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A/CN.4/SR.1595

Summary record of the 1595th meeting

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-

1980, vol. I

54. With regard to the effectiveness of conciliation, Mr. Jagota had rightly drawn attention to one favourable precedent. Actually, nobody yet had any clear idea of what conciliation was, for the procedure was not very well defined and practice had hardly more than a dozen cases to show.

55. The most important aspect of the Vienna Convention concerning that point was that it attributed the central role to the Secretary-General of the United Nations. If the Commission decided to set up some general conciliation machinery, it would have to be very cautious about the role of the Secretary-General, for all international disputes involved an international treaty, and the future machinery would therefore become applicable to all future disputes. The discussions seemed to show that the Commission wished to adhere to the main lines of the machinery established by the Vienna Convention.

56. The Chairman, speaking as a member of the Commission, had asked several questions that broadened the horizon of its work. The problem of parallel procedures touched on extremely complex subjects, which it might be better to consider in the Drafting Committee rather than in plenary. Concerning the other points, he (Mr. Reuter) thought that the report might mention the possibility of specific procedures for certain specified cases. He added that the decision on the subject of the annex would necessarily have repercussions on the drafting of draft article 66 and the commentary thereto.

The meeting rose at 1.05 p.m.

1595th MEETING

Wednesday, 21 May 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

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

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

[Item 3 of the agenda]

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

ANNEX (Procedures established in application of article 66)[1] (*continued*)

1. Mr. REUTER (Special Rapporteur), introducing section I of the draft annex, said that the text as a whole called for few additional comments.

2. In his view, the question whether a distinction should be made between two types of case, as in the draft articles, or three types of case, as suggested by Mr. Ushakov at the previous meeting, should be considered when the Commission discussed section II of the annex.

3. Section I merely reproduced the provisions of the Vienna Convention.[2] The heading of the section in the draft would certainly have to be amended and subsequently brought into line with the final heading of section II, and should be as concise as possible.

4. Mr. Ushakov had raised an important point, and it would be for the Commission to decide whether it should depart substantially from the Vienna Convention by dispensing with the provision concerning the list of conciliators or whether to keep the reference to the list. If the reference to the list was dropped, the States, the Secretary-General of the United Nations and the President of the International Court of Justice would be given full latitude; that would raise no great difficulty from the merely technical viewpoint, but there might be two major objections: in choosing that course the Commission would be departing from the Vienna Convention and, at the same time, from the general trends in the matter of conciliation and arbitration as reflected, *inter alia*, in the most recent draft texts of the Third United Nations Conference on the Law of the Sea, which provided for conciliation machinery based on a list of conciliators.[3]

5. The question of the number of lists, if any, should preferably be considered in connexion with section II of the annex.

6. He added that a number of members of the Commission had rightly expressed the view that the discussion on section I of the annex should offer them an opportunity for making some additional observations on the problem of parallelism.

7. Mr. RIPHAGEN said that, during the discussion of draft article 66 (1589th and 1590th meetings) and the draft annex, he had been struck by the paradox that, as international lawyers, the members of the Commission were used to the situation in which sovereign States unilaterally determined the extent of their obligations under international law and even the extent of the obligations of other sovereign States under international law and then drew therefrom conclusions concerning their own conduct. However,

[1] For text, see 1593rd meeting, para. 58.

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

[3] "Informal Composite Negotiating Text/Revision 2" (see 1586th meeting, foot-note 10), annex V.

now that the members of the Commission had taken the step forward of allowing an impartial body to play a role in determining how States should act in the case of disputes with other States, they were suddenly frightened of parallel procedures and of the possibility that different impartial bodies might express different opinions.

8. It was, however, quite natural that the settlement of a dispute should be a bilateral affair—a matter of deciding between two conflicting views resulting from a specific situation and determining the resulting legal relationship between the two parties to the dispute. It was also quite natural that both the specific situation which had given rise to the dispute and the legal rules to be applied by the impartial body should, and almost always did, involve third parties. That was obvious when the rules to be applied by the impartial body were rules of general international law or rules laid down in a multilateral convention. The interpretation and application of such rules could not but interest entities which were not parties to the dispute.

9. The decision of the impartial body could also affect the interests of entities which were not parties to the dispute. For example, in a case where one of two parties to a multilateral treaty invoked a fundamental change of circumstances as a ground for suspending, in its relations with the other party, the operation of the treaty as a whole, the impartial body might recommend that only part of the treaty should be suspended or that another arrangement should be made by the parties to the dispute. In that connexion, he noted in passing that draft articles 41 and 58[4] limited the possibility of such bilateral arrangements because of the need to take account of interests of third parties to the multilateral treaty. It was nevertheless theoretically possible that, if the parties to the dispute followed the recommendation of the impartial body, other disputes might arise between them and a third party. In actual fact, however, the chances that two different impartial bodies might arrive at incompatible conclusions were much smaller than the chances that States parties to a treaty might arrive at different conclusions. The proof was that the legal decisions taken by one body almost always referred to similar decisions taken by other bodies. Moreover, binding judgements by impartial bodies often served only as a basis for an amicable settlement between the parties to the dispute.

10. From the point of view of efficiency, there was something to be said for a system bringing together all the entities interested in the legal consequences of a given situation in a procedure that would lead to a settlement *erga omnes*. Such a system would, however, require the establishment of an international organization *ad hoc*. In a typical system for the settlement of disputes, moreover, the possibilities of arriving at more efficient procedures were very limited indeed, and interested third parties did not take part in the settlement procedures on an equal footing with the parties to the dispute.

11. Even under Article 59 of the Statute of the International Court of Justice, for example,

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

Under Articles 62 and 63 of the Statute, the possibilities for intervention by a third interested State were very limited, and if such a State should decide that it had an interest of a legal nature which might be affected by the decision in the case, it would be for the Court to decide whether or not that State could be allowed to intervene. With regard to an interest in the construction which the Court might give to rules of general international law, there was no possibility of intervention at all. It was, moreover, quite probable that an intervening State would have no right to choose a judge *ad hoc*. In the *North Sea Continental Shelf* cases, the Court had treated the Netherlands and Denmark as parties "in the same interest",[5] and had practically forced them to present identical pleadings. Similarly, the Court of Justice of the European Communities allowed third parties to intervene only in order to support the arguments of one of the parties to the dispute.[6]

12. Referring to conciliation as a method for the settlement of disputes, he said that a bold step in the direction of greater efficiency seemed to have been taken in the most recent version of the Informal Composite Negotiating Text of the United Nations Conference on the Law of the Sea,[7] which in Annex V, article 3 (*h*), stated that:

> In disputes involving more than two parties, the provisions of subparagraphs (*a*) to (*f*) shall apply to the maximum extent possible.

(Subparagraphs (*a*) to (*f*) related to the constitution of the Conciliation Commission.) Unfortunately, the Informal Composite Negotiating Text threw no light on what that "maximum extent" was, when more than two parties were involved, or whether it was relevant that some of the parties were parties in the same interest.

13. Only considerations of efficiency could tempt the Commission to try to improve on the procedures provided for in the Vienna Convention, which at least had the merit of recognizing how important it was to all States that a treaty was or became void if it came into conflict with *jus cogens*. In the case of a dispute arising in that connexion, the Vienna Convention allowed for arbitration, which was an *ad hoc* procedure. There was no reason to try to improve on that

[4] See 1585th meeting, foot-note 3.

[5] *Order of 26 April 1968, I.C.J. Reports 1968*, p. 9.

[6] See, for example, United Nations, *Treaty Series*, vol. 298, p. 154, article 37 of the Protocol on the Statute of the Court of Justice of the European Economic Community (EEC).

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

system by devising complicated rules designed to avoid parallel or subsequent procedures relating to the same situation. It would be better to leave well enough alone and follow the suggestions made in that respect by the Special Rapporteur, who had, after all, pointed out that the procedure of conciliation could be applied under draft article 66 only if no solution had been reached under draft article 65, paragraph 3, within a period of twelve months following the date on which an objection had been raised. If, in the case of a multilateral treaty, one of the parties indicated to all the other parties the "measure proposed to be taken" under draft article 65, paragraph 1, the other parties could then assess their interest in the matter. Since there were presumably many parties to the treaty, more than one objection would probably be raised. In any case, under draft article 65, paragraph 3, all the parties to the treaty were required to seek a peaceful solution. If they wished to do so by calling a conference, the stage of the "international organization *ad hoc*" would have been reached, and every interested party would participate in it on an equal footing. If a settlement was not reached at that stage, the parties having the stamina to do so could then turn to a bilateral procedure for the settlement of the dispute. Even then, some multilateral elements might be introduced, but if they were not introduced or were considered insufficient from the point of view of efficiency, parallel or subsequent procedures could be instituted. Such procedures would, in his opinion, be quite possible to accept.

14. Mr. USHAKOV said that in principle he did not object either to the list of conciliators or, consequently, to paragraph 1 of the draft annex. He had merely wished to draw attention to the difficulty raised by the simultaneous reference in the paragraph to international organizations and to States. In the corresponding provision of the Vienna Convention, it was clear that the phrase "or a party to the present Convention" referred to States parties to the Vienna Convention which were not Members of the United Nations. The text of the draft articles, on the other hand, appeared to distinguish expressly "every State which is a Member of the United Nations or a party to the present articles" from "any international organization to which the present articles have become applicable", thus creating two categories of entity concerned; it was that differentiation which was a source of difficulty. He had done no more than query the meaning of that passage in paragraph 1. He was not pressing for the omission of the reference to the list, but merely wished to draw attention to the potential difficulties.

15. Commenting on section I of the annex, he said that the provisions of that section were closely linked to draft article 66 and hence indirectly to draft article 65. In the Vienna Convention, the reference to article 66 was clear, since paragraph 2 of the annex could apply only to the case of a dispute between States. The situation was otherwise in the draft articles, and consequently the Commission would have to consider the structure of the annex.

16. If article 66 distinguished three possible categories of dispute, it would certainly be logical to divide the provision into three paragraphs. It followed that, if article 66, paragraph 1, provided for the case of an objection by one State with respect to another State, the annex should contain an express cross-reference to article 66, paragraph 1. Similarly, a reference to the case of an objection by an international organization with respect to another international organization in article 66, paragraph 2, should be echoed by an express cross-reference to that clause in the annex. And thirdly, if article 66, paragraph 3, provided for the case of an objection by a State with respect to an international organization or by an international organization with respect to a State, an express cross-reference to that paragraph 3, should appear in the annex. Another section of the annex might then deal with the Conciliation Commission.

17. The language to be used in each of the various provisions might, he thought, be modelled on the terms of the Vienna Convention as far as disputes between States were concerned. In the provisions concerning disputes between international organizations, the following formulas should be used: "the organization or organizations constituting one of the parties to the dispute" and "the organization or organizations constituting the other party to the dispute". As regards mixed disputes, which would form the subject of a section III, he suggested the following wording: "the State or States or the organization or organizations constituting one of the parties" and "the State or States or the organization or organizations constituting the other party". The situation might, of course, be even more complex in practice, but it was quite impossible to envisage all eventualities in the draft text. On that point, the Commission might perhaps use the model of the draft being considered by the United Nations Conference on the Law of the Sea.

18. The Commission might therefore divide the annex into three sections to take account of the three main categories of dispute, and might provide that in any other situation the rules should be followed as closely as possible.

19. The remainder of section I was modelled on the corresponding provision of the Vienna Convention, but it would have to be amended in the light of the decision to be taken on the question of the list.

20. Lastly, he emphasized the capital importance of the words "with the consent of the parties to the dispute", in section I, paragraph 3 of the annex.

21. Mr. ŠAHOVIĆ said that, having considered the views expressed at the previous meeting, he had come to the firm conclusion that the Commission should endorse the proposals of the Special Rapporteur.

22. There were two types of problem to be solved: problems of principle and technical and adaptation problems. As far as the problems of principle were concerned, he gathered that many members regarded the debate on the annex as an opportunity for considering the general lines to be followed by the draft, since the questions raised by the use of various methods of settlement of disputes had to be dealt with at that stage. In that respect, he considered that the Commission should follow the Vienna Convention, since the annex was principally concerned with Part V of the draft, relating to the invalidity, termination and suspension of the operation of treaties, and particularly to section 4 thereof, on procedure. It would not be desirable to extend the scope of articles 65 and 66, nor, consequently, that of the annex. The authors of the Vienna Convention had made a choice, and, as the Special Rapporteur had said, the Commission should follow that precedent.

23. With regard to problems of adaptation, he considered that, if the Commission adhered to principles, it would be able the more easily to adapt the text of the Vienna Convention to take account of the special features of the situations to be covered in the draft articles. Accordingly, he supported the view of the members of the Commission who considered that the solution for the annex should be closely linked with that for the substance of draft articles 65 and 66. In his view, it was the Drafting Committee's responsibility to settle those problems.

24. He fully understood Mr. Ushakov's position concerning the list of conciliators. The Commission should consider what benefits there were in the list system; the 1975 Vienna Convention[8] provided, in article 85, for the establishment of a conciliation commission composed of persons designated by the parties independently of any pre-established list. Yet, he doubted that it would be desirable to depart from the text of the Vienna Convention on the Law of Treaties in the drafting of provisions relating to the very substance of the law of treaties. If the Commission nevertheless decided to use the list system, the co-existence of two separate categories of entities should not prevent the compilation of a single list containing both categories of conciliator.

25. He added that as yet the Commission was considering the draft articles only in a first reading, and was only formulating proposals for submission to States with a view to obtaining their opinion. The wording of the various provisions was certainly of capital importance, but the essence would be contained in the commentary to the draft articles. He hoped that the Commission would reflect in its report all the opinions expressed during the discussion, so as to obtain the reactions of States before working out final texts.

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

26. With regard to parallel procedures, he thought that perhaps the Special Rapporteur had overstressed that aspect from the outset, for the essential point was to ensure that the decisions of the Conciliation Commission and other bodies for the settlement of disputes were binding on all parties to a treaty or agreement.

27. Mr. TSURUOKA said that, preferably, parallel procedures or successive procedures at short intervals should be avoided, for the sake of the conventional, or even international, legal order. The Commission should write a particularly full commentary on section I, paragraph 3, of the annex. In his opinion, that paragraph should remain as it stood in the draft, because its wording followed broadly the model of the Vienna Convention.

28. In order to avoid parallel or successive procedures it would be very desirable, however, that parties to a treaty which were involved in a dispute or in points raised by a dispute should be able to express their opinions freely before the Conciliation Commission.

29. Accordingly, the part of the commentary concerning the words "with the consent of the parties to the dispute" might indicate that in the Commission's view the parties to a dispute covered by section I of the annex should give their consent to other parties to the treaty being invited to submit their views. Equally, the Commission might indicate that the words "may invite" were intended virtually to mean "should invite". Such an interpretation would go a long way towards avoiding parallel or successive procedures that might disturb the conventional legal order. Moreover, such an interpretation would make it possible to settle disputes in a manner wholly satisfactory to all parties, since what was involved was a dispute concerning an objection to an interpretation. In such a case the Conciliation Commission should, with the consent of the parties to the dispute, invite all parties to the treaty to express their views before it. The machinery would therefore be made less rigid, to the benefit of the common sense which should always guide conciliation.

30. Mr. THIAM said that he hoped the Commission would not depart too far from the Vienna Convention and urged it to follow the Special Rapporteur's proposal on that point.

31. However, paragraph 3 of section I of the annex was a source of difficulty. The first sentence of the paragraph provided that the Conciliation Commission should decide its own procedure, but went on to limit its power. If the members of the Conciliation Commission wished to ask a party to the treaty for its opinion, it was hardly desirable that a party to the dispute should be able to object. Either the provision should be drafted differently from the corresponding clause of the Vienna Convention or else the commentary should state that it was preferable that any party to the treaty

should be given a hearing if the Conciliation Commission so wished.

32. Mr. REUTER (Special Rapporteur) noted that in his comments on the general structure of the annex Mr. Ushakov distinguished three theoretical situations: a dispute between States, a dispute between international organizations, and a dispute between States and international organizations. He also thought that it might be necessary to differentiate those three cases in the body of draft article 66 as well as in the annex. The Commission should therefore make a decision on the matter.

33. In the draft annex, he (Mr. Reuter) had devoted section I to the first case and had covered together in section II the case of disputes between international organizations and that of disputes between States and international organizations. The final decision would of course depend above all on whether the differentiation of the three cases was justified by important differences in the treatment of the last two cases. If the differences were minor, there was hardly any justification for repeating the same provisions in two successive sections.

34. As regards the lists of conciliators, he considered that the Commission could keep one single list, provided that it did not wish to stipulate conditions for inclusion in the list other than those contained in the Vienna Convention. If, however, it decided to require additional qualifications, a list divided into two categories, as proposed by Mr. Šahović, might then be appropriate. Speaking as a member of the Commission, he expressed reservations on that point generally.

35. In his opinion, a good deal remained to be done in order to work out satisfactory wording for section I of the annex, and the Drafting Committee would have to take into account, *inter alia*, the proposals concerning paragraph 3.

36. He then introduced section II of the draft annex. He explained that the heading of the section and the system of paragraph numbering would have to be changed, either by the Drafting Committee, or by the Commission during the second reading of the draft.

37. Paragraphs 3 *bis*, 4 *bis* and 5 *bis* of section II were identical to the corresponding paragraphs of the annex to the Vienna Convention. Actually, only two questions arose in connexion with section II: a question of principle related to the possibility of the United Nations being a party to a dispute, and the practical question of the presentation of the different cases covered by section II.

38. So far as the first question was concerned, he considered that if the United Nations was a party to a dispute the Secretary-General would not be able to perform the function attributed to him by the annex to the Vienna Convention; at least, he would not be able to discharge his essential responsibilities. Those responsibilities would have to be entrusted to the President of the International Court of Justice, although the Secretary-General might provide the Conciliation Commission with the necessary assistance and facilities referred to in the Vienna Convention. It was that consideration which explained the provision in paragraph 7 *bis* that such assistance and facilities would be provided "directly or, as appropriate, through the intermediary of the President of the International Court of Justice". Accordingly, the two issues to be settled were whether the draft should deal with the special case of a dispute to which the United Nations was a party, and whether the Special Rapporteur's approach was acceptable.

39. The second question concerned the contents of paragraph 2 *bis*. That provision dealt with two cases: the case of a dispute between one or more international organizations and one or more international organizations, and the case of a dispute to which one party was constituted by at least one State or at least one international organization. The reason why the case in which one or more States constituted one of the parties had been framed in the conditional form was that it did not occur in all the situations covered by paragraph 2 *bis*, which covered also cases where none of the parties included any State. The second case, by contrast, was not presented in the conditional, for one or more international organizations must necessarily constitute one of the parties, and it might happen that international organizations constituted both of them. The phrasing of the provisions describing that case was not entirely satisfactory, particularly in the versions other than the French.

40. It would be for the Commission to decide whether the subject could be divided in that way, with certain drafting changes, or whether the case in which both parties were constituted of one or more international organizations should be treated separately.

41. He wished to make two criticisms of his own draft. He should have mentioned the simplest case, that in which both parties were constituted of one or more international organizations, before the more complicated case. Secondly, he had omitted to mention the case in which one party was constituted of one or more States and one or more international organizations having to appoint conciliators. That case, which should be mentioned after the other two, might be covered by a clause in the following terms:

> "If one or more international organizations and one or more States constitute one of the parties they shall appoint:
>
> "(*a*) one conciliator who may or may not be chosen from the list referred to in paragraph 1; and
>
> "(*b*) one conciliator not of the nationality of any of the States parties to the dispute and not included in the list on the initiative of an international organization party to the dispute."

42. The second-mentioned sole conciliator appointed by one or more States and by one or more inter-

national organizations must therefore fulfil both the requirements for appointment by a State and the requirements for appointment by an organization: he should not have the nationality of a State party nor should he have been included in the list of conciliators on the initiative of an international organization party to the dispute. It was the latter condition which best satisfied the condition requirement that there must not be any nationality link for the appointment of the second conciliator by one or more States. The authors of the Vienna Convention had intended that there should be no nationality link between a State and the conciliator appointed by that State. The only equivalent link which might exist between an international organization and an individual would be that resulting from the inclusion of that individual, on the initiative of the organization, in the list of conciliators. It might of course be stipulated that an official of an international organization party to a dispute would not be eligible for appointment, but the members of the Commission who had referred to such a stipulation had been thinking of the appointment of the first conciliator as well as that of the second.

43. Mr. USHAKOV said that the case where the United Nations was a party to a dispute should be taken into consideration, but felt that in such a case the President of the International Court of Justice should not necessarily act in lieu of the Secretary-General. According to the machinery established in the annex, the Secretary-General acted not as an interested party but in an impartial capacity. If, in the context of the Vienna Convention, a State not a Member of the United Nations raised an objection to a notification by a Member State made under article 65, the Secretary-General, in the exercise of the functions entrusted to him in the annex, would not be acting on behalf of the Member State. Besides, the Secretary-General was the depositary of the Vienna Convention, and all communications relating to the Convention would be transmitted through him, even in the case of a dispute to which the United Nations was a party. It might be, after all, that in a dispute to which the United Nations was a party the other party or parties would agree to the Secretary-General exercising the appointing functions mentioned in the annex. Consequently, it would be better to make provision for a mere faculty for the President of the International Court of Justice to exercise those functions.

44. Under the terms of paragraph 6 *bis*, the report of the Conciliation Commission was deposited with the Secretary-General of the United Nations or, as appropriate, the President of the International Court of Justice. He (Mr. Ushakov) considered that the report should in all cases be addressed to the Secretary-General, even if the President of the I.C.J. performed the appointing functions. Paragraph 6 *bis* might apply to all cases covered in section II.

45. Under the terms of paragraph 7 *bis*, the Secretary-General provided the Conciliation Commission either directly or, as appropriate, through the intermediary of the President of the International Court of Justice, such assistance and facilities as it might require. He considered that, even in cases where the President of the Court was empowered to make appointments, the assistance and facilities which the Conciliation Commission might require should be provided directly by the Secretary-General, who might surely be expected to provide such assistance and facilities completely impartially. Like paragraph 6 *bis*, paragraph 7 *bis* might apply to all the cases indicated in section II.

46. Mr. RIPHAGEN said that, while he did not question the independence of the Secretary-General, he would point out that Article 100 of the Charter of the United Nations provided that the Secretary-General should not seek or receive instructions from "any other authority external to the Organization". That was a clear indication that the Secretary-General was not completely independent of the authority of the Organization. He therefore agreed that, in the case of disputes to which the United Nations was a party, the President of the International Court of Justice, rather than the Secretary-General of the United Nations, should appoint conciliators. Any impression that certain functions involved in the settlement of disputes were vested in one party to the dispute would then be dispelled.

47. He likewise agreed that, in the case of conciliators appointed by an international organization, the nationality test should not apply and that such conciliators should be drawn from a list of persons nominated by the organization in question. The special link which was said to exist by virtue of the nationality of a person had no counterpart in the case of an organization, but the inclusion of a person's name in such a list was presumably an indication of the organization's confidence in that person.

48. Mr. SCHWEBEL said that Mr. Riphagen's point was well taken. If, for example, a Member State contested a majority decision of the Organization, would that State feel at ease if, in the ensuing conciliation process, the Secretary-General was the appointing authority? And if, as was conceivable, the acts which were the subject of the dispute had been performed at the Secretary-General's initiative, should he then appoint a conciliator? There was no doubt that, in such cases, the Secretary-General would act impartially, but for the sake both of legal principle and of appearances he should be replaced by a substitute, and the President of the International Court of Justice would appear to be eminently suitable. Moreover, the arbitration provisions that were traditionally incorporated in treaties between States and international organizations provided that the third arbitrator would be chosen by agreement of the parties or should be appointed from a third source, typically the President of the International Court of Justice. He saw no need to make a distinction between that process and the process of conciliation.

49. He would be grateful if those members who had taken part in the United Nations Conference on the Law of Treaties could enlighten him on the following point. Had consideration been given—and, if not, should it now be given—to the advisability of not initially making public the recommendations of conciliators? There seemed to him to be a difference between an arbitral or judicial decision, which by its very nature required immediate publication, and the recommendations of a conciliation panel. In the latter case, the findings of the conciliators might be based not so much on the law as on the need to arrive at a compromise position, in which case the possibilities of a practical accommodation could perhaps be furthered if those findings were not published straightaway. He was thinking, in particular, of the process of mediation, the successful outcome of which could depend to a large extent on secrecy for a certain limited period of time, although he was not suggesting that secrecy should be indefinite. Perhaps the paragraphs which dealt with the deposit of the award should be more explicit on that score, while making clear that publication would be required after a time.

50. Lastly, with regard to the questions raised in paragraph (9) of the commentary to the annex (A/CN.4/327), he considered that it would be desirable to broaden the scope of application of the provisions rather than limiting them to Part V of the draft. The Commission might wish to take a step in the direction of the progressive development of international law by making a proposal to that effect with a view to ascertaining the reaction of Member States.

51. Mr. JAGOTA said that the main question dealt with in section II of the annex, the constitution of a conciliation commission and the selection of its members, posed no great difficulty and could be resolved by drafting changes. A more substantive question was whether there was any need for section II at all. Although, under paragraph 1 of the annex, the members of a conciliation commission would be drawn from a list which included the names of persons nominated either by States or by international organizations, subparagraph (*a*) of the second paragraph of paragraph 2 *bis* provided that an international organization could appoint a conciliator who "may or may not be chosen from the list referred to in paragraph 1". In other words, in the event of a dispute between two international organizations or between one international organization and a State, the organizations could appoint anyone at will.

52. He wondered, however, whether, when such disputes arose out of the same treaty, it was really necessary to provide for two or more procedures to be applied according to the parties to, and the subject matter of, the dispute, and whether it would not be preferable to refer the matter to the same conciliation commission, irrespective of the category into which the disputes fell. That was a question which merited careful reflection in view of its relevance for other conferences, including the Conference on the Law of the Sea, which had yet to consider the specific issue involved. Whatever decision the Commission reached would inevitably have persuasive authority in other forums; members should therefore be intellectually convinced of the need to draw a distinction between sections I and II of the annex.

53. Furthermore, subparagraphs (*a*) and (*b*) of the third paragraph of paragraph 2 *bis*, as drafted, applied only to disputes to which one of the parties was an international organization or a group of organizations. Those subparagraphs should therefore be redrafted to make it quite clear that two categories of dispute were envisaged, namely, those between a State and an international organization, and those between one international organization and another.

54. Lastly, with regard to paragraphs 6 *bis* and 7 *bis*, he agreed with the Special Rapporteur's proposal regarding the distinction to be drawn between the functions of the Secretary-General of the United Nations and the President of the International Court of Justice but considered that careful consideration should be given to the question of the categories of dispute to which the United Nations could become a party. For instance, would the United Nations be a party to the future convention and, if not, would the provisions of the convention apply to the United Nations? In the case of action taken pursuant to the provisions of Part V of the draft, would not the terms of the Charter prevail by virtue of its Article 103? It was clear that the United Nations could be a party to a dispute arising out of any agreement into which it had entered—for instance, a headquarters agreement—but in such cases the procedure for the settlement of disputes would probably be prescribed by the agreement itself.

The meeting rose at 1.05 p.m.

1596TH MEETING

Thursday, 22 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

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

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

[Item 3 of the agenda]