Document:-
A/CN.4/SR.1589

Summary record of the 1589th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1980, vol. I

delegation to the United Nations Conference on the Law of Treaties, namely, that the provision embodied in draft article 65, standing on its own, was inadequate and unsatisfactory. If draft article 65 was to be included in the draft articles, it should be based on the provision embodied in draft article 66.

46. Mr. REUTER (Special Rapporteur) said that for a number of reasons he was hesitant to accept the idea of allowing a longer period where international organizations were concerned. If the dispute arose between two States, the extension of the period was unnecessary. If it arose between two international organizations, or between a State and an international organization, the extension of the period could be justified if the international organization was the object of the notification, but not if the international organization was the author of the notification. Hence, in the last-mentioned case it was debatable whether there was really any need to draw a distinction between the situation of States and that of international organizations.

47. With regard to the reference to the means of peaceful settlement of disputes indicated in Article 33 of the Charter, he said that Article 33 should be considered simply as a catalogue; it was open to each State and to each international organization to choose the preferred mode of settlement. Personally, he believed that the best settlement procedure for international organizations was perhaps conciliation, which was the most flexible procedure and included inquiry. In that connexion, he pointed out that article 66, paragraph (*b*) of the Vienna Convention provided for recourse to the conciliation procedure only in the case of disputes concerning the application or interpretation of the provisions of Part V of that Convention, and he suggested that recourse to that procedure should perhaps be envisaged in the case of all disputes.

48. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 65 to the Drafting Committee.

It was so decided.[14]

The meeting rose at 12.50 p.m.

[14] For consideration of the text submitted by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

1589th MEETING

Monday, 12 May 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

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

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

[Item 3 of the agenda]

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

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

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 66 (A/CN.4/327), which read:

**[*Article 66. Procedures for judicial settlement, arbitration and conciliation*

1. When, in the case of a treaty between several States and one or more international organizations, the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more States with respect to another State and under paragraph 3 of article 65 no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) Any State party to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

(*b*) Any State party to a dispute concerning the application or the interpretation of any of the other articles in part V of the present articles may set in motion the procedure specified in the annex (section 1) to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. When the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more international organizations parties to the treaty or involves one or more international organizations parties to the treaty and under paragraph 3 of article 65 no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice, unless the parties by common consent agree to submit the dispute to arbitration; the parties shall regard the advisory opinion of the Court as binding;

(*b*) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles of part V of the present articles may set in motion the procedure specified in the annex (section II) to the present articles by submitting a request to that effect, as appropriate, to the Secretary-General of the United Nations or to the President of the International Court of Justice.]

2. Mr. REUTER (Special Rapporteur), referring to his introduction of article 65 at the previous meeting, said that the reason why he had placed draft article 66 in square brackets was that the corresponding provision of the Vienna Convention[1] had been drafted not by the Commission but by the United Nations Conference on the Law of Treaties. The Conference had had great difficulty in working out the text of the provision; its intention had been to allay the fears of Governments that all the grounds mentioned in part V of the Vienna Convention for challenging the validity or application of treaties might jeopardize the stability of the treaties. The article, which offered a compromise solution, had not entirely satisfied all States. Nor did it cover all disputes concerning the application or interpretation of the Convention; it applied only to those connected with part V of the Convention. In the circumstances, he might have refrained from submitting a draft article 66, and might have suggested that the Commission should refer the question to the Sixth Committee and to the General Assembly, as well as to the plenipotentiary conference that would perhaps one day draft the final clauses of which the article would form part. It was evident, however, that many Governments considered article 66 of the Vienna Convention to be a necessary pendant to article 65.

3. It was therefore in order to provide the Commission with a working basis that he had prepared a draft article 66. It would be open to the Commission in its discretion to dispense with a draft article 66, to submit such an article with or without square brackets, or else to suggest an alternative draft article. Whereas the article related only to disputes concerning the application or interpretation of the articles in part V, the Commission might propose that paragraph 1 of article 66 should be replaced by a clause providing for a conciliation procedure in the case of disputes concerning any provision of the future convention. Such a solution would, of course, be a considerable departure from the solution adopted in the Vienna Convention, but it was the one applied by the 1978 Vienna Convention on Succession of States in Respect of Treaties[2] and by the 1975 Vienna Convention.[3]

4. As in the case of most of the other draft articles, the Commission should consider whether it was possible to cover all foreseeable cases by one single provision. As far as the articles in part V were concerned, disputes might arise between one State and another State, between one international organization and another organization, between an organization and a State, or even between several organizations and several States. Article 66 of the Vienna Convention provided for two modes of settlement of disputes. In the case of disputes concerning articles 53 and 64, which raised questions of *jus cogens*, it provided for a written application to the International Court of Justice; in the case of all other disputes, it provided for a conciliation procedure in which the Secretary-General of the United Nations played an essential role. The innovations in the draft article under consideration were easily explained. If a dispute arose between States alone, there was no reason to depart from the provisions of the Vienna Convention. Paragraph 1 of the article under consideration was therefore, with some slight drafting changes, identical to the corresponding article of the Vienna Convention. However, in the case of a dispute between one international organization and another or between a State and an organization, the two courses provided for in article 66 of the Vienna Convention had to be adjusted somewhat to take account of the fact that international organizations could not be parties to litigation before the Court.

5. Any solution that might be proposed for dealing with disputes relating to articles 53 and 64 would necessarily be imperfect, inasmuch as the Conference on the Law of Treaties had regarded such disputes as serious enough to be submitted to the Court. The reason why he had not suggested the arbitration solution was that application for adjudication could be made only to an authority whose competence was recognized by the entire international community. Conflicting arbitral awards would strike a blow not only at every rule of *jus cogens* in question, but at the very principle of *jus cogens*. The solution he proposed, which was imperfect in more than one respect, was that of providing for the possibility of asking a competent body of the United Nations to request an advisory opinion from the International Court of Justice. The international organization in question might not have the capacity to request an advisory opinion. Some of the international organizations in the United Nations system had that capacity, but organizations outside the system, whether regional or universal, did not. An international organization which was not qualified to ask for an advisory opinion could bring the matter to the United Nations, and through it, might eventually succeed in having a request for an advisory opinion made to the International Court. That solution was also imperfect, because the body competent to request an advisory opinion enjoyed discretionary powers. Moreover, advisory opinions were not binding. There was, however, a practice provided for in a number of international instruments, such as the 1946 Convention on Privileges and Immunities of the United Nations[4] and the United Nations Headquarters Agreement of 26 June 1947 between the United Nations and the United States of America,[5] by which it was recognized in advance that

[1] See 1585th meeting, foot-note 1.

[2] *Official Records of the United Nations Conference on the Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185. Hereinafter called "1978 Vienna Convention".

[3] See 1587th meeting, foot-note 12.

[4] United Nations, *Treaty Series*, vol. 1 p. 15

[5] See 1587th meeting, foot-note 14.

the advisory opinion would be binding. The same solution had been adopted in respect of advisory opinions related to decisions of the Administrative Tribunals of the United Nations and the International Labour Organisation. In the draft articles under consideration, he had accordingly suggested that the advisory opinion would be considered by the parties as binding.

6. The question with regard to conciliation was much simpler. In the Vienna Convention the conciliation procedure attributed an important role to the Secretary-General of the United Nations, particularly if one of the States concerned did not appoint a conciliator as it should, or if the third member of the conciliation commission was not appointed. A dispute involving the United Nations would cause a problem, for how could the Secretary-General act in an independent capacity in a dispute to which the Organization was a party? That was why paragraph 2 (*b*) of draft article 66 provided that a request could be submitted to the Secretary-General of the United Nations or to the President of the I.C.J., as appropriate. The mode of operation of the conciliation procedure would be considered by the Commission in connexion with the draft annex relating to procedures established in application of article 66.

7. Mr. USHAKOV said that the comments he had made during the previous meeting concerning article 65, paragraph 3, applied equally to article 66.

8. Paragraph 1 of draft article 66 seemed to be acceptable, but paragraph 2 presented great difficulties. That provision covered the situation when "the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more international organizations", but apparently it also covered the case where a State raised an objection to a notification by an international organization. Again, the passage "involves one or more international organizations" struck him as an implied reference to an objection raised by one or more States with respect to another State, a case covered in paragraph 1. Both passages would accordingly need redrafting.

9. Commenting on the reference to articles 53 and 64 in subparagraph 2 (*a*) of draft article 66, he noted that, according to that provision, any party to a dispute "may ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice". Under Article 96, only the General Assembly and the Security Council were competent to request the Court to give an advisory opinion, but the General Assembly could authorize other organs of the United Nations and specialized agencies to make such a request. If, therefore, a regional economic organization was a party to a dispute it would have to apply to the United Nations and ask that one of its competent organs request an advisory opinion. Actually, it was doubtful whether such an application would be acted upon, particularly if it concerned a matter wholly extraneous to the United Nations. In practice, therefore, it might be very difficult to channel the request for an opinion as envisaged in subparagraph 2(*a*). Besides, the paragraph contained a proviso concerning the case where the parties agreed by common consent to submit the dispute to arbitration. He pointed out that whereas article 66 of the Vienna Convention offered the choice between a request to the International Court and arbitration, the choice offered in the article under consideration was that between an application for a request for an advisory opinion and arbitration, which did not really seem to correspond to the Special Rapporteur's intention. The paragraph further provided that "the parties shall regard the advisory opinion of the Court as binding", a clause which might be a source of difficulties if the organization concerned was not a party to the future convention, for how could it be bound by the advisory opinion?

10. In view of the problems to which draft article 66 gave rise, he said that preferably the matter should be referred to the plenipotentiary conference which might one day be convened or, better still, provision should be made for conciliation procedure to be applied in all disputes.

11. Mr. ŠAHOVIĆ said that, during the discussion on article 65 (1588th meeting), he had already expressed support for article 66. The square brackets around the article might even be removed, as there was a corresponding provision in the Vienna Convention and as its drafting stages, paralleling those of article 65, were reported in the records.

12. As draft article 66 was closely bound up with the annex relating to procedures established in application of the article, the annex should be studied, if not at the same time as the article, at least immediately thereafter. He saw no reason why the future Convention should not have such an annex.

13. It was perfectly logical, in keeping with the Commission's own guidelines, to divide draft article 66 into two paragraphs each covering very different cases.

14. The faculty referred to in paragraph 2 (*a*) to "ask" one of the competent bodies to request an advisory opinion was acceptable, since it corresponded with the specific position of the United Nations. It might be advisable not to deal in the same provision with the question whether or not advisory opinions were binding. The examples cited by the Special Rapporteur concerned situations appreciably different to those to which article 66 referred. The question was more complex than it seemed, and should not form the subject of too much research.

15. He supported the provision in subparagraph 2(*b*) whereby the request which would set the conciliation procedure in motion could be submitted to the Secretary-General of the United Nations or to the President of the International Court of Justice as appropriate.

16. Mr. RIPHAGEN, voicing his general support for the views expressed by the Special Rapporteur and Mr. Šahović, said that a number of delegations to the United Nations Conference on the Law of Treaties had felt that, as there were so many articles on invalidity in the Convention, it was imperative to provide for some method of settling disputes that arose in regard to the application of those articles. As a consequence, the necessary procedures had been incorporated as part and parcel of the Convention. For the same reason, and also for the sake of logic, he considered that a corresponding provision should be included in the draft articles and he therefore agreed that the Commission should adopt draft article 66 without the square brackets.

17. The only reason why the Vienna Convention provided for a special procedure in the case of articles 53 and 64 was that those two articles dealt with *jus cogens*, and it had been felt necessary that the highest Court in the world should have a say in such matters. While the same consideration applied to the draft articles, there was a point of difficulty, since disputes arising out of draft articles 53 and 64 were not bilateral in character; the International Court of Justice, under its Statute, was called upon to deal mainly with bilateral disputes, and an international organization could not be a party to a dispute either as claimant or defendant. The Special Rapporteur had therefore been right to provide in subparagraph 2 (*a*) of draft article 66 that in such cases an advisory opinion could be requested from the Court. Although there was no certainty that such a request would in fact be made, Article 96 of the Charter of the United Nations provided that the General Assembly could request the International Court of Justice to give an advisory opinion on any legal question, and not necessarily on one dealing only with the work of the General Assembly. That meant that the opinion of the Court could be sought on any matter of world-wide interest: in his submission, if *jus cogens* was involved, the matter would be of interest to the whole world and hence also to the General Assembly and the other organs of the United Nations.

18. Sir Francis VALLAT said that he had already indicated the importance which he attached to draft article 66, and it followed from the remarks he had made at the previous meeting that he was in favour of deleting the square brackets around the draft article, although he understood why the Special Rapporteur had inserted them.

19. Referring to the text of the draft article, he first pointed out that, as he had explained in connexion with draft article 62, the expression "several States", which occurred in the first line of paragraph 1 of article 66, implied, in English, three or more States. Since a dispute between two States was perfectly possible, he considered that the expression should be amended to read "two or more States". Secondly, he did not see why the objection raised by one or more States should be limited to the case of an objection against another State, since it was quite conceivable that such an objection could be multilateral on both sides. For instance, one State might well find itself obliged to defend its position against a group of States which had joined together to commit a breach of a treaty, and it was in precisely such a case that the one State would need the protection the procedure was designed to provide. Thirdly, he noted that whereas in paragraph 1 the clause "in the case of a treaty between several States and one or more international organizations" made it clear to which treaties that paragraph applied, there was no corresponding clause in paragraph 2. If the latter paragraph was meant to apply to all treaties to which the draft articles applied, then, purely as a matter of drafting, it would be desirable to state so expressly. Fourthly, he would like to know what exactly was meant by the expression "involves one or more international organizations parties to the treaty", which occurred in paragraph 2. Did it mean that an objection was directed to one or more organizations? And in what way would an international organization be involved? Lastly, with regard to subparagraph 2 (*a*), he considered that, while the word "may" ("Any one of the parties ... may ask") should perhaps be retained, it should be made quite clear in the commentary, as a matter of courtesy, that the provision was not intended to override the procedures of any international organization concerned.

20. Turning to questions of substance, he expressed his full agreement on the need to provide that the International Court of Justice should be the ultimate judicial body to pronounce on questions of *jus cogens*. That had been a vital issue at the Conference on the Law of Treaties and it was equally vital in the case of draft articles 53 and 64. It would be most unsatisfactory if, because a treaty happened to be between a State and two or more international organizations, a reference to the Court could be bypassed in some way. He therefore regarded subparagraph 2 (*a*) of draft article 66 as essential to the whole structure of the draft so far as validity, invalidity and *jus cogens* were concerned. If that proposition were accepted, as he believed it would be by the majority of States, the next question which arose was how to bring the issue of *jus cogens* before the International Court. The answer, clearly, was by way of a request for an advisory opinion; and, equally clearly, given the precedents to which the Special Rapporteur had referred, the international organizations concerned could agree in advance that an advisory opinion would be binding upon them. That was now part of the jurisprudence of the Court, and hence of the States Members of the United Nations, despite serious doubts about the soundness of the proposition in the past.

21. There was, however, one point on which he would hesitate to go so far as subparagraph 2 (*a*). It arose from Article 96 of the Charter of the United Nations. That Article drew a distinction between, on the one hand, the General Assembly and the Security

Council, which could request an advisory opinion of the International Court of Justice on any legal question, and, on the other, specialized agencies or other organs of the United Nations, which could also request such opinions on legal questions arising within the scope of their activities. Normally the distinction was of little significance, but in cases where a point of *jus cogens* was referred to the Court it could assume importance. In other words, questions of *jus cogens* as such would not generally be questions for the specialized agencies, although they might be questions for other organs of the United Nations. For example, a human rights issue, involving a point of *jus cogens*, could well be referred to the Economic and Social Council, but in such a case the Council would be wise, to say the least, to refer the matter to the General Assembly or possibly the Security Council.

22. One possibility, of course, would be to provide that any organ of the United Nations could request the International Court of Justice for an advisory opinion, although the difficulty that might then be encountered was whether the issue was within the scope of the activities of the organ in question. The difficulty could perhaps be surmounted by following the precedent set forth in regard to conciliation in the Annex to the Vienna Convention and treating the Secretary-General of the United Nations as the person to whom the request should be referred for adoption by the competent organ of the United Nations. As he saw the matter for the time being, however, he considered it would be better to limit the faculty of asking the Court for an advisory opinion to the United Nations, and not to extend it to the specialized agencies. That would be in conformity with the fundamental concept of *jus cogens* and would avoid the risk that a request for an advisory opinion might be referred to another organization that was not entirely appropriate. To his mind, the universal character of the United Nations and its broad influence made it the body *par excellence* to be consulted. If there were any arguments to the contrary, he would be pleased to hear them since he was entirely open to conviction.

23. Mr. SCHWEBEL said that he too agreed that the square brackets around draft article 66 should be removed. He considered, however, that the compromise reached at the Conference on the Law of Treaties regarding third-party settlement was not the ideal result, but only the best that could be achieved, and in his view it was particularly deficient in that it did not subject claims of *rebus sic stantibus* to the compulsory jurisdiction of the International Court of Justice. If the Commission were to depart to any marked degree from the formula of the Vienna Convention, he trusted that it would be in the direction of extending, rather than narrowing, the provisions for third-party settlement. The Commission was, after all, concerned with the progressive, not regressive, development of international law. Bearing in mind that the Commission's mandate was to abide by the provisions of the Vienna Convention, he was however prepared to accept the draft article as a minimal provision.

24. He would prefer it if an advisory opinion, when sought in such circumstances, were binding, particularly since the relevant provision in the draft article was cast in the form of an alternative or complement to arbitration, which was by definition binding.

25. The point raised by Sir Francis Vallat regarding a possible limitation of the advisory procedure was very pertinent. Specialized agencies were showing a tendency to stray into areas of a political nature and it might well be that, in their own interests, they should not be encouraged to do so.

26. The CHAIRMAN, speaking as a member of the Commission, also agreed that the square brackets around draft article 66 should be removed.

27. He had noted an apparent ambiguity in paragraphs 1 and 2 of the draft article and would be grateful for the Special Rapporteur's clarification. Whereas the introductory part of paragraph 1 provided for an objection raised by one or more States with respect to another State, the introductory part of paragraph 2 provided for an objection raised by one or more international organizations with respect to one or more organizations parties to the treaty. That phraseology, coupled with the use of the word "involves" in paragraph 2, suggested to him that the objection provided for in paragraph 2 might be raised not by an international organization but, perhaps, by a State. He therefore wondered whether the intent was to establish a broader principle under paragraph 2 than under paragraph 1.

28. The Special Rapporteur had made an excellent attempt in paragraph 2 to reflect the solution offered by article 66 of the Vienna Convention by providing for an advisory opinion to be requested of the International Court of Justice, which the parties would agree to regard as binding, in place of the normal decision of that Court. The only difficulty was that the competent bodies which would be asked by the parties to a dispute to make such a request were not clearly specified.

29. Further, he had noted that Mr. Ushakov had suggested arbitration as a possible alternative method of settlement, in addition to a request for an advisory opinion or the conciliation procedure, as provided for under subparagraphs 2 (*a*) and (*b*) respectively. He wondered, however, whether arbitration was in fact the only alternative and whether the intent was that any other method of compulsory settlement agreed by the parties should be excluded. Possibly a clause reading "unless the parties by common consent agree to submit the dispute to another method of compulsory settlement" could be inserted, or some wording along similar lines, to provide for cases where, under a treaty to which an international organization was a party, a method of compulsory settlement other than arbitration was contemplated and agreed.

30. Lastly, he drew attention to the second revision of the "Informal composite negotiating text" of the United Nations Conference on the Law of the Sea,[6] which contained many interesting ideas of direct relevance to the subject-matter under consideration. He suggested that the members of the Commission might pay particular attention to articles 186 to 189 of the text itself and to annex VI, section 4.

31. Mr. CALLE Y CALLE said that, just as it had been logical for the United Nations Conference on the Law of Treaties to formulate procedural articles such as articles 65 and 66, so it would be logical to incorporate in the set of draft articles provisions like those in draft articles 65 and 66 proposed by the Special Rapporteur.

32. If in the case envisaged in draft article 66, paragraph 1, the dispute related to the existence of a peremptory norm of general international law or to the emergence of a new peremptory norm of general international law, the dispute could be submitted to the International Court of Justice, or else, with the common consent of the parties, it could be referred to arbitration. In his opinion, it might be desirable for the Commission to consider whether the Conference on the Law of Treaties had been right in providing that such an important decision could be taken during an arbitration procedure organized by the parties to the dispute.

33. According to draft article 66, paragraph 2, the objection provided for in draft article 65, paragraphs 2 and 3, could be raised by one or more international organizations parties to the treaty or could involve one or more international organizations parties to the treaty. If no solution was reached under draft article 65, paragraph 3, which referred to "the means indicated" in Article 33 of the Charter (which include "judicial settlement"), a problem could arise, because international organizations did not have the same possibility as States of seeking solutions by judicial settlement. Provision must nevertheless be made for some kind of settlement since, under draft article 66, paragraph 2 (*a*), any one of the parties to a dispute relating to the existence or emergence of a peremptory norm of general international law could ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court, the binding nature of whose advisory opinions would be analogous to that of a judgement. If the dispute did not relate to a peremptory norm of general international law, draft article 66, subparagraph 2 (*b*), stated that any one of the parties could set in motion the procedure specified in the Annex (sect. II) to the draft articles by submitting a request to that effect.

34. He noted that the draft articles as a whole would apply to all international organizations, not only to those related to the United Nations, which were, however, the only ones that could ask the Court for an advisory opinion under the terms of Article 96 of the Charter. Accordingly, international organizations not related to the United Nations would be excluded from the procedure provided for in article 66, paragraph 2 (*a*), and would be able to submit their disputes to arbitration only.

35. Lastly, he said that he fully agreed with section II, paragraph 2 *bis*, of the Annex to the draft articles, which provided that, if a request was made by or directed against the United Nations (in accordance with paragraph 2 (*b*) of draft article 66) it should be submitted to the President of the International Court of Justice.

36. Mr. TSURUOKA said that draft article 66 should not be placed in square brackets, although it called for some improvements. Paragraph 1 referred only to States. However, a dispute between States could have repercussions on the position of international organizations. It would be desirable, therefore, that the international organizations concerned should have the possibility of participating in the settlement of a dispute. Such a solution had in fact been provided for in Article 34 of the Statute of the International Court of Justice. The possibility of the international organizations concerned participating in the settlement of a dispute should be mentioned in the commentary to the draft article.

37. Like other members of the Commission, he had a number of difficulties with paragraph 2 (*a*), with regard to the competent bodies that could be approached with a request for an advisory opinion and the procedure to be followed in obtaining the consent of the bodies competent within the meaning of Article 96 of the Charter of the United Nations. He would submit to the Drafting Committee the text of an amendment designed to improve the wording of the subparagraph in question. Personally, as far as the application and interpretation of articles 53 and 64 were concerned, he was of the view that the only competent authority was the International Court of Justice.

38. Mr. QUENTIN-BAXTER said that while he fully agreed with other members of the Commission that draft article 66 should be included in the text of the draft articles under consideration, he thought that it might give rise to some purely practical difficulties.

39. For example, it seemed reasonable to him that when a dispute arose between States parties to a treaty the procedure provided for in article 66 of the Vienna Convention should apply as exactly as possible. The result of the application of that procedure would nevertheless be that an international organization also party to the treaty might find itself in a position of standing by with nothing to say, because if the dispute was submitted to the International Court of Justice, the international organization would have no chance of being heard. In such a case, however, the international

[6] See 1586th meeting, foot-note 10.

organization party to the treaty could also raise an objection, thus immediately bringing into play paragraph 2 of draft article 66.

40. That paragraph, which must apply whenever an international organization party to a treaty was either the party giving notice under draft article 65 or the party objecting, might also create problems because of the difficulty of adapting the advisory opinion procedure of the International Court to a circumstance for which it had not been designed. As the Special Rapporteur had pointed out, however, there was no reason to suppose that the Court would object to the course suggested in paragraph 2 (*a*) or to the stipulation that the parties should regard its advisory opinion as binding.

41. In his opinion, the request referred to in subparagraph 2 (*b*) should be made to the Secretary-General of the United Nations when the United Nations was involved in a dispute. Paragraph 2 (*a*) should also contain wording indicating which body was competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice. He could see no reason in principle why that should not be one of the most important United Nations bodies, particularly since it was clearly the policy of the Vienna Convention that disputes relating to *jus cogens* should always be settled by the highest judicial organ of the United Nations. If the procedure proposed in draft article 66 was applied as strictly as possible, the body competent to request an advisory opinion from the Court and approached for that purpose, would surely take the view that the policy of the Vienna Convention was clear and that the dispute should be settled by the Court. Accordingly, he was of the opinion that the commentary to draft article 66 should favour the presumption that a request for an advisory opinion would need no other substantiation than the fact of an unresolved dispute.

42. Mr. THIAM noted that subparagraphs 1 (*a*) and (*b*) of draft article 66 referred only to the case of a dispute between States parties to a treaty. However, such a dispute could have repercussions on the position of one or more international organizations. The draft articles before the Commission concerned essentially international organizations, and he was in favour of enhancing the legal personality of international organizations. For those various reasons, he considered that reference should be made to the position of international organizations in paragraph 1 of the text under consideration.

43. Mr. REUTER (Special Rapporteur) spoke in reply to Mr. Ushakov's question regarding the interpretation of subparagraph 2 (*a*) of draft article 66, as compared with subparagraph 1 (*a*).

44. He said that in Mr. Ushakov's view both the corresponding text of the Vienna Convention and that of subparagraph 1 (*a*) gave the impression that the Vienna Convention offered a choice to States which were parties to a dispute concerning the application or interpretation of articles 53 or 64, in that any State party to such a dispute could, by an application, submit the dispute to the International Court of Justice, unless the parties by common consent decided to submit the dispute to arbitration. Consequently, the parties had a somewhat surprising option, a fact which would tend to prove that the United Nations Conference on the Law of Treaties had not wished to draw all the necessary inferences from the line of thinking expressed by some members of the Commission, namely that the best body to decide such matters was the Court. He (Mr. Reuter) pointed out, however, that the option open to the parties actually included a third possibility: the State which raised an objection when another State invoked the invalidity of a treaty on the grounds that it was contrary to *jus cogens* could withdraw its objection. The State which considered the treaty invalid could legitimately draw all the inferences from that act.

45. That third possibility aside, it was true that there was never any certainty that, in the case of the draft articles under consideration, an advisory opinion would be requested through one of the competent bodies. A provision might be drafted stipulating that, if an advisory opinion was not requested, the two parties should submit to arbitration, but, there again, there was no certainty that that obligation would be acted on. The insertion of such a provision, moreover, would constitute a significant departure from the Vienna Convention. To remove the possibility of dropping the case would be a departure from the line followed in the Vienna Convention.

Point of order raised by Mr. Ushakov

46. Mr. USHAKOV, speaking on a point of order, drew the attention of the members of the Commission to a letter dated 24 April 1980 from the Minister of Foreign Affairs of the Democratic Republic of Afghanistan, addressed to the Secretary-General of the United Nations, which read as follows:

Excellency,

As your Excellency may be aware Mr. Tabibi, who is a member of the International Law Commission, resigned from Government service and he is not now in Afghanistan. In an international organ such as the International Law Commission, where in accordance with the provisions of Article 8 of the Statute, the main forms of civilization and the principal legal systems of the world should be represented, Mr. Tabibi cannot represent the legal system of the New Afghanistan.

For this reason the Government of the Democratic Republic of Afghanistan declares Mr. Tabibi as not possessing the required qualifications referred to in Article 8 of the Statute.

Taking into account the above, I request your Excellency to declare the post, occupied at present by Mr. Tabibi, who no longer represents the legal system of Afghanistan, vacant.

In accordance with Article 11 of the ILC, I request, your Excellency, that the ILC at its forthcoming Session, which

resumes its work on 5th May, 1980 hold elections to fill this causal vacancy.

At the same time the Government of the D.R.A. proposes as candidate for election to this post Dr. Mohhammad Akbar *Kherad* the curriculum vitae of whom is attached.

(*Signed*) Shah Mohammad DOST
Minister of Foreign Affairs of the Democratic Republic of Afghanistan

47. Mr. Ushakov stated that, under article 3 of the Statute of the Commission, the members of the Commission were elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations. Under article 2 of the Statute, each member should be a national of one State and, in the event of dual nationality, a candidate would be deemed to be a national of the State in which he ordinarily exercised civil and political rights. Moreover, article 8 provided that the electors should bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that, in the Commission as a whole, representation of the main forms of civilization and of the principal legal systems of the world should be assured. In the case of Mr. Tabibi, the conditions prescribed by article 8 of the Commission's Statute were no longer fulfilled, with all that that implied. That was the view he wished to express on the matter.

48. He requested that the text of the letter from the Minister of Foreign Affairs of the Democratic Republic of Afghanistan which he had just read out should be reproduced in the summary record of the meeting and that his opinion should be reflected in the Commission's report.

49. The CHAIRMAN said that the letter read out by Mr. Ushakov raised a question which related to the interpretation of the Commission's Statute and which might give rise to controversy. Since Mr. Ushakov had raised the matter referred to in the letter as a point of order, the members of the Commission now had to decide whether to interrupt their work on the topic under consideration and how to deal with the statement made by Mr. Ushakov.

50. Mr. TSURUOKA proposed that discussion of the question whether the Commission could deal with the matter raised by Mr. Ushakov should be postponed.

51. Sir Francis VALLAT seconded the proposal made by Mr. Tsuruoka.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission decided to postpone consideration of the matter raised by Mr. Ushakov.

It was so decided.

The meeting rose at 6 p.m.

1590th MEETING

Tuesday, 13 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

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

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

[Item 3 of the agenda]

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

ARTICLE 66 (Procedures for judicial settlement, arbitration and conciliation)[1] (*concluded*)

1. Mr. FRANCIS said he agreed with the substance of draft article 66, in which the Special Rapporteur had skilfully adapted the text of article 66 of the Vienna Convention[2] to the case where several States and one or more international organizations were parties to a treaty.

2. Subparagraph 2 (*a*) of the draft article dealt with the case where, in the event of an objection made by or addressed to an international organization, any party to the dispute could ask a body competent under Article 96 of the Charter to apply to the International Court of Justice for an advisory opinion. The question as to which body such a request should be addressed had been brought into sharp focus at the preceding meeting by Sir Francis Vallat, who had pointed out that the General Assembly and the Security Council had broader competence than other bodies because they could request the Court to give an advisory opinion on any legal question. He (Mr. Francis) was of the opinion that subparagraph 2 (*a*) should also enable international organizations outside the United Nations family to apply to the Court for advisory opinions through the competent United Nations body, in order to encourage the development of the jurisprudence of the organizations concerned and to strengthen the peace-making role which the United Nations could play in its relations with other international organizations.

3. He agreed with the view that the advisory opinions of the International Court of Justice should be binding on the parties to the treaty. States might, of course,

[1] For text, see 1589th meeting, para. 1.

[2] See 1585th meeting, foot-note 1.