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45th Meeting of the Committee of the Whole

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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.

practical operation of the Convention was concerned, it would have to include means of control in the form of sanctions that would prevent abuse or misuse of the rather wide general clauses.

3. His delegation welcomed the suggestion to form a small *ad hoc* group to consider possible solutions, preferably headed by the President of the Conference and with the participation of the Chairman of the Drafting Committee and the sponsors of the amendments.

4. As regards the criteria to be adopted, a place should be given to compulsory rules so that it was not possible by means of reservations to avoid the need to submit disputes to impartial settlement as a last resort.

5. Mr. RYBAKOV (Union of Soviet Socialist Republics) said that he had been impressed by the statements of many of the Asian, African and Latin American delegations at the 44th meeting, and even of some Western European delegations, which had expressed their views on the peaceful settlement of disputes as applicable to the convention under consideration. Some representatives, notably those of the United States of America, the United Kingdom and the Federal Republic of Germany, had not agreed with what had been said by the representatives of India, Nigeria, Spain, Swaziland, Uganda and Venezuela, for example, whose statements his delegation did indeed endorse, particularly in their reference to Article 33 of the United Nations Charter as a fundamental provision to be included in the convention. Had not the representative of Swaziland been right in saying[2] that the international community, at its present stage of development, was not yet ready for a binding legal procedure, that the time was not yet ripe for compulsory jurisdiction by the International Court of Justice and compulsory arbitration and in emphasizing the need to observe maximum flexibility in settling disputes? Had the representative of Nigeria not been right in saying[3] that the overwhelming majority of disputes, particularly in matters covered by the convention, could not avoid taking on a certain political flavour? Had not all those delegations been right in stressing that contemporary machinery should take into account existing realities and the free choice by States as to the means of settling disputes rather than the imposition of some compulsory procedure? He fully understood the representative of Swaziland's objections to the United States proposal (A/CONF.80/C.1/L.38/Rev.1), and particularly to its first three paragraphs, and his objections to the entire arbitration machinery and the intervention of the International Court of Justice. He also fully appreciated that developing countries preferred the "opting in" system as a basis for the "clean slate" approach, rather than the "opting out" system.

6. He was not prepared to support the view of the representative of the Federal Republic of Germany. The matter was not one of practical implications but of the entire conception underlying the peaceful settlement of disputes. A clear legal philosophy required consistency in the matter of disputes; the arguments put forward by delegations which had doubted the advisability of the procedure involving the International Court of Justice had indeed been valid.

7. His delegation fully understood the reference by the representative of Nigeria to the link between the two United States proposals, one on the settlement of disputes (A/CONF.80/C.1/L.38/Rev.1) and the other on objections to succession (A/CONF.80/C.1/L.37/Rev.2). In trying to respond to questions concerning developing countries, the United States had said its proposal did not deal with objections to succession as such but to succession with respect to treaties;[4] the Soviet delegation doubted whether that changed anything. The representative of Nigeria had also been correct in stating that if the United States proposal on incompatible treaty obligations (A/CONF.80/C.1/L.51/Rev.2) were adopted, then it was essential that all disputes should be covered by that document. His argument had been extremely clear.

8. The statements made by representatives of the Asian, African and Latin American countries had in fact contained useful and constructive ideas for a solution to the problem of the settlement of disputes under the convention. His delegation was particularly interested in the ideas advanced by the represenative of Venezuela,[5] in his reference to Article 33 of the United Nations Charter, and in the suggestion by the representative of Swaziland[6] that disputes should be settled by means of negotiation and consultation, but that the Committee should not discount the possibility of laying down a procedure in a special document in the form of an annex or an optional protocol, based on the "opting in" system in conformity with the United Nations Charter and on the sovereign equality of States.

9. His delegation was able to agree with the United Kingdom[7] proposal to set up an *ad hoc* working group to consider the problem, but could not agree with its other views. Any document prepared by the Conference should take into account the feelings of the majority, and it was important for all representatives of regional groups to take part in the consultations on a balanced basis. His delegation was fully prepared to participate. Some delegations had referred to certain articles of the Vienna Convention on the Law of Treaties being used as possible models for the Conference document, but account had to be taken of the fact that not all States were parties to that Convention, and that the nature of the convention under consideration was such that the Vienna Convention on the Law of Treaties did not offer any real possibility of solving their present problems.

10. Mr. MONCAYO (Argentina) said his delegation felt that the States parties had two courses of action open to

[2] See 44th meeting, para. 25.

[3] *Ibid.*, para. 40.

[4] *Ibid.*, para. 2

[5] *Ibid.*, paras. 14-17.

[6] *Ibid.*, para. 25.

[7] *Ibid.*, para. 24.

them in connexion with the United States proposal (A/CONF.80/C.1/L.38/Rev.1), namely either to recognize the settlement of disputes through arbitration or by recourse to the International Court of Justice in accordance with paragraph 1 of the proposed article, or to exclude compulsory jurisdiction by making the declaration provided for in paragraph 2.

11. For those States which were reluctant to agree to compulsory jurisdiction, adherence to the principle of free choice, which the draft admitted and apparently endorsed, would only be fully achieved by recognizing the need for making recourse to the conciliation procedure imposed by the draft voluntary.

12. In that connexion, it could be stipulated that if negotiation or any other procedure proved unsuccessful, the parties should attempt to settle the dispute by submitting it to conciliation. They should not, however, have a procedure imposed on them whereby certain compulsory elements were introduced, such as the intervention of the International Court of Justice, even in an advisory capacity, particularly since it was open to either party to the dispute to declare unilaterally that it would abide by the recommendations of the report of the conciliation commission.

13. In principle, his delegation agreed with the United States proposal, but considered that for it to gain general acceptance, paragraph 4 would have to make recourse to the conciliation procedure—the detailed rules for which were set out in the annex to the proposed article—subject to the joint wish of the parties. In any event, in order to produce a text which harmonised divergent views, his delegation fully supported the proposal to refer the matter to an *ad hoc* working group as suggested by the representative of the United Kingdom.

14. Nevertheless, having studied the conciliation procedure as proposed, his delegation wished to make a few comments on paragraph 5 of the annex to the United States draft. It conferred on the conciliation commission the power to recommend to the United Nations that an advisory opinion be requested from the International Court of Justice. His delegation felt that it was wrong to confer on a conciliation commission the power to make recommendations to organs of the United Nations. It should be accorded the power "to request" instead of "to recommend".

15. His delegation had several doubts, some as to the practical value of such a faculty in itself, and others of a more serious nature. A request to the International Court of Justice by the General Assembly or the Security Council for an advisory opinion should be a matter for discussion and should be subject to a vote. The decision to request an advisory opinion necessarily implied that such an opinion would be based on the merits of the case in respect of an ongoing dispute between two or more States. And although the Court's opinion might not be binding, the circumstances in which it would be given would weaken the force and nature of its advisory role. In the case of specific dispute, such an opinion would in effect amount to a non-executory judgment.

16. In addition, the opinion handed down would be addressed not to the conciliation commission, but to the United Nations body which had requested it. That gave rise to two questions. Was the United Nations body requesting that opinion to pronounce on it, or was its role to be confined to that of a mere intermediary, conveying the Court's decision to the commission?

17. Moreover, when the commission received the opinion, was it to abide by its terms or would it have the power to depart from them and establish some other basis for conciliation?

18. The possibility of recourse to the International Court of Justice had not been included in the annex to the Vienna Convention on the Law of Treaties and the Argentine delegation felt that the Conference should seek a solution which excluded from the procedure provided for any advisory opinion which in itself was alien to the conciliation method.

19. Mr. AL-OTHMAN (Kuwait) said the United States and Netherlands delegations were to be congratulated on their efforts to provide a possible solution to the problem facing the Conference.

20. The draft convention should form a complete unit, but at present it lacked one element, and that was an article on the settlement of disputes. Paragraph 1 of the United States proposal provided for all possible solutions at world level. Paragraph 2 contained no novel idea, because many international conventions already made the same provision. But it was nevertheless useful, as was the provision in paragraph 3. His delegation could not support paragraph 4, however, and considered that the Conference should adopt the same measures as provided for in the Vienna Convention on the Law of Treaties.

21. The amendment proposed by the Netherlands was similar to article 66 of the Vienna Convention on the Law of Treaties, but it could not be adopted until article 6 and paragraph 3 of article 33 were adopted. He fully supported the proposal by the United Kingdom representative that a text acceptable to all delegations should be worked out by an *ad hoc* working group.

22. Mr. DIENG (Senegal) said that his delegation would be willing to accept the inclusion of provisions or the settlement of disputes in all international conventions, on the express condition that the procedure laid down was pragmatic and took account of the fact that the international community could not, by its very nature, be as rigidly structured as an individual State. It would be a particularly serious omission not to incorporate provisions for the settlement of disputes in the articles under discussion, since most of those articles represented a fragile compromise reached after laborious efforts and were, therefore, likely to give rise to differences of opinion.

23. In view of the requirement for flexibility and pragmatism, his delegation was unable to accept the Netherlands amendment, for it provided for automatic recourse to the International Court of Justice, whereas the States members of the international community were

reluctant to accept the dominion of any organ. Futhermore, since the amendment was limited to articles 6 and 33 of the draft convention, it offered only a partial solution to what was a general problem.

24. The United States amendment represented an ingenious attempt to preserve both the principle of self-determination and that of continuity. He subscribed, however, to the comments of the representative of Italy[8] and of the United Arab Emirates[9] concerning the internal cohesion of the proposal. On the other hand, he did not subscribe to the presumption favourable to the International Court of Justice that the proposal contained. States parties to the future convention should have not only the possibility accorded to them by paragraph 3 of the proposal, but also the possibility of declaring at any time that they did not consider themselves bound by paragraph 1. His delegation was favourably disposed to the principle of recourse to conciliation, providing the parties concerned were able to retain full freedom in the choice of their representatives, the establishment of their mandates, and the schedule for the proceedings.

25. The suggestions concerning conciliation procedure contained in the United States amendment seemed to him, however, to depart too widely from the corresponding provisions of article 65 of the Vienna Convention on the Law of Treaties and of the annex to that instrument. He was not sure that, by the innovations it proposed, the United States delegation had found the best way of simplifying the problem or of obtaining the approval of the Committee. Paragraph 5 of the annex to the United States amendment seemed to provide, albeit in a veiled manner, for automatic recourse to the International Court of Justice, which was something his delegation could not accept. It was also to be noted that the paragraph said nothing specific about the weight which a conciliation commission should accord to an advisory opinion of the Court: was it not likely that the expression of a point of view by such an august body would considerably influence a commission's deliberations? Again the second sentence of paragraph 6 of the annex to the United States proposal represented an innovation, which he was not sure was appropriate, by comparison with the corresponding provision of the Vienna Convention on the Law of Treaties. Subject to those considerations, his delegation considered that the United States proposal could serve as a basis for discussion within an *ad hoc* working group to draft a compromise text.

26. Mr. AL-KHASAWNEH (Jordan) said it was his delegation's belief that international agreements ought to contain provisions for the settlement of disputes and that belief seemed to be shared by a large number of States, as could be seen from document A/CONF.80/5. The need for such provisions in the present draft convention had been felt by at least some of the members of the International Law Commission (A/CONF.80/4,pp. 14-15) and the question at issue within the Committee seemed to be not so much whether the provisions were required, as what their specific nature should be. His delegation agreed with much of what had already been said concerning the particular provisions of the draft articles that were most likely to give rise to disputes.

27. The Netherlands proposal was that which his delegation would ideally like to see in the draft convention. It was reasonable to expect States to show their good faith by accepting that their conduct under agreements that they ratified should be open to third party arbitration and adjudication. But, while its adoption would undoubtedly enhance the effectiveness of international law, the proposal must also be viewed in the light of the requirement to secure the widest possible participation in the future convention, and of the legitimate reservations of States with regard to compulsory jurisdiction, especially in relation to claims of an essentially political nature. He did not agree with the representative of India[10] that disputes relating to the application and interpretation of article 6 and article 33, paragraph 3, could be considered any more political than disputes in fields in which the authority of the International Court of Justice had already been recognized.

28. The United States proposal was worthy of special attention as being the more likely of the two draft articles before the Committee to gain general approval. Paragraph 1 of that proposal presumed that States parties accepted the principle of arbitration and the authority of the International Court of Justice, while paragraph 2 permitted them to refute that presumption at any time. That procedure represented an improvement on the provisions of article 66 of the Vienna Convention on the Law of Treaties. The United States proposal was also quite flexible, in that it made provision not only for arbitration, but also for negotiations and conciliation. He would leave discussion of the details of conciliation procedure to the *ad hoc* working-group which the United Kingdom representative had suggested should be established. He did, however, wish to state his agreement with the view of the representative of the United Arab Emirates that the final version of the article should give preference to recourse to the International Court of Justice over compulsory arbitration unless the parties otherwise agreed.

29. Mr. DUCULESCU (Romania) said that in the view of his delegation, it was very important that the provisions of the convention concerning the settlement of disputes in relation to State succession should be as flexible as possible, so as to take account of the reality of the modern world, which called for co-operation between sovereign States. What was required was a flexible procedure in which States could participate on the basis of their sovereign equality. That requirement could be met by insistence on negotiation as the first of the measures designed to bring about the settlement of any dispute.

30. It was the firm conviction of his delegation that even the most complex problems of international life, whether

[8] *Ibid.*, paras. 30-34.

[9] *Ibid.*, paras. 42-44.

[10] *Ibid.*, para. 10.

economic, political or juridical could and must be settled through negotiation. It was for that reason that his delegation wished direct negotiation between the parties concerned to remain the essential means of settling the differences of opinion relating to State succession.

31. In view of the advantages it offered over other means available to States for the settlement of pending issues, increasing recourse was being had to negotiation. It was therefore with justification that writers on international law referred to a true "principle of the precedence of negotiation". Negotiation—the first of the peaceful means envisaged by Article 33 of the Charter of the United Nations for the settlement of disputes—rightly applied both the concepts of sovereignty and equality of States and those of international co-operation and mutual advantage.

32. In the view of his delegation, the provisions for the settlement of disputes should be drafted so that they reflected the primacy of negotiations and the consensus of the parties to have recourse to every means of settlement.

33. In the light of those considerations, his delegation could not subscribe to the United States amendment. The very interesting draft resolution submitted by the United States in document A/CONF.80/C.1/L.51/Rev.2 had led his delegation to think that its latest amendment would begin by stressing that negotiations were the rule as regards the settlement of disputes. That, at any rate, was what must be done in the draft convention; the primacy of negotiations should be stressed in the body of the instrument while reference to conciliation should be made only, as the representative of Venezuela had suggested, in an optional protocol or annex.[11] If the possibility of recourse to conciliation was specifically mentioned in an article, it would then be necessary to give States parties to the convention the right to enter reservations to the article.

34. While appreciating the efforts of the Netherlands delegation to ensure the settlement of disputes, his delegation realized that it could not accept the proposed text, particularly since it made no provision for the primacy of negotiation and agreement by the parties. For those reasons, he found it unacceptable.

35. He supported the proposal that an *ad hoc* working group should be established to seek generally acceptable wording for a provision on the settlement of disputes.

36. Mr. GILCHRIST (Australia) said he would remind the Committee that his Government had acceded to the Vienna Convention on the Law of Treaties and had accepted its provisions for the settlement of disputes. There was clearly a great need to include in the draft articles under discussion some generally acceptable means of resolving disputes, for, as the representative of the United Kingdom had pointed out, there were at least 17 potential sources of uncertainty and conflict in the present text. Since it must be accepted as a fact of present day diplomatic life that some States had strong reservations about automatic reference to compulsory arbitration, his delegation agreed with that of Brazil that the Netherlands amendment was too rigid to gain general acceptance.[12]

37. The United States proposal, however, allowed for considerable flexibility in its operation, particularly by virtue of paragraphs 2 and 3. His delegation regarded as of great relevance and importance the comments by the United Kingdom representative that the mere existence of machinery for the adjudication of disputes, as an alternative to negotiation, would constitute a powerful incentive for parties to settle their disagreements between themselves by negotiation through the diplomatic channels. With regard to paragraph 2 of the United States proposal, his delegation also agreed with that of the United Kingdom,[13] that it was preferable to create a presumption that States would wish to be bound by paragraph 1 of the proposal unless they declared the contrary. His delegation hoped that the essential parts of the United States proposal would receive widespread support.

38. Such provisions for the settlement of disputes as the Conference might adopt should be an integral part of the future convention, rather than an optional protocol or annex. The representative of the United Arab Emirates had mentioned some valuable precedents in that respect. It should, naturally, be made clear that those provisions would apply equally to all States, whatever the category in which they could be considered to fall under the terms of the Convention.

39. His delegation would be willing to consider improvements to the United States proposal and saw merit in the establishment of a small group for a detailed study of those and any other relevant suggestions. It was convinced that generally acceptable provisions on the settlement of disputes were vital to the effective operation of the future convention.

40. Mr. RANJEVA (Madagascar) said that the question of the settlement of disputes was one of the main questions which arose in relation to the succession of States. It seemed to him that the "clean slate" principle constituted an obstacle to the institution of a mandatory procedure for such settlement, since the imposition of an obligatory course of action would limit the discretion of new States to accede or not to the treaties of their predecessors. That being so, and the necessary principle of the continuity of treaties notwithstanding, the Netherlands proposal must be ruled out as being too rigid. What his delegation would like to see was a very flexible procedure which would take into account both the "clean slate" and the continuity principles, but give priority to the former.

41. Having studied the United States proposal in the light of draft article 6, his delegation considered that it required the international community to make at least an indirect pronouncement on the acceptability under international law of the existence of a new State. It was not clear from the proposal, however, who was supposed to decide on the lawfulness of the succession. The proposal seemed to refer the matter to the International Court of Justice, but he

[11] *Ibid.*, para. 17.

[12] *Ibid.*, para. 57.

[13] *Ibid.*, paras. 18-24.

wondered whether the degree of political acceptance of that body was as yet such that its decisions would be effective. His delegation would have preferred the question of the settlement of disputes to be entrusted not to an institution which had not yet gained universal recognition, but to the international community as a whole, through the mechanism of negotiations, good offices and mediation, and, in the final instance, conciliation.

42. Paragraph 2 of the United States proposal seemed to make of arbitration a residual means of settling disputes and was therefore unacceptable for the same reasons as militated against the reference of disputes to the International Court of Justice.

43. In general, his delegation would prefer the mechanism for the settlement of disputes concerning succession with respect to treaties to be linked directly to the corresponding mechanism in the Vienna Convention on the Law of Treaties. It could see no justification for establishing any special mechanism for the immediate purpose, although it did not exclude the possibility that special provisions might be required when dealing with matters other than treaties. It fully supported the proposal that a special group should be established to see whether a solution might be found to the problem now before the Committee.

44. Mr. BJÖRK (Sweden) said his Government had repeatedly stressed the need to include rules for the settlement of disputes in the draft Convention. The reasons were self-evident but he would mention in particular that there were a number of concepts in the draft Convention which would undoubtedly give rise to disputes and that the Vienna Convention on the Law of Treaties contained similar rules. His Government would therefore have had no difficulty in accepting a mechanism for compulsory jurisdiction when consultation and negotiation failed. The Conference could not close its eyes to reality, however, and in principle, therefore, his delegation supported the United States proposal, which was flexible and was based on the corresponding provisions of the Vienna Convention on the Law of Treaties. It also supported the United Kingdom proposal that an *ad hoc* working group be appointed to draft a text that would meet with general acceptance.

45. Mr. RITTER (Switzerland) said that his Government, which regarded the settlement of disputes as an indispensable complement to respect for the rule of law, favoured a compulsory system of settlement–compulsory both in the sense that a State would be required to accept the institution of proceedings against it by another State, and in the sense that the award or judgment would of necessity be binding. On that basis, he would have had authority to state that his Government supported the proposal which provided for the system that came closest to absolute compulsion. There were, however, certain limits which could not be exceeded and he therefore preferred to say that his Government was prepared to go as far as the international community, as represented at the Conference, could agree to go.

46. The principle of free choice in the matter of settlement of disputes, though eminently worthy, should always remain at the service of an effective settlement and should never be allowed to become an obstacle to it. That meant that, while the parties should be free to choose the means of settlement best suited to a given situation, one party should not be allowed to persist in its preference for a method of settlement that had been tried but had failed. Once that happened, there was an obligation on the parties to seek another method. Moreover, a party should not be allowed to place an obstacle in the way of proceedings by denying the existence of a dispute.

47. Both the United States and the Netherlands proposals were equally acceptable to his delegation, although the former seemed better to reflect the requirements of the existing international community. He noted that the Netherlands proposal provided for a dual régime in respect of disputes, under both paragraphs (*a*) and (*b*), but wondered whether it would not be preferable to provide for a single régime.

48. As to the United States proposal, he shared the view that it was a little unusual in that it offered a choice between conciliation, on the one hand, and arbitration combined with a reference to the International Court of Justice, on the other. Experience had shown that, even where recourse was ultimately had to arbitration or some judicial procedure, conciliation could have great practical value as a first step. The United States proposal might therefore be improved if it were amended to provide that all parties should begin by embarking on a conciliation procedure.

49. The annex to the United States proposal was similar to article 85 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[14] an article which incorporated certain amendments introduced by the Swiss delegation with a view to strengthening the text prepared by the International Law Commission and to providing for simple and speedy methods of settling disputes. The question was whether those methods could be transposed beyond the confines of diplomatic law. The achievements of the 1975 United Nations Conference on the Representation of States in Their Relations with International Organizations, and the adoption of article 85 without opposition, nonetheless augured well for the outcome of the present Conference, since they showed that a solution could be reached by both the proponents and the adversaries of compulsory settlement.

50. Paragraph 5 of the annex to the United States proposal had caused some surprise among certain delegations and he too wondered whether such a provision had been included in any other international instrument, prior to the Vienna Convention on the Representation of States in Their Relations with International Organizations of a

[14] For the text of the Convention, see *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.

Universal Character Convention. The underlying principle had first been introduced in the International Law Commission's draft of the Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. It might therefore be advisable, in the continuing work on the peaceful settlement of disputes, to refer to the International Law Commission's preparatory work in that connexion, with a view to ascertaining its reasoning in the matter and to determining the significance which it had attached to the question.

51. Responsibility for the provisions of the final sentence of paragraph 6 of the annex to the United States proposal, which were also somewhat unusual, rested with the Swiss delegation, on whose initiative special machinery had been devised at the United Nations Conference on the Representation of States in Their Relations with International Organizations for the settlement of disputes in diplomatic law, with particular reference to conciliation procedures as they applied to disputes arising out of the representation of the sending State to an international organization situated in the host State. He would, however, hesitate to say whether such machinery could usefully be extended beyond that particular case.

52. He realized that the United States had not included in its proposal provisions similar to those of paragraph 8 of article 85 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, providing for any other appropriate procedure agreed by the parties, because the choice between conciliation and arbitration meant that there was now a guaranteed procedure for the settlement of disputes. He none the less considered, particularly where recourse was not had to compulsory conciliation as a preliminary step, that it would be useful to open the way for parties to disputes to adopt the means which seemed most appropriate to them in the circumstances.

53. Lastly, he agreed that the matter should be referred to a special *ad hoc* working group which, he would suggest should be presided over by the Chairman of the Committee.

54. Mrs. DAHLERUP (Denmark) said that, in her Government's view, the draft convention might well give rise to disputes that could not be solved by negotiation. It therefore endorsed the suggestion already made by certain members of the International Law Commission that provision should be included for the settlement of disputes.

55. Since Denmark recognized the compulsory jurisdiction of the International Court of Justice, her delegation would have had no difficulty in supporting the Netherlands proposal. At the same time, it appreciated the pragmatic approach of the United States proposal, which had aroused general interest. It trusted that, on that basis, the proposed *ad hoc* working group would be able to arrive at a satisfactory solution.

56. Mr. YACOUBA (Niger) said that any procedure for the settlement of disputes which embodied elements of coercion would obviously be self-defeating, and he knew of no international convention that made settlement by arbitration or legal proceedings compulsory in the case of a dispute arising out of the interpretation or application of its terms. The United States and Netherlands proposals were therefore a clear exception to the accepted rule that contracting States should be free to choose the procedure which appeared to them to be most suitable. Notwithstanding the saving clause in paragraph 2, the United States proposal would constitute a dangerous precedent and could disrupt the international legal order. It was his delegation's firm view that the future convention should not go beyond the terms of the Vienna Convention on the Law of Treaties so far as the settlement of disputes was concerned. That Convention provided for a faculty—and not an obligation—to choose among several possibilities available to States parties.

57. The conciliation procedure proposed by the United States would have had his delegation's sympathy but for the unduly restrictive character of its terms, in particular paragraph 4 and the second sentence of paragraph 5. However, while his delegation was unable to give its support to either of the two proposals, it was not opposed in principle to the inclusion in the draft convention of provisions for the settlement of disputes and it trusted that the proposed *ad hoc* working group would succeed in drafting a text which took account of the views expressed.

58. Mr. CASTRÉN (Finland) said his delegation agreed that the draft convention contained many vague terms which could give rise to differing interpretations, and that it should therefore be complemented by an adequate mechanism for the settlement of disputes arising out of its application. Negotiation and consultation, though very useful as a preliminary step, were not always successful and it would have been best to provide for compulsory arbitration or legal proceedings. Several States were not ready to adopt that method, however, and it was therefore necessary to think in terms of the less rigid procedure of conciliation.

59. Of the two proposals before the Committee, his delegation preferred that submitted by the United States, which was at once more realistic and more flexible. He noted, however, that paragraphs 4 and 5, and the last sentence of paragraph 6, of the annex to that proposal, relating to a proposed conciliation procedure, had been the subject of some criticism by certain delegations. As those provisions were not particularly important, they could perhaps be deleted. Alternatively, annex A could be replaced by the corresponding provisions of the annex to the Vienna Convention on the Law of Treaties.

60. Lastly, he endorsed the proposal that a small *ad hoc* working group be appointed.

61. Mr. DE VIDTS (Belgium) said his delegation considered it essential, in a convention that sought to codify the law on succession of States in the matter of treaties, to provide for a procedure for the settlement of disputes based on, or similar to, that laid down in the Vienna Convention on the Law of Treaties. It was therefore very much in favour of the proposal to appoint an *ad hoc* working group, which would certainly be able to arrive at an acceptable

solution on the basis of the proposals submitted by the Netherlands and the United States.

62. Mr. AL-NASHERI (Yemen) said he endorsed the remarks of the representative of the United Arab Emirates, and would have great difficulty in accepting either of the proposals submitted by the Netherlands and the United States. He agreed, however, that an *ad hoc* working group should be appointed with a view to finding an acceptable solution.

63. Mr. SMALLWOOD (Liberia) said his country, which had always favoured the settlement of disputes through negotiation, would welcome the inclusion in the draft convention of some mechanism for settlement along those lines. The Netherlands proposal, however, was wholly unacceptable to his delegation for the reasons already stated by other delegations, particularly in regard to paragraph (*a*), which provided for the automatic referral of disputes to the International Court of Justice when settlement through the normal diplomatic channels failed. His delegation, while more sympathetic to the United States proposal, would also have difficulty in accepting paragraphs 2 and 4 of the Annex to that proposal, which set forth a proposed conciliation procedure. It supported the proposal that the question be referred to an *ad hoc* working group and would suggest that the African group be represented by its Chairman, the representative of Niger, or by a person to be appointed by him.

64. Miss GRAINGER (New Zealand), supporting the proposal for the appointment of an *ad hoc* working group, said her delegation considered it vital to include in the draft convention some provision for a dispute settlement procedure. It had no difficulty with the Netherlands proposal but appreciated that that proposal went somewhat further than many delegations could accept. In the circumstances, it considered that the United States proposal offered a reasonable compromise.

65. Mr. NATHAN (Israel) said the inclusion of a dispute settlement clause in the draft convention was an obvious necessity and it sufficed to refer to article 6, article 33 (3) and to the many exception clauses to appreciate only some of the difficulties that were likely to arise.

66. The procedure adopted for the settlement of disputes should be realistic, to take account of the realities of the present-day international community and of its sensitivities, yet at the same time should be as effective as possible. In general, the United States proposal met those requirements.

67. So far as the proposed conciliation procedure was concerned, however, he would have preferred to follow, in whole or in part, the corresponding provisions of the annex to the Vienna Convention on the Law of Treaties, for the following reasons. In the first place, paragraph 1 of the annex to the United States proposal did not provide for the case where a State party to a dispute failed to designate a person to serve as a member of the conciliation commission. That omission could cause the entire conciliation procedure to be abortive; paragraph 4 had been included to fill the lacuna but it too might lead to very unsatisfactory results. Secondly, the last sentence of paragraph 5 which provided for an advisory opinion to be requested of the International Court of Justice, would make the conciliation procedure unduly cumbersome, subject it to consideration by political organs such as the United Nations General Assembly, and introduce certain elements of compulsory third party procedure into the conciliation process by the back door as it were. He did not think that was the intention of the draftsmen. Thirdly, he failed to understand the meaning of the last sentence of paragraph 6. If the conciliation commission decided in favour of one party, that party would undoubtedly abide by its recommendations–but without legal effect, if the losing party did not do likewise. In his view, the corresponding provisions of the Vienna Convention on the Law of Treaties were of a far more forceful character. Furthermore, the annex to that Convention provided for interim measures to be indicated by the conciliation commission and also for third parties to a treaty to be invited to express their opinion before such a commission. Both those provisions were extremely useful and should certainly be included in the draft convention.

68. Lastly, while the Netherlands proposal was deserving of every praise for its idealistic approach, it had to be recognized that the international community was not as yet ready for such far-reaching provisions.

69. Mr. MARESCA (Italy) said he agreed entirely that machinery for the settlement of disputes was, in a sense, a guarantee of the rule of law.

70. The conciliation procedure envisaged differed somewhat from the traditional understanding of that concept, in that it was at once compulsory, in the sense that the parties would be required to bring their dispute before a conciliation commission, and also optional, in the sense that the findings of the commission would not be binding on the parties although they would have considerable moral force.

71. The CHAIRMAN said that, if there was no objection, he would take it that the Committee agreed in principle to the appointment of an *ad hoc* working group to consider the inclusion in the draft convention of a provision on the settlement of disputes. The exact composition of the *ad hoc* working group could be decided at the beginning of the following week.

It was so agreed.

The meeting rose at 6.10 p.m.

46th MEETING

Monday, 7 August 1978, at 10.40 a.m.

Chairman: Mr. RIAD (Egypt)

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