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Summary record of the 1137th meeting

Topic:

Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-

1971, **vol. I**

1137th MEETING

Thursday, 15 July 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 to 3; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.169; A/CN.4/L.171; A/CN.4/L.174 and Add.2 and 3)

[Item 1 of the agenda]

(resumed from the previous meeting)

THIRD REPORT OF THE WORKING GROUP *(continued)*

ARTICLE 81 (Consultations between the sending State, the host State and the organization) and

ARTICLE 82 (Conciliation) *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of articles 81 and 82 as they appeared in the Working Group's third report (A/CN.4/L.174/Add.3).

2. Mr. USHAKOV said that the Working Group agreed that the words "among the participating States", in the first sentence of article 82, paragraph 6, should be deleted.

3. Mr. REUTER said he could not agree to the deletion of the last sentence in article 82, paragraph 6, as had been intimated by Mr. Kearney at the previous meeting.[1] He would suggest that the sentence be restored.

4. Nor could he accept the substance of the first sentence of paragraph 6, since the entire article was based on the assumption that the dispute was between States and that the Organization was not a party to it. The sentence should read: "If the States concerned have not reached agreement...". The present wording was unacceptable.

5. With regard to the words "*à l'occasion de la conférence*", at the end of the French version of paragraph 7, which Mr. Ushakov found unsatisfactory as a rendering of the English "in connexion with",[2] it was hard to find anything better, since all the possible alternatives posed problems.

6. Mr. CASTRÉN said that the Working Group had submitted an admirable text for articles 81 and 82, which suitably completed the draft articles by making provision for the settlement of disputes arising out of their application and interpretation, as several Governments, as well as several members of the Commission, had requested. He had no difficulty in accepting the wording of articles 81 and 82, subject to the drafting changes which had been suggested.

7. With regard to the relationship between the two articles, they complemented each other well; both were important, but the emphasis should be placed on the compulsory conciliation procedure, since consultations could always be organized without difficulty, even in the absence of any express provision. The Organization played an important role in consultations; the fact that in the conciliation procedure it had some administrative functions should not affect the role it played in the consultations.

8. With regard to Mr. Reuter's comments at the previous meeting on article 82 paragraph 7,[3] he thought the paragraph was not only useful but also acceptable juridically. Even if the conference was not a juridical person, that did not prevent it from taking the necessary decisions with regard to the procedure to be followed for the settlement of disputes arising in connexion with the conference, and from doing so through its competent organs, in the first instance the General Assembly, which in addition could delegate its powers to a certain extent.

9. Finally the last sentence of article 82, paragraph 6, which appeared in the text by mistake, was not only redundant, since it was self-evident that the report of a conciliation commission would not bind the parties, but also dangerous, since mention of that fact might diminish the interest of States in the conciliation procedure.

10. Mr. YASSEEN said that article 81, which provided for a consultation procedure, with the intervention of the Organization, and which should be capable of settling most disputes, was admirable.

11. Article 82, on the other hand, was unsatisfactory because the conciliation procedure for which it provided, as a subsequent stage to the consultations, doubtless by analogy with the law of treaties, was little else than a more formal process of consultation and would be unlikely in practice to be more effective than the consultation procedure itself. There were good reasons for thinking that a dispute which was not settled by consultation would not be settled by conciliation. A different procedure should therefore be envisaged.

12. The analogy with the law of treaties was inappropriate, since the Organization which was the subject of the draft articles was not to be found in treaty relations and so could not intervene in disputes between States with regard to a treaty. Most problems referable to treaty law were bilateral, whereas problems arising

[1] See 1136th meeting, para. 14.

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

[3] *Ibid.*, paras. 51 and 52.

in relations with international organizations were multilateral, since they concerned most or all of the member States of international organizations.

13. The recourse to the International Court of Justice for an advisory opinion, provided for in article 82, paragraph 5, meant that the General Assembly would have to consider the question, since its authorization was required. That was not a practical solution, quite apart from the fact that such a procedure was scarcely commensurate with the minor nature of the matters that would require settlement.

14. The wording of pararagraph 6 did not correspond with the concept of conciliation, which implied not an agreement being imposed but simply the parties accepting or rejecting the solution proposed. In addition, from the drafting point of view, it was incorrect to speak in the penultimate sentence of a time-limit for the preparation of the report, since earlier in the paragraph it was provided that the Commission should merely prepare its report "as soon as possible", which did not imply any time-limit.

15. Paragraph 7 was unacceptable from the technical point of view. Whether or not the conference was a juridical person, it could not formulate rules enforceable against States on a question which did not concern the conference but which arose in connexion with it. For example, if a conference decided that a dispute between a participating State and the host State should be referred to the International Court of Justice, such a decision would not be enforceable against the host State.

16. He therefore questioned the value of article 82 and feared that the Commission's concern to provide for a conciliation procedure might, as in the League of Nations days, result in the creation of machinery which would remain ineffectual.

17. Mr. ELIAS said that article 81 was quite acceptable to him. He supported Mr. Tammes' proposal that the words "between one or more sending States and the host State" be deleted,[4] but would be prepared to accept the text as it stood.

18. As for article 82, despite the Commission's decision at the previous meeting to replace, in paragraph 3, the term "Executive Head" by the words "chief administrative officer", and to drop the proposal for a new subparagraph 3 *bis* for paragraph 1 of article 1,[5] a number of difficulties still remained.

19. The proposed conciliation commission was conceived as a permanent body with power to request, through the General Assembly of the United Nations, an advisory opinion from the International Court of Justice regarding the interpretation or application of the draft articles. As he saw it, Article 65 of the Statute of the International Court of Justice did not provide any basis for such a procedure. If that proposal were adopted, it would be necessary to change the rules of procedure of the International Court of Justice in order to make it possible to set in motion the procedure envisaged in the second sentence of paragraph 5 of article 82.

20. With regard to the conciliation procedure, he noted with satisfaction that the Working Group had reached unanimous agreement on a simple procedure. The powers conferred upon the proposed conciliation commission, including that of extending time-limits, were consistent with the permanent character of the proposed institution. He hoped the Commission would be able to agree on the proposed scheme, so that it could be submitted in due course to a conference of plenipotentiaries, but a number of problems could arise. For example, if either of the two parties concerned, especially the host State, refused to co-operate, it was difficult to see how the procedure of obtaining an advisory opinion from the International Court of Justice could be relied on to effect a settlement. As for disputes arising out of conferences, it was more than probable that the conference would be over before the International Court of Justice had time to give an advisory opinion.

21. In paragraph 1, he suggested that the concluding words, "by giving written notice to the other States participating in the consultations and to the Organization", be replaced by the words "by giving written notice to the Organization and to the other States participating in the consultation", thus reversing the order of reference.

22. Mr. ROSENNE said the Working Group had produced a text which represented an important contribution to enabling the Commission to perform one of its essential roles as they had developed in the course of time, that of acting as a catalyst from points of departure which at first sight might seen irreconcilable. The observations which he was about to make were intended to draw attention to a number of problems which needed to be resolved before the Commission could present to the General Assembly, to Governments, and in due course to a conference of plenipotentiaries, a well-thought-out basis for discussion and thus allow the international community to reach a viable solution to a difficult problem.

23. The first problem was that of determining the States to which it was intended that articles 81 and 82 should apply. One possibility was that those articles should apply only to the States parties to the convention that would emerge from the present draft articles. Another was that they should apply to all States that were members of the Organization, regardless of whether they were parties to the convention or not. A third possibility was that they should apply to all States coming within the scope of the convention, States which would vary from organization to organization, for it should be remembered that the draft articles dealt also with the relations between the Organization and non-member States. It was also possible to envisage that those matters should be left to be governed by the rules of international law on the subject of treaties and third States; he was inclined to feel that such a solution was perhaps the best.

24. With regard to article 82, he wished to raise a question which was only partly one of drafting, since it also involved a question of principle. In his view, article 82

[4] *Ibid.*, para. 21.

[5] *Ibid.*, para. 45.

should include a provision on the lines of the new paragraph 3 which had been proposed in the Special Rapporteur's working paper on the question of the inclusion in article 50 of a provision on the settlement of disputes.[6] The additional paragraph would specify that the provisions of article 82 were without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States or between States and international organizations.

25. He did not agree with the statement by the Chairman of the Working Group at the previous meeting, that the matter was covered by the provisions of article 4.[7] That article contemplated agreements on the subject of the representation of States to international organizations; it was not intended to contemplate such agreements as the general treaties of conciliation, arbitration and judicial settlement concluded by Switzerland with a number of countries, including his own. The problem was one of the application of successive treaties and it would be useful to clarify the matter by means of a provision on the lines of that which had been proposed by the Special Rapporteur and which he had already referred to. Such clarification was particularly necessary in the light of the fact that, as stressed at the previous meeting by the Chairman of the Working Group, the proposed conciliation procedure was intended as a procedure between States[8] a view which he entirely accepted.

26. With regard to paragraph 5, it was clear that there was no analogy between its provisions and those of article 66 of the 1969 Vienna Convention on the Law of Treaties and the Annex to that Convention. In view of the difference in substance, no such analogy was possible, but the Working Group had of course drawn inspiration from the language of the 1969 Vienna Convention. In that spirit, he would himself suggest that, in the first sentence of paragraph 5, the word "decisions" be replaced by the words "decisions and recommendations", which was the formula used in the last sentence of paragraph 3 of the Annex to the 1969 Vienna Convention.[9]

27. On the question of the authorization of the General Assembly for requesting an advisory opinion from the International Court of Justice, it was his understanding that the Working Group had been thinking in terms of Article 96(2) of the Charter, which provided that specialized agencies, and organs of the United Nations other than the General Assembly Council, might be authorized by the General Assembly to request advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities. It was also his understanding that the Working Group was in favour of a general authorization. If that were the case, the Commission should exercise great caution before it considered introducing, even in a commentary, the far-reaching idea of recommending that a conciliation body of three members should be authorized to request an advisory opinion of the International Court of Justice.

28. In the first sentence of paragraph 6, it was essential to retain the idea which the words "among the participating States" endeavoured to express, though the drafting of the passage was open to criticism.

29. He had misgivings regarding the use of the term "resolution" in that same sentence and of the words "the Commission's findings upon the facts and the law" in the second sentence of paragraph 6. That wording was unsatisfactory, especially if linked with the use of the word "decisions" in the first sentence of paragraph 5.

30. The deletion of the final sentence of paragraph 6, "The report shall not be binding upon the participating States or upon the Organization", was a drafting matter but the idea which the sentence expressed should find a place somewhere in the draft.

31. With regard to the conciliation procedure in paragraph 6, he had noted two small omissions which he would be prepared to accept if they were intentional. The first was that no indication was given as to who was to bear the cost of the proceedings; that point could be left out of the draft if the Commission so desired. The second was the question of a possible quasi-intervention in conciliation proceedings, a very difficult question which had been discussed at length during the Vienna Conference on the Law of Treaties. There again, the Commission might prefer not to deal with the question.

32. With regard to paragraph 7, he shared the already expressed view that it was basically not relevant; the essential ideas which it attempted to cover probably appeared elsewhere. In the case of a conference of any length, the matter would in any case be covered in the agreement which was invariably concluded between the Organization and the host State before the conference. The question therefore came within the scope of the provisions of article 4 and could be explained in the commentary.

33. Mr. EUSTATHIADES said the Working Group was to be commended for laying before the Commission a set of provisions which formed an acceptable basis for the consideration of a question which could not be overlooked in the draft articles. Those provisions owed much to Mr. Kearney's proposals,[10] which had the advantage over those of the Special Rapporteur[11] of making conciliation compulsory and establishing the procedure.

34. The wording of articles 81 and 82 was on the whole satisfactory, and the Commission would do well to adhere to the general approach which they represented, despite certain differences of opinion and the one or two problems which arose.

35. Article 81, in particular, raised the virtually insoluble problem of the States to which the future convention would apply. That problem arose at the stage of article 81, since at the conciliation stage, represented by

[6] See document A/CN.4/L.171, para. 6.

[7] See 1136th meeting, para. 57.

[8] *Ibid.*, para. 9.

[9] *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 301.

[10] A/CN.4/L.169.

[11] A/CN.4/L.171.

article 82, the question of which States would be parties to the dispute was already settled. The answer which sprang to the jurist's mind was that article 81 could apply only to the States which would be parties to the future convention, since the article provided that the consultation procedure was applicable to disputes arising out of the application or interpretation of the "present articles". The question would appear in a different light if the draft articles were adopted in the form of a recommendation, as in the case of the Convention on Special Missions. At all events, the question needed to be raised.

36. With regard to the conciliation procedure provided for in article 82, it would appear that it was intended to deal merely with minor disputes for which the prior consultation procedure had proved unsuccessful. The only other disputes that could arise would be serious disputes relating to political rather than legal problems, in which case it would be inappropriate to resort to the advisory opinion of the International Court of Justice and preferable to rely on agreements between the parties concerned, in particular between States and international organizations, as the Special Rapporteur had provided.[12] However, such a solution was only to be contemplated in exceptional cases, for which provision admittedly had to be made, but without encouraging the practice of concluding agreements for the settlement of routine disputes, for which consultations and conciliation should suffice.

37. The reservation for a procedure established in the Organization, provided for in article 82, paragraph 1, had been rightly criticized by Mr. Reuter.[13] If what was contemplated was a procedure in which the Organization itself could intervene as a party, for example under a headquarters agreement, that should be clearly stated. As it was worded, the paragraph was open to question and did not even cover the idea expressed in paragraph 3 of the article 50 proposed by the Special Rapporteur[14]

38. He supported Mr. Elias' proposal that, at the end of paragraph 1, the Organization should be mentioned before the participating States.[15]

39. He agreed with Mr. Reuter that it was inappropriate to provide, in paragraph 3, that the chairman of the conciliation commission might be appointed by the Organization[16] since, irrespective of whether it was a party to the dispute—and it was not clear exactly when it became a party—conciliation was in its general interests.

40. The time-limits stipulated in paragraphs 1 and 6 were excessive, because it was easy to arrange consultations, with all the parties on the spot, and the minor nature of the disputes which would require settlement would not involve a lot of preparatory work. Moreover, it was preferable to encourage the parties to expedite matters. It would therefore be better either to stipulate shorter periods of time or else to speak of "a reasonable period of time".

41. With regard to paragraph 6, if the words in the first sentence, "among the participating States", were deleted, as had been proposed,[17] it was difficult to see from whom the Commission would have to secure agreement. It would be more logical to say either "If, within [a period to be stipulated] no agreement has been reached on a settlement of the dispute...", which preserved the idea of agreement without specifying between whom; or, in more general terms, "If the dispute has not been settled".

42. With regard to the contents of the report of the conciliation commission, the words "upon the facts and the law" in the second sentence of paragraph 6 should be deleted, since the Commission might not necessarily have to find on a point of law and might be called simply to establish facts. However, if the present wording was retained, the words "as the case may be" should be added after the words "the law".

43. He reserved his position with regard to the deletion of the last sentence of the paragraph, which, the Commission had been told, had appeared in the text by mistake.[18]

44. At the previous meeting, Mr. Reuter had criticized the fact that article 82, paragraph 7, appeared to endow a conference with legal personality.[19] He himself agreed with Mr. Kearney that the draft articles should make it possible for disputes arising in connexion with the conference to be settled without delay and without recourse to lengthy procedures.[20] The provision in paragraph 7 was therefore appropriately placed in article 82, although its wording could be improved.

45. Mr. ROSENNE said that he would like to make it clear that when he had raised the question to whom the conciliation procedure was intended to apply,[21] he had not been referring to the broad question to whom the draft articles as a whole should apply. He hoped the Working Group was clearly aware of what it intended to say by the words in article 82, paragraph 1, "... it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may be established in the Organization".

46. Mr. RUDA said that he had certain doubts about articles 81 and 82. In particular, he had doubts about the exact role of the Organization in the consultation procedure provided for in article 81. If the dispute was between a sending State and the host State, it would seem logical that the process of conciliation should be exclusively between those two parties. The introduction into that article of the "Organization" seemed to add an element of confusion, since the Organization might be represented by its most important organ, such as the

[12] *Ibid.*, para. 6.
[13] See 1136th meeting, para. 53.
[14] See document A/CN.4/L.171, para. 6.
[15] See para. 21 above.
[16] See 1136th meeting, paras. 49 and 50.
[17] *Ibid.*, para. 16.
[18] *Ibid.*, para. 14.
[19] *Ibid.*, para. 51.
[20] *Ibid.*, para. 56.
[21] See para. 23 above.

General Assembly, or by its chief administrative officer. He would suggest, therefore, that the final phrase in that article, "or of the Organization itself" be deleted.

47. Mr. Kearney had said that article 4 covered that type of situation by stating: "The provisions of the present articles (*a*) are without prejudice to other international agreements in force between States or between States and international organizations of international character". He would point out, however, that the case of the settlement of disputes within the Organization was also provided for in article 3, which stated: "The application of the present articles is without prejudice to any relevant rules of the Organization or to any relevant rules of procedure of the conference". If specific mention were made of article 4, therefore, article 3 should be mentioned as well.

48. With respect to article 82, paragraph 3, he shared Mr. Reuter's doubts about the advisability of entrusting the chief administrative officer of the Organization with the power to appoint a member of the conciliation commission, since that officer might not possess the necessary degree of impartiality. He would prefer that that power be entrusted to some such person as the President of the International Court of Justice.

49. With regard to paragraph 5, he supported Mr. Rosenne's suggestion that the word "decisions" in the first sentence be replaced by the words "decisions and recommendations".[22] He also had some doubts about the second sentence, which stated that the Commission, with the authorization of the General Assembly, could request an advisory opinion from the International Court of Justice regarding the interpretation or application of the present articles.

50. He shared Mr. Reuter's views concerning paragraph 6.

51. He also shared Mr. Reuter's doubts about paragraph 7, which only complicated the conciliation procedure in general and would be better left out.

52. Mr. REUTER said that he wished to define his position, but in a constructive spirit. To take first the points he regarded as secondary, he noted Mr. Kearney's view that article 4 provided an adequate safeguard for treaty provisions in bilateral agreements between States.[23] Since that safeguard also applied to procedures instituted within the Organization, the latter received an enhanced status by being expressly mentioned in article 82, paragraph 1. However, he was not opposed to that formulation.

53. He maintained his position with regard to article 82, paragraph 7, and noted with satisfaction that Mr. Yasseen, Mr. Rosenne and Mr. Ruda all shared his view. However, he was prepared to vote for the paragraph even though he found it ill-conceived.

54. Finally, although the beginning of article 82, paragraph 6, was rather clumsily drafted, a circumstance which to some extent affected the actual nature of the procedure, he could accept the paragraph, at a pinch, in view of the drafting problems which had been pointed out.

55. There were two very important points, however. First, with regard to the intervention of the chief administrative officer of the Organization provided for in article 82, paragraph 3, it had been said that the entire draft was based on the idea that, from a formal point of view, the disputes being dealt with were in fact disputes between States and that the article was not concerned with disputes between States and the Organization. But while he endorsed that view, he would point out that the reality was rather different, so that certain precautions were necessary. He therefore proposed the addition at the end of that paragraph of a sentence which might be worded: "If he considers it appropriate, the chief administrative officer of the Organization may request the President of the International Court of Justice to make the above appointments".

56. For the Organization had two courses open to it. It could either take a definite stand in the consultations, as in the Santiesteban case discussed in the Secretariat's study of the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities,[24] or again as in the case of the building for the Chinese delegation to UNESCO, where the Director-General of UNESCO had taken a vigorous stand against the French Government at the request of UNESCO's Executive Board.[25] Or, if relatively unimporant issues were involved, such as an untimely alcohol test or a case of bigamy during an interminable conference, it could refrain from intervening in the consultations altogether. If it adopted the first course, its chief administrative officer would obviously not take advantage of his powers and appoint a third member who supported his views; on the contrary, he would take care to appoint the most impartial chairman possible. From the chairman's point of view, however, it would be a little embarrassing if the person responsible for his appointment had played a part in the case itself, and it would certainly be preferable for the chief administrative officer himself, if he were relieved of such a burden and allowed to transfer the responsibility for the appointment of the chairman to the International Court of Justice.

57. With regard to the last sentence of article 82, paragraph 6, which the Working Group had finally decided to delete and which stated that "The report shall not be binding on the participating States or upon the Organization", the Working Group seemed to have been looking for a quasi-arbitral conciliation formula. He had no objection to a formula of that kind, but a political question was involved, namely, just how far to go. Also, the sentence to be deleted had an unfortunate pyschological effect.

[22] *Ibid.*, para. 26.

[23] See 1136th meeting, para. 57.

[24] See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 172-173.

[25] *Ibid.*, pp. 202-203.

58. However, if it was intended to emphasize that conciliation proper was meant, it should be remembered that the word "conciliation" was occasionally employed even in cases where such a procedure had mandatory effects. In any case, it was clear from the text proposed that those responsible for it had sought to set up a fairly firm régime, with at least the appearance of giving rise to obligations. If it was possible to go further than conciliation pure and simple, it might be well to base the provisions in question on the draft convention on international liability for damage caused by space objects,[26] article XIX, paragraph 2 of which provided that, when the decision of the claims commission was not binding, "the Commission shall render a final and recommendatory award, which the parties shall consider in good faith". If even that could not be said in article 82, it might be better to say nothing at all.

59. Mr. AGO said that he would start with a few general observations. First, he would say to those members of the Commission who thought that article 82 should have gone as far as providing for arbitration, and even for the compulsory jurisdiction of the International Court of Justice, that although the system proposed did not fully meet his wishes, he had decided to accept it because it was the only solution which seemed likely to secure the approval of the Commission as a whole.

60. He had the impression from the discussion that an insufficiently sharp distinction had been drawn between mere consultations and conciliation procedure. Consultations had nothing to do with any procedure. Consultations meant simply holding discussions. Conciliation procedure was quite a different matter. It was a procedure in the formal sense, whose specific purpose was to reach a settlement of the dispute, even if, in the last resort, that settlement depended on its acceptance by the parties. Thus the conciliation procedure provided for in article 82 in no way duplicated the consultations provided for in article 81.

61. Furthermore, there was at present a definite trend in favour of conciliation procedures, as evidenced by the Vienna Convention on the Law of Treaties and the draft convention on international liability for damage caused by space objects. Even if some thought that the draft did not go far enough, at least it made a start, and that was something.

62. With regard to the scope of the provisions, the procedure would obviously be binding only on the States to the convention. It was also certain, though, that once the convention had entered into force, international organizations would endeavour to secure the greatest possible number of accessions to it and, even if the States involved in a dispute were not parties to the convention, there would be nothing to prevent them from agreeing *de facto* to the operation of the procedure which the convention set up. The system proposed might therefore have repercussions beyond the circle of States parties. But that was only his personal hope, and in no way an acknowledgment that there was any legal obligation on States which did not become parties to the future convention.

63. At the same time, it was vitally important to safeguard the procedures established by existing bilateral and multilateral agreements, because those procedures might be more advanced and provide for arbitration, or even for the compulsory jurisdiction of the International Court of Justice. He did not think that article 4 offered a sufficient safeguard in that respect, since it related essentially to conventions concerning representation of States in international organizations in general rather than the settlement of disputes. Article 82 should therefore include an express proviso of the kind which the Special Rapporteur had proposed.[27]

64. To turn to a few points of detail, he was opposed to the deletion, from the first line of article 81, of the words "between one or more sending States and the host State". Those words limited the scope of articles 81 and 82 by excluding disputes between a State and the Organization, and to delete them would only create confusion.

65. He was also opposed to the deletion of the concluding words of the article, "or of the Organization itself" because the Organization could play a useful role in encouraging the parties to meet it for consultations.

66. With regard to the procedure for the appointment of the chairman laid down in article 82, he had absolutely no doubt that the Organization's chief administrative officer would be completely objective. For example, the Director-General of the ILO was responsible under several international agreements for appointing the chairmen of arbitral tribunals or conciliation commissions, as the case might be, and the parties had always found his choice excellent. It was true, though, that where the dispute was one where a settlement was to the Organization's interest, or where the Organization had taken a definite stand in consultations, it was desirable from the point of view of the chief administrative officer himself, that he should be able to delegate the appointment of the chairman to the President of the International Court of Justice.

67. As far as the advisory opinion of the International Court of Justice was concerned, Article 96 of the Charter and Article 65 of the Court's Statute made authorization by the General Assembly indispensable. It had been suggested that such authorization might be given once and for all. That solution would clearly have the advantage of expedition, but it was scarcely compatible with the fact that in principle each dispute would be submitted to an *ad hoc* commission. Although the General Assembly was free to refuse its authorization, it was difficult to see why it should.

68. The wording of paragraph 6 suitably expressed the idea that the settlement of the dispute was dependent on the agreement of the parties, since the conciliation commission confined itself to making recommendations.

[26] A/AC.105/94.

[27] See document A/CN.4/L.171, para. 6.

69. The English version, "resolution of the dispute", of the phrase "*solution du différend*" which was used in the French version, was possibly a little ambiguous.

70. It was certainly psychological reasons which had led the Working Group to decide on the deletion of the last sentence of the paragraph. Obviously there could be no settlement without the agreement of the parties, but the parties themselves were perfectly aware of that and it was inappropriate to remind them of the fact in an express provision.

71. If the last sentence were to be kept, however, he would not be opposed to the addition, as suggested by Mr. Reuter, of a sentence to the effect that the parties should consider the commission's report in good faith.[28] That was a minimal condition to require of the parties. It was important that they should not go into a conciliation procedure with the fixed intention of disregarding the commission's recommendations. Conciliation sometimes came very near to arbitration, of course, and it was striking to note the variety of language employed in treaties in connexion with it. In any case, it was a constructive step to move towards a conciliation procedure which tended, however slightly, in the direction of arbitration.

72. Perhaps the article should even provide that the conciliation commission might recommend in its report that, if the dispute remained unsettled owing to the failure of the parties to agree on the commission's recommendations, it should be submitted to arbitration or to the jurisdiction of the International Court of Justice. The conciliation commission would naturally be free to make such a recommendation in any case, but it might be useful to say so.

73. Lastly, paragraph 7 was not as important as some members seemed to think. In view of the inevitable delays attaching to conciliation procedures, the time-limits stipulated were always too short and it was always necessary to ask for extensions; a conciliation procedure was therefore unlikely to succeed within the relatively short life of a conference. That might be regrettable, both for minor issues and for urgent problems such as questions of privileges and immunities. The Working Group had therefore decided to include the proviso which paragraph 7 represented.

74. Mr. ALCÍVAR said that he had serious reservations about the form of arbitral conciliation suggested by Mr. Ago. He would prefer to keep the text of article 82, paragraph 3, as it stood.

75. Mr. CASTRÉN said that in his view paragraph 6 did not confuse conciliation proper with arbitration. There was no ambiguity.

76. Although the word "decision" appeared in paragraph 5, it was clear from paragraph 6 that the commission made recommendations which were not binding upon the parties.

77. With regard to paragraph 7, Mr. Ago and Mr. Eustathiades had shown that the periods of time involved in the conciliation procedure were too long for a conference, and the usefulness of the provision was therefore undeniable.

78. Mr. TABIBI said that, after listening to Mr. Ago, he was prepared to accept the basic régime for consultations and conciliation provided for in articles 81 and 82. He himself would have preferred a compulsory procedure, such as arbitration or reference to the International Court of Justice, but he realized that the present text represented a compromise.

79. He agreed with Mr. Rosenne that there was no analogy between the present articles and article 66 of the Vienna Convention on the Law of Treaties and the Annex to that Convention.[29]

80. He was somewhat concerned about the suggestion that the General Assembly should authorize the conciliation commission to request an advisory opinion from the International Court of Justice; it would be much better if the General Assembly itself made that request directly to the Court.

81. Lastly, since paragraph 7 of article 82 was not part of the conciliation procedure set forth in the preceding paragraphs, it might be more appropriately embodied in a separate article 23.

82. The CHAIRMAN suggested that, if there were no objection, the Commission refer articles 81 and 82 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.

The meeting rose at 1.10 p.m.

[28] See para. 58 above.

[29] See para. 26 above.

1138th MEETING

Friday, 16 July 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Elias, Mr. Eustathiades, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Yasseen.