UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/AC.182/L.75/Rev.1
28 January 1994

ORIGINAL: ENGLISH

SPECIAL COMMITTEE ON THE CHARTER OF
THE UNITED NATIONS AND ON THE
STRENGTHENING OF THE ROLE OF THE
ORGANIZATION
7-25 March 1994

Note by the Secretariat

The Secretariat has received from the Permanent Mission of Guatemala to the United Nations, under cover of a letter dated 19 January 1994, the communication annexed to the present note which is being circulated, pursuant to the agreement reached at the 1993 session of the Special Committee, 1/ in connection with the consideration by the Committee, in accordance with paragraph 3 (b) (i) of General Assembly resolution 48/36 of 9 December l993, of the proposal on United Nations rules for the conciliation of disputes between States.

1/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 33 and corrigendum (A/48/33 and Corr.1), para. 160.

Annex

[Original: English/Spanish]

EXPLANATORY MEMORANDUM CONCERNING THE FINAL VERSION OF THE UNITED NATIONS RULES (NOW ENTITLED "MODEL RULES") FOR THE CONCILIATION OF DISPUTES BETWEEN STATES, SUBMITTED BY GUATEMALA

1. Guatemala has the honour to submit, in the appendix to this document, the final version of the United Nations rules (now entitled "model rules") for the conciliation of disputes between States, which the Special Committee considered at its 1992 and 1993 sessions. This version of the rules, or model rules, takes into account, in so far as we consider them justified, the comments made in the Special Committee at its 1993 session. It also contains other revisions that we considered appropriate. Guatemala is thus acting on the offer it made at the 1993 session to submit to the Special Committee, for consideration in 1994, a final version of the model rules.

I. GENERAL COMMENTS ON THE ISSUE OF THE "FLEXIBILITY" OF THE MODEL RULES

2. In both 1992 and 1993 it was stressed in the Special Committee that the model rules for conciliation should be "flexible", and a number of provisions were criticized on the grounds that they made the rules less flexible.

3. If this consideration is to be taken to its logical extreme, it would obviously be ideal for a conciliation commission to function without rules or - since flexibility should not be tantamount to anarchy or arbitrariness - for a commission to function only on the basis of rules to be adopted by itself on an ad hoc basis. However, maximum flexibility would achieve not conciliation but mediation, since mediation is carried out by a body (normally but not invariably a single individual or Government) with no seat, secretariat or records, that is characteristically completely flexible, if not fluid; such a body, whose meetings with the parties are not formal, can and must constantly improvise on a completely autonomous basis, and therefore does not require rules laid down in advance, which would in fact be a hindrance to it. 1/

1/ In his course at the Academy of International Law at the Hague in 1976, Prof. L. Sohn stated: "Mediation and conciliation are fundamentally similar. In both procedures the third party attempts, through inquiry and consultation, to propound a solution to which the parties can agree bilaterally. Mediation is a flexible process, wherein the mediator consults first one party then the other, and continuously proposes trial solutions to be modified and reproposed in order to solicit the parties' responses. Conciliation, often connected with an enquiry, is a more formal undertaking, characteristically involving a commission which, on the basis of hearings and other evidence, prepares a written report, with recommendations for the parties' consideration." (Recueil des Cours de l'Académie de Droit international, 1976-II, p. 263; emphasis added). Also see para. 7 of the explanatory memorandum (A/AC.182/L.75,

4. Thus, if it is to exist at all, international conciliation must be characterized by a certain amount of formality; as may easily be appreciated, it is of a semi-judicial nature or at least bears a pronounced similarity to judicial proceedings. 2/

5. Where conciliation is concerned, any contrast or tension there may be between flexibility, on the one hand, and rigidity or formalism, on the other, does not arise in terms of whether or not the conciliation proceedings should be conducted on the basis of certain rules or, on the contrary, in a complete regulatory void (which is characteristic of mediation). The contrast is between a possible inclination to make conciliation and judicial proceedings too similar and the opposite tendency to equate conciliation and mediation.

6. In this connection, it is interesting to note that in drawing up its conciliation rules - on which, as we have pointed out from the outset, our model rules are largely based - the Institute of International Law (referred to below as "the Institute") by no means ignored the need for the rules to be somewhat flexible. 3/ As pointed out by the renowned Henri Rolin, the Institute's rapporteur for the topic, conciliation commissions tend to be based on proceedings of an arbitral nature or on the Rules of Court of the International Court of Justice, whereby slow and cumbersome written proceedings are conducted, which are then followed by oral proceedings. 4/

7. Now that the validity of the contrast between flexibility and rigidity or formalism has thus been clarified, a few comments on a more important form of dichotomy are called for. A number of necessary preliminary remarks are set out in the paragraph below.

8. Since a conciliation commission can clearly neither confer powers upon itself nor, on its own authority, assign obligations to the parties to the conciliation process, the rules laying down the powers of the commission and the obligations of the parties must be agreed upon by the parties themselves, since the parties should obviously reach such an agreement before embarking on the conciliation process. It is also clear that rules on each and every detail as to how the conciliation process is to be conducted must be excluded from the conciliation agreement, because such rules should be adopted at the commission's discretion.

(continued)

annex) on the draft considered by the Special Committee in 1993 (referred to below as "the previous explanatory memorandum").

2/ See para. 6 of the previous explanatory memorandum.

3/ With regard to the Institute's rules, see paras. 14 and 15 of the previous explanatory memorandum.

4/ Annuaire de l'Institut de Droit international, vol. 49, Part II (1961), p. 197.

9. The dichotomy referred to in paragraph 7 above stems from the possibility for the conciliation agreement to leave it to the commission to take decisions not only on rules on issues relating to details but also on some or even all fundamental rules on the functioning of the commission.

10. With regard to the possibility referred to above, it is interesting to note that the draft conciliation rules initially submitted, in 1961, by the above-mentioned rapporteur of the Institute, Mr. Rolin, were intended to be a set of model rules for adoption by the conciliation commission. However, like Guatemala's model rules, the final version of the Institute's rules is a set of rules for inclusion in a conciliation agreement between the States parties. 5/

11. The dichotomy referred to above - between the adoption of basic procedural rules by States parties and the adoption of such rules by the commission - poses less of a dilemma than it would appear to at first glance. Where fundamental procedural rules are concerned, it is inconceivable that once States have authorized the commission to adopt such rules the commission will exercise that authority without first ascertaining that the rules that it wishes to adopt are acceptable to both parties. This is because the adoption by the commission of fundamental procedural rules that do not meet with the approval of both States will give rise to tension between the two States, which could jeopardize the outcome of the conciliation process. 6/ Moreover, if the commission is obliged to consult the parties before adopting its basic procedural rules time will be wasted, and thus also money, since the States parties will incur the corresponding costs while the conciliation process is under way, 7/ and these costs will be much higher than those resulting from negotiation of a conciliation agreement.

12. In connection with the decision as to which procedural rules should be left to the commission's discretion because they are secondary and which rules should be included in the conciliation agreement because they are of a fundamental nature, a balance must be struck between the need for the members of the

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5/ Compare the last preambular paragraph of the draft resolution submitted by the rapporteur with the last preambular paragraph of the resolution adopted by the Institute, on pages 199 and 375, respectively of part II of the above-mentioned 1961 Annuaire (ibid.).

6/ Under article 23, paragraph 1, of the Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe, a conciliation commission set up under the Convention must consult the parties before determining its procedure. This rule makes the proceedings less flexible and, what is more, may lead to difficulties as a result of the different approaches taken by the parties, or by the commission and one or both of the parties with respect to which rules the commission may adopt without consulting the parties because they are of a secondary nature and which rules require consultation with the parties because they are basic rules. (See International Legal Materials, vol. XXXII (1993), p. 563.

7/ In connection with the comments made in this paragraph, see para. 27 of the previous explanatory memorandum.

commission not to feel that they are being hobbled by rules that are too detailed and the need for the commission not to waste time and thus run the risk of provoking the parties by consulting them before adopting its fundamental procedural rules.

13. The General Act of 1928 for the Pacific Settlement of International Disputes, revised by the United Nations General Assembly in 1949 (art. 11, para. 1), the European Convention of 1957 for the Settlement of Disputes (art. 12, para. 1) and the United Nations Convention on the Law of the Sea (annex V, art. 4) rightly determine that States parties to conciliation proceedings under their relevant provisions may, without any hindrance, lay down procedural rules for implementation by the conciliation commissions to which they submit the issues in question. 8/ We believe that in order to facilitate the work of a conciliation commission and to avoid waste of time and subsequent disagreements, the States parties to any conciliation process should make full use of their power, by virtue of their sovereignty, to lay down the fundamental procedural rules to be followed by the commission in question. Thus, just as Minerva sprang fully armed from Jupiter's brow, the conciliation commission must come into being already equipped with its basic procedural rules, through the volition of the parties, or as a result of the conciliation agreement. The model rules that we are proposing not only are based on this assumption, which is reflected in article 9 of the rules (corresponding to article 9 of the previous draft), but also to a great extent derive their raison d'être from it.

14. Lastly, notwithstanding what has just been said, it should be noted that if - instead of including in their conciliation agreement basic procedural rules for implementation by the commission - the parties leave such rules to the commission's discretion, that would not mean that the model rules would no longer serve any purpose. In such circumstances, nothing would prevent the commission from filling the lacuna in question by adopting the relevant provisions of the model rules or drawing on those provisions.

8/ States wishing to set up ad hoc conciliation machinery with a view to settling a dispute between them may be parties to a bilateral or multilateral agreement that requires them to resort to conciliation in order to settle any disputes that arise between them. Naturally, where the agreement is bilateral there is nothing to prevent States from using the model rules as they stand instead of the agreement if the agreement provides for ad hoc conciliation, that is to say, if no conciliation body has already been set up. If such a body has already been set up, they may, if they prefer the model rules to the rules set out in the agreement under which the body in question was set up, implement the model rules, making the necessary amendments to enable the existing commission to deal with the dispute. If the existing agreement is multilateral, States may take the approach just described, taking into account - if the model rules, with any agreed modifications, do not fully accord with the provisions on conciliation set forth in the agreement - that article 41 of the Vienna Convention on the Law of Treaties requires them to notify the States parties to the agreement of the modifications that they have made in it as a result of their decision to implement the model rules. The State parties may be so notified through the depositary of the agreement.

II. MULTILATERAL DISPUTES

15. With regard to paragraph 133 of the report of the Committee, 9/ it should be noted that disputes involving more than two States are exceedingly rare. Moreover, the number of parties is not the sole factor contributing to the variability and complexity of such cases, which are reflected in article 3 (g) and (h), annex V, of the United Nations Convention on the Law of the Sea, and in paragraph 139 of the report of the Committee on its 1992 session. 10/ Because of that variability and complexity, multilateral disputes are not conducive to settlement by means of model rules. This is why the model arbitration rules adopted by the International Law Commission in 1958 refer solely to bilateral disputes. Accordingly, if they are to be settled by conciliation or another method involving third parties, multilateral disputes must be the subject of ad hoc agreements which take into account the specific features of each case. Lastly, it should be noted that, in the case of multilateral disputes, our model rules lose very little of their usefulness. Whenever a dispute of that type arises, the model rules will require few adjustments in order to be applicable.

III. ARTICLES DELETED

16. Articles 15 and 25 of the previous draft have been deleted. Having given some thought to the criticisms made of the first of these articles in 1993 (para. 142 of the Special Committee's report), 9/ we decided that those criticisms were justified, and that it would be best to delete this article, which has no precedent in practice. With regard to article 25 (para. 152 of the Special Committee's report), it seemed to us that if two States agree to settle by conciliation a dispute to which they are parties, there is no reason to think that they would wish to include in the agreement in question a provision which envisages the possibility that one of them is not acting in good faith, or that both are not.

IV. ANALYSIS OF THE VARIOUS PROVISIONS OF THE NEW DRAFT

17. With the exception of purely stylistic or inconsequential changes, and those which are self-explanatory, we will endeavour to explain the reasons for all the changes made vis-à-vis the previous draft.

Article 1

18. We are surprised by the observation made at the start of paragraph 127 of the report of the Committee; in our view, it is absolutely inconceivable that a United Nations body should make the slightest attempt to infringe upon the

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9/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 33 (A/48/33).

10/ Ibid., Forty-seventh Session, Supplement No. 33 (A/47/33).

principle of free choice of peaceful means of dispute settlement, as stipulated in Article 33, paragraph 1, of the Charter of the United Nations - a principle which, because it is axiomatic, would exist even if there were nothing resembling that paragraph in the Charter. 11/ Nevertheless, we have reformulated this provision so as not to leave the slightest doubt as to the compatibility of the model rules with that basic principle. To that should be added the change which we have made in the title of our draft, since that change also helps to dispel any such doubts.

19. In paragraph 1, the previous reference to "the diplomatic channel" has been replaced by a reference to "direct negotiations", thus taking into account a comment made in the Committee.

Article 2

20. In order to take account of the observations made in paragraphs 128 and 129 of the report of the Committee, paragraphs 1 and 2 of this article have been substantially amended and combined; paragraph 1 of new article 2 corresponds to them. The linguistic services required by international meetings are expensive, especially when ad hoc meetings are involved. Moreover, it is quite likely that there will initially be a difference of opinion on that subject between the parties to the conciliation proceedings, which cannot take place without an agreement between the parties concerning such services. Accordingly, we considered it appropriate to include in paragraph 1 of article 2 a reference to the agreement to be concluded between the parties concerning these services (which, of course, will be needed only if the parties do not speak the same language, or, if some of the conciliators do not speak the common language of the parties).

21. We have retained paragraph 3 of this article, which is now paragraph 2, since we consider it appropriate to encourage those States wishing to resort to conciliation in settling disputes between them to request the assistance of the Secretary-General, and it seems perfectly natural to us that he should afford them assistance. As we state in paragraph 18 of the previous explanatory memorandum concerning the version of our draft considered by the Committee in 1993, to link the Secretary-General to conciliation proceedings is fully in keeping with paragraph 20 of the important declaration annexed to General Assembly resolution 43/51, of 5 December 1988. 12/ Another precedent which should be mentioned in this connection is article 9, paragraph 2, of the General Act mentioned above (in the version revised by the General Assembly in 1949), which paragraph enables conciliation commissions established under the Act to request assistance from the Secretary-General. The assistance which the

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11/ It should be recalled that, in 1923, the Permanent Court of International Justice declared that principle to be a fundamental principle of international law (P.C.I.J., Series B, No. 5, p. 27).

12/ Declaration on the Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field.

Secretary-General provided to Libya and Malta in 1982, in connection with notifying the International Court of Justice of their agreement to refer to the Court their dispute with regard to the delimitation of the areas of continental shelf appertaining to each of them, should also be recalled. Likewise, it should be noted that the Special Rapporteur of the International Law Commission on the topic of State responsibility has included, among the articles on settlement of disputes in that area relating to conciliation, a provision enabling a conciliation commission established under those articles to request assistance from the Secretary-General of the United Nations. 13/ Furthermore, four multilateral treaties adopted under the auspices of the United Nations provide not only that the conciliation commissions which they envisage are to receive assistance from the Secretary-General of the United Nations, but also that all the costs of these commissions are to be defrayed by the Organization. 14/ In view of these and other similar precedents, as well as the general philosophy on which the Charter is based, and the well-known broad use which the Secretary-General has made of his implicit powers with regard to the settlement of disputes between States, it is unquestionably, in our view, his moral, if not legal, obligation to provide whatever assistance he can to States wishing to settle disputes by peaceful means and, hence, to those applying the proposed conciliation rules, especially if they have been given the General Assembly's "stamp of approval". Lastly, as can be expected, we have amended the draft resolution containing that "stamp of approval", incorporating into it a request to the Secretary-General to lend, as far as possible, support to users of the model rules (see para. 56 below).

Article 3

22. It should be noted that in international practice, as embodied in the numerous treaties which provide for recourse to conciliation, five-member commissions and, exceptionally, three-member commissions, are the rule. Accordingly, we have retained the text of this article unchanged, despite the observations contained in paragraph 131 of the report of the Special Committee.

CHAPTER IV

23. We feel that it would be useful to make general comments on this chapter, which consists of articles 4, 5 and 6. The possible variations in respect of the procedure for the appointment of the members of conciliation commissions are almost infinite and it is probably impossible to reach consensus on which of

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13/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10, note to para. 279).

14/ See the final paragraph of the annex to the Vienna Convention on the Law of Treaties, the Vienna Convention on Succession of States in respect of Treaties, the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

them are the best. If, at first sight, the procedure we have selected seems excessively complicated, it has to be borne in mind that in devising it we took into account, not only international practice, but also the value of anticipating and resolving difficulties which may arise in the course of the appointment process. This consideration explains, for example, article 5, paragraph 3, which is innovative. The general comment we wish to make about chapter IV is that, even if they have adopted the provisions of article 4 or article 5 without any changes, the parties may at any time, by mutual agreement, apply a different procedure, without having to make a formal amendment to the conciliation agreement. Thus for example, if the States parties to a dispute, having included article 4, without changes, in their conciliation agreement, have not been able to appoint by mutual agreement the third member of the commission, they may, without having to make a formal amendment to the agreement, entrust this appointment to a Government or to the President of the International Court of Justice, or alternatively to the Secretary-General of the United Nations or to any other authority.

Article 4

24. In any conciliation commission, it may be expected that members appointed individually by the parties are likely to be less objective than members appointed by both parties or by a third party. Indeed, members of a commission who have been appointed individually by the parties are in approximately the same situation as the judges ad hoc of the International Court of Justice, of whom it has been said that only "limited impartiality" can be expected. In a conciliation commission of three members, the members appointed individually by the parties are in a majority. In view of this and in order to reduce somewhat any inclination they may have to favour the party which appointed them, we have changed article 4 to provide that no member may be of the nationality of the party which appointed him.

Articles 5 and 6

25. These articles have been left unchanged.

CHAPTER V

26. Despite the comments made in paragraph 135 of the Committee's report, we felt that it would be advisable to leave the title of this chapter unchanged. The first of the two articles it contains, article 7 (the text of which has been slightly shortened), corresponds to article 7 of the previous draft, and sets forth, in an introductory manner, the basic functional principles of conciliation, while the second article, article 8, sets forth its basic substantive principles. It thus seems to us that the title of this chapter, a title which must be a common denominator between the two articles, cannot differ substantially from the present title.

27. Furthermore, we do not feel that it would be advisable for article 8, corresponding to article 8 of the previous draft, to contain a reference to

international law. Conciliation, like mediation, has the characteristic that the body which carries it out should be guided more by equity than by strict precepts of law when making its final proposal for the settlement of the dispute. Thus, it is difficult to discern differences between the principles on which this body should draw and those which should be applied by the International Court of Justice in a dispute in which the parties, making use of the possibility offered to them in Article 38, paragraph 2, of the Statute of the Court, have requested the Court to decide the case ex aequo et bono. It should also be noted that disputes submitted to a conciliation commission do not have to be legal disputes: they may be merely political in nature, in which case the law is, by definition, inapplicable to their substance. Furthermore, it should not be forgotten that the conciliation commission may give consideration to law, that is international law, but only "among other things", a provision which should be read in conjunction with the last sentence of article 20, paragraph 2, of the model rules (corresponding to the last sentence of article 7 of the conciliation rules of the Institute of International Law, which studied in detail the role of law in conciliation). Furthermore, it should not be overlooked that in formulating the terms of settlement, a conciliation commission must take into account any inclination shown by a party, in the interests of achieving an amicable settlement of the dispute, to waive some of its rights, so that, if the commission feels that it should try to take advantage of this flexible attitude, it may, in formulating the terms, deliberately disregard those rights. (This explains, in part, the inclusion in article 8 of the restrictive words "among other things".) It should be noted, lastly, that in many cases (including, in particular, the delimitation of maritime zones) law, which must be based on equity, coincides with equity or can barely be distinguished from it. Therefore, the only restriction which international law may impose on a conciliation commission in respect of its substantive recommendations is that the commission must ensure that the recommendations do not violate jus cogens or the rights of third States (which would obviously run counter to the provisions of Article 2, paragraph 3, of the United Nations Charter dealing with the procedure for the settlement of international disputes by peaceful means). And in a way these limitations are imposed not only by law, but also by equity itself, which, in the ultimate analysis, must be the main source of inspiration for the Commission, since it is virtually inconceivable that recommendations which violate jus cogens or the rights of third States could be equitable. As to the other suggestion made in the second sentence of paragraph 135 of the Committee's report (that the Charter of the United Nations should be mentioned), it should be noted, first, that the only principle laid down in the Charter which the commission must respect when formulating its terms of settlement, and the agreement reached by the parties, is the precept (just mentioned in parentheses) contained in Article 2, paragraph 3, of the Charter on the procedure for the settlement of disputes by peaceful means. However, it is so obvious that both the terms of settlement and the agreement reached by the parties must conform with this precept that it is not necessary for it to be mentioned in the model rules.

Article 9

28. Except for a minor stylistic change, we have left this article unchanged; it corresponds to article 9 of the previous draft. With regard to article 9,

which is of fundamental importance, we refer to the observations made in paragraphs 2 to 14 above and in paragraph 27 of the previous explanatory memorandum.

Article 10

29. We have amended paragraph 3 of this article, which corresponds to the same article of the previous draft, to specify that agents of the parties should attend the informal meetings referred to in that paragraph.

Article 11

30. We have included in paragraph 1 of this article a reference to the adoption by the commission of its procedural rules and the need for the commission, in organizing its work, to bear in mind the time-limit for its completion. (On this question, see article 4 of the rules of the Institute of International Law.)

31. We do not agree with the comments made in paragraph 138 of the report of the Special Committee. A conciliation commission simply cannot function without a secretariat, which should therefore be established as soon as the proceedings begin. (See article 4 of the rules of the Institute.) Paragraph 1 of article 11 encourages flexibility, since it permits the commission to decide whether the proceedings require both a written and an oral phase, or merely an oral one. The last sentence of this paragraph further promotes flexibility.

32. The first sentence of paragraph 2 is based on the second paragraph of article 6 of chapter I of annex No. 1 to the Treaty of Peace and Friendship between Argentina and Chile, of 29 November 1984. 15/

Articles 12, 13 and 14

33. These articles correspond to articles 12 and 13 of the previous draft. Current article 12 is paragraph 1 of previous article 12. Paragraphs 2 and 3 of previous article 12 are now article 13 (paragraph 1 of which, corresponding to paragraph 2 of article 12 of the previous draft, contains two slight additions which are self-explanatory and which take into account the comment made at the beginning of paragraph 139 of the report of the Special Committee). Paragraph 4 of article 12 of the previous draft is now paragraph 2 of article 14.

34. Paragraph 3 of article 14 has been added to take account of the comment made at the end of paragraph 139 of the report of the Special Committee. It is based on Article 19 of the Statute of the International Court of Justice.

15/ Registered with the Secretariat of the United Nations, in June 1985, as No. 23392. An English translation has been published in volume XXIV of International Legal Materials, 1985, p. 11.

35. We do not agree with the second sentence of paragraph 139 of the Committee's report and refer to the third and fourth sentences of paragraph 30 of the previous explanatory memorandum.

Article 15

(Article 14 of the previous draft)

36. This article has been retained, except for the correction of a translation error in the French and English versions which made it difficult for some members of the Special Committee to understand the article. (See paragraph 32 of the previous explanatory memorandum.)

Article 16

37. We disagree with the first sentence of paragraph 143 of the report of the Special Committee: What would be the use of a proposal made by one of the parties if it is not communicated to the other party? We have expanded this article by giving the commission the right to comment on any proposal that is submitted.

Article 17

38. This article has had two minor revisions which need no comment.

Article 18

39. We believe that the rules should provide for the commission to endeavour to take its decisions unanimously. It should be borne in mind that, in any case, the commission will include members who have been appointed individually by the parties, each one of whom is likely to find in favour of the party which has appointed him (see para. 24 above). Consequently, any decision by the commission which has received the favourable vote of all its members will probably be acceptable to both parties, while, on the contrary, a decision which has received a negative vote from one of the members who have been appointed individually will probably not be acceptable to the party which has appointed such member. The second sentence of article 18, which is taken from article 13 of the European Convention, seems very reasonable to us. Article 18 is in line with article 6 of the rules of the Institute, article 12 of the General Act, as revised by the General Assembly, and, in particular, with the above-mentioned article 13 of the European Convention.

Article 19

40. For the reasons given in paragraph 21 above, we have retained this article.

Article 20

41. The critical comments on this article which are contained in paragraph 147 of the report of the Special Committee do not seem justified. Article 20 is generally consistent with articles 7 and 8 of the rules of the Institute, which, in our view, are well conceived. There is a small change in the first sentence of paragraph 1, which is self-explanatory. In the second sentence of paragraph 2, we have rendered discretionary what was previously mandatory. We have amended the third sentence of the same paragraph to bring it fully into line with the last sentence of article 7 of the rules of the Institute.

Article 21

42. The criticisms of this article which are contained in paragraph 148 of the report of the Special Committee are unjustified. The second sentence of this paragraph does not reflect the fact that the model rules are intended to be the basis of agreement between those States that choose to apply them. When this is taken into account, the sentence becomes quite unexceptional, although we have strengthened it by adding the words "in good faith". The purpose of the sentence is to ensure that, even if the commission's proposal seems at first glance to be contrary to its interests and perhaps unjust, a party will not reject it without prior careful consideration. It should be noted, lastly, that article 11, paragraph 5, of the 1985 Vienna Convention for the Protection of the Ozone Layer requires the parties to conciliation proceedings carried out in accordance with the relevant provisions of the Vienna Convention to consider "in good faith" the recommendations of the relevant commission. The objective of the last sentence of article 21 is both obvious and commendable, since it seeks to ensure that the parties continue their dialogue, notwithstanding the failure of conciliation.

Article 22

43. We have some difficulty with the first sentence of paragraph 149 of the report of the Special Committee. Under Article 33, paragraph 1 of the Charter of the United Nations, the obligation to continue to seek a solution to a dispute between States exists, strictly speaking, only if the continuance of the dispute is likely to endanger the maintenance of international peace and security; moreover, it is inconceivable that the parties are unaware of this key provision of the Charter. Lastly, it should be noted that, if the suggestion in question were accepted, a provision that is inconsistent with conciliation would be introduced into the model rules. The second sentence of article 22, paragraph 2, has been amended and a stylistic change introduced in order to bring it into line with the second sentence of paragraph 149 of the report of the Special Committee.

Article 23

44. This article is based on article 14 of the Institute's rules. In our view, the documents should not remain in the possession of the parties, since any indiscretion by either party could create tension between them, a risk which is minimized if the documents are in the possession of an impartial third party. And this third party should ideally be the Secretary-General of the United Nations, who - since he already has such an enormous quantity of documents in his keeping - can, without great additional cost or inconvenience, keep a set of documents that to him would be like drops of water in the sea. Therefore, taking into account the observations contained in paragraph 21 above, we have retained this article, despite paragraph 150 of the Committee's report.

Article 24

45. We were surprised by the criticisms of this article in paragraph 151 of the Committee's report, since it seems eminently reasonable that setting the time-limit for the conclusion of the commission's work should be left to the discretion of the parties. Some international disputes, because they are basically straightforward, involve a low volume of documentation and do not require the collection of evidence, can be quickly resolved, while others not only raise extraordinarily complex questions but call for the analysis of a great number of documents as well as much evidence-collecting; many other disputes stand between those two extremes. Thus, the conciliation proceedings conducted under the auspices of the General Agreement on Tariffs and Trade (GATT) have lasted between several months and three years. It must furthermore not be forgotten that for the parties to conciliation proceedings "time is money", and the parties should therefore have some prior idea of the length of the proceedings they have initiated and the conciliators should feel a certain pressure to conclude without undue delay.

Title of chapter VIII

46. According to paragraph 153 of the Committee's report, some members objected to the use of the word "secrecy". In that connection, it should be noted that Article 54, paragraph 3, of the Statute of the International Court of Justice, employs the word "secret" in discussing its deliberations.

Article 25

(Articles 26 and 27 of the previous draft)

47. This article combines the content of articles 26 and 27 of the previous draft, without revisions. The criticisms of these two articles (which correspond to articles 10 to 13 of the Institute's rules) contained in paragraphs 153 and 154 of the Committee's report, are not justified. Article 25, paragraph 4, is identical with the second paragraph of article 10 of the Institute's rules, which was adopted by the Institute on the proposal of

Sir Humphrey Waldock (who later served as the President of the International Court of Justice).

48. With regard to the suggestion at the end of paragraph 154 of the Committee's report, it should be noted there can be only two reasons for a party not being represented at a meeting of the commission. Such a situation would arise, first, in the case of deliberations of the commission, in which, naturally, neither party is represented, and, second, in the case of a meeting of the kind described in the final sentence of article 20, paragraph 1, in which only one party is represented. These considerations are the rationale for article 25, paragraph 2, of the Model Rules.

Article 26

(Article 28 of the previous draft)

49. The criticisms of this article contained in paragraph 155 of the Special Committee's report, are not justified. We do not share the views expressed in paragraph 5 of the statement made on behalf of the Legal Counsel, which appears in paragraph 159 of the Committee's report. We have nevertheless deleted article 28, paragraph 3, from the previous draft. Article 26, paragraph 1, excludes from the secrecy obligation regarding documentation any terms of settlement accepted by the parties. Article 26, paragraph 2, contains several self-explanatory amendments.

50. The proviso at the beginning of article 26, paragraph 1, addresses the need to ensure that any evidence that emerges during the conciliation proceedings may be submitted in any subsequent judicial or arbitral proceedings dealing with the same dispute.

Article 27

(Article 29 of the previous draft)

51. Paragraph 1 of this article was considered unnecessary and deleted. In the remaining paragraph, or paragraph 2 of previous article 29, self-explanatory amendments have been made.

Article 28

(Article 30 of the previous draft)

52. Paragraph 1 of this article is based on the eighth preambular paragraph of the Institute's rules, which in turn is based on proposals of two eminent authorities in the field of international law, Wilfred Jenks and Sir Gerald Fitzmaurice. This rule, whose importance was emphasized by the Institute, reflects the idea so neatly expressed by the eminent Max Huber, who observed that "la conciliation permet de céder tout en laissant entière la question de principe". It should be noted, however, with respect to article 28,

paragraph 1, that its terms are mutatis mutandis those of article 35 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, one of the provisions of that Convention that concern conciliation; its formulation seemed more appropriate than that of the eighth preambular paragraph of the Institute's rules.

53. Article 28, paragraph 2, has no counterpart in the previous draft. It is based on the second sentence of article 19 of chapter I of annex No. 1, to the Treaty of Peace and Friendship cited in paragraph 32 above.

Article 29

(Article 31 of the previous draft)

54. We do not share the view, expressed at the start of paragraph 158 of the Committee's report, that the translation into French of this article contains an error. In fact, "d'office" is the correct translation of "motu proprio". (Compare the English and French versions of article 75, paragraph 1, of the Règlement (Rules of Court) of the International Court of Justice.)

55. The suggestion made in the second sentence of paragraph 158 of the Committee's report seems entirely inappropriate: dividing the costs in an equitable manner is not the same as dividing them in equal shares, and serious differences can arise over exactly which proportions may be considered equitable.

GENERAL ASSEMBLY DRAFT RESOLUTION

56. In this draft resolution, in which stylistic changes have been made, the first preambular paragraph has been significantly altered and expanded, and a new paragraph 2 has been added to the operative part, in which the General Assembly would request the Secretary-General to lend support to the users of the Model Rules. That new paragraph would thus meet the objections raised by the Legal Counsel in 1993 (para. 1 of the statement set out in para. 159 of the Special Committee's report) to the draft resolution that accompanied the draft considered by the Special Committee that year. 16/

16/ In this connection, it is worthwhile to refer by analogy to the legal opinion published in the United Nations Juridical Yearbook, 1972, pp. 186-188.

Appendix

UNITED NATIONS MODEL RULES FOR THE CONCILIATION OF DISPUTES BETWEEN STATES

The General Assembly,

Considering that conciliation is one of the methods of peaceful settlement of disputes between States that the United Nations Charter enumerates in its Article 33, paragraph 1, and that it has been adopted in numerous treaties, bilateral and multilateral, with a view to the settlement of such disputes,

Convinced that the establishment of model rules of conciliation between States incorporating the results of the most recent scientific studies and experience in the field of international conciliation, together with certain innovations which can with advantage be made in the traditional practice in this field, could contribute to the development of harmonious relations between States,

1. Recommends the application of the United Nations Model Rules for the Conciliation of Disputes between States, the text of which is contained in the annex to the present resolution, in any case where a dispute arises between States which it has not been possible to settle by direct negotiations and which the parties wish to settle by amicable means;

2. Requests the Secretary-General to lend, as far as possible and in accordance with the relevant provisions of the Model Rules, his support to States resorting to conciliation on the basis of those Rules;

3. Also requests the Secretary-General to take appropriate measures to circulate to all Governments the text of the present resolution, together with the annex thereto.

Annex

UNITED NATIONS MODEL RULES FOR THE CONCILIATION OF DISPUTES BETWEEN STATES

CHAPTER I

APPLICATION OF THE RULES

Article 1

1. These rules apply to the conciliation of disputes between States which it has not been possible to settle by direct negotiations, where those States have expressly agreed in writing to their application.

2. The States applying these rules may at any time agree to exclude or amend any of their provisions.

CHAPTER II

INITIATION OF THE CONCILIATION PROCEEDINGS

Article 2

1. The conciliation proceedings shall begin as soon as possible after the States concerned have agreed in writing to the application of the present rules, with or without amendments, as well as on a definition of the subject of the dispute, the number of members of the conciliation commission, its seat and the maximum duration of the proceedings, as provided in Article 24. If necessary, the agreement shall contain provisions concerning the language or languages in which the proceedings are to be conducted and the linguistic services required.

2. If the States cannot reach agreement on the definition of the dispute, they may jointly request the assistance of the Secretary-General of the United Nations to resolve the difficulty. They may also request his assistance to resolve any other difficulty they may encounter in reaching an agreement on the modalities of the conciliation proceedings.

CHAPTER III

NUMBER OF CONCILIATORS

Article 3

There may be three conciliators or five conciliators. In either case the conciliators shall form a commission.

CHAPTER IV

APPOINTMENT OF CONCILIATORS

Article 4

If the parties have agreed that three conciliators shall be appointed, each one of them shall appoint a conciliator, who may not be of its own nationality. The parties shall appoint by mutual agreement the third conciliator, who may not be of the nationality of any of the parties or of the other conciliators. The third conciliator shall act as president of the commission. If he is not appointed within two months of the appointment of the conciliators appointed individually by the parties, the third conciliator shall be appointed by the Government of a third State chosen by agreement between the parties or, if such agreement is not obtained within two months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment shall be made by the Vice-President or the next member of the Court in order of seniority who is not a national of the parties. The third conciliator shall not reside habitually in the territory of the parties or be or have been in their service.

Article 5

1. If the parties have agreed that five conciliators should be appointed, each one of them shall appoint a conciliator who may be of its own nationality. The other three conciliators, one of whom shall be chosen with a view to his acting as president, shall be appointed by agreement between the parties from among nationals of third States and shall be of different nationalities. None of them shall reside habitually in the territory of the parties or be or have been in their service. None of them shall have the same nationality as that of the other two conciliators.

2. If the appointment of the conciliators whom the parties are to appoint jointly has not been effected within three months, they shall be appointed by the Government of a third State chosen by agreement between the parties or, if such an agreement is not reached within three months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment shall be made by the Vice-President or the next judge in order of seniority who is not a national of the parties. The Government or member of the International Court of Justice making the appointment shall also decide which of the three conciliators shall act as president.

3. If at the end of the three-month period referred to in the preceding paragraph, the parties have been able to appoint only one or two conciliators, the two conciliators or the conciliator still required shall be appointed in the manner described in the preceding paragraph. If the parties have not agreed that the conciliator or one of the two conciliators whom they have appointed shall act as president, the Government or member of the International Court of Justice appointing the two conciliators or the conciliator still required shall also decide which of the three conciliators shall act as president.

4. If, at the end of the three-month period referred to in paragraph 2 of this article the parties have appointed three conciliators but have not been able to agree which of them shall act as president, the president shall be chosen in the manner described in that paragraph.

Article 6

The vacancies which may occur in the commission as a result of death, resignation or any other cause shall be filled as soon as possible by the method established for appointing the members to be replaced.

CHAPTER V

FUNDAMENTAL PRINCIPLES

Article 7

The commission, acting independently and impartially, shall endeavour to assist the parties in reaching an amicable settlement of the dispute. To that end, it shall attempt to clarify the issues in dispute and seek to obtain all

information necessary or useful for the attainment of those objectives. If no settlement is reached during consideration of the dispute, the commission shall draw up and communicate to the parties such terms of settlement as it deems appropriate.

Article 8

The commission shall be guided by principles of objectivity, equity and justice, giving consideration to, among other things, the rights and obligations of the parties and the facts and circumstances of the case.

CHAPTER VI

PROCEDURES AND POWERS OF THE COMMISSION

Article 9

While adhering to all the provisions of these rules, the commission shall adopt its procedure.

Article 10

1. Before the commission begins its work, the parties shall designate the agents and shall communicate the names of such agents to the president of the commission. The president shall determine, in agreement with the parties, the date of the commission's first meeting, to which the members of the commission and the agents shall be convoked.

2. The agents of the parties may be assisted by counsel and experts appointed by the parties.

3. Before the first meeting of the commission, its members may meet informally with the agents of the parties to deal with administrative and procedural matters.

Article 11

1. At its first meeting, the commission shall appoint a secretary, adopt its procedural rules and hear initial statements by the parties. As soon as the information provided by the parties so permits, the commission, having regard, in particular, to the time-limit laid down in Article 24, shall decide whether the parties should be invited to submit written pleadings and in what order and within what time-limits they are to be submitted, as well as the dates when, if necessary, the agents and counsel will be heard. The decisions taken by the commission in this regard may be amended at any later stage of the proceedings.

2. The secretary of the commission shall not have the nationality of any of the parties, shall not reside habitually in their territory and shall not be or

have been in the service of any of them. He may be a United Nations official if the parties so wish and if they agree with the Secretary-General of the Organization on the conditions under which he will exercise his functions.

3. Subject to the provisions of Article 20, paragraph 1, the commission shall not allow the agent or counsel of one party to attend a meeting without having also given the other party the opportunity to be represented at the same meeting.

Article 12

The parties, acting in good faith, shall facilitate the commission's work and, in particular, shall do everything possible to provide it with whatever documents, information and explanations may be relevant.

Article 13

1. The commission may ask the parties for whatever relevant information or documents, as well as explanations, it deems necessary or useful. It may also make comments on the arguments advanced as well as the statements or proposals made by the parties.

2. The commission shall accede to any request by a party that persons whose testimony it considers necessary or useful be heard, that experts be consulted or that local investigations be conducted. It may, however, in any case in which it considers it neither necessary nor useful to accede to such a request, ask the party making the request to reconsider it.

Article 14

1. If the commission ascertains that the parties disagree on issues of fact, it may, motu proprio, consult experts, conduct local investigations or question witnesses.

2. The parties shall use the means available to them to enable the commission to enter their territory and, in accordance with their laws, convoke and hear witnesses or experts and visit any part of their territory to conduct local investigations.

3. The members of the commission, the agents of the parties and the secretary, when engaged on the business of the commission, shall enjoy diplomatic privileges and immunities.

Article 15

The commission may propose to the parties that they jointly appoint expert advisers to assist it in the consideration of technical aspects of the dispute. If the proposal is accepted, its implementation shall be conditional upon the

expert advisers being appointed by the parties by mutual agreement and accepted by the commission and upon the parties fixing their emoluments.

Article 16

Each party may at any time, at its own initiative or at the initiative of the commission, make proposals for the settlement of the dispute. Any proposal made in accordance with this article shall be communicated immediately to the other party by the president, who may, in so doing, transmit any comment the commission may wish to make thereon.

Article 17

At any stage of the proceedings, the commission may, at its own initiative or at the initiative of one of the parties, draw the attention of the parties to any measures which in its opinion might be advisable or facilitate a settlement.

Article 18

The commission shall endeavour to take its decisions unanimously but, if unanimity proves impossible, it may take them by a majority of votes of its members. Except in matters of procedure, the presence of all members shall be required in order for a decision to be valid.

Article 19

The commission may, at any time, ask the Secretary-General of the United Nations for advice or assistance with regard to the administrative or procedural aspects of its work.

CHAPTER VII

CONCLUSION OF THE CONCILIATION PROCEEDINGS

Article 20

1. On concluding its consideration of the dispute, the commission shall, if full settlement has not been reached, define the terms of settlement which in its opinion are likely to be acceptable to the parties. To that end, it may hold an exchange of views with the agents of the parties, who may be heard jointly or separately.

2. The terms of settlement adopted by the commission shall be set forth in a report communicated by the president of the commission to the agents of the parties, with a request that the agents inform the commission, within a given period, whether the parties accept them. The president may include in the report the reasons which, in the commission’s view, might prompt the parties to

accept the proposed terms of settlement. The commission shall refrain from presenting in its report any final conclusions with regard to facts or ruling formally on issues of law, unless the parties have jointly asked it to do so.

3. If the parties accept the terms of settlement proposed by the commission, a procès-verbal shall be drawn up setting forth the conditions of acceptance. The procès-verbal shall be signed by the president and the secretary. A copy signed by the secretary shall be provided to each party. This shall conclude the proceedings.

Article 21

The terms of settlement proposed shall be merely recommendations submitted to the parties for consideration in order to facilitate an amicable settlement of the dispute. The parties nevertheless undertake to study them in good faith, carefully and objectively. If one of the parties rejects terms of settlement which the other party accepts, it shall inform the latter, in writing, of the reasons why it could not accept them.

Article 22

1. If the terms of settlement are not accepted by both parties and the latter do not wish further efforts to be made to reach agreement on different terms, a procès-verbal signed by the president and the secretary of the commission shall be drawn up, omitting the proposed terms and indicating that the parties were unable to accept them and do not wish further efforts to be made to reach agreement on different terms. The proceedings shall be concluded when each party has received a copy of the procès-verbal signed by the secretary.

2. If the terms of settlement are not accepted by both parties but the latter wish efforts to reach agreement on different terms to continue, the proceedings shall be resumed, with all the provisions that have thus far governed the proceedings continuing to apply, except that it shall not be necessary to appoint a new secretary. Article 24 shall apply to the resumed proceedings, with the relevant time-limit, which the parties may, by mutual agreement, shorten or extend, running from the commission’s first meeting after resumption of the proceedings.

Article 23

Upon conclusion of the proceedings, the president of the commission shall deliver the documents in the possession of the secretariat of the commission to the Secretary-General of the United Nations, who, without prejudice to the possible application of article 26, paragraph 2, shall preserve their secrecy.

Article 24

Except where the parties or the commission, with the consent of the parties, decide on an extension, the commission shall conclude its work within ..... from the date of its first meeting.

CHAPTER VIII

SECRECY OF THE COMMISSION'S WORK AND DOCUMENTS

Article 25

1. The commission's meetings shall be closed. Its members and expert advisers, the agents and counsel of the parties, and the secretary and secretariat staff, shall refrain from divulging any documents or statements, or any communication concerning the progress of the proceedings, without the prior approval of both agents.

2. Each party shall receive, through the secretary, certified copies of the minutes of the meetings at which it was represented.

3. Each party shall receive, through the secretary, certified copies of any documentary evidence received and of experts' reports, records of investigations and statements by witnesses.

4. If any indiscretion occurs during the proceedings, the commission may determine its possible effect on their continuation.

Article 26

1. Except with regard to the certified copies referred to in article 25, paragraph 3, the obligation to respect the secrecy of the proceedings and of the deliberations shall remain in effect for the parties and for members of the commission, expert advisers and secretariat staff after the proceedings are concluded and shall extend to terms of settlement and proposals which were not accepted.

2. Notwithstanding the foregoing, the parties may, upon conclusion of the proceedings and by mutual agreement, make available to the public all or some of the documents that in accordance with the preceding paragraph are to remain secret, or authorize the publication of all or some of those documents.

CHAPTER IX

PROHIBITION OF ACTS WHICH MIGHT HAVE AN ADVERSE EFFECT ON THE CONCILIATION

Article 27

The parties shall refrain from any measure which might aggravate or exacerbate the dispute. They shall, in particular, refrain from any measures which might have an adverse effect on the terms of settlement proposed by the commission, so long as those terms have not been explicitly rejected by both or one of the parties.

CHAPTER X

PRESERVATION OF THE LEGAL POSITION OF THE PARTIES

Article 28

1. Except as the parties may otherwise agree, neither party shall be entitled in any other proceedings, whether in a court of law or before arbitrators or before any other body, entity or person, to invoke any views expressed or statements, admissions or proposals made by the other party in the conciliation proceedings, but not accepted, or the report of the commission, the terms of settlement approved by the commission or any proposal made by the commission, unless accepted by both parties.

2. Acceptance by a party of terms of settlement proposed by the commission does not in any way imply agreement with the considerations upon which they may be based.

CHAPTER XI

COSTS

Article 29

The costs of the conciliation proceedings, including those occasioned by any investigations which the commission decided to conduct motu proprio and the emoluments of expert advisers appointed in accordance with article 15, shall be borne by the parties in equal shares.
