

Document:-
A/CN.4/SR.1725

Summary record of the 1725th 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:-
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54. Noting that no member of the Commission wished to speak on that article, he proposed that it be referred to the Drafting Committee.

*It was so decided.*¹³

ARTICLE 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)

55. The CHAIRMAN invited the Commission to consider draft article 73, which read:

Article 73. Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

56. Mr. REUTER (Special Rapporteur) said that article 73 had elicited comments from Governments wishing to enlarge its scope. Moreover, several members of the Commission had already had occasion, during the current session, to comment on paragraph 2 of the article, expressing the hope that various terms would be clarified. For his part, he did not really feel the need for clarification, especially as he had initially proposed more easily understandable wording.

The meeting rose at 1 p.m.

¹³ *Idem.*

1725th MEETING

Friday, 11 June 1982, at 11.15 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING² (*continued*)

ARTICLE 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)³ (*concluded*)

1. The CHAIRMAN suggested that, since no member of the Commission wished to speak on the article, it should be referred to the Drafting Committee.

*It was so decided.*⁴

ARTICLE 74 (Diplomatic and consular relations and the conclusion of treaties)

2. The CHAIRMAN invited the Commission to consider draft article 74, which read:

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

3. Mr. REUTER (Special Rapporteur) recalled that, in first reading, the Commission had decided not to deal with the idea of the specific organic relations, permanent or otherwise, that could be established between an organization and a State. However, one international organization had suggested that such cases should be covered by articles 63 and 74. As the Commission had not acted on that suggestion during its consideration of article 63 in second reading, it should probably refrain from acting on it at the current stage.

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 74 to the Drafting Committee.

*It was so decided.*⁵

ARTICLE 75 (Case of an aggressor State)

5. The CHAIRMAN invited the Commission to consider draft article 75, which had not given rise to any observations on the part of either Governments or international organizations and which read:

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1724th meeting, para. 55.

⁴ For consideration of the text proposed by the Drafting Committee, see 1740th meeting paras. 2 and 63.

⁵ *Idem.*

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

6. He suggested that, since no member of the Commission wished to take the floor on the article, it should be referred to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 76 (Depositaries of treaties)

7. The CHAIRMAN invited the Commission to consider draft article 76, which had not given rise to any observations on the part of either Governments or international organizations and which read:

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

8. Mr. BALANDA said that the first sentence of paragraph 1 could be made less unwieldy by placing the words "as the case may be" after the word "made", or perhaps by deleting those words altogether. According to the second sentence of paragraph 1, a number of States could be designated as depositaries of a treaty. While, in theory, there was obviously nothing to prevent such a designation being made, he wondered whether it was desirable in practice.

9. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 76 to the Drafting Committee.

*It was so decided.*⁷

ARTICLE 77 (Functions of depositaries)

10. The CHAIRMAN invited the Commission to consider draft article 77, which read:

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or organization in question;

(e) informing the parties and the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and the contracting organizations; or

(b) where appropriate, the competent organ of the organization concerned.

11. Mr. REUTER (Special Rapporteur) said that article 77 had given rise to no observations by either Governments or international organizations, except perhaps in connection with article 80. The provision which had caused the Commission most difficulty was that contained in subparagraph 1 (g) which concerned the registration of treaties with the Secretariat of the United Nations. The term "registration" seemed to have been taken in a broader sense in article 77 than in article 80. One Government had stressed the need to avoid impinging on the right of the United Nations to deal with matters of registration. However, the Commission had taken due account of that right in drafting article 77, and it would be difficult to improve upon the text.

12. Mr. USHAKOV said that, according to article 77, subparagraph 1 (g), one of the functions of depositaries was to register treaties with the Secretariat of the United Nations. Under Article 102 of the Charter of the United Nations, no treaty or international agreement which had not been so registered could be invoked by a party before any organ of the United Nations. That provision applied not only to treaties between States, but also to treaties between States and international organizations and possibly also to treaties between international organizations. If that were the case, did it attach the same consequences to the non-registration of treaties between organizations? If draft article 80 imposed no obligation to register treaties in that category, no corresponding obligation devolved upon the depositary under article 77. It might be as well to avoid using the

⁶ *Idem.*

⁷ *Idem.*

word “registration”, as it was the word which had the consequences provided for in Article 102 of the Charter.

13. Mr. STAVROPOULOS, referring to Mr. Ushakov’s comments concerning article 80, pointed out that, while every treaty entered into by any Member of the United Nations had to be published in accordance with Article 102 of the Charter of the United Nations, international organizations were under no such obligation. Article 80 should be amended accordingly. The United Nations Treaty Section had established a practice whereby treaties entered between international organizations were registered but not published. The distinction between the obligations of States and those of international organizations in that respect should be made clear. The matter should be examined further with the Treaty Section with a view to bringing article 80 into line with United Nations practice.

14. Mr. REUTER (Special Rapporteur) said that all the questions raised had already been discussed at length on first reading⁸ and that subparagraph 1 (g) of article 77 was identical to the corresponding provision of the Vienna Convention. It was clearly understood that, under the Charter of the United Nations, international organizations were not obligated to have their treaties registered. It was for that reason that the Commission had contemplated stipulating, in subparagraph 1 (g) of article 77, that only where appropriate would the functions of depositaries include registration of treaties. That proviso would have applied to treaties concluded between international organizations. It had been maintained, however, that such a provision entailed no obligation to have treaties registered, but simply described the functions of depositaries. Any obligation which might exist regarding registration derived from some other source. The explanations provided by Mr. Stavropoulos were correct. The Secretariat of the United Nations agreed to register treaties concluded between international organizations, but it was for the organizations involved to decide whether they wished to transmit such treaties to the Secretariat. For its part, the Secretariat was not obligated, under article 80, to publish the full text of all treaties transmitted to it and, in practice, it drew a distinction as far as the texts of treaties concluded between States were concerned. In his view, it was unnecessary to insert the words “where appropriate” in subparagraph 1 (g) of article 77. Members of the Commission wishing to make amendments to that provision or to article 80 should submit specific drafting proposals.

15. Mr. STAVROPOULOS said that it was not article 77, but article 80, which he proposed should be amended. A distinction should be made in article 80 between the situation of States, which must register treaties, and that of organizations, which might do so if they so wished.

16. Mr. JAGOTA said he was not certain that any decision taken by the Commission with respect to article

80 would involve an amendment of Article 102 of the Charter of the United Nations. It was true that that Article referred to registration and publication of treaties entered into by Members of the United Nations, which obviously could only mean States. Treaties might be concluded between Members of the United Nations, between a Member and a non-member of the United Nations, between a Member of the United Nations and an international organization or between international organizations. If a Member of the United Nations was a party, it would be subject to the requirements of Article 102, paragraph 1, of the Charter, and to the consequences of paragraph 2 of that Article in the event of non-registration. If it was United Nations practice to register, but not to publish, treaties concluded between international organizations, the distinction between registration and publication in such cases was made by the United Nations Secretariat itself. It did not derive from Article 102 of the Charter, and entailed no amendment of that Article. The decision not to publish such treaties had probably been made for financial reasons and to avoid the need to recruit additional staff which publication would entail. Any decision by the Commission involving registration and publication of treaties between international organizations would be tantamount to requesting the Secretary-General of the United Nations to perform additional functions. The Secretary-General’s acceptance of such functions would not necessarily imply the amendment of Article 102 of the Charter, which, in its existing form, would have to be interpreted as being applicable only to Member States. The question of additional functions, and consequent additional expenditures, would have to be settled by the Secretary-General. If there were any objections from the Secretariat, the matter might be reviewed later; but if the Secretariat was prepared to perform the functions in question, articles 77 and 80 would enable it to do so.

17. Mr. VALENCIA OSPINA (Deputy-Secretary of the Commission) read out the relevant provisions of the regulations to give effect to Article 102 of the Charter (General Assembly resolutions 97 (I) and 33 (141)), explaining that the Commission might find them useful for an understanding of the situation.

18. Mr. JAGOTA said that he would like to be certain whether or not registration and/or publication of treaties concluded between States and international organizations or between international organizations *per se* would come under article 4 of those regulations. He therefore requested the Deputy-Secretary to read out the relevant article once again.

19. Mr. VALENCIA OSPINA (Deputy-Secretary of the Commission), in response to Mr. Jagota’s request, read out article 4 of the regulations (General Assembly resolution 97 (I)).

20. Mr. STAVROPOULOS observed that the article referred to registration and not to publication. That confirmed the point he had raised.

21. Mr. VALENCIA OSPINA (Deputy-Secretary of the Commission) said that, although article 4 of the

⁸ See *Yearbook ... 1980*, vol. I, pp. 50-52, 1593rd meeting, paras. 8-31.

regulations referred only to registration, publication was covered by article 12, as amended by General Assembly resolution 33 (141).

22. Mr. JAGOTA said that the point he had made appeared to be covered by article 4, but since that article was subject to the terms of article 1 of the same regulations, he would like to be certain that draft articles 77 and 80 were covered by article 4 and that the United Nations would therefore have no difficulty in accepting the functions in question. He requested that the text of General Assembly resolutions 97 (I) and 33 (141) should be circulated to the Commission and considered by the Drafting Committee, with a view to determining whether the provisions of draft articles 77 and 80 were covered by existing United Nations provisions or whether they would entail an amendment to Article 102 of the Charter.

23. The CHAIRMAN said that the Secretariat would circulate the texts of the resolutions in question.

24. Mr. REUTER (Special Rapporteur) said that, quite apart from the question of drafting, a question of substance was involved. When article 77 had been considered in first reading, the understanding of the Commission appeared to have been that the depositary, as well as perhaps other entities under article 80, performed his international obligations on the basis of texts other than the draft articles. In no instance had the Commission sought to amend the Charter by means of the draft or to impose a rule on the United Nations Secretariat. If the Commission was agreed on that point, article 77 could be referred to the Drafting Committee. At the very most, it could be modified to clarify or expand on paragraph 1 (g). After all, some treaties had to be registered with bodies other than the United Nations. There were at least four or five international organizations, such as the Council of Europe, for example, to which certain treaties must be transmitted for registration. Article 77 simply stated that, in the event of an obligation, the function of the depositary was to register treaties. Perhaps it would be preferable not to reproduce the wording used in the Vienna Convention as it stood.

25. The CHAIRMAN suggested that, in the light of the explanation provided by the Special Rapporteur, draft article 77 should be referred to the Drafting Committee.

*It was so decided.*⁹

ARTICLE 78 (Notifications and communications)

26. The CHAIRMAN invited the Commission to consider draft article 78, which had given rise to no observations from either Governments or international organizations, and which read:

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

27. He suggested that, since no member of the Commission wished to take the floor, the draft article should be referred to the Drafting Committee.

*It was so decided.*¹⁰

ARTICLE 79 (Correction of errors in texts or in certified copies of treaties)

28. The CHAIRMAN invited the Commission to consider article 79, which had given rise to no observations from either Governments or international organizations and which read:

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations or, as the case may be, the said organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations agree should be corrected.

⁹ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 64.

¹⁰ *Idem*, paras. 2 and 65.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations or, as the case may be, the signatory organizations and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations or, as the case may be, to the signatory organizations and contracting organizations.

29. Mr. JAGOTA said that paragraphs 1 and 2 gave the impression that errors in the text of a treaty could be corrected after the text had been authenticated, but not yet signed or ratified. Perhaps the Drafting Committee could examine those paragraphs in conjunction with paragraphs 5 and 6, which appeared to take account of the fact that errors in the text of a treaty could be corrected at any time after the authentication of the text, even once the treaty had entered into force.

30. Mr. REUTER (Special Rapporteur) said that the concerns expressed by Mr. Jagota would appear to be dealt with in draft article 48, paragraph 3.

31. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 79 to the Drafting Committee.

*It was so decided.*¹¹

ARTICLE 80 (Registration and publication of treaties)

32. The CHAIRMAN invited the Commission to consider article 80, which read:

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

33. Mr. REUTER (Special Rapporteur) said that the most significant observations regarding the article had already been made in connection with article 77. He therefore had nothing to add.

34. Mr. USHAKOV said that article 80 obligated the parties to all treaties—whether concluded between States and international organizations or between two or more international organizations—to transmit such treaties to the Secretariat of the United Nations for registration or filing and recording, as the case might be, and for publication. However, it was quite clear that, in the final analysis, the Secretariat was free to perform or not to perform those acts. While he was quite prepared to accept that obligation in the case of treaties concluded between States and international organizations, he found it more difficult to do so in the case of treaties concluded solely between international organizations. It might be preferable if the procedure

were to be made optional in the case of international organizations, including the United Nations itself, and if the two different cases were dealt with in separate subparagraphs of paragraph 1.

35. Mr. STAVROPOULOS said that, after looking closely at article 80, he thought that paragraph 1, and in particular, the words “for registration or filing and recording, as the case may be” were broad enough to cover all the cases that could possibly arise.

36. Mr. REUTER (Special Rapporteur) said that, under article 35 of the draft (Treaties providing for obligations for third States or third international organizations), the United Nations would not be bound by the obligation provided for in article 80, since it, too, would have to accept it expressly in writing. In any event, the obligation concerned only the transmission of treaties to the United Nations Secretariat: the United Nations would undoubtedly record and file them, but it might refuse to register them and it would certainly refuse to publish them because of lack of financial resources. Nevertheless, the observation made by Mr. Ushakov was not without significance if it was to be interpreted as meaning that it was not good form to invoke article 35, which created an obligation for a third party and afforded it the opportunity of accepting or not. However, from the legal point of view, article 80 presented no difficulty.

37. Mr. USHAKOV said that it was rather the obligation to transmit treaties that caused him difficulty. While he understood that such an obligation should be imposed in the case of treaties concluded between States and international organizations, in the case of treaties concluded solely between international organizations, such transmission should be optional.

38. Mr. NI said that the explanations provided by the Special Rapporteur and by Mr. Stavropoulos, and General Assembly resolutions 97 (I) and 33 (141) as read out by the Deputy-Secretary of the Commission during the consideration of article 77, had enabled him better to understand the situation with regard to the registration of treaties by the United Nations. In view of the importance of the implementation of Article 102 of the Charter, however, he suggested that the Commission should have more time in which to study the General Assembly resolutions read out by the Deputy-Secretary.

39. The CHAIRMAN suggested that the Commission should suspend its consideration of article 80 until its following meeting and resume its consideration of the annex to the draft articles.

It was so decided.

ANNEX (Procedures established in application of article 66)¹² (*continued*)

40. Mr. REUTER (Special Rapporteur) said that no detailed observations had been submitted in respect of

¹¹ *Idem*, paras. 2 and 66.

¹² For the text, see 1724th meeting, para. 1.

the annex. The square brackets around the words "and any international organization to which the present articles have become applicable", in paragraph 1, were there simply to indicate that the wording would be inaccurate if, for example, international organizations became parties to the instrument arising out of the draft articles. The square brackets must be retained, since it was not for the Commission to stipulate the manner in which the draft articles would apply to international organizations.

41. A number of States had stressed that, under the conciliation procedure provided for in the annex, States and international organizations should be regarded as on a completely equal footing. That might concern a number of provisions with regard to which doubts had been expressed, particularly the drawing up of a list of conciliators. If the Commission decided that, in the case of disputes concerning the application or interpretation of articles 53 or 64 to which an international organization was a party, provision should be made for a settlement procedure other than judicial settlement by the International Court of Justice, it would be necessary to consider the possibility of providing for an arbitration procedure, as well as a conciliation procedure, in the annex.

42. Mr. USHAKOV recalled that, in the first reading, he had stressed the need to draft the annex in terms which were easily intelligible.¹³ However, such was not the case as far as the text under consideration was concerned. While it was true that conciliation, as a means of settling disputes provided for in article 66, was compulsory, did that mean that the parties to a dispute, particularly international organizations, were obliged to apply the procedure described in the annex? It was possible that they might agree jointly on some other procedure, instead of being obliged to apply to the Secretary-General of the United Nations. The problem raised, in particular, by the establishment of the list of conciliators referred to in paragraph 1 of the annex would thus be solved, since the list in question, like that provided for in the Vienna Convention, would be drawn up solely on the basis of a proposal by the States.

43. Mr. REUTER (Special Rapporteur) said that while, admittedly, it was possible to allow international organizations, with their consent, to resort to an alternative procedure, their consent was nevertheless necessary. As the conciliation procedure was compulsory, the text must be retained. Mr. Ushakov's difficulty was that he was opposed in principle, rather than because of the complexity of the text, to the idea that international organizations could designate conciliators. In the case of a compulsory conciliation procedure, the advantage of pre-established conciliation machinery was undeniable. Indeed, experience showed that, if the parties were left to set up the machinery without any obligation other than to reach agreement on it, and they actually failed to reach such agreement, the compulsory character of the conciliation procedure disappeared.

44. Mr. USHAKOV said that he was not questioning the obligation to resort to conciliation. He simply wished the parties to a dispute to be allowed to decide either to apply the procedure provided for in the annex, or to make use of some other machinery.

45. Mr. REUTER (Special Rapporteur) agreed that it was possible to argue that the obligation to resort to conciliation existed, even in the absence of pre-established conciliation machinery. However, there was no guarantee that the parties to a dispute would agree on the establishment of conciliation machinery.

46. Mr. LACLETA MUÑOZ said he thought that the possibility to which Mr. Ushakov had referred, namely, that the parties to a dispute should be able to agree to a procedure other than the one specified in the annex, was clearly provided for in article 65, paragraph 3. He also fully agreed with the Special Rapporteur that there could be no compulsory conciliation without a clearly defined procedure for the establishment of a conciliation commission.

47. Mr. STAVROPOULOS said that the words:

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period.

in the last part of paragraph 2 of the annex proved that the annex was necessary because, if, in the case referred to by Mr. Ushakov, the four conciliators could not agree who should be appointed as the fifth conciliator and chairman, there would be no conciliation procedure at all until the Secretary-General had appointed the chairman.

48. Mr. JAGOTA said that the Commission would not be able to finalize the text of the annex until the Drafting Committee had solved the problems in article 66 arising from the difference between the respective situations of States and international organizations that were parties to a dispute concerning the application or the interpretation of a rule of *jus cogens* under articles 53 or 64, and until it had decided whether there would be one single annex or two different ones, one relating to States and the other to international organizations.

49. Referring to Mr. Ushakov's objection to the institutionalization of the compulsory conciliation procedure through the intermediary of the Secretary-General of the United Nations, he said that the institutional aspects of compulsory conciliation, which had been provided for in the Vienna Convention, were residual in nature and were applicable only if the parties to a dispute could not agree on any of the other procedures provided for in article 65, paragraph 3, and article 66, paragraphs 2 and 3.

50. Although the words "The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission", in the last part of

¹³ Yearbook ... 1980, vol. I, p. 66, 1595th meeting, paras. 14-20.

paragraph 2 of the annex, had been based on the corresponding wording of the Annex to the Vienna Convention, he thought that it might be presumptuous for the Commission itself to propose such wording to a conference of plenipotentiaries and that the wording used in subparagraph 2 (a) (i) of the annex was more appropriate. The Drafting Committee might also consider whether the words “of the dispute” should not be added, for the sake of clarity, at the end of paragraph 4 of the annex.

The meeting rose at 1.05 p.m.

1726th MEETING

Monday, 14 June 1982, at 3.10 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Paul REUTER

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (continued)

ANNEX (Procedures established in application of article 66)³ (concluded)

1. Mr. USHAKOV said that, since the annex also dealt with the conciliation procedure, he thought that, in article 66, paragraph 1, subparagraph (b), and paragraphs 2 and 3, the words “the procedure specified in the annex to the present articles” should be replaced by the words “the conciliation procedure specified in the annex to the present articles”. It would thus be clear that recourse to that procedure was compulsory. If they so agreed, however, the parties to the dispute and, in particular, international organizations, might set that conciliation procedure in motion otherwise than by submitting a request to that effect to the Secretary-General of the United Nations. It was only in the absence of such agreement that they would submit a request to the Secretary-General. In that case, the procedure should be

much simpler, both in drafting and in practical terms, than the one described in the annex and it should be provided that the list of conciliators would be drawn up exclusively on the basis of nominations by States.

2. Mr. NI said that he understood the difficulties encountered by some members as a result of the complex wording and numbering of the various parts of the annex. Such complexity was, however, unavoidable because of the many different cases covered, particularly in subparagraph 2 (c), where he wondered whether it might not be possible simply to allow the parties to agree among themselves on arrangements for conciliation. Referring to the question of the right of international organizations to nominate conciliators to be included in the list, he said that, since international organizations had the capacity to conclude treaties, they could be parties to disputes arising from such treaties and should therefore be entitled to nominate conciliators. Accordingly, he proposed the deletion, in the second sentence of paragraph 1 of the annex, of the square brackets around the words “and any international organization to which the present articles have become applicable”.

3. Mr. CALERO RODRIGUES said that, if his own understanding was correct, Mr. Ushakov was not questioning the compulsory nature of the conciliation procedure under consideration, but, rather, seeking only to make that procedure more flexible. Mr. Ushakov’s point was well-taken, because the main value of conciliation as a means for the settlement of disputes lay precisely in its flexibility and in the freedom it gave the parties to choose the conciliators who would settle the dispute. There was at present a deplorable tendency to make conciliation more rigid and to turn it into something like a system of judicial settlement imposed upon States.

4. In the procedure under consideration, the principle of compulsory conciliation could be combined with the freedom of the parties to choose the conciliators as they wished. To that end, however, it might be necessary to make some changes in the wording of article 66 and the first part of the annex. In that connection, he drew attention to the provisions of annex V of the recently adopted Convention on the Law of the Sea.⁴ Those provisions applied to two different situations: first, to the ordinary conciliation procedure, which was voluntary, and, secondly, to compulsory submission to the conciliation provided for in Part XV, section 2, of that Convention. That system of compulsory conciliation was identical with the one now under discussion. He drew particular attention to annex V, article 10, of the Convention on the Law of the Sea, which stated that the parties could by agreement modify any provision of that annex. The parties could thus not reject conciliation itself, but they could by agreement modify the provisions governing conciliation in matters such as the composition and functions of the conciliation commission.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1724th meeting, para. 1.

⁴ See 1699th meeting, footnote 7.