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44th Meeting of the Committee of the Whole

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were entirely abnormal conditions and the rules governing their legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States, as the Commission affirmed in paragraph 4 of its commentary to draft articles 38 and 39 (A/CONF.80/4, p. 108). Finally, cases of State responsibility had already been covered by article 73 of the Vienna Convention on the Law of Treaties, to which the necessary reference should be made.

58. Mrs. THAKORE (India) said that articles 38 and 39 made a general reservation concerning any question that might arise in regard to a treaty from the international responsibility of a State, or from the outbreak of hostilities between States or the military occupation of a territory. Questions arising from the international responsibility of a State or from the outbreak of hostilities between States were excluded from the Vienna Convention on the Law of Treaties by article 73. Both those matters might have an impact on the law of succession of States in respect of treaties and had therefore been excluded from the scope of the draft articles so as to prevent any misunderstanding as to the inter-relationship between the rules governing those matters and the law of treaties. Military occupation of a territory did not constitute a succession of States.

59. Her delegation was in favour of maintaining articles 38 and 39 in order to remove any misunderstanding on the subject and was not therefore in a position to support the Mexican amendment.

60. Mr. ABOU-ALI (Egypt) said that to delete the articles would be tantamount to ignoring the problem of hostilities in the succession of States. Their maintenance would remove any doubt that armed aggression, which was contrary to the Charter of the United Nations and international law, did not provide a legal basis for any decision relating to the succession of States. His delegation therefore supported the Indian representative.

61. Mr. TORNARITIS (Cyprus) said his delegation also supported the retention of the articles.

62. Mr. LUKABU-K'HABOUJI (Zaire) said that deletion of the articles might give rise to disputes. If the Mexican amendment was put to the vote, he would vote against it.

63. Mr. GUTIÉRREZ EVIA (Mexico) said that all representatives who had spoken so far appeared to be aware that the articles were unnecessary and that their contents were not in keeping with the nature of the draft convention. However, in a spirit of conciliation, he was prepared to withdraw his amendment.

64. The CHAIRMAN said if there were no objections, he would take it that the Committee wished to refer the original text of draft articles 38 and 39 to the Drafting Committee.

It was so decided.[11]

[11] For resumption of the discussion of articles 38 and 39, see 53rd meeting, paras. 30-33.

65. Mr. PÉREZ CHIRIBOGA (Venezuela), seconded by Sir Ian SINCLAIR (United Kingdom) and Mr. TORNARITIS (Cyprus), moved that the meeting adjourn.

It was so decided.

The meeting rose at 5.50 p.m.

44th MEETING

Friday, 4 August 1978, at 10.25 a.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976

[Agenda item 11] (*continued*)

PROPOSED NEW ARTICLE 37 *bis* (Objections to succession)[1] (*continued*)

In the absence of the Chairman, Mr. Ritter (Switzerland), Vice-Chairman, took the Chair.

1. Mr. ROVINE (United States of America) said that, following the discussion at the 43rd meeting concerning the new article 37 *bis* proposed by his country (A/CONF.80/C.1/L.37/Rev.1) and after consulting other delegations, his delegation had prepared a revised version of the text of that provision. No change had been made to article 37 *bis*, paragraph 1, but paragraphs 2, 3, and 4 had been replaced by new paragraphs 2 and 3. The new version of article 37 *bis* would appear in document A/CONF.80/C.1/L.37/Rev.2, which had not yet been circulated. It would be noted that paragraphs 2 and 3 were similar to articles 65 and 66 of the Vienna Convention on the Law of Treaties.

2. Replying to questions raised at the 43rd meeting, he said that article 37 *bis* related to objections to succession to a treaty, not to objections to a succession of States. Paragraph 1 of that article should perhaps be clearer on that point. It should also be noted that the question of objections was entirely different from that of the settlement of disputes. An objection did not necessarily lead to a dispute. Article 37 *bis* was intended to provide a regular procedure for the objections which certain States would undoubtedly make in connexion with succession to treaties on the grounds that such succession would be incompatible with the object and purpose of those treaties or that it would radically change the conditions of their operation. Such objections could be made by the successor State or by a party of the treaty.

[1] For the list of amendments submitted, see 43rd meeting, foot-note 9.

3. After a brief procedural discussion in which Mr. NATHAN (Israel), Mr. FONT BLAZQUEZ (Spain) and Mr. LUKABU-K'HABOUJI (Zaire) took part, the CHAIRMAN suggested that the discussion on article 37 *bis* should be postponed until document A/CONF.80/C.1/L.37/Rev.2 had been circulated.

It was so decided.[2]

PROPOSED NEW ARTICLE 39 *bis* (Settlement of disputes)[3]

4. Mr. ROVINE (United States of America), introducing the new article 39 *bis* proposed by his delegation (A/CONF.80/C.1/L.38/Rev.1), said that that article was essential in order to protect newly independent States in the choice they could make in accordance with the "clean-slate" principle and to protect the treaty rights of States in general in the application of the principle of continuity. As the United Kingdom representative had pointed out,[4] the draft convention contained 17 references to the concepts of incompatibility with the object and purpose of a treaty and of a radical change in the conditions for the opreration of a treaty. There was no doubt that the provisions containing those references would give rise to differences of opinion concerning their interpretation and application. Other provisions were vague, but they were of lesser importance to the draft. The references to incompatibility with the object and purpose of a treaty and to a radical change in the conditions for the operation of a treaty were to be found not only in articles requiring the application of the "clean slate" principle such as articles 16, 17, 18, 26 and 29, but also in articles requiring the application of the principle of continuity, such as articles 30 to 37. For both kinds of articles, it was essential to have a provision on the settlement of disputes.

5. According to article 16, paragraph 1, for example, a newly independent State could establish its status as a party to any multilateral treaty which at the date of the succession of States had been in force in respect of the territory to which the succession of States related. If no such option existed, the "clean slate" rule would be largely meaningless. According to article 16, paragraph 2, however, paragraph 1 did not apply if it appeared from the treaty or was otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty. That limitation, while fully justified, was nevertheless very vague. There was no doubt that its interpretation would give rise to difficulties and that a system for the settlement of disputes was needed. Indeed, without a system for the settlement of disputes, it would, in practice, be difficult to establish whether or not a newly independent State was a party to a particular treaty.

6. The application of the principle of continuity also required a system for the settlement of disputes. With regard to article 30 on the effects of a uniting of States in respect of treaties in force at the date of the succession of States, he referred to the hypothetical case in which a State that was bound by treaties to 100 States united with another State that was also bound by treaties to 100 States. If the newly formed State claimed that it had not succeeded to most of those treaties because their application would be incompatible with their object and purpose or would radically change the conditions for their operation, and if no provision had been made for a procedure for the settlement of disputes, the other States parties to those treaties would probably not be prepared simply to relinquish their rights under those treaties, for if they did, they would be allowing the successor State to reintroduce the "clean slate" principle in the provisions of Part IV of the draft. In the case of the future convention, a procedure for the settlement of disputes was therefore more than an abstract ideal. The purpose of such a procedure was not to reduce the chances of negotiation; rather, it was based on the idea that, in such disputes, negotiations might break down. Nor was it designed to weaken the sovereignty of States or to establish better international judicial or arbitration mechanisms for their own sake. Draft article 39 *bis* was designed only to protect newly independent States in the context of the application of the "clean slate" rule and States in general in the context of the application of the principle of continuity.

7. The mechanism proposed in the new article 39 *bis* enabled States to choose between the submission of disputes to arbitration, to the International Court of Justice or even to the conciliation procedure. The article established a presumption in favour of arbitration and the submission of disputes to the International Court of Justice, but any State could, by means of a reservation, declare that it did not consider itself bound by that presumption, which was nevertheless the best means of protecting States in the application both of the "clean slate" rule and of the principle of continuity. It was evident that binding decisions provided better protection than did non-binding decisions, which could nevertheless be of some use. The proposed article 39 *bis* did not go as far as article 66 of the Vienna Convention on the Law of Treaties, which concerned the interpretation of the concept of a peremptory norm of general international law. The question which the Committee must now decide was whether it really desired to protect States in the application of the future convention. If it did, a procedure for the settlement of disputes was essential.

8. Mr. STUTTERHEIM (Netherlands), introducing his delegation's amendment (A/CONF.80/C.1/L.56) to the new article 39 *bis* proposed by the United States of America, said that his country had long been of the opinion that international disputes ought to be submitted to inter-

[2] For resumption of the discussion, see 46th meeting, paras. 27 *et seq.*

[3] At the 1977 session, the United States of America proposed the insertion of a new article 39 *bis* (A/CONF.80/C.1/L.38). At the resumed session, the United States of America submitted a revised version of the amendment (A/CONF.80/C.1/L.38/Rev.1); the Netherlands submitted an amendment (A/CONF.80/C.1/L.56) to the proposed new article 39 *bis*.

[4] See 43rd meeting, para. 41.

national authorities and that provisions on the settlement of disputes should be included in treaties which might give rise to disputes. That attitude was not dictated by the fact that the International Court of Justice had its seat at The Hague. Rather, it was because the Netherlands was in favour of the international judicial settlement of disputes that the Court had its seat in that country.

9. The United Nations General Assembly was also in favour of provisions on the peaceful settlement of disputes, as could be seen from its resolution 3232 (XXIX), in which it had drawn the attention of States to the advantage of inserting in treaties clauses providing for the submission to the International Court of Justice of disputes which might arise from the interpretation or application of such treaties. His Government had, moreover, already stressed the need for an article on the settlement of disputes in the comments in had made, in 1975, on the International Law Commission's provisional draft articles (A/CONF.80/5, pp. 313-314). The differences of opinion which had emerged in the Committee of the Whole in connexion with some provisions had only confirmed him in that view. In so far as possible, disputes relating to the application or interpretation of the future convention should therefore be submitted to the International Court of Justice. The United States amendment provided for recourse to the International Court of Justice only when the parties failed to agree on an arbitration procedure. In his delegation's opinion, that arrangement should be reversed in the case of disputes concerning article 6 and article 33, paragraph 3; such disputes should be submitted to the Court unless the parties decided to settle them by means of an arbitration procedure. In the case of other disputes, the procedure provided for in paragraph 1 of the United States proposal would be acceptable. His delegation could not, however, accept paragraph 2 of that proposal, and that was why it had submitted its own draft article 39 *bis*. He was not unaware of the fact that a member of delegations would not welcome a provision which imposed on States an obligation to submit their disputes to the International Court of Justice, or even compulsory arbitration. He nevertheless hoped that the discussion which would take place would prompt those delegations to reconsider their position. Limits must be placed on the sovereignty of States when the interests of the international community were at stake or, in other words, when it was in the interest of good relations among States to find the most effective means of settling disputes.

10. Mrs. THAKORE (India), referring to article 39 *bis*, paragraph 4, as proposed by the United States of America, said that her delegation would have no difficulty in agreeing to a compulsory conciliation procedure along the lines of that provided for in article 66 of the Vienna Convention on the Law of Treaties, since the future convention would complement the Vienna Convention. Her delegation was pleased to note that the revised version of article 39 *bis* did not provide for the compulsory submission of disputes to the International Court of Justice. The question whether a State was a newly independent State or had been formed in circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State was not of such fundamental importance as the question of the existence and content of a peremptory norm of general international law; it did not, therefore, warrant a decision by the supreme judicial organ of the international community. Moreover, disputes concerning the first of those two questions were more political than legal in nature. At the eighteenth session of the Asian-African Legal Consultative Committee, some of its members had rightly reached that same conclusion and had stated that disputes regarding the future convention should be settled through diplomatic negotiations.

11. According to article 39 *bis*, paragraph 1, any dispute regarding the interpretation or application of the future convention should be submitted to compulsory arbitration or to compulsory judicial settlement. Since the international community was not yet ready to accept those two forms of settlement of disputes, her delegation welcomed the fact that article 39 *bis* paragraph 2, enabled States to declare that they did not consider themselves bound by paragraph 1, in which case the other States parties would not be bound by paragraph 1 with respect to States which had made such a declaration. Paragraph 2 of article 39 *bis* was similar to article 13, paragraph 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973.[5]

12. Paragraph 3, which provided that any State which had made a declaration in accordance with paragraph 2 could at any time withdraw that declaration by notification to the Secretary-General, was similar to article 13, paragraph 3, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Paragraphs 2 and 3 of article 39 *bis* made the article more flexible and might make it more acceptable.

13. In view of the position which her delegation had adopted on article 39 *bis*, as proposed by the United States of America, it could not accept article 39 *bis*, subparagraph (*a*), as proposed by the Netherlands, for that subparagraph reintroduced the concept of the compulsory judicial settlement of disputes concerning the interpretation or application of article 6 or article 33, paragraph 3. Her delegation was also unable to support subparagraph (*b*), since it provided for compulsory arbitration or judicial settlement in the case of disputes concerning the interpretation or application of all the other provisions of the future convention; States were not entitled to declare that they did not consider themselves bound by subparagraph (*b*). Consequently, the whole of article 39 *bis* as proposed by the Netherlands was unacceptable to her delegation.

14. Mr. PÉREZ CHIRIBOGA (Venezuela) said that the Conference must deal with the question of the settlement of disputes in one way or another. The procedures proposed so far were interesting, but his delegation could

[5] General Assembly resolution 3166 (XXVIII).

not support them. Venezuela had always been peace-loving and had tried to find peaceful solutions to disputes. It could pride itself on never having had any international disputes since its accession to independence. Generally speaking, direct negotiations seemed to be the best means of settling disputes; moreover, there was an obligation on States to negotiate. It should be noted, in that connexion, that the notion of the peaceful settlement of disputes did not necessarily entail compulsory judicial settlement. In itself, compulsory judicial settlement was a good means of settling disputes, but it must not be imposed on a State which had not expressly accepted it for a particular category of dispute. Whereas other delegations regarded compulsory jurisdiction as a sure, prompt and definitive guarantee of the settlement of disputes, his delegation believed experience showed that it was better to allow the parties concerned to choose the means they considered most appropriate.

15. As a lawyer, he hoped that the future convention would be supplemented by a procedure for the settlement of disputes. As a Government representative, however, he had to take account of the fact that it was useless to draw up international instruments that had little chance of entering into force. The Vienna Convention on Diplomatic Relations (1961), for instance, had been ratified by 92 States, but only 31 States had signed its Optional Protocol concerning the Compulsory Settlement of Disputes.[6] If the provisions of the Protocol had been introduced into the Convention, the latter would not have obtained the same number of ratifications and it would not render the services it was currently rendering to the international community. Clearly, States were not yet prepared to accept a system of compulsory jurisdiction. No one was unaware of the difficulties encountered by the United Nations Conference on the Law of the Sea in devising a procedure for the settlement of disputes concerning matters relating to State sovereignty.

16. Far from facilitating the speedy and effective settlement of disputes, the conciliation procedure which the United States delegation proposed should be annexed to the convention represented the most roundabout way of tackling the problem. He could not accept the provision in the second sentence of paragraph 5 of the annex proposed by the United States, because that provision in fact again gave a role to the International Court of Justice, given the considerable moral effect of an advisory opinion of the Court. The power granted to the chairman of the conciliation commission in paragraph 4 seemed to be contrary to the very nature of a commission. Lastly, the provision in the final sentence of paragraph 6 contained an element of coercion that was contrary to the very essence of genuine conciliation. He was not, therefore, in a position to support the proposal of the United States or the proposal of the Netherlands.

17. He was in favour of omitting from the convention any reference to a system for the settlement of disputes, so as to leave the parties the greatest possible freedom in choosing the method of settlement they deemed appropriate, bearing in mind the provisions of Article 33 of the Charter of the United Nations. He could, however, agree to a compromise solution under which the provisions on the settlement of disputes contained in the annex to the 1969 Vienna Convention on the Law of Treaties would be reproduced in an optional protocol.

18. Sir Ian SINCLAIR (United Kingdom) said that, as the representative of the United States had pointed out, the draft convention contained a number of provisions the interpretation and application of which might give rise to difficulties in certain cases of succession of States in respect of treaties. The discussion on article 37 *bis* proposed by the United States (A/CONF.80/C.1/L.37/Rev.1) had highlighted the problems posed by a saving clause that appeared no fewer than 17 times in the draft articles. That saving clause was based on two criteria: succession to a treaty could be objected to either on the ground that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or on the ground that it would radically change the conditions for its operation. The first of those two criteria was similar to the criterion that had been adopted in subparagraph (*c*) of article 19 of the Vienna Convention on the Law of Treaties with a view to determining the validity of a reservation in the case of a treaty containing no provisions on reservations. The second was taken from article 62 of the Vienna Convention on the Law of Treaties, which related to a fundamental change of circumstances. Those were intended to be objective criteria which would be invoked in good faith in certain cases, but there would doubtless be cases in which a successor State or another State party to a treaty would invoke one of the two criteria to establish, to its own advantage, the non-applicability of the treaty. A mechanism must therefore be found to prevent improper use of that saving clause.

19. Clearly, however, the problem was not limited to the interpretation or application of saving clauses. The discussion on article 6 of the draft had brought out the difficulties raised by that article, which would undoubtedly be a source of disputes if maintained in the convention. The discussion on article 33, paragraph 3, had also shown the need to provide for machinery for the settlement of disputes if a provision of that kind was to appear in the Convention.

20. An effective system for the settlement of disputes must, therefore, be established if the convention was to be of any use. That view had been shared by some members of the International Law Commission and it was only lack of time that had prevented the Commission from adopting a draft article on the settlement of disputes, as was stated in paragraph 80 of its commentary to the general features of the draft articles (A/CONF.80/4, p. 15).

21. It might be argued that the Conference's sole task was to codify substantive rules and that it need not concern itself with the manner in which the convention would be applied in practice. However, the whole object of the exercise was to prepare a convention which would make it

[6] United Nations, *Treaty Series*, vol. 500, pp. 95 and 241.

possible to resolve the practical problems raised by cases of succession of States in respect of treaties. The Conference must not, therefore, adopt a convention which, it knew in advance, would be difficult to interpret and apply without making provision for the settlement of disputes.

22. There were constructive elements in both the proposals before the Committee. The proposal of the Netherlands was more radical in that it provided for disputes concerning the interpretation or application of article 6 or article 33, paragraph 3, to be submitted directly to the International Court of Justice. It was of course based on the assumption that those two provisions would be maintained in the convention in their existing form. The Committee would therefore have to wait until it had taken a decision on those two provisions before pronouncing on that aspect of the Netherlands proposal. That proposal also envisaged the solution of arbitration, with the possibility of submitting the dispute to the International Court of Justice if the arrangements necessary to permit the arbitration to proceed had not been completed within one year.

23. The proposal of the United States was more qualified. It also envisaged arbitration as the basic solution with the possibility of submitting the dispute to the International Court of Justice for decision if the arrangements necessary to permit the arbitration to proceed had not been completed within a prescribed period of time. Paragraph 2 took account of the objections of those who had difficulty in accepting automatic recourse to arbitration or to the International Court of Justice: under it, each State party could declare that it did not consider itself bound by that system. In any case, provision was made for a conciliation procedure in the case of disputes between States which accepted the basic system and those which did not.

24. His delegation supported the United States proposal and would even be prepared to support that part of the Netherlands proposal providing for the direct submission to the International Court of Justice of disputes concerning article 6 or article 33, paragraph 3, if those provisions were included in the convention. It was, however, aware that that element of the Netherlands proposal might lead to controversy. In conclusion, his delegation suggested that a special *ad hoc* working group might be established to prepare a proposal on machinery for the settlement of disputes which would command general agreement. The group should be representative of all trends of opinion in the Committee.

25. Mr. KRISHNADASAN (Swaziland) noted that the proposals of the United States and the Netherlands represented an attempt to fill a gap in the draft convention and were based on a draft article on the settlement of disputes that had been submitted to the International Law Commission by one of its members (A/CONF.80/4, p. 14). He experienced the same difficulties with those two proposals as did the representatives of India and Venezuela. Like them, he considered that the procedure for the settlement of disputes should be as flexible as possible and that since disputes concerning the interpretation of the Convention might be political in nature, the best means of settling them would be through the normal diplomatic negotiations procedure. He also considered that the international community was not yet ready to accept a compulsory settlement procedure such as that which existed in internal law.

26. Turning to the conciliation procedure which the United States proposed to annex to the convention, he said that, for the reasons given by the representative of Venezuela, he could not accept the provision in paragraph 5 to the effect that the conciliation commission "may recommend to the United Nations that an advisory opinion be requested from the International Court of Justice regarding the application or interpretation of the Present Convention". He pointed out that the annex to the 1969 Vienna Convention on the Law of Treaties contained no provision of that kind; in his view, that provision went far too far, given the considerable importance attached to the advisory opinions of the International Court of Justice.

27. He also had difficulty in accepting the provision in the last sentence of paragraph 6 to the effect that "any party to the dispute may declare unilaterally that it will abide by the recommendations in the report [of the conciliation commission] so far as it is concerned". He wondered what would happen if, the conciliation commission having made recommendations favourable to one of the parties, that party declared unilaterally that it would abide by those recommendations.

28. The best solution might be to set out a conciliation procedure in an annex to the convention, as proposed by the United States, but on condition that that conciliation procedure conformed to the procedure contained in the annex to the Vienna Convention on the Law of Treaties. He could not, therefore, support the proposal of the Netherlands.

29. Mr. KOECK (Holy See) said that he unreservedly supported any procedure likely to lead to a pacific settlement of disputes to which the interpretation or the application of the convention gave rise. He considered that the parties should, in the first instance, be free to select, the procedure they preferred, but was ready, in conformity with the position taken by all the Popes, to support any proposal providing for compulsory arbitration. While recognizing the merits of the negotiation procedure, he considered that provision should be made for a more effective procedure for the settlement of disputes to which parties might have recourse if negotiations failed. He was therefore grateful to the sponsors of the proposals submitted in documents A/CONF.80/C.1/L.38/Rev.1 and A/CONF.80/C.1/L.56. In his opinion, it was high time that the international community renounced the use of force and sought more peaceful methods of settling disputes. The Holy See would, consequently, support any initiative to make provision for such a solution in the convention.

30. Mr. MARESCA (Italy) said that it was not enough merely to prescribe rules; efforts should also be made to ensure that they were applied. Although all codification conventions were capable of giving rise to disputes, few of them contained provisions relating to the settlement of such disputes.

31. The method adopted in the case of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations,[7] whereby provisions relating to the settlement of disputes were presented in the form of an optional protocol, offered certain advantages, as the representative of Venezuela had commented, but it did not guarantee the application of legal rules and, without such a guarantee, a rule had no more force than a mere declaration. A method other than that of the optional protocol must therefore be found, and provisions relating to the settlement of disputes must be incorporated into the body of the convention.

32. The proposals of the United States and the Netherlands had the merit of offering genuine solutions and of being based on major international institutions such as the International Court of Justice and the arbitration procedure, which enjoyed the respect and confidence of the entire international community. However, their fault was that they failed to follow the hierarchical order of the various procedures. Those procedures could be divided into two categories: procedures such as good offices, mediation or conciliation, which produced a purely optional solution; and procedures such as arbitration and recourse to the International Court of Justice, which produced a mandatory solution. The logical practice was therefore to begin with the former procedures and have recourse to the latter only when the former had failed.

33. He thought that recourse should first be had to negotiation, which was the most natural method, then to conciliation, when negotiation had failed. In his view, it was not the solution provided by conciliation, but the recourse to conciliation which should be compulsory if diplomacy had not succeeded. The United States deserved great credit for setting forth that conciliation procedure in detail, but it had been in error in presenting it as an alternative to arbitration, when it ought to precede arbitration. He thought that stress should be laid on the conciliation procedure, since it could be accepted by all States, and that recourse to arbitration or to the International Court of Justice should be contemplated only if conciliation had failed.

34. He shared the view of the United Kingdom representative that a working group should be set up to consider the proposals by the United States and the Netherlands and to try to find a solution acceptable to all. In his opinion, a sequence should be established in the methods used to settle disputes: the first step that should be envisaged was mandatory recourse to conciliation, followed in case of failure, by recourse to arbitration. During the conciliation procedure, it might be preferable not to request an advisory opinion from the International Court of Justice so as not to influence the conciliation commission.

35. Mr. NAKAGAWA (Japan) observed that, during the general debate which had taken place at the beginning of the Conference in 1977, his delegation had stressed the need–subsequently recognized by a good number of other delegations–to include in the body of the convention a system for the settlement of disputes,[8] since some rules might lead to complications in application or interpretation. In the context of the draft convention, his delegation had always favoured a clear and, if possible, compulsory settlement procedure. Moreover, the United Nations Conference on the Law of Treaties had partly incorporated in article 66 of the Vienna Convention the idea, which had its origins in a Japanese proposal submitted at that Conference, of referring to the International Court of Justice, at the request of one of the parties to the dispute, any disputes arising from claims under the articles concerning *jus cogens*, and, in any other cases concerning the interpretation or application of the articles of Part V of that Convention, of referring the dispute to arbitration, if no solution had been found after a specified period. In general, his delegation favoured the establishment of a system envisaging, in the first instance, negotiations and subsequently, if negotiations failed, *compulsory* recourse to the International Court of Justice or to arbitration. However, it would be prepared to accept a conciliation procedure as long as reference to that procedure was compulsory.

36. In its proposal, the United States delegation had visualized two kinds of disputes and had embraced the procedure embodied in Article 33 of the Charter of the United Nations and by the International Court of Justice, on the one hand, and the conciliation procedure, on the other. His delegation could support the Netherlands proposal, which envisaged a compulsory procedure, since it was in line with the position it had taken at the Conference on the Law of Treaties. If, however, the international community considered that it was still too early to accept a compulsory procedure for the settlement of disputes, provision would then have to be made at least for conciliation procedures based on the Vienna Convention on the Law of Treaties. His delegation could, accordingly, accept the United States proposal, but reserved the right to revert to the question, if need be.

Mr. Riad (Egypt) took the Chair.

37. Mr. FONT BLÁZQUEZ (Spain) said that the draft convention unquestionably contained a number of ambiguous formulations which would have to be clarified by political negotiations. While, at the national level, a judge could interpret provisions which gave rise to misunderstanding, at the international level the situation was more complicated, since State sovereignty had to be taken into account and the rights, not of individuals, but of States had to be dealt with. That was why negotiations were the only method which gave satisfaction to the parties without arousing their resentment.

38. Citing Articles 62 and 63 of the Statute of the International Court of Justice, he commented that not only those States which ratified the convention on succession of

[7] United Nations, *Treaty Series*, vol. 596, p. 261.

[8] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.78.V.8), p. 30, 3rd meeting, para. 21.

States in respect of treaties but even those which merely signed it would be affected by problems of interpretation or application raised by the convention. He drew attention to article 18 of the Vienna Convention on the Law of Treaties concerning the obligation not to defeat the object and purpose of a treaty prior to its entry into force, under which a State which signed a treaty was required to assume a number of obligations. If, however, that State had obligations to fulfil, it could expect to have a number of rights. Consequently, a State which had signed the convention without ratifying it would be entitled to make representations to the tribunal to which the dispute arising from the interpretation or application of the convention had been submitted. That meant that many or virtually all the States present would appear before the Tribunal in an attempt to clarify what they had not made clear when preparing the convention.

39. The United States proposal envisaged two circumstances in which recourse might be had to the International Court of Justice–submission of the dispute for decision or a request for an advisory opinion. Everyone was aware that the moral and legal force of the Court's advisory opinions was comparable to that of its judgments, or, to put it another way, that its judgments were hardly more effective than its opinions. In any event, however, one might wonder what the reaction of the International Court of Justice would be if confronted with a whole series of ambiguous expressions. It might deplore the fact that the participants in the Conference had not drawn up a clearer text. For that reason, his delegation was opposed to the United States proposal and was even more strongly opposed to the Netherlands proposal.

40. Mr. SANYAOLU (Nigeria) said he was of the opinion that consultations and negotiations offered the best prospects for settling disputes, most of which were political in nature. The United States proposal might be considered to be superfluous if the Conference later decided to adopt a resolution based on the United States draft (A/CONF.80/C.1/L.51/Rev.2) concerning incompatible obligations and rights under treaties. His delegation also had reservations on the Netherlands proposal since it would find it difficult to accept the idea of compulsory methods for the settlement of disputes.

41. Mr. TORNARITIS (Cyprus) said that his delegation had always subscribed to the principle that the parties to a dispute should spare no effort to arrive at a peaceful settlement of their differences, a principle which underlay the Charter of the United Nations and formed the subject-matter of Article 33. Similarly, article 66 of the Vienna Convention on the Law of Treaties provided machinery to ensure observance of that principle. His delegation therefore welcomed the United States proposal concerning a new article 39 *bis*, which envisaged methods of settlement to which the parties to a dispute might resort.

42. Mr. YASSEEN (United Arab Emirates) said that, although the problem of the settlement of disputes was a general one, it was preferable to resolve it separately in the context of each treaty, particularly if the treaty was a general multilateral one. Recent practice showed, moreover, that most codification conventions prescribed particular methods of settlement; the future convention on succession of States should be no exception to the rule, for there was no doubt that it raised a number of problems which would engender disputes.

43. It would be an easy matter to make provision for the compulsory jurisdiction of the International Court of Justice, as the Netherlands delegation proposed, but there was no certainty that the international community would accept such a solution in the present case. It was therefore necessary that provisions specifying a flexible method of settlement should be incorporated into the text of the convention, as the United States delegation proposed. He, however, recognized that it was incumbent upon States to strengthen the authority of the International Court of Justice; recourse to arbitration should not therefore be the first resort as the United States amendment suggested. The United States amendment had the advantage that it allowed States the choice of withdrawing by declaration from the obligation to have recourse to the International Court of Justice. As there was no doubt that a number of States would refuse to be bound by compulsory methods of settlement, some alternative would have to be found. The Vienna Convention on the Law of Treaties provided for compulsory recourse to conciliation, but the Conciliation Commission's report was not binding on the parties to the dispute. The United States amendment proposed certain conciliation procedure which was not quite the same as that provided for in the Vienna Convention on the Law of Treaties. Since there was a close relationship between that Convention and the convention to be adopted by the Conference, it would be most practical to adopt the same procedure as that adopted by the Vienna Convention on the Law of Treaties. That would facilitate the implementation of the convention on succession of States in respect of treaties, for it would be possible to have a single list of conciliators.

44. In conclusion, he expressed the hope that the United States and Netherlands delegations would hold consultations with a view to achieving the desired objective, without losing sight of the realities of international life.

45. Mr. LUKABU-K'HABOUJI (Zaire) said that his delegation, which had been among the first to stress the absence from the convention of provisions relating to the settlement of disputes, welcomed the efforts of the United States and Netherlands delegations to make good that deficiency.

46. The text proposed by the United States was very attractive at first sight, but it raised some problems: for instance, paragraph 2 provided that each State party could at the time of signature or ratification of the convention or accession thereto declare that it did not consider itself bound by paragraph 1. However, in introducing his proposal, the United States representative had said that it was designed basically to settle disputes which might arise in connexion with article 30. The Zairian delegation wondered at what point a State which came into being in the circumstances mentioned in article 30 and consequently

inherited the duties of the predecessor State, would be able to make the declaration provided for in paragraph 2 of the United States text.

47. He was also concerned to note from paragraph 4 of the annex to the convention proposed by the United States that the conciliation commission was to function as soon as the chairman had been appointed, even if its composition was incomplete. That meant that, even though a party to the dispute might not be represented in the commission, it would nevertheless be considered to be bound by its conclusions. Paragraph 5, under which the commission could recommend to the United Nations that an advisory opinion be requested from the International Court of Justice without the agreement of the parties, also seemed to him difficult to accept. Moreover, for reasons already stated by other speakers, he was also unable to accept the last sentence of paragraph 6.

48. The text proposed by the Netherlands provided for the compulsory submission of disputes to the International Court of Justice, a procedure which was quite unacceptable to the Zairian delegation. He agreed with the representative of India that disputes arising from the interpretation or application of the convention would be more political than legal in character and should therefore be settled by arbitration. In that connexion, it was pertinent to mention the example of the Charter of the Organization of African Unity, which did not provide for the compulsory submission of disputes to a court but laid down a conciliation procedure, whose excellent results were known to all.

49. His delegation drew the Committee's attention to the fact that draft resolution A/CONF.80/C.1/L.51/Rev.2, submitted by the United States, also dealt with the settlement of disputes; it wondered what the position would be if the Conference adopted both that draft and one of the texts proposed by the United States and the Netherlands.

50. It was essential to find a method of settling disputes which was acceptable to all. His delegation supported the proposal of the United Kingdom representative to set up a small working group on the question.

51. Mr. ECONOMIDES (Greece) said he supported the text proposed by the United States, because it served to promote international justice, the advancement of which determined the progress of the international community in general. It was true, as had been emphasized, that negotiation was the basic means of settling disputes. When, however, negotiations produced no results, only two remained open: arbitration or war; there could be no hesitating between them.

52. Moreover, all major codification conventions which, like that being elaborated by the Conference, aimed at universality and were intended to endure ought to contain rules that were as affective and as detailed as possible concerning the settlement of disputes which might arise out of their application or interpretation. The United States proposal, which at first sight seemed complicated, envisaged a procedure that was both comprehensive, since it covered all disputes, and flexible, since States could choose between various courses. His delegation therefore supported it.

53. It could also support the text proposed by the Netherlands although it was perhaps more inflexible than the United States proposal.

54. Lastly, it supported the United Kingdom representative's proposal to set up a working group to find a solution acceptable to all.

55. Mr. SETTE CÂMARA (Brazil) said that there was no scope for innovation in the matter of the settlement of disputes: there were a limited number of solutions, and the problem was to combine them according to a particular order of priorities. If the precedents in that field were studied, it would be found, for example, that the optional protocols to the Vienna Conventions on Diplomatic Relations, on Consular Relations and the Convention on Special Mission[9] placed recourse to the compulsory jurisdiction of the International Court of Justice before arbitration, and arbitration before the conciliation procedure. The Vienna Convention on the Law of Treaties, on the other hand, provided for the establishment of conciliation machinery, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character[10] provided for the settlement of disputes through consultations (article 84) or a conciliation procedure (article 85). In his view, the Committee should, as suggested by the United Kingdom representative, set up a small working group, of which the United States and Netherlands representatives, in particular, should be members, to study how to bring together the components of the existing machinery so as to find a solution acceptable to all.

56. As to the United States proposal, he thought that a reference should be made in paragraph 1 not only to diplomatic channels but also to direct consultations, which were of fundamental importance. In its draft annex, the United States delegation had, however, proposed a sound conciliation system, closely modelled on the one set out in the annex to the Vienna Convention on the Law of Treaties, but with some slight differences. For instance, under the Vienna Convention on the Law of Treaties, the States parties each nominated two conciliators for a specified period, which was perhaps preferable to the United States proposal of a single conciliator for an indefinite period. Again, the annex to the Vienna Convention on the Law of Treaties provided that the Chairman of the Conciliation Commission should be appointed within 60 days, whereas the United States proposal specified a period of one month, which was not perhaps altogether adequate. His delegation had no objection to the last sentence of paragraph 6 of the annex proposed by the United States, which introduced a clause that had not appeared in the Vienna Convention on the Law of Treaties, since it imposed no obligation on the parties: only States wishing to do so would make the unilateral declaration in question.

[9] General Assembly resolution 2530 (XXIV).

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

57. The Netherlands proposal seemed a little too inflexible. He also had doubts about the advisability of establishing special machinery to settle disputes concerning the interpretation or application of particular articles.

58. Mr. KAKOOZA (Uganda) remarked that one of the weaknesses of international law was that it lacked the means of enforcing its provisions. The Conference must, therefore, take care to adopt a method for the settlement of disputes which could be freely accepted by States with no likelihood of their regarding it as a limitation upon their sovereignty. As pointed out by the representative of Zaire, the only procedure for the settlement of disputes under the Charter of the Organization of African Unity was conciliation. The Ugandan delegation considered that any other method would be contrary to the ideology of the newly independent countries. In his view, it was essential that the Conference should adopt a procedure for the settlement of disputes which took account of individual preferences, allowing States parties to choose the methods of settlement, and which was swift.

59. He supported the United Kingdom delegation's proposal to set up a working group on the matter. The procedure for the settlement of disputes worked out by the group should have the features he had mentioned; they were not sufficiently prominent in the United States and Netherlands proposals, which were unacceptable to his delegation.

60. Mr. GÜNÜGÜR (Turkey) said that, however interesting they might be, the drafts of article 39 *bis* submitted by the United States and the Netherlands were scarcely acceptable in their present form. The two proposals provided that disputes concerning the application or interpretation of the convention that were not settled through the diplomatic channel should be referred to arbitration or to the International Court of Justice. In practice, that procedure would amount to submitting the dispute directly to arbitration or to the jurisdiction of the Court, as it would be an easy matter for States parties to say that they had not succeeded in making a settlement through the diplomatic channel. It had surely not been the intention of the sponsors of the two drafts thus to minimize in practice the importance of negotiation.

61. Turkey was not opposed in principle to the submission of disputes to the jurisdiction of the International Court of Justice. However, it considered that the disputes to which the provisions of the convention might give rise would probably be political in character, whereas the competence of the Court was strictly juridical. It therefore seemed much more logical to adopt a procedure by which the parties to a dispute first agreed on the content of the dispute before submitting it, by mutual consent, to arbitration, or, if necessary, to the International Court of Justice. His delegation could not, therefore, accept the United States and Netherlands proposals in their present form. It reserved its right to speak on other proposals, if the need arose.

The meeting rose at 1.05 p.m.

45th MEETING

Friday, 4 August 1978, at 3.50 p.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976

[Agenda item 11] (*continued*)

PROPOSED NEW ARTICLE 39 *bis* (Settlement of disputes)[1] (*continued*)

1. Mr. TREVIRANUS (Federal Republic of Germany) said that his delegation was strongly in favour of the inclusion in the convention, of an article on the settlement of disputes, since the draft articles contained many provisions which could give rise to different interpretations, in particular the escape clauses, formulae by which the Commission had intended to lay down an international objective legal test of compatibility which, if applied in good faith, should provide a reasonable, flexible and practical rule.

2. According to paragraph 14 of the International Law Commission's commentary to article 14, "incompatibility with the object and purpose of the treaty" and a "radical change in the conditions for the operation of the treaty" were "the appropriate criteria... to take account of the interests of all the States concerned and to cover all possible situations and all kinds of treaties" (A/CONF.80/4, p. 51). That view appeared to be shared by the great majority of delegations. The *bona fide* clause occurred frequently in domestic law, and provided the possibility of a settlement by a third party if the parties concerned could not agree on how a general clause should be interpreted or applied. The International Law Commission had been compelled to a large extent to take refuge in general clauses. That did not imply a criticism of the Commission's work, only that it had recognized the difficulty of laying down special rules for all possible cases arising out of the succession of States. The infinity of cases and the fact that the interests of States were not always identical meant that some body had to be responsible for the settlement of disputes as a way of providing an impartial settlement where no legal rules existed. The very nature of the draft convention meant that some compulsory procedure was indispensable. With no recourse to customary international law, some way had to be found of bringing disputes to a conclusion. The relationship between the draft Convention on the succession of States in respect of treaties and the Vienna Convention on the Law of Treaties was a complex one; and thus should ideally be considered as constituting a *corpus juris* in the sense that in the procedural field there was no possibility for different solutions. As far as the

[1] For the list of amendments submitted, see 44th meeting, foot-note 3.