. Paragraph (11) of the commentary, in its reference to treaties establishing a boundary between at least two States to which one or more international organizations were parties, contained an idea which needed closer study. The delegation of Argentina's attempt to clarify the expression "boundary of a State" was praiseworthy, but did not eliminate the problem of interpretation. The amendment of the Soviet Union was clearer. He felt that consultation between the two delegations might result in production of a text which could be referred to the Drafting Committee.

18. The CHAIRMAN, summing up, said that many views had been expressed both for and against the Commission's article 62 and the two amendments thereto, and the Committee would have to decide whether those amendments related to matters of substance. In his view the article was in no way concerned with the creation or establishment of rights for international organizations, and the Conference was codifying the law of treaties and not the rights of international organizations.

19. As he understood them, the Argentine amendment, as orally revised, meant that "boundaries" were the boundaries of a State in the context of the draft article, while the Soviet amendment meant that only States could establish the boundaries of States. If there was no objection, therefore, he would take it that the Committee of the Whole approved the International Law Commission's text, approved the two proposed amendments as drafting amendments and agreed to refer them to the Drafting Committee.

*It was so decided.*

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

##### *Paragraph 3*

20. Mr. ISAK (Austria), introducing the amendment proposed by his own delegation and that of Egypt (A/CONF.129/C.1/L.58/Rev.1), said that, generally speaking, article 65 as drafted by the International Law Commission was satisfactory. However, the opening

clause of paragraph 3 of the Commission's draft differed from that of article 65, paragraph 3, of the 1969 Vienna Convention, which read: "If, however, objection has been raised by any other party, . . .". The idea behind that formulation was to link paragraph 3 of the article to paragraph 2, particularly in respect of the time-limit imposed on the right to raise an objection to a notification made under paragraph 1 of the article. In wording paragraph 3 of the present draft article, the Commission had departed from that formulation in order to disconnect the paragraph from paragraph 2, the reason being, as it had observed in paragraph (4) of its commentary to the article, that in the case of the treaties which were the subject of the draft articles, it would be advisable not to provide for loss of the right to raise an objection to a notification designed to dissolve or suspend a treaty. But the new wording set up a contradiction, since paragraph 2 of the article did impose a time-limit on that right, whereas paragraph 3 did not. Irrespective of the question of the admissibility of an objection raised beyond the time-limit established in paragraph 2, his delegation considered that the opening clause of paragraph 3 could not confer on such an objection the legal effects contemplated in paragraph 2. The new wording would only widen the scope for the objections which were subject to the dispute settlement procedure provided for in paragraph 3.

21. His delegation was well aware of the legal problems which the formulation in the 1969 Vienna Convention could not solve—particularly that of prescription—and which remained unsolved with the new formulation. However, the new wording in paragraph 3 created a new régime which differed from that of the 1969 Vienna Convention. In order to avoid the existence of a double régime, which would certainly not contribute to the predictability, precision and certainty of international relations under international law, the Austrian and Egyptian delegations proposed the reinstatement of the formulation used in the 1969 Vienna Convention. That would certainly improve the wording of the article and facilitate the future application and interpretation of its provisions.

22. Mr. RIPHAGEN (Netherlands) said that the International Law Commission had given a reason for changing the wording of paragraph 3. If the Conference decided to revert to the old formulation, it would give the impression that it rejected the idea that the time-limit of not less than three months established in paragraph 2, in other words a minimum period, should not be applicable in paragraph 3, which dealt implicitly with a maximum period. He would prefer the matter to be referred to the Drafting Committee, which would decide whether a matter of substance was involved.

23. Mr. STEFANINI (France) said that his delegation had certain doubts about the scope of article 65 and reserved the right to speak on the subject at a later stage. However, it was prepared to accept the Commission's text provisionally and had no objection to the proposed amendment. He suggested that in the French version of the amendment the word "*cependant*" should be replaced by the word "*toutefois*".

24. Mr. FOROUTAN (Islamic Republic of Iran) said that his delegation found the change introduced by

the International Law Commission at the beginning of paragraph 3 unsatisfactory, because the paragraph no longer had its place in the succession of steps which had to be followed in cases of dispute. Taking into consideration the time-limit stipulated in paragraph 2, it would normally be the case that after its expiry the notifying party would be free to carry out the measure it had proposed, in the manner provided in article 67. Paragraph 3 represented a step which was out of line with the preceding paragraph. It was unnecessary to depart from the language of the 1969 Vienna Convention at that point. His delegation therefore approved the amendment proposed by Austria and Egypt and suggested that it should be referred to the Drafting Committee.

25. Mr. BERMAN (United Kingdom) said that paragraph 3 represented a substantive and unjustified departure from the 1969 Vienna Convention. It should be amended to reinstate the wording of that instrument. Consequently, his delegation fully supported the amendment put forward by Austria and Egypt and suggested that the article as thus amended should be referred to the Drafting Committee.

26. Mr. NGUAYILA (Zaire) said that his delegation could accept the draft article prepared by the International Law Commission. In general, the article took its inspiration from the corresponding article of the 1969 Vienna Convention. The amendment proposed by Austria and Egypt seemed to involve a drafting change.

27. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that article 65 established a suitable mechanism for ensuring stability and legal certainty in treaty relations. The requirement of notification prevented a party to a treaty from taking arbitrary measures unilaterally to dissolve it or suspend it. The article reflected article 65 of the 1969 Vienna Convention, which had been debated thoroughly and at length. Paragraph 3 concerned objections to proposals for the dissolution or suspension of a treaty, as well as the obligation of States to solve their differences peacefully, which was a fundamental principle of the Charter of the United Nations. The reference to Article 33 of the Charter expressed the well-established principle that States had a choice of means for settling disputes. The amendment proposed by Austria and Egypt brought the text into line with that of the 1969 Vienna Convention. His delegation could therefore accept it, and agreed that it should be referred to the Drafting Committee.

28. Mr. AENA (Iraq) said that in general his delegation found article 65 as prepared by the International Law Commission acceptable, since it laid down a procedure that ensured justice for all parties to a dispute relating to the dissolution or suspension of a treaty. The achievement of a solution through the means indicated in Article 33 of the Charter of the United Nations was appropriate. His delegation supported the proposal by Austria and Egypt and agreed that it should be referred to the Drafting Committee.

29. Mr. RASOOL (Pakistan) said that his delegation approved the wording of article 65 proposed by the International Law Commission. The amendment of Austria and Egypt seemed to introduce a change of

substance, and his delegation therefore opposed it. However, if the Committee clearly understood the proposal as involving only a matter of drafting, his delegation would not object to it being referred to the Drafting Committee on that understanding.

30. Mr. HERRON (Australia) said that in his view the International Law Commission had not necessarily made a change of substance; what it had done was to decide between two possible interpretations of the words "if, however, objection has been raised" in article 65, paragraph 3, of the 1969 Vienna Convention, which were ambiguous. Not to accept the change proposed by the Commission would be tantamount to choosing deliberately to retain the ambiguity. His delegation preferred the future convention not to contain a known ambiguity, and therefore agreed with the Commission's decision to make it clear that article 65, paragraph 3, did not prescribe loss of the right to raise an objection to a notification concerning the dissolution or suspension of a treaty. Accordingly, it approved the Commission's wording.

31. With regard to the possible effect of the change introduced by the Commission on the interpretation of the corresponding article of the 1969 Vienna Convention, the ambiguity of the article would remain, but the international community would probably interpret it in accordance with subsequent practice.

32. Mr. MORELLI (Peru) said that his delegation supported the proposals by Austria and Egypt. However, in the Spanish version of the amendment, the words "*no obstante*" should be replaced by the words "*por el contrario*", which were the ones used in article 65, paragraph 3, of the 1969 Vienna Convention.

33. Mr. DENG (Sudan) said that his delegation found the language of paragraph 3 incompatible with that of paragraph 2. The wording proposed by Austria and Egypt would therefore be acceptable, provided it implied the continuance of the right of objection, as advocated by the International Law Commission.

34. Mr. SZASZ (United Nations) said that his delegation was of two minds regarding the proposal by Austria and Egypt to reinstate the language of the 1969 Vienna Convention. Any deviation from that Convention was undesirable unless the special nature and requirements of international organizations in relation to the draft convention justified it. In his view, the justification in the present case would be that international organizations, because of their international structure, might not react as fast as States to a notification under article 65, paragraph 1. For organizations such as the United Nations which had executive heads empowered to act on behalf of the organization, the time-limit of three months should not present a problem. Smaller international organizations possessing treaty-making capacity might, however, not be able to react within that period, and consideration should therefore be given to wording the article so as to cater to them.

35. The International Law Commission had decided to make no distinction between States and international organizations in paragraph 2; indeed, such a distinction would have created a problem because it would not have been clear, if there had been prescribed for organ-

izations either a longer period than for States or no period at all, what would be the position of a party making a notification pursuant to paragraph 1. If the wording of article 65, paragraph 3, of the 1969 Vienna Convention could be interpreted as prescribing a time-limit for an objection to a notification, it would be inadequate for use in the present draft in respect of international organizations. That might therefore be a reason for deviating from the 1969 wording.

36. In the view of his delegation, either choice involved interpreting article 65, paragraph 3, of the 1969 Vienna Convention, which strictly speaking was something that this Conference could not do. Accordingly, if the proposal by Austria and Egypt was rejected, the Conference should place it on record that, in rejecting it, it did not thereby mean to give a restrictive interpretation to the Vienna Convention on the Law of Treaties. If on the other hand the proposal was adopted, the Conference should place on record its intention that article 65, paragraph 3, of the future convention should not be given a restrictive interpretation.

37. Mr. MONNIER (Switzerland) said that it was clear from the discussion that article 65 involved closely interrelated considerations of substance and form. The real difficulty was that the International Law Commission's wording aimed at a change of substance but did not make that change of substance clear. His delegation saw no fundamental difference in meaning between the words "when an objection is raised" and the words "if, however, objection has been raised". The substantive point which the Commission had sought to make was that it was inappropriate that the draft convention should provide for loss of the right to raise objections to a notification designed to dissolve or suspend a treaty. His delegation was not convinced of the need for the new instrument to diverge from the 1969 Vienna Convention on that point of substance. Secondly, if that Convention did contain an ambiguity, he doubted the wisdom of adding to that ambiguity by adopting an article which aimed at a change of substance but whose language failed to achieve one. In his view, the need for certainty in legal relations required the Committee to choose the wording of the 1969 Vienna Convention for article 65, paragraph 3. His delegation therefore supported the proposal by Austria and Egypt. The Committee must realize that the choice between the two alternatives was a matter of substance, not of drafting, and needed to be fully debated before the article could be sent to the Drafting Committee.

38. Mr. WIBOWO (Indonesia) said that the International Law Commission had stated in paragraph (4) of its commentary to article 65 that the new wording of paragraph 3 indicated that an objection to a notification under the article could be raised at any time. His delegation felt that view to be incompatible with the reference to the three-month period which paragraph 2 contained. It did not consider that paragraph 3 needed to depart from the 1969 Vienna Convention, and it would therefore support the proposal by Austria and Egypt.

39. Mr. UNAL (Turkey) said that his delegation considered that the Austrian-Egyptian amendment improved the Commission's text and would facilitate the interpretation and application of article 65, paragraph 3.

40. Mr. RIPHAGEN (Netherlands) observed that the statements by the United Nations and Australia had made it clear where the difficulty lay. While paragraph 2 dealt with a time-limit for the party notifying its intent not to perform a treaty, that was not the same period as the one which governed the right to raise an objection to the notification. Most of the matters pertaining to loss of the right to raise an objection related to article 45, to which there was a reference in paragraph 6 of article 65. The interpretation of the 1969 Vienna Convention was quite clear, and the wording used in that instrument would therefore be satisfactory for article 65, paragraph 3. The Conference should make it clear, however, that the reason for reinstating the wording of the 1969 Convention was not that the period allowed for raising an objection was too short.

41. The CHAIRMAN said that the main point seemed to be whether there were any considerations in the article which would justify using a different formulation for it from the one in the 1969 Vienna Convention. The actual interpretation of that Convention was not at issue. Since widespread support had been expressed for the amendment proposed by Austria and Egypt, he would take it, if he heard no objection, that the Committee adopted it and referred article 65, paragraph 3, as amended, to the Drafting Committee.

*It was so decided.*

#### Organization of work

42. Mr. BERMAN (United Kingdom) said that as a member of the Drafting Committee, he wished to raise a general question about the relationship between the work of the Drafting Committee and that of the Committee of the Whole. His delegation and other delegations were concerned about the terms in which the Committee of the Whole referred some articles to the Drafting Committee. Although the line between substance and drafting was often uncertain, they felt that the Committee of the Whole was leaving too much responsibility for matters of substance to the Drafting Committee.

43. Taking article 62 as an illustration of his point, the discussion had revealed general support for the International Law Commission's text, support from some delegations for both of the proposals to amend it and support from other delegations for one or other of those proposals, as well as disagreement on whether the points at issue were matters of substance or of drafting. Following the discussions, however, the Committee had apparently adopted both the Commission's text and the two amendments and had referred them all to the Drafting Committee. Since his own delegation had not expressed support for either amendment it had been surprised to hear that the amendments had been adopted. He asked the Chairman for guidance as to how the Drafting Committee should proceed in such cases.

44. The CHAIRMAN said that in summing up the discussion on article 62, he had given the Committee of the Whole his understanding of both amendments and had asked whether there were any objections to that understanding. Since there had been none, that understanding had formed the basis of the Committee's

decision to refer both amendments to the Drafting Committee as generally acceptable, together with the International Law Commission's text.

45. Mr. BERMAN (United Kingdom) agreed that the Chairman had given an interpretation of the intent underlying the amendments proposed by Argentina and the Soviet Union and that no objection had been voiced to that interpretation. It was wrong, however, to say that the Committee had accepted the use of their wording. That was for the Drafting Committee to decide, and it would not be bound by the decision of the Committee of the Whole because that Committee had not adopted a particular wording.

46. Mr. MONNIER (Switzerland) said that the representative of the United Kingdom had raised a very important question. The amendment by Argentina to article 62 (A/CONF.129/C.1/L.57) was an illustration of the difference between substance and form: on the one hand, it proposed a substantive change by adding the words "of a State" to a new subparagraph 2 and, on the other, a change of form by combining paragraphs 2 and 3. The debate on the Soviet Union amendment (A/CONF.129/C.1/L.59) had shown that all delegations were agreed on the substantive point that only States could have boundaries and that only States could determine them. It was clear, therefore, that the changes sought by the two amendments touched on the substance of the article. The Committee should be aware that action of the kind it had taken in regard to article 62 could complicate the work of the Drafting Committee.

47. Mr. STEFANINI (France) endorsed the views expressed by the representatives of the United Kingdom and Switzerland. His delegation could not agree to the transmission of the International Law Commission's text of article 62 to the Drafting Committee together with two amendments which partly contradicted each other. The Drafting Committee was not a negotiating body; it could adapt a text, but it could not be expected to combine two amendments with opposing points of view. If amendments which involved substantive differences were referred to the Drafting Committee, his delegation might well be obliged to refuse to examine them there. Articles on which there was disagreement should be regarded as pending and negotiated elsewhere than in the Drafting Committee.

48. Mr. NASCIMENTO e SILVA (Brazil) said that paragraph 2 of rule 48 of the rules of procedure provided that the Drafting Committee should consider any draft articles referred to it by the Committee of the Whole after initial consideration by that Committee. It was also empowered to prepare draft and give advice on drafting as requested by the Committee of the Whole. Accordingly, the Drafting Committee could send articles back to the Committee of the Whole for further consideration. As he understood it, after initial consideration of a draft article, the Committee of the Whole was entitled to send amendments to that article to the Drafting Committee for an opinion.

49. Mr. MÜTZELBURG (Federal Republic of Germany) said that it was clear from the rules of procedure that the Drafting Committee was not a negotiating body; it should be remembered that international or-

ganizations were entitled to participate in reaching a consensus on matters of substance—in other words, to negotiate—but not to participate in the work of the Drafting Committee.

50. The CHAIRMAN said that it was generally agreed that the Drafting Committee should concentrate

on drafting. If discussions which had already taken place in the Committee of the Whole were repeated in the Drafting Committee, the latter should send the article back to the former for further consideration.

*The meeting rose at 5.20 p.m.*

## 23rd meeting

Friday, 7 March 1986, at 10.50 a.m.

Chairman: Mr. SHASH (Egypt)

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

[Agenda item 11] (*continued*)

**Article 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. Mr. HAFNER (Austria), introducing his delegation's amendment to paragraph 1 of article 73 (A/CONF.129/C.1/L.63), said that the article touched on very delicate matters. One of the guiding principles of the present Conference was that, as far as possible, each article should be in line with the corresponding article of the 1969 Vienna Convention on the Law of Treaties.<sup>1</sup> However, paragraph 1 of the International Law Commission's draft of article 73 referred to "the outbreak of hostilities between States parties to that treaty", whereas article 73 of the 1969 Vienna Convention referred only to "the outbreak of hostilities between States".

2. The final wording of that provision of the 1969 Convention had been formulated at the Conference on the Law of Treaties itself, as a result of negotiation: the International Law Commission having decided that the draft articles on the law of treaties should not refer to hostilities at all, two proposals on the point had been submitted, respectively by Hungary and Poland and by Switzerland (A/CONF.39/C.1/L.279 and L.359),<sup>2</sup> and had led the Conference to include the words "outbreak of hostilities between States" in the article.

3. It was clear from the Official Records of the Conference on the Law of Treaties that the reference it had made to hostilities between States, without further qualification, had been deliberate and added in full knowledge of the legal consequences of that formula-

tion. Paragraph (5) of the commentary to the present draft article (see A/CONF.129/4) indicated why the International Law Commission had decided to retain the words "hostilities between States", but gave no reason for the addition of the words "parties to that treaty", notwithstanding the fact that those words could conceivably create a new régime for the administration of treaties which differed not only in wording but also in substance from that of the 1969 Convention, with unforeseeable but possibly far-reaching legal and practical consequences.

4. The present Conference was certainly not the right place to embark, without due preparation, on formulating rules to determine the effect of events such as hostilities on treaties. Since there was no reason to depart from the text of the 1969 Vienna Convention, his delegation proposed that the wording of article 73 of that instrument should be adhered to.

5. Mr. SZASZ (United Nations), introducing the amendment proposed by the International Labour Organisation, the International Monetary Fund and the United Nations (A/CONF.129/C.1/L.65), reminded the Committee that although those organizations had submitted an amendment to article 36 bis (A/CONF.129/C.1/L.56), when introducing it (see 19th meeting, para. 23), they had indicated that their real preference was for the deletion of that article, as proposed by the Austrian-Brazilian amendment to article 36 bis (A/CONF.129/C.1/L.49).

6. Powerful arguments had been adduced against the deletion of the article, particularly by the Netherlands representative (19th meeting), the most trenchant of them being that, in its absence, the matter with which it dealt would fall under articles 34, 35 and 36. While he did not necessarily agree with that interpretation, it was certainly a possible outcome and had dangerous implications. It would be most undesirable if, in the situations contemplated in article 36 bis, States members of international organizations could be regarded as third parties to a treaty. The three international organizations proposing the amendment were therefore submitting it as the appropriate wording for the Committee to adopt if it decided to delete article 36 bis, so as to make it clear that the entire subject with which that article dealt was left out of the purview of the draft convention.

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

<sup>2</sup> *Ibid.*, document A/CONF.39/14, par. 636.

7. That subject was part of the broader question of the internal law of international organizations and the possible liability of States for acts by international organizations of which they were members. In the draft convention, the question arose only in relation to treaty-making, but it could arise in many other spheres as well, including ordinary commercial agreements, damage to the environment and other means by which an organization might become liable beyond its assets. It would be unfortunate if one small aspect of the large issue of liability of member States was dealt with in the present case on the basis of a draft which did not really please anyone. The proper context in which to consider the whole question might be in the second phase of the International Law Commission's discussion of the relations between States and international organizations.

8. If the amendment which had just been presented was adopted, the title of article 73 would have to be modified. Since the proposal was closely linked to the future of article 36 *bis*, the consideration of which had been postponed, he suggested that the proposed addition to article 73 be taken up jointly with that article.

9. Mr. SAHOVIC (Yugoslavia) said that if the Austrian amendment to paragraph 1 was adopted, the formulation of the article would be much broader than what had been proposed by the International Law Commission. That point might perhaps be referred to the Drafting Committee; all the same, his delegation preferred the Commission's text. He agreed that the consideration of the three-organization amendment should be deferred, as suggested.

10. Mr. STEFANINI (France) said that in general his delegation approved both the substance and the drafting of the article. It would not have objected had it contained reference to succession of international organizations—not for the purpose of assimilating that to succession of States, but to draw attention to the rules applicable to the transition from one organization to another. His delegation welcomed the Commission's decision that the article should not deal with hostilities involving international organizations. However, it should be made clear that the enforcement measures envisaged in Chapter VII of the Charter of the United Nations could not—at least in the opinion of the French delegation—be considered as hostilities.

11. His delegation could support the Austrian proposal, but reserved its position on the three-organization amendment, the consideration of which should be deferred until article 36 *bis* was taken up again.

12. Mr. RADY (Egypt) said that he preferred the wording proposed by Austria to the International Law Commission's draft of paragraph 1, which differed from the text in article 73 of the 1969 Vienna Convention; the reasons for that were not altogether clear, notwithstanding the Commission's commentary. He agreed with the suggestion to defer consideration of the three-organization amendment.

13. Mrs. OLIVEROS (Argentina) supported the Austrian amendment, which reinstated the wording of the 1969 Vienna Convention and made article 73 easier to understand; it also broadened its scope in a manner

which conformed with the International Law Commission's original intention.

14. As to the amendment of the three international organizations, she reminded the Committee that her delegation had supported the proposal to delete article 36 *bis* (see 20th meeting). If the Committee adopted that proposal, her delegation would favour the insertion of the proposed new paragraph 3 in the article and would like its wording to be modified so as to make it clear that the obligations and rights of States which it referred to were obligations and rights that were in conformity with the rules of the international organization. Her delegation felt that both amendments might be referred to the Drafting Committee.

15. Mr. SIEV (Ireland) said there was a marked and significant difference between draft article 73 and article 73 of the 1969 Vienna Convention. The difference lay in the addition of the words "parties to that treaty" at the end of paragraph 1. An examination of the International Law Commission's commentary revealed no explanation for those additional words. His delegation accordingly supported the Austrian amendment, which would have the effect of aligning the draft article with the corresponding provision of the 1969 Convention.

16. The problem raised by the three-organization proposal could not be dealt with at present and must await the Committee's decision on article 36 *bis*.

17. Mr. BARRETO (Portugal) said that the International Law Commission had not given any convincing reason for adding the words "parties to that treaty" at the end of paragraph 1. His delegation would like to hear the Expert Consultant's observations on that point, but it could support the Austrian proposal even without them, because that amendment did not alter the meaning of article 73 as drafted by the Commission. Article 73 and the Austrian amendment should therefore be referred to the Drafting Committee. The Committee should defer the consideration of the amendment of the three international organizations for the reasons stated by other speakers in the meeting.

18. Mr. HERRON (Australia) said that his delegation approved article 73 as proposed by the International Law Commission, but could support the Austrian amendment as well.

19. With regard to the three-organization proposal, his delegation had expressed support for the inclusion of article 36 *bis* in the future convention. The question, therefore, of introducing a paragraph 3 into article 73 if article 36 *bis* was deleted did not yet arise for the Australian delegation. Nevertheless, should article 36 *bis* be deleted, it would be a sensible precaution for the draft articles to contain a saving provision on the lines of the proposal of the three organizations. For the time being, however, his delegation continued to advocate the retention of article 36 *bis*.

20. Mr. RIPHAGEN (Netherlands) supported the Austrian proposal. There was an additional reason for eliminating the words "parties to that treaty": whatever position was eventually taken about the situation of member States with respect to the treaties of an international organization to which they belonged, it was obvious that if hostilities broke out between a

member State and an outside State, those hostilities could not fail to have an influence on the international organization. If the words "parties to that treaty" were retained at the end of paragraph 1, that situation would be excluded from the purview of the safeguard clause which the paragraph contained.

21. The proposal made by three international organizations could only be discussed when the Committee came to deal with article 36 *bis*.

22. Mr. SWINNEN (Belgium) supported the Austrian proposal. The Committee should take no decision on the proposal of the three organizations until it decided whether to retain article 36 *bis*.

23. Mr. ECONOMIDES (Greece) also supported the Austrian proposal, since it would introduce a desirable element of precision into the text. The three-organization proposal did not really fall within the ambit of article 73; basically, it dealt with questions of international responsibility which were outside the scope of the draft convention. His delegation agreed that its consideration should be deferred until the Committee examined article 36 *bis*.

24. Mr. NGUAYILA (Zaire) said that his delegation would have no difficulty in accepting the text proposed by the International Law Commission. It could also support the Austrian proposal. No decision could be taken on the amendment of the three organizations until the Committee settled the question of article 36 *bis*.

25. The CHAIRMAN said that there appeared to be widespread support for the Austrian amendment, as well as general agreement to defer the consideration of the three-organization proposal. Accordingly, if he heard no objection, he would take it that the Committee agreed to refer the International Law Commission's text of article 73, as amended by the Austrian proposal, to the Drafting Committee and to defer the consideration of the other proposal until it had taken a decision on article 36 *bis*.

*It was so decided.*

#### Article 75 (Case of an aggressor State)

26. The CHAIRMAN invited the Committee to consider article 75, to which no changes had been proposed.

27. Mr. MÜTZELBURG (Federal Republic of Germany) said that draft article 75 was identical in substance with article 75 of the Vienna Convention on the Law of Treaties. At the time of signing that Convention, his country had expressed an understanding of the article<sup>3</sup> which his delegation wished to reiterate in order to make its position clear on the identical aspect of the present draft article. Accordingly, it stated that the Federal Republic of Germany, in conformity with article 4, understood the words "measures taken in conformity with the Charter of the United Nations" in draft article 75 as referring to measures decided upon in future by the Security Council of the United Nations

relating to the maintenance or restoration of international peace and security.

28. The CHAIRMAN said that, if there were no further comments, he would take it that the Committee agreed to refer article 75, as proposed by the International Law Commission, to the Drafting Committee.

*It was so decided.*

#### Article 77 (Functions of depositaries)

29. Mrs. OLIVEROS (Argentina) said that she had considerable misgivings about the text of paragraph 2 of article 77, and especially about the use of the conjunction "or" to link subparagraphs (a) and (b). The International Law Commission, in paragraph (9) of its commentary to the article (see A/CONF.129/4), had given a lengthy explanation of that particular point; it ended with a sentence stating that some members of the Commission had considered that the word "or" was unsatisfactory and should either be replaced by "and" or simply be deleted. Her delegation would not in fact oppose the adoption of article 77 as it stood, but it did wish to put on record its misgivings about the unsatisfactory drafting of paragraph 2, which left the door open to difficulties of interpretation.

30. The CHAIRMAN, speaking as the representative of EGYPT, said that he shared the Argentine representative's concern, particularly about subparagraph 2 (b).

31. Mr. HAFNER (Austria) referred to subparagraph 1 (g), under which the depositary was required to register a treaty with the Secretariat of the United Nations. He noted that the scope of Article 102 of the Charter of the United Nations, which provided for the registration of treaties with the Secretariat, had been broadened by the regulations to give effect to Article 102 adopted by General Assembly resolution 97 (I) in 1946, as amended by General Assembly resolution 482 (V) in 1950. Article 10 of those regulations made provision for the filing and recording by the Secretariat of the United Nations *inter alia* of treaties or international agreements other than those entered into by one or more Members of the United Nations. In his delegation's view, therefore, the word "registering" in article 77, subparagraph 1 (g), should not be interpreted as excluding the right of the Secretariat of the United Nations to file and record treaties or international agreements entered into by bodies not Members of the United Nations. Since the same word was used in article 77 of the 1969 Vienna Convention, it was not his delegation's intention to propose an amendment to article 77.

32. Mr. GAUTIER (France) agreed with the remarks made about paragraph 2. His delegation would not oppose the adoption of article 77, but considered that the Drafting Committee should clarify the meaning of that paragraph.

33. Mr. HERRON (Australia) endorsed the view expressed by the Austrian representative about subparagraph 1 (g), pointing out that article 80, paragraph 1, provided not only for the registration but also for the filing and recording of treaties by the Secretariat. His delegation too saw no need to change the wording of draft article 77 from that of article 77 of

<sup>3</sup> *Ibid.*, (United Nations publication, Sales No. E.68.V.7), Summary records of the meetings of the Committee of the Whole, 76th meeting, paras. 44 to 46.

the 1969 Vienna Convention, although the omission in the latter article of a reference to filing and recording did seem to have been a mistake.

34. With regard to paragraph 2, in its written comments<sup>4</sup> the United Nations had expressed its acceptance of the conjunction "or" between subparagraphs (a) and (b), citing by way of example the manner in which the Secretary-General dealt with instruments of accession to the Convention on the Privileges and Immunities of the Specialized Agencies which were accompanied by reservations, namely, that he did not bring them first to the attention of the General Assembly. It might be preferable for the depositary first to act in that way and withhold the matter from the competent organ of the international organization concerned. Even if the word "or" in subparagraph 2 (a) was replaced by "and", the depositary could still rely on the words "where appropriate" in subpara-

graph 2 (b) as justification for not bringing a matter before the competent organ. His delegation therefore considered that the replacement of "or" by "and" was unnecessary and that the existing wording should be retained.

35. Mr. BERNAL (Mexico) expressed his support for the remarks made by the Austrian and Australian representatives.

36. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation too agreed with the observations which had been made concerning the functions of depositaries.

37. The CHAIRMAN said that, in the absence of further comment, he would take it that the Committee wished to adopt article 77 and refer it to the Drafting Committee.

*It was so decided.*

*The meeting rose at 11.50 a.m.*

## 24th meeting

Monday, 10 March 1986, at 11.25 a.m.

*Chairman:* Mr. SHASH (Egypt)

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

[Agenda item 11] (*continued*)

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

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

1. Mr. AVAKOV (Union of Soviet Socialist Republics), introducing his delegation's amendments to article 66 (A/CONF.129/C.1/L.60) and the annex (A/CONF.129/C.1/L.61), said that the problem with which article 66 dealt was quite an old one but was at the same time new. It had been considered anew at all the six Vienna codification conferences, although in principle it remained the same.

2. International arbitration was one of the oldest institutions in international law, and its creation and development were associated with the search for legal means for the peaceful settlement of disputes. It implied, on the one hand, a special procedure for considering and settling international disputes and, on the other, temporary international bodies established by mutual agreement between States for the settlement either of specific types of disputes or of disputes in general.

3. The practical experience of such arbitration was as yet only limited. Between 1900 and 1940, only 23 cases had been referred to the Permanent Court of Arbitration at The Hague, and from 1940 to the present, only two. Arbitration was sometimes also carried out on an *ad hoc* basis. The distinctive feature of international arbitration was that the procedure was established by the parties to the dispute themselves and the decision was binding on them. Arbitration was dealt with in Article 12 of the Covenant of the League of Nations, and delegations would be familiar with the failure of arbitration in that context in 1938 and 1940.

4. The desirability of parties to any dispute seeking a peaceful means of settlement of their own choice was enshrined in Article 33 of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), of 24 October 1970, annex). Part V of the Final Act of the Conference on Security and Co-operation in Europe signed at Helsinki on 1 August 1975 and the Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10, of 15 November 1982, annex).

5. Under present conditions, however, the concept of limiting the sovereignty of States in favour of international legal institutions appeared to be unrealistic: at best a tribute to pacifism and idealism, at worst a means of exerting pressure on those countries adopting a more balanced position towards the possibility of using international arbitration and other legal institutions. That

<sup>4</sup> See *Yearbook of the International Law Commission, 1982*, vol. II, Part II, p. 136, para. 12.

was demonstrated in particular by the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and by the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, which provided for procedures that were not legally binding.

6. His delegation was not opposed to arbitration in general. It could be useful in the technical field, in the case of agreements on such questions as air transport, technical assistance or investment guarantees, where provision for conciliation and international tribunals could be worthwhile. But the present Conference was considering a draft convention of a general nature. The International Law Commission's article 66 was therefore unsatisfactory, in his delegation's view, since recourse to any means of peaceful settlement of disputes should be by mutual agreement between the parties; that would be both more correct and more effective.

7. A further argument against mandatory arbitration was that there was a lack of international experience of international organizations having recourse to arbitration, let alone of any such organization agreeing in advance to compulsory arbitration. Article 66 was thus both legally inconsistent and politically harmful, and that was the reason underlying his delegation's amendment.

8. For similar reasons, his delegation was also opposed to the Commission's proposed annex on arbitration and conciliation procedures established in application of article 66, and had accordingly submitted an amendment to that text calling, *inter alia*, for the deletion of section II. The annex was both too unwieldy and legally without justification. However, his delegation's proposals concerning the texts under consideration were open to modification; thus they might be replaced by a wording similar to the provisions on conciliation in the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, which were well balanced and more suitable. Article 66 was, in his delegation's view, of vital importance. He therefore hoped that there might be co-operation and compromise on the part of other delegations in the matter.

9. Mr. HARDY (European Economic Community), introducing the Community's amendment to the annex (A/CONF.129/C.1/L.64), said that the words "The States and international organizations which constitute one of the parties to the dispute" in paragraph 2 of the draft might give the impression that the parties to a dispute would invariably be composed of both States and international organizations. However, there were in fact three possible categories of parties to a dispute, namely, a State (or States), an international organization (or organizations) or a State and an international organization. The wording in paragraph 2 should be changed accordingly, and a similar change should be made in the parallel phrase in the second paragraph of subparagraph 2 (b). The amendment was not controversial, and indeed a similar distinction was made in the Soviet amendment. He hoped that the Community's amendment might be referred to the Drafting Com-

mittee, if the point of principle he had explained was agreed.

10. Mr. SZASZ (United Nations), introducing the amendment in document A/CONF.129/C.1/L.66, said that the change which his organization proposed to subparagraph (a) of article 66 was based on the fundamental principle that the Conference should seek to reproduce as faithfully as possible the provisions of the 1969 Vienna Convention on the Law of the Treaties,<sup>1</sup> having due regard to certain differences in subject-matter. The essential element of the corresponding provision in that Convention was that disputes concerning articles 53 or 64, involving *jus cogens*, should be submitted to the International Court of Justice for decision unless there was agreement by common consent to submit them to arbitration. Like the International Law Commission, the United Nations recognized that those particular provisions could not be reproduced in the present draft convention, since international organizations could not be parties to disputes before the International Court. The Commission's text provided, in default of consensual arbitration, for arbitration under precise rules set out in the annex, analogous to the compulsory conciliation procedure for disputes other than those involving *jus cogens* that was prescribed in the annex to the 1969 Vienna Convention.

11. The Commission had considered the possibility of providing for a request to the International Court for an advisory opinion but, in view of the imperfections and uncertainties it perceived in that procedure, it had decided, as indicated in paragraph (4) of the International Law Commission's commentary to article 66, not to include it in the text of article 66. The United Nations differed, however, from the Commission on that point: it felt that the advisory opinion procedure for the resolution of disputes was a sufficiently well-established instrument, particularly as there could be a back-up procedure; it also considered it of overriding importance that matters involving *jus cogens* should be resolved as far as possible by the International Court of Justice. Only if that procedure proved impossible should some other method, such as arbitration, be employed.

12. The formulation of the United Nations amendment was somewhat complicated because it not only proposed additional text—italicized in the document—but also attempted to indicate that certain optional deletions would not affect the additional text. The amendment maintained the overriding provision of the 1969 Vienna Convention allowing all of the parties to the dispute by common consent to submit the dispute to arbitration, even though that was a departure from the principle that all disputes involving *jus cogens* should be submitted to the International Court of Justice. However, the concluding phrase of subparagraph (a) was changed from "agree to submit the dispute to another arbitration procedure"—implying *ad hoc* acceptance of that procedure—to "have agreed to submit the dispute to [another] arbitration [procedure]"—referring

<sup>1</sup> Official Records of the United Nations Conference on the Law of Treaties (United Nations publication, Sales No. E.70.V.5), p. 287.

either to *ad hoc* submission or to the situation in which an arbitration procedure was already called for by the international treaty concerned.

13. If there was no such agreement between the parties, the dispute should be referred to the International Court of Justice for an advisory opinion. It had been argued that reference to the advisory opinion procedure should not be made in a general convention, such as the present draft convention, because most international organizations, as well as States, could not make a direct request to the Court for an advisory opinion. However, it was not difficult for such entities to take appropriate steps to seek an advisory opinion, for example, through the United Nations General Assembly, which was constantly being addressed by entities of all types on matters of international concern. A dispute about *jus cogens* interfering with the validity of an international treaty could certainly be considered by the Assembly.

14. The United Nations differed with the sponsors of the seven-Power amendment (A/CONF.129/C.1/L.69) concerning the need to spell out the procedures whereby an advisory opinion of the International Court of Justice might be requested. In its view, the phrase "appropriate steps" would suffice. In default of consensual arbitration, an arbitral tribunal established in accordance with the annex should then hold that the taking of steps to request an advisory opinion of the Court was a prior condition for bringing the case before it. It was true that there was no absolute certainty in the advisory opinion procedure. The decision to request such an opinion must, under Article 96 of the Charter of the United Nations, be taken by certain specified political organs, and the political organ concerned might decide it more judicious not to submit the request. The Court itself was not bound to respond to the request, but it was a matter of record that the present Court had responded to every single request made to it, considering that it was its duty to render that type of assistance. Accordingly, the United Nations was sufficiently certain of the outcome to designate the advisory opinion procedure as its primary and preferred method.

15. Another element in the United Nations amendment was the two options, "will" and "may", contained in the proposed subparagraph (c). For certainty in the matter of the settlement of disputes, "will"—in the sense that the parties to a dispute must consider an advisory opinion as binding—would be preferable. However, it was not absolutely essential. If the International Court of Justice gave an advisory opinion on a dispute involving *jus cogens*, the parties would undoubtedly take due account of it, as would an arbitral tribunal, whether or not it was provided that the opinion should be binding. The Court had indicated on a number of occasions that whether or not the parties to a dispute intended to regard its advisory opinion as binding would not affect its consideration of questions addressed to it. From its point of view, agreement to accept its opinions was not relevant to its own jurisprudential work.

16. The main difference between the United Nations amendment and the seven-Power amendment was that the text of the former was much simpler. While both were obviously inspired by the same considerations,

his organization did not think it necessary to describe in detail who should go through what organ in order to request an advisory opinion. One provision of that amendment which his organization found troublesome, however, was that in subparagraph 2 (a). If a dispute were to arise within the context of the proposed convention, an international organization would necessarily be involved, but under subparagraph 2 (a) its views would not be presented to the Court. Unlike the advisory opinion procedure, on which his organization preferred to rely, the procedure for resolving contentious disputes made no provision for participation by others than the parties. The work of the International Court of Justice would be virtually the same whether the submission was under the contentious or the advisory procedure.

17. Finally, regarding the annex, he noted that under paragraphs 9 and 14 the expenses of arbitral tribunals or conciliation commissions would have to be borne by the United Nations. The Conference could not, of course, adopt an instrument that burdened the United Nations. The United Nations Conference on the Law of Treaties had recognized that point and had adopted, in the annex to its Final Act,<sup>2</sup> a resolution requesting the General Assembly to approve the provisions of paragraph 7 of the annex to the 1969 Vienna Convention, which contained a similar provision. The General Assembly had thereupon adopted resolution 2534 (XXIV) of 8 December 1969 explicitly approving that paragraph. An analogous procedure would need to be undertaken by the present Conference, but that was a routine matter with which the Drafting Committee might be asked to deal.

18. Mr. WANG Houli (China), introducing the joint amendment of Algeria, China and Tunisia (A/CONF.129/C.1/L.68), said that article 66 was the most difficult one the Committee had yet had to consider. The solution adopted by the International Law Commission had in fact been rejected by some of its own members. Whether or not the difficulties presented by the article could be settled in a satisfactory manner would have a direct bearing on the Conference's success. The three-Power amendment had been submitted in a spirit of co-operation, with a view to resolving disputes that involved the interpretation or application of the articles of part V of the convention in a way that was acceptable to the majority of States. The sponsors considered that any international dispute, including disputes arising from the application or interpretation of the present convention, should be settled through direct negotiations by the parties according to the principle of free choice of means, or by common consent, or through any other of the peaceful means provided for in the Charter of the United Nations and the norms of international law. That principle, which had stood the test of time, had been endorsed in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes and in other international legal instruments.

19. Arbitration was one of the most efficient means for the peaceful settlement of international disputes and

<sup>2</sup> *Ibid.*, p. 285.

had frequently been resorted to by the international community. It was therefore appropriate that article 66 should provide for the arbitration procedure as a means of settlement. His delegation believed, however, that the basic intent of arbitration was that it should be a voluntary jurisdiction based on the principle of sovereignty. A State was under no obligation to consent to submit a dispute to arbitration, nor did international law require it to submit itself to compulsory arbitration. In practice, moreover, in the absence of common consent by the parties, rulings that required compulsory arbitration frequently proved incapable of implementation and did not necessarily contribute to the peaceful settlement of disputes. The sponsors of the three-Power amendment therefore recommended that arbitration should be set in motion only with the common consent of all the parties.

20. The present Conference was engaged in drawing up a general international convention, and its aim was to ensure the widest possible ratification of and accession to that instrument. Seventeen years had elapsed since the adoption of the 1969 Vienna Convention, but not many countries had ratified or acceded to it. One hundred and ten States had participated in the United Nations Conference on the Law of Treaties, but there were only 44 parties to the Convention. One of the major reasons for that situation was the inability of many countries to accept the Convention's provisions in article 66 concerning compulsory jurisdiction. If the present draft convention also adopted compulsory arbitration as a means of settling disputes concerning *jus cogens*, similar difficulties would arise for many countries, and the entry into force and application of the convention would be adversely affected. It was safe to predict that article 66 in its present form would prevent a number of countries from acceding to or ratifying the convention.

21. The sponsors felt that the conciliation procedure provided for in the article was a sound and practical means for the peaceful settlement of disputes. The amendment therefore suggested that, in the case of dispute over any article in part V, including articles 53 and 64, any party to the dispute might set in motion the conciliation procedure specified in the annex. The fact that that would provide increased opportunities for the settlement of *jus cogens* disputes was another important element in the amendment.

22. He noted that the amendment did not rule out the possibility of a dispute involving articles 53 and 64 being submitted to arbitration if all the parties consented to it. The amendment would require only minor changes in the International Law Commission's text, and, if it was accepted, the corresponding changes required in the annex could be carried out by the Drafting Committee.

23. Mr. OGISO (Japan), introducing on behalf of its sponsors—which had now been joined by Nigeria—the amendment to article 66 in A/CONF.129/C.1/L.69/Rev.1 said that they considered that article to be one of the most important in the proposed convention. In their view, the article should be strengthened by making it more comprehensive, so that it would cover all the situations and issues that could be expected to arise. He acknowledged that the text of the amendment was

somewhat complex. In order to facilitate the Committee's understanding of its purpose and wording, he wished to explain the basic philosophy underlying it.

24. Both the 1969 Vienna Convention and the present draft articles distinguished between disputes that concerned *jus cogens* and those that concerned other provisions of part V, and they established entirely separate procedures for dealing with the two types of disputes. The sponsors of the amendment endorsed that basic approach. Disputes that concerned the application or interpretation of articles 53 and 64 not only would be of a legally controversial nature but might well involve highly political considerations. The procedure for settling such disputes must therefore be worked out with particular care.

25. The 1969 Vienna Convention's definition of a peremptory norm of general international law (*jus cogens*) was a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation was permitted and which could be modified only by a subsequent norm of general international law having the same character. Thus, no State, either unilaterally or jointly with other States, could be legally permitted to take any action in contravention of such a norm.

26. Norms of *jus cogens* were of a universal nature and contained obligations *erga omnes*. Because of that universal nature the sponsors of the amendment deemed it essential to provide in the draft articles for a mechanism whereby objective judgement could be made, in a uniform and stable manner, on questions such as whether a given norm had the character of *jus cogens* or whether a specific treaty was in conflict with *jus cogens*. The existence of a single competence to decide those questions would eliminate the risk of widely diverging jurisprudence on *jus cogens*.

27. In the view of the sponsors, the institution best qualified to make such an objective judgement was undoubtedly the International Court of Justice. They felt that the Court was, and should be, the only tribunal competent to deal with questions of *jus cogens* in an objective and uniform manner. As drafted by the International Law Commission, article 66 of the 1969 Vienna Convention gave no role to the International Court of Justice. After long and heated discussion at the United Nations Conference on the Law of Treaties, the present text of the article, containing the idea of referring disputes involving questions of *jus cogens* to the International Court of Justice, had finally been adopted on the wise and constructive initiative of ten countries, to which he wished once again to pay tribute.

28. That text should constitute the basis for any new elements introduced into the present draft convention because of its new subject-matter. It was clear from paragraph (2) of the International Law Commission's commentary to article 53 (see A/CONF.129/4) that the norms of *jus cogens* applied not only to States but also to international organizations, since the latter were established by States under agreements which they concluded and the establishing States constituted their members. It was natural, therefore, and even logically necessary, that the present Conference should adopt

the same approach of entrusting the International Court of Justice with the task of handling any disputes concerning *jus cogens*. Such a parallel between the two conventions was based on the consistent demand, deriving from the special nature and significance of the concept of *jus cogens*, that judgements regarding *jus cogens* be made uniformly by the same authoritative world body, irrespective of whether treaties between States or treaties concluded by international organizations were involved.

29. The eight-Power amendment was a concrete reflection of those basic ideas. In making the necessary adjustments to article 66 of the 1969 Vienna Convention to accommodate the new situation now being dealt with, one difficult question needed to be solved without including any change in the Statute of the International Court of Justice or the Charter of the United Nations. Under the Statute, only States could take a dispute to the Court for decision and the General Assembly, the Security Council, and other organs of the United Nations and specialized agencies could only request advisory opinions of the Court under Article 96 of the Charter of the United Nations. The question was how the future convention could give other international organizations access to the Court for advisory opinions. The solution embodied in the text of the eight-Power amendment was to enable such an organization to approach the Court indirectly through a State Member of the United Nations which was also a member of the organization concerned, after an appropriate decision by the General Assembly or by the Security Council.

30. Paragraph 1 of the amendment was similar to the introductory part of article 66 as proposed by the International Law Commission. Paragraph 2 set forth the procedures to be followed with respect to disputes concerning *jus cogens*. Subparagraphs (a) to (d) were intended to cover all conceivable cases of disputes classified according to the type of parties to the dispute. Subparagraph (e) stipulated that any advisory opinion given by the International Court of Justice was to be accepted as decisive by all the parties to the dispute. If the advisory opinion given pursuant to subparagraphs 2 (b) to 2 (d) were to have no binding effect, those provisions would be extremely unbalanced vis-à-vis those of the 1969 Vienna Convention and of subparagraph 2 (a).

31. Because of the fundamental nature of *jus cogens*, the opinions of the International Court of Justice must, in the view of the sponsors, be made binding both in contentious cases and where an advisory opinion was sought. In stipulating that an advisory opinion was decisive, the sponsors of the amendment had used wording similar to that employed, for example, in section 30 of the Convention on the Privileges and Immunities of the United Nations (General Assembly resolution 22 (I), of 13 February 1946) and in section 32 of the Convention on the Privileges and Immunities of the Specialized Agencies (General Assembly resolution 179 (II), of 21 November 1947).

32. Subparagraph 2 (f) of the amendment envisaged a situation where a request for an advisory opinion might not, for some reason, reach the Court. The provisions

of subparagraphs 2 (b) to 2 (d) contained no guarantee that all such requests would be properly made. Subparagraph 2 (f) therefore provided that, in such an eventuality, any one of the parties to the dispute might submit it to arbitration in accordance with the annex to the draft convention.

33. Under paragraph 3 of the amendment, the parties to a dispute could agree by common consent to submit the dispute to arbitration. The arbitration could follow any procedure, but reference was made to that specified in the annex, as in the case of subparagraph 2 (f). Paragraph 4 dealt with disputes concerning the problems of invalidity, termination and suspension of the operation of treaties other than those involving *jus cogens* and adopted the same procedure as was chosen in the 1969 Vienna Convention, namely, a compulsory conciliation procedure as specified in the annex.

34. The sponsors of the amendment believed that their proposal did not call for any change in the substance of the annex as drafted by the International Law Commission, and that only slight changes of a purely drafting nature were needed in that text. Such changes as were necessary could be left to the Drafting Committee.

35. Mr. RIPHAGEN (Netherlands), introducing his delegation's amendment to section III of the annex to the draft articles (A/CONF.129/C.1/L.67), stressed the importance of the system of compulsory conciliation provided for in annex V to the United Nations Convention on the Law of the Sea,<sup>3</sup> under which the Conciliation Commission itself decided whether or not it had competence, acting under the section in question of that annex, in cases of disagreement concerning such competence. Such a decision was in fact implicit by virtue of the compulsory character of the conciliation.

36. Notwithstanding the statement by the representative of Japan in his introduction of the eight-Power amendment, that the sponsors of that text—which included the Netherlands—did not believe their proposal called for any change of substance in the annex to the present draft convention as proposed by the International Law Commission, the Netherlands delegation had thought it useful to include a similar provision in section III of the annex. The amendment was a technical one, aimed at clarifying the implication of the text.

37. Mr. TUERK (Austria) said that his delegation had become a sponsor of the eight-Power proposal because it was convinced of the need for a dispute settlement procedure to guarantee the effectiveness of the rules of international law.

38. Article 66, in its reference to articles 53 and 64, linked the dispute settlement procedure to *jus cogens* and consequently to the compulsory jurisdiction of the International Court of Justice, even if only as a subsidiary means of arbitration if the parties to the dispute so wished. Within the framework of the law of treaties, disputes concerning questions of *jus cogens* were subject to the compulsory jurisdiction of a dispute set-

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

tlement organ whose decisions were binding upon the parties. Priority was given to the International Court because of the binding nature of its decisions, because it was the principal judicial organ of the United Nations and because it was able to ensure a homogeneous and uniform interpretation of the rules of *jus cogens*. Furthermore, the Manila Declaration on the Peaceful Settlement of International Disputes emphasized that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

39. It was not possible to transfer the provisions of the 1969 Vienna Convention to the present draft. Existing mechanisms did not permit adoption of that solution; the International Court's limited possibility of settling disputes involving international organizations and the right of States to request advisory opinions were well known. A solution therefore had to be found which preserved the procedure of the 1969 Vienna Convention as far as possible, as well as the ideas underlying it, but at the same time took account of the existing legal possibilities. The amendment of which his delegation was a co-sponsor had the advantage of combining both of those features, and he therefore believed it should be acceptable to the international community as a whole. It should be borne in mind, however, that subparagraph 2 (a) was linked with the outcome of the negotiations on the new article which had been proposed in connection with article 3.

40. Adoption of the Soviet Union proposal to delete subparagraph (a) would cause certain problems, as the meaning of subparagraph (b), and particularly of the phrase "any of the other articles in part V of the present articles", would not then be clear. The proposal also appeared to exclude the possibility that a dispute between an international organization and a State might, on a compulsory basis, be subject to proceedings involving binding decisions. The Austrian delegation was not aware of any circumstance that would prohibit the

establishment of such an obligation. A large number of headquarters agreements contained such a clause, as did the statutes of some international organizations. For example, article 28 of the 1970 Statute of the International Investment Bank, set up within the framework of the Council for Mutual Economic Assistance, provided that disputes between the Bank and its clients were subject to arbitration. If a State were a client, the same situation as would occur with the International Law Commission's draft would arise. A similar dispute settlement clause was to be found in article 37 of the articles of the Bank for Economic Co-operation. Moreover, the suggestion that the proposed deletion was justified by the unequal position of States and international organizations was not confirmed in practice, because whatever kind of mechanism was provided for in constituent instruments of international organizations and in treaties concluded by them for the peaceful settlement of disputes between States and international organizations, the relevant provisions were based on the principle of equality. The Austrian delegation therefore saw no need to exclude the compulsory jurisdiction of an international mechanism which would lead to binding decisions. On the contrary, such jurisdiction was necessary, particularly in cases involving *jus cogens*.

41. The amendment of Algeria, China and Tunisia called only for an "opting in" procedure for compulsory settlement of disputes, which went only half-way towards the goal which the Conference was striving to attain.

42. The United Nations amendment had basically the same structure as the text proposed in the eight-Power amendment, of which the Austrian delegation was a sponsor. He hoped that a unified text might result from further negotiations.

*The meeting rose at 1.05 p.m.*

## 25th meeting

Monday, 10 March 1986, at 3.20 p.m.

*Chairman: Mr. SHASH (Egypt)*

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

[Agenda item 11] (*continued*)

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

1. The CHAIRMAN reminded the Committee that, in addition to the amendments proposed to article 36 *bis* itself, by Austria and Brazil (A/CONF.129/C.1/L.49), the Netherlands (A/CONF.129/C.1/L.50), Switzerland (A/CONF.129/C.1/L.51), the International Labour Organisation, the International Monetary Fund and the United Nations (A/CONF.129/C.1/L.56) and the Soviet Union (A/CONF.129/C.1/L.62), the Committee had before it, in accordance with the decision taken at its 23rd meeting, a related proposal by the same three organizations relating to article 73 (A/CONF.129/C.1/L.65).
2. Mr. TEPAVICHAROV (Bulgaria) said that the subject-matter to be regulated by article 36 *bis* was very

\* Resumed from the 20th meeting.

complex. The rule embodied in it might well modify an existing rule of treaty law, namely, the one set forth in article 34. Almost all the international organizations which had expressed their views on article 36 bis had stated either that the article would not apply to them or that their practice was at variance with its contents.

3. The article was intended to regulate the relations between States members of an international organization but not parties to a treaty to which the organization itself was a party. In its commentary to the article (see A/CONF.129/4), the International Law Commission had made perfectly clear the situations to which the article was intended to apply, as well as the requirements for the establishment of rights and obligations for member States in the situation envisaged. In the light of the Commission's explanations, the text of article 36 bis could be interpreted in several different ways. In his delegation's view, the amendments which had been proposed to the article did not succeed in removing the ambiguities.

4. It had been stated that article 36 bis provided for the possibility of expressing a collective consent before the treaty was concluded; in his delegation's view, that was only one of several possibilities which the article afforded. The Commission itself had considered the case of such a consent as an exceptional one, but the scope of the article was obviously wide and would extend to headquarters agreements.

5. It could hardly be claimed that article 36 bis sought to codify existing international custom or practice. If the article was to form part of the draft convention, a number of questions concerning its interpretation and application would have to be clarified.

6. The introductory wording of the article made it clear that, in order for the obligations and rights to arise for States members of an international organization in the circumstances specified in the article, that intention must be expressly stated in the treaty, as must the conditions and effects to which the parties consented in regard to those rights and obligations. However, the use of the words "or have otherwise agreed thereon" introduced an element of uncertainty, since they could be construed as providing either for an implied consent by some of the parties to the treaty or for a consent which might not be given in written form; and as defined in article 2, subparagraph 1 (a), a treaty to which the draft articles applied must be in written form.

7. He now wished to turn to the consent of the States members of the organization and to the conditions laid down in subparagraphs (a) and (b). Paragraphs (13) to (16) of the International Law Commission's commentary indicated that three conditions were necessary to bring article 36 bis into operation and that they applied cumulatively: the consent of the parties, provided for in the introductory wording, the consent of the States members, regulated by subparagraph (a), and the communication of that consent, provided for in subparagraph (b).

8. The main question raised by subparagraph (a) was the manner of expressing the consent. The representative of the Netherlands had explained at the 19th meeting that it could be given through the constituent

instrument of the organization containing a provision to that effect; if so, the assumption was that the individual consents of its members would not be needed at the time of the negotiation of the treaty by the international organization and its partners. If that was the case, it was not clear how subparagraph (b) would be applied. Who would have to furnish the information concerning the prior consent given by the members? Could it be assumed that the international organization, by virtue of its constituent instrument, was empowered to interpret the will of its member States in the matter? If so, the requirement of communication set forth in subparagraph (b) would become a mere formality and would not correspond with the view expressed by the Commission in paragraph (16) of its commentary that the elements communicated before the closure of the negotiation of a treaty with regard to the consent of the members of the organization were "a vital factor".

9. A second means whereby the consent of the States members could be expressed was, as subparagraph (a) provided, "by virtue of the constituent instrument". In his delegation's view, that meant explicit consent. The words "or otherwise" in subparagraph (a) suggested a further possibility but were extremely vague; the proposal by the Netherlands to replace them by the words "in accordance with other rules" did not do much to clarify the position. The essential element in subparagraph (a) was that of the unanimous consent of the States members of the international organization. The question of how that unanimous agreement was reached was a procedural matter which lay outside the scope of the present discussion.

10. The considerations he had mentioned led his delegation to support the Soviet Union amendment. If the majority did not favour that amendment, however, his delegation would formally propose the deletion of the words "by virtue of the constituent instrument of that organization or otherwise" in subparagraph (a). As thus amended, the wording of the subparagraph would leave the widest choice possible to the States concerned to determine by future practice how they would express their consent, who must communicate it to the parties to the negotiation and exactly when—prior to, at the same time as, or after the negotiation.

11. Mr. REUTER (Expert Consultant) said that he wished to speak at some length on the problems raised by article 36 bis in order to explain the International Law Commission's attitude towards it. His task had been facilitated by the observations made on the article by the representative of the Netherlands, who in his statement at the 19th meeting had expressed some valuable considerations which reflected the Commission's views.

12. The Committee was faced with the apparently simple problem of deciding whether to adopt the article, possibly with some amendments, or to delete it. Three questions therefore arose. The first was whether article 36 bis was essential for the future convention. The history of the codification of international law suggested that no article of a draft was indispensable. That being so, a second question arose: Was it advisable to include article 36 bis in the draft? He would not comment on that, since it was a question for Governments.

13. There remained the third and more modest question whether article 36 *bis* was useful and, if so, why. He would reply to that in the light of the discussion of the article by the International Law Commission. The article dealt with the circumstances in which a treaty concluded by an international organization had effects for its member States. The question whether such a treaty could have legal effects in the relations between the member States and a State which had concluded the treaty with the international organization was governed by the rules of the organization, and by those rules alone. Normally the treaty would not have such effects, but the rules of the organization might provide for certain effects of the treaty in the relations between the organization and its member States. The position taken by the Commission was that it accepted that the member States of an organization were free to decide their wishes on that point and to include a rule on the subject in the constituent instrument of the organization.

14. Accordingly, it had been suggested that the provisions of article 36 *bis* should be amended so as to subordinate them entirely to the rules of the organization. A formula of that type would mean almost pushing at an open door, for it was obvious that the relations between an international organization and its member States were governed by the rules of the organization.

15. Some of the amendments proposed to the article raised the question whether it was legitimate to require the unanimous consent of the States concerned. It seemed preferable not to do so, and instead to lay down the rule that the member States, as sovereign States, were free to settle that question themselves. Their undoubted right to settle the problem of the effects of the treaties of the international organization was brought out in the wording of subparagraph (a) of article 36 *bis*.

16. A further issue would arise in the case of an international organization whose constituent instrument specified that the member States had the obligation to observe the treaties concluded by the organization. A provision of that kind would not have any effect for the State which was the partner of the international organization in a treaty. The International Law Commission had considered whether a treaty concluded by an international organization could create rights or obligations in the relations between its member States and the State which was a partner of the organization in the treaty. The Commission had had to deal with that question in the light of the rules embodied in the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> in the first place, the rule that a treaty did not create obligations for a third State. There was thus a clear-cut distinction between the parties to a treaty and third parties.

17. It had been pointed out in the Committee that it was somewhat strange to say that the member States of an organization were third parties in their relations with a State which had concluded a treaty with the organization. The International Law Commission had considered that point, and asked itself whether cases existed in which a State was neither a party to a treaty nor a

third party, but in a somewhat intermediate position. It had arrived at the conclusion that, where a treaty was concerned, a State must be either a party or a third party. Accordingly, in relation to treaty concluded by an international organization, its member States were third States.

18. The position of third States under the proposed convention was the same as the one set forth in articles 34, 35 and 36 of the 1969 Vienna Convention: in the case of obligations, a treaty could not impose them on a third State without its express and written consent, but in the case of rights there was a presumption of consent by a third State to the creation of a right in its favour—in other words, a strict rule for obligations and a more flexible one for rights. A problem arose, however, with treaties which provided at the same time for rights and obligations for third parties; if a treaty conferred a whole body of such rights subject only to the performance of a single obligation, it would seem that the rule which should prevail was the one which governed the creation of the rights.

19. Reference had been made in the Committee to the case envisaged in article 37 of the 1969 Vienna Convention, namely, that of the revocation or modification of obligations or rights of third States. That article, and the corresponding draft article, stipulated that no such revocation or modification could take place without the consent of the third State—a situation which would create fewest difficulties.

20. In regard to article 36 *bis*, the International Law Commission had been fully aware that a treaty concluded by an international organization did not normally create obligations for its member States. There was some value, however, in providing for the possibility of the member States having relations with the State which had concluded the treaty with the organization. The basic principle underlying article 36 *bis* was quite simple: the member States, the international organization and the third State were free to adopt the solutions they wished, but they should do so with clarity and precision. The provisions of article 36 *bis* as a whole were flexible; they left the States concerned free to decide matters by agreement among themselves.

21. It had been suggested that the provisions of article 36 *bis* might represent a threat to existing headquarters agreements which had been functioning satisfactorily. A headquarters agreement certainly created a legal nexus between the international organization and the host State, but did it also create legal relations between the member States of the organization and the host State? There was no single answer to that question: each agreement had its own pattern, and each organization its own rules and practice. Where a headquarters agreement provided for legal relations between the host State and the member States of the organization, the situation, if article 36 *bis* was deleted, would be governed by article 36. As it stood, that article implied a situation in which the member States would benefit from the rights provided for in the treaty.

22. In conclusion, he stressed that he had not sought to defend article 36 *bis* but merely to explain the thinking of the International Law Commission about the problems which the article involved. The Commis-

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

sion had worked hard to make article 36 *bis* both clear and flexible. It was for the Committee to weigh the value of those qualities against any advantages which might lie in ambiguity and rigidity.

23. Mr. OGISO (Japan) observed that article 36 *bis* was closely related to the definition of "third State" and "third organization" in article 2, subparagraph 1 (*h*). As the discussion of the draft articles in the International Law Commission had shown, there were two schools of thought about the position of a State member of an international organization in relation to a treaty to which that organization was a party: Was it a third State in the strict sense of the term, or was it a "less pure" third State because, in a way, it participated in concluding the treaty through the organization? His delegation remained undecided on the matter, but took the view that the existence of the former school of thought provided a sufficient reason for considering the problems which the Commission sought to meet in article 36 *bis*. That being so, his delegation was convinced that articles 34, 35 and 36 could deal with the matter adequately, and that discussion of it on the basis of article 36 *bis* would only invite confusion.

24. The Netherlands representative had argued at the 19th meeting that article 36 *bis* sought merely to introduce a new element, namely, that member States might be permitted to express their consent to be bound by a treaty collectively, and possibly beforehand. The Japanese delegation had highly appreciated his detailed explanation of the nature of the article, but was unable to support his argument, since it believed that articles 35 and 36 did not exclude the possibility of prior acceptance of obligations and prior assent to the acquisition of rights by a third State. A third State might normally be expected to express its consent to be bound by specific provisions of a treaty only after the treaty was concluded, but it might conceivably express in advance its acceptance of obligations or its assent to the creation of certain rights by a treaty still under negotiation, in order to encourage the negotiating parties to conclude the treaty.

25. Several speakers had raised the issue of the collective will of the States members of international organizations. His delegation did not believe that article 36 *bis* was necessary to deal with questions of that kind. The general rule regarding third States and third organizations was clearly laid down in article 34, and embodied the principle of consensuality; a third State or third organization was not bound by any provisions of treaties unless it so agreed. That principle certainly applied as well to the relationship between member States of an international organization and a treaty to which the latter was a party. As the representative of the Federal Republic of Germany had correctly explained at the 20th meeting, there were three cases where the States members of an organization were bound by provisions of a treaty which that organization concluded. One was the case where the States members had agreed to be bound beforehand by virtue of the constituent instrument. In such a case, there was absolutely no need for article 36 *bis*. To establish an organization empowered to conclude treaties which would create certain rights and obligations for its mem-

ber States, without obtaining their specific consent other than by following the procedures set out in its constituent instrument, was undoubtedly to imply the acceptance by those States in advance of such future rights and obligations. That was one of the situations already covered by articles 35 and 36.

26. It might be countered that States did not usually confer such a broad power on an organization in its constituent instrument; that was true, and it was precisely because the rules in article 36 *bis* would rarely be applicable that the Japanese delegation had not been persuaded of its usefulness and necessity. In any case, that question concerned articles 6 and 46, which dealt with the capacity of international organizations to conclude treaties, and not article 36 *bis*.

27. The second case referred to by the representative of the Federal Republic of Germany was that in which member States could be bound by the treaty in accordance with other rules of the organization. The argument which held for the first case was valid for the second as well: the fact of being a member of an organization, participating in the making of its rules and abiding by them, constituted assent to the possible creation of rights and obligations. But the number of international organizations which had "other rules" of the kind envisaged was possibly extremely small. That issue too fell under articles 6 and 46, but where rules empowering the organization to create certain rights and obligations for its member States existed, articles 35 and 36 appeared to regulate the situation adequately.

28. The third case was the *ad hoc* expression of the collective will of the States members of the organization. That was the issue addressed in the Soviet Union proposal. That kind of collective consent appeared not to be covered by articles 35 and 36. The basic principle was once again the same: if the States members of an organization so agreed, they would be bound by the treaty to which the organization was a party; otherwise, they would not. Such agreements could be made individually or collectively, depending on the wish of the member States; and in no case would rights or obligations arise for a member State without its consent, which might be expressed in the constituent instrument or other rules of the organization, or by a specific act of acceptance or assent performed either individually or collectively. Since the case of collective will being expressed on an *ad hoc* basis was so rare, and in any case was already covered in a broad sense by article 34, his delegation considered it unnecessary that a special provision should be prepared for it.

29. All those considerations tended to show that the need to retain article 36 *bis* was very slight. The representative of the International Labour Organisation had rightly pointed out, at the 19th meeting, that since international organizations were so diverse, it was almost impossible to lay down a general rule governing the relationship between them and their member States. Furthermore, the rules and practices of organizations were constantly evolving. A controversial provision would make the situation even more confusing. The Committee had already adopted articles 34, 35 and 36, which regulated the matter clearly. Each international organization had its own constituent instru-

ment as well as other rules, and those rules should be sufficient to regulate the relationships between the organization and its member States. His delegation believed that the deletion of article 36 *bis* would have the benefit of allowing a general rule on the matter to develop freely as practice accumulated.

30. His delegation might be able to accept article 36 *bis* if it was amended appropriately, but none of the changes proposed so far were satisfactory. It would therefore be best to delete the article, as proposed by Austria and Brazil in their amendment.

31. Mr. HALTTUNEN (Finland) said that his delegation shared the doubts expressed about article 36 *bis*. One of its objections to the article lay in the fact that States members of an international organization could be parties to the same treaty as the organization of which they were members, and thereby acquire competing rights and obligations. States members of an organization had a general obligation under customary international law to observe the organization's treaties, and therefore could hardly be seen as real third parties to those treaties.

32. Furthermore, when changes occurred in the membership of an intergovernmental organization—and there were a number of examples of that in practice—difficulties could arise as to the continuance, termination or suspension of the operation of the organization's treaties as between the former member State and the other parties to the treaty, and indeed among the other member States or member organizations.

33. The Finnish delegation shared the view that the subject-matter of article 36 *bis* was not ripe for codification and that the article might well be deleted. In the future, two conventions—the Vienna Convention on the Law of Treaties and the one now being drafted—would be applicable, in some cases simultaneously, to treaty relations between States and international organizations; in that situation, the absence of article 36 *bis* would possibly make it easier to apply not only those conventions but also, in cases where States were not parties to either of them, the general rules of international law.

34. His delegation therefore supported the Austrian-Brazilian proposal. As far as the other proposals for article 36 *bis* were concerned, it saw some merit in them but did not believe that any of them could solve the problems which the article created.

35. Mr. NASCIMENTO e SILVA (Brazil) pointed out that the delegations of Austria and Brazil, in proposing the deletion of article 36 *bis*, had taken into account both the work of the International Law Commission and the past and future practice of international organizations.

36. The explanations of the article given by the Expert Consultant and the representative of the Netherlands corresponded with the International Law Commission's understanding of it, but not "with the ordinary meaning to be given to the terms of the treaty" under article 31 of both the Vienna Convention on the Law of Treaties and the draft convention. In other words, in order to understand article 36 *bis* it would be necessary

to have recourse to the supplementary means of interpretation provided for in article 32.

37. He wished to assure the Committee that the purpose of the Austrian and Brazilian proposal to delete the article was not to deny the existence of the rule in question but simply to exclude it from the draft convention, since the issue was not ripe for codification. In his opinion, some international organizations might develop their practice along the lines of article 36 *bis*; others might depart from it. In other words, the deletion of the article was not likely to freeze future developments. He shared the view that articles 34, 35 and 36 covered the matter satisfactorily.

38. Mr. AL-HADDAD (Bahrain) said that article 36 *bis* posed problems for his delegation. That it was open to many different interpretations had been clearly brought out in the debate, and in particular in the excellent explanation provided by the Expert Consultant. Nevertheless, the International Law Commission had made strenuous efforts to draft an acceptable text on the subject. His delegation's attitude to it would be dictated by the need for a consensus, whether that proved to be for the deletion of the article or for its adoption.

39. Mr. SAHOVIC (Yugoslavia) said that his views on article 36 *bis* had changed more than once during the lengthy process of preparation of the draft articles. His delegation had finally concluded that the International Law Commission had been right to include the article in the text in the form it had proposed.

40. In the early stages of preparation, there had been considerable feeling that the subject-matter of the article might be dealt with in connection with third States; later it had become clear that the issue had far broader implications for international organizations and their status in international law than had been supposed. The political and legal issue of the relationship between international organizations and their members had assumed serious proportions, and it would appear that the intention behind article 36 *bis* was to contribute substantially to a strengthening of the role of those organizations and a clarification of that relationship. That was something which should be stressed, because the adoption of the draft, and any consequent decisions, would mark a new stage in the development of the personality of international organizations in international law—in the evolution of what was known as the "organized" international community.

41. Furthermore, article 36 *bis* was one of the few articles which implied a decisive step forward in the progressive development of international law. Although it might be argued, and had been, that practice was not yet sufficiently mature for the Conference to codify a general rule such as the article contained, it would not be the first time that such a step had been taken by a codification conference. Moreover, the arguments which had been advanced in favour of the adoption of the article themselves demonstrated that the issue was one which called for legal clarification as a matter of principle.

42. Looking at the matter from a more technical point of view, he observed that all the proposals to alter the

wording of the article presumed the formulation of a rule; they sought to improve the product of the International Law Commission's lengthy cogitations, and particularly to render more explicit the conditions under which the rule should be applied—for example, by reducing the uncertainty created by the word "otherwise" in the Commission's draft.

43. It was his delegation's view that to omit from the draft convention any reference to the question of obligations and rights arising for States members of an international organization from a treaty to which it was a party would be to neglect an important element of the Conference's task; it therefore believed that article 36 *bis* should be retained. An acceptable formulation for it which accommodated the various proposals for altering the text proposed by the International Law Commission might perhaps be found by the Drafting Committee.

44. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that the statements made by the representatives of the international organizations and by Japan, Brazil and Finland had led him to consider article 36 *bis* in a new light. It had been correctly pointed out that each international organization had its own rules, and that articles 34, 35 and 36 covered the situation contemplated in article 36 *bis* adequately. He therefore withdrew the amendment proposed by his delegation and supported the proposal by Austria and Brazil to delete the article. He appealed to the sponsors of the remaining amendments to do the same.

45. Mr. SIEV (Ireland) said that his grave doubts about the usefulness of article 36 *bis* had been confirmed by the Expert Consultant's statement. His delegation was convinced that the article should be deleted. Article 34 set out the general rule applicable to third States and third organizations, while articles 35 and 36 dealt respectively with their obligations and their rights. The latter two articles were sufficient to regulate the situation of third States with regard to rights and obligations, which was the subject-matter of article 36 *bis*. He thought it would be premature to adopt a provision such as the one in draft article 36 *bis*. His delegation therefore supported the proposal by Austria and Brazil to delete the article.

46. Mr. RAMADAN (Egypt) said that, in his view, it was inadvisable to adopt the article as it stood. The expression in it of the principle of unanimity would amount to giving a right of veto to every member of the organization. As the consent for which the article provided must embrace all the provisions of the treaty establishing the rights and the obligations, it would seem that the relevant conditions should appear in the constituent instrument, in which case subparagraph (b) would be superfluous. With regard to the question of notification, it might be impossible to conclude a treaty if some States failed to provide the information mentioned in subparagraph (b). Even if the unanimity requirement was replaced by the requirement of a qualified or simple majority, difficulties might arise for the organization in a case in which dissenting States were among its major financial contributors.

47. Those considerations, combined with the fact that the practice of international organizations was not yet

established firmly enough for the codification of such a general rule as the one in article 36 *bis*, led his delegation to support the Austrian and Brazilian proposal to delete it. It also supported the three-organization proposal for article 73, which left open the possibility of developing such a rule gradually.

48. Mr. SANG YONG PARK (Republic of Korea) said that he had some sympathy for the International Law Commission's attempt, in article 36 *bis*, to regulate an exceptional situation with legal certainty. He nevertheless supported the proposal to delete the article because it would rarely be applicable. The issue should be left in abeyance until practice in the matter had developed further.

49. Mr. BOONPRACONG (Thailand) said that his delegation considered article 36 *bis* as a progressive development of international law, since it was intended to provide an additional facility for States members of an international organization to accept obligations arising out of treaties to which the international organization was a party, without deviating from the general rule outlined in article 34. He did not believe that a lack of unanimity among member States would prevent an international organization from concluding a treaty. His delegation supported the adoption of article 36 *bis* as it stood.

50. Mr. KADIRI (Morocco) said that article 36 *bis* was intended to break new ground, but legal practice was not yet sufficiently developed for its adoption. In his view, the application of articles 35 and 36 would be amply sufficient to cover for the time being the matter dealt with in article 36 *bis*. If the latter article was adopted, it might, without the guidance provided by established practice, become a mechanism for diminishing the sovereignty of States. He asked himself, for example, whether a headquarters agreement implied an agreement between the host State and a State member of the organization; if so, the State member might become bound against its will. The provision in article 36 *bis* might be appropriate for the integrative type of international organization, of which the European Economic Community was a good example, but less so for one based on co-operation. The sovereignty of States must remain intact, clear and effective. His delegation agreed with the Expert Consultant that the present convention would only be successful if it contained scope for future development. His delegation therefore supported the proposal to delete article 36 *bis*.

51. The CHAIRMAN said that there seemed to be widespread support for the proposal by Austria and Brazil to delete article 36 *bis*. He asked the delegations of the Netherlands and Switzerland and of the International Labour Organisation, the International Monetary Fund and the United Nations whether they could follow the example of the Soviet Union and withdraw their respective amendments, thus paving the way for a decision to delete the article. If they could not, informal consultations on the matter would seem the best course.

52. Mr. SZASZ (United Nations), speaking on behalf of the sponsors of the amendment in document A/CONF.129/C.1/L.56, said that they would withdraw

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

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

*It was so decided.*

*The meeting rose at 5.55 p.m.*

## 26th meeting

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

Chairman: Mr. SHASH (Egypt)

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

[Agenda item 11] (*continued*)

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

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

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

Austria, Colombia, Ireland, Japan, Mexico, Netherlands, Nigeria and Switzerland (A/CONF.129/C.1/L.69/Rev.1), which adopted such an approach.

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

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

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

\* Resumed from the 24th meeting.

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

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

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

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

7. His delegation considered the eight-Power amendment incompatible with the realities of international relations and attitudes towards mandatory jurisdiction. It took no account of the specific nature of the future convention and also ran counter to the established practice of international organizations. In his delegation's view, mandatory application of the advisory opinions of the International Court of Justice stretched the limits of international law and practice in consultative pro-

cedures and set a bad precedent. It might even be considered to be contrary to the letter and spirit of the relevant provisions of the Charter of the United Nations and the Statute of the International Court of Justice. His delegation was therefore unable to support such an amendment. For the same reason, his delegation could not support the amendment proposed by the United Nations.

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

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

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

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

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

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

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

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

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

16. Mrs. THAKORE (India) said that the distinction made between articles 53 and 64 relating to *jus cogens* and the remaining articles in part V of the convention was justified because the issues arising under the former articles would necessarily relate to fundamental questions of international law. Since the rules of *jus cogens* had an overriding character, jurisdiction should be conferred on the International Court of Justice in such matters, as was the case under the 1969 Vienna Convention. The use of the same forum for both the 1969 Convention and the present convention would eliminate the risk of widely diverging jurisprudence on a matter of extreme importance. The International Law Commission had dealt with the fact that international organizations could not be parties in cases before the International Court of Justice by providing in subparagraph (a) of article 66 for arbitration as the means of

settling disputes concerning articles 53 or 64, irrespective of whether the parties to them were States or international organizations. A compulsory conciliation procedure had been provided in subparagraph (b) for the remaining articles in part V. The Commission, after due consideration, had rejected the idea of providing for a right to request an advisory opinion from the Court.

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

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

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

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

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

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

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

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

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

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

26. Mr. BARRETO (Portugal) said that in the matter of the peaceful settlement of disputes, his delegation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55. The Finnish delegation could also support the amendment submitted by the European Economic Community and by the Netherlands. With regard to the possibility of controversies arising from the application and interpretation of any future convention, questions of that nature were typical legal issues which, under Article 36, paragraph 3, of the Charter of the United

Nations, should as a general rule be referred by the parties to the International Court of Justice.

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

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

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

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

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

such a case involving an international organization and a State.

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

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

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

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

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

of a supplementary provision, his delegation would support the three-Power amendment.

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

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

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

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

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

pute between one or more States and a single international organization authorized to seek advisory opinions from the International Court, the recourse to United Nations organs was not self-evident. The reasons for not allowing the States in such a case to go to the international organization were not self-evident. A text of that nature might cause particular difficulties for an organization such as the one she represented, whose organs differed greatly in composition from those of the United Nations and which often tended to be particularly sensitive to any encroachment on their positions.

It would therefore be very difficult for the International Labour Organisation to accept that, in any dispute between itself and States, United Nations organs would necessarily have to decide whether the International Court of Justice should be requested to give an advisory opinion and what the terms of the request should be. The problem might be solved if the Committee could ensure that the provisions relating to advisory opinions were formulated a little less precisely.

*The meeting rose at 10.45 p.m.*

## 27th meeting

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

*Chairman:* Mr. SHASH (Egypt)

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

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

[Agenda item 11] (*continued*)

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

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

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

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

4. Subparagraph 1 (j), which defined the term "rules of the organization", had been an important issue in the negotiations because it gave rise to several problems.

The text now proposed had been agreed to by certain delegations on the clear understanding that the ideas expressed by them during the negotiations with regard to the notion of established practice would be reflected in another part of the future convention, such as the preamble.

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

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

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

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

9. The CHAIRMAN said that the Committee should take formal decisions on the points which delegations had settled in the negotiations.

*Article 2 (Use of terms) (concluded)\**

10. The CHAIRMAN said that, if there were no further comments, he would take it that the Committee adopted article 2 as proposed in document A/CONF.129/C.1/L.70 and referred it to the Drafting Committee.

*It was so decided.*

11. Mr. HERRON (Australia) explained the views of his delegation with regard to the wording adopted by the Committee for article 2, subparagraph 1 (h). He recalled that the International Law Commission had pointed out in its commentary to article 36 bis that an international organization was not a third party with respect to its own constituent instrument (see A/CONF.129/4, footnote 105). In the consultations mentioned by the President of the Conference, his delegation had referred to that opinion and had said that the definition of "third organization" in subparagraph 1 (h) did not express the Commission's view in an obvious manner. It had been agreed in the consultations that the definition should not be altered, as his delegation had suggested, so as to bring that point out, but that the common intention was that an international organization should not be regarded as a third organization in respect of its own constituent instrument.

12. In view of that indication of common intention, his delegation had accepted unchanged the wording of subparagraph 1 (h) of article 2, which the Committee had just adopted. It agreed to that wording on the understanding that an international organization was not, in terms of subparagraph 1 (h), a "third organization" for the purposes of the draft convention; and that, consequently, article 34 would not prevent rights and obligations arising for an international organization under its own constituent instrument. His delegation understood its position to be very widely shared by other delegations.

*Article 5 (Treaties constituting international organizations and treaties adopted within an international organization) (concluded)\*\**

13. The CHAIRMAN said that, if there was no objection, he would take it that the Committee adopted article 5 as proposed in document A/CONF.129/C.1/L.70 and referred it to the Drafting Committee.

*It was so decided.*

*Article 11 (Means of expressing consent to be bound by a treaty) (paragraph 2) (concluded)\*\*\**

*Article 19 (Formulation of reservations) (paragraph 2) (concluded)\*\*\*\**

*Article 20 (Acceptance of and objection to reservations) (concluded)\*\*\*\*\**

*Article 27 (Internal law of States, rules of international organizations and observance of treaties) (paragraph 2) (concluded)\**

14. The CHAIRMAN said that, if there was no objection, he would take it that the Committee adopted the International Law Commission's texts of article 11, paragraph 2, article 19, paragraph 2, article 20 and article 27, paragraph 2, and referred them to the Drafting Committee, on the understanding that the ideas contained in the amendments proposed by the German Democratic Republic (A/CONF.129/C.1/L.12, L.40, L.41), Cape Verde (A/CONF.129/C.1/L.34) and the Soviet Union (A/CONF.129/C.1/L.38, L.39) would be reflected elsewhere in the future convention, for example, in the preamble.

*It was so decided.*

*Proposed deletion of the word "relevant" in articles 5, 6, 35 to 37, 39 and 65*

15. The CHAIRMAN said that, if there was no objection, he would take it that the Committee agreed in principle to delete the word "relevant" before the word "rules" in articles 5 and 6, and in paragraph 2 of article 35, paragraph 2 of article 36, paragraph 5 of article 37, paragraph 2 of article 39 and paragraph 4 of article 65, on the understanding that if the Drafting Committee found the need to restore the adjective "relevant" in any of those provisions it should make a recommendation to the Committee of the Whole to that effect; and further that the Committee agreed to instruct the Drafting Committee accordingly.

*It was so decided.*

16. Mr. KORONTZIS (Greece) said that he wished to reserve his delegation's position until it saw the final text produced by the Drafting Committee.

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

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

17. Mr. CANÇADO TRINDADE (Brazil) said that the whole chapter of international law on the peaceful settlement of international disputes was marked by the ambivalence between, on the one hand, the general duty of contending parties to settle disputes peacefully and, on the other, the litigants' freedom of choice of the appropriate means of peaceful settlement. As a matter of principle, his own delegation did not favour mandatory application of third-party, binding procedures for the settlement of disputes. However, in the particular case of *jus cogens* it was prepared to accept a more flexible approach, since disputes concerning the existence of peremptory norms of international law were too important for conciliation to be taken as the only procedure for their settlement.

18. His delegation supported the generally accepted concept of *jus cogens* at the present Conference, as it had done at the 1968-69 Vienna Conference on the Law of Treaties. It regarded *jus cogens* as incompatible with

\* Resumed from the 4th meeting.

\*\* Resumed from the 6th meeting.

\*\*\* Resumed from the 11th meeting.

\*\*\*\* Resumed from the 12th meeting.

\*\*\*\*\* Resumed from the 14th meeting.

\* Resumed from the 14th meeting.

the voluntarist conception of international law, because that conception failed to explain the formation of rules of general international law. *Jus cogens* was, in its view, a concept in evolution, as had been recognized in draft article 64, and the progressive determination of its content was left to the international practice of States and international organizations, to general multilateral treaties, to case law and to legal opinion.

19. The mechanism for settling disputes embodied in article 66 of the 1969 Vienna Convention on the Law of Treaties<sup>1</sup> was meant to be viewed within a wider scale of values than the traditional disputes settlement procedures. A difficulty arose, however, in the case of the present draft because of the limitation imposed in Article 34, paragraph 1, of the Statute of the International Court of Justice, which specified that only States could be parties in cases before the Court. In that connection, his delegation appreciated the efforts of the sponsors of the eight-Power amendment (A/CONF.129/C.1/L.69/Rev.1).

20. While the International Court of Justice in its advisory opinions—for example, in the Reparation for Injuries case of 1949<sup>2</sup> and in the Namibia case of 1971<sup>3</sup>—had made significant contributions to the development of international law, its advisory jurisdiction had in recent years served more for settling internal problems of intergovernmental organizations than as a mechanism for settling disputes between States and other entities. Admittedly that trend could be reversed, and suggestions had been made recently for broadening or enhancing the Court's advisory jurisdiction. Those suggestions were still under consideration. Moreover, it was worth noting that the sponsors of two of the amendments before the Committee, (A/CONF.129/C.1/L.66 and L.69/Rev.1) had made an effort to avoid the risk of advisory opinions being regarded as purely recommendatory in a dispute relating to *jus cogens*.

21. In his delegation's view, the text of article 66 proposed by the International Law Commission had the merit of maintaining the separate treatment of disputes concerning allegations of conflict between the provisions of a treaty and a peremptory norm of international law and of adopting, for those particular disputes, one single procedure, namely, that of arbitration, to be applied both to States and to international organizations.

22. His delegation was giving careful consideration to the amendment proposed by China, Algeria and Tunisia (A/CONF.129/C.1/L.68). It felt, however, that some degree of flexibility was necessary if a consensus formula was to be arrived at. In its view, it was necessary, in deciding on appropriate dispute-settlement procedures in the present context, to recognize that the infiltration of an evolving system of values, of a universally acceptable minimum, into positive law was desirable

and that the concept of an international legal system was not a voluntary but a necessary one. That implied that, in the particular context of *jus cogens*, the treatment of dispute-settlement was closely linked to the work of codification itself. His delegation also took note, however, of the arguments of those who, even in that specific context, felt that the question of dispute-settlement should retain its autonomous character. It therefore reserved its position on the point under discussion for the present, in the hope that a compromise solution might be found.

23. Mr. KORONTZIS (Greece) said that procedure for the settlement of disputes, particularly where *jus cogens* was involved, was a key element of the draft convention. His delegation warmly commended the eight-Power amendment to article 66 and endorsed the statements which had been made by the representatives of Japan and Austria (24th meeting) and the United Kingdom (26th meeting). To provide for recourse by States to the International Court of Justice, especially in disputes concerning the application or interpretation of articles 53 and 64, was to bring the provisions of the present draft more closely into line with those of the 1969 Vienna Convention to add a further element of legal security and undoubtedly to enhance the authority of the present convention. His delegation could not support any amendment which did not give such security.

24. The provisions of subparagraphs (b), (c) and (d) of paragraph 2 of the eight-Power amendment simply incorporated in the draft convention a procedure already provided for in the Statute of the International Court of Justice, while precedents for the provision in subparagraph (e) that the advisory opinion of the Court should be accepted as decisive were to be found in the Convention on the Privileges and Immunities of the United Nations (General Assembly resolution 22 (I), of 13 February 1946) and the Convention on the Privileges and Immunities of the Specialized Agencies (General Assembly resolution 179 (II), of 21 November 1947). In any case, it seemed hardly likely that, having agreed on such a procedure, the parties to a dispute would not accept the opinion as decisive.

25. The eight-Power amendment also introduced a certain useful differentiation and flexibility, which was balanced by the additional security it provided with regard to the fundamental concept of *jus cogens*. Furthermore, by establishing a closer link with the 1969 Vienna Convention it contributed to greater uniformity of procedure.

26. Mr. RASOOL (Pakistan) said that without a workable and effective procedure for the settlement of disputes, rules, however categorically they were expressed, would remain meaningless. The basic objective should always be peaceful and amicable settlement, with parties' free choice of means as a natural corollary. The provisions of article 66 would become operative only when parties failed to agree on a procedure to be followed in the case of dispute.

27. Subject to certain terms and conditions, Pakistan had accepted the compulsory jurisdiction of the International Court of Justice. That commitment, together

<sup>1</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

<sup>2</sup> See *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports, 1949*, p. 174.

<sup>3</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971*, p. 16.

with its belief in the sanctity of the principles enshrined in articles 53 and 64 of the 1969 Vienna Convention, had led his delegation to give particular support to article 66, subparagraph (a), of that instrument. It saw no reason why the provisions of the present draft should be less effective than those of that earlier Convention.

28. Two points needed to be emphasized. The first was that the convention under consideration would govern treaties—and disputes arising therefrom—to which one or more international organizations might be parties. The second was that at present, and in the foreseeable future, international organizations could not become contentious parties before the International Court of Justice. For that reason the International Law Commission had proposed, in a departure from the provisions of the 1969 Vienna Convention, an arbitration procedure for dealing with disputes concerning *jus cogens*.

29. The delegation of Pakistan appreciated the underlying difficulties, but it was less than fully satisfied with the Commission's methodology. Notwithstanding the explanation in its commentary that disputes to which only States were parties would be governed by the provisions of the 1969 Vienna Convention, the indication in subparagraph (a) of article 66 that any party to the dispute could set the arbitration procedure in motion lacked clarity. More explicit drafting seemed to be required.

30. His delegation therefore viewed with interest and approval the eight-Power amendment. While it sympathized with the general thrust of the United Nations amendment, it was not satisfied with the idea of a binding advisory opinion, which certain legal systems would contest.

31. The amendment proposed by the European Economic Community (A/CONF.129/C.1/L.64) appeared to involve only a matter of drafting and might, he felt, be referred to the Drafting Committee.

32. As had already been pointed out, the Soviet amendment (A/CONF.129/C.1/L.60) seemed not to achieve the declared objective. It seemed not to reinforce the parties' free choice of means (which was already provided for), but rather to erode the necessary distinction, established in the 1969 Vienna Convention as well as in the present draft, between the rule of *jus cogens* and the other principles of part V.

33. As for the three-Power amendment, it retained the arbitration procedure in form, but at the same time eliminated it as a compulsory procedure by making it subject to express consent.

34. In order to create consistency between internal law and international obligations for the purposes of ratification and accession, it would be necessary to find a compromise solution to the present differences on the binding character of an advisory opinion. The delegation of Pakistan was prepared to support any formula that would both maintain the sanctity of the rule of *jus cogens* and ensure wide acceptance of the draft convention.

35. Mr. BERNHARD (Denmark) said that his country had always held the view that, as far as possible, States should create mechanisms for the effi-

cient settlement of disputes which could not be resolved through negotiation. That implied mandatory procedures leading to binding decisions. It was difficult to see how such mechanisms could be in conflict with the principle of the sovereign equality of States; on the contrary, an efficient system for the settlement of disputes tended to protect weaker States on the basis of international law.

36. While article 66 met the criteria to which he had referred with regard to disputes concerning *jus cogens*, it must be regarded as a retrograde provision in comparison with the 1969 Vienna Convention. That, of course, was partly due to the fact that international organizations could not be parties to a dispute before the International Court of Justice. His delegation nevertheless considered it important to try to maintain the influence of the Court in disputes concerning *jus cogens*, more particularly because practice concerning such principles should be built up by a permanent and highly qualified legal body such as the Court, whose background seemed clearly preferable to that of various arbitral tribunals.

37. Those considerations led his delegation warmly to endorse the eight-Power amendment, which had the merit of seeking for the International Court of Justice a role which resembled as closely as possible, in the present context, that which it played in the 1969 Vienna Convention, and at the same time strengthening the mandatory and binding elements in the settlement procedure.

38. The same reasoning led his delegation to view the amendment proposed by the United Nations with considerable sympathy. On the other hand, both the Soviet proposal and the three-Power amendment seemed—although to a somewhat differing degree—to be weaker in comparison both with the provisions of the 1969 Vienna Convention and with the mechanism proposed by the International Law Commission.

39. Mr. ROMAN (Romania) said that his delegation would have some difficulty in accepting the International Law Commission's proposal that any party to a dispute concerning the application or interpretation of article 53 or article 64 might submit the dispute to arbitration. As many speakers had already pointed out, the proposal tended to substitute obligatory arbitration for voluntary arbitration. Furthermore, his delegation could not, as a matter of principle, accept arbitration as a procedure in disputes involving peremptory norms of general international law (*jus cogens*), still less when such arbitration would not be subject to the common agreement of the parties.

40. Those considerations led his delegation to view with interest the Soviet proposal (A/CONF.129/C.1/L.60) calling for the deletion of subparagraph (a) of article 66 and the proposal to delete section II of the annex (A/CONF.129/C.1/L.61). While it supported those amendments, it was also open to any other proposals inspired by the same concerns and could therefore also support the three-Power amendment. As an alternative solution, the Commission's draft might be improved, for example, by stipulating in subparagraph (a) that the arbitration should be subject to agreement between the parties concerned, or by re-

moving from that paragraph the reference to article 53. Such modifications would, in the view of his delegation, result in a more balanced article likely to secure wider support.

41. For the reasons which he had already given, his delegation could support neither the United Nations amendment nor the eight-Power amendment.

42. Mr. SANG YONG PARK (Republic of Korea) said that, in his delegation's view, disputes involving *jus cogens* should be settled by an impartial and effective judicial procedure and that the International Court of Justice was the proper organ for that purpose, irrespective of the type of parties involved.

43. The present text of subparagraph (a) of article 66 was reticent on recourse to the Court for a decision or advisory opinion in the case of disputes arising from the application or the interpretation of articles 53 or 64. The fact that it provided only for arbitration might well constitute a substantive weakness of the draft, and lead to the expression of serious reservations. His delegation considered that the statutory functions of the Court should be brought into play in such cases.

44. In stressing the role of the International Court in the context of article 66, his delegation by no means implied that less importance should be attached to arbitration or conciliation procedures, or to other peaceful means of settlement as stipulated in Article 33 of the Charter of the United Nations. It wished to reaffirm the Republic of Korea's abiding commitment to the pacific settlement of all disputes.

45. All the proposed amendments to article 66 and the annex deserved careful attention. His delegation saw particular merit in those submitted by the United Nations and by eight countries. It hoped that, combined, they might serve as the basis of an acceptable text for article 66.

46. Mr. FOROUTAN (Islamic Republic of Iran) said that the provisions of draft article 66 quite clearly differed from those of the 1969 Vienna Convention concerning the settlement of disputes arising from the application or interpretation of articles 53 and 64. His delegation would have great difficulty in accepting the binding conciliation procedure provided for in the draft in its present formulation. The draft failed to reflect present realities, inasmuch as certain special cases were usually referred to arbitral tribunals.

47. Important disputes concerning *jus cogens* should be referred, but only with the clear consent of the parties involved, to the highest judicial organ, rather than to an arbitral tribunal. International organizations did not have the authority to appear before the International Court of Justice, but it would be perfectly justifiable to provide a non-obligatory procedure under which the advisory opinion of the Court might be obtained in cases involving them. Freedom of choice to resort to any means of settlement, based on the consent of all parties in each case, was the basic and main criterion.

48. During the deliberations on the subject in 1969, the delegation of his country had been among those which had expressed dissatisfaction on the matter of

strict procedural safeguards, arguing that formulations that were suitable from the point of view of some countries might cause certain difficulties for others. The developed Western countries already possessed adequate administrative machinery for dealing with the question of safeguards, whereas such machinery was unfortunately lacking in many developing countries. Regrettably, the views expressed in 1969 by many delegates from developing countries who had shared the same concern had not been taken into consideration, and sufficient efforts had not been made to reach a compromise solution capable of securing wide support. The 1969 Vienna Convention had indeed been adopted, but reluctance to approve the compulsory provision in the text of the draft new convention persisted at the present Conference. The issue was what was really desired: a universally accepted instrument, or merely one that satisfied a small minority of States?

49. Turning to the various proposals before the Committee, he found shortcomings in the Soviet amendment to article 66 in that it called for the deletion of subparagraph (a) of the article without providing for the necessary change in subparagraph (b). His delegation could accept the first part of the Soviet amendment to the annex, but could not agree to the deletion of section II of the annex because it believed that the description of procedure was always helpful for clarity and precision.

50. His delegation appreciated the clarification provided in the amendment proposed by the European Economic Community.

51. In connection with the United Nations amendment, his delegation considered that the International Court of Justice was the most suitable organ to give an advisory opinion on an important legal matter. It was necessary, however, that the opinion be obtained with the consent of the parties concerned. States were in most cases willing to refer their disputes to the Court, but on a voluntary basis. While his delegation agreed with the philosophy behind the United Nations proposal, it could not accept the latter, as it provided for the same binding arbitration procedures as did the International Law Commission's text. Nor could it accept subparagraph (c) proposed in that amendment.

52. His delegation supported the three-Power amendment because it laid due emphasis on the key element of consent of the parties to the dispute, and despite the shortcoming that it did not offer recourse to the advisory opinion of the International Court of Justice as an option. The text of that amendment could, he believed, be referred to the Drafting Committee.

53. Finally, his delegation acknowledged the efforts made by the sponsors of the eight-Power proposal to deal with all the situations which might arise in connection with arbitration and conciliation. For the reasons he had mentioned earlier, however, it would have difficulty in supporting that amendment.

54. Mr. DALTON (United States of America) said that, in his delegation's view, the text of the draft convention should follow as closely as possible the provisions of the 1969 Vienna Convention, which his Government had signed and followed in its treaty practice.

It was from that perspective that his delegation approached the proposals before the Committee.

55. Under article 66 of the 1969 Vienna Convention, any State could bring before the International Court of Justice a *jus cogens* dispute involving the application and interpretation of articles 53 and 64, unless the parties by common consent agreed to submit the dispute to arbitration. However, given the greater scope of the draft convention at present being considered and the fact that an international organization could not bring a dispute before the International Court of Justice, the International Law Commission had proposed in subparagraph (b) of article 66 a different provision for the settlement of disputes, whereby any party to such a dispute could bring the matter before an arbitral tribunal, as provided for in the annex; disputes on other matters could be brought before a conciliation commission whose function would be confined to making recommendations to the parties for the amicable settlement of the dispute.

56. The Soviet amendments and the three-Power amendment ignored the Commission's fundamental purpose of establishing a strong mechanism for the settlement of *jus cogens* disputes and seemed to be based on the curious premise that the parties to the draft convention did not need any effective protection in the event of such disputes, even though the convention underlined the special nature of such disputes where the invalidity of treaties that violated *jus cogens* principles was involved. Such an approach posed a great risk to the stability of treaty relations.

57. The United Nations amendment retained the essence of the distinction proposed in draft article 66 but had a number of disadvantages which made it less acceptable than the International Law Commission's text. The eight-Power amendment had the merit of building on the Commission's text and aligning the provision relating to *jus cogens* disputes as closely as possible with that in the 1969 Vienna Convention.

58. The Netherlands amendment (A/CONF.129/C.1/L.67) to the annex introduced a useful clarification and should be accepted.

59. Mr. SWINNEN (Belgium) said that the codification of international law, including the law of treaties, was of real benefit only if it was accompanied by effective machinery for application and interpretation. Codification did not end with the conclusion of negotiations nor even with the entry into force of a convention, for difficulties of interpretation and application would undoubtedly arise. It was therefore important to provide a suitable system for the settlement of disputes.

60. His delegation was unable to approve article 66 as proposed by the International Law Commission because, unlike the corresponding provision of the 1969 Vienna Convention, it made no provision for reference of disputes concerning a peremptory norm of general international law to the International Court of Justice. He fully shared the views expressed by the Austrian and Japanese representatives on that point at the 24th meeting.

61. The positive stand his country had taken with regard to the 1969 Vienna Convention was based on the

link it established between the articles on *jus cogens* and the guarantees provided for the submission of disputes to the International Court. It was his delegation's hope that a similar balance would be achieved at the present Conference, in the interest of building up a consistent body of case-law. The Conference's primary task in its codification endeavour was to establish a proper settlement-of-disputes procedure that would support that endeavour and enhance legal certainty.

62. For all those reasons, his delegation favoured the closest possible parallel with the 1969 Vienna Convention. For the same reasons, it favoured the eight-Power amendment, which took due account of the increasingly important role that international organizations were called upon to play. It would be undermining that role if international organizations were not enabled to avail themselves of the advisory opinions of the International Court of Justice. Subparagraph 2 (e) of that amendment was, admittedly, somewhat paradoxical, and it might well be asked whether an opinion could be regarded as binding, and *a fortiori* an advisory opinion. However, the Japanese representative's remarks were pertinent in that regard. Acceptance of the advisory opinion as decisive by all the parties to the dispute ensured the necessary balance with the 1969 Vienna Convention.

63. Ideally, an advisory opinion handed down by the highest international judicial body on such important rules as those of *jus cogens* should be decisive for all parties. A further point to be borne in mind was that the advisory opinion procedure in question was already incorporated in the Convention on the Privileges and Immunities of the United Nations and in the Convention on the Privileges and Immunities of the Specialized Agencies. If, however, subparagraph 2 (e) of the eight-Power amendment did not meet with general approval, consideration could perhaps be given to some wording along the lines proposed in paragraph 2 of the United Nations amendment.

64. In conclusion, he said that the Belgian delegation supported the amendments to the annex proposed by the European Economic Community and the Netherlands.

65. Mr. HERRON (Australia) said that the compulsory settlement of disputes presented no problem for his country. It accepted the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court, and had had occasion to have recourse to its contentious jurisdiction. It had supported the inclusion of a procedure for the compulsory settlement of disputes in the 1969 Vienna Convention and, indeed, would have preferred that procedure to apply to the whole of part V, and not only to questions of *jus cogens*. That was also the position of his delegation in regard to the present convention.

66. Australia welcomed the inclusion in the draft articles of provision for compulsory arbitration in the case of disputes concerning *jus cogens*. It was essential for peremptory norms of general international law to be interpreted under a system that would promote certainty in international relations. Decisions in disputes as to the application of *jus cogens* should therefore be

binding on the parties to the dispute and, ideally, should involve a decision of the International Court of Justice itself, as proposed in the eight-Power amendment.

67. The provision for the compulsory settlement of disputes contained in article 66 was entirely reasonable, in his delegation's view. Recourse to such a procedure would be rare, and would be the final step in a series of procedural steps as provided for under articles 65 and 66. Also, article 66 was wholly in keeping with the obligations under the Charter of the United Nations, for it could be seen as a specific application of the requirement under Article 33 of the Charter that the parties to a dispute should seek a solution by any peaceful means, including conciliation or arbitration.

68. Turning to the amendments, he said that his delegation was unable to accept the Soviet proposals and the three-Power proposal, which ran counter to the views he had expressed. It could, however, accept the European Economic Community amendment and the Netherlands amendment. The United Nations amendment, whereby any party to the dispute could seek an advisory opinion, was also acceptable in principle. His delegation favoured in particular the eight-Power proposal, which provided for the widest possible referral to the International Court of Justice.

69. Ms. LUHULIMA (Indonesia) said that, while her delegation was not opposed to arbitration, as proposed in the draft articles, it considered that compulsory jurisdiction would give rise to inflexibility and impair the exercise of State sovereignty with regard to choice of the means for resolving disputes. It would therefore prefer to retain the principle of freedom of choice of means, with the possibility, but not the obligation, of having recourse to arbitration.

70. Her delegation was attracted by the Soviet proposal to delete subparagraph (a) of article 66, but considered that subparagraph (b) of the article required some adjustment. It also had sympathy with the three-Power amendment.

71. Mr. PIL (Democratic People's Republic of Korea) stressed the importance of settlement of disputes in keeping with the spirit of the Charter of the United Nations. Specifically, his delegation considered that disputes regarding the interpretation and application of the provisions of part V of the draft convention should, as far as possible, be resolved by means agreed upon by the parties and by direct negotiation between them.

72. The shortcomings of article 66 of the 1969 Vienna Convention, which were apparent from the number of States that had entered reservations to that provision, should not be repeated. If the text of article 66 was to be made more widely acceptable, it should take account of the need for direct negotiation, respect for State sovereignty and free choice of peaceful means of settling disputes.

73. His delegation could support the Soviet proposal to amend article 66, the purpose of which was to exclude arbitration and to rely on conciliation. The Conference, in its view, was seeking to draw up a convention of a universal character, not an agreement of narrow scope, and that convention should not be undermined by a provision which was unrealistic and

contrary to State sovereignty and would result in inflexibility.

74. His delegation also supported the three-Power amendment, which was along the same lines as the Soviet amendment but approached the question from a different angle. It favoured in particular the clause providing that the express consent of the parties to the dispute was required before recourse could be had to arbitration, since that would provide a firm guarantee of State sovereignty.

75. Mr. DENG (Sudan) said that while article 66 as drafted by the International Law Commission distinguished between disputes relating to *jus cogens* and those concerning the application or the interpretation of provisions of part V dealing with other matters, it stopped short of the corresponding provision in the 1969 Vienna Convention, which provided that where parties failed to resolve a dispute relating to a rule of *jus cogens* under Article 33 of the Charter of the United Nations they could submit that dispute to the International Court of Justice. As the force of *jus cogens* was recognized and accepted by the international community, his delegation believed that any departure from the provisions of the 1969 Convention would lead to problems in the future and result in uncertainty in international relations. It therefore considered that any dispute relating to the application or interpretation of the present articles 53 and 64 should, if unresolved by application of the procedures laid down in Article 33 of the Charter of the United Nations, be referred to the International Court of Justice.

76. For those reasons, his delegation supported the eight-Power amendment. In so doing it maintained the position it had taken in co-sponsoring the proposal which had led to the adoption of article 66 of the 1969 Vienna Convention. The eight-Power amendment, together with the United Nations amendment, which expressed a similar intention, could in its view be referred to the Drafting Committee. Although that proposal largely followed the International Law Commission's draft, his delegation could not support the three-Power amendment, since it added a new requirement that States parties to a dispute relating to a rule of *jus cogens* should give their express consent to arbitration. It could not accept the Soviet Union amendment to article 66, as it did not provide a mechanism for the resolution of disputes where other procedures had proved ineffective. Finally, the amendments designed to improve the provisions of the annex had the support of his delegation, which felt they could be sent to the Drafting Committee, as they did not raise issues of substance.

77. Mr. AVAKOV (Union of Soviet Socialist Republics) said that the debate on article 66 reflected the complexity of the problems raised by that text, the solution of which required a delicate approach. It was indeed desirable to achieve a unified jurisprudence, a complex task necessitating a spirit of compromise, to which his delegation was prepared to contribute. His delegation was gratified by the support expressed for its amendment. That proposal constituted a reasonable approach aimed at eliminating some of the defects of the 1969 Vienna Convention, an instrument which, as

the representative of China had rightly pointed out (24th meeting), had taken 11 years to come into force and had been ratified by only 44 of the 110 States which had participated in the Conference on the Law of Treaties. That fact confirmed that a prerequisite for implementation of the proposed new convention was that it should satisfy the world community.

78. His delegation agreed with the view that the establishment of rules of *jus cogens* was not a matter for the International Court of Justice or for arbitration procedures. Their role was to apply the law, not to create it. His delegation's amendment was designed to protect the sovereignty of States and allow them a free choice of the means of settlement of disputes. Reference had often been made in the past to the binding nature of decisions of the International Court of Justice and arbitral awards. However, it was necessary to move with the times, and devise new approaches founded on *jus cogens*. He noted that many of those delegations which supported his delegation's amendment to article 66 had stressed the need to make adjustments to subparagraph (b). He suggested that that was a matter for the Drafting Committee.

79. His delegation wished to stress that, contrary to the opinion expressed by the representative of the United Kingdom (26th meeting), his delegation had introduced its amendment not for tactical purposes but because it reflected a position of principle, as his delegation had previously explained (24th meeting). The principle involved the sovereignty of States and their freedom to choose between the possible means of settlement of disputes. He also wished to emphasize that the argument that the present draft convention should follow the 1969 Vienna Convention as closely as possible was not convincing. The purpose of the present Conference was not to duplicate the 1969 Convention, but to produce an effective set of provisions appropriate to relations involving international organizations.

80. His delegation did not insist only on its own amendment. It felt that the amendment of the three Powers might in due course provide the basis for a compromise incorporating its ideas on recourse to international organs. His delegation could not, as a matter of principle, support the eight-Power amendment, as it sought to make binding the findings of the International Court of Justice by having its advisory opinions accepted as decisive. His delegation was also unable to support the United Nations amendment.

81. With regard to the proposals relating to the annex, the amendments of the European Economic Community and the Netherlands could, he felt, be sent to the Drafting Committee. If his delegation's amendment, which referred to arbitration and conciliation procedures, was not acceptable, he suggested the adoption, *mutatis mutandis*, of a procedure similar to that provided for in articles 84 and 85 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>4</sup> That would be an improvement on the In-

ternational Law Commission's draft which called for procedures that were unwieldy and impracticable.

82. In conclusion, he again emphasized that his delegation was ready to co-operate in a spirit of compromise. It would therefore reserve its position on article 66 and the annex pending any further proposals or amendments.

83. Mr. DROUSHIOTIS (Cyprus) said that his delegation was in favour of binding, third-party, compulsory settlement of disputes by adjudication, since that procedure best satisfied the requirements of objectivity, impartiality and uniformity for the peaceful settlement of disputes. He emphasized the need, of small States in particular, to be able to have recourse to the law and its institutions, as that would help to ensure an effective world order governed by law.

84. His delegation considered that in the case of disputes involving *jus cogens*, recourse to the International Court of Justice should be provided for wherever possible. Norms of *jus cogens* were the most important rules of international law, as they were of a universal nature and contained obligations *erga omnes*. His delegation therefore fully supported the eight-Power amendment and was sympathetic to the amendment submitted by the United Nations. It considered the former proposal preferable, as it was more specific and clearer.

85. For the reasons he had expressed earlier, his delegation could not support the amendments to article 66 proposed by the Soviet Union and by the three Powers. The Netherlands amendment relating to the annex involved only drafting, and could be referred to the Drafting Committee. The delegation of Cyprus believed that the solutions offered by the 1969 Vienna Convention should be followed as closely as possible, subject to what was possible under existing law, particularly in relation to *jus cogens*.

86. Mr. MBAYE (Senegal) said that two opposing views had emerged from the discussion, one in favour of disputes relating to *jus cogens* being subject to mandatory arbitration, the other requiring the express consent of the parties to arbitration. There appeared to be general agreement that disputes related to the articles in part V, other than articles 53 and 64, should be referred to conciliation. His delegation wished to take a middle position.

87. The three-Power amendment had the merit of requiring the express consent of all the parties to initiate the arbitration procedure set out in the annex. However, that amendment would be more appropriate if it specified a time-limit for the expression of such consent. That would avoid the risk of an impasse being reached and the dispute being prolonged. If, on expiry of the time-limit, the party whose consent was sought had not given it, the procedure in article 66, subparagraph (a), as proposed by the International Law Commission, would apply. At that point, mandatory arbitration would come into force. If such a formula were adopted, the Drafting Committee could draw up two separate paragraphs accordingly.

88. With regard to disputes not related to *jus cogens*, his delegation preferred the conciliation procedure

<sup>4</sup> See *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12) p. 207.

provided for in the International Law Commission's draft.

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

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

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

92. He expressed surprise that the representative of the United Nations, an organization of which Bulgaria was a Member, should have introduced an amendment which did not take account of his delegation's position. His understanding of that amendment was that, at the request of a State member of an international organization, any dispute concerning *jus cogens* to which that organization was a party could be brought before the

General Assembly or before the Security Council, as provided in Article 96 of the Charter of the United Nations, with a request that the dispute be forwarded for an advisory opinion to the International Court of Justice. The principal organs of the United Nations would thus be involved in dealing with a dispute relating to *jus cogens*. Discussion as to the appropriateness of such a procedure would inevitably take place within the United Nations.

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

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

*The meeting rose at 6.10 p.m.*

## 28th meeting

Thursday, 13 March 1986, at 3.30 p.m.

Chairman: Mr. SHASH (Egypt)

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

[Agenda item 11] (continued)

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

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

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

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

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

\*\* Resumed from the 25th meeting.

\*\*\* Resumed from the 23rd meeting.

\*\*\*\* Resumed from the 16th meeting.

\* Resumed from the 10th meeting.

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

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

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

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

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

*It was so decided.*

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

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

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

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

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

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

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

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

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

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

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

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

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

15. However, in the context of the present draft convention a technical difficulty arose from the fact that an international organization raising an objection could not appear before the International Court of Justice. The only solution then was a request for an advisory opinion. Such a request required use of the procedures laid down in the Charter of the United Nations, and was therefore dependent on the collaboration of organs of international organizations which were not parties to the dispute. In order to avoid the situation where a settlement could not be achieved, due to the non-col-

laboration of such organs, an alternative procedure was required, and that was compulsory arbitration. Without that, it would never be known what the rule of *jus cogens* was. A similar situation would arise where only international organizations invoked *jus cogens*. There again, if there were no collaboration in seeking an advisory opinion, another procedure would have to be followed. The only possible procedure was then compulsory arbitration. He therefore urged the Committee to adopt the eight-Power amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29. Regarding the general obligation to settle disputes by peaceful means, he could not accept the view put forward by certain delegations that negotiation constituted a special and somehow privileged means of settlement. There was no basis for that interpretation in

any of the provisions of the Charter of the United Nations or in the relevant General Assembly resolutions. On the contrary, there was only one means of settlement that was really privileged by the Charter, namely, reference of disputes of a legal nature to the International Court of Justice. That was a strong argument in favour of judicial settlement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of the world had set up the International Court of Justice as a supreme court to safeguard international law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59. It was consequently obvious that the Canadian delegation could not accept the first amendment submitted by the Soviet Union or paragraph 2 of its second amendment. Nor could it accept the three-Power amendment. All the amendments would, it believed, constitute a retrograde step in relation to the valuable achievements of the 1969 Vienna Convention. *Jus*

*cogens* must remain *jus cogens*; the fact that the present draft convention concerned treaties to which international organizations were parties changed nothing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

75. Article 66 of the 1969 Vienna Convention and the present draft article 66 both envisaged disputes involving two or more parties to a treaty. It was inconceivable, however, that a court would rule on the invalidity of a treaty as between two or more parties only, the remaining parties continuing to be bound by the treaty regardless of the fact that the norms of *jus cogens* had been violated and articles 53 and 64 applied. To replace in the new convention the compulsory judicial

settlement involving the International Court of Justice which was provided for in the 1969 Vienna Convention by compulsory arbitration was merely to transpose the problem in its entirety; there again, the invalidity of a treaty under article 53 or 64 would apply to all the parties to the treaty, and not merely to those involved in the dispute.

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

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

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

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

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

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

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

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

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

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

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

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

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

been signed by over 159 States, both Members and non-Members of the United Nations.

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

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

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

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

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

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

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

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

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

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

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

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

100. Another point which had been raised concerned the important principle of free choice of means for the settlement of disputes, which was affirmed in article 65, paragraph 3. It was not the intent of the eight-Power amendment to deny that principle but, rather, to provide for an additional safeguard in the event that the dispute-settlement procedure selected by the parties concerned proved to be unworkable. Such an additional procedure was particularly necessary given the unique *jus cogens* nature of the disputes concerned.

Moreover, the proposed compulsory settlement procedure was not new to multilateral treaty-making and did not infringe the principle of free choice of means, for it would apply solely to States that became a party to the convention and thereby agreed in advance to the procedure.

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

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

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

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

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

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

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

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

*It was so decided.*

*The meeting rose at 5.40 p.m.*

## 29th meeting

Monday, 17 March 1986, at 5.15 p.m.

*Chairman:* Mr. SHASH (Egypt)

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

[Agenda item 11] (*continued*)

**Article 3 (International agreements not within the scope of the present articles) (*concluded*)\***

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

*It was so decided.*

### Preamble

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

*It was so decided.*

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

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

*Statement by the President of the Conference*

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

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

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

*It was so decided.*

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

\* Resumed from the 5th meeting.

requested formally by a State, and no such request had been made.

7. He therefore invited the Committee to vote, in an indicative vote, first on the amendment proposed by the Soviet Union (A/CONF.129/C.1/L.60).

*Switzerland, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Algeria, Angola, Argentina, Bulgaria, Byelorussian Soviet Socialist Republic, China, Cuba, Czechoslovakia, Democratic People's Republic of Korea, German Democratic Republic, Hungary, Indonesia, Iran (Islamic Republic of), Mozambique, Nicaragua, Peru, Poland, Romania, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Viet Nam.

*Against:* Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Cyprus, Denmark, Finland, Germany, Federal Republic of, Greece, Holy See, Ireland, Italy, Japan, Jordan, Lesotho, Liechtenstein, Mexico, Netherlands, New Zealand, Nigeria, Norway, Portugal, Senegal, Spain, Sudan, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

*Abstaining:* Bahrain, Bangladesh, Barbados, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Egypt, France, Gabon, Guatemala, India, Iraq, Israel, Kenya, Kuwait, Lebanon, Madagascar, Morocco, Oman, Pakistan, Philippines, Qatar, Republic of Korea, Saudi Arabia, Thailand, Tunisia, United Arab Emirates, Zaire, Zambia.

8. The CHAIRMAN invited the Committee to vote, in an indicative vote, on the amendment submitted by Algeria, China and Tunisia (A/CONF.129/C.1/L.68).

*The Union of Soviet Socialist Republics, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Algeria, Angola, Argentina, Bulgaria, Burkina Faso, Byelorussian Soviet Socialist Republic, China, Congo, Cuba, Czechoslovakia, Democratic People's Republic of Korea, German Democratic Republic, Hungary, Indonesia, Iran (Islamic Republic of), Mozambique, Nicaragua, Peru, Poland, Romania, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Viet Nam, Zaire.

*Against:* Australia, Austria, Belgium, Canada, Chile, Colombia, Cyprus, Denmark, Finland, Germany, Federal Republic of, Greece, Holy See, Ireland, Italy, Japan, Kenya, Lesotho, Liechtenstein, Mexico, Netherlands, New Zealand, Nigeria, Norway, Portugal, Spain, Sudan, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America.

*Abstaining:* Bahrain, Barbados, Brazil, Cameroon, Côte d'Ivoire, Egypt, France, Gabon, Guatemala, India, Iraq, Israel, Kuwait, Lebanon, Madagascar, Morocco, Oman, Pakistan, Philippines, Qatar, Republic of Korea, Saudi Arabia, Senegal, Thailand, United Arab Emirates, Yugoslavia, Zambia.

9. The CHAIRMAN invited the Committee to vote, in an indicative vote, on the eight-Power amendment (A/CONF.129/C.1/L.29/Rev.1).

*Zambia, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Australia, Austria, Barbados, Belgium, Canada, Chile, Colombia, Côte d'Ivoire, Cyprus, Denmark, Finland, Germany, Federal Republic of, Greece, Holy See, India, Ireland, Italy, Japan, Kenya, Kuwait, Lesotho, Liechtenstein, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Portugal, Republic of Korea, Spain, Sudan, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia, Zambia.

*Against:* Algeria, Angola, Bulgaria, Burkina Faso, Byelorussian Soviet Socialist Republic, China, Congo, Cuba, Czechoslovakia, Democratic People's Republic of Korea, German Democratic Republic, Hungary, Indonesia, Iran (Islamic Republic of), Mozambique, Nicaragua, Peru, Poland, Romania, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Viet Nam.

*Abstaining:* Argentina, Bahrain, Brazil, Cameroon, Egypt, France, Gabon, Guatemala, Iraq, Israel, Jordan, Lebanon, Madagascar, Morocco, Oman, Philippines, Qatar, Saudi Arabia, Senegal, Thailand, United Arab Emirates, Zaire.

#### *Article 80 (Registration and publication of treaties)*

10. The CHAIRMAN drew the Committee's attention to an amendment submitted by Egypt to article 80, which had been referred by the Conference directly to the Drafting Committee. He considered that rule 28, subparagraph 2 (a), of the rules of procedure was applicable, and he invited the delegation of Egypt to introduce the amendment.

11. Mr. RAMADAN (Egypt), introducing his delegation's amendment (A/CONF.129/C.1/L.78), said that, in the light of the International Law Commission's commentary to article 80 (see A/CONF.129/4), his delegation proposed that the expression "filling and recording" should be reserved for the type of treaty to which an international organization was a party, while the word "registration" should apply only to treaties between States. There were three reasons for this. First, the concept of registration of international treaties had developed originally as a means of avoiding the undesirable consequences of secret treaties between States, and to encourage open diplomacy. It was unlikely that one or more international organizations would conclude a secret treaty, particularly in view of the fact that their existence was based on the intention to promote social and economic progress and international security. Secondly, Article 102 of the Charter, of the United Nations applied only to the registration of treaties entered into by States Members of that organization. Thirdly, it was his understanding that the Secretariat of the United Nations had a single procedure for the "registration" of treaties to which only States were parties and for the "recording" of treaties to which international organizations were parties. His delegation

would be grateful if the representative of the United Nations would confirm that understanding.

12. Mr. BERMAN (United Kingdom), speaking on a point of order, asked whether it was appropriate for an article to be discussed in the Committee of the Whole before the latter had decided that the article was properly before it.

13. The CHAIRMAN asked if the Committee of the Whole wished to give substantive consideration to article 80 and to consider the amendment proposed by Egypt.

14. Mr. BERMAN (United Kingdom) said that he did not wish his intervention to be regarded as an objection to substantive consideration of article 80 by the Committee. However, as a procedural matter, he was somewhat perplexed by the situation which had arisen, inasmuch as it was now seemingly proposed to reopen substantive discussion of an article in respect of which the Drafting Committee had already completed its deliberations. He wondered if the Chairman of the Drafting Committee could provide any clarification of the matter.

15. The CHAIRMAN observed that under rule 28, subparagraph 2 (a), of the rules of procedure, the Committee of the Whole could decide to give substantive consideration to a particular article of the basic proposal that had been referred directly to the Drafting Committee, which was the case of article 80.

16. Mr. AL-KHASAWNEH (Jordan), Chairman of the Drafting Committee, recalled that article 80 had been referred directly to the Drafting Committee at the beginning of the Conference. Since the article had now been provisionally adopted by the Drafting Committee, which would shortly be called upon to report to the Conference, it would greatly complicate matters if substantive discussion of the article were reopened.

17. Mr. GAJA (Italy) said that it had always been his understanding that Article 102 of the Charter of the United Nations applied also to treaties between States and international organizations. He suggested that the representative of the United Nations might be asked to clarify the matter.

18. Mr. SZASZ (United Nations) said that within the Secretariat of the United Nations there were two pro-

cedures for the recording of a treaty: "registration" in accordance with Article 102 of the Charter and the regulations adopted pursuant to that article, on the one hand, and application of the rules relating to the "filing and recording" of treaties not subject to that Article, on the other. The latter procedure applied equally to non-member States, international organizations or any other entity. It had existed at the time of adoption of the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> which was why the International Law Commission had retained the language of that Convention for article 80 of the proposed new convention. From the Secretariat's point of view, the provision in article 80 of the 1969 Vienna Convention had proved adequate, and a similar provision would be adequate in the future convention. The differences in procedure existed only within the Secretariat, and no distinction was made between treaties to which States only were parties and other treaties, either in their submission for registration or recording or in their publication, since they appeared in the same monthly statement and volume of the United Nations *Treaty Series*.

19. Mr. RAMADAN (Egypt) said that in the light of the explanations given by the representative of the United Nations, his delegation withdrew its amendment contained in document A/CONF.129/C.1/L.78.

20. Mr. NETCHAEV (Union of Soviet Socialist Republics) suggested that the future convention might usefully reflect the practice of the Secretariat of the United Nations regarding the registration or filing and recording of treaties involving States and international organizations.

21. Mr. BERMAN (United Kingdom) reiterated that his delegation had not wished to make a formal objection to the amendment proposed by Egypt, and recognized the latter's right to request a reopening of substantive discussion. However, he believed it was appropriate for the Egyptian amendment to have been withdrawn.

*The meeting rose at 6.25 p.m.*

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

## 30th meeting

Wednesday, 19 March 1986, at 10.25 a.m.

*Chairman:* Mr. SHASH (Egypt)

**Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4) and A/CONF.129/9)**

[Agenda item 11] (concluded)

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

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

1. The CHAIRMAN said he was informed that delegations had not reached agreement on a text for article 66 and the annex which would command general support. The Committee would therefore have to vote

on the various proposals for those provisions. In accordance with rule 41 of the rules of procedure, it would vote in the following order on the amendments proposed to the International Law Commission's text for article 66: the Soviet Union proposal (A/CONF.129/C.1/L.60), the proposal of Austria, Colombia, Ireland, Japan, Mexico, Netherlands, Nigeria and Switzerland (A/CONF.129/C.1/L.69/Rev.2) and the proposal by Algeria, China and Tunisia (A/CONF.129/C.1/L.68). The Committee would not vote on the United Nations proposal (A/CONF.129/C.1/L.66), since no State had requested that.

2. With regard to the proposal for amending the Commission's text of the annex, a decision on the Soviet Union's wording (A/CONF.129/C.1/L.61, para. 2) would depend on the decision taken on the Soviet Union's proposal for article 66 (A/CONF.129/C.1/L.60); the European Economic Community's proposal (A/CONF.129/C.1/L.64) would not be voted on, since no State had requested that; while the proposal by the Soviet Union for section I, subparagraph 2 (b), of the annex (A/CONF.129/C.1/L.61, para. 1) and the proposal by the Netherlands (A/CONF.129/C.1/L.67) were drafting matters which did not require a vote.

3. He invited the Committee to vote on the Soviet Union proposal for article 66 (A/CONF.129/C.1/L.60).

*At the request of the representative of Japan, a recorded vote was taken.*

*In favour:* Algeria, Angola, Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, German Democratic Republic, Hungary, Iran (Islamic Republic of), Mozambique, Peru, Poland, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Yemen.

*Against:* Australia, Austria, Barbados, Belgium, Brazil, Canada, Chile, China,<sup>1</sup> Colombia, Cyprus, Denmark, Finland, Gabon, Germany, Federal Republic of, Greece, Holy See, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Portugal, Spain, Sudan, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

*Abstaining:* Argentina, Bahrain, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Egypt, France, Guatemala, India, Indonesia, Iraq, Israel, Kenya, Kuwait, Madagascar, Malta, Morocco, Oman, Panama, Philippines, Qatar, Republic of Korea, Saudi Arabia, Senegal, Thailand, Tunisia, United Arab Emirates, Viet Nam, Zaire, Zambia.

*The amendment proposed by the Soviet Union (A/CONF.129/C.1/L.60) was rejected by 36 votes to 17, with 31 abstentions.*

4. Mr. WANG Houli (China) said that, owing to a misunderstanding, the vote recorded for his delegation had related to the eight-Power proposal and not to the Soviet Union proposal. His delegation was in favour of the Soviet Union proposal for article 66.

5. The CHAIRMAN invited the Netherlands representative to introduce the revised version of the eight-Power proposal (A/CONF.129/C.1/L.69/Rev.2).

6. Mr. RIPHAGEN (Netherlands) said that the only difference between the new proposal and the one in document A/CONF.129/C.1/L.69/Rev.1 was the insertion of the words "or, where appropriate, the competent organ of the organization concerned" after the words "Security Council" in the original proposed subparagraph 2 (b). The new words were intended to provide for the situation in which an international organization requested an advisory opinion from the International Court of Justice. The insertion had been made at the request of a number of specialized agencies and involved no substantive change.

7. The CHAIRMAN invited the Committee to vote on the proposal of Austria, Colombia, Ireland, Japan, Mexico, Netherlands, Nigeria and Switzerland (A/CONF.129/C.1/L.69/Rev.2).

*At the request of the representatives of France and Colombia, a vote was taken by roll-call.*

*Algeria, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Australia, Austria, Barbados, Belgium, Canada, Chile, Colombia, Cyprus, Denmark, Finland, Germany, Federal Republic of, Greece, Holy See, Iceland, India, Ireland, Italy, Japan, Jordan, Kenya, Kuwait, Lebanon, Liechtenstein, Luxembourg, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Portugal, Republic of Korea, Spain, Sudan, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia, Zambia.

*Against:* Algeria, Angola, Argentina, Bulgaria, Burkina Faso, Byelorussian Soviet Socialist Republic, China, Cuba, Czechoslovakia, Democratic People's Republic of Korea, Egypt, German Democratic Republic, Hungary, Indonesia, Iran (Islamic Republic of), Mozambique, Peru, Poland, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Viet Nam.

*Abstaining:* Bahrain, Brazil, Cameroon, Congo, Côte d'Ivoire, Ecuador, France, Gabon, Guatemala, Iraq, Israel, Madagascar, Malta, Morocco, Oman, Panama, Philippines, Qatar, Saudi Arabia, Senegal, Thailand, United Arab Emirates, Yemen, Zaire.

*The amendment proposed by Austria, Colombia, Ireland, Japan, Mexico, the Netherlands, Nigeria and Switzerland (A/CONF.129/C.1/L.69/Rev.2) was adopted by 40 votes to 24, with 24 abstentions.*

8. The CHAIRMAN said that, in view of the result of the vote on the eight-Power proposal, the Committee would not need to vote on the proposal by Algeria, China and Tunisia (A/CONF.129/C.1/L.68). Unless he heard any objection, he would take it that the Committee of the Whole adopted article 66 as proposed by the International Law Commission and amended, as well as the annex proposed by the Commission, and referred them to the Drafting Committee together with the Soviet Union proposal for section I, subparagraph 2 (b), of the annex (A/CONF.129/C.1/L.61, para. 1) and the

<sup>1</sup> See the statement by the delegation of China in paragraph 4 below.

Netherlands proposal for section III of the annex (A/CONF.129/C.1/L.67).

*It was so decided.*

9. Mr. GILL (India) said that his delegation had voted in favour of the eight-Power amendment for the reasons it had given in its statement at the 26th meeting on disputes arising out of articles 53 and 64 of the draft convention. Its vote indicated that it continued to believe that there should be mandatory procedures for the settlement of disputes, with recourse to arbitration or conciliation only with the consent of both parties.

10. Mr. SAHOVIC (Yugoslavia) said that his delegation had voted in favour of the eight-Power amendment because it contained two elements which it regarded as decisive: a régime based on article 66 of the 1969 Vienna Convention on the Law of Treaties<sup>2</sup>, which Yugoslavia had ratified without reservation and which provided for recourse to the International Court of Justice, and the idea underlying the Commission's proposal.

11. Mr. RASOOL (Pakistan) said that his delegation had voted in favour of the eight-Power amendment because it was in line with the corresponding provision of the 1969 Vienna Convention. However, it reserved its position on subparagraph 2 (e) of the article, which made an advisory opinion of the International Court of Justice binding. That situation was a departure from normal practice. While favouring a compulsory procedure for articles 53 and 64 because of their sacrosanct nature, it was opposed to a binding character being attributed to advisory opinions of the Court.

12. Mr. GÜNEY (Turkey) said that his delegation's vote on the Soviet Union and eight-Power amendments reflected the views expressed in the statement it had made at the 26th meeting.

13. Mr. TEPAVICHAROV (Bulgaria) said that his delegation had voted against the eight-Power amendment because it believed that a conference which was codifying international law, and in particular dealing with a problem such as the settlement of disputes, should adopt a régime which commanded general support. In the view of his delegation, the decision to adopt the eight-Power amendment amounted to denying the Conference a valid text to consider on the settlement of disputes.

14. Mr. ALMODÓVAR (Cuba) said that his delegation had voted against the eight-Power amendment on the principle which it had maintained about article 66 from the outset: that it could not accept any system involving a compulsory supranational dispute procedure whereby decisions, the nature and scope of which could not be foreseen, could be imposed on the parties to a dispute.

15. Mr. AL-KHASAWNEH (Jordan) said that his delegation had voted in favour of the eight-Power amendment because it believed that a State party to a treaty was bound to resort to the settlement procedure for which that proposal provided. The Conference

should reaffirm the principle of the sovereignty of international law, on which his delegation's support for the amendment had been based. Any action which weakened that principle would be harmful to the international community as a whole.

16. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation had voted against the eight-Power amendment because it believed that in regard to every dispute there should be agreement by all the States concerned to refer the matter to a particular body. Furthermore, the Conference was codifying generally recognized rules of international law; it should not, therefore, codify rules which were not recognized by a majority of States, and the compulsory jurisdiction procedure had been recognized by less than one third of the world's States.

17. Mr. KHARMA (Lebanon) said that his delegation had voted in favour of the system proposed in the eight-Power amendment because that régime was in line with the one established by the 1969 Vienna Convention. However, it had reservations about the provision in subparagraph 2 (e) of the article.

18. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that his delegation had voted against the eight-Power amendment since it considered that the procedure for the settlement of international disputes should, irrespective of the nature of the dispute, be based on the consent of all the parties concerned. In addition, it questioned whether the advisory opinions of the International Court of Justice could be considered as binding. It maintained the views which it had expressed at the 26th meeting.

19. Mr. PALOMO (Guatemala) said that his delegation had abstained from voting on the eight-Power amendment because it considered that the procedure established for determining the content of peremptory norms of international law was purely formalistic and would not enable the nature, scope and essence of those norms to be determined with any clarity or precision. Furthermore, his delegation had serious reservations about the advisability of providing for an arbitration or conciliation procedure which imposed a decision on the parties concerned.

20. Mr. MORELLI (Peru) said that the régime which the Committee had adopted, with its provision for compulsory jurisdiction, would hamper the exercise by States of sovereignty in choosing the most suitable means of settling disputes peacefully. What had been a reasonable proposal to set up machinery for that purpose had been distorted by the Committee's decision, in accordance with which an *ultra vires* and mandatory character was imparted to institutions to which the international community had not given that character, such as conciliation, arbitration and the advisory opinion procedure of the International Court of Justice. In the case of arbitration, the purpose of the institution was to settle disputes through arbitrators appointed by the parties acting in accordance with the law. Consequently, it was a legal procedure involving the impartial application of rules binding on both parties, and the binding force of those rules arose from the fact that two or more States, in the full exercise of their sovereignty, agreed to submit the dispute to arbitral settlement. It

<sup>2</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

was regrettable that the adoption of the eight-Power amendment did not attempt to reconcile the various points of view which existed about the settlement-of-disputes provisions, and that it did not reflect the spirit of established norms, such as those of the 1969 Vienna Convention. It was likely that the considerable number of States participating in the Conference whose views had been ignored would enter reservations to the convention or find themselves unable to ratify it. In his delegation's opinion, the adoption of the eight-Power amendment did not mean that the rule it contained was sufficiently accepted by the international community to make a contribution to the progressive development of international law.

21. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) said that his delegation had voted against the eight-Power amendment because that proposal envisaged an arbitration and conciliation procedure incompatible with his country's position on the matter, namely, that in every case of a dispute, all the parties concerned should agree beforehand to submit the dispute to the International Court of Justice. Furthermore, an international organization could not legally have recourse to the Court because, according to the Statute of the Court, only States could be parties to a case dealt with by that body.

22. Mr. POEGGEL (German Democratic Republic) said that his delegation could not accept a compulsory jurisdiction procedure in respect of disputes involving *jus cogens*. In view of the legal importance and political nature of *jus cogens*, the settlement of such disputes should not be left to a so-called neutral body.

23. Mr. AL-MUBARAKY (Kuwait) said that the régime adopted by the Committee constituted a step forward, and one which was in conformity with article 66 of the 1969 Vienna Convention.

24. Mr. RADY (Egypt) said that his delegation had voted against the eight-Power amendment because it was convinced that there had to be agreement between the parties to a dispute about the means to be adopted to settle it. The means must not itself be a subject for dispute.

25. Mr. FISCHER (Holy See) said that his delegation had voted in favour of the eight-Power amendment because it reflected the position taken for centuries by the Holy See in regard to the settlement of disputes. Popes had acted as arbitrators or conciliators for over a thousand years, and in many cases had peacefully settled disputes which would otherwise have led to war. His delegation was convinced that the law was sovereign and that compulsory machinery was needed to settle disputes arising from matters regulated by the proposed convention.

26. Mr. LÊ BÁ CÁP (Viet Nam) said that his delegation had voted against the eight-Power amendment because it believed strongly in the need for direct negotiations between the parties to a dispute in regard to the selection of the means of settling it.

27. Mr. SZASZ (United Nations) said that paragraphs 9 and 14 of the annex to the draft convention provided that the expenses of arbitral tribunals and conciliation commissions established in pursuance of

the annex would be borne by the United Nations. It would therefore be necessary for the United Nations General Assembly to take note of and approve the provisions of those paragraphs. The United Nations would submit a draft resolution to the Conference inviting it to request the General Assembly to take that action.<sup>3</sup>

#### *Article 81 (Signature)*

#### *Article 82 (Ratification or act of formal confirmation)*

#### *Article 83 (Accession)*

#### *Article 84 (Entry into force)*

#### *Article 85 (Authentic texts)*

28. Mr. NETCHAEV (Union of Soviet Socialist Republics), introducing his delegation's proposal for the final clauses of the draft convention (A/CONF.129/C.1/L.76 and Corr.1), said that it sought to distinguish between States and international organizations as subjects of international law.

29. In principle, his delegation could accept the text of the final clauses proposed by Brazil, Cameroon, Egypt, India and Yugoslavia (A/CONF.129/C.1/L.79), but it could not approve the provision in that proposal which would allow international organizations to sign the future convention. The reasons for that were, first, that the purpose of the present Conference was codification, and there had never been a codification conference at which international organizations, participating at the invitation of States and the General Assembly, had signed the text of a convention elaborated by States; secondly, since the decisions taken at the present Conference were adopted by voting or other procedures in which observers could not participate, it would be appropriate for the draft convention to contain a provision whereby international organizations could accede to the convention at any time, even before it entered into force.

30. Mr. RAMADAN (Egypt), introducing the proposal for the final clauses submitted by Brazil, Cameroon, his own country, India and Yugoslavia (A/CONF.129/C.1/L.79), said that it was necessary, from both the legal and the procedural points of view, formally to place before the Committee the text of the draft final clauses which the General Assembly had referred to the Conference in annex III to resolution 40/76. The five Powers which sponsored the proposal believed that the text in question was suitable for use in the draft convention because it was based on the 1969 Vienna Convention and because it took into consideration the interests of all those concerned. For example, article 81, subparagraph (c), provided that the convention would be open for signature by international organizations which had been invited to participate in the Conference, and article 84, paragraph 1, provided that the entry into force of the convention depended upon the deposit of a specific number of instruments of ratification or accession by States or by Namibia.

<sup>3</sup> Subsequently circulated as document A/CONF.129/L.4.

31. He was authorized by the delegations of the countries of the Group of 77 to state that they endorsed the text of the final clauses reproduced in the attachment to the note by the Secretary-General circulated to the Conference under the symbol A/CONF.129/9. The five Powers proposed that in article 84, paragraph 1, the number of instruments of ratification or accession required for the entry into force of the convention should be 25. That text should therefore be completed by the insertion of the word "twenty-fifth" before the word "instrument" in that paragraph.

32. Mr. YIN Yubiao (China) supported the proposal that the required number of instruments of ratification or accession should be 25.

33. Mr. BERMAN (United Kingdom) introduced the amendment proposed by his delegation and that of the Netherlands (A/CONF.129/C.1/L.80) to the five-Power proposal for article 84 as orally amended by its sponsors. He said that the requirement of 35 instruments of ratification or accession by States or by Namibia suggested by the United Kingdom and the Netherlands was the same as the corresponding requirements of the 1969 Vienna Convention. The proposed requirement of five instruments for acts of formal confirmation or accession by international organizations represented roughly the same ratio of instruments to the number of such organizations as the figure of 35 represented to the total number of States members of the international community eligible to become parties to the future convention.

34. The CHAIRMAN invited the Committee to vote on the proposals by the Soviet Union (A/CONF.129/C.1/L.76 and Corr.1), the Netherlands and the United Kingdom (A/CONF.129/C.1/L.80) and Brazil, Cameroon, Egypt, India and Yugoslavia (A/CONF.129/C.1/L.79), as completed orally by its sponsors. In accordance with rules 41 and 42 of the rules of procedure, the proposals should be voted on in that order.

35. Mr. BERMAN (United Kingdom) requested that the proposed final clauses should be voted upon article by article.

36. The CHAIRMAN said that, unless he heard any objection, he would take it that the Committee agreed to that request.

*It was so decided.*

#### *Article 81*

*At the request of the representative of Egypt, a vote was taken by roll-call on the Soviet Union proposal (A/CONF.129/C.1/L.76).*

*The Federal Republic of Germany, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Democratic People's Republic of Korea, German Democratic Republic, Hungary, Poland, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Viet Nam.

*Against:* Australia, Austria, Barbados, Belgium, Brazil, Cameroon, Canada, Chile, Colombia, Den-

mark, Egypt, Finland, France, Gabon, Germany, Federal Republic of, Greece, Guatemala, Holy See, Indonesia, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Portugal, Spain, Sudan, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia, Zambia.

*Abstaining:* Algeria, Angola, Argentina, Bahrain, Burkina Faso, China, Congo, Côte d'Ivoire, Cyprus, Ecuador, India, Iran (Islamic Republic of), Iraq, Israel, Jordan, Kenya, Kuwait, Lebanon, Madagascar, Morocco, Mozambique, Oman, Panama, Peru, Philippines, Qatar, Republic of Korea, Saudi Arabia, Senegal, Thailand, Tunisia, Turkey, United Arab Emirates, Venezuela, Yemen, Zaire.

*The text proposed by the Soviet Union for article 81 was rejected by 40 votes to 12, with 36 abstentions.*

37. The CHAIRMAN said that, in view of the result of the vote, he would take it, unless he heard any objection, that the Committee adopted the text of article 81 proposed by Brazil, Cameroon, Egypt, India and Yugoslavia in document A/CONF.129/C.1/L.79.

*It was so decided.*

#### *Article 82*

*At the request of the representative of Egypt, a vote was taken by roll-call on the Soviet Union proposal (A/CONF.129/C.1/L.76).*

*Qatar, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Democratic People's Republic of Korea, German Democratic Republic, Hungary, Poland, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Viet Nam.

*Against:* Australia, Austria, Belgium, Brazil, Cameroon, Canada, Chile, Colombia, Denmark, Egypt, Finland, France, Gabon, Germany, Federal Republic of, Greece, Guatemala, Holy See, Indonesia, Ireland, Italy, Japan, Kenya, Liechtenstein, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Portugal, Senegal, Spain, Sudan, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia, Zambia.

*Abstaining:* Algeria, Angola, Argentina, Bahrain, Barbados, Burkina Faso, China, Congo, Côte d'Ivoire, Cyprus, India, Iran (Islamic Republic of), Iraq, Israel, Jordan, Kuwait, Lebanon, Madagascar, Morocco, Mozambique, Oman, Panama, Peru, Philippines, Qatar, Republic of Korea, Saudi Arabia, Thailand, Tunisia, Turkey, United Arab Emirates, Venezuela, Yemen, Zaire.

*The text proposed by the Soviet Union for article 82 was rejected by 41 votes to 12, with 34 abstentions.*

38. The CHAIRMAN said that, in view of the result of the vote, he would take it, unless he heard any objection, that the Committee adopted the text of article 82

proposed by Brazil, Cameroon, Egypt, India and Yugoslavia in document A/CONF.129/C.1/L.79.

*It was so decided.*

#### Article 83

39. The CHAIRMAN noted that the proposal of the Soviet Union (A/CONF.129/C.1/L.76) and that of the five Powers (A/CONF.129/C.1/L.79) contained identical texts for article 83. If he heard no objection, he would take it that the Committee adopted the text in question.

*It was so decided.*

#### Article 84

40. Mr. BERMAN (United Kingdom) withdrew the proposal made by the Netherlands and the United Kingdom (A/CONF.129/C.1/L.80).

41. Mr. NETCHAEV (Union of Soviet Socialist Republics) moved the suspension of the meeting in order to allow delegations to engage in informal consultations on the number of instruments of ratification or accession to be specified in article 84, paragraph 1. In all other respects the texts of the two proposals before the Committee for article 84 were identical.

*The meeting was suspended at 12.15 p.m. and resumed at 12.40 p.m.*

42. Mr. RAMADAN (Egypt), speaking on behalf of the sponsors of the proposal in document A/CONF.129/C.1/L.79, as completed orally, said that in the informal consultations which had just been held delegations had agreed that the number of instruments of ratification or accession to be stipulated in article 84, paragraph 1, should be 35. The sponsors therefore amended their proposal by replacing the word "twenty-fifth" in that paragraph by the word "thirty-fifth".

43. Mr. TEPAVICHAROV (Bulgaria) said that the members of the East European group of countries approved the amendment proposal.

44. Mr. NETCHAEV (Union of Soviet Socialist Republics) agreed. He suggested that the Committee should not now take separate decisions on articles 84 and 85.

45. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee adopted the wording for articles 84 and 85 at present before it, with the word "thirty-fifth" inserted before the word "instrument" in paragraph 1 of article 84, and that it referred articles 81 to 85 to the Drafting Committee.

*It was so decided.*

46. Mr. BERMAN (United Kingdom) said that his delegation's participation in the general agreement on the provisions which had just been adopted reflected the spirit in which lengthy negotiations had been conducted on the final clauses of the proposed convention before the Conference had taken place. The distinction drawn between the international organizations referred to in subparagraph 1 (c) of article 81 and in article 82, on the one hand, and those referred to in article 83, on the other—between those international organizations invited to participate in the present Conference and other international organizations—was highly convenient,

but did not necessarily correspond to all the aspects of treaty-making covered by the draft convention. It was article 83 which contained a reference to treaty-making capacity and corresponded to normal practice in that regard. His delegation understood the wording of articles 81 to 85 adopted by the Committee of the Whole as not introducing any departure in substance from the articles so far adopted by the Conference in plenary session.

#### Adoption of the report of the Committee of the Whole

47. Mrs. THAKORE (India), Rapporteur, introducing the report of the Committee of the Whole (A/CONF.129/C.1/L.74 and Add.1-5, 7-8), said that the sections of the report relating to article 66 and the annex and to the final clauses were not yet available, since those provisions had only just been adopted by the Committee. It was her intention to report on the Committee's deliberations on article 66 and the annex (see A/CONF.129/C.1/L.74/Add.6 and Corr.1) and on the proceedings relating to the final clauses (see A/CONF.129/C.1/L.74/Add.9).

48. The report consisted of three chapters. Chapter II constituted the major part of the report and described the work of the Committee on agenda item 11. The Committee had examined 23 articles of the basic proposal requiring substantive consideration, the annex entitled "Arbitration and conciliation procedures established in application of article 66" and proposals for a new article. In addition, it had prepared the preamble and the final clauses of the convention. The Conference had referred the remaining articles of the basic proposal directly to the Drafting Committee. The results of the work of the Drafting Committee were contained in that Committee's reports (A/CONF.129/11 and Add.1-3) and did not form part of the report of the Committee of the Whole.

49. The report of the Committee of the Whole was designed to be read in conjunction with the summary records of its meetings. Delegations were requested to draw the secretariat's attention in writing, as soon as possible, to any inaccuracies which the report contained.

50. The CHAIRMAN thanked the Rapporteur for her statement. He suggested that the Committee, in order to avoid holding a meeting exclusively for the purpose of adopting the two outstanding portions of the report, should entrust the Rapporteur with the task of completing those portions with the help of the secretariat and in accordance with the pattern she had followed for the rest of the report; and that it should adopt the report in that form.

*It was so decided.*

51. The CHAIRMAN said that, with the adoption of its report, the Committee of the Whole had now completed its work. He paid tribute to the other officers and to the members of delegations and the secretariat for their contribution to the successful outcome of the Committee's proceedings.

*The meeting rose at 1.05 p.m.*

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