A/CN.4/SER.A/1958

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1958

Volume I

Summary records of the tenth session

28 April - 4 July 1958

UNITED NATIONS

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UNITED NATIONS
New York, 1958

INTRODUCTORY NOTE

The summary records which follow were originally distributed in mimeographed form as documents A/CN.4/SR.431 to A/C.N.4/SR.478. They include the corrections to the provisional summary records that were requested by the members of the Commission and such drafting and editorial modifications as were considered necessary.

Symbols of United Nations documents are composed of capital letters combined with figures. The occurrence of such a symbol in the text indicates a reference to a United Nations document.

The documents pertaining to the work of the tenth session of the Commission are reproduced in volume II of this publication.

A/CN.4/SER.A/1958

UNITED NATIONS PUBLICATION

Sales No.: 58. V. 1, Vol. I

Price: $(U.S.) 2.50; 18/- stg.; Sw. fr. 10.50
(or equivalent in other currencies)

CONTENTS

	Page
Members of the Commission	ix
Agenda	ix
List of documents pertaining to the tenth session of the Commission	x
Note concerning the numbering of draft articles	xii
431st Meeting	
Monday, 28 April 1958, at 3 p.m.	
Opening of the session	1
Election of officers	2
432nd Meeting	
Tuesday, 29 April 1958, at 9.45 a.m.	
Statement by the representative of the Secretary-General	2
Adoption of the agenda (A/CN.4/112)	2
Statement by Mr. Tunkin	5
433rd Meeting	
Wednesday, 30 April 1958, at 9.45 a.m.	
Filling of casual vacancy in the Commission (article 11 of the Statute)	5
Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113)	
General debate	5
Consideration of the model draft on arbitral procedure (A/CN.4/113, annex)	9
Article 1	9
434th Meeting	
Thursday, 1 May 1958, at 9.45 a.m.	
Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*	
Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*	
Article 1 *(continued)*	10
Article 2	15
435th Meeting	
Friday, 2 May 1958, at 9.45 a.m.	
Communications from Mr. Khoman and Faris Bey El-Khouri	15
Statement by Mr. Hsu	15
Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*	
Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*	
Article 3	15
436th Meeting	
Monday, 5 May 1958, at 3 p.m.	
Appointment of a drafting committee	17
Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*	
Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*	
Article 3 *(continued)*	17
Article 4	21
Article 5	21
437th Meeting	
Tuesday, 6 May 1958, at 9.45 a.m.	
Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*	
Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*	
Article 5 *(continued)*	22
Article 6 and additional article proposed by Mr. Ago	23
Article 7	26
Article 6 *(continued)*	27
438th Meeting	
Wednesday, 7 May 1958, at 9.45 a.m.	
Communication from the Secretary-General (A/CN.4/L.74)	27
Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*	
Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*	
Article 5 *(continued)*	27
Article 8	30
Additional article proposed by Mr. Ago *(continued)*	32
439th Meeting	
Thursday, 8 May 1958, at 9.45 a.m.	
Communication from the Asian-African Legal Consultative Committee	33
Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*	
Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*	
Article 4	33
Article 5 *(continued)*	39
440th Meeting	
Friday, 9 May 1958, at 9.45 a.m.	
Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*	
Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*	
Article 5 *(continued)*	39
Article 4 *(continued)*	39
Article 8 *(continued)*	40
Article 9	40
Article 10	43

Page

441st Meeting

Monday, 12 May 1958, at 3 p.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*

Article 10 *(continued)* 45

Article 11 46

Article 9 *(continued)* 49

Article 12 50

442nd Meeting

Tuesday, 13 May 1958, at 9.45 a.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*

Article 12 *(continued)* 51

Article 13 54

Article 14 56

Article 15 56

443rd Meeting

Wednesday, 14 May 1958, at 9.45 a.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*

Article 16 56

Article 17 56

Article 18 57

Article 19 58

Article 20 58

Article 21 60

444th Meeting

Friday, 16 May 1958, at 9.45 a.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113, annex) *(continued)*

Article 21 *(continued)* 61

Article 22 63

Article 23 65

445th Meeting

Monday, 19 May 1958, at 3 p.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113 annex) *(continued)*

Article 24 66

Article 25 67

Article 26 69

Article 27 70

Composition of the Drafting Committee 71

446th Meeting

Tuesday, 20 May 1958, at 9.45 a.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113 annex) *(continued)*

Article 28 72

Article 29 72

Article 30 73

Article 31 75

Article 32 75

Article 33 75

Article 34 75

Article 35 76

Article 36 77

447th Meeting

Wednesday, 21 May 1958, at 9.45 a.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113 annex) *(continued)*

Article 38 78

Article 39 78

Additional article proposed by Mr. Bartos . . . 83

448th Meeting

Thursday, 22 May 1958, at 9.45 a.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113 annex) *(continued)*

Additional article proposed by Mr. Bartos *(continued)* 83

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-5, A/CN.4/116 and Add.1, A/CN.4/L.72) 84

Final form of the draft 84

449th Meeting

Friday, 23 May 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-5, A/CN.4/116 and Add.1, A/CN.4/L.72) *(continued)*

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1) 90

Definitions clause 90

Article 1 90

Article 2 91

450th Meeting

Tuesday, 27 May 1958, at 3 p.m.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

Consideration of the model draft on arbitral procedure (A/CN.4/113 annex) *(continued)*

Article 36 95

Article 37 99

451st Meeting

Wednesday, 28 May 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72) *(continued)*

Page

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Article 3 100
Additional article (article 3 A) 100
Article 4 101
Article 5 103

452nd Meeting

Thursday, 29 May 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Article 5 (*continued*) 105
Article 6 108
Article 7 111

453rd Meeting

Friday, 30 May 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Article 7 (*continued*) 112
Article 8 114
Article 9 116

454th Meeting

Monday, 2 June 1958, at 3 p.m.

Resignation of Mr. El-Erian 118
Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Article 10 118
Article 11 119
Article 12 120
Additional article (article 12 A) 120
Article 13 122
Article 14 122

455th Meeting

Tuesday, 3 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Observations of the Czechoslovak Government on section I 123
Additional article (article 14 A) 123
Article 14 (*continued*) 124
Article 15 126
Article 16 127

Page

456th Meeting

Wednesday, 4 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1) (*continued*)
Article 16 (*continued*) 129

457th Meeting

Thursday, 5 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles on diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Article 17 134
Article 18 135
Article 19 136
Article 20 137
Article 21 138

458th Meeting

Friday, 6 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles on diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Article 21 (*continued*) 140

459th Meeting

Monday, 9 June 1958, at 3 p.m.

Filling of casual vacancy in the Commission (article 11 of the Statute) 143
Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Additional article (article 21 A) 143
Article 22 144
Article 23 144
Article 24 146

460th Meeting

Tuesday, 10 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)
Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)
Article 24 (*continued*) 149
Article 25 154

Page

461st Meeting

Wednesday, 11 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)

Article 25 (*continued*) 156
Article 26 157
Additional article (article 26 A) 157
Article 27 158
Article 28 160

462nd Meeting

Thursday, 12 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)

Article 28 (*continued*) 161
Article 29 167

463rd Meeting

Friday, 13 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)

Article 29 (*continued*) 167
Article 30 168
Article 31 172
Article 32 172

464th Meeting

Monday, 16 June 1958, at 3 p.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)

Article 32 (*continued*) 174

Planning of future work of the Commission 174

Representation at the thirteenth session of the General Assembly 180

Date and place of the eleventh session 180

465th Meeting

Tuesday, 17 June 1958, at 9.45 a.m.

Date and place of the eleventh session (*continued*) . . 180

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)

Article 33 180
Article 34 181
Article 35 181
Article 36 182
Article 37 184

466th Meeting

Wednesday, 18 June 1958, at 9.50 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)

Article 37 (*continued*) 186
Additional article (article 12 A) (*continued*) . . . 191

467th Meeting

Thursday, 19 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)

Additional article (article 12 A) (*continued*) . . . 193
Additional article on reciprocity and non-discrimination 194
Additional article on exemption from social security legislation 198
Definitions clause (*continued*) 198
Final form of the draft (*continued*) 199

468th Meeting

Friday, 20 June 1958, at 9.45 a.m.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (*continued*)

Draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16; A/CN.4/116/Add.1-2) (*continued*)

Final form of the draft (*continued*) 200

Planning of future work of the Commission 200

Co-operation with other bodies 200

Consular intercourse and immunities (A/CN.4/108)
General debate 201

469th Meeting

Monday, 23 June 1958, at 3 p.m.

Consular intercourse and immunities (A/CN.4/108) (*continued*)

General debate (*continued*) 205

Draft provisional articles on consular intercourse and immunities (A/CN.4/108, part II)
Article 1 207

470th Meeting

Tuesday, 24 June 1958, at 9.45 a.m.

Consular intercourse and immunities (A/CN.4/108) (*continued*)

Draft provisional articles on consular intercourse and immunities (A/CN.4/108, part II) (*continued*)
Article 1 (*continued*) 210

Page

471st Meeting

Wednesday, 25 June 1958, at 9.45 a.m.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1)

Chapter II : Arbitral procedure (A/CN.4/L.78/Add.1)

I. Introduction

Paragraphs 1 to 5 217

Paragraph 6 217

III, A. General observations

Paragraph 8 218

Paragraph 9 218

Paragraph 10 218

Paragraph 11 219

Paragraph 12 219

Paragraph 13 219

II. Text of the draft *and* III. Commentary

Title and preamble 219

Comments on the preamble (A/CN.4/L.78/Add.1, paras. 14 and 15) 220

Article 1 220

Comments on article 1 (A/CN.4/L.78/Add.1, para. 6) 220

472nd Meeting

Thursday, 26 June 1958, at 9.45 a.m.

Limitation of documentation: General Assembly resolution 1203 (XII) 221

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1) (*continued*)

Chapter II : Arbitral procedure (A/CN.4/L.78/Add.1) (*continued*)

II. Text of the draft *and* III. Commentary (*continued*)

Article 2 221

Article 3 221

Article 4 221

Article 5 222

Article 6 223

Article 7 223

Article 8 224

Article 9 224

Article 10 224

III. A. General observations (*continued*) 225

473rd Meeting

Friday, 27 June 1958, at 9.45 a.m.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1) (*continued*)

Chapter II : Arbitral procedure (A/CN.4/L.78/Add.1) (*continued*)

III, A. General observations (*continued*) 228

II. Text of the draft *and* III. Commentary (*continued*)

Article 11 228

Article 12 228

Articles 13 to 17 228

Article 18 229

Page

Article 19 229

Article 20 229

Article 21 229

Article 22 229

Article 23 229

Article 24 230

Article 25 230

Article 26 230

Article 27 230

Article 28 230

Article 29 230

Article 30 230

Article 31 230

Article 32 230

Article 33 230

Article 34 231

Article 35 231

Article 36 232

Article 37 232

Article 38 232

474th Meeting

Monday, 30 June 1958, at 4.20 p.m.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (*continued*)

Chapter III : Diplomatic intercourse and immunities (A/CN.4/L.78/Add.2)

I. Introduction 234

II. Text of the draft

Article 1 234

Article 2 235

Commentary on article 2 235

Article 3 235

Commentary on article 3 235

Articles 4 and 5 235

Article 6 236

Article 7 236

Article 8 236

Commentary on articles 4 to 8 236

475th Meeting

Tuesday, 1 July 1958, at 9.45 a.m.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (*continued*)

Chapter III. Diplomatic intercourse and immunities (A/CN.4/L.78/Add.2) (*continued*)

II. Text of the draft (*continued*)

Commentary on articles 4 to 8 (*continued*) . . 237

Article 9 239

Commentary on article 9 239

Article 10 239

Commentary on article 10 239

Article 11 239

Commentary on article 11 240

Article 12 240

Commentary on article 12 240

Article 13 240

Page

Commentary on article 13 240
Articles 14 and 15 240
Article 16 240
Article 17 240
Commentary on articles 14 to 17 240
Article 18 241
Commentary on article 18 241
Article 19 241
Commentary on article 19 241
Article 20 241
Commentary on article 20 241
Article 21 241
Commentary on article 21 241
Article 22 242
Commentary on article 22 242
Article 23 and commentary 242
Article 24 242
Commentary on article 24 242

476th Meeting

Wednesday, 2 July 1958, at 9.45 a.m.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (*continued*)

Chapter III: Diplomatic intercourse and immunities (A/CN.4/L.78/Add.2) (*continued*)

II. Text of the draft (*continued*)

Article 25 242
Commentary on article 25 242
Article 26 243
Commentary on article 26 243
Subsection C. Personal privileges and immunities 243
Article 27 243
Commentary on article 27 243
Article 28 243
Commentary on article 28 243
Article 29 244
Commentary on article 29 244
Article 30 245
Commentary on article 30 245
Additional article on exemption from social security legislation 245
Article 31 245
Commentary on article 31 245
Article 32 245
Commentary on article 32 245
Article 33 245
Commentary on article 33 245
Article 34 246

Page

Commentary on article 34 246
Article 35 247
Commentary on article 35 247
Article 36 248
Commentary on article 36 248

477th Meeting

Thursday, 3 July 1958, at 9.45 a.m.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (*continued*)

Chapter III. Diplomatic intercourse and immunities (A/CN.4/L.78/Add.2) (*continued*)

II. Text of the draft (*continued*)

Commentary on article 36 (*continued*) . . . 248
Article 37 248
Commentary on article 37 248
Article 38 249
Commentary on article 38 249
Article 39 249
Commentary on article 39 250
Article 40 250
Commentary on article 40 251
Article 41 251
Commentary on article 41 251
Article 42 and commentary 251
Article 43 251
Commentary on article 43 251
Article 44 251
Commentary on article 44 251
Additional article on exemption from social security legislation (*continued*) 251
Commentary on the additional article . . . 252

Chapter IV: Progress of work on other subjects under study by the Commission (A/CN.4/L.78/Add.3) 252

Chapter V: Other decisions of the Commission (A/CN.4/L.78/Add.4) 252

478th Meeting

Friday, 4 July 1958, at 9.45 a.m.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (*continued*)

Chapter III: Diplomatic intercourse and immunities (A/CN.4/L.78/Add.2) (*continued*) 255

Additional article on exemption from social security legislation (*continued*) 256

Chapter I: Organization of the session (A/CN.4/L.78) 257

Closure of the session 257

MEMBERS OF THE COMMISSION

Name	*Nationality*
Mr. Roberto Ago	Italy
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Milan Bartos	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. Abdullah El-Erian	Egypt
Faris Bey El-Khouri	Syria
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Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Kisabúro Yokota	Japan
Mr. Jaroslav Zourek	Czechoslovakia

Officers

Chairman:	Mr. Radhabinod Pal
First Vice-Chairman:	Mr. Gilberto Amado
Second Vice-Chairman:	Mr. Grigory I. Tunkin
Rapporteur:	Sir Gerald Fitzmaurice
Secretary to the Commission:	Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs

AGENDA

Document A/CN.4/112
27 January 1958

The Commission adopted the following agenda at it 432nd meeting, held on 29 April 1958:

1. Filling of casual vacancy in the Commission (article 11 of the statute).
2. Arbitral procedure: General Assembly resolution 989 (X).
3. Diplomatic intercourse and immunities.
4. Law of treaties.
5. State responsibility.
6. Consular intercourse and immunities.
7. Date and place of the eleventh session.
8. Planning of future work of the Commission.
9. Limitation of documentation: General Assembly resolution 1203 (XII).
10. Other business.

LIST OF DOCUMENTS PERTAINING TO THE TENTH SESSION OF THE COMMISSION

Document No.	*Title*	*Observations and references*
A/2456	Report of the International Law Commission covering the work of its fifth session	*Official Records of the General Assembly, Eighth Session, Supplement No. 9*
A/2899 and Add.1 and 2	Comments received from Governments regarding the draft convention on arbitral procedure prepared by the International Law Commission at its fifth session, in 1953	*Ibid., Tenth Session, Annexes,* agenda item 52
A/3159	Report of the International Law Commission covering the work of its eighth session	*Ibid., Eleventh Session, Supplement No. 9*; also reproduced in *Yearbook of the International Law Commission, 1956,* vol. II
A/3623	Report of the International Law Commission covering the work of its ninth session	*Ibid., Twelfth Session, Supplement No. 9*; also reproduced in *Yearbook of the International Law Commission, 1957,* vol. II
A/3859	Report of the International Law Commission covering the work of its tenth session	*Ibid., Thirteenth Session, Supplement No. 9*; also reproduced in *Yearbook of the International Law Commission, 1958,* vol. II
A/CN.4/91	Diplomatic intercourse and immunities: report by A. E. F. Sandström, Special Rapporteur	See *Yearbook of the International Law Commission, 1955,* vol. II *
A/CN.4/92	*Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session*: document prepared by the Secretariat	United Nations publication, Sales No.: 1955.V.1
A/CN.4/101	Law of treaties: report by G. G. Fitzmaurice, Special Rapporteur	See *Yearbook of the International Law Commission, 1956,* vol. II
A/CN.4/107	Law of treaties: second report by G. G. Fitzmaurice, Special Rapporteur	See *Yearbook of the International Law Commission, 1957,* vol. II
A/CN.4/108	Consular intercourse and immunities: report by Jaroslav Zourek, Special Rapporteur	*Ibid.*
A/CN.4/109	Arbitral procedure: Draft convention on arbitral procedure adopted by the Commission at its fifth session: report by Georges Scelle, Special Rapporteur (with a "model draft" on arbitral procedure annexed)	*Ibid.*
A/CN.4/111	State responsibility: International responsibility: third report by F. V. García Amador, Special Rapporteur	See *Yearbook of the International Law Commission, 1958,* vol. II
A/CN.4/112	Provisional agenda	Adopted without change. See page above.
A/CN.4/113	Arbitral procedure: Draft on arbitral procedure adopted by the Commission at its fifth session: report by Georges Scelle, Special Rapporteur (with a model draft on arbitral procedure annexed)	See *Yearbook of the International Law Commission, 1958,* vol. II
A/CN.4/114 and Add.1-6	Diplomatic intercourse and immunities: comments by Governments on the draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16)	See A/3859, annex
A/CN.4/115 [and Corr.1]	Law of treaties: third report by G. G. Fitzmaurice, Special Rapporteur	See *Yearbook of the International Law Commission, 1958,* vol. II

* Not yet issued at the time of publication of the present volume.

Document No.	*Title*	*Observations and references*
A/CN.4/116	Diplomatic intercourse and immunities: summary of observations received from Governments (A/CN.4/114 and Add.1) and conclusions of the Special Raporteur	Mimeographed
A/CN.4/116/Add.1 and 2	Diplomatic intercourse and immunities: articles proposed by A. E. F. Sandström, the Special Rapporteur	See *Yearbook of the International Law Commission, 1958*, vol. II
A/CN.4/117	Report of the International Law Commission covering the work of its tenth session	Same text as A/3859
A/CN.4/L.71	Arbitral procedure: summary of opinions expressed in the Sixth Committee at the eighth and tenth sessions of the General Assembly and in the written comments by Governments on the draft convention on arbitral procedure (A/2456, para. 57): working paper prepared by the Secretariat	Mimeographed
A/CN.4/L.72	Diplomatic intercourse and immunities: summary of opinions expressed in the Sixth Committee at the twelfth session of the General Assembly on the draft articles concerning diplomatic intercourse and immunities (A/3623, para. 16): working paper prepared by the Secretariat	Ditto
A/CN.4/L.74	Communication dated 2 May 1958 from the Secretary-General of the United Nations to the Chairman of the Commission	See *Yearbook of the International Law Commission, 1958*, vol. II
A/CN.4/L.75	Diplomatic intercourse and immunities: summary of opinions expressed in the comments by Governments (A/CN.4/114 and Add.1) on the draft articles concerning diplomatic intercourse and immunities: working paper prepared by the Secretariat	Mimeographed
A/CN.4/L.76	Planning of future work of the Commission: comments and proposals submitted by Mr. Jaroslav Zourek	See *Yearbook of the International Law Commission, 1958*, vol. II
A/CN.4/L.77	Co-operation with inter-American bodies: proposal submitted by Mr. Alfaro, Mr. Amado and Mr. García Amador	See A/3859, para. 72
A/CN.4/L.78 and Add. 1-4	Draft report of the International Law Commission covering the work of its tenth session	Mimeographed
A/CN.4/SR.188	Summary record of the 188th meeting of the Commission	See *Yearbook of the International Law Commission, 1953*, vol. I *

* Not yet issued at the time of publication of the present volume.

NOTE CONCERNING THE NUMBERING OF DRAFT ARTICLES

As a result of the decisions of the Commission, changes occurred in the numbering of the draft articles considered at the tenth session. A list of the articles adopted by the Commission and of the corresponding articles of the drafts before the Commission is given below.

Arbitral procedure

Model rules adopted by the Commission at its tenth session (A/3589, para. 22)	Model draft submitted by the Special Rapporteur (A/CN.4/113, annex)
Articles	*Articles*
Preamble	1
1	3
2	2
3	4
4	5
5	6
6	8
7 *	[*article proposed by Mr. Ago*]
8	9
9	10
10	11
11	12
12	13
13	16
14	17
15	18
16	19
17	20
18	21
19	22
20	23
21	24
22	26
23	27
24	28
25	29
26	25
27 *	—
28	30
29	31
30	32
31	33
32	34
33	35
34 *	[*article proposed by Mr. Bartos*]
35	36
36	37
37	38
38	39
	Deleted
	7
	14
	15

Diplomatic intercourse and immunities

Draft articles adopted by the Commission at its tenth session (A/3859, para. 53)	Draft articles adopted by the Commission at its ninth session (A/3623, para. 16)
Articles	*Articles*
1 *	—
2	1
3	2
4	3
5 *	[*3 A*]
6	4
7	5
8	6
9 *	—
10	7
11 *	—
12	8
13	10
14	11
15	12
16	13
17	9
18 *	[*14 A*]
19	15
20	16
21	17
22	18
23	19
24	20
25	21
26 *	—
27	22
28	23
29	24
30	25
31 *	—
32	26
33 *	[*26 A*]
34	27
35	29
36	28
37	30
38	31
39	32
40	33
41	34
42	35
43	36
44 *	—
45	37
	Deleted
	14

* New article.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TENTH SESSION

Held at the Palais des Nations, Geneva, from 28 April to 4 July 1958

431st MEETING

Monday, 28 April 1958, at 3 p.m.

Chairman: Mr. Jaroslav ZOUREK;
later: Mr. Radhabinod PAL.

Opening of the session

1. The CHAIRMAN declared the tenth session of the International Law Commission open.

2. He observed that the tenth anniversary of the commencement of the Commission's work was an appropriate moment for considering how it had acquitted itself of the task of "promotion of the progressive development of international law and its codification" assigned it by resolution 174 (II) of the General Assembly on the strength of Article 13 of the Charter.

3. Tracing the history of the Commission from its establishment in 1948, he said that, after feeling its way in the early years, the Commission, as could be judged from its draft articles on the law of the sea, had evolved a sound method of work. For the quality of those articles, which dealt with all aspects of the régime of the sea — the régime of the territorial sea, of the continental shelf and of the high seas, and conservation of the living resources of the sea — the Commission owed a debt of gratitude to its Special Rapporteur on the subject, Mr. François.

4. In studying the various topics in its programme of work, the Commission, thanks to the efforts of the Codification Division of the Secretariat, had accumulated a rich store of material on the state of international law, including the collection of *Reports of International Arbitral Awards,* the *Legislative Series* and sundry valuable memoranda.

5. Yet the Commission had long remained relatively unknown to the general public. That was partly because its work was highly technical and for a long time few of its documents were published, but also partly because until 1956 none of the drafts it had prepared had been regarded by the General Assembly as an appropriate basis for an international convention.

6. The first of its texts to have served as the subject of an international conference was the set of draft articles on the law of the sea, completed by the Commission at its eighth session. The United Nations Conference on the Law of the Sea, convened by resolution 1105 (XI) of the General Assembly to codify the law of the sea and study the question of free access of land-locked countries to the sea, had been an undoubted, and to some extent unexpected, success. The problem of the breadth of the territorial sea had, admittedly, not been settled, but the Conference had approved four conventions, on the territorial sea and the contiguous zone, on the high seas, on the continental shelf, and on fishing and conservation of the living resources of the high seas, and had achieved positive results on the free access of land-locked States to the sea, a question which, unlike the other aspects of the law of the sea, had been little explored as a whole either by writers or by international conferences.

7. The Conference on the Law of the Sea, the largest ever convened under the auspices of the United Nations, was a milestone in the as yet brief history of the Commission, for it was the first time that representatives of eighty-six States had had the opportunity of passing judgement on the fruit of the Commission's labours. Many of its articles had been adopted with little or no change. Indeed, the Conference, acting on a proposal of the Colombian delegation, had passed a resolution expressing esteem, respect and admiration for the Commission's achievements in the field of the development of international law and its codification, and commending the Commission on the quality of its texts and commentaries, for which gesture he, as Chairman of the Commission, had thanked both the sponsor of the resolution and those who had unanimously adopted it.

8. Such success, however, carried with it the obligation to maintain a consistently high standard of work. And to ensure that, the Commission must continue to apply the method that had led to success, namely, to codify existing international law and to seek such solutions based on the fundamental principles of that law as would be acceptable to most Governments.

9. The success of the Conference on the Law of the Sea was a good omen for the future work of codification in matters less controversial than the law of the sea. He was convinced that in pursuing its task the Commission would greatly contribute, in conformity with the precepts of the United Nations Charter, to the

strengthening of international law, the consolidation of peace and the banishment for ever of the use of force in international politics.

Election of officers

10. The CHAIRMAN called for nominations for the office of chairman.

11. Mr. SANDSTRÖM proposed Mr. Pal, whose qualities as a jurist were known to all the members of the Commission.

12. Mr. MATINE-DAFTARY seconded the proposal.

13. Mr. TUNKIN, Sir Gerald FITZMAURICE, Mr. EDMONDS, Mr. BARTOS, Mr. AMADO, Mr. VERDROSS and Mr. SCELLE supported the proposal.

Mr. Pal was unanimously elected Chairman and took the Chair.

14. The CHAIRMAN thanked the members of the Commission for the honour done to him and called for nominations for the offices of first and second vice-chairman and rapporteur.

15. Mr. GARCIA AMADOR congratulated the Chairman on his election, and proposed Mr. Amado for the office of first vice-chairman, Mr. Tunkin for the office of second vice-chairman, and Sir Gerald Fitzmaurice for the office of rapporteur.

Mr. Amado was unanimously elected First Vice-Chairman.

Mr. Tunkin was unanimously elected Second Vice-Chairman.

Sir Gerald Fitzmaurice was unanimously elected Rapporteur.

The meeting rose at 4.05 p.m.

432nd MEETING

Tuesday, 29 April 1958, at 9.45 a.m.

Chairman : Mr. Radhabinod PAL.

Statement by the representative of the Secretary-General

1. The CHAIRMAN extended a welcome on behalf of the Commission to Mr. Stavropoulos, Legal Counsel to the United Nations and representative of the Secretary-General.

2. Mr. STAVROPOULOS, representative of the Secretary-General, said it was his pleasant duty to convey to the International Law Commission the many expressions of praise for its work that had been voiced in the recent United Nations Conference on the Law of the Sea. The fact that the great majority of the Commission's draft articles had been adopted without substantial change greatly enhanced the authority of the United Nations work in the codification and development of international law, and he congratulated the Commission on its achievement.

3. The CHAIRMAN, after thanking the representative of the Secretary-General for his kind words, expressed the Commission's own appreciation of the support it received from other United Nations organs in the vitally important task of bringing the nations of the world under the sway of international law.

4. Sir Gerald FITZMAURICE paid a tribute to the outstanding contribution Mr. Stavropoulos himself had made to the success of the recent Conference. Time and again when the Conference had been on the point of breaking down, owing to the massive work with which it had to deal, the slow start it had made and the large number of amendments it had had to dispose of, his resource and determination had averted what might have been a real debacle.

5. The Conference had brought out clearly the great difficulty of drafting in large assemblies, and the consequent importance of having a well prepared text on which to work. The Conference had been fortunate in that respect ; considering the number of articles and the number of delegations, many more amendments might in fact have been expected, and the fact that they had not been submitted showed that the Commission had done its preparatory work well and that it was desirable that it should continue to aim at quality rather than quantity.

Adoption of the agenda (A/CN.4/112)

6. The CHAIRMAN drew attention to the provisional agenda (A/CN.4/112), which had been prepared in accordance with the decision taken at the ninth session.[1]

7. Mr. SANDSTRÖM said that lack of time had unfortunately prevented him from preparing a report on *ad hoc* diplomacy as requested by the Commission, but that he had prepared a report — which would be distributed shortly [2] — on the basis of the comments which Governments had submitted on the draft articles concerning diplomatic intercourse and immunities adopted at the ninth session.

8. Mr. EL-ERIAN said that at the twelfth session of the General Assembly the question of speeding up the Commission's work had again been raised in the Sixth Committee. He had pointed out — as had Mr. Khoman — that the Commission's work was necessarily slow, by its very nature, and had assured the Committee that the Commission was well aware of the desirability of greater speed wherever possible. While those members of the Sixth Committee who had raised the question were fervid supporters of the Commission, fully appreciated the efforts it was already

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[1] *Official Records of the General Assembly, Twelfth Session, Supplement No. 9,* para. 25.

[2] Later issued as document A/CN.4/116.

making, and were quite content to leave any decision in the matter to it, he hoped that, in view of the assurance given, one or two meetings at the current session could be devoted to that question.

9. The CHAIRMAN said that the Commission had already decided at its ninth session [3] to give further consideration to the question, which would come up in connexion with item 8 (Planning of future work of the Commission).

10. Mr. ZOUREK said that he would in due course submit his report on the views expressed at the General Assembly on the organization of the International Law Commission's work, as he had undertaken to do at the twelfth session of the General Assembly in his capacity as Chairman of the Commission.[4]

11. He also wished to inform the Commission that the Permanent Observer of Switzerland to the United Nations had called on him while he was in New York to inquire whether the Swiss Government would have an opportunity to participate in the work of codification of international law and to submit its comments on the draft articles prepared by the International Law Commission. He had promised to submit the Permanent Observer's request to the Commission and would be grateful if the Commission could consider it at the appropriate time.

12. Mr. STAVROPOULOS, representative of the Secretary-General, said that the Secretary-General had received a similar request from the Swiss Government, pointing out that the Commission was laying down principles of international law, not merely of law governing Members of the United Nations, and that non-member States should therefore have an equal right to comment on its proposals. The request had been passed on to the Secretary of the Commission, who would doubtless lay it before the Commission in due course.

13. Mr. GARCIA AMADOR said that if the question of speeding up the Commission's work was to be considered under item 8, that item should be taken up as soon as possible, in order that the Commission's decision in the matter might be put into effect at the current session.

14. The CHAIRMAN suggested that the Commission consider that part of item 8 in private session as soon as the Secretariat could supply it with all the relevant information. On that understanding he asked whether the Commission was prepared to accept the provisional agenda.

15. Mr. AGO said he fully agreed with Sir Gerald Fitzmaurice that the Commission should aim at quality rather than quantity. In his view it could not hope to consider at the current session all the substantive items on the provisional agenda, and he thought it should be understood that if it placed them on the agenda it was only to enable it, once it had completed its work on arbitral procedure and diplomatic intercourse and immunities, to choose which of the remaining items it wished to take up.

16. Mr. GARCIA AMADOR said no one imagined the Commission could complete its work on the five substantive items on the provisional agenda at its current session. It had, however, always been the Commission's practice to include in the agenda all items on its current programme of work. That did not mean that it necessarily considered them all every year : the Commission's work proceeded by stages, and it was usually possible to advance the work on each subject one stage every year, but some subjects were better for being " rested " for a year or so, once they had reached a particular stage.

17. Mr. FRANÇOIS said that in the General Assembly attention has been drawn to the close connexion between diplomatic intercourse and immunities and consular intercourse and immunities and the hope had been expressed that the Commission's drafts on those two subjects could be submitted to the General Assembly at the same time. He therefore wondered whether it might not be better to take up consular intercourse and immunities at the current session, leaving aside State responsibility and the law of treaties, both subjects which would require a great deal of work.

18. Sir Gerald FITZMAURICE said that there were really two distinct points involved : the question of how many subjects were to be studied at a session, and the question of the degree of priority to be accorded each subject with a view to the submission of a text for the consideration of the General Assembly.

19. The Commission had devoted a large part of its previous session to the topic of diplomatic intercourse and immunities, in order to be able to submit a text to Governments for comment. But the topic of consular intercourse and immunities had not yet been thoroughly discussed, and there was no draft on the subject to submit to Governments. Any attempt to present texts on both subjects to the Assembly simultaneously would therefore mean undue delay in submitting the draft on diplomatic intercourse, which otherwise could quite easily be ready for consideration by the Assembly at its thirteenth session.

20. On the other hand, he saw no objection to giving the subject of consular intercourse sufficient priority to enable a draft to be prepared for the comments of Governments at the Commission's eleventh session, with a view to producing a final draft for submission to the Assembly a year later.

21. He agreed with Mr. García Amador that it was inadvisable to deal with only one or two subjects at each session. It was essential to keep several jobs on the stocks in order to submit a regular sequence of drafts to the Assembly, and to provide for the possible absence of a rapporteur on a priority subject. And now that the Commission's proceedings were published, the reading

[3] *Official Records of the General Assembly, Twelfth Session, Supplement No. 9,* para. 29.

[4] *Ibid., Twelfth Session, Sixth Committee,* 513th meeting.

public would be disappointed if its records covered only two subjects a session. He would therefore prefer that the existing practice should be continued.

22. As regards the law of treaties, he would like some time to be devoted to it at that session. It was, however, a big subject and would prove more manageable if dealt with in the sections into which it quite naturally fell. The Commission might, therefore, try to complete a study of one section (though obviously not at that session), with a view to submitting a draft on it to Governments and later to the General Assembly.

23. Mr. LIANG, Secretary to the Commission, agreed that the nature of the two subjects, diplomatic intercourse and consular intercourse, made it seem logical for them to be brought closer together than they were on the provisional agenda. Considerable enthusiasm had, in fact, been shown during the discussions in the Sixth Committee of the General Assembly for the idea of submitting draft conventions on the two subjects simultaneously. The Commission at its ninth session, however, had approached the whole matter from the different standpoint of the degree of maturity of the various topics, preferring to press on with the two subjects whose preparation was most advanced.

24. Although the whole compass of the law of treaties and of the question of State responsibility had not been covered, distinct sections of those subjects were ripe for consideration. A distinct section of the law of treaties, the question of the framing of treaties, on which Sir Gerald Fitzmaurice had submitted a report in 1956 [5] and the Secretariat had published a large body of information, could be ready for submission to the Assembly in the form of draft articles in two years' time, in other words, before the subject of consular intercourse, which did not lend itself to sectional treatment.

25. Mr. VERDROSS observed that with the drafts on two subjects, arbitral procedure and diplomatic intercourse so far advanced, it was essential for the Commission to review them in the light of the comments of Governments with a view to their early submission to the Assembly. If it considered the question of consular intercourse first, the other two drafts might not be ready in time. General discussions on the other less advanced subjects would be useful.

26. Mr. YOKOTA said that there appeared to be general agreement on the need to prepare the draft on arbitral procedure for submission to the Assembly forthwith, and to press on with the revision of the draft on diplomatic intercourse with the same object in view. Once those two tasks were completed, the Commission could consider whether, taking into consideration the time that remained, it should discuss all three other subjects briefly, or study one of them in detail. That would be a more practical procedure to follow.

27. Mr. TUNKIN thought that the Commission should adhere to its usual practice and leave on the agenda all the subjects listed there, even though it might in fact deal with only two of them. The drafts on arbitral procedure and diplomatic intercourse should be completed, but it would be of great value to have general discussions on the other three topics.

28. As regards the order of priority, item 3 (Diplomatic intercourse and immunities) and item 6 (Consular intercourse and immunities), though undoubtedly related, were nevertheless distinct topics. They would form altogether too broad a subject if dealt with together, and such a procedure would unduly delay the submission of the draft on diplomatic intercourse and immunities. He accordingly proposed that the agenda be approved as it stood, on the understanding that item 2 (Arbitral procedure) and item 3 (Diplomatic intercourse and immunities) would be brought to maturity, and general discussions held on item 4 (Law of treaties), item 5 (State responsibility) and, if possible, item 6 (Consular intercourse and immunities).

29. Mr. GARCÍA AMADOR said that he could support Mr. Tunkin's proposal if the order of items 5 and 6 were reversed.

30. Mr. SANDSTRÖM remarked that, until the Commission knew how long it would take to complete the drafts on arbitral procedure and diplomatic intercourse, it was difficult to decide anything with regard to the other subjects.

31. Mr. AMADO agreed that work on the two almost completed subjects should be finished first. The Commission could then touch on the subject of the law of treaties, and see what time remained for the others. Since the question of State responsibility was constantly evolving, it would do no harm if the submission of a draft on the subject were delayed a little.

32. Mr. ZOUREK, referring to Mr. François' suggestion, said that since diplomatic and consular intercourse and immunities were parallel subjects which some members of the Sixth Committee of the General Assembly desired to consider simultaneously, there was much to be said for studying them as closely together as possible. On the other hand, even though the report by the Special Rapporteur on *ad hoc* diplomacy was not yet completed, the subject of diplomatic intercourse was in a far more advanced state than that of consular intercourse.

33. The Commission could perhaps discuss the most important aspects of consular intercourse at the current session, so that it might, at its next session, be in a position to adopt a provisional draft together with its draft on *ad hoc* diplomacy. The order of items 5 and 6 might be reversed, since the Special Rapporteur on State responsibility agreed to that course.

34. The CHAIRMAN, replying to a question by Mr. BARTOS, said that the inclusion of new topics in the Commission's programme of work could be considered under item 8 of the provisional agenda.

[5] *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), document A/CN.4/101.

35. The Commission had two suggestions before it which involved altering the existing order of items in the provisional agenda. Since, however, there was nothing inflexible about the order of items, he thought that the agenda might well be adopted as it stood, subject to any change that might subsequently prove desirable.

It was so agreed.

The agenda (A/CN.4/112) was adopted.

Statement by Mr. Tunkin

36. Mr. TUNKIN said that he wished to call attention to a grave injustice inflicted on the People's Republic of China. The fact that a country of some 600 million people, which was actively engaged in creating a new socialist society and a new legal system, was not represented on the Commission was an affront to international law.

37. The CHAIRMAN said that the Commission took note of Mr. Tunkin's statement.

The meeting rose at 11.20 a.m.

433rd MEETING

Wednesday, 30 April 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Filling of casual vacancy in the Commission (article 11 of the Statute)

[Agenda item 1]

1. The CHAIRMAN announced that the Commission had elected Mr. Ricardo J. Alfaro of Panama, by a majority of votes at a private meeting, to fill the casual vacancy caused by the resignation of Mr. Jean Spiropoulos consequent upon his election to the International Court of Justice.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113)

[Agenda item 2]

GENERAL DEBATE

2. The CHAIRMAN recalled the work done on arbitral procedure by the Commission at its ninth session,[1] in the light of General Assembly resolution 989 (X) of 14 December 1955.

3. The Commission had decided[2] to submit the draft on arbitral procedure not as a convention, but as a set of rules to guide States in the drafting of provisions for inclusion in international treaties and special arbitration agreements. On that basis, the Commission had discussed certain of the key articles in the revised draft submitted by the Special Rapporteur in his report,[3] and had taken certain decisions.

4. The Special Rapporteur had prepared a new report which took into account the decisions taken at the Commission's ninth session.

5. Mr. SCELLE, Special Rapporteur, introduced his model draft and report on arbitral procedure (A/CN.4/113).

6. He fully understood the difficulties facing Governments with respect to arbitration agreements. Those difficulties were connected with the concessions of sovereignty which an undertaking to arbitrate might imply, and were at the root of much of the criticism voiced in the Sixth Committee of the General Assembly regarding the Commission's 1953 draft on arbitral procedure.[4]

7. The same difficulties would not, however, arise in the case of the current model draft on arbitral procedure. When that draft was approved in final form by the Commission and submitted to the General Assembly, it would not constitute an arbitration convention but merely a set of rules offered to States as guidance. States would remain free to make use of the model in whole or in part or to resort to other procedures.

8. In order to make that position clearer, the order of the articles had been changed. The article concerning the *compromis*, which in the 1953 draft had appeared as article 9, had been renumbered article 2, and now followed immediately after the article concerning the undertaking to arbitrate. The article dealing with the constitution of the tribunal (article 4) had been placed in a position of lesser prominence. Hence, in the new text the emphasis was on the conclusion of a *compromis* rather than on the constitution of the arbitral tribunal.

9. The article dealing with the arbitrability of disputes (article 3) had been amended to take into consideration the comments made by Governments and the observations made in the Sixth Committee. The majority of States had expressed a certain reluctance to submit the question of arbitrability to the International Court of Justice. The new provision therefore gave States the choice of submitting that question either to the Permanent Court of Arbitration or to the International Court of Justice.

10. The model draft on arbitral procedure represented a substantial concession to the views expressed by Governments when compared to the earlier drafts relating to the same subject approved by the International Law Commission, or to the General Act of

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[1] See *Official Records of the General Assembly, Twelfth Session, Supplement No. 9*, paras. 18 and 19.

[2] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol.1), 419th meeting, para. 43.

[3] *Ibid.*, vol. II (United Nations publication, Sales No.: 1957.V.5, vol. II), document A/CN.4/109.

[4] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

1928.[5] He did not consider those concessions as in any sense improvements ; they had been introduced in order to make the model more readily acceptable to States.

11. There was no standard State practice in the matter of arbitral procedure. There was no uniformity even in the practice of a single State. The questions which Governments submitted to arbitration were so important that it was difficult for them to adhere to a standard form of arbitration applicable to all disputes.

12. Since there was no general custom governing the subject. the Commission's task could not be said to be that of codifying existing law regarding arbitration procedure. The Commision, however, could not ignore such valuable procedents as The Hague Convention for the Pacific Settlement of International Disputes of 1907, the General Act of 1928, the various arbitration treaties concluded by Switzerland with its neighbours in 1924 and in later years, and the Pact of Bogotá of 1948.

13. In his latest report (A/CN.4/113) he had therefore endeavoured to make use of those precedents. The Commission had the duty to contribute to the progressive development of international law, or at least to codify existing law. It should therefore avoid taking any action which could be construed as a retreat from existing arbitration systems.

14. The question had been asked whether the undertaking to arbitrate constituted a treaty. In his opinion, such an undertaking produced in law exactly the same effects as a treaty, and it was important to note, in that connexion, that article 1 of the new draft specified, as its predecessors had done, that the undertaking to arbitrate had to result from a written instrument.

15. Of course, in the carrying out of an undertaking to arbitrate, as in the application of any treaty, difficulties might arise. The question of the responsibility for the failure to carry out a treaty was always a question of fact.

16. He had endeavoured to prepare a coherent model draft, and he hoped that the Commission would not alter it substantially, since otherwise he would regretfully be unable to continue to be responsible for it.

17. Now that every trace of obligation had been eliminated from the draft, it could not possibly be open to any objection based on State sovereignty. Governments, and particularly the Governments of new States, were understandably concerned about State sovereignty. There was, however, nothing incompatible with that sovereignty in a draft which left States completely free to make use of some or all of its provisions in the arbitration of a dispute, when once they had agreed to the arbitration of that dispute.

18. Mr. GARCIA AMADOR said that the Commission, when it had decided to submit its draft on arbitral procedure as simply a set of rules, had already made a great concession to the views expressed in the General Assembly. In his opinion, it was not necessary to make any further concessions.

19. It had been stressed that the majority of the States represented in the General Assembly had commented adversely on the system proposed by the Commission for arbitral procedure. It was significant, however, that the United Nations Conference on the Law of the Sea had adopted a Convention on Fishing and Conservation of the Living Resources of the High Seas containing provisions on arbitration which followed the pattern proposed by the International Law Commission. It was true that the same Conference had not accepted the principle of compulsory judicial settlement of disputes concerning the articles on the continental shelf. But it was important to distinguish between the reluctance of Governments to accept a general arbitration clause, and their approach to the arbitration procedure formulated by the Commission. Where States had accepted the principle of arbitration, as in the case of the Convention on Fishing and Conservation of the Living Resources of the High Seas, they had found the procedure proposed by the Commission acceptable.

20. He recalled that, in the discussion on arbitral procedure during the Commission's ninth session, he had emphasized that States were not opposed to the system of arbitral procedure proposed by the Commission but rather to its general application.[6] That view had been borne out by developments in the Conference on the Law of the Sea, which constituted an encouragement to the Commission to go forward with its work.

21. Mr. SCELLE, Special Rapporteur, thanked Mr. García Amador for drawing the Commission's attention to a valuable precedent.

22. The question of compulsory arbitration did not arise in the Commission's discussion of the subject of arbitral procedure. The Commission was concerned with determining the most satisfactory procedure in those cases in which States agreed to submit their disputes to arbitration.

23. All the objections made to the Commission's earlier draft on the grounds that it represented a trend towards compulsory arbitration had no validity whatsoever.

24. Mr. ZOUREK said that by the terms of General Assembly resolution 989 (X) the Commission was unquestionably obliged to reconsider its draft in the light of the comments of Governments and the discussions in the Sixth Committee. Moreover, the Commission had already taken a decision to do so at its ninth session.[7] For that purpose the best procedure might be, as had been suggested at the previous session, for the Commission itself to discuss the crucial articles (such as articles 1, 2, 3, 4 and 9) and refer the others to a committee ; as it was unlikely, however, that the

[5] General Act for the Pacific Settlement of International Disputes. See League of Nations, *Treaty Series*, vol. XCIII, p. 343.

[6] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No. : 1957.V.5, vol. I), 422nd meeting.

[7] *Ibid.*, 418th meeting, para. 38.

majority of the articles would give rise to much discussion, he would see no objection to the entire draft being reconsidered in plenary if the Commission could do it fairly quickly.

25. He could not subscribe to Mr. García Amador's view that the decisions of the recent Conference on the Law of the Sea indicated a change in the attitude of Governments to the question of compulsory arbitration ; for the articles in which provision had been made for compulsory arbitration were those relating to the conservation of the living resources of the sea, which a number of States had been unwilling to accept unless a system of compulsory arbitration was introduced. To that extent, therefore, those articles constituted a special case, and it could not be said that the Conference had revealed any general trend towards the acceptance of compulsory arbitration as part of international law.

26. Mr. SCELLE, Special Rapporteur, said that his draft formed a whole, and that one article could not be regarded as more important than any other. In his view, all the articles should be reviewed by the Commission itself ; to refer any of them to a committee would only lead to duplication of work.

27. Sir Gerald FITZMAURICE thought there was no doubt that in recent years States had been increasingly reluctant to accept provisions for compulsory arbitration. In the years preceding the Second World War there had at least been greater willingness to include arbitration clauses in particular conventions, and seldom or never had objection been made to their inclusion. Now the situation was vastly different, and he agreed with Mr. Zourek that the recent Conference had not revealed any general trend in the opposite direction. Certainly the comments which Governments had made on the Commission's draft on arbitral procedure contained constant references to the supposed incompatibility of the draft articles with the sovereignty of States. In his view, those criticisms were wide of the mark, for no State would have been obliged to sign a convention containing the draft articles prepared by the Commission any more than it was obliged to sign any other convention which involved recourse to compulsory arbitration. What was now envisaged, however, was not even a convention the signature of which would involve recourse to compulsory arbitration ; it was not in fact a convention at all, but only a set of model rules. While therefore he agreed with Mr. Zourek that the Commission should examine the comments of Governments, he believed it would find that in view of the changed nature of the draft many of them had become irrevelant, even if they had not been so before.

28. He entirely agreed with the Special Rapporteur's fundamental premise that any agreement to have recourse to arbitration was equivalent to a treaty and so gave rise to international obligations, and fully supported his basic aim which was to suggest a way in which two States which seriously intended to arbitrate could ensure that their intentions were not frustrated through circumstances arising in the course of the proceedings.

29. Finally, he suggested that in submitting the draft articles to the General Assembly, the Commission might help to make their real nature and purpose clear by annexing to them a specimen *compromis* drawn up in accordance with them.

30. Mr. AMADO, referring to the text of General Assembly resolution 989 (X), said that paragraph 2 of the resolution was not meant to question the intrinsic value of the Commission's earlier draft — which could hardly be questioned — but it did cast some doubt on the acceptability of the draft to States. In that respect, the Commission's task was now much easier, for the idea of a convention had been superseded by that of a set of model rules. The model draft which Mr. Scelle had prepared formed, as the author himself had said, a single whole ; what was more, it was a text which could hardly be bettered. He would therefore be in favour of submitting it to the General Assembly as it stood and leaving it to individual States to make whatever use of it they thought fit ; he was opposed to referring it to a committee, where it would only be needlessly tampered with.

31. Finally, he agreed with the Special Rapporteur that the question of compulsory arbitration did not arise at all in connexion with his draft.

32. Mr. AGO thought it might be more correct to refer to the Special Rapporteur's draft as a " draft model " or " draft model rules " rather than as a " model draft ". Otherwise, he had no general criticisms of the draft itself. In his view, the Special Rapporteur had done right to make it as inherently satisfactory as he could, without worrying unduly as to whether or not it was likely to meet the present views of the great majority of States. As had already been pointed out, the Commission was now doing no more than suggesting model rules which State were free to adopt, in whole or in part, in their agreements.

33. Mr. FRANÇOIS congratulated the Special Rapporteur on his new draft, which should certainly prove more acceptable to States than the previous draft. The Commission should harbour no illusions, however, about the welcome its proposals were likely to get, even in their new attenuated form, from a considerable number of States and from the General Assembly. He agreed, of course, that no State would be obliged to sign any instrument containing the draft articles. Yet the fact remained that many States, and particularly the newer States, believed that compulsory arbitration was incompatible with their sovereignty, and, in many cases, at variance with their constitutional provisions. It was therefore understandable that they should be unwilling to support a draft which aimed at regularizing compulsory arbitration and thus extending its influence, even though the draft itself contained nothing which compelled them to have recourse to arbitration against their wish.

34. He also agreed that once arbitral proceedings had begun it was essential that they should continue until an award was rendered. It must be borne in mind,

however, that one of the main advantages of arbitral procedure lay in its flexibility ; the value which States placed on a flexible procedure was shown by their increasing recourse to the still more flexible procedure of conciliation. It was to be foreseen that several States would hesitate to throw away one of the main advantages which arbitral procedure offered for the sake of the rigidity which characterized the draft in certain places, in particular in the provisions relating to the appointment of the members of the arbitral tribunal.

35. In conclusion, he agreed that it would not help matters to refer the draft to a committee.

36. Mr. YOKOTA agreed with Mr. Zourek that the Commission should not derive undue satisfaction from the fact that the recent Conference on the Law of the Sea had agreed to compulsory recourse to arbitration in one particular case. What was more encouraging was that the articles which the Conference had adopted in that respect provided that the arbitral procedure, once begun, could not be broken off until an award had actually been rendered, as that was precisely the point which the Commission was seeking to safeguard in its draft.

37. He entirely agreed with Sir Gerald Fitzmaurice that many of the objections to the draft articles prepared by the Commission at its fifth session, and particularly the objections based on the principle of sovereignty, betokened a complete misunderstanding of the true purpose of the articles. He was hopeful that once those misunderstandings had been removed many of the objections would be withdrawn.

38. Mr. SANDSTRÖM said that the sole aim of the draft articles prepared at the fifth session had been to ensure that once an obligation to have recourse to arbitration existed it should be possible to make it effective, regardless of circumstances. He had supported the draft articles and regretted that the Commission should have had to lower its sights and substitute a so-called " model draft ". As far as it went, however, the model draft should prove helpful, and, though his decision would necessarily depend upon the final form of the draft, he would probably be able to support it.

39. Mr. BARTOS remarked that the Conference on the Law of the Sea had adopted the principle of compulsory arbitration on one specific subject only, considering it preferable for the points at issue in disputes on conservation measures to be submitted to arbitration, since they were technical rather than legal points. For all other matters, in which the issues would be largely of a legal nature, the Conference had followed the general system for the pacific settlement of disputes prescribed in the Charter of the United Nations, including possible acceptance of the compulsory jurisdiction of the International Court of Justice.

40. Turning to the model draft itself, he said that, after consulting eminent Yugoslav jurists, as was his custom before the sessions of the Commission, he had been led to change his attitude towards the draft. He wished to withdraw his previous general reservation, and thought that it might be preferable to have such a model, even though certain of its provisions were somewhat rigid.

41. One point raised by the Yugoslav jurists was that of the constitutionality of the model draft in the light of the provisions defining the competence of the International Court of Justice. According to its Statute, the functions of the Court were to decide or give advisory opinions on points of law. Some parts of the model draft however, article 4, for instance, made the Court part of the hierarchic procedural machinery, giving it functions belonging to what was known in German as *Justizverwaltung*. He was afraid that, even with the agreement of the parties to the dispute, the Court would not be able to undertake such functions as the appointment of arbitrators until its Statute had been revised. And a revision of the Statute of the Court would, in effect, involve a revision of the Charter. He hoped that the Special Rapporteur could find some way out of that difficulty.

42. Mr. SCELLE, Special Rapporteur, pointed out that the Court would not be asked to decide preliminary questions unless the parties to the dispute had previously agreed to refer such questions to the Court. By virtue of Article 36 of its Statute, the Court was fully competent to decide questions referred to it in those circumstances. Requests to the President of the International Court of Justice, on the other hand, would be addressed not to the Court itself, or to the President as a member of the Court, but to the President in his capacity as an eminent jurist.

43. Mr. BARTOS said that his concern was not with the competence of the Court under Article 36 of its Statute but with the auxiliary services which the Court might be called upon to render under the model draft. The President could, it was true, be absolved from following the normal procedure by the provision, in Article 38 of the Statute, allowing the Court to decide a case *ex aequo et bono*.

44. Since the revision of the Statute of the Court with a view to increasing the number of judges was already being mooted, a question which entailed, after all, only a minor extension of the powers of the Court might also be raised.

45. Mr. VERDROSS considered that the point mentioned by Mr. Bartos was covered by Article 36, paragraph 1, of the Statute of the Court. If the parties to the dispute, having concluded an arbitration treaty, disagreed on the interpretation of the treaty or the existence of a dispute, the Court was competent to decide the question under that provision.

46. Mr. BARTOS agreed. He was, however, merely concerned with the other functions of an administrative nature which the Court might, under the model draft, be called upon to perform on behalf of the parties to the dispute. He was not entirely opposed to the provisions in question, but merely regarded them as somewhat doubtful.

47. Mr. AGO pointed out that arbitration treaties frequently made provision for a third or fifth arbitrator to be appointed by some neutral person or body. In particular they could provide for a nomination by the President of the Court, but the function which the President was called upon to fulfil in such a case was not of the type for which provision was or could be made in the Statute of the Court. When the President of the Court was requested to appoint arbitrators he was not carrying out a statutory function: he was acting in his individual capacity, as a person regarded as the highest legal authority in the world. He might, of course, refuse, but no remedy could be found to that difficulty by revising the Statute of the Court. On the whole, the problem struck him as more theoretical than real. He could not recall any case in which the application of an arbitration treaty had been hampered by difficulties of the nature described by Mr. Bartos.

48. Mr. SCELLE said that Mr. Ago had admirably explained the situation. In the circumstances contemplated in article 4 of the draft, the President of the Court would be acting *ex officio*.

49. The CHAIRMAN, speaking as a member of the Commission, observed that the Governments which objected to the original draft on the ground that it made arbitration compulsory appeared to be labouring under some misunderstanding. Arbitration was compulsory only in the sense that there was an attempt to attach a certain amount of sanctity to the undertaking to arbitrate of the States parties by seeking to make the undertaking effective — by seeking to subdue the potential anarchy of forces and so-called interests into a tolerable harmony. In the present form of the draft, however, even that amount of compulsion was absent: there was only an invitation to recognize in advance a rule voluntarily accepted. The principle underlying such recognition in advance was accepted in Article 36, paragraph 2, of the Statute of the Court. In the current draft that principle was less objectionable to States, being less general in nature. It was certainly not one of the implications of sovereignty that States were not bound to honour their undertakings. It was his firm belief that in the case of the majority of States the preservation of their sovereignty depended not on the physical power of States to defend themselves but on the prevalence of a certain degree of rule of law. Any doctrine which, in relations between States, postulated the individual interest of the single State as the ultimate standard of values amounted to a negation of such rule of law.

50. The point raised by Mr. Bartos had been well answered by the Special Rapporteur and Mr. Ago. The designation of a person who was to appoint arbitrators in certain circumstances was quite a common feature of the domestic legal systems of various countries. The point was, in any case, a matter of detail which could be raised in connexion with the relevant articles.

51. Speaking as Chairman, he declared the general debate closed.

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX)

52. The CHAIRMAN presumed that, so far as procedure was concerned, the Commission wished to adhere to its previous decision that the draft on arbitral procedure should take the form of a set of model rules. He proposed that the Commission itself consider the various articles of the model draft one by one, since experience had shown the inadvisability of referring texts to a committee for prior consideration. Questions of drafting might, however, be referred to a drafting committee, provided that it was given explicit instructions.

It was so agreed.

ARTICLE 1

53. Mr. SCELLE, Special Rapporteur, introduced article 1 of the model draft.

54. Replying to a question by Mr. AMADO on the meaning of the words " or in some other undertaking " in paragraph 4 of the article, he said that States might well agree in some document other than the *compromis* (in an arbitration treaty, for instance) to have recourse to certain procedures. If, for example, nothing had been decided regarding the law applicable, the parties to a dispute might agree in a special undertaking to accept article 11 of the draft, or, in other words, to be guided by Article 38, paragraph 1 of the Statute of the International Court of Justice.

55. Mr. BARTOS said that, after consulting eminent Yugoslav jurists, he had come to the conclusion that the words " a dispute between States " in article 1, paragraph 1, were too restrictive. Perhaps the Special Rapporteur would consider extending the scope of the article and of the draft to cover disputes between international organizations, and disputes between an international organization and a State, for such disputes were not infrequent.

56. Again, although Yugoslav jurists were not opposed to the application of an undertaking to arbitrate to " disputes arising in the future ", they thought it very difficult to state that the undertaking would apply to all future disputes of any nature whatsoever. He suggested that the Special Rapporteur might consider including a qualifying phrase such as " in so far as it has been agreed that they should be submitted to arbitration ".

57. Mr. AMADO inquired whether, in view of the reference in paragraph 4 of the article to matters agreed " in the *compromis* or in some other undertaking ", article 10 should not therefore read ". . . possesses the widest powers to interpret the *compromis* or other undertaking."

58. Mr. SCELLE, Special Rapporteur, replying to Mr. Bartos, said that he had no objection to making paragraph 1 of the article apply to disputes in which one or more of the parties was an international organization. Perhaps the members of the Commission

would reflect on the form which the addendum should take.

59. Commenting on the suggestion that the reference to future disputes should be limited to specific cases, he said that, since the procedures offered by the draft applied only to disputes specified in the *compromis*, the rather timid qualifying phrase was hardly necessary.

60. Mr. GARCÍA AMADOR supported Mr. Bartos' suggested additional provision extending the scope of the draft to disputes between States and international organizations. If the Commission agreed to the addition, he would ask it also to consider the advisability of extending the draft to cover disputes between States and individuals or bodies corporate concerning agreements or contracts containing an arbitration clause. Two agreements of that type, namely, that involving the Government of Yugoslavia and the Société anonyme Losinger et Cie [8] and the Convention between the Government of Greece and the Société commerciale de Belgique,[9] had figured in cases dealt with by the former Permanent Court of International Justice. A more recent example of such an agreement was the Iran-Consortium Agreement of 19-20 September 1954.[10]

The meeting rose at 1 p.m.

[8] Publications of the Permanent Court of International Justice, *Pleadings, Oral Statements and Documents*, series C, No. 78.

[9] *Ibid.*, No. 87.

[10] J. C. Hurewitz, *Diplomacy in the Near and Middle East*, vol. II, *A Documentary Record: 1914-1956*, pp. 348 ff.

434th MEETING

Thursday, 1 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN./113, ANNEX) (*continued*)

ARTICLE 1 (*continued*)

1. Mr. ZOUREK, viewing the article from the standpoint of the decision to present the draft in the form of a model set of rules, observed that, whereas the first three paragraphs of the article enunciated a rule or principle, paragraph 4 was more of an explanation concerning the nature of the draft. Perhaps the Special Rapporteur would consider the possibility of detaching the paragraph and making it an introduction to the whole draft.

2. He commented on the suggestions made at the previous meeting that the scope of the draft should be extended to cover disputes to which international organizations were parties. He agreed that, in so far as such bodies had the right, under their constitutions, to enter into international agreements, questions of interpretation and application were bound to arise, and the organizations might find it necessary to have recourse to arbitration. However, the draft could not be applied as it was to disputes arising from those agreements. If the draft was to deal with the matter, the best way of indicating the applicability of the draft to disputes between States and international organizations might be to add an article at the end of the text stating that it could apply *mutatis mutandis* to such disputes.

3. The disputes between States and private persons or corporations mentioned by Mr. García Amador (433nd meeting, para. 60) were, however, outside the scope of the draft. Though agreements between large corporations and Governments were quite frequent, the arbitration of disputes arising out of such agreements belonged to the domain not of public international law but of private international law. It was commercial arbitration which would be governed either by the Protocol on Arbitration Clauses of 1923 [1] or the Convention on the Execution of Foreign Arbitral Awards of 1927,[2] which was to be revised at a conference to be held in New York in May 1958.

4. The model *compromis* which Sir Gerald Fitzmaurice had offered to prepare would be a welcome addition to the draft. The Commission should, however, bear constantly in mind that the practice of recourse to arbitration could be fostered only if States had confidence in the arbitral tribunal, and their confidence would be all the greater if the draft did not place too rigid restrictions on the free exercise of the will of the parties, which was the basis of arbitration.

5. Mr. FRANÇOIS pointed out that there was a very serious objection to extending the scope of the draft to include disputes involving international organizations. Articles 3, 37 and 39 assigned certain functions to the International Court of Justice. But the competence of the Court was confined by its Statute to disputes between States. All reference to disputes involving international organizations and *a fortiori* to those involving private persons or corporations should therefore be omitted.

6. Sir Gerald FITZMAURICE said that he had only a few minor amendments to suggest to the wording of the draft. The model draft could be of real assistance to Governments in two ways. If two Governments decided to submit disputes to arbitration and were able to define the nature of the disputes in the arbitration agreement, they might find it difficult or be unwilling to draw up a detailed *compromis*. In that case they could include in the arbitration agreement a general provision stipulating that, subject to any variations that

[1] League of Nations, *Treaty Series*, vol. XXVII, 1924, No. 678.

[2] League of Nations, *Treaty Series*, vol. XCII, 1929-1930, No. 2096.

might be agreed on in the course of proceedings, the articles of the model draft should serve as a *compromis*. If, on the other hand, they agreed to have recourse to arbitration and drew up a *compromis*, they could incorporate in that instrument whatever parts of the draft they saw fit.

7. Those two possible uses of the draft might be pointed out in a preamble or introductory paragraph, and in its discussion of the articles the Commission might take such an addition into account. As it stood, the draft was a mixture of statements of pure principle and of detailed provisions concerning procedure which normally figured in a *compromis*. The provisions concerning questions of principle should perhaps be grouped together. Article 1, paragraph 1 of article 4, paragraph 1 of article 5 and article 10, for example, were statements of pure principle, whereas article 2, paragraph 2 of article 4, and paragraphs 2 and 3 of article 5 related to points of procedure. The only part of the draft with which his suggestion would clash was article 9, paragraph 2, which stated that the tribunal itself should draw up the *compromis* if the parties failed to do so. Were his suggestion adopted, it would perhaps be better to state in article 9 that the parties should draw up a *compromis* or, failing that, might agree to regard the model draft as constituting the *compromis*.

8. Mr. EL-ERIAN remarked that Mr. García Amador's suggestion for the extension of the scope of the draft was an interesting one but, especially in view of the objections mentioned by Mr. François and Mr. Zourek, he doubted whether it would be feasible to adopt it at that stage. Since the draft was in its final stage, it would not be advisable, from a practical point of view, to embark on the consideration of a point which had not been studied before by the Special Rapporteur or the Commission, and on which the views of Governments had not been ascertained.

9. The suggestion also gave rise to difficulties of substance. As Mr. François had pointed out, the draft contained several provisions, such as those of articles 3, 37 and 39, which presupposed the application of the draft to disputes between States, because they referred to the International Court of Justice before which only States could appear. Disputes between States and private individuals or corporate bodies did not belong to the domain of international law and, therefore, should not be envisaged in a draft which dealt with relations between entities possessing international personality.

10. Mr. AGO, referring to Sir Gerald Fitzmaurice's suggestion concerning a model *compromis* to be appended to the draft, said that it would be a great advantage if parties to a dispute wishing to save themselves the labour of drawing up a *compromis* could simply include in their agreement to arbitrate a clause to the effect that they would use the model *compromis* annexed to the model draft. The draft would thus be in two parts, the first enunciating principles and outlining certain alternative courses and the second containing a model *compromis*. Parties to disputes could then accept the model *compromis* as a whole, subject to any variations later agreed upon, or select such of its provisions as they saw fit. The draft would undoubtedly have a much greater influence on international arbitral procedure if it offered a model *compromis* which the parties could simply render applicable to their mutual relations whenever they wished.

11. As for the suggestions for extending the scope of the draft, he thought that it would undoubtedly be most advantageous if it could apply to disputes between States and international organizations. Agreements of that kind were quite common and, in particular, agreements between international organizations and the States on whose territory they had their headquarters invariably contained an arbitration clause. There would be fewer occasions when the draft could be applied to disputes between international organizations, but that too was feasible.

12. On the other hand, he was entirely opposed to making the draft applicable to disputes between States and private persons or corporations. To do so might easily give rise to difficulties. Some of the private corporations with which States concluded agreements and to which they granted concessions were very powerful, and it was already difficult enough to bring them to realize that they were not States and consequently could not be subjects of international law. Such corporations, powerful though they were, always remained subjects of municipal law alone, and disputes relating to any agreements which they might conclude with States came within the scope of municipal law and not the law of nations. While arbitration might be a means of settling such disputes, it would not be international arbitration *stricto sensu*. International arbitration could apply only to disputes between subjects of international law.

13. On points of drafting, he would suggest that the term " arbitration *ad hoc* " (in article 1, paragraph 2) should rather be " *ad hoc* undertaking " since the actual arbitration came at a later stage. Again, since the article was proceeding from the specific to the general, it would be better if the order of the terms " arbitration treaties " and " arbitration clauses " were reversed.

14. Mr. BARTOS fully agreed with Mr. Ago regarding Mr. García Amador's suggestion. There was a tendency for powerful corporations involved in disputes with a foreign State to claim rights that really belonged to their State of nationality. Generally, in such disputes a process of substitution occurred, by which the State, at some stage in the dispute, espoused the cause of its aggrieved national. He cited, for purposes of illustration, the dispute involving the Société anonyme Losinger et Cie,[3] in which the Swiss Government had taken up the case of its national, and the Brazilian Federal Loans case and the Serbian Loans case,[4] in which the Permanent Court of International Justice had not agreed

[3] See Publications of the Permanent Court of International Justice, *Pleadings, Oral Statements and Documents*, series C, No. 78.

[4] *Idem, Collection of Judgments*, series A, Nos. 20/21.

to hear the plaintiff until after he had been appointed official counsel for his State of nationality, France. There was always a danger in such cases that the State unsuccessful in the litigation would have recourse to other remedies in private law, or apply for the annulment of the award on the plea that the State had not the right to substitute itself for its national. Preferably, therefore, the draft should apply only to disputes between States, between States and international organizations, and between international organizations. An interesting case in connexion with disputes between international organizations and States was that of the European Organization for Nuclear Research, under whose constitution it was possible for member States of the organization to bring an action against another member State on the ground of non-fulfilment of the undertakings into which it had entered on becoming a member.

15. As far as the terminology used in article 1 was concerned, he was likewise not in favour of using the term " arbitration *ad hoc* ", and thought it preferable to separate the term " arbitration treaties " from " arbitration clauses " by a semi-colon to make it clear that they were far from synonymous.

16. Mr. ZOUREK acknowledged the soundness of Mr. François' objection to making the draft applicable to disputes involving entities other than States. It was in fact because he (Mr. Zourek) had realized the impossibility of simply applying the draft to them as it stood that he had suggested the device of stating that it applied *mutatis mutandis* to disputes involving international organizations. On second thoughts, he considered that the best course might be to confine the scope of the draft to disputes between States, but to point out in a commentary that many of its provisions could be applied to disputes between States and international organizations or between international organizations.

17. Mr. SCELLE, Special Rapporteur, inquired whether, in view of the course taken by the discussion, Mr. García Amador wished to maintain his suggestion (433rd meeting, para. 60). Though he was in favour of granting certain private bodies personality in international law in future, he realized that they did not enjoy that status under existing international law and he would therefore be obliged to oppose the suggestion.

18. Mr. GARCÍA AMADOR said that his remarks at the previous meeting on the subject of the applicability of the draft to disputes between States and private persons or corporations had been in the nature of a suggestion and not a proposal. After hearing the discussion, he realized that, however advisable it might be at a later stage, such a move would be inexpedient at the moment, and he would not press his suggestion.

19. It was nonetheless interesting to note that the Iran-Consortium Agreement of 19-20 September 1954 [5] between the Government of Iran, a corporation organized under Iranian law and a number of foreign companies contained clauses similar to, and in some cases identical with, certain provisions of the draft. Under article 44 of the Agreement, for instance, the President of the International Court of Justice might be requested to appoint an umpire, if the parties failed to agree, or a single arbitrator if either party failed to appoint an arbitrator or to notify the other of the appointment. Such agreements were bound to recur, and it would be useful if the model draft could apply to them.

20. Mr. SCELLE, Special Rapporteur, thanked Mr. García Amador for withdrawing his suggestion regarding private persons and corporations. The draft should be conservative, for the inclusion of any reference to private persons could well jeopardize the draft when it came before the Assembly.

21. He agreed to delete, in accordance with Mr. Ago's suggestion, the phrases in parenthesis in article 1, paragraph 2. They were explanatory remarks and not essential to the text. In fact, the whole of paragraph 2 could be deleted because it merely stated the well-known fact that an undertaking to have recourse to arbitration could be either abstract and cover all future disputes, or concrete and refer to a specific dispute.

22. He did not agree with the remarks of Mr. François regarding international organizations. The International Court of Justice had jurisdiction over States ; it therefore also had jurisdiction over associations of States. He suggested, therefore, that international organizations should be covered, either by a separate provision expressly relating to them, or by an amendment of article 1, paragraph 1, having the effect of making the article refer to disputes the parties to which were States or international organizations having personality in public international law.

23. It was only in article 1, paragraph 1, that his draft referred to States. In all the other provisions, the reference was to the parties to a dispute, a term which could cover international organizations as well as States. For his part, he considered that the parties to a dispute were the Governments rather than the States, and he had no great liking for the notion of the juridical personality of States, a notion which he was only prepared to accept as a legal fiction.

24. He had no objection to Mr. Zourek's suggestion that paragraph 4 should become a preamble or introductory provision.

25. With regard to Sir Gerald Fitzmaurice's suggestions, he said he would like some time for reflection.

26. Mr. SANDSTRÖM said that there was some advantage in making the draft applicable to international organizations, but the Statute of the International Court of Justice gave the Court jurisdiction in disputes between States only. The objection was not disposed of by the argument that the Court was qualified to give advisory opinions to international organizations ; those opinions were given by virtue of a specific provision of the Charter. There was no provision either in the

[5] See J. C. Hurewitz, *Diplomacy in the Near and Middle East*, vol. II, *A Documentary Record: 1914-1956*, pp. 348 ff.

Charter or in the Statute of the Court that gave the Court jurisdiction in disputes involving international organizations.

27. He suggested that the drafting of article 1, paragraph 2, could be improved by replacing the plural " disputes " by the singular " dispute ".

28. Mr. LIANG, Secretary to the Commission, said that the question whether international organizations could avail themselves of the set of rules on arbitral procedure was a purely theoretical one. By contrast, if the draft had taken the form of a convention, the question whether it would be available to States only would have been of practical importance.

29. In fact, the Commission had agreed that its draft would constitute a set of rules or model to guide States. It was clear that any international organization could make use of that model in planning and carrying out arbitration arrangements. Some organizations had already made use of the International Law Commission's work on arbitration. In connexion with the problems arising out of the creation of the United Nations Tribunal in Libya, the General Assembly had been called upon to recommend a method of settlement and it had drawn inspiration from the Commission's earlier draft on arbitral procedure.

30. The suggested use of the term " parties " would involve some difficulties. Firstly, in certain cases it was difficult to determine who were the parties to a dispute. Secondly, the term " parties " was ambiguous because it could refer to the parties to a treaty or to the parties to a dispute.

31. Lastly, he pointed out that, if it was intended to impose an obligation to carry out the undertaking to arbitrate, that undertaking had to be carried out by States as entities in international law. He thought that the provisions of article 1, paragraph 1, should be maintained.

32. Mr. AGO said that while the drafting of article 1, paragraph 2, might well be improved, it would not be advisable to delete the text, as the Special Rapporteur was apparently now prepared to do. The paragraph expressed a very well known notion, but it had its place in the general structure of the draft.

33. He agreed with Mr. François that not all the provisions of the draft could apply to cases of arbitration involving international organizations. The articles providing for action by the President of the International Court of Justice in his personal capacity would not create any serious problems, but stipulations such as article 2, paragraph 1, and article 39, paragraph 6, which provided for recourse to the International Court of Justice itself, could not apply to international organizations because under its Statute the International Court only had jurisdiction in matters affecting States.

34. One possible solution might be to add a provision to the effect that international organizations could avail themselves of the draft with the exception of the provisions which related to the jurisdiction of the International Court of Justice.

35. Despite those minor difficulties, he was still of the opinion, in principle, that international organizations should be authorized to avail themselves of the draft. In that connexion, he had noted with interest that the agreement between Switzerland and the European Organization for Nuclear Research contained arbitration provisions not unlike those of the International Law Commission's earlier draft.

36. Lastly, he favoured a rearrangement of the articles which would facilitate the use of the draft by States in the conclusion of agreements.

37. The CHAIRMAN said that the Commission appeared to be in agreement that the set of rules would only apply to disputes between States.

38. There appeared to be no objection to the substance of article 1, and most of the suggestions which had been made were of a drafting character. He suggested that the question of the arrangement of the articles should be dealt with by the Commission at a later stage.

39. Mr. SCELLE, Special Rapporteur, said that he was still convinced that there was no basis in law for a narrow interpretation of the Statute of the International Court of Justice which would deny international organizations access to the Court. The Court was unlikely to disclaim jurisdiction over a dispute in which one of the parties was a confederation of States which did not constitute a super-State. The only difference between such a confederation and an international organization was that an international organization was specialized in character.

40. He therefore saw no difficulty in amending article 1, paragraph 1, in such a way that the draft would apply to international organizations, or in including a separate article to the same effect. If a separate article was to be included, he did not consider that any reservation regarding the jurisdiction of the International Court of Justice was justified, because, in his opinion, that Court had jurisdiction in cases involving international organizations.

41. Mr. BARTOS said that he agreed with Mr. Ago on the necessity of retaining article 1, paragraph 2.

42. He agreed with those members of the Commission who considered that the competence of the Court to give advisory opinions to international organizations was not a decisive argument in favour of its jurisdiction in disputes involving such organizations. If, therefore, a provision was to be included extending the application of the draft to international organizations, it would be necessary to find some substitute for the International Court of Justice so as to cover the possibility of that Court's disclaiming jurisdiction.

43. He did not think it was advisable to make any provision for the use of the model by private persons and corporations, although it was true that there were some interesting new trends affecting their status in international law. He drew attention in that respect to the practice of the United States Department of State concerning agreements relating to certain investments of United States capital. It was also interesting to note

that the Soviet Union, in its agreements concerning technical and economic assistance to other countries, specified that, although the agreements constituted contracts with certain specialized entities, any dispute arising out of those agreements would be treated as a matter involving the relations between States, and would be settled by diplomatic negotiations. In the case of Yugoslavia, all the difficulties which had arisen with the Soviet Union with regard to such agreements had been settled satisfactorily by negotiation ; no provision had, however, been made for the case in which negotiations might be unduly prolonged. Those interesting developments arising out of the new conceptions regarding social and economic organization and the status of aliens had not, however, reached a stage which would warrant the inclusion in the draft of a provision dealing with interests other than those of States.

44. Mr. FRANÇOIS said it was perfectly clear from Article 34 of the Statute of the International Court of Justice, as well as from Article 96 of the Charter, that international organizations could not be parties in cases before the Court. He was quite convinced that the Court would never accept the view that they could be assimilated to States for that purpose.

45. Mr. Ago's suggestion that mention of the International Court of Justice be replaced by mention of the Permanent Court of Arbitration could be further considered when the Commission took up the relevant articles. For the present he would merely point out that, even if recourse were had to the Permanent Court of Arbitration, it would still be necessary to set up an arbitral tribunal, so that the difficulties which the Commission was seeking to obviate would again arise. Disputes between States and international organizations or private interests could be referred to the Permanent Court of Arbitration, but the States in question had to be members of the Permanent Court of Arbitration.

46. Mr. YOKOTA said that, though he was in principle in favour of extending the scope of the Commission's draft to disputes between States and international organizations or between international organizations themselves, certain provisions of the draft — for example, article 3, paragraph 1 — were not in their present form applicable to such disputes, for the reasons already indicated. He therefore agreed that for the moment the Commission should confine itself to laying down a form of arbitral procedure applicable to disputes between States.

47. Mr. AGO agreed that for the present the Commission had virtually no choice but to confine itself to disputes between States. However, that was no reason why it should not at a later stage in its work consider how the scope of the draft could best be extended to cover disputes concerning international organizations, as desired by most of its members.

48. Mr. GARCÍA AMADOR also agreed that the Commission should continue with its consideration of the draft articles, while bearing in mind that the majority of members were in favour of making them applicable to international organizations, in a manner which would have to be settled later.

49. Mr. AMADO thought that in prevailing circumstances, when it was difficult enough to get States to submit disputes between themselves to arbitration, it was quite unrealistic to consider extending the scope of the Commission's draft to disputes between them and international organizations. He agreed, however, that the question could be left aside for future consideration.

50. The CHAIRMAN asked whether it was then agreed that in considering the draft articles the Commission should for the time being confine itself to disputes between States, on the understanding that it could subsequently revert to the question of extending their scope, if so desired.

It was so agreed.

51. Mr. PADILLA NERVO pointed out that the Commission must at some stage decide whether members were to be free to submit whatever amendments they liked to the draft articles, or whether they should confine themselves to examining the comments submitted by Governments and the various points made during the discussions in the Sixth Committee and modifying the draft articles accordingly wherever it seemed desirable to do so. In his view it would shorten the discussion considerably if the second course were adopted.

52. The CHAIRMAN pointed out that no amendments had in fact been proposed to paragraphs 1, 2 and 3 of article 1, which might therefore be referred to the Drafting Committee. On the other hand Sir Gerald Fitzmaurice and Mr. Zourek had both made suggestions affecting paragraph 4.

53. Mr. AMADO said that though he was still opposed to any unnecessary revision of the Special Rapporteur's model draft, he agreed it would be an improvement to remove paragraph 4 and any other provisions which were in the nature of statements of principle from the body of the text, and group those provisions in a preamble.

54. Sir Gerald FITZMAURICE said that his suggestion — which the Special Rapporteur had promised to consider — did not directly affect the wording of any of the draft's provisions, but related to the arrangement of the draft as a whole. He therefore saw no reason why the Commission should not proceed with its consideration of the draft articles and revert to his suggestion later. The point he wished to make was that under its present arrangement the draft fell between two stools. Originally intended as a formulation of the fundamental principles governing arbitration, such as might form the basis of a convention, it had now been recast as a set of model rules, but still contained certain statements of principle which would not normally be included in a *compromis* ; and the retention of such statement was, he thought, at least partly responsible

for the unfounded suspicion that the draft somehow provided for a system of compulsory arbitration. If the provisions in question were removed from the body of the text and made to form an introductory statement of the basic law of arbitration, the purpose of the draft might be clarified and certain current misunderstandings cleared up.

55. Mr. ZOUREK recalled that the Special Rapporteur had accepted his suggestion that paragraph 4 be removed from the body of the text and placed in a kind of introduction. It seemed therefore that paragraph 4 could also be referred to the Drafting Committee on the understanding that that would be done.

56. The CHAIRMAN proposed that article 1 be referred to the Drafting Committee on that understanding, and on the understanding that the arrangement of the articles as a whole would be further considered in the light of Sir Gerald Fitzmaurice 's suggestion.

It was so agreed.

ARTICLE 2

57. The CHAIRMAN recalled that the Commission had already adopted article 2 at its ninth session.[6]

The meeting rose at 1 p.m.

[6] See *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), 422nd meeting, para. 20.

435th MEETING

Friday, 2 May 1958, at 9.45 a.m.

Chairman : Mr. Radhabinod PAL.

Communications from Mr. Khoman and Faris Bey El-Khouri

1. Mr. LIANG, Secretary to the Commission, said that Mr. Khoman had written expressing his deep regret that urgent duties in Washington would prevent him from attending the current session before the second half of May. A letter had also been received from Faris Bey El-Khouri, in which he expressed his regret that ill-health temporarily delayed his arrival in Geneva.

Statement by Mr. Hsu

2. Mr. HSU asked to have placed on record his regret that at the 432nd meeting Mr. Tunkin should have again introduced into the Commission's discussions a political question, namely, that of the representation of China.

Arbitral procedure : General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

[Agenda item 2]

ARTICLE 3

3. The CHAIRMAN invited the Commission to take up article 3.

4. Mr. SCELLE, Special Rapporteur, said that article 3 dealt with the delicate but vital question of what he had called arbitrability. A State which wished to escape from its obligation to arbitrate, for reasons which might be legitimate but which were inconsistent with that obligation, could argue that the dispute did not come within the scope of the obligation. That question, which was a purely legal question, must clearly be settled before the arbitral procedure could be set in motion, and could be settled only by an independent legal body. In his view, the International Court of Justice was the most appropriate body for that purpose, and in its previous text [1] the Commission had proposed that, in the absence of agreement between the parties upon another procedure, the question of arbitrability, if raised, should be brought before the International Court of Justice. That provision had been strongly criticised in the General Assembly, however. Accordingly, he now proposed that it be left open to the parties, if they preferred, to refer the question to the Permanent Court of Arbitration.

5. Mr. VERDROSS pointed out that if the parties agreed to refer the question of arbitrability to the Permanent Court of Arbitration, they would still have to choose arbitrators from the panel, which was all that the Court in fact comprised. If one party refused to do so, an impasse would result. He therefore suggested that it be made clear in paragraph 1 of article 3 that, if the parties agreed to refer the question to the Permanent Court of Arbitration and either party then refused to nominate arbitrators, the other party should have the right to bring it before the International Court of Justice.

6. Mr. SCELLE, Special Rapporteur, said he would be quite prepared to add some provision of that kind, in order to meet the perfectly valid point which Mr. Verdross had made. He would only point out that a large proportion of the General Assembly had been opposed to any suggestion of compulsory recourse to the International Court of Justice, and that if Mr. Verdross's suggestion were adopted the same objection might arise again despite the changed nature of the draft.

7. Mr. YOKOTA pointed out that there was also the possibility of an impasse if the parties failed to agree whether to bring the question of arbitrability before the

[1] Article 2 of the 1953 draft. See *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

Permanent Court of Arbitration or to bring it before the International Court of Justice. For he doubted very much whether in the phrase "either before the Permanent Court of Arbitration for summary judgement or, preferably, before the International Court of Justice, likewise for summary judgement or for an advisory opinion", the word "preferably" would be interpreted as meaning that, if the parties failed to agree which of the two Courts should be asked to settle the question, it would be brought before the International Court of Justice. He therefore suggested that the words "either before the Permanent Court of Arbitration for summary judgement or, preferably" be deleted. That would not preclude recourse to the Permanent Court of Arbitration since there was already the proviso contained in the words "failing agreement between the parties upon the adoption of another procedure", and such other procedure might well be recourse to the Permanent Court of Arbitration. If the majority of the Commission wished to make specific reference to the Permanent Court of Arbitration, he would have no objection, but in that case it should be made clear that, if the parties failed to reach agreement on the proposal to refer the question of arbitrability to the Permanent Court of Arbitration, it should be referred to the International Court of Justice.

8. The last words of paragraph 1 of article 3, namely, "likewise for summary judgement or for an advisory opinion", might also lead to an impasse. One party might insist on the Court's summary procedure while the other might prefer to seek an advisory opinion. In his view the Commission should choose one procedure or the other, and he thought the summary procedure would be preferable.

9. Mr. BARTOS said he fully agreed that the question of arbitrability was a legal question, which could only be decided by a judicial body. He wondered, however, why the Special Rapporteur would allow the parties to seek an advisory opinion of the International Court of Justice, seeing that the Court's Statute contained no provision whereby States parties to a dispute before it could seek an advisory opinion.

10. The Special Rapporteur's suggestion that the preliminary question of arbitrability be referred in certain circumstances to the International Court of Justice, which might at a later stage in the procedure be called upon to give a ruling on certain aspects of the substance of the dispute, also raised the question whether it was right that the same judicial body should decide legal questions of competence and questions of substance in one and the same dispute. He did not say that the Special Rapporteur's approach was unacceptable, but would merely draw his attention to the fact that on that question there were two points of view. He agreed that in the present case it could be argued that the same judicial body was not concerned, since, in considering the preliminary question, the Court would be acting by summary procedure and only a few of its members would therefore be involved.

11. With regard to paragraph 2, he had no objection to the text proposed but pointed out that, in his view, it only covered one aspect of provisional measures of protection, and that not the most important. It was not merely a question of allowing one party to take steps to protect its interests; the Court must also be empowered to order the other party to take whatever action was necessary to maintain the existing situation and prevent irreparable damage.

12. Mr. ZOUREK pointed out that certain of the objections which had been made to the original text of paragraph 1 had lost their importance because the Commission was no longer engaged in preparing a draft convention, but only a model set of rules which could only become binding on the parties to the extent that they incorporated them, or referred to them, in an international instrument. He wondered whether article 3 should be retained in the draft, since the draft only contained model rules to which Governments could have recourse when they were already agreed on the arbitrability of the dispute.

13. Sir Gerald FITZMAURICE agreed that it was of very little use to refer to the Permanent Court of Arbitration in article 3, since, if the parties were not able to agree on the constitution of an arbitral tribunal, it was most unlikely that they would be able to agree on the constitution of an arbitral panel chosen from the members of the Permanent Court of Arbitration. The Commission could either adopt Mr. Yokota's suggestion — in which case it should perhaps indicate in the commentary that it had taken the comments of Governments into account and explain why, in article 3, it referred only to the International Court of Justice — or, if it wished to retain the reference to the Permanent Court of Arbitration, replace the words "be brought by them within three months" by some such words as "be brought, at the instance of either of them, within three months".

14. He agreed with Mr. Bartos that States could not ask the International Court of Justice for an advisory opinion and that the words "likewise for summary judgement or for an advisory opinion" in paragraph 1 must therefore be amended. In that connexion he pointed out that in the English text the French words "*procédure sommaire*" should be rendered "summary procedure", not "summary judgement". He suggested that the last part of the paragraph might read as follows: "... before the International Court of Justice. Unless the parties otherwise determine, the matter shall be settled by summary procedure".

15. It seemed to him that Mr. Bartos' criticism of paragraph 2 was based on the French text which referred to "les mesures provisoires que les parties pourront prendre", whereas the English translation referred to "the provisional measures to be taken". In that particular case he suggested to the Special Rapporteur that the translation was to be preferred to the original.

16. Mr. GARCIA AMADOR thought the recent Conference on the Law of the Sea had again

demonstrated that many countries which began by expressing strong criticism of a draft eventually came round to supporting it, because they realized that taken as a whole it would work to their interest ; their initial strictures were largely inspired by the desire to strike as good a bargain as possible in the later stages. For that reason he did not believe that the Commission should make extreme concessions in the endeavour to meet every objection that had been raised. In particular, he believed it would be ill advised to make any concessions at all on article 3, which, as the Special Rapporteur had rightly pointed out, was vital to the draft as a whole. If the parties were to be given the chance of escaping from their obligations by failure to agree on whether to refer a preliminary question of arbitrability to the Permanent Court of Arbitration or the International Court of Justice, the Commission might as well go back to The Hague Convention for the Pacific Settlement of International Disputes of 1907. He accordingly urged the Special Rapporteur to withdraw the fatal and, in his view, unnecessary concession he had made in article 3.

17. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. García Amador that there was no need to make a concession in paragraph 1 of article 3 which was likely to defeat the whole purpose of the draft on arbitral procedure. The procedure outlined in the article, being subject to the proviso in paragraph 4 of article 1, became binding upon the parties only if they had expressly agreed to adopt it. He suggested that the reference to the Permanent Court of Arbitration in the article might well be dispensed with.

18. Mr. SCELLE, Special Rapporteur, said that he was in the curious position of having to defend himself against himself, for the Commission was in effect returning to its original position with which he was in entire agreement. He would gladly delete a reference to the Permanent Court of Arbitration which had been included only as a concession to those Governments which had criticized the idea of the compulsory jurisdiction of the International Court of Justice. Indeed, now that the text was merely a model code of procedure, initial acceptance of which was entirely optional, a whole series of objections by Governments no longer applied. He would point out, however, that in remodelling the draft he had not abandoned everything. If the parties accepted article 3 they must, in the event of disagreement, bring the preliminary question before one court or the other and, if it came before the Permanent Court of Arbitration and either party refused to accept its decision, that party would be committing an act of blatant bad faith.

19. He was, on the other hand, more reluctant to delete the reference to seeking an advisory opinion. It was possible for a State, by a process of substitution similar to that described by Mr. Bartos at the 434th meeting, to seek an advisory opinion through the medium of the competent international organization of which the State was a member. And advisory opinions, even though States were not bound to accept them, carried, in his view, the same force as court judgements. Such a procedure was, in fact, an elegant way out of a dilemma, enabling a State to obtain a ruling on a point of law without losing its case in open court.

20. He had taken note of the pertinent observations made by Sir Gerald Fitzmaurice.

21. Mr. BARTOS fully agreed with the Special Rapporteur that, in the circumstances he had just mentioned, advisory opinions could play a part in disputes between States. The International Civil Aviation Organization, for instance, which was given the role under its constitution [2] of permanent arbitrator, so to speak, and preserver of good relations between its members in matters of civil aviation, might well seek an advisory opinion of the International Court of Justice on behalf of one or more member States. But such advisory opinions could be sought by a State only indirectly through a different legal entity, and paragraph 1 of article 3 did not make that point clear.

22. On the proposal of the CHAIRMAN, Mr. SCELLE, Special Rapporteur, agreed to submit a revised draft of article 3, in the light of the discussion.

The meeting rose at 11.15 a.m.

[2] See article 44 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944, in United Nations, *Treaty Series*, vol. 15, 1948, No. 102.

436th MEETING

Monday, 5 May 1958, at 3 p.m.

Chairman : Mr. Radhabinod PAL.

Appointment of a Drafting Committee

1. The CHAIRMAN proposed that the Commission's Drafting Committee should be constituted as follows: Mr. Amado as Chairman, Sir Gerald Fitzmaurice, Mr. François, Mr. García, Mr. Sandström, Mr. Scelle, Mr. Tunkin and Mr. Zourek.

It was so agreed.

Arbitral procedure : General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 3 *(continued)*

2. Mr. EL-ERIAN said that both he and Mr. Zourek, who was unable to attend that meeting, were of the opinion that the Permanent Court of Arbitration could play a useful part, and that the reference to it in paragraph 1 of article 3 should therefore be retained.

3. He, too, doubted whether the procedure of applying to the International Court of Justice for an advisory opinion could be resorted to in a disagreement as to the existence of a dispute or as to its arbitrability. Apart from the fact, already pointed out by previous speakers, that such advisory opinions could be requested only by the General Assembly or Security Council of the United Nations or by certain other authorized international organizations, there was a further consideration. Under Article 65 of its Statute, the Court was competent to give an advisory opinion on any " legal question ", by which he understood legal points of a general nature connected with the interpretation and application of the Charter of the United Nations. The list of past advisory opinions tended to substantiate that view, for they had related mainly to such matters as the admission of new Members to the United Nations, to the question whether decisions of the United Nations Administrative Tribunal were subject to review by the General Assembly, and other similar legal questions.

4. Mr. VERDROSS, referring to the argument that States could obtain advisory opinions through the international organizations of which they were members, said that he failed to see how a disagreement regarding the existence or arbitrability of a dispute could be brought before one of the specialized agencies, which could ask for advisory opinions solely on legal questions arising within the scope of their activities. Only the General Assembly or the Security Council could request an advisory opinion on the interpretation of an arbitration agreement. But those authorities were not obliged to agree to such a request.

5. Mr. SCELLE, Special Rapporteur, read out the following revised text of paragraphs 1 and 2 of article 3, paragraph 3 remaining unchanged :

" 1. If, before the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to arbitrate, such preliminary question shall, failing agreement between the parties upon the adoption of another procedure, be brought by both or either of the parties within three months before the International Court of Justice for summary procedure or shall be the subject of a request for an advisory opinion in conformity with Chapter IV of the Statute of the Court.

" 2. In its decision on the question, the Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties. The decision shall be final."

6. He had, somewhat reluctantly, deleted all reference to the Permanent Court of Arbitration, in deference to the view of several members of the Commission that the provision of alternative courts introduced an unnecessary complication. He could not agree with the two previous speakers, however, on the matter of advisory opinions. A question concerning the interpretation of an undertaking to arbitrate was a " legal question " within the meaning of Article 65 of the Statute of the Court and, as Mr. Bartos had made quite clear, a specialized agency could request an advisory opinion on behalf of a Member State, provided that the subject of the dispute was within its competence. An advisory opinion was a ruling on a point of law, and the International Court of Justice followed much the same procedure in its advisory as in its judicial capacity.

7. Mr. HSU said that, though he had no objection to them as such, advisory opinions should probably not be referred to in article 3. In order for a State to obtain an advisory opinion of the International Court of Justice, a political body might have to intervene and, in existing circumstances, the attitude of that body on the question might not be entirely objective.

8. Sir Gerald FITZMAURICE asked the Special Rapporteur how a disagreement as to the existence or arbitrability of a dispute could form the subject of a request for an advisory opinion of the International Court from the General Assembly, the Security Council or any international body authorized to make such a request. Though it might be theoretically possible for those bodies to make the request, the likelihood of such an eventuality was extremely remote. Even allowing for so unlikely a contingency, it seemed quite sufficient in the context simply to say that the disagreement should be brought before the International Court of Justice.

9. Mr. FRANÇOIS said that strange as it might seem for him, as Secretary of the Permanent Court of Arbitration, not to advocate the extension of that Court's competence to the utmost, he must declare in favour of deleting the reference to it. As already pointed out by Mr. Verdross (435th meeting, para. 5), the Permanent Court of Arbitration was not a standing body like the International Court of Justice, but had to be constituted on each occasion. Was it likely, therefore, that parties which could not agree as to the existence or arbitrability of a dispute would collaborate in selecting arbitrators from a list of judges in order to settle their disagreement? A further difficulty was that the number of States signatories to The Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 did not include all Members of the United Nations. The problem was not, however, as great as it seemed. The words " failing agreement between the parties upon the adoption of another procedure " in article 3 obviously implied that the parties were free to have recourse to the Permanent Court of Arbitration if they wished. That point might be brought out in the Commission's report.

10. Mr. AGO agreed with the Special Rapporteur and Mr. François on the advisability of omitting the reference to the Permanent Court of Arbitration which was, in fact, only a panel of judges and not a ready-made court that could function at short notice. Only the latter kind of body could meet the need if the parties failed to agree on an arbitral board between themselves.

11. On the question of the reference to advisory opinions, he agreed with Sir Gerald Fitzmaurice. States were not authorized to apply to the Court for an advisory opinion on the subject-matter of their dispute, and even if they could do so through an international organization — a possibility which seemed out of the question — an advisory opinion could never, by its very nature, represent a final settlement.

12. Mr. YOKOTA said he was also in favour of deleting all mention of advisory opinions, for the reasons he had given previously (435th meeting, para. 7). The article was quite adequate as it stood, since it stated that preliminary questions should be referred to the International Court of Justice, unless the parties to the dispute agreed otherwise. There was no reason to prevent the parties from submitting to the ordinary procedure of the Court, if they wished to do so.

13. Mr. AMADO said that, since there was no question of revising the Statute of the International Court of Justice, there was no point in referring to advisory opinions in article 3.

14. Despite his great respect for the Permanent Court of Arbitration, he thought that the inclusion of a reference to that Court as an alternative recourse would weaken the draft. Surely, the whole object of the model draft was to prevent either of the parties from eluding the obligation to arbitrate through some loophole in the procedure.

15. Mr. GARCIA AMADOR, while appreciating the technical objections to the inclusion of a reference to advisory opinions in paragraph 1 of article 3, thought that Article 96 of the Charter, by virtue of which the United Nations had in the past requested advisory opinions, provided a means of surmounting the difficulties. Incidentally, one disadvantage of the advisory opinion procedure not so far pointed out was the danger of long delay. Whereas the summary procedure of the International Court of Justice was comparatively rapid, it would be many months before the disagreement on a preliminary question could be brought before the General Assembly and the advisory opinion finally delivered.

16. In one sense, it would be a pity if no reference were made in the article to such advisory opinions. Preliminary disagreements on the existence or arbitrability of a dispute were generally due to a claim by one of the parties that the matter lay within its domestic jurisdiction. As the Commission well knew, under Article 2, paragraph 1, of the Charter, matters essentially within the domestic jurisdiction of any State were outside the competence of the United Nations, but unfortunately none of the questions so far referred to the International Court for an advisory opinion had been such as to shed light on the much disputed question of what matters were " essentially within the domestic jurisdiction " of a State. The Court in delivering an advisory opinion on the arbitrability of a dispute might in its opinion state some general principles which could be of assistance in interpreting Article 2, paragraph 1, of the Charter. Such a consideration was not, however, sufficient to justify including a reference to advisory opinions in article 3, paragraph 1, if most members of the Commission were opposed to it.

17. Mr. SCELLE agreed with Mr. García Amador's argument in favour of including a reference to advisory opinions in article 3. The chief advantage of an advisory opinion was that it would enable a State not in the right to submit to the statement of the Court regarding the respective rights of the parties, without the Court's having to render a formal judicial decision. There was, moreover, a certain body of opinion in favour of permitting arbitration in disputes between specialized agencies. The procedure of requesting an advisory opinion in such cases would be helpful.

18. Replying to Sir Gerald Fitzmaurice, he said that circumstances might well arise in which a specialized agency would be called upon to request an advisory opinion, on the initiative of a Member State. A member of the International Labour Organisation (ILO), for instance, might well seize the ILO's Committee on Standing Orders and the Application of Conventions and Recommendations of a dispute due to the fact that failure by a neighbouring State to apply a particular labour convention was causing it acute embarrassment in its own territory. The International Labour Organisation could then ask for an advisory opinion on the matter. Similar situations could arise in the International Civil Aviation Organization (ICAO) or other specialized agencies or within the United Nations itself.

19. Mr. Verdross' original point was, he thought, adequately met by the words " by both or either of the parties " in the amended version of paragraph 1.

20. Mr. AGO said he could not quite understand the Special Rapporteur's suggestion that States could seek an advisory opinion from the International Court of Justice through international organizations. To take the specific example referred to by him, in the event of a member State of a specialized agency complaining that another State had failed to implement a convention concluded under the auspices of that agency, the question at issue would be considered by the machinery which was provided for that purpose within the agency concerned. It was only in the event of difficulties or doubts arising within the agency as to the way in which a given convention should be interpreted that the agency would ask the Court for an advisory opinion ; and in that case the agency would be acting on its own behalf, not on behalf of the States which were parties to the dispute that had arisen concerning the convention's application. Moreover, the Court's advisory opinion would certainly not of itself settle the dispute, but would only provide the basis on which it could be subsequently settled by the agency's internal machinery.

21. In his view, therefore, it would be wrong to refer to the possibility of an advisory opinion in article 3, at least as long as the text was intended to apply solely to disputes between States.

22. Sir Gerald FITZMAURICE said he had not been

convinced by the Special Rapporteur's further explanations, and fully agreed that, for the reasons indicated by Mr. Ago, all mention of advisory opinions should be eliminated from article 3. If an international organization asked the Court for an advisory opinion, it did so, as Mr. Ago had said, for reasons of its own, no matter how the question had arisen.

23. A reference to the advisory opinion procedure in article 3 would, he believed, produce consequences at variance with one of the main aims of the article, namely, to secure a rapid decision on any question of arbitrability that arose. As Mr. García Amador had pointed out, the international organization concerned would have to place the question on the agenda for the next session of its general conference. Even if the general conference acceded to the parties' request, the organization would still have to submit it to the International Court of Justice ; but the general conference might well reject the request, in which case the parties would have to submit the question to the Court in the ordinary way, as they might have done in the first place. Moreover, as Mr. Yokota had pointed out, reference to two possible procedures presented the parties with a choice, which might well prove another source of difficulties and delay.

24. As against those serious disadvantages, he could see no conceivable advantage in referring to a protracted and round-about procedure which would very rarely be applicable and, in any case, was not appropriate to the type of disagreement which the Commission was at present considering.

25. Mr. BARTOS said that, although the Special Rapporteur was undoubtedly correct in principle, he agreed that, for the practical reasons mentioned by other members of the Commission, the reference to the advisory opinion procedure could not be retained in its present form. The cases which the Special Rapporteur had had in mind might well arise ; it was not only certain specialized agencies such ICAO and ILO that might have occasion to seek an advisory opinion from the International Court of Justice on points arising out of disagreements between States, but also the General Assembly of the United Nations — as had indeed already happened in the case of the allegations concerning non-observance of the human rights provisions in the Peace Treaties — and the Security Council. On the other hand, there was no means whereby the States parties to a dispute could compel the international organization concerned to seek an advisory opinion from the Court if it did not wish to. Nor could the Commission, which was laying down rules for the parties, stipulate that the international organization must comply with their request.

26. Although he was therefore in favour of retaining the reference to the advisory opinion procedure, he thought it should be redrafted and placed elsewhere, either in a separate article stating merely that the parties would abide by any advisory opinion that was obtained by an international organization in matters relating to the dispute, or, if the Commission decided to include a section relating to international organizations, in that part of it which referred to their role in supervising the application of conventions.

27. Mr. EL-ERIAN said that other members of the Commission had sufficiently stressed the practical difficulties of the Special Rapporteur's proposal. He still had serious doubts about its legal aspects. Referring to the advisory opinion which the Permanent Court of International Justice had rendered in 1923 with regard to interpretation of the domestic jurisdiction clause in Article 15, paragraph 8, of the Covenant of the League of Nations, which had been one of the points at issue in the dispute between France and Great Britain as to the nationality decrees in Tunisia and the French Zone of Morocco,[1] he pointed out that the advisory opinion procedure rested on the assumption that the international organization concerned was already seized of the dispute and then encountered a legal difficulty on which it sought the Court's advice. It was clear, therefore, that the advisory opinion procedure provided for in the Court's Statute was intended to apply to an entirely different type of situation from any that could arise under article 3, and he accordingly appealed to the Special Rapporteur to reconsider his proposal.

28. Mr. PADILLA NERVO said he was in favour of deleting from article 3 all reference to the Permanent Court of Arbitration.

29. As regards the advisory opinion procedure, it was true that there was a fundamental difference between the type of situation contemplated by the Special Rapporteur and those cases in which the General Assembly, for example, had in the past sought an advisory opinion ; under article 3 it would be necessary for the parties to agree to have recourse to the advisory opinion procedure, whereas what had actually happened in the past was that a majority had asked for the Court's opinion on the legal propriety of certain acts committed by a minority, not only without the minority's agreement but against its express wishes. He also agreed with Mr. García Amador that the advisory opinion procedure would give rise to considerable delay and uncertainty if States would only have recourse to it through an international organization ; but he was by no means convinced that Article 65 of the Statute of the International Court of Justice necessarily debarred States from themselves seeking an advisory opinion from the Court. Article 34 laid down that only States could be parties in cases before the Court, and Article 65 merely stated that the Court could " give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request " ; he very much doubted whether the Court, if it were asked by two States to give an advisory opinion, would conclude from those two articles, taken together, that it was debarred from doing so. As the Special Rapporteur had pointed out, there were, moreover, weighty political reasons in favour of

[1] Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 4.

including a reference to the advisory opinion procedure. On balance, he therefore considered it would be advisable to do so, although, as Mr. Bartos had suggested, a better place might be found than article 3.

30. Mr. SANDSTRÖM said he was in favour of deleting all reference to the Permanent Court of Arbitration and the advisory opinion procedure, for the reasons indicated. While Mr. Padilla Nervo was possibly correct in arguing that the terms of Article 65 of the Statute of the International Court of Justice did not necessarily exclude the possibility that States might seek the Court's advisory opinion, it seemed probable that such had been the intention ; for in the ordinary course of events it was neither necessary nor natural for States which were parties to a dispute to seek an advisory opinion ; what interested them was to have the dispute settled by a judicial decision. International organizations, on the other hand, might need an advisory opinion to guide them in their future course of action. The absence of any mention of States in Article 65 was, therefore, in all probability deliberate.

31. The CHAIRMAN called for a vote on the proposal that all reference to the Permanent Court of Arbitration should be deleted from article 3.

The proposal was adopted by 14 votes to none, with 1 abstention.

32. The CHAIRMAN called for a vote on the proposal that all reference to the advisory opinion procedure of the International Court of Justice should be deleted from article 3.

The proposal was adopted by 11 votes to 3, with 1 abstention.

33. Mr. BARTOS said he had abstained in the second vote because he was in favour of deleting reference to the advisory opinion procedure from article 3, but not in favour of deleting it altogether from the draft.

34. Mr. AMADO said he had voted in favour of deleting all reference to the advisory opinion procedure, not because he was opposed to it but because it was, unfortunately, ill suited to an imperfect world.

Article 3 was referred to the Drafting Committee.

ARTICLE 4

35. The CHAIRMAN said that the consideration of article 4 would be deferred owing to the absence of Mr. Zourek, who had a proposal to introduce concerning that article.

ARTICLE 5

36. Mr. SCELLE, Special Rapporteur, introduced article 5 of the model draft.

37. Paragraph 1 of the article set forth the fundamental principle of the immutability of the arbitral tribunal.

38. Once the arbitrators had been appointed, they became members of an international organ entrusted with the task of deciding the dispute. The arbitrator appointed by a party was not an advocate for that party ; the task of defending the interests of each of the parties was the duty of its agent and counsel.

39. Paragraph 2 made it possible for one of the parties to replace its arbitrator before the proceedings had begun ; that provision had been introduced because a number of Governments had expressed the view that it should always be possible for one of the parties to replace an arbitrator appointed by it (see A/CN.4/L.71). In his view, the replacement should only be permitted so long as the arbitrator had not actually begun to function as such. The second sentence of paragraph 2 made it possible to replace an arbitrator during the proceedings by agreement between the parties.

40. Paragraph 3 defined the moment at which proceedings were deemed to have begun.

41. Mr. GARCIA AMADOR said that article 5 had not given rise to any serious criticism on the part of Governments, and it was therefore possible for the Commission to approve it without much discussion. He believed that the same was true of the following two or three articles of the model draft.

42. Mr. BARTOS asked the Special Rapporteur whether the first sentence of paragraph 2 applied also to the case of an arbitrator appointed by the President of the International Court of Justice, or another authority, after one of the parties had failed to appoint an arbitrator in due time.

43. He also wished to know whether an arbitrator appointed jointly by the two parties could be replaced by agreement of the parties at any time.

44. Mr. SCELLE, Special Rapporteur, said that if an arbitrator was appointed by the President of the International Court of Justice, or by another authority, that arbitrator was not deemed to be an arbitrator appointed by one of the parties. The party concerned could not therefore replace the arbitrator so appointed.

45. An arbitrator appointed by agreement between the parties could, of course, be replaced by agreement between the parties.

46. Mr. BARTOS said that paragraph 2, concerning the replacement, should contain the following additional stipulations. Firstly, a " national " arbitrator who should have been appointed by one of the parties but who, in default of action by that party, had been appointed in the manner described in article 4, should be treated in law as though he had been appointed by the party concerned and was hence capable of being replaced by another arbitrator appointed by that party. If, on the other hand, the parties had agreed that the arbitrators would be appointed by an international official, in his capacity as such and not acting in lieu of a party which had failed to make the appointment in due time, then those arbitrators could not be replaced by order of the States concerned. Secondly, if it was agreed that a certain number of arbitrators taking the place of " national " arbitrators were to be appointed by agreement, or that the appointment by one of the

parties was subject to the consent of the other, then the removal or replacement of the arbitrators would require the concurrence of both parties. It was, of course, self-understood that those provisions would only operate so long as the proceedings had not in fact begun.

47. To the extent of his remarks, therefore, he disagreed with the Special Rapporteur; he added, however, that he would not press for a vote on the clause in question.

48. Mr. AGO said that he was not altogether satisfied with paragraph 2 which might give some scope for dilatory tactics. He suggested that the provision contained in the second sentence of that paragraph should apply — in the same way as that in the first sentence — only to an arbitrator appointed by one of the parties; as drafted, the text appeared to suggest that any arbitrator could be replaced during the proceedings by agreement between the parties.

49. He suggested the deletion of the words " written or oral " in paragraph 3. Usually oral proceedings did not commence until after the written proceedings, and the wording used in the draft might therefore give rise to doubt about the exact moment to which it was intended to refer. The paragraph should simply state that the proceedings were deemed to have begun when the first order concerning procedure had been made.

50. Mr. SCELLE, Special Rapporteur, agreed to the deletion of the words " written or oral " from paragraph 3.

51. Mr. SANDSTRÖM said that it was ncessary to make some provision to cover the case of an arbitrator appointed by both parties. Paragraph 2, particularly if amended in the manner suggested by Mr. Ago, would not make it clear whether it was possible for the parties to replace such an arbitrator by agreement and, if so, whether that right was limited to the period before the proceedings had begun.

52. Sir Gerald FITZMAURICE agreed that some provision had to be made to cover the case mentioned by Mr. Sandström. Perhaps the best course was to amend the second sentence of paragraph 2 in the manner suggested by Mr. Ago, and to draft a separate paragraph to deal with the question of arbitrators appointed jointly by both parties.

53. The CHAIRMAN said that the question could perhaps be dealt with by the Drafting Committee.

54. Mr. AMADO said that the points raised concerned questions of substance and should be disposed of by the Commission rather than by the Drafting Committee.

55. Mr. SCELLE, Special Rapporteur, said that he would consult with Mr. Ago and Sir Gerald Fitzmaurice and submit a revised text to the Commission.

The meeting rose at 6.15 p.m.

437th MEETING

Tuesday, 6 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 5 *(continued)*

1. Mr. SCELLE, Special Rapporteur, said that he and Mr. Ago had agreed on a redraft of article 5, in the light of the discussion at the 436th meeting. Paragraph 1 would remain unchanged and the remainder of the article would read:

> " 2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. An arbitrator appointed by a party may not be replaced during the proceedings before the tribunal except by agreement between the parties.
>
> " 3. Umpires appointed by agreement between the parties may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in article 4, paragraph 2, may not be changed even by agreement between the parties.
>
> " 4. The proceedings are deemed to have begun when the president of the tribunal or the sole arbitrator has made the first order concerning procedure."

2. Mr. SANDSTRÖM asked whether an order fixing the date and place of the first meeting of the tribunal would constitute a first order concerning procedure within the meaning of paragraph 4.

3. Mr. SCELLE, Special Rapporteur, answered in the affirmative.

4. Mr. FRANÇOIS said that the expression " save in exceptional circumstances " in paragraph 3 was somewhat vague.

5. Mr. SANDSTRÖM said that the phrase in question appeared to constitute a recommendation to the parties rather than a mandatory provision.

6. Mr. SCELLE, Special Rapporteur, said that it was difficult to make the provision more definite. Some indication that the changes in question were generally undesirable was, however, appropriate.

7. The CHAIRMAN said that a decision on article 5 would be postponed until a later meeting so that members could study the new text.

ARTICLE 6 AND ADDITIONAL ARTICLE PROPOSED BY MR. AGO

8. Mr. SCELLE, Special Rapporteur, introduced article 6 dealing with vacancies caused in the tribunal by the death or incapacity of an arbitrator. A provision concerning such contingencies was contained in most of the texts setting forth rules of arbitral procedure.

9. Mr. FRANÇOIS said that the corresponding text approved by the Commission in 1953, at its fifth session,[1] was more comprehensive ; it covered not only the case of death or incapacity but also that of the resignation of an arbitrator prior to the commencement of proceedings. There was a gap in the new model draft in that respect ; article 7 only dealt with the case of the resignation of an arbitrator after the proceedings had begun.

10. Mr. SCELLE, Special Rapporteur, said that he had not considered it advisable to retain a reference to the resignation of an arbitrator in article 6. That article dealt with vacancies caused by events beyond the control of the parties to a dispute. The resignation of an arbitrator was unfortunately often the result of pressure by the arbitrator's Government.

11. In redrafting the provisions on the replacement of arbitrators, he had endeavoured to strike a balance between his desire to afford maximum freedom to the parties and his reluctance to see the arbitrators become mere representatives of the parties to a dispute.

12. It was unnecessary to make any reference to the resignation of an appointed arbitrator before the proceedings had begun, because it was obvious that, at that stage, the party which had appointed him could appoint another arbitrator to replace him.

13. Mr. AMADO said that the model draft constituted a structure based on the premise that the arbitrators were judges and not attorneys. In practice, arbitrators had always been regarded as the attorneys of the parties, and the whole system of arbitration had been based on agreement between the parties. The draft was designed to prevent an undertaking to arbitrate from being frustrated by the unwillingness of one of the parties to carry out all its obligations under that undertaking. Its object was to give arbitrators an increasingly judicial role.

14. Mr. SANDSTRÖM agreed with Mr. François that there was a gap in the model draft rules because no explicit provision was made for the case of the resignation of an arbitrator before the proceedings had begun. The new text of article 5 merely stated that arbitrators appointed in the manner provided for in paragraph 2 of article 4 could not be changed even by agreement between the parties ; nothing was said regarding the manner in which a vacancy caused by the resignation of such an arbitrator was to be filled.

15. Mr. FRANÇOIS said that he saw no reason for omitting an explicit provision to the effect that, if an arbitrator appointed by one of the parties resigned before the proceedings had begun, the party in question had the right to appoint another arbitrator in his place. The text of article 6 approved by the Commission in 1953 was much clearer than the corresponding clause in the latest draft.

16. Sir Gerald FITZMAURICE said that he could not agree with Mr. Scelle's suggestion that the resignation of an arbitrator appointed by one of the parties was always the result of pressure by the Government of the arbitrator's country.

17. He, too, had some misgivings regarding the text of article 6. It did not make clear whether its provisions applied at all times or only before the proceedings had begun. He proposed that after the commencing word " If " the following words should be added between commas : " whether before or after the proceedings have begun ".

18. Article 6 seemed to say that, if an arbitrator named by one of the parties resigned, then the party concerned would have to try and reach agreement with the other party in order to fill the vacancy, and that it was only in the absence of such agreement that the vacancy would be filled in accordance with the procedure prescribed for the original appointment. He proposed the deletion of the reference to an agreement between the litigants.

19. Mr. LIANG, Secretary to the Commission, said that it was essential, for the purposes of clarity, to insert a phrase along the lines of that proposed by Sir Gerald Fitzmaurice, so as to make it clear that the provisions of article 6 did not apply only to the case in which the proceedings before the tribunal had not yet begun, as was the case with the provisions of article 7.

20. Mr. AGO expressed his concern at the fact that article 6, speaking of the eventuality of an arbitrator's death or incapacity, merely provided for that person's replacement, regardless of the stage of the proceedings reached at the time the vacancy occurred. No attempt had been made to deal with the problem whether, in the event of the vacancy arising at an advanced stage, the proceedings should begin afresh or could continue as if nothing had happened. In fact, such an occurrence would raise difficult problems. In most municipal systems, the replacement of an arbitrator necessitated the recommencement of at least such oral proceedings as might already have started.

21. Mr. AMADO said that it was customary to recommence the oral proceedings whenever a new judge joined a court to replace one who had died.

22. The CHAIRMAN said that article 6 was only concerned with the question of the filling of vacancies. If it was desired to deal with the legal effects of the reconstitution of the tribunal on proceedings which had already begun, a separate provision would have to be introduced.

[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

23. Mr. SANDSTRÖM said that the question raised by Mr. Ago was relevant only in cases where the arbitrators were named in the *compromis*, and where it was clear that the agreement of the parties to arbitrate was conditional on the choice of the arbitrators.

24. Mr. AGO said that he did not agree with Mr. Sandström. The question he had raised was relevant also in the case of the death or incapacity of an arbitrator appointed by one of the parties. His replacement by a new arbitrator might in certain circumstances place that party at a serious disadvantage unless the oral proceedings were recommenced.

25. Mr. BARTOS agreed with Mr. Ago that if an arbitrator died or was incapacitated after the proceedings had begun, steps must be taken to restore strict equality between the parties. If, by analogy with the provisions of Austrian law concerning such contingencies, a provision was inserted to the effect that for each arbitrator there should be an alternate, it might not be necessary to recommence the proceedings *ab initio* in the event of the death or incapacity of the titular arbitrator, for the alternate would have followed the entire proceedings without the right to vote and hence would be ready to replace him.

26. Mr. SCELLE, Special Rapporteur, thought that Mr. Sandström's remarks raised the question whether the tribunal could be regarded as continuing in existence, and therefore capable of exercising its functions, in the event of the death or incapacity of one of its members. The view that it could was certainly in accordance with the general trend of his draft.

27. Mr. AGO said he was radically opposed to the idea that the tribunal could continue its proceedings in the absence of one arbitrator, since that would disturb its equilibrium and conflict with the principle of the equality of the parties.

28. The question he had raised, however, was different — namely, whether, if a new arbitrator were appointed, the proceedings could continue, as if nothing had happened, from the point they had reached at the time the vacancy occurred. He did not think so. In order to facilitate the procedure, however, the draft might provide that, where an arbitrator was replaced, the proceedings should continue from the point they had already reached unless the new arbitrator requested that the oral proceedings be recommenced *ab initio*.

29. Mr. SCELLE, Special Rapporteur, thought, with regard to the first question referred to, that Mr. Ago's point of view was based on the old concept of diplomatic arbitration, where strict equality between the parties was regarded as essential. If the Commission accepted the contrary view that the members of the arbitral tribunal were acting as impartial judges, it seemed less necessary to replace an arbitrator who had died or been incapacitated — and there were instances where no replacement had in fact been made — though, on balance, he was in favour of a replacement in those circumstances.

30. If a new arbitrator were appointed, however, he did not think that the proceedings should be recommenced, for the fundamental object of arbitration was the expeditious settlement of a dispute. On the other hand, so far as the point at which proceedings should recommence was concerned, he considered that they should either be recommenced altogether or not at all. At first sight Mr. Ago's compromise proposal seemed illogical.

31. Sir Gerald FITZMAURICE said the second of the two views referred to by the Special Rapporteur as regards the nature of arbitration was hardly in accordance with the realities of modern practice. It would, moreover, be difficult to reconcile with article 14, which stated that " The parties shall be equal in any proceedings before the tribunal ". Such equality was clearly impossible if one party was represented by fewer national arbitrators than the other. It was also impossible if one of its national arbitrators had sat for only a part of the proceedings. For while it was true that national arbitrators should, and in general did, adopt an impartial attitude, they were unlikely to agree to serve on the tribunal if they thought their Government was definitely in the wrong; hence they inevitably approached the proceedings, if not with a prejudice, at least with a predisposition in favour of their Government.

32. On the other hand, the inequality between the parties that might result from the replacement of an arbitrator after the proceedings had begun was perhaps less than Mr. Ago believed. The newly appointed arbitrator would be able to study the written proceedings, and provided that a transcript had been made of the oral proceedings he could study that as well, though admittedly the reading of the text would not be as satisfactory as actually hearing the pleadings. For practical reasons Sir Gerald would therefore be opposed to recommencing the entire proceedings, though it might sometimes be necessary to recommence the oral proceedings; the practical objections to recommencement were greater than in the case of domestic proceedings, since international proceedings tended to be longer and more complicated.

33. Mr. AGO pointed out that circumstances would differ so much from case to case that it was essential that any rule the Commission might lay down in the matter should be flexible. He proposed that a new article be inserted after article 8, reading as follows:

> " Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require the oral proceedings to be recommenced from the beginning, should they already have started."

34. Mr. BARTOS said he was in favour of some such provision, for it would ensure that all the arbitrators were on an equal footing and safeguard the principle that judicial decisions should in general be based on direct oral testimony rather than on written evidence.

For those reasons it was only right that the newly appointed arbitrator — unless, as alternate, he had himself followed the proceedings and been entitled to ask for explanations, as was sometimes the case — should be able to require the oral proceedings to be recommenced from the beginning or to revert to some point that had arisen in their course if it seemed to him to require examination.

35. Mr. VERDROSS said he supported Mr. Ago's proposed text, not only because it restored equilibrium between the parties but also because it ensured the objectivity of the award ; for the new arbitrator might reasonably claim that he could not judge the case objectively unless he was in possession of all the evidence that had been offered.

36. Mr. YOKOTA agreed that a provision of the kind proposed by Mr. Ago should be inserted after article 8, but considered that even though the request for recommencement of the oral proceedings came from the newly appointed arbitrator, it should be for the tribunal itself to decide whether his request was justified.

37. Mr. EDMONDS agreed that some provision of the kind was necessary, but thought that it should not be left entirely to the newly appointed arbitrator, or even to the tribunal itself, to decide whether the oral proceedings should be recommenced. In his view the parties should be given some say in the matter. For example, the newly appointed arbitrator might say in all good faith that it was unnecessary for the oral proceedings to be recommenced, yet the result might be to make him less than fair to one of the parties.

38. Mr. LIANG, Secretary to the Commission, suggested that the question raised by Mr. Ago might be more appropriately dealt with elsewhere in the draft, for example, in connexion with article 14, which laid down that the parties should be equal in any proceedings before the tribunal.

39. He added that it was perhaps regrettable that the Special Rapporteur should have omitted any section headings in the new draft, as they had made the draft adopted at the fifth session much easier to refer to and comprehend.

40. Mr. AGO said he would have no objection to placing the proposed article elsewhere, though in that case a cross-reference should perhaps be included in article 6. He recalled, however, that the whole question of the final arrangement of the draft articles had been deferred (434th meeting, para. 56), pending consideration of a suggestion by Sir Gerald Fitzmaurice. The question of where to place the article therefore seemed to be of secondary importance at the current stage of the discussion.

41. Mr. SCELLE, Special Rapporteur, said he had now had time to consider that suggestion, and in his view article 14 was in fact one of those which might most suitably be transferred to a preamble in which the general principles of arbitration were laid down. It seemed to him, therefore, that the text proposed by Mr. Ago, which admittedly related to a very important point, and one not covered by previous conventions, should be inserted after the articles relating to the replacement and disqualification of arbitrators.

42. Mr. YOKOTA admitted the force of Mr. Edmonds' remarks and accordingly proposed that the additional article should read as follows :

> " In case a vacancy has been filled after the proceedings have begun, the tribunal shall decide, at the request of the newly appointed arbitrator or one of the parties, the procedure to be followed thereafter."

43. Mr. SANDSTRÖM and Mr. AMADO said they could not accept Mr. Yokota's proposal as they believed the question was one which only the newly appointed arbitrator himself could decide.

44. Mr. BARTOS said that no one arbitrator but only the tribunal as a whole was competent to make the decision in question.

45. The CHAIRMAN observed that the members of the Commission appeared to be generally in favour of stipulating that vacancies should be filled regardless of whether they occurred before or after the proceedings had commenced. He presumed, therefore, that the Commission agreed to the following text for article 6, which took into account the amendments proposed by Sir Gerald Fitzmaurice :

> " If, whether before or after the proceedings have begun, a vacancy should occur on account of the death or the incapacity of an arbitrator, the vacancy shall be filled in accordance with the procedure prescribed for the original appointments."

It was so agreed.

46. The CHAIRMAN said that since it appeared to be the wish of the Commission to indicate the effect of the filling of a vacancy upon the course of the arbitral proceedings, it would be necessary to decide whether the proceedings should continue uninterrupted or commence afresh, and also whether the provision on that point should form part of article 6 or be placed at the end of the group of article 6, 7 and 8.

47. Mr. AGO suggested that the point raised by Mr. Edmonds could be met by adding the words " or one of the parties " to the text of the proposed new article.

48. As for the position of the new provision, he proposed that it be tentatively placed at the end of the group of articles dealing with the filling of vacancies, without prejudice to a possible rearrangement of the draft.

49. The CHAIRMAN put to the vote Mr. Ago's proposal that any provision regarding the filling of vacancies on the course of proceedings be tentatively placed at the end of the group of articles dealing with vacancies.

The proposal was adopted by 10 votes to none, with 4 abstentions.

50. The CHAIRMAN said that a decision on Mr. Ago's proposed new article would be deferred until the following meeting.

ARTICLE 7

51. Mr. SCELLE, Special Rapporteur, introduced the text of article 7, pointing out that paragraph 1 was directed against resignations on specious grounds.

52. Sir Gerald FITZMAURICE said that he had misgivings regarding the provision that an arbitrator might withdraw or resign only with the consent of the tribunal. In practice, it would be quite impossible to prevent an arbitrator from resigning or to compel him to take part in proceedings from which he had every intention of withdrawing. Indeed, the impossibility of doing so was clearly recognized in paragraph 2, which began " If the withdrawal should take place without the consent of the tribunal ". Paragraph 1 was clearly inspired by the desire to prevent the resignation of arbitrators for some improper reason, such as pressure from their State of nationality. Though arbitrators sometimes resigned for such reasons, it would be wrong to assume that they always did. It was in fact more usual, and he could recall cases in support of that view, for arbitrators to wish to resign for personal reasons having nothing to do with the case, or because the course taken by the proceedings made them personally unwilling to continue to be associated with them. Perhaps the Special Rapporteur's object could be achieved by a provision in paragraph 1 stating that " an arbitrator may resign only after consultation with the president of the tribunal ".

53. Mr. EDMONDS agreed with Sir Gerald Fitzmaurice's remarks on the inconsistency of paragraphs 1 and 2 of the article. In his opinion, paragraph 1 could be omitted entirely.

54. Mr. AGO agreed with Sir Gerald Fitzmaurice that an arbitrator might well resign for reasons that were not improper. Reference had been made to cases where the reasons for resignation might have seemed suspicious ; but there had also been cases of arbitrators or even the president of a tribunal having resigned because they had found the conduct of the other members of the tribunal suspicious. He proposed that the entire article 7 should be deleted, and that the words " on account of the death or the incapacity of an arbitrator " in article 6 should be amended to read " on account of the death, incapacity or resignation of an arbitrator ".

55. Mr. SCELLE, Special Rapporteur, said that he would have no objection to Mr. Ago's proposals, since it was in accordance with his own original conception.

56. Mr. FRANÇOIS expressed surprise at the concession made by the Special Rapporteur. In previous years, the Commission had taken the view that safeguards must be provided against the exercise of pressure on arbitrators by their Governments, and the Special Rapporteur himself had always been concerned at the possibility of an arbitrator being compelled to resign against his wish.[2]

57. Mr. SCELLE, Special Rapporteur, said that he had since become convinced of the impossibility of preventing such resignations. He had also accepted the necessity of making concessions to the views of Governments.

58. Mr. AMADO noted with pleasure the tendency to return to a text on the lines of article 59 of The Hague Convention of 1907 [3] and article XV of the Convention for the Establishment of an International Central American Tribunal.[4]

59. Mr. EL-ERIAN said that he shared the misgivings of Sir Gerald Fitzmaurice and other speakers with regard to the provisions of article 7. One way of providing for cases of resignation without establishing too rigid a provision would be to stipulate that once the proceedings before the tribunal had begun resignations would be tendered only after consultation with the tribunal.

60. Mr. PADILLA NERVO expressed agreement with Mr. Ago's proposal as accepted by the Special Rapporteur. The whole purpose of article 7 had been to provide safeguards against improper conduct by the State of nationality of an arbitrator. An arbitrator's resignation might, however, be due either to an act of his State of nationality or to cause quite unconnected with that State. The Commission must assume, until it were proved otherwise, that States would act in a proper manner.

61. Mr. BARTOS said that, though he would not oppose the Special Rapporteur's withdrawal of article 7, he would have preferred to see such an article retained on various grounds, namely, that of the freedom of the individual and of the need to expedite the tribunal's proceedings and ensure sound judgement. Arbitrators quite frequently resigned after proceedings had been going on for a long time, not so much on the orders of their Government as in response to strong national feeling. Arbitrators could not be prevented from resigning, but if they resigned they might be liable for non-performance of contract, if the other members of the tribunal considered that the grounds for resignation were unreasonable. He would, therefore, have preferred a text distinguishing between resignations accepted by the tribunal and those tendered on specious grounds.

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[2] *Official Records of the General Assembly, Fifth Session, Supplement No. 12,* para. 180, and *ibid., Seventh Session, Supplement No. 9,* para. 19.

[3] Convention for the Pacific Settlement of International Disputes, The Hague, 1907. See *The Reports to the Hague Conferences of 1899 and 1907,* James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 303.

[4] Signed at Washington on 7 February 1923. See *Supplement to The American Journal of International Law,* vol. 17 (1923), p. 89.

62. Mr. AMADO quoted from the *Commentary on the Draft Convention on Arbitral procedure,*[5] to show that practice was somewhat uncertain concerning the effect of the withdrawal of an arbitrator, and that the opinions of writers also indicated a lack of unanimity. It was impossible to allow for all contingencies in a model draft. The proper place for provisions on the resignation of arbitrators was in the *compromis.*

63. Mr. VERDROSS, referring to Mr. Bartos' remark concerning remedies in case of the improper withdrawal of an arbitrator, suggested that the best remedy in cases of withdrawal of an arbitrator under pressure from his State of nationality would be to stipulate that if an arbitrator withdrew without the consent of the tribunal, the tribunal's proceedings would continue without him.

64. The CHAIRMAN pointed out that the Special Rapporteur had withdrawn article 7 and that no member of the Commission had proposed its restoration. The article was therefore to be regarded as deleted. It merely remained to agree on any possible addendum to article 6.

ARTICLE 6 (*continued*)

65. Mr. EL-ERIAN suggested the following new paragraph to be added to article 6:

> " If, however, an arbitrator should wish to resign, he shall consult with the president of the tribunal before tendering his resignation."

66. Mr. AGO remarked that the suggested addendum should read " with the president or members of the tribunal ", since the president himself might wish to resign.

67. Mr. SCELLE, Special Rapporteur, did not think it possible to provide for a remedy along the lines suggested. He understood the Commission to be generally opposed to the idea that the proceedings before the tribunal should continue despite the withdrawal of an arbitrator.

68. Mr. FRANÇOIS said that he could not see the point of Mr. El-Erian's suggestion. The Commission's object had been to protect an arbitrator against pressure from his State of nationality. To stipulate that he must consult the other members of the tribunal would provide no such safeguard. He must be able to tell his Government that it was impossible for him to resign. An effective remedy against improper resignation would be to fill the vacancy thus created in a manner unfavourable to the State of nationality of the resigning arbitrator, namely by requesting the President of the International Court of Justice to appoint a new arbitrator.

69. Mr. EL-ERIAN, replying to the CHAIRMAN, said that he did not wish to press his suggestion.

70. The CHAIRMAN put to the vote the proposal (para. 54 above) that the words " on account of the death or the incapacity of an arbitrator " should be amended to read " on account of the death, incapacity or resignation of an arbitrator ".

The proposal was adopted by 12 votes to none, with 2 abstentions.

The meeting rose at 1 p.m.

438th MEETING

Wednesday, 7 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Communication from the Secretary-General (A/CN.4/L.74)

1. Mr. LIANG, Secretary to the Commission, drew attention to the communication dated 2 May 1958 from the Secretary-General of the United Nations to the Chairman of the Commission, regarding the establishment of the United Arab Republic (A/CN.4/L.74).

The Commission took note of the communication.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) (*continued*)

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

ARTICLE 5 (*continued*)

2. Mr. SCELLE, Special Rapporteur, read out the revised text of article 5 (see 437th meeting, para. 1).

3. Article 5 assumed that the arbitral tribunal had already been constituted in accordance with article 4, and he hoped that no difficulty would arise from the fact that the decision on article 4 had been deferred. The matters dealt with in paragraph 3 had not been fully discussed, but he believed that the article as a whole was acceptable to the Commission.

4. The CHAIRMAN observed that, since there had been no objection during the previous discussion to paragraph 1, the first sentence of paragraph 2 and paragraph 4 of the article, as revised by the Special Rapporteur, he assumed that the Commission was disposed to adopt them.

It was so agreed.

5. Mr. AMADO said that he was not in favour of the words " save in exceptional circumstances " in paragraph 3 of the article. Though he realized that the draft was merely a model and not a convention, he still found the phrase altogether too subjective. In the absence of any indication of what was meant by " exceptional ", the phrase had little meaning in law.

6. Mr. EDMONDS considered that the second sentence of paragraph 2 was inconsistent with article 6 as

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[5] United Nations publication, Sales No.: 1955.V.1., pp. 28-30.

approved at the previous meeting (437th meeting, paras. 45 and 70). One article provided that an arbitrator might not be replaced during the proceedings and another stated that he could be replaced on account of death, incapacity or resignation.

7. Sir Gerald FIZMAURICE did not think that there was any inconsistency between article 5 and article 6. Article 5 dealt with the changing of arbitrators who were still in office, while article 6 dealt with the replacing of arbitrators who had ceased, owing to one of the reasons specified, to perform their functions.

8. The CHAIRMAN, speaking as a member of the Commission, observed that no provision appeared to have been made for the changing of umpires appointed by agreement between the arbitrators themselves.

9. Mr. SCELLE, Special Rapporteur, thanked the Chairman for raising a point which had not been covered in that or previous drafts. It posed the fundamental question whether arbitrators appointed by the parties were to be regarded as agents of the States concerned or to be considered, once appointed, as independent authorities. In his opinion, the latter view was correct, and hence an umpire chosen by arbitrators as independent authorities was not removable at the will of the parties. He would, however, welcome the views of other members on that point.

10. Replying to Mr. Amado, he said that the parties to a dispute could not be denied the right to change the " neutral " arbitrators on the tribunal. However, as Mr. Ago had said, changes of that kind should be quite exceptional, since such arbitrators might play a considerable part in producing the final award. To specify in the draft what was meant by " exceptional circumstances " would be far too complicated and lengthy a business. The clause was after all only a recommendation.

11. Mr. AMADO cited the writings of learned jurists in support of the view that arbitrators once appointed ceased to be agents of the State which had appointed them.

12. Mr. EL-ERIAN said that, since the second sentence in paragraph 3 f article 5 was entirely dependent on article 4, paragraph 2, no decision could be taken on the former until article 4 had been adopted.

13. Mr. SANDSTRÖM remarked that another case which had not been discussed was that where all the arbitrators had been appointed by agreement between the parties.

14. Mr. YOKOTA said that the Chairman's point might be covered by inserting the words " or between the arbitrators " after the words " between the parties " in the first sentence of paragraph 3. He wished to propose an amendment to that effect.

15. Mr. FRANÇOIS said that, since the Commission had decided to dispense with article 7, the second sentence of paragraph 2 of article 5 was of little practical value. What was the point of stipulating that an arbitrator appointed by a party could not be replaced, if there was no safeguard against the arbitrator's being compelled to resign by the State which had appointed him ?

16. Referring to paragraph 3, he said that the parties to a dispute should have the right to change any arbitrator or umpire by agreement between them. The confidence of the parties in the arbitrators being the very basis of arbitration, he would even go further and say that the parties must have the right to change even an arbitrator appointed by the President of the International Court of Justice under article 4, paragraph 2.

17. Mr. SCELLE, Special Rapporteur, said that, if an arbitrator was appointed by an authority other than the parties to the dispute, the decision of that authority should be respected, and the arbitrator could not therefore be changed by the parties. Were the contrary the case the effect of article 4 might be vitiated.

18. Sir Gerald FITZMAURICE agreed with the Special Rapporteur. It would be quite illogical and contrary to good order if an umpire appointed by the arbitrators, who might well be the president of the tribunal, could be changed after appointment. One might well wonder in such a case why the arbitrators appointed by the parties had agreed to appoint him in the first place. Similar considerations applied when the arbitrator was appointed by an outside authority, such as the President of the International Court of Justice.

19. He could not agree with Mr. François that it was unnecessary to make provision for the replacement of an arbitrator, since in any case he could not be forced to continue. The Commission had admittedly failed to provide any safeguard against an arbitrator's being compelled to resign by the State which appointed him, but at least it should not go further and encourage such improper conduct by making it impossible to replace an arbitrator by any other means.

20. Incidentally, he thought that the word " umpires " was not a particularly happy term in the context. He proposed that the word " arbitrators " should be used instead.

21. Mr. FRANÇOIS did not consider that it would destroy the whole procedural system if the parties were allowed to replace by agreement an arbitrator appointed by the President of the International Court of Justice. The parties might find the President's choice of arbitrator unfortunate, and if they finally agreed on another candidate so much the better. An arbitrator of their choice was preferable to one imposed on them. Far from destroying anything, such a provision would merely help to re-establish the ideal state of affairs in which arbitration was based on the agreement of the parties and the arbitrators enjoyed their confidence. Nor did he consider that such a change would in any way detract from the prestige of the President of the Court. He thought, however, that there should be a time limit on such changes.

22. Mr. BARTOS agreed with Mr. François. The fact

that an arbitrator was appointed by the President of the International Court acting in lieu of one of the parties did not alter the arbitrator's position in the least; he still sat on the tribunal as though he had been appointed by the party itself and could therefore be changed by agreement between the parties. He also considered that such a change would not affect the prestige of the President of the Court, for the latter would not be acting in his official capacity.

23. Mr. HSU said that he, too, was not satisfied with the words " save in exceptional circumstances " in paragraph 3 of the article. They constituted an imperfection inconsistent with what was meant to be a model draft. Like Mr. François, he saw little point in the second sentence of paragraph 2, in view of the Special Rapporteur's decision to withdraw article 7, a concession which he regretted.

24. Mr. EL-ERIAN still maintained the view that no decision should be taken on article 5, paragraph 3, until article 4 had been adopted. The provision that the President of the International Court might be requested to appoint an arbitrator was based on the supposition that the parties could not agree on the appointment themselves. If, however, they later reached agreement, their agreed choice was much to be preferred to an imposed appointment, since the agreement of the parties and their confidence in the arbitrators was the very basis of arbitration.

25. Mr. AGO could not agree with those members who thought that, article 7 having been dispensed with, the second sentence in paragraph 2 of article 5 no longer served any useful purpose. He could see no reason for deleting a clause which at least constituted a safeguard against improper manoeuvring by States.

26. With reference to Mr. François' comment concerning the second sentence of paragraph 3, he thought, first of all, that the case of an agreement between the parties to replace an arbitrator appointed by the President of the International Court of Justice was a highly theoretical one. It was most improbable that the parties, after having long failed to agree on the appointment of arbitrators, would suddenly find themselves in complete accord immediately after the President of the Court had made the appointment in consequence of the previous lack of agreement between the parties. Moreover, to allow the parties not to accept the decision of the President of the Court and to replace an arbitrator appointed by him would result in the undermining of his authority. It should be a rule that, if the parties failed to agree on the appointment of arbitrators and the President of the Court had to make the appointment in their stead, they thereby lost the right to partake in the appointment.

27. Sir Gerald FITZMAURICE also disagreed with Mr. François. A request to the President of the International Court to appoint arbitrators would be made only after protracted negotiations and a considerable lapse of time. The President, moreover, would also devote much thought to the appointment and almost certainly consult both parties, which would be free until the very last moment to appoint the arbitrators themselves. It therefore seemed inconceivable to permit them at that late stage to turn round and reject as unsuitable an arbitrator appointed by the President of the Court. To permit such behaviour would undermine the prestige of the President of the International Court.

28. Mr. VERDROSS fully agreed with Mr. Ago and Sir Gerald Fitzmaurice, and pointed out that even though the changing of an arbitrator appointed by the President of the Court might not undermine the prestige of the Court, since the President was not acting in his official capacity, it would undoubtedly be damaging to the dignity of the person of the President.

29. Mr. AMADO was in favour of leaving paragraph 3 as it stood. The Commission could only proceed on the assumption that all concerned, namely, the parties and the President of the Court, would act in good faith throughout.

30. Mr. PADILLA NERVO said that the situation in practice was perhaps not quite as simple as had been suggested. In the first place, article 4, paragraph 2, made it possible for one of the parties to request the designation of arbitrators by the President of the International Court of Justice against the wishes of the other party. In the second place, the three-month period specified in that article could well prove insufficient. Negotiations beyond that time limit could result in an agreement between the parties concerning the choice of arbitrators.

31. In addition, the arbitral tribunal might conceivably consist of five members. In that case, there would be more scope for the parties to agree on the replacement of one of the members of the tribunal.

32. He agreed with Mr. François that the agreement between the parties afforded the best assurance that the dispute would be settled by arbitration. It was therefore important not to place any obstacles in the way of the agreement between the parties.

33. Mr. BARTOS said that there appeared to be a conflict between the desire to safeguard the prestige of international authorities and the need to ensure the peaceful settlement of disputes. For his part, he thought that the peaceful settlement of disputes should be the overriding consideration.

34. It was open to the parties, by agreement, to dispense with the undertaking to arbitrate altogether. They were free to do so at any time if they considered that diplomatic negotiations were preferable, and it was in the interests of the international community that their freedom of action should remain unquestioned. If, then, the parties were at liberty to substitute, by agreement, some other form of pacific settlement for arbitral procedure, *a fortiori* they had the right, on condition of course that they were agreed, to replace an arbitrator appointed by the President of the International Court of Justice by another.

35. The CHAIRMAN called for a vote on the second

sentence of paragraph 2, as revised (see 437th meeting, para. 1).

The second sentence of paragraph 2 was adopted by 13 votes to none, with 2 abstentions.

36. Mr. FRANÇOIS said that he had abstained from voting on the second sentence of paragraph 2 of article 5 because the relationship of its provisions to those of article 6, as adopted by the Commission, was not quite clear. For his part, he considered that the provisions of article 6 should prevail over those of the sentence in question.

37. Mr. AMADO said that he had voted in favour of the second sentence of paragraph 2 because its provisions were consistent with the principle of the immutability of the tribunal.

38. The CHAIRMAN said that the Commission had before it an amendment by Mr. Yokota (see para. 14 above) which would add in the first sentence of paragraph 3 as revised a reference to arbitrators co-opted by agreement between the arbitrators.

39. Mr. SCELLE, Special Rapporteur, said that Mr. Yokota's amendment was not in its proper context in the first sentence of paragraph 3. It would be more appropriate to discuss that amendment in connexion with the second sentence of the same paragraph; co-opted arbitrators were judges and could not be treated in the same manner as arbitrators appointed by agreement between the parties. On the contrary, they should be treated similarly to arbitrators appointed in the manner provided for in article 4, paragraph 2.

40. Mr. YOKOTA said that he saw no difference between an arbitrator appointed by agreement between the parties and an arbitrator appointed by agreement between the arbitrators appointed by the parties. He therefore pressed for a vote on his amendment at that stage.

41. The CHAIRMAN called for a vote on Mr. Yokota's amendment to the first sentence of paragraph 3.

The amendment was rejected by 6 votes to 3, with 6 abstentions.

42. The CHAIRMAN called for a vote on the first sentence of paragraph 3 as revised, with the substitution of the word " Arbitrators " for the word " Umpires ".

The first sentence of paragraph 3, as amended, was adopted by 12 votes to 1, with 2 abstentions.

43. The CHAIRMAN said that the second sentence of paragraph 3, which contained a reference to article 4, paragraph 2, would be voted upon after the Commission had disposed of article 4.

ARTICLE 8

44. Mr. SCELLE, Special Rapporteur, introduced article 8, dealing with the question of the disqualification of an arbitrator. Its provisions made it clear that disqualification could not be proposed by reason of facts existing before the constitution of the tribunal and known at the time.

45. Mr. VERDROSS said that he was in agreement with the substance of article 8, paragraph 1. As a drafting change, he proposed the deletion, in the last sentence, of the phrase " and particularly in the case of a sole arbitrator ". The commencing words " In all cases " rendered the phrase in question unnecessary.

46. He also proposed the insertion of the words " at the request of one of the parties " at the end of the last sentence.

47. Mr. SCELLE, Special Rapporteur, accepted the two suggestions put forward by Mr. Verdross.

48. Mr. SANDSTRÖM said that article 8 of the 1953 draft [1] left the decision on the disqualification of an arbitrator to the other members of the arbitral tribunal. He asked the Special Rapporteur why the new draft proposed a different procedure.

49. Mr. SCELLE, Special Rapporteur, said that it was a very delicate matter for the members of the tribunal to deal with the disqualification of one of their own colleagues. It seemed preferable to leave the decision to an independent body of unquestioned authority.

50. The CHAIRMAN, speaking as a member of the Commission, said that the change introduced by the Special Rapporteur had taken into account some of the suggestions made by Governments. Other suggestions had, however, also been made. One Government had suggested that the parties should first be given an opportunity to settle the matter by mutual agreement.[2] Another had suggested that jurisdiction should be vested in the Court only at the request of both parties.[3] The Netherlands Government had suggested that the vacancies resulting from disqualification should be filled by the method laid down for the ordinary appointment.[4]

51. Mr. EL-ERIAN said that he shared Mr. Sandström's doubts regarding the last sentence of paragraph 1, and suggested that the following words be added at the end of that sentence: " except where the parties agree on a different procedure ". An amendment along those lines would leave intact the principle of the recourse to the International Court of Justice, but would give the parties an opportunity to settle the matter by means of some other procedure if they could agree upon it.

52. Mr. AMADO said that in his considerable practical experience of arbitration he could not recall any instance of a proposal for the disqualification of an arbitrator. Furthermore, he could hardly imagine that States would submit a question of that character to the International Court of Justice.

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[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

[2] *Ibid., Tenth Session, Annexes,* agenda item 52, document A/2899 and Add. 1 and 2, sect. 12.

[3] *Ibid.,* sect. 1.

[4] *Ibid.,* sect. 13.

53. The interesting suggestion made by Mr. El-Erian would provide a way out of the difficulty.

54. Mr. BARTOS said that the principle contained in article 8, paragraph 1, was a sound one, but could give rise to practical difficulties. Article 36, paragraph 2, of the Statute of the International Court of Justice did not give that Court jurisdiction to decide on the disqualification of an arbitrator. The Court had consistently taken the view that it could only deal with disputes coming within its jurisdiction under a specific provision of its Statute. For his part, he would have taken a broader view of the jurisdiction of the Court, but it was certainly not inconceivable that the Court itself might disclaim jurisdiction in respect of disqualification proceedings.

55. He would prefer the question of the disqualification of an arbitrator to be decided by the other members of the arbitral tribunal. It was only where one of the parties challenged the decision of the other arbitrators that it was appropriate to bring the matter to the International Court of Justice as a matter involving the interpretation of a treaty.

56. With regard to article 8, paragraph 2, he considered that, on the disqualification of an arbitrator, the party which had appointed him should be given the choice of appointing a new arbitrator in his place. He was prepared, however, to accept the decision of the Commission with regard to the question of filling vacancies resulting from disqualification.

57. Mr. SCELLE, Special Rapporteur, said that he had been impressed by the misgivings expressed by Mr. Bartos on the basis of Article 36, paragraph 2, of the Statute of the International Court of Justice. Those misgivings would, however, appear less serious if it was remembered that the acceptance by the parties to a dispute of a provision along the lines of article 8, paragraph 1, would be equivalent to the recognition of the jurisdiction of the Court in disqualification proceedings.

58. A proposal for the disqualification of an arbitrator could only be made by one of the parties to a dispute ; it was inconceivable that both parties should jointly request such a disqualification.

59. Mr. VERDROSS said that the undertaking of the parties to arbitrate constituted a treaty, and Article 36, paragraph 1, of the Statute of the International Court of Justice gave the Court jurisdiction in matters provided for in treaties. There could therefore be no doubt regarding the competence of the International Court of Justice.

60. Mr. LIANG, Secretary to the Commission, said that technically the view expressed by Mr. Verdross on competence was undoubtedly correct. In practice, however, it would be an elaborate and embarrassing process for the International Court of Justice to deal with cases concerning disqualification.

61. For his part, he preferred the formulation contained in article 8 of the 1953 draft which left the decision on the disqualification of an arbitrator to the other members of the tribunal, and only called for action by the International Court of Justice in the case of a sole arbitrator. The provision for such action in that particular case was an innovation introduced by Mr. Scelle in order to remedy a deficiency in the original draft on arbitral procedure submitted to the Commission.

62. The *Commentary on the Draft Convention on Arbitral Procedure* prepared by the Secretariat cited certain opinions and precedents [5] in support of the system embodied in the 1953 draft.

63. Mr. SCELLE, Special Rapporteur, said that he fully agreed with the Secretary of the Commission. He also preferred article 8 of the 1953 draft. He had introduced some changes only in order to take into account certain Government comments.

64. He therefore withdrew article 8 of the latest draft and replaced it by the text of article 8 of the 1953 draft.

65. The CHAIRMAN thought that most of the objections voiced concerning article 8, paragraph 1, of the model draft did not apply to the text of article 8, paragraphs 1 and 2 of the 1953 draft. On the other hand, it would be necessary to defer a decision on paragraph 3 until agreement had been reached on article 4.

66. Mr. BARTOS suggested that the words " in the absence of agreement between the parties " should be added to paragraph 2 since, as he had already pointed out, it would be very difficult to ask the International Court of Justice to decide the question unless there was at least the semblance of a dispute.

67. Sir Gerald FITZMAURICE said he had some doubts on a point which, he thought, bore indirectly on that raised by Mr. Bartos. The International Court of Justice was only competent to decide legal questions, and he was not sure that the question of disqualification of an arbitrator was a strictly legal question. It might therefore be preferable that the question should be decided by the President of the International Court of Justice in his personal capacity.

68. Mr. YOKOTA said he was inclined to agree with Sir Gerald Fitzmaurice. If one party proposed disqualification of the arbitrator and the other party agreed, no dispute could be said to exist.

69. Mr. SANDSTRÖM said that in his view the question of disqualification was a legal question, quite different in nature from the administrative questions which the Commission had already agreed might appropriately be referred to the President of the Court in his personal capacity.

70. Mr. FRANÇOIS said he agreed entirely with Mr. Sandström, and very much doubted whether the President of the Court would be prepared to discharge an entirely novel function which was, at any rate, of a quasi-judicial nature.

[5] See United Nations publication, Sales No.: 1955.V.1, pp. 31-33.

71. Mr. VERDROSS said he was in complete agreement with Mr. Sandström and Mr. François. In any case he did not share Sir Gerald's view that the Court was only competent to decide purely legal questions. It was only Article 36, paragraph 2, of the Court's Statute which referred to " legal disputes " ; in Article 36, paragraph 1, it was clearly stated that the Court's jurisdiction comprised " all cases which the parties refer to it ".

72. Mr. SCELLE, Special Rapporteur, agreed with Mr. Verdross. There might be some slight doubt in the matter, but no more so than in the case of various other articles in which provision was made for recourse to the International Court of Justice.

73. He pointed out, however, that it was not only in the case of a sole arbitrator that recourse to the International Court of Justice might be necessary. For example, it would also be most desirable to make provision for such recourse if the arbitrator whose disqualification had been proposed was the president of the tribunal.

74. Sir Gerald FITZMAURICE said he still thought that the proposed procedure was not entirely satisfactory since it might well give rise to unnecessary embarrassment and delay, but he appreciated the objections to referring the matter to the President of the International Court of Justice and would not therefore press the point further.

75. Mr. BARTOS said he could not altogether accept Mr. Verdross's interpretation of Article 36, paragraph 1, of the Statute of the International Court of Justice. If that clause was read in conjunction with Chapter III, it became perfectly clear that by " case " the Statute meant " case in dispute ". Moreover the Court itself, when referring to disputes of which it was seized, always referred to them as " cases ".

76. He agreed, however, that it would be difficult to ask the President of the International Court of Justice in his personal capacity to settle what was, in Mr. Bartos' opinion, indubitably a legal question.

77. Mr. SCELLE, Special Rapporteur, recalled that he had already indicated his willingness to amend article 8 of the model draft in the manner originally suggested by Mr. El-Erian. To take account of that point and of the point which he himself had raised in his previous statement, he suggested that article 8, paragraph 2, of the 1953 draft be amended to read as follows :

> " In the case of a sole arbitrator or of the president of the tribunal, the question of disqualification shall, in the absence of agreement between the parties, be decided by the International Court of Justice on the application of either party."

78. The CHAIRMAN called for a vote on article 8 of the 1953 draft.

Paragraph 1 was adopted unanimously.

Paragraph 2, in the amended form suggested by the Special Rapporteur (para. 77 above), was adopted by 13 votes to none, with 1 abstention.

Further consideration of paragraph 3 was deferred to a later meeting.

ADDITIONAL ARTICLE PROPOSED BY MR. AGO (*continued*)

79. Mr. AGO said he thought his proposal (437th meeting, paras. 33 and 47) had been sufficiently explained at the previous meeting.

80. Mr. AMADO said he was still not convinced that there was any real need for the words " or one of the parties " in Mr. Ago's proposal and accordingly proposed their deletion.

81. Mr. YOKOTA recalled that he had submitted an alternative proposal on the same subject (437th meeting, para. 42). In his view it was a general principle of international arbitration that procedural points of detail should, in the absence of agreement between the parties, be settled by the tribunal itself. That principle was reflected in article 13, paragraph 1, of the model draft. It would be not only in accordance with that provision but also the most objective and fair way of reaching a decision in the matter, if the responsibility for deciding whether it was necessary to recommence the oral proceedings was entrusted to the tribunal itself. If the newly appointed arbitrator was given that responsibility, the consequence might be that the oral proceedings would be recommenced unnecessarily ; but provided that the new arbitrator's request was well founded, there was no reason why the tribunal should respect it.

82. Mr. AGO said he could not agree with Mr. Yokota. The question whether the oral proceedings should be recommenced or not in the event of the replacement of an arbitrator was not a minor point but a fundamental question, and Mr. Yokota's reference to article 13 was therefore irrelevant in that connexion.

83. It should be borne in mind that in most systems of municipal law the oral proceedings were, in comparable circumstances, recommenced as a matter of course. The Commission would therefore be very progressive in providing that the proceedings should carry on from the point they had reached at the time the vacancy occurred unless the newly appointed arbitrator requested that they be recommenced. But it could not go further. It would surely not be conducive to obtaining an entirely fair award and to respecting the principle of the equality of the parties if one of the arbitrators could be deprived by a majority vote of his right to hear the entire proceedings.

84. In reply to Mr. Amado, he recalled that he had inserted the words " or one of the parties " only in deference to an observation of Mr. Edmonds. For his own part, he agreed that that observation related to a very remote contingency and he was quite prepared to accept Mr. Amado's proposal and return to the text he had originally proposed.

85. The CHAIRMAN accordingly put the additional article proposed by Mr. Ago (437th meeting, paras. 33 and 47), without the words " or one of the parties ".

The additional article was adopted by 11 votes to 1, with 2 abstentions.

86. The CHAIRMAN said that in consequence of the vote it would be unnecessary to vote on Mr. Yokota's proposal.

The meeting rose at 1 p.m.

439th MEETING

Thursday, 8 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Communication from the Asian-African Legal Consultative Committee

1. Mr. LIANG, Secretary to the Commission, brought to the attention of the Commission a communication from the Secretariat of the Asian-African Legal Consultative Committee, informing the Commission that the second session of that Committee would be held at Colombo, Ceylon, from 14 to 26 July 1958, and that under its rules the Committee had authority to admit observers from international organizations.

2. The provisional agenda for the second session of the Committee included some items relating to the work of the International Law Commission.

3. Mr. LIANG suggested that the communication might be discussed by the Commission when it dealt with matters relating to co-operation with other bodies. Meanwhile, he would inform the Asian-African Legal Consultative Committee that its communication had been brought to the attention of the Commission.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

ARTICLE 4

4. Mr. SCELLE, Special Rapporteur, introduced article 4 of the model draft, the text of which followed very much the same lines as articles 3 and 4 of the 1953 draft.[1]

5. Mr. ZOUREK proposed that article 4 be amended to read:

"1. Immediately after the request made for the submission of the dispute to arbitration or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps, within the time limit and in the manner agreed upon between the parties, in order to arrive at the constitution of the arbitral tribunal.

"2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision on the arbitrability of the dispute, the appointment of the arbitrators not yet designated shall, at the request of either party, be made in conformity with the provisions of article 45 of the Convention for the Pacific Settlement of International Disputes, Signed at The Hague in 1907.

"3. If one of the parties should refuse to follow the procedure specified in paragraph 2, the appointment of the arbitrators not yet designated shall, at the request of either party, be made by the President of the International Court of Justice.

"4. The appointments referred to in paragraph 3 shall be made in accordance with the provisions of the *compromis,* or of any other instrument containing the undertaking to arbitrate, and after consultation with the parties. In so far as these texts contain no rules with regard to the composition of the tribunal, the composition of the tribunal shall conform to the provisions of article 45 of the Convention for the Pacific Settlement of International Disputes, 1907.

"5. Where provision is made for the choice of a president of the tribunal, or of other arbitrators, by the arbitrators already designated, the tribunal shall be deemed constituted when all the arbitrators and the president of the tribunal have been selected. If the president and the other arbitrators have not been chosen within two months of the appointment of the arbitrators designated by the parties to the dispute, they shall be appointed in the manner described in paragraphs 2 and 3.

"6. The time limits specified in the present article shall apply only if longer time limits have not been fixed by common consent between the parties.

"7. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law."

6. The main object of his proposal was to offer a possible answer to some of the objections raised by Governments to the procedure described in the corresponding provisions of the 1953 draft, particularly the objection that that procedure gave excessive prominence and discretionary power to the President of the International Court of Justice and hence conflicted with the principle of the autonomy of the parties in international arbitration.[2] He therefore proposed, in paragraph 2, that if the tribunal was not constituted within the specified period, recourse should be had to the procedure laid down in article 45 of the 1907 Convention for the Pacific Settlement of International Disputes, which provided for the intervention of a third party or third parties chosen by the parties to the dispute, and, in the last resort, for determining the matter by lot.[3] Mr. Zourek said that that procedure, while more complicated than the one provided for in

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[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

[2] See document A/CN.4/L.71, under article 3, sect. B.

[3] *The Reports to the Hague Conference of 1899 and 1907,* James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 300.

the Special Rapporteur's draft, was better adapted to arbitration which was based essentially on the will of the parties. It was only if one party showed obvious bad faith by refusing to follow the procedure specified in paragraph 2 that he proposed, in paragraph 3, that recourse should be had to the President of the International Court of Justice.

7. The purpose of paragraph 4 was to ensure that if application was made to the President of the International Court of Justice, he should be given some guidance with regard to the composition of the tribunal, even if the *compromis* contained no rules in that respect.

8. In other respects, his proposal followed broadly the lines of the model draft, except that he had inserted a new paragraph (paragraph 6) to meet the Yugoslav Government's point that it should be open to the parties to stipulate longer time limits than those laid down in the article.[4]

9. Mr. EDMONDS, referring to the second sentence of paragraph 5 in the model draft, asked what the precise status of the experts would be.

10. Mr. SCELLE, Special Rapporteur, said that it was normal practice in domestic arbitration for the tribunal to call, where necessary, on expert advisers who sat with the tribunal but without the right to vote.

11. Mr. LIANG, Secretary to the Commission, wondered if Mr. Edmonds was thinking of the status of expert witnesses in American procedure. In France and other countries on the continent of Europe, however, experts were not regarded as witnesses. In that connexion he also drew attention to Articles 50 and 51 of the Statute of the International Court of Justice.

12. Sir Gerald FITZMAURICE agreed that by "experts" the Special Rapporteur meant, in paragraph 5, what were known in English, and he thought American, procedure as "assessors". Assessors sat with the tribunal as expert advisers, but without the right to vote; they were not witnesses and could not be cross-examined by the other side.

13. Mr. SANDSTRÖM said that in his view experts could not be regarded as members of the tribunal, and it was therefore somewhat surprising to find them referred to in the article relating to the constitution of the tribunal. A more appropriate place would appear to be the provisions relating to the tribunal's procedure.

14. Mr. ZOUREK agreed, and pointed out that he had omitted the sentence in question from his proposal.

15. Mr. SCELLE, Special Rapporteur, said that the Secretary's explanation concerning the meaning of the word "experts" as used in the model draft was correct. Though not on the same footing as the arbitrators, the experts would nevertheless collaborate with the tribunal.

16. Mr. YOKOTA doubted whether the procedure referred to in paragraph 2 of Mr. Zourek's proposal was really necessary. Paragraph 4 related to the case where the undertaking to arbitrate contained no rules with regard to the composition of the tribunal; so it was to be assumed that paragraph 2 related to the case where it did contain such rules. That being so, and provided the parties reached agreement on the composition of the tribunal, its composition would normally be similar to that provided for in article 45 of The Hague Convention of 1907. If they failed to reach agreement, the effect of Mr. Zourek's proposal would therefore be to throw them back on a procedure which they had already tried unsuccessfully.

17. On the other hand he supported paragraph 4 of Mr. Zourek's proposal. Paragraph 3 in the model draft was open to the objection that the President of the International Court of Justice would find it very difficult to determine the composition of the tribunal if no rules were laid down in advance.

18. Mr. FRANÇOIS said he shared Mr. Yokota's doubts regarding paragraph 2 of Mr. Zourek's proposal, though it admittedly had the merit of limiting the number of cases in which recourse would be had to the President of the International Court of Justice. In that connexion he asked to what extent the President had accepted similar functions in the past, and whether, before doing so, he had sought the advice of the Court. For to say that the President was applied to in his personal capacity did not alter the fact that it was as President of the International Court of Justice that the matter was referred to him — as was clear from the provision that if he was prevented from acting, the appointments were made by the Vice-President or another member of the Court; nor did it, for example, alter the fact that if his decision proved unwise, the reputation of the Court itself would suffer.

19. Mr. LIANG, Secretary to the Commission, said that the Court's Yearbook for 1956-1957 contained some thirty pages, with about 250 items, listing instruments which conferred on the Court or its President functions similar to those which were conferred on the President in the model draft.[5] It was clear, therefore, that the practice of conferring such functions on the Court or its President was already fairly widespread.

20. Mr. BARTOS said that many of the arbitration conventions which had been concluded by Yugoslavia provided for recourse to the President of the International Court of Justice if the parties failed to agree on the appointment of arbitrators and other matters. Before accepting the functions thus placed upon him, however, the President habitually consulted the other members of the Court, although there were slight differences in the way in which individual presidents interpreted the nature of the extrajudicial functions entrusted to them. Actually, none of them had ever

[4] See document A/CN.4/L.71, under article 3, sect. E.

[5] International Court of Justice, *Yearbook, 1956-1957*, chapter X, fourth part, "Instruments conferring upon the Court, or its President, an extrajudicial function: appointment of umpires, members of conciliation commissions, etc, etc.".

had to exercise those functions, since the parties had invariably reached agreement on all the matters in point.

21. He preferred paragraph 2 in the model draft to paragraph 2 of Mr. Zourek's proposal, since the procedure laid down in article 45 of the The Hague Convention had, in his view, largely given way to recourse to the President of the International Court of Justice.

22. Sir Gerald FITZMAURICE welcomed the fact that the Court's Yearbook for 1956-1957 so clearly illustrated what he had already emphasized on a number of occasions, namely, that a large number of existing bilateral conventions already contained provisions of the kind proposed by the Special Rapporteur. To the best of his knowledge, the Court and its President had never objected, and could therefore be regarded as having tacitly accepted the practice.

23. He had noted Mr. Zourek's comment that the main difference between his proposal and the model draft was that the former left the parties free to constitute the arbitral tribunal in the first place by agreement between themselves, and only as a last resort provided for recourse to the President of the International Court of Justice. In that respect, however, it did not differ in the slightest from the model draft. In his opinion, the only difference between the two was that Mr. Zourek's proposal interposed an additional procedure which, as Mr. Yokota had pointed out, was very similar to that which *ex hypothesi* the parties had already tried unsuccessfully.

24. Mr. SANDSTRÖM said that he preferred the text in the model draft, not only because it was in keeping with the Commission's earlier decisions but also because it would result in the tribunal's being constituted more simply and rapidly.

25. Mr. GARCIA AMADOR agreed that paragraph 2 of Mr. Zourek's proposal might give rise to very serious — in fact indefinite — delay, which would frustrate the whole purpose of the undertaking to arbitrate. Mr. Zourek's main concern appeared to be to ensure that the will of the parties was respected, but that point was already covered in the model draft, which provided for recourse to the President of the International Court of Justice only as a last resort. There was nothing in the model draft which would prevent the parties from having recourse to the procedure laid down in article 45 of The Hague Convention if they thought that would help them to reach agreement. In that respect he welcomed the flexibility which had been introduced into the model draft by comparison with the 1953 draft, but would be opposed to introducing any further flexibility at the expense of the whole purpose of the draft, which was to ensure that the will of the parties, as expressed in the undertaking to arbitrate, was duly implemented.

26. Mr. ZOUREK stressed that the procedure he proposed was designed to meet criticisms which had been expressed by several Governments, including those of Argentina, Brazil, the Byelorussian Soviet Socialist Republic, Chile, Czechoslovakia, Iran, the Union of Soviet Socialist Republics and Uruguay. He did not press for a separate vote on his proposal, but would ask the Special Rapporteur if he could not at least accept paragraph 4, which would give the President of the International Court of Justice some guidance with regard to the composition of the tribunal in cases where the *compromis* or other instrument containing the undertaking to arbitrate contained no rules in that respect. He thought they would be going too far if they gave the President of the Court the power to determine the composition of the arbitral tribunal.

27. Mr. SCELLE, Special Rapporteur, said he did not think it was possible to accept Mr. Zourek's proposal, which seemed to be based on the assumption that the model draft, by providing in a number of places for recourse to the International Court of Justice or its President, did not take the will of the parties sufficiently into account. That objection might have some force if the Commission was drafting a multilateral convention, but it was now only preparing a model draft which States were free to use or not to use as they thought fit. He had deliberately refrained from referring to The Hague Convention, the basic conceptions underlying which had long since given way to the desire for a speedier procedure in international arbitration, and he would be very unwilling to reintroduce any mention of it in any part of the draft.

28. Sir Gerald FITZMAURICE said that it was a serious objection to paragraph 4 of Mr. Zourek's proposal that it bound the President of the International Court of Justice to conform to the provisions of article 45 of The Hague Convention, when making appointments under paragraph 3 of the article and in the absence of any rules with regard to the composition of the tribunal in the *compromis* or any other instrument containing the undertaking to arbitrate. The President of the Court could be requested to make such appointments, and might agree to do so, but it was very doubtful whether he could be compelled to follow a particular procedure. Paragraph 3 of the Special Rapporteur's draft article was open to a similar objection, but to a much lesser degree, since it merely bound the President of the Court to consult the parties, which he might be expected to do in any case.

29. Mr. ZOUREK said that he had been struck by the fact that under the Special Rapporteur's draft article the President of the International Court of Justice would be called upon not only to appoint arbitrators but even to decide on the constitution of the tribunal. In his own proposal he had replaced that provision by a reference not, as had been claimed, to the procedure laid down in article 45 of The Hague Convention of 1907 but to the composition of the tribunal as set out in that article. The difficulty could perhaps be avoided in another way, by substituting a text on the following lines for the last sentence of paragraph 4 in his own proposal:

"In so far as these texts contain no rules with

regard to the composition of the tribunal, each party shall appoint two arbitrators, of whom one only may be its national or chosen from among the persons selected by it as members of the Permanent Court of Arbitration. These arbitrators shall together choose an umpire."

By adopting such a clause, which provided for what might be said to be the normal composition of an arbitral tribunal in conformity with the terms of a large number of treaties, the Commission would make it unnecessary for the parties to apply to the President of the International Court of Justice for the purpose of the constitution of the tribunal; they would call on his services only for the purpose of making appointments.

30. Sir Gerald FITZMAURICE, replying to a question from the CHAIRMAN, said that he had always found article 4, paragraph 3, of the model draft somewhat puzzling. The constitution of the arbitral tribunal was almost invariably fixed in the *compromis* or the arbitration agreement; so much so that the supposition of no such provision being made in the *compromis* was hardly realistic. He had never envisaged the possibility of the President of the International Court of Justice being called on to do anything more than appoint an arbitrator or arbitrators, and had never thought that the President might have to decide how the arbitral tribunal should be composed and constitute it himself. Such a case might possibly arise, but it was so rare as to be hardly worth taking into account. Perhaps Mr. Zourek's latest suggestion could be adopted in that connexion.

31. Mr. AMADO agreed that it was difficult to conceive that a case would ever arise in practice where the parties to a dispute in which vital interests might be at stake would fail to specify so elementary and essential an element of the *compromis* as the composition of the arbitral tribunal. He was willing to accept the Special Rapporteur's article, which, despite the observations of the Brazilian Government,[6] was one in which respect for the will of the parties was carried to the extreme. He must point out, however, that the situation envisaged in the second sentence of paragraph 3 seemed practically inconceivable.

32. Mr. AGO recalled that the Commission had already stipulated in article 2 that the parties should conclude a *compromis* which should specify, among other things, the method of constituting the tribunal and the number of arbitrators. If, therefore, the parties had drawn up the *compromis*, it was difficult to imagine that they would not have specified the method of constituting the tribunal, and if they had done so the second sentence of article 4, paragraph 3, of the model draft would not apply. The other possibility was that the parties had not drawn up a *compromis*; he wondered whether that was the case the Special Rapporteur had had in mind and whether he wished to provide that, if such a case should arise, the President of the Court should take the place of the parties and draw up the *compromis* himself. He found the idea difficult to accept.

33. Mr. YOKOTA pointed out that the first sentence in paragraph 3 in the model draft stipulated that the appointment should be made in accordance with the provisions of the *compromis* or of any other instrument pursuant to the undertaking to arbitrate, while paragraph 1 specified that the parties to the undertaking to arbitrate should take the necessary steps, either in the *compromis* or by special agreement, in order to arrive at the constitution of the arbitral tribunal. In view of those two provisions there seemed to be no need for the second sentence in paragraph 3 at all.

34. Mr. SCELLE, Special Rapporteur, suggested that the Commission appeared to be going too far in the search for possible implications of article 4. Paragraph 1 of the article, just referred to by Mr. Yokota, laid down the normal procedure. The parties might not, however, succeed in fixing the composition of the arbitral tribunal in the *compromis*, and it was precisely on that point that many moves to have recourse to arbitration had broken down in the past. If, at that stage, neither party made any request to the President of the International Court of Justice there would simply be no arbitration. But if either party requested the President of the Court to act, he could appoint an arbitrator or, in exceptional cases of complete failure by the parties to constitute the tribunal, could appoint all the members of the tribunal. In doing so, he must nevertheless consult all the documents from which he could obtain guidance on the question. The article said no more than that and he saw no particular difficulty in it.

35. Mr. SANDSTRÖM was of the opinion that the powers of the President of the Court with regard to the *compromis* should be confined to fixing the number of arbitrators and making the necessary appointments.

36. Mr. ZOUREK, replying to a question from the CHAIRMAN, said that he would not press for a vote on his proposal but would like the Drafting Committee to take certain parts of it into account, especially the first sentence in paragraph 5. He agreed with previous speakers in considering that a decision as to the composition of the arbitral tribunal could hardly be entrusted to an outside authority. Such a provision seemed contrary to the whole concept of arbitration and to article 37 of The Hague Convention of 1907, which referred to " the settlement of disputes between States by judges of their own choice".[7] Since, as Mr. Ago had pointed out, article 2 already stated that the *compromis* should specify the composition of the tribunal, the simplest solution would be to delete the second and third sentences in paragraph 3 of the Special Rapporteur's article.

37. Mr. AGO said that two situations were possible.

[6] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* annex I, sect. 3.

[7] *The Reports to the Hague Conferences of 1899 and 1907,* James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 298.

The first hypothesis was that the parties had drawn up a *compromis* but failed to specify the composition of the tribunal. That seemed to him a quite inconceivable state of affairs; moreover, in entertaining such a hypothesis the draft would seem to be contradicting itself, since article 2 already stipulated that the *compromis* should specify the composition of the tribunal. The other hypothesis was that no *compromis* or similar instrument existed, in which case, if the Special Rapporteur's suggestion were followed, it would be necessary to request the President of the International Court of Justice, in effect, to draw up all the provisions of the *compromis*. That was a totally different hypothesis from the first one, going far further than the position apparently envisaged in paragraph 3. If, however, they were to confine themselves to the first hypothesis, he saw no need for the provision contained in the second sentence of paragraph 3.

38. Mr. SCELLE, Special Rapporteur, said that it was perfectly possible for a *compromis* to have been drawn up in which no arbitrators were designated. Article 45 of The Hague Convention of 1907 had been drafted to meet such eventualities. The *compromis* might well simply specify the number of arbitrators and by whom they were to be appointed, and go no further on that point.

39. The CHAIRMAN said that in the Commission's 1953 draft on arbitral procedure, the sentence corresponding to the second sentence in paragraph 3 of the latest draft was somewhat different. It read: "In the absence of such provisions the composition of the tribunal shall be determined, after consultation with the parties, by the President of the International Court of Justice or the judge acting in his place".[8] Perhaps the adoption of that wording, which made no reference to texts, would meet Mr. Ago's objection.

40. Mr. AGO said he was not sure that that suggestion would be in line with what the Special Rapporteur now had in mind, since the 1953 draft was based on the assumption that the *compromis* was in existence.

41. Replying to Mr. Scelle, he pointed out that there were two different questions. The parties might fail to appoint one or all of the arbitrators in the *compromis*. That he was willing to admit as perfectly possible. But that the parties, while taking the trouble to draw up a *compromis*, should make no provision at all, for the constitution of the tribunal seemed very strange indeed. In any case, he thought it would be better to adopt a solution providing for the complete provision for the constitution of the tribunal than to place the President of the Court in the embarrassing position of having to draw up the *compromis* himself in cases where the parties had not done so.

42. Sir Gerald FITZMAURICE said that the difference in wording between the 1953 text and the latest draft was important. The real difficulty in paragraph 3 of the model draft lay in the words "In so far as these texts contain no rules". Since they obviously implied that texts existed, it was difficult not to share Mr. Ago's view that it was inconceivable that no provision had been made in them for the constitution of the tribunal. What was conceivable, however, was that the parties would not succeed in drawing up a *compromis* and would get no further than a formal undertaking to have recourse to arbitration. Article 9, which was shortly to be discussed, made provision precisely for that eventuality, stating in paragraph 2 that the tribunal itself should draw up the *compromis*. But that clearly supposed that the tribunal already existed, and there was therefore a certain logic in the insistence in article 4 on the absolute need for a tribunal to be set up in order for certain steps to be taken. It would therefore be advisable to keep paragraph 3 in some form or other, even though it might involve placing a difficult task on the President of the Court. The Commission should, however, try to change the wording to provide for the case in which no *compromis* or similar document existed, and might well adopt the wording of the 1953 draft, namely, "In the absence of such provisions..."

43. Mr. AMADO said that, if the parties could not agree on so important a point as the constitution of the arbitral tribunal, he could not see why they should not refer the dispute directly to the International Court of Justice under Article 36 of its Statute. Indeed, in so strange a situation, it could only be assumed that it was the unavowed intention of at least one of the parties to refer the dispute directly to the Court. Such a case might be abnormal, but was not entirely impossible.

44. If the Commission left paragraph 3 as it stood, parties to a dispute might be tempted to make no provision for the constitution of the tribunal, and leave the task to the President of the Court.

45. Mr. BARTOS said that, while provision for the constitution of the tribunal was one of the essential elements in a *compromis*, it was conceivable that the parties, instead of specifying the composition of the tribunal, might delegate the task of forming it to an outside authority such as the President of the International Court of Justice. But the delegation must be explicit. If such was the intention of the Special Rapporteur, he saw no contradiction between article 4, paragraph 3, and article 2 or article 9, which latter merely dealt with the addition to the *compromis* of elements other than those relating to the constitution of the tribunal. His whole attitude to the paragraph depended on the interpretation placed on the text by the Special Rapporteur, for if the Special Rapporteur had not such an explicit delegation of powers in mind, then the paragraph represented a return to what he had previously criticized as "blank cheque" arbitration, which he could not accept.

46. Mr. SCELLE, Special Rapporteur, said that he was prepared to accept drafting amendments to article 4, paragraph 3, but he was opposed to any changes affecting substance.

[8] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

47. The CHAIRMAN said that the Commission was now in a position to take decisions on all the paragraphs of article 4 except paragraph 3.

Paragraph 1 was adopted unanimously.

Paragraph 2 was adopted by 15 votes to none, with 1 abstention.

Paragraph 4 was adopted unanimously.

48. Mr. SANDSTRÖM proposed the deletion from paragraph 5 of the last sentence, namely, " They may call upon experts ", on the understanding that a provision along those lines could be introduced elsewhere in the draft.

49. The CHAIRMAN called for a vote on Mr. Sandström's proposal to delete the last sentence of paragraph 5.

The proposal was adopted by 13 votes to none, with 2 abstentions.

Paragraph 5, as amended, was adopted unanimously.

50. The CHAIRMAN asked the members of the Commission whether paragraph 3 could be accepted subject to drafting changes.

51. Mr. BARTOS said that the second sentence of paragraph 3 would have to be redrafted so as to bring it into line with the provisions of article 2. In his opinion, the sentence in question could only refer to the case in which the parties themselves expressly delegated to the President, or to another member of the International Court of Justice, the power to decide on the composition of the arbitral tribunal.

52. Mr. AGO said that, if Mr. Bartos' view was the correct one, then the second sentence of paragraph 3 would be unnecessary, because the first sentence of that same paragraph, which stated in general terms that the composition of the tribunal would be determined by the provisions of the *compromis* or other similar instrument, covered cases where the power to determine the composition of the tribunal had been delegated to a third party. If the Commission was agreed on the substance, it could perhaps leave it to the Drafting Committee to decide whether the sentence in question was actually necessary.

53. Mr. SCELLE, Special Rapporteur, said that it was essential to cover the case of an undertaking to arbitrate which was not followed by a *compromis* or any other instrument. It was possible that the parties might be unable to agree not merely on the choice of arbitrators but even on the number of arbitrators. In such an event, it was necessary to enable each of the parties to ask the President of the International Court of Justice to determine the composition of the arbitral tribunal.

54. Sir Gerald FITZMAURICE said that, in order to cover the case of the absence of a *compromis* or other like instrument, it was necessary to make use of terms similiar to those of the 1953 draft, namely, " In the absence of such provisions . . ." The expression " In so far as these texts contain no rules " was inadequate, because there might be no texts of the nature envisaged. He therefore proposed that, so far as the second sentence of paragraph 3 was concerned, the Commission should revert to the language of the 1953 draft.

55. Mr. SCELLE, Special Rapporteur, said that the amendment proposed by Sir Gerald Fitzmaurice seemed acceptable.

56. Mr. ZOUREK said that a provision such as that embodied in the second sentence of paragraph 3 would be understandable in a draft convention on arbitral procedure. The provision would then have been binding on States ratifying the convention. The Commission had, however, decided that its draft would be merely a model ; in the circumstances, there would necessarily have to be an agreement in each case, and that agreement would no doubt determine the composition of the arbitral tribunal or delegate to an outside authority the power to determine that composition. In either case, the second sentence of paragraph 3 was unnecessary and he proposed its deletion.

57. Mr. AGO said that if the intention was to cover the case where the undertaking to arbitrate was not followed by the signing of a *compromis* or other similar instrument, then a provision going so far as to envisage the possibility that that instrument might be drawn up by a third party would become an extremely important one and could not be left in the form of a mere passing reference. If the Commission really wished to adopt a provision along those lines, it should do so in the form of a separate article vesting the President of the International Court of Justice, or the judge acting in his place, with the responsibilities in question. In article 4, however, the second sentence of paragraph 3 should, in his opinion, be deleted or amended.

58. Mr. BARTOS said that the action of the parties in agreeing on the composition of the arbitral tribunal, or in delegating powers to determine that composition, constituted an expression of the sovereign will of the States concerned.

59. In accordance with article 2, sub-paragraph (*c*), the parties had to decide on the composition of the arbitral tribunal, even if only by delegating the power to determine that composition to the President of the International Court of Justice. But in the absence of any agreement, that power could not, he thought, be given to the President of the Court. He would therefore vote against the second sentence of article 4, paragraph 3. He was, however, in agreement with the first and third sentences of that paragraph.

60. Mr. AMADO said that it was difficult to conceive of a case of arbitration in which the parties were not in agreement concerning the composition of the tribunal.

61. The CHAIRMAN put to the vote the first sentence of paragraph 3 of article 4.

The first sentence of paragraph 3 was adopted unanimously.

62. The CHAIRMAN put to the vote the proposal

(see para. 56 above) that the second sentence of paragraph 3 should be deleted.

The proposal was rejected by 7 votes to 5, with 3 abstentions.

63. The CHAIRMAN put to the vote the proposal (see para. 54 above) that the second sentence of article 4, paragraph 3 should be replaced by the second sentence of article 3, paragraph 3, of the 1953 draft.

The proposal was adopted by 10 votes to none, with 5 abstentions.

The third sentence of article 4, paragraph 3, was adopted by 13 votes to none, with 2 abstentions.

Article 4, paragraph 3, as a whole, as amended, was adopted by 10 votes to 1, with 4 abstentions.

64. Mr. ZOUREK said that he had voted against paragraph 3 as a whole because he was opposed to its second sentence.

ARTICLE 5 (*continued*)

65. The CHAIRMAN said that at the previous meeting (438th meeting, para. 43) the Commission had deferred taking a decision on the second sentence of paragraph 3 of article 5 as revised by the Special Rapporteur (437th meeting, para. 1) until the Commission had disposed of article 4.

The second sentence of paragraph 3 as revised by the Special Rapporteur was adopted by 9 votes to 6.

66. Mr. SCELLE, Special Rapporteur, introduced a third sentence in the following terms : " The same rule shall apply to arbitrators co-opted by the other members of the tribunal ". The introduction of that sentence was necessary in view of the Commission's decision (438th meeting, para. 41) to reject Mr. Yokota's amendment to the first sentence of paragraph 3 (*ibid.*, para. 14).

67. Mr. ZOUREK said that the Commission's decision to reject Mr. Yokota's amendment did not imply a decision to adopt a provision along the lines proposed by the Special Rapporteur.

68. Mr. EL-ERIAN said that the sentence proposed by the Special Rapporteur would place co-opted arbitrators on the same footing as arbitrators appointed by the President of the International Court of Justice. The main argument in favour of the non-replacement of arbitrators appointed by the President of the Court was the need to safeguard the President's authority ; no such reason could be invoked in the case of co-opted arbitrators.

69. The CHAIRMAN said that the matter could be clarified by a vote on Mr. Scelle's proposed additional sentence. He put the proposed sentence to the vote.

The proposed additional sentence was not adopted, 7 votes having been cast in favour and 7 against, with 1 abstention.

70. Mr. SCELLE, Special Rapporteur, said that the decision just taken by the Commission was inconsistent with the one taken at the previous meeting regarding Mr. Yokota's amendment.

The meeting rose at 1.05 p.m.

440th MEETING

Friday, 9 May 1958, at 9.45 a.m.

Chairman : Mr. Radhabinod PAL.

Arbitral procedure : General Assembly resolution 989 (X) (A/CN.4/113) (*continued*)

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

ARTICLE 5 (*continued*)

1. The CHAIRMAN said that it now remained for the Commission to vote on the revised text of paragraph 3 of article 5, as a whole (see 437th meeting, para. 1), as amended at the 438th meeting (para. 42), namely :

> " 3. Arbitrators appointed by agreement between the parties may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in article 4, paragraph 2, may not be changed even by agreement between the parties."

Paragraph 3 as a whole, as amended, was adopted by 6 votes to 3, with 3 abstentions.

Article 5 as a whole, as amended, was adopted by 9 votes to 2, with 2 abstentions.

2. Mr. YOKOTA wondered if the sense of the Commission was really not to regulate the question of co-opted arbitrators at all.

3. Sir Gerald FITZMAURICE said that it was a frequent occurrence for an umpire or presiding arbitrator to be co-opted by the other arbitrators. The text of article 5 as approved by the Commission was silent on the position of the presiding arbitrator, and to that extent the draft was therefore incomplete. At a suitable moment, perhaps during the second reading of article 5, he intended to move the reopening of the discussion on the second sentence of article 5, paragraph 3.

4. The CHAIRMAN said that paragraph 1 laid down the general principle of the immutability of the tribunal ; all the other paragraphs of article 5 related to exceptions to that general principle. It followed therefore that, in the absence of a specific provision, co-opted arbitrators were irremovable.

ARTICLE 4 (*continued*)

5. Mr. ZOUREK said that, at its previous meeting (439th meeting, paras. 47, 49 and 63), the Commission

had voted on the several paragraphs of article 4 but not on the article as a whole.

6. The CHAIRMAN said that article 4 as a whole would be voted upon after it had been considered by the Drafting Committee.

ARTICLE 8 (*continued*) [1]

7. The CHAIRMAN said that, at the 438th meeting (para. 78), the decision on paragraph 3 of article 8 of the 7953 draft, appearing as paragraph 2 of article 8 in the model draft (A/CN.4/113), had been deferred until the Commission had disposed of article 4. In consequence of its decision concerning article 4, the Commission was now in a position to vote on article 8, paragraph 3.

Paragraph 3 was adopted by 12 votes to 1, with 1 abstention.

Article 8, as a whole, as amended, was adopted by 12 votes to 2.

ARTICLE 9

8. Mr. SCELLE, Special Rapporteur, introduced article 9, which he described as one of the key articles of the model draft. The basic idea underlying the whole draft was that the undertaking to arbitrate constituted a treaty. In conformity with that idea, article 9 treated the original undertaking to arbitrate as the basis of the arbitration, and not the *compromis* or other instrument drawn up by the parties pursuant to that undertaking.

9. Mr. EDMONDS said that there appeared to be a gap in the provisions of article 9. The second sentence of paragraph 1 covered the case in which one of the parties refused to answer an application on the grounds that the provisions contained in the undertaking to arbitrate, or any supplementary agreement, were insufficient for the purpose of a *compromis*. Nothing was said, however, regarding the case of a party refusing to answer the application without stating any such grounds.

10. Mr. SCELLE, Special Rapporteur, said that in his opinion the second sentence of paragraph 1 applied also to the second of the cases mentioned by Mr. Edmonds.

11. Sir Gerald FITZMAURICE said that one of the principal questions arising in connexion with arbitration was the definition of the nature of the dispute.

12. It was often difficult to draw up a *compromis* because so much depended on the manner in which the case was stated; on occasion, months and even years had been spent in attempts to define a dispute for the purpose of drawing up a *compromis*. It had also occurred that an arbitral award had been materially influenced by the manner in which the dispute had originally been defined in the *compromis*.

13. If the parties were unable to arrive at a definition of the dispute, article 9 gave the arbitral tribunal itself powers to define that dispute, on which it would render its award at a later stage. It was difficult for a tribunal to take such action without to some extent prejudging its decision, because, in order to state the issues involved in a case, it was necessary to go to some extent into its merits. The tribunal would thus have to form a view on the issues of the case without having yet heard any argument from the parties. The consequence might well be that the issue was prejudged in an undesirable manner, and that at least one of the parties would be placed at a disadvantage.

14. Mr. AMADO said that the provisions of The Hague Convention of 1907,[2] empowering the Permanent Court of Arbitration to draw up a *compromis*, could not be used as an argument in support of article 9 of the draft.

15. In the first place, the Convention of 1907 was binding on those States which had ratified it, whereas the draft before the Commission was intended as a model only.

16. In the second place, article 53 of the Convention of 1907, in giving the Permanent Court of Arbitration powers to settle the *compromis*, employed terms which were much narrower than those of article 9 of the model draft.

17. Mr. SCELLE, Special Rapporteur, said, in reply to Sir Gerald Fitzmaurice, that in all the cases covered by article 9 there would be an application on the merits of the case by the party desiring to pursue the matter to an arbitration award. In that application, the claimant party would give a definition of the dispute. It was interesting to compare the provisions of article 9 with those of article 29 dealing with the case of the non-appearance of one of the parties, or its failure to defend its case.

18. He added that the point raised by Mr. Amado should be considered in the light of the provisons concerning the arbitrability of the dispute.

19. Mr. LIANG, Secretary to the Commission, said that article 9 of the draft, like article 10 of the 1953 draft,[3] by giving the arbitral tribunal itself the power, in the last resort, to draw up the *compromis*, could lead to a somewhat unsatisfactory situation. The same tribunal which was ultimately going to decide on the merits of the case would be called upon to define the character and scope of that case.

20. In preparing it *Commentary on the Draft Convention on Arbitral Procudure*,[4] the Secretariat had been unable to find any precedent for such a provision in existing arbitration treaties or in any *compromis*. In some cases, it was provided that the arbitral tribunal could take a decision on the merits of the case in the

[1] Resumed from 438th meeting.

[2] Convention for the Pacific Settlement of International Disputes, The Hague, 1907. See *The Reports to the Hague Conferences of 1899 and 1907*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), pp. 292 ff.

[3] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

[4] United Nations publication, Sales No.: 1955.V.1, pp. 42-44.

absence of a *compromis*. Another system used in practice was to establish a special tribunal to draw up the *compromis*, so that the definition of the dispute was not left to the arbitral tribunal which would ultimately adjudicate upon it. Article XLIII of the Pact of Bogotá [5] empowered the International Court of Justice to draw up the *compromis*: under that system, the arbitral tribunal would adjudicate on the issue as defined by the Court.

21. With reference to the second of the cases mentioned by Mr. Edmonds, he said that the drawing up of a *compromis* suggested that there was at least a constructive agreement between the parties. Mr. Liang doubted whether a judgement by default could be given by the arbitral tribunal in the case in question.

22. The International Court of Justice, when dealing with a case under the optional clause provided for in Article 36, paragraph 2, of the Statute of the Court, could of course define the dispute.

23. Mr. BARTOS said it was extremely doubtful whether an obligation to have recourse to arbitration could be said to exist if there was insufficient agreement between the parties " on the essential elements of the case as set forth in article 2 . . ." The " essential elements " were clearly those described as a " minimum " in the first paragraph of article 2 — the undertaking to arbitrate itself, the subject-matter of the dispute and the method of constituting the tribunal and the number of arbitrators. If the initial instrument did not specify those points, if it was in fact a mere *pactum de contrahendo*, it was difficult to see how, in the absence of an express provision to that effect, it could be held to confer on a not yet existent body the power to substitute its views for the will of the parties. Certainly article 53 of the Convention of 1907 had never, to the best of his knowledge, been interpreted as conferring powers of that sort on the Permanent Court of Arbitration.

24. Mr. EDMONDS said that he did not experience the same difficulty as Sir Gerald Fitzmaurice, probably because it was a common practice in the United States for the court to determine the issues between the parties if they were unable to do so themselves.

25. What seemed to him anomalous in the present text was that paragraph 1 referred to the case where the other party refused to answer the application on the ground that the provisions of the initial instrument were insufficient, but did not refer to the case where that other party simply refused to answer the application without stating any grounds. In other words, a party which did not wish the arbitral procedure to continue could successfully stop the proceedings by simply refusing to answer the application without stating any grounds. He therefore proposed that the words " or refuses to answer it " be inserted before the words " on the ground " so that the first part of the sentence in question would read:

> " If the other party refuses to answer the application or refuses to answer it on the ground that the provisions above referred to are insufficient, . . ."

26. Mr. SCELLE, Special Rapporteur, said he was in fundamental disagreement with Mr. Bartos who appeared to be reverting to the concept of diplomatic arbitration. What created the obligation to have recourse to arbitration was not the *compromis*, but the initial bare undertaking to arbitrate. Throughout the model draft the *compromis* was regarded as a subsidiary instrument, whose provisions the tribunal was, for example, at liberty to disregard if they were such as to prevent it from arriving at an award (article 13). If that was agreed, the question remained what was to be done if the parties failed to draw up the *compromis* themselves; the idea that in that case it should be drawn up for them, so far from being a novel one, had in fact been accepted in The Hague Convention of 1907 and, more recently, in the Pact of Bogotá. He would have been quite content to follow the provisions of the Pact of Bogotá and entrust the task of drawing up the *compromis* to the International Court of Justice, had it not been for the manifest reluctance of many States to provide for recourse to the Court more than was absolutely necessary; in order to take their comments as far as possible into account, he had therefore proposed in his model draft that the task be entrusted to the tribunal itself.

27. Mr. BARTOS thought it was necessary to distinguish between the case where there was a prior undertaking to arbitrate and the case where there was none. In the former, a *compromis* was not strictly necessary. In the latter, the *compromis* itself created the obligation to have recourse to arbitration, but it could only do so if it specified the " minimum " particulars enumerated in the first paragraph of article 2. If it failed to specify those particulars it was not really a *compromis* at all and created no obligation; and no third party could commit sovereign States to a course of action which they had not already expressed their intention of following. In fact, therefore, the difference between him and the Special Rapporteur was not, he thought, as great as the latter supposed.

28. Sir Gerald FITZMAURICE concurred in the view that the area of disagreement was narrower than might at first sight appear. He was not entirely satisfied by the Special Rapporteur's explanations. Mr. Scelle had referred to a bare undertaking to arbitrate, but such an undertaking must at least indicate, even if only in general terms, the subject-matter of the dispute. Frequently, the parties felt that initial instrument to be insufficient and in a subsequent agreement in which they also fixed the number of arbitrators and other particulars, defined the subject-matter of the dispute more precisely. On occasion, they might wish to do so but fail; and in such a case he agreed with the Secretary that the tribunal which would later have to decide the dispute should not be asked to define its subject-matter. As Mr. Edmonds had said, that might be normal practice in municipal law, but it would be

[5] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series*, vol. 30, 1949, No. 449.

most undesirable in international proceedings, where circumstances were rather different. For, in defining the subject-matter, the tribunal could not help to some extent prejudging it; he therefore agreed that if a *compromis* were required and the parties failed to draw it up, the task should be entrusted to some quite separate organ such as the International Court of Justice. But it was by no means always necessary that the subject-matter of the dispute should be defined more precisely than in the initial instrument, any more than an agreed definition was required when a case was brought before the Court by unilateral application. The model draft, however, only provided for the case where a *compromis* was required. He therefore proposed that article 9, paragraph 3, be amended to read as follows:

> "If both parties consider that the elements available to the tribunal are insufficient for the purpose of a *compromis* but are themselves unable to draw up a *compromis*, the tribunal may within three months after the parties report failure to agree (or after the decision, if any, on the arbitrability of the dispute) proceed to hear and decide the case on the application of either party, unless one of them requests the International Court of Justice to establish the *compromis* through its summary procedure."

The proposed wording was based on article 27 to the Revised General Act[6] and on article XLIII of the Pact of Bogotá.

29. Mr. SCELLE, Special Rapporteur, said that though it was not only common but the usual practice for one and the same tribunal to define the subject-matter of the dispute and to decide on its merits, he saw no objection to Sir Gerald Fitzmaurice's proposal; in fact he preferred it and, as he had already pointed out, had only proposed that the task of drawing up the *compromis* in the absence of agreement between the parties be entrusted to the tribunal in view of the reluctance of certain States to provide for recourse to the Court more than was strictly necessary.

30. He had never claimed that a mere undertaking to arbitrate sufficed to define the dispute. In such an undertaking the parties might for example agree to refer to arbitration any disputes relating to the continental shelf. But that was clearly quite a different thing from defining the subject-matter of the specific dispute which had arisen.

31. Mr. ZOUREK said he agreed with the Special Rapporteur that the undertaking to have recourse to arbitration was the basis of the arbitral proceedings in all cases of institutional arbitration. It was, however, necessary to define the essential elements of such an undertaking; in his view it implied not only agreement to refer the dispute in question to arbitration, but also agreement, at least in general terms, on its subject-matter and on the way in which the tribunal should be constituted. An instrument which did not specify those essential elements was a mere *pactum de contrahendo*, and it would be contrary to the basic principles of arbitration, which rested on the will of the parties, to allow an outside authority to substitute itself for their joint expression of will in such a case. He could not therefore accept the last sentence of paragraph 1, more especially since what the Commission was preparing was not a convention but a set of model rules which should be compatible with international law.

32. In any case article 9 was based on the assumption that the arbitral tribunal had already been constituted. If so, it must have been constituted under a prior agreement; and he could not imagine that such an agreement would not specify the essential elements, at least in general terms. He could not therefore see how the necessity of concluding a *compromis* could arise at that stage.

33. In cases where the parties were not bound by a prior undertaking, it was clear that their joint will could only be manifested in the *compromis*. If the *compromis* failed to specify the essential elements listed in the first paragraph of article 2, there was no obligation. In that connexion, he pointed out that paragraph 2 of article 9 in the draft did not envisage the case where there was no prior undertaking to arbitrate, since in such a case the tribunal could only be constituted by virtue of the *compromis* itself and the words "agree on" were therefore inappropriate.

34. Mr. EL-ERIAN thought that the clause entrusting to the tribunal the task of drawing up the *compromis*, if the parties failed to agree on it or to complete it, was a rather strange provision, though he noted the Special Rapporteur's reasons for introducing it (A/CN.4/113, para. 14).

35. He approved of Sir Gerald Fitzmaurice's amendment to paragraph 3 (see para. 28 above) but would propose adding the words "or unless the tribunal wishes to appoint a commission from the Permanent Court of Arbitration to draw up the *compromis*". That would deal both with the objections to the tribunal's performing the task itself and with those to the establishment of a kind of dependence between the International Court of Justice and the Permanent Court of Arbitration.

36. Mr. AMADO, referring to the Special Rapporteur's introductory remarks to article 9 (A/CN.4/113, para. 14), pointed out that few States had ratified the Pact of Bogotá, and even those few had made many reservations. He was not in favour of a provision under which the International Court of Justice would draw up the *compromis*.

37. Mr. BARTOS said that, according to standard practice, all treaties concluded under the auspices of the United Nations contained a clause providing for arbitration in disputes with regard to the interpretation and application of the treaty in question. Where such

[6] Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly of the United Nations on 28 April 1949, United Nations, *Treaty Series*, vol. 71. 1950, No. 912.

an arbitration clause existed, it was certainly possible but not at all necessary to have a *compromis* to implement the clause.

38. Replying to the CHAIRMAN, Mr. BARTOS said that he did not propose the actual deletion of the last sentence in paragraph 1, but thought that it should be modified so as not to give the tribunal the absolute right to order the parties to complete or conclude the *compromis*. He wondered whether the Special Rapporteur would consider including a phrase such as " if the parties have given the tribunal such a right ".

39. Mr. AGO said that he entertained grave reservations with regard to the power given to the tribunal in paragraph 2 of the article to draw up the *compromis* — which was a typical agreement between parties — instead of the parties, if the latter were unable to do so. Perhaps the same solution could be adopted in paragraph 2 as was proposed by Sir Gerald Fitzmaurice in the case of paragraph 3, and the two clauses could then be combined in a single one.

40. Sir Gerald FITZMAURICE endorsed Mr. Ago's suggestion. His own amendment would, in fact, be more fittingly applied to paragraph 2, which would then read as follows :

> " 2. If the parties fail to agree on or to complete the *compromis* within the time-limit fixed in accordance with the preceding paragraph, the tribunal may within three months after the parties report failure to agree (or after the decision, if any, on the arbitrability of the dispute) proceed to hear and decide the case on the application of either party, unless one of them requests the International Court of Justice to establish the *compromis* through its summary procedure."

In such a case paragraph 3 could be dispensed with altogether.

41. He was also willing to accept Mr. El-Erian's proposal (para. 35 above). He would, in fact, go further and suggest that, since there was so much difficulty about the drawing up of the *compromis* by the tribunal or a third jurisdiction, it would suffice to state that if the parties failed to agree on or to complete the *compromis* within the specified time limit, the tribunal might proceed to hear and decide the case on the application of either party. The dispute would then be treated in exactly the same way as a case brought before the International Court of Justice, without any special agreement, the issues being gradually defined in the course of the written and oral procedure.

42. Mr. SCELLE, Special Rapporteur, said that Sir Gerald Fitzmaurice's latest proposal seemed acceptable.

43. Mr. EL-ERIAN withdrew his amendment accordingly.

44. The CHAIRMAN invited the Special Rapporteur to redraft the article in the light of the discussion. Mr. Edmonds' proposal (para. 25 above) still stood and could be voted upon as an amendment.

It was so agreed.

ARTICLE 10

45. Mr. SCELLE, Special Rapporteur, said that article 10 enunciated an axiomatic rule. The Commission had discussed the article at length at previous sessions and had settled on the existing wording.

46. Mr. AMADO thought it was hardly correct to describe the article in its existing, rather grandiloquent form as axiomatic. The tribunal was undoubtedly judge of its own competence, but the description of it as " *maître* " of its competence was contested by some learned jurists. The arbitrator, though judge of his own competence, was not the master of it. Though in municipal law it might not be a very serious matter, because of the remedies provided, for a tribunal to exceed its powers, it constituted a very real danger in international arbitration where no such safeguards existed.

47. Mr. VERDROSS agreed with Mr. Amado. Though he naturally accepted the principle underlying the article, he could not agree to the way in which it was expressed, as it seemed to give the tribunal excessively broad powers. He proposed instead a text modelled on article 73 of The Hague Convention of 1907 in the following terms :

> " The tribunal is authorized to declare its competence in interpreting the *compromis*, as well as the other papers and documents which may be invoked, and in applying the principles of law."

48. Mr. ZOUREK said that he agreed with the two previous speakers and merely wished to add, in support of their views, that the article had been much debated at the Commission's fifth session and had been finally adopted by a majority of only two. It had also been criticized by a number of Governments, five of which objected to the use of the word " *maître* " in the French text.

49. Mr. LIANG, Secretary to the Commission, agreed with the members of the Commission who had just spoken, but wished to view the text from another standpoint. The purpose of the article was essentially to deal with the jurisdiction of the tribunal. As the article was worded, however, that object did not clearly emerge. The text seemed to be a proclamation of the standing of the tribunal, and it was as such that it had been criticized. The chief trouble was the failure to indicate the purpose of the tribunal's interpreting the *compromis*. In the counterpart of the article in The Hague Convention of 1907, quoted by Mr. Verdross, that purpose was made clear, the tribunal being authorized to interpret the *compromis* from two points of view, that of determining its competence, and that of applying the principles of law. Though he thought the latter affirmation hardly necessary, since that was precisely what a tribunal was for, he did think it essential to bring out the point that the tribunal had full power to interpret the *compromis* in determining its competence.

50. As for the phrase " the widest powers ", there was a natural tendency to associate it with the idea of a liberal interpretation as opposed to a narrow one. In other words, the phrase might conceivably encourage the tribunal to decide, in case of doubt, that a matter lay within its jurisdiction rather than outside. The phrase was, in fact, equivocal and had naturally inspired some misgivings. He did not regard it as a necessary device for enhancing the standing of the tribunal. It was grandiloquent, as Mr. Amado had pointed out, but it did not have the precision required for the purpose of determining the competence of the tribunal.

51. Mr. YOKOTA thought that the rule could be put in a much simpler form. The objectionable passages were not at all essential. He thought it would fully express the intention if the article were revised to read:

> " The arbitral tribunal has the power to interpret the *compromis*."

52. Mr. GARCIA AMADOR said that, of the two expressions criticized, only that concerning the tribunal's interpretative powers involved a question of substance. But, he submitted, the draft would be incomplete unless it provided that the tribunal had the power to interpret the *compromis*, though he agreed that that power should not perhaps be described in the sweeping terms employed in the Special Rapporteur's draft. He suggested that the article should be revised to read:

> " The arbitral tribunal, being the judge of its own competence, has the power to interpret the *compromis* "

53. Mr. AGO also thought that article 10 should be worded more simply. Mr. García Amador's suggestion was acceptable, but he would prefer the text suggested by Mr. Yokota, which conveyed the same idea but was not marred by the unnecessary repetition of the same idea. The tribunal's interpretative powers must not, however, be confined to interpreting the *compromis*, but should extend to the undertaking to have recourse to arbitration and to any other instruments pursuant to the undertaking. He therefore proposed the addition, after the word " *compromis* ", of the words " and the other instruments on which its competence is based ".

54. Mr. SCELLE, Special Rapporteur, said that he had no objection to the use of the word " *juge* " instead of " *maître* " in the French text; in his opinion, the terms were synonymous.

55. As for the danger of the tribunal's exceeding its powers, that eventuality was provided for in article 36. Article 10 did not imply that the tribunal might exceed its competence, but merely stated that it had the right to exercise it. He was still in favour of the phrase " the widest powers ", and indeed would have used an even stronger phrase had one existed. He was even tempted to add that the tribunal might, in some cases, modify the *compromis*. International law, like other branches of law, lived on case-law, and not merely on the literal interpretation of texts; and case-law could modify the law if the social situation demanded. International law, in fact, was as much derived from arbitration cases as from any other source.

56. Mr. Ago's suggestion (para. 53 above) that documents other than the *compromis* should also be mentioned in article 10 seemed acceptable.

57. Mr. YOKOTA also agreed to the addition suggested by Mr. Ago. However, he still doubted the advisability of retaining the phrase " which is the judge of its own competence ". Since the Commission had decided that some aspects of arbitral procedure might be referred to the International Court of Justice, the competence of the tribunal would, in some cases, be restricted.

58. Mr. PADILLA NERVO agreed with the suggestions made by Mr. Ago and Mr. Yokota. Though the Special Rapporteur was quite right in giving the tribunal the widest powers of interpretation, the problem was to ascertain the exact extent of those powers. In his opinion the test was the intention of the parties in vesting jurisdiction in the tribunal. The tribunal must constantly bear in mind the intention of the parties, as expressed in the *compromis* or agreement, when determining its competence.

59. Mr. VERDROSS thought the Commission should accept Mr. Ago's suggestion. There might well be no *compromis* at all but only an arbitration agreement. The tribunal could interpret whichever of the documents existed, and if both existed could interpret both. He said that in that respect Mr. Ago's suggested text was similar to the text which he had proposed, modelled on article 73 of The Hague Convention of 1907.

60. As for the phrase " the widest powers ", he said that if the danger of the tribunal's exceeding its powers was acknowledged, it seemed impossible to give the tribunal unlimited power. Its powers were, in fact, delimited by the common will of the parties.

61. Mr. AGO said that he could not agree with the Special Rapporteur's implication that reference should also be made in the article to the tribunal's right to interpret international law in general. It certainly had that right, but rather with reference to the substance of the dispute, whereas article 10 dealt exclusively with the question of the tribunal's competence, which was based on specific instruments.

62. Mr. SCELLE, Special Rapporteur, said that the tribunal could not be prevented from interpreting customary international law.

63. Mr. AGO agreed, but pointed out that that was another question, to be dealt with in a different article.

The meeting rose at 1.10 p.m.

441st MEETING

Monday, 12 May 1958, at 3 p.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 10 *(continued)*

1. The CHAIRMAN said that a number of suggestions had been made regarding article 10. Mr. Amado had objected to the use of the word "*maître*" in the French text. Exception had also been taken to the expression "widest powers". Mr. Yokota had proposed that the power of interpretation given to the tribunal be limited to the interpretation of the *compromis*. Mr. Ago had supported Mr. Yokota but proposed that the power be extended to cover the interpretation of other incidental agreements. It had been suggested that any possible conflict between article 10 and the provisions of article 3 and article 36, sub-paragraph (*a*), should be avoided. There seemed to have been general agreement as to the tribunal's power to take decisions as to its own comptence if questioned by one of the parties. However, some members of the Commission were of the opinion that no express provision in that respect was needed.

2. Mr. SCELLE, Special Rapporteur, said that, in deference to the suggestions made by several members of the Commission, he had redrafted article 10 to read:

> "The arbitral tribunal, which is the judge of its own competence, possesses the necessary powers to interpret the *compromis* and the other instruments on which that competence is based."

3. In the French text, the word "*maître*" had been replaced by the less categorical word "*juge*". The word "necessary" had been substituted for the word "widest", which had been thought too sweeping.

4. Mr. YOKOTA said that it was doubtful whether an arbitral tribunal was always the judge of its own competence. Articles 3 and 36 limited its powers in that respect. He suggested that a separate vote be taken on the words "which is the judge of its own competence".

5. Sir Gerald FITZMAURICE said that the power of the arbitral tribunal to decide on its own competence was not in dispute. It had simply been argued that the tribunal was not the sole judge of that matter because of the possibility of an appeal to the International Court of Justice in certain cases. Clearly, some provision concerning the tribunal's powers was needed in the draft; the only question was what form that provision should take, and he doubted that the possible omission of the phrase mentioned by Mr. Yokota would offer a solution.

6. Mr. AMADO said that he was opposed to the deletion of the phrase mentioned by Mr. Yokota. The text of article 10 as redrafted by the Special Rapporteur was acceptable. Under the model draft, the arbitrators were not the representatives of the parties. They exercised judicial functions, and all judicial bodies were judges of their own competence.

7. Mr. LIANG, Secretary to the Commission, said that if the phrase in question was deleted the arbitral tribunal would be given the necessary powers to interpret the *compromis* without any provision being made for decisions on competence; it could then be argued that the tribunal's powers of interpretation related only to questions other than competence. A reference to article 2 showed that the *compromis* could contain provisions on many subjects other than competence. It was therefore apparent that a reference to the arbitral tribunal's powers to decide on its own competence was necessary.

8. Mr. SCELLE, Special Rapporteur, said that it was a general principle of law that a court was the judge of its own competence.

9. Mr. TUNKIN said that Mr. Scelle's statement was absolutely correct in municipal law, but a different conclusion would probably be reached if the problem was viewed in the light of existing international law.

10. The deletion of the phrase mentioned by Mr. Yokota would improve the article. An arbitral tribunal was set up by an agreement between States and it could only interpret the instruments by virtue of which it had been set up. It could decide on its own competence, provided that it did so by interpreting those instruments. He had serious doubts concerning any provision which seemed to give an arbitral tribunal the power to go beyond the interpretation of those instruments in deciding issues of competence. Provisions of that character would seem to place the arbitral tribunal above the States which had set it up.

11. Mr. VERDROSS said that general agreement could perhaps be reached if article 10 was re-drafted along the lines of Article 36, paragraph 6, of the Statute of the International Court of Justice. He suggested the following text:

> "In the event of a dispute as to whether the arbitral tribunal has jurisdiction, the matter shall be settled by the decision of the tribunal on the basis of the *compromis* and of the other instruments on which its competence is based."

12. Mr. AGO said that in consequence of the addition of the words "and the other instruments on which that competence is based" in the Special Rapporteur's redraft, the phrase "which is the judge of its own competence" had became unnecessary. Once the article empowered the tribunal to interpret the instruments whereby its competence had been established, the fact that the tribunal could decide on questions relating to its own competence became self-evident.

13. Mr. YOKOTA proposed that article 10 should consist of two paragraphs, of which the first would set forth the tribunal's powers to interpret the *compromis* and other similar instruments, while the second would deal with the question of competence in the following terms :

> " The arbitral tribunal shall decide on its own competence subject to the provisions of these articles."

14. Mr. GARCIA AMADOR said that, as a question not of form but of principle was involved, the Commission should decide by a vote whether article 10 should contain a provision stating that the tribunal was the judge of its own competence.

15. Mr. ZOUREK agreed with Mr. Garcia Amador.

16. The CHAIRMAN said that he would put to the vote the question whether article 10 should contain a provision stating that the arbitral tribunal was the judge of its own competence, on the understanding that if the decision was in the affirmative, the drafting of the provision would be left to the Drafting Committee.

The Commission, by 13 votes to 2, with 3 abstentions, answered the question in the affirmative.

Article 10, as a whole, as redrafted, was adopted by 16 votes to none, with 2 abstentions, subject to drafting changes.

ARTICLE 11

17. Mr. SCELLE, Special Rapporteur, introduced article 11, the provisions of which were intimately related to those of article 12 which precluded findings of *non liquet.*

18. Mr. EL-ERIAN asked why article 11 referred only to Article 38, paragraph 1, of the Statute of the International Court of Justice and not also to the paragraph dealing with decisions *ex aequo et bono.*

19. Mr. SCELLE, Special Rapporteur, said that the question of the parties agreeing to give the tribunal power to decide a case *ex aequo et bono* was covered by the commencing words of article 11, " In the absence of any agreement between the parties concerning the law to be applied . . ."

20. Mr. VERDROSS proposed that the words " shall be guided by " be replaced by the words " shall apply ".

21. Mr. SCELLE, Special Rapporteur, said that the purpose of the expression " shall be guided " was to give the tribunal ample latitude in order that it should not bring in a finding of *non liquet.*

22. Mr. AMADO said that the reference to Article 38, paragraph 1 of the Statute of the International Court of Justice made a finding of *non liquet* practically impossible, because sub-paragraph 1 (*c*) of that Article of the Statute referred to the general principles of law recognized by civilized nations. It was virtually inconceivable that a case could arise which could not be decided by reference to such principles.

23. Mr. YOKOTA said that, in view of the rule against findings of *non liquet* in article 12, the provisions of article 11 were insufficient. If the tribunal could not bring in a finding of *non liquet,* it had to be provided with sufficient criteria to decide all disputes.

24. Article 38, paragraph 1, of the Statute of International Court of Justice contained sufficient criteria for the purpose of decisions in legal disputes, which were precisely the kind of dispute which States tended to submit to the International Court of Justice. Arbitration treaties, however, usually dealt with political or non-legal disputes, in respect of which existing rules of law were insufficient.

25. As an example of the difficulties which could arise, he mentioned the case of the continental shelf. If a dispute concerning a coastal State's claims in respect of the continental shelf were submitted to arbitration, it was difficult to see what criteria the arbitral tribunal would apply. There were no international conventions applicable so long as the parties concerned had not signed and ratified the Convention on the Continental Shelf adopted by the recent United Nations Conference on the Law of the Sea — on the assumption, of course, that that convention had been brought into force by the requisite number of ratifications. There was no international custom nor were there any general principles of law concerning the shelf. Inasmuch as the Conference on the Law of the Sea had adopted certain principles by a large majority, it could reasonably be argued, however, that it would be equitable to admit some right or interest of the coastal State in respect of the continental shelf. But the proposed text of article 11 would not enable such equitable grounds to be taken into consideration by the tribunal. In order, therefore, to complete the provisions of article 11 and make them fully consistent with those of article 12, he proposed that a provision along the following lines should be added at the end of article 11 :

> " In so far as there exist no such rules of international law applicable to the dispute, the tribunal shall decide *ex aequo et bono.*"

26. Mr. GARCIA AMADOR regretted the tendency of the debate to develop into a discussion on the general sources of international law, for experience showed that such discussions produced no positive results. It must, however, be recognized that Article 38, paragraph 1, of the Statute of the International Court of Justice had had a somewhat restrictive effect on the deliberations of the Court in certain cases. For example, in the Colombian-Peruvian asylum case,[1] the Court, despite the existence of principles of international law on the subject, applicable to the Latin American countries, had relied on a treaty which had not been ratified by one of the parties. And instances could be found in the case-law of the former Permanent Court of International Justice where that Court had gone beyond the letter of the provision in its Statute corresponding to Article 38, paragraph 1, of the Statute of the Inter-

[1] *Judgement of November 20th, 1950 : I.C.J. Reports 1950,* p. 266.

national Court of Justice, applying principles of equity not specifically referred to in that paragraph of the Article.

27. Furthermore, if article 11 were drafted in narrow terms it would tend to defeat the purpose of article 12, and in consequence it would become more difficult for the tribunal to avoid bringing in a finding of *non liquet*. He would accordingly prefer the words " shall be guided by " in the existing text of article 11 to the words " shall apply ", since the former allowed for greater flexibility. It should nonetheless be clearly understood that the element of discretion allowed the tribunal was purely a supplementary power enjoyed by it in the absence of any agreement between the parties concerning the law to be applied.

28. Mr. ZOUREK observed that opinion in the Commission seemed to be divided less on the substance than on the form of article 11. The article should follow closely the language of article 2, which mentioned among the possible contents of the *compromis* specific provisions concerning " the rules of law and the principles to be applied by the tribunal ". Since article 11 was only a subsidiary provision to article 2, the words " shall be guided by " seemed a trifle ambiguous and, like Mr. Verdross, he would prefer to see them replaced by " shall apply ". He proposed a wording based on article 28 of the Revised General Act for the Pacific Settlement of International Disputes,[2] namely, " the tribunal shall apply the substantive rules enumerated in Article 38, paragraph 1 . . ." It was essential to give a clear directive to the tribunal on the point, and he could not therefore agree with Mr. García Amador's arguments in favour of greater flexibility. The Commission had always taken the view that the arbitral tribunal should settle disputes on the basis of the law.

29. Though he fully appreciated the purpose of Mr. Yokota's proposal, he was bound to say that it went too far. It was questionable whether all States would be prepared to accept adjudication *ex aequo et bono*. Besides, the proposal conflicted with article 2. In that article it lay entirely in the discretion of the parties to confer on the tribunal in the *compromis* the power to decide *ex aequo et bono*. According to Mr. Yokota's proposal, however, the tribunal would have the right so to adjudicate, even without the prior agreement of the parties, in all disputes to which no existing rules of international law were applicable.

30. Sir Gerald FITZMAURICE said that, although he understood the reasons underlying Mr. Yokota's proposal, he thought that, were it accepted, it would blur the very necessary distinction between arbitral procedure, in which the function of the tribunal was basically to decide by law, and conciliation, in which disputes were settled *ex aequo et bono*. It would be a very novel departure to give an arbitral tribunal a general residual power so to adjudicate, even though the power had not been conferred on it by the parties to the dispute.

31. Mr. Yokota's main reason for making his proposal was apparently to forestall findings of *non liquet*. In fact, however, of all the many hundreds of cases submitted to arbitration there was scarcely one in which a tribunal had returned a verdict of *non liquet*. Though the problem loomed large in the textbooks, it hardly ever arose in practice. It was, moreover, generally accepted by students of the case-law of the International Court of Justice that the reference in Article 38 of the Statute of the Court to " the general principles of law recognized by civilized nations " meant that in legal disputes the Court would never find itself in the position of having to bring in a finding of *non liquet*. That being so, not only did Mr. Yokota's proposal appear unnecessary, but there was a possibility that article 12 might be unnecessary too, though he would prefer to reflect further on that point.

32. With regard to Mr. Yokota's observations on the state of international law with respect to the continental shelf, he said that, though he did not wish to dwell upon them, realizing that they had been brought in merely as an illustration, he could not agree that no rules of customary international law existed on the subject. That, at least, had not been the view of the Commission when preparing its draft on the law of the sea. Though conscious that it was dealing with a very new field in which custom had not had much time to establish itself, it had considered that there was a very general consensus among nations on the subject of the continental shelf, and that rules none the less existed which were not merely proposals *de lege ferenda*. The continental shelf was, in fact, a good example of a subject which, even though not perhaps governed by customary rules of international law, was yet not entirely unprovided for in the " general principles of law recognized by civilized nations ". Indeed, it was largely from such principles that the rules which had come to be accepted as governing the continental shelf had been evolved. And he was certain that in other similar cases it would be possible for a tribunal to settle the dispute on the same basis without having to bring in a finding of *non liquet*. He therefore regretted that he did not favour the additional provision proposed by Mr. Yokota.

33. Mr. EL-ERIAN noted that article 11 referred only to Article 38, paragraph 1, of the Statute of the International Court of Justice and not to paragraph 2, whereas the corresponding article 18 of the Revised General Act, the wording of which Mr. Zourek preferred, mentioned Article 38 as a whole. Though it might be argued that reference to Article 38, paragraph 2, of the Statute of the Court was unnecessary since article 11 applied " in the absence of any agreement between the parties concerning the law to be applied ", he must point out that an agreement between the parties concerning the applicability of a certain law sometimes referred only to specific rules. For instance, in the case of the conditions governing the acquisition of sovereignty over territory by prescription — a subject in which the rules were quite clear except in the matter of the duration of the period of prescription —

[2] United Nations, *Treaty Series*, vol. 71, 1950, No. 912.

arbitration agreements often specified a duration, frequently fifty years, as the criterion on which the arbitral tribunal should base its award. Thus, such agreements between the parties concerning the law to be applied did not necessarily cover cases where the tribunal was to adjudicate *ex aequo et bono*. He would for those reasons prefer the wording of article 18 of the Revised General Act, and proposed that the draft be amended accordingly.

34. Mr. AMADO said that the reference to Article 38, paragraph 1, of the Statute of the International Court of Justice had been introduced precisely to counter the constant danger that arbitration might degenerate into mere adjudication *ex aequo et bono*, and that the tribunal, arguing by analogy and not by legal reasoning, might depart from the rules and sources of law and obscure the true legal nature of the dispute. Adjudication *ex aequo et bono*, which was the last resort of parties anxious to settle a dispute at all costs, represented a departure from the rules of law, and was moreover unnecessary since the possibility of recourse to the general principles of law made it practically impossible for a tribunal to be compelled to bring in a finding of *non liquet*. He could not therefore accept Mr. El-Erian's proposal.

35. He was in favour of retaining the Special Rapporteur's text with the sole change of the words " shall be guided by " to " shall apply ", for, despite Mr. García Amador's plea for flexibility, he thought it essential that article 11 should be quite specific as to the law to be applied by the tribunal.

36. The CHAIRMAN, speaking as a member of the Commission, observed that under article 2, the power to adjudicate *ex aequo et bono* could be conferred on the tribunal by agreement of the parties. Article 38, paragraph 2, of the Statute of the Court equally safeguarded the Court's power to decide *ex aequo et bono*, if the parties agreed thereto. Article 11 was intended to provide for the guidance of the tribunal as to the law to be applied in the absence of any agreement between the parties in that respect. Unless, therefore, there was any idea of extending the power to decide *ex aequo et bono* even if the parties did not agree, as in article 28 of the General Act for the Pacific Settlement of International Disputes of 1928,[3] he did not see why it should be necessary to add to article 11 any clause regarding decisions *ex aequo et bono*, either directly or by extending the reference to Article 38 of the Statute of the Court.

37. Mr. AGO said that he agreed with previous speakers that the power to adjudicate *ex aequo et bono* must derive from an explicit agreement of the parties. Even so, from the standpoint of drafting, he thought that some separate provision on the subject should be added to article 11, since the initial qualification in that article regarding the absence of agreement between the parties concerning the law to be applied would not, strictly speaking, cover the case of adjudication *ex aequo et bono*. Perhaps it would satisfy Mr. Yokota if the following sentence were added to article 11 : " If the agreement between the parties so provides, the tribunal may also adjudicate *ex aequo et bono*."

38. As to the proposed amendments of the passage " the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice ", he thought that it would be difficult to say either that the tribunal " shall apply the rules " or that it " shall apply the sources " mentioned in Article 38, paragraph 1. That paragraph spoke not only of " rules " but also of principles and of means for the determination of those rules and principles. Furthermore, the use of the term " sources " would give rise to some obvious difficulties of a scientific nature. In an endeavour to find a phrase more specific than " shall be guided by Article 38, paragraph 1 " and yet more accurate than " shall apply Article 38, paragraph 1 " — since application *stricto sensu* was a matter solely for the Court — he would tentatively suggest the wording " . . . the tribunal shall comply with Article 38, paragraph 1, . . ."

39. Mr. YOKOTA said that, although not completely convinced by previous speakers, he wished to withdraw his proposal in favour of that made by Mr. Ago.

40. Mr. EL-ERIAN explained that he had proposed that article 11 should refer also to Article 35, paragraph 2, of the Statute of the International Court of Justice precisely because that paragraph made the power of the Court to decide a case *ex aequo et bono* dependent upon the agreement of the parties. He, too, wished to withdraw his proposal in favour of that of Mr. Ago.

41. Mr. VERDROSS, Mr. TUNKIN and Sir Gerald FITZMAURICE also expressed preference for Mr. Ago's proposal.

42. Mr. AMADO said that, since the Commission wished to use the language of the provisions which governed the judicial powers of the Court, he could not see why the phrase " shall apply " should not be used. He was not in favour of Mr. Ago's proposal.

43. Mr. ZOUREK pointed out that the wording of article 18 of the Revised General Act had the advantage of being very clear and of having been accepted by States. Normally, an international tribunal could apply only the substantive rules referred to in Article 38, paragraph 1, of the Court's Statute, and solely in case of uncertainty could it resort to doctrine in order to discover what the rules were. He thought that the task of finding a satisfactory expression could be left to the Drafting Committee.

44. Mr. SCELLE, Special Rapporteur, said that he would agree to the words " shall be guided by " being replaced by " shall apply " ; the other problems could be solved if article 11 referred to the whole of Article 38 of the Statute of the Court instead of to paragraph 1 only. Incidentally, he considered that articles 11 and 12 belonged together and should form a single article, as in

[3] League of Nations, *Treaty Series*, vol. XCIII, p. 343.

the Commission's draft on arbitral procedure of 1953.[4]

45. Mr. PADILLA NERVO observed that there was general agreement that the tribunal could not adjudicate *ex aequo et bono* unless the parties gave it the power to do so. That being so, he considered it unnecessary for article 11 to repeat what was already said in the second paragraph of article 2. It seemed illogical moreover to refer to a matter which required the agreement of the parties in an article beginning " In the absence of any agreement between the parties ".

46. The CHAIRMAN thought that perhaps what some members of the Commission had in mind was that, even if the parties failed to give the tribunal the power to adjudicate *ex aequo et bono* in the *compromis,* they might wish to do so at some later stage. Article 11, according to them, would be the proper place to provide for such a case.

47. He put to the vote the proposal that a provision be inserted in article 11 relating to the power of the tribunal to adjudicate *ex aequo et bono* if the parties so agreed ; the drafting of such a provision could, he thought, be left in the first instance to the Drafting Committee.

The proposal was adopted by 11 votes to 4, with 3 abstentions.

Article 11 was approved by 11 votes to 1, with 5 abstentions, on the understanding that the Drafting Committee would make the agreed changes.

48. Sir Gerald FITZMAURICE, explaining his vote, said that although he had voted in favour of including in article 11 a reference to adjudication *ex aequo et bono,* he agreed with Mr. Padilla Nervo that, in view of the terms of article 2, no such provision was really necessary. Nevertheless, as some members of the Commission thought differently — owing no doubt partly to the reference to Article 38 of the Statute of the International Court of Justice and partly to the words " concerning the law to be applied " — it seemed to him safer to avoid any possible misunderstanding, even at the cost of what was after all a harmless repetition.

49. Mr. AGO said he had voted in favour of the proposal for the reasons given by Sir Gerald, with whose remarks he associated himself.

50. Mr. ZOUREK said he had voted against the proposal, since it would involve an entirely unnecessary repetition in the text of the draft.

51. Mr. AMADO said he had voted against the proposal, not only because it would involve unnecessary repetition, but also because its adoption would involve the Commission in serious practical difficulties in dealing with many other articles of the draft.

52. Mr. BARTOS said that, although a provision relating to the tribunal's power to adjudicate *ex aequo et bono* was not strictly necessary in article 11, such a provision was desirable for it would remove all doubt on the matter. Several of the points which were being referred to the Drafting Committee, however, were not really points of drafting but of substance, and he had abstained from voting in order to reserve his right to comment on the actual text proposed.

ARTICLE 9 (*continued*)

53. The CHAIRMAN said that the Special Rapporteur and Sir Gerald Fitzmaurice proposed the following text to replace paragraphs 2 and 3 of article 9, paragraph 1 remaining unaltered :

> " If the parties fail to agree or to complete the *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal, within three months after the parties report failure to agree — or after the decision, if any, on the arbitrability of the dispute — shall proceed to hear and decide the case on the application of either party."

54. He also recalled Mr. Edmonds' proposal that the words " or refuses to answer it " should be inserted before the words " on the ground that " in the second sentence of paragraph 1 (440th meeting, para. 25).

55. Sir Gerald FITZMAURICE said that he and the Special Rapporteur had considered Mr. Edmonds' proposal, but had felt it was unnecessary in view of article 29, paragraph 1, which dealt in general with what happened when one party failed to appear before the tribunal or to defend its case.

56. Mr. EDMONDS said that he had not overlooked article 29 ; but that article related to the tribunal's decision on the merits of the case. Article 9 dealt with a specific question which had to be settled before the tribunal even considered the merits of the case. In his view, there was no reason why a party which refused to answer the other party's application on the ground that the provisions of the *compromis* were insufficient should be treated differently from a party which simply refused to answer the application without stating any grounds.

57. Mr. BARTOS said he agreed with Mr. Edmonds that the general question of judgement by default was distinguishable from the case in point. Refusal by one party to answer the other party's application, whether it gave grounds or not, obliged the tribunal to decide the question of its competence.

58. Sir Gerald FITZMAURICE said he still felt that Mr. Edmonds' proposal was unnecessary. If one party refused to answer the other party's application without giving any grounds, it would, in his view, be refusing to answer on the merits of the case.

59. Mr. EDMONDS said he was by no means convinced that the question referred to in article 9 could be regarded as a question concerning the merits of the case. It would at all events be better to add the words he proposed, in order to avoid any possible misunderstanding.

[4] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

60. Mr. ZOUREK recalled that he had pointed out (440th meeting, para. 31) that the last sentence of paragraph 1 was unacceptable, for if there was insufficient agreement between the parties on the essential elements of the case as set forth in article 2, there was no basis on which the tribunal could make the order referred to in the sentence in question ; the tribunal could not proceed as though the parties were agreed to arbitrate when in fact they were not. Moreover, as the present text now seemed to recognize that in the last resort the tribunal could proceed without a *compromis* fulfilling the conditions laid down in the first paragraph of article 2, the sentence in question was quite unnecessary, and he accordingly proposed its deletion.

61. Sir Gerald FIZMAURICE said that, far from being superfluous, the last sentence in paragraph 1 seemed to him to constitute a logical stage in the whole procedure. A *compromis* might not always be necessary, but he thought the Commission agreed it was always desirable, and the main object of article 9 as a whole was to ensure that there was one if possible. If there was no *compromis* by the time the tribunal was constituted, the latter could, if necessary, order the parties to complete or conclude one ; and it was only if they failed to do so that the provisions of paragraph 2 came into effect. From Mr. Zourek's own point of view, therefore, he would have thought it preferable to retain the last sentence of paragraph 1, since it ensured that the parties had every chance to put their wishes into as precise a form as they desired.

62. Mr. AGO pointed out that there was some inconsistency between paragraph 1 and paragraph 2 as revised ; according to paragraph 2 the tribunal would, in certain cases, be able " to proceed " to hear and decide the case even though there was not, according to paragraph 1, " sufficient agreement between the parties on the essential elements of the case as set forth in article 2 to enable it to proceed." He proposed therefore that the words " to enable it to proceed " should be deleted from the second sentence of paragraph 1.

63. The CHAIRMAN put to the vote Mr. Edmonds' proposal (440th meeting, para. 25) that the words " or refuses to answer it " should be inserted before the words " on the ground " in the second sentence of paragraph 1.

The proposal was rejected by 6 votes to 4, with 7 abstentions.

64. The CHAIRMAN called for a vote on Mr. Ago's proposal (para. 62 above) that the words " to enable it to proceed " in the second sentence of paragraph 1 should be deleted.

The proposal was adopted by 11 votes to none, with 5 abstentions.

65. The CHAIRMAN called for a vote on Mr. Zourek's proposal (para. 60 above) that the last sentence of paragraph 1 should be deleted.

The proposal was rejected by 11 votes to 4, with 2 abstentions.

66. The CHAIRMAN put to the vote paragraph 1, as amended.

Paragraph 1, as amended, was adopted by 14 votes to 1, with 3 abstentions.

67. The CHAIRMAN put to the vote paragraph 2 in the modified form proposed by the Special Rapporteur and Sir Gerald Fitzmaurice (para. 53 above).

Paragraph 2, in the modified form, was adopted by 14 votes to none, with 4 abstentions.

68. The CHAIRMAN put to the vote article 9, as a whole, as amended.

Article 9, as a whole, as amended, was adopted by 14 votes to 1, with 2 abstentions.

ARTICLE 12

69. Mr. VERDROSS said he realized that in practice there was very rarely any need for the tribunal to bring in a finding of *non liquet* since the parties did not usually place any limit on the rules which were to be applied. He therefore did not wish to propose any change in the text of article 12, but would merely point out that the parties might, for example, stipulate that the case should be decided on the basis of existing treaties only ; in such a case, if the treaties contained no provisions covering the dispute, the tribunal might have no choice but to bring in a finding of *non liquet.*

70. Sir Gerald FITZMAURICE and Mr. LIANG, Secretary to the Commission, thought the type of case which Mr. Verdross had in mind would not be covered by article 12, which referred to " the silence or obscurity of international law or of the *compromis* ".

71. Mr. FRANÇOIS said that in a situation such as Mr. Verdross envisaged, the proper course would be for the tribunal to repect the application.

72. Mr. TUNKIN pointed out that the parties might stipulate that the tribunal should decide the case on the basis of specified treaties. If those treaties did not in fact provide a juridical basis for a decision, was it seriously contended that the tribunal should ignore them and proceed as it thought fit, without paying any regard to the express will of the parties? In his view article 12 was unnecessary and not in keeping with the principles governing international arbitration.

73. Mr. ZOUREK agreed that the article certainly required further consideration. He did not share Mr. François' view that in the kind of situation Mr. Verdross envisaged the tribunal's proper course would be to reject the application. It might also happen that the parties had expressly stipulated that the tribunal should not adjudicate *ex aequo et bono* ; it seemed illogical that the tribunal should have to reject an application which it might have granted if it had been empowered to adjudicate *ex aequo et bono.* The question was not so simple as Mr. François appeared to think.

He drew attention to the statement by Politis to the effect that " in the event of the considerations of fact or law submitted to him not providing adequate data upon which to base a decision, he [the arbitrator] has not only the right, but the duty to refuse to render judgement ".[5] The Special Rapporteur himself, in his comments on the model draft (A/CN.4/113, para. 17), admitted that the problem of *non liquet* was complex and controversial. In particular the reference in article 12 to the silence of the *compromis* would raise serious practical difficulties.

74. Mr. AGO agreed with Mr. Verdross that the present text of article 12 would give rise to difficulties if the parties — unwisely — limited the rules of international law which were to be applied. It might perhaps be possible to find some means of prohibiting the parties from inserting in the *compromis* such an absurd limitation on the rules of international law which the tribunal could apply. Clearly, however, the whole matter required further consideration.

The meeting rose at 6.10 p.m.

[5] Quoted in the *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations publication, Sales No.: 1955.V.1), p. 50.

442nd MEETING

Tuesday, 13 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

ARTICLE 12 (*continued*)

1. Mr. VERDROSS said that there were various courses open to the Commission in dealing with article 12. It could dispense with the article altogether, or it could preface the article by the words " In principle ", or, lastly, it could leave the article as it was but point out in a commentary that the article was based on the assumption that the tribunal had the power to apply all international law. He advocated the third course.

2. Sir Gerald FITZMAURICE found it difficult to agree with Mr. Verdross. Even when the tribunal was bound by the parties to reach its decision on the basis of a specific treaty, there could never be any question of its bringing in a finding of *non liquet*. There seemed to be some confusion as to the exact connotation of the term *non liquet*. Article 12 did not mean that when the law was silent or obscure the tribunal was entitled to indulge in invention; it simply meant that the tribunal must render a decision.

3. Mr. VERDROSS, intervening, pointed out that in a case concerning sovereignty over a disputed territory, the tribunal, if instructed to deliver its judgement on the basis solely of existing treaties, would be bound to bring in a finding of *non liquet* if the treaties gave no guidance.

4. Sir Gerald FITZMAURICE said that it was precisely his point that in such a case the tribunal was not constrained to do any such thing. In arbitration cases a question of sovereignty would hardly be put to the tribunal in the abstract; in cases such as that mentioned by Mr. Verdross there would always be a party claiming a right under a treaty or complaining of encroachment by the other party on its rights under that treaty. If the treaty was silent on the point, the tribunal would have to give a decision against the complaining party because the latter had not established its case. Fundamentally, the question was: had the complainant discharged the onus of proof? There was always one party which had to establish its case and if it failed to do so the tribunal was bound to rule against it. The reason why it had failed to establish its case — whether because the law was obscure or because no rules of law existed on the matter — was immaterial. The provisions of article 12 were perfectly justified for they meant that there would always be a decision, even if for no other reason than that the rules were silent.

5. He made a comparison with the situation which arose when a proposal was the subject of a tied vote in the Commission. A tied vote did not mean that the matter remained unsettled; it did not constitute anything analogous to a finding of *non liquet*. On the contrary, it constituted a decision against the maker of the proposal who had not, as it were, made out a sufficient case.

6. Mr. LIANG, Secretary to the Commission, said that the case mentioned by Mr. Verdross was actually the reverse of those dealt with in article 12, since in the hypothesis of Mr. Verdross the *compromis* was neither silent nor obscure but so clear as to prevent any misunderstanding. Indeed, it was only in cases where the parties allowed the tribunal to apply or resort to the whole of international law in reaching its decision, or when the parties failed to agree on the law to be applied, that it was thought theoretically possible for a tribunal to bring in a finding of *non liquet* after consulting the sources of international law — as, for example, those set out in Article 38, paragraph 1, of the Statute of the International Court. Even so, a finding of *non liquet* had never been brought in either by the Permanent Court of International Justice or by its successor, the International Court of Justice. It could not be denied that both Courts had, tacitly, resorted to " the general principles of law ".

7. A finding of *non liquet* was often confused with a nonsuit. When the parties agreed that specific rules of law should be applied, as very frequently happened in arbitration cases, no question of *non liquet* was involved, for if the tribunal found that the claimant State did not

prove its claim in accordance with those specific rules of law, it would decide to disallow the claim. That would not be a case of *non liquet*. He agreed with previous speakers that findings of *non liquet* were in any case extremely rare.

8. Mr. ZOUREK found Mr. Verdross' example very well chosen. In such cases, it was not true to say that there was always a plaintiff and a defendant. A question of sovereignty might be referred as such for arbitration without either of the parties being complainant or defendant. When that occurred, and the tribunal was instructed to deliver its judgement on the basis of existing treaties, it could not settle the case if it found no legal basis for a decision in the treaties in question.

9. Mr. SCELLE, Special Rapporteur, fully agreed with Sir Gerald Fitzmaurice. The whole purpose of article 12 was to ensure that the tribunal reached a decision, since it was the very essence of arbitration that it should put an end to disputes. The article had been amply discussed at the Commission's fifth session and could not now be simply rejected without further consideration. If that were done, the Commission would have to reconsider article 13 as well, since it dealt with a similar situation. The essence of the draft, which broke with the old practice of States according to which if there was no *compromis* there was no obligation to arbitrate, was that the basis of the tribunal's decision was not the *compromis*, but the undertaking of the parties to have recourse to arbitration. Once that existed, the two parties were bound to have recourse to arbitration and the tribunal was bound to deliver an award.

10. Mr. SANDSTRÖM agreed with Sir Gerald Fitzmaurice. The mere fact that the parties to a dispute were both agreed to limit the law on which the award was to be based changed nothing. There were bound to be opposing theses in the dispute. The two parties might be plaintiff and defendant. If the law to be applied was narrowly defined by the parties, then the tribunal should reflect that limitation in its decision, saying, for instance, that on the basis indicated, the claim of the plaintiff could not be accepted ; but there would always be a decision, even if that decision did not necessarily prevent any future litigation on the same subject.

11. Mr. VERDROSS said that he entirely agreed with the Special Rapporteur that the article could be retained, provided that the Commission started from the premise that the tribunal could apply all international law. His hypothesis was a different one, however : that the parties had limited the law to be applied, instructing the tribunal to confine itself, for instance, to existing treaties. Only in such a case — a very rare one, incidentally — could a finding of *non liquet* occur.

12. Mr. AMADO said that Mr. Zourek appeared to ignore the right of the tribunal to interpret treaties. With so many sources of law to refer to and with its right to interpret the *compromis*, the tribunal could not bring in a finding of *non liquet*.

13. Mr. HSU was in favour of retaining the article, which had been thoroughly discussed at the Commission's fifth session. He thought the rule was still needed, in view of the stage of development which had been reached in arbitral procedure, even though it was impossible for the tribunal to bring in a finding of *non liquet* if it applied Article 38, paragraph 1, of the Statute of the International Court.

14. Mr. ZOUREK, replying to Mr. Sandström, said that in a case where both parties were at one and the same time plaintiff and defendant, it would be hard for the tribunal to come to a decision if it found no legal basis for a settlement of the dispute in the law it was instructed to apply. In his opinion, if the Commission provided in article 2 for the possible limitation of the law to be applied, it should also make provision for the admittedly very rare case of *non liquet*.

15. He agreed with Mr. Amado that a solution might sometimes be found through the interpretation of treaties, but that was not always the case. Had the Minquiers and Ecrehos case,[1] for example, been referred not to the International Court but to arbitration, with instructions to the tribunal to apply existing treaties only, he wondered how the tribunal could possibly have settled the dispute.

16. Mr. AGO said that he was becoming increasingly convinced that the discussion on article 12 was more theoretical than practical. There certainly seemed to be something essentially theoretical about the notion of an express restriction designed to compel the arbitrators to apply only the rules contained in certain specified treaties and thus to exclude from the law applicable other rules of existing international law. In principle, arbitrators could not apply certain rules in complete isolation from other rules recognized by the same legal system. Rules of law, in fact, had no meaning when divorced from the general framework of the legal complex in which they belonged. Even if directed to apply certain rules exclusively, the tribunal was obviously not debarred from applying the rules governing their interpretation, for otherwise the tribunal could not interpret the law on which it was to base its decision.

17. As far as the text of article 12 was concerned, he thought that perhaps it would be more acceptable if the words " or of the *compromis* " were deleted. The *compromis* was concerned with procedure, while the purpose of the article was to show the substantive law to be applied. The article might be clearer if it referred merely to the silence or obscurity of the law to be applied by the tribunal.

18. Mr. TUNKIN considered that there was a certain contradiction between article 2 and article 12 of which the Special Rapporteur himself appeared to be aware. They were based on two different conceptions. Article 2 enunciated the right of the parties to constitute a tribunal and to give it certain directives on the law to be

[1] *The Minquiers and Ecrehos case, Order of January 29th, 1953 : I.C.J. Reports 1953*, p. 4.

applied. But article 12 stipulated that in no case might the dispute be left undecided. That being so, the tribunal must be free to apply the rule of law or, if necessary, to adjudicate *ex aequo et bono*. The draft appeared to be going much further than the Statute of the International Court of Justice. The Statute recognized that there might be cases which could not be decided on the basis of international law and therefore provided for the possibility of the Court's adjudicating *ex aequo et bono* with the consent of the parties. The draft, on the other hand, stated that in no case must the tribunal fail to reach a decision.

19. Sir Gerald FITZMAURICE, referring to the type of case in which neither party was plaintiff or defendant — for example, a joint request to determine which of them was sovereign over certain territory — said that was precisely the position in the Minquiers and Ecrehos case, between the United Kingdom and France. That case had been referred to the International Court simply in the form of a question as to which of the two countries enjoyed sovereignty over the islands. The Court, had it been limited to the inconclusive mediaeval treaties relating to the subject, could not have given a finding in favour of either party. But neither need it have given no finding because the applicable instruments were inconclusive. It would have been bound to find that neither country had established title to sovereingty. That would have been a decision, not a finding of *non liquet*, and the islands might have been *res nullius*, or possibly under the sovereignty of a third Power.

20. The suggestion of Mr. Tunkin would be at variance with one of the best established rules of international arbitration. An arbitral tribunal could never go outside its terms of reference as laid down in the *compromis*. If directed to reach a decision on the basis of certain treaties, it could not look beyond those treaties ; it could, of course, resort to the general rules of law for the purpose of interpreting the treaties. But even when so restricted, it could always reach a decision.

21. Mr. EL-ERIAN thought that the implications of article 12 called for further reflexion. Since the Commission had decided to add a clause concerning adjudication *ex aequo et bono* to article 11, there was some possibility of a contradiction between articles 11 and 12. If the parties explicitly agreed to allow the tribunal to adjudicate *ex aequo et bono*, a finding of *non liquet* could not, of course, be brought in at all, but if the parties had not so agreed, he did not see how the tribunal could be expected to reach a decision in law in every possible case. As Sir Gerald Fitzmaurice had pointed out, cases of *non liquet* did not arise in practice. Nevertheless, from the theoretical point of view, the Commission could not adopt a provision that might run counter to its decision at the previous meeting. He thought that, even without article 12, the object of the Special Rapporteur would be accomplished by the rest of the draft.

22. The CHAIRMAN thought there was still some misunderstanding. Any case before any tribunal consisted of the hearing of one party's claim against another ; if it failed to establish its claim, either in fact or in law, the tribunal did not bring in no finding at all but rejected the claim. What was meant by saying that an arbitral tribunal could not bring in a finding of *non liquet* was that in a similar case it too must reject the claim. No question of deciding *ex aequo et bono*, therefore, could arise.

23. Mr. SCELLE, Special Rapporteur, replying to Mr. Tunkin, said that there could be no conflict between article 2 and other articles of the draft. Article 2 merely set forth the elements which a well drafted *compromis* should contain. If, as was often the case, the *compromis* was defective, the model draft would enable the arbitral tribunal itself to cure the defects.

24. Mr. YOKOTA said that article 12 should be omitted, because in logic its provisions were in contradiction with those of article 11.

25. Under article 11, an arbitral tribunal could only decide a case *ex aequo et bono* if the parties specifically gave it the power to do so. If the parties, however, did not agree to give the tribunal such powers and called for a decision on the basis of international law, it was possible that the tribunal might not find any rules of international law applicable to the case. In that event, it should be able to return a finding of *non liquet*.

26. Mr. PADILLA NERVO referred to the Special Rapporteur's comments on article 12 (A/CN.4/113, para. 17). In view of the complexity and controversial character of the subject of *non liquet*, and in view of the general agreement that the question was not of great practical importance, he was of the opinion that article 12 should be omitted.

27. Mr. BARTOS said that the idea of adjudication *ex aequo et bono* had to be kept separate from the concept of findings of *non liquet*.

28. It had been suggested that where the parties had specified the rules of law to be applied by the arbitral tribunal, a finding of *non liquet* was possible. The parties could, of course, specify that the arbitral tribunal was to apply a particular convention, but they could not therebv exclude the application of the principles of general and positive international law.

29. In a recent case, it had been claimed before a mixed commission, set up under a boundary convention, that the Yugoslav Government had violated that convention by admitting refugees ; the Yugoslav Government's representative had repudiated that claim on the grounds that, although the case was not covered by the convention in question, the two parties could not exclude the application of the general principles on the subject of refugees adopted by the organs of the United Nations and accepted by both of them. Although the case had not been formally settled by the mixed commission, on which both parties had equal representation, it provided an interesting illustration for the purpose of the present discussion.

30. Mr. AGO agreed with Mr. Bartos that it was necessary to keep the idea of an adjudication *ex aequo*

et bono separate from the problem of avoiding cases of *non liquet.*

31. It was always possible for an arbitral tribunal to give a decision on the basis of law, even if it thought that, as a result, the decision was not altogether equitable. When international law contained no rule on a given matter, the consequence was not that the tribunal could not decide on the basis of law but that it had to base its decision on a recognition of the fact that States were under no legal obligation in that matter.

32. For the reasons given on an earlier occasion (441st meeting, para. 74), he proposed that the concluding words of article 12, " of international law or of the *compromis* ", should be replaced by the words " of the law to be applied ". The question of the inadequacy of the provisions of the *compromis* was covered by article 9 and it was not necessary to refer to the possible obscurity of the *compromis* in article 12.

33. Mr. SCELLE, Special Rapporteur, said that there appeared to be no objection to the wording proposed by Mr. Ago for article 12.

34. A certain amount of confusion had arisen between the concept of decisions *ex aequo et bono* and that of findings of *non liquet.* A finding of *non liquet* was a decision given in cases where the tribunal was required to adjudicate according to law, whereas a decision ex *aequo et bono* was a settlement in the nature of a conciliation.

35. He explained that the rule against findings of *non liquet* was based on a fundamental principle of law. In municipal law, the courts had a statutory duty to decide cases submitted to them. In France, for instance, that duty was laid down expressly in the *Code civil.*

36. Mr. ZOUREK said that a decision *ex aequo et bono* was not in the nature of a conciliation formula ; it was an arbitral award binding on the parties. Attempts at conciliation could only be final if accepted by the parties.

37. The analogy drawn from municipal law was not valid. Municipal courts applied a complete system of law, whereas an arbitral tribunal might have only a limited number of rules available to it for the settlement of a dispute. Even if it were admitted that a reference to specific treaty provisions did not exclude the application of general rules of customary international law, it could still occur that there were no rules of customary international law applicable to the particular case. There was therefore a fundamental difference between arbitration tribunals and municipal courts.

38. Mr. EL-ERIAN said that in article 4 of the *Code Napoléon,* which had been adopted by many countries of the Middle East, it was stated that courts were under an obligation to decide on cases submitted to them. The provision, however, added that where there were gaps in the law, the courts were to apply the principles of equity and natural law. In municipal law, the courts did so without the agreement of the parties ; in international law, it was not possible, in the absence of such agreement, for an arbitral tribunal to base its decision on the principles of equity and natural law.

39. Sir Gerald FITZMAURICE said he believed a certain confusion had arisen in the minds of members of the Commission. A sharp distinction should be drawn between a finding of *non liquet* and a decision *ex aequo et bono.* He considered that three possible cases were distinguishable. Firstly, a tribunal might be directed to decide according to law. In that case, a finding of *non liquet* could never be brought in, for if one of the parties was unable to prove its case according to the law to be applied, the tribunal would disallow that party's claim. Secondly, a tribunal might be empowered to adjudicate *ex aequo et bono.* In that case, the tribunal would never, as was generally agreed, bring in a finding of *non liquet.* Thirdly, a not uncommon case, a tribunal might be asked to decide the legal issues in a case according to law and then to proceed to give its views on the equitable aspects of the case — in other words, to express an opinion *ex aequo et bono.* In that situatione the tribunal would begin by deciding on the law in favour of the claimant, or in favour of the respondent, or in favour of neither, but would never return a finding of *non liquet* on the legal aspects. It would then go on to deal with the equiable aspects.

40. He agreed with Mr. Ago and with the Special Rapporteur that there was no contradiction between article 11 and article 12.

41. The CHAIRMAN called for a vote on the proposal that article 12 should be deleted.

The proposal was rejected by 11 votes to 7.

42. The CHAIRMAN put to the vote Mr. Ago's proposal (para. 32 above) that the words " of international law or of the *compromis* " should be replaced by the words " of the law to be applied ".

The proposal was adopted by 12 votes to 1, with 5 abstentions.

Article 12, as amended, was adopted.

ARTICLE 13

43. Mr. SCELLE, Special Rapporteur, introduced article 13 of the draft, the purpose of which was to enable the arbitral tribunal to arrive at a decision notwithstanding the absence of an agreement between the parties concerning procedure or the existence of gaps in the agreement.

44. Mr. LIANG, Secretary to the Commission, said that the phrase " or if the tribunal is unable to arrive at an award on the basis of the *compromis* " seemed somewhat obscure. If the reference was to substantive questions, article 9 covered that point already.

45. Sir Gerald FITZMAURICE agreed with the opinion expressed by the Secretary and asked the Special Rapporteur whether he would accept the deletion of the phrase in question.

46. Mr. SCELLE, Special Rapporteur, said that the phrase in question referred to the hypothetical case of a *compromis* specifying such rules of procedure as would make it impossible for the tribunal to arrive at an award. The purpose of the provision was to enable the tribunal, in that case, to amend the rules of procedure set forth in the *compromis* in such a way that it would be in a position to render an award.

47. Sir Gerald FITZMAURICE thought that even if the Commission shared the views which the Special Rapporteur had just expressed, the text of paragraph 1 of article 13 would have to be considerably modified, somewhat along the following lines :

> " In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules of procedure set out in the *compromis* are insufficient to enable the tribunal to arrive at an award, the tribunal shall be competent to make its rules of procedure or, as the case may be, to modify those set out in the *compromis*."

He was still in some doubt on the substance, however. The main points to be borne in mind in laying down rules of procedure were widely known, and it would be very rare indeed for the rules formulated by the parties to be so defective as to prevent the tribunal from arriving at an award. If the parties inserted some unusual provision in the rules of procedure, they would doubtless have good reasons for doing so, and it did not seem right that the tribunal should be able to override their decision.

48. Mr. AGO said he fully agreed with Sir Gerald. Should the parties ever be so misguided as to insert in the *compromis* provisions which would make it impossible for the tribunal to arrive at an award, there were various ways in which the tribunal could persuade them to modify the provisions in question. He would find difficulty, however, in accepting the idea of the tribunal's being authorized to modify the *compromis* of its own motion when the parties refused to do so.

49. Mr. LIANG, Secretary to the Commission, submitted that it might also be more logical to limit article 13, paragraph 1, solely to the question of the tribunal's rules of procedure and leave aside the question whether the tribunal should be entitled to make any more far-reaching changes which seemed to be required in order to enable it to arrive at an award.

50. Mr. BARTOS agreed with Mr. Ago that though the arbitrator could not take the matter into his own hands and modify provisions laid down by agreement between the parties, it was sometimes his duty to advise them on points of procedure with a view to removing any impediments to the course of justice. That practice was commonly accepted, and an appropriate reference to it should perhaps be inserted in the comment.

51. Mr. SCELLE, Special Rapporteur, agreed that the practice referred to by Mr. Ago and Mr. Bartos had a legitimate place in the case of disputes between private persons, who frequently needed advice on matters of procedure. In the case of arbitration between States the position was quite different ; and inasmuch as there the parties remained masters of the procedure, any pressure which the tribunal might exert on them might prove ineffective. One party might well have prevailed on the other to insert in the *compromis* provisions which would, in effect, frustrate the whole purpose of the undertaking to arbitrate ; moreover, there was the danger of collusion between the parties with a view to imposing on the tribunal rules which might be acceptable to them individually, but were not compatible with the fundamental principles of the model draft.

52. However, he did not attach capital importance to the matter, and would be prepared, albeit reluctantly, to delete the second clause of paragraph 1 of article 13 if the majority of the Commission so desired.

53. Mr. AGO pointed out that if the passage in question was deleted, the paragraph would then relate only to the case where there was no agreement between the parties concerning the tribunal's procedure and would not cover the case where the parties had agreed on provisions but those provisions were insufficient. He therefore proposed that the paragraph be amended to read :

> " In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, the tribunal shall be competent to formulate or complete the rules of procedure."

54. Mr. SCELLE, Special Rapporteur, accepted Mr. Ago's proposal.

The proposal was adopted unanimously.

55. With regard to article 13, paragraph 2, Mr. ZOUREK recalled that one Government had proposed (A/CN.4/L.71) that a provision be inserted to the effect that the arbitrators must not abstain from voting.

56. Mr. AMADO said he supported that proposal. At the very least, a reference to the important question of abstentions should be included in the comment.

57. The CHAIRMAN recalled that another Government had proposed (A/CN.4/L.71) adding the words " unless the parties stipulate otherwise ".

58. Mr. LIANG, Secretary to the Commission, asked whether the reference to " All questions " covered questions of substance as well as of procedure. If so, the paragraph should perhaps be placed elsewhere, since to place it under article 13, paragraph 1, might suggest that it covered questions of procedure only.

59. Mr. SCELLE, Special Rapporteur, agreed, and said he would accordingly withdraw paragraph 2 of article 13, though he might reintroduce it in connexion with the articles relating to the award. Meanwhile, he would consider how effect could best be given to the various proposals referred to.

It was agreed that the provisions of article 13,

paragraph 2, would be dealt with later, in connexion with the articles relating to the award.

ARTICLE 14

60. Mr. SCELLE, Special Rapporteur, recalled Sir Gerald Fitzmaurice's suggestion (434th meeting, para. 54) that the provisions in the draft which related to questions of general principle should be removed from the body of the text. In Mr. Scelle's view, article 14 was one such provision and might well be placed in a preamble along with the first three paragraphs of article 1 and, possibly, a provision stating explicitly that all the succeeding rules were optional. There was, however, no reason why the Commission should not vote on the substance of article 14, on the understanding that its place in the draft would be decided later.

On that understanding, article 14 was adopted unanimously.

ARTICLE 15

61. Mr. SCELLE, Special Rapporteur, pointed out that articles 15 to 19 had been added in response to certain comments made in the Sixth Committee during the eighth session of the General Assembly, where a number of Governments had criticized the 1953 draft [2] on the ground that what purported to be a draft on arbitral procedure contained a great many provisions which did not relate to procedure at all and omitted much that had a direct bearing on procedural questions. Articles 15 to 19 related, however, for the most part, to points which the Commission had regarded as so self-evident or universally recognized as not to require mention. That being so, he hoped they would not give rise to much discussion.

62. Mr. VERDROSS proposed that in article 15 the word " sovereign " be replaced by the words " head of State ".

63. Mr. EL-ERIAN supported Mr. Verdross' proposal, which would be in accordance with what the Commission had decided at the ninth session in connexion with the draft on diplomatic intercourse and immunities.

64. Mr. BARTOS also supported the proposal. He doubted, however, whether it was in keeping with the modern view of the functions of the head of a State to make him solely responsible for settling the arbitral procedure in the event of his being chosen as arbitrator — unless, of course, it was so agreed in the *compromis*.

65. Mr. MATINE-DAFTARY said he also had doubts about the desirability of retaining article 15 but agreed that, if it was retained, the word " sovereign " should be replaced by the words " head of State ".

66. Mr. LIANG, Secretary to the Commission, thought it was extremely doubtful whether in cases where a sovereign had been chosen as arbitrator, the parties had retained no say at all in settling the arbitral procedure. If, on the other hand, all that article 15 meant was that in the absence of any agreement between the parties concerning the arbitral procedure, or if the rules laid down by them were insufficient, the sovereign or head of State should make his own rules of procedure or add to them as necessary, that situation appeared to be already covered by the text adopted for article 13, paragraph 1.

67. It was moreover an unquestionable fact that it was now rare for heads of State to be chosen as arbitrators in international proceedings.

68. Mr. TUNKIN said he doubted whether article 15 was compatible with the modern principles of international law, and in particular with the principle of the equality of States. Surely, the head of a third State could not be regarded as superior to the two States directly concerned in the dispute. Naturally they could leave it to him to settle the entire procedure if they wished, but that was a matter of courtesy and not of law.

69. Mr. PADILLA NERVO, Mr. ZOUREK and Mr. AGO agreed that article 15 should be deleted for the reasons given by previous speakers.

70. Mr. SCELLE, Special Rapporteur, said he had no objection to the deletion of article 15 if the majority of the Commission so desired but would merely point out that if there was any custom in international arbitration which was hallowed by long-established usage it was the custom that when a sovereign was chosen as arbitrator, it should be left to him to settle the arbitral procedure.

It was unanimously agreed to delete article 15.

The meeting rose at 1 p.m.

443rd MEETING

Wednesday, 14 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 16

Article 16 was adopted unanimously.

ARTICLE 17

1. Mr. SCELLE, Special Rapporteur, replying to questions by Mr. FRANÇOIS, Mr. MATINE-

[2] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

DAFTARY and Mr. AGO, explained that all that was meant by the second sentence of paragraph 5 of article 17 was that neither the questions put nor the remarks made during the hearing were to be regarded as prejudging the way in which the members of the tribunal would vote at the time of the award; that the reason why paragraph 3 referred only to oral submissions was that written submissions were dealt with in article 18; and that there was no danger of paragraph 3 being invoked by agents or counsel who wished to present further evidence after the proceedings had been declared closed, since it must be read in conjunction with the other relevant provisions in the draft.

2. Mr. LIANG, Secretary to the Commission, thought that the Drafting Committee should pay particular attention to the English text of article 17. For one thing, he was doubtful whether the part played by agents in the proceedings could be properly described as that of "intermediaries" between the tribunal and the parties.

3. More generally, he thought it would improve the structure of the model draft if the provisions which had figured in the 1953 draft [1] were kept together and the rules of a purely routine nature, which had been added in deference to the views of certain Governments, relegated to a separate part, if it was desired to insert them at all.

4. Mr. TUNKIN, quoting the French text, wondered whether there was not some repetition as between article 17, paragraph 4, and article 22.

5. Sir Gerald FITZMAURICE, referring to the English text, suggested that whereas article 22 dealt with incidental or additional claims or counter-claims, article 17, paragraph 4, clearly dealt with the main claim.

6. Mr. ZOUREK drew attention to a discrepancy between the two texts: whereas the French text referred to "*incidents*" in article 17, paragraph 4, and "*demandes incidentes*" in article 22, the English text referred to "points of law" in the former context and "incidental claims" in the latter.

7. Mr. MATINE-DAFTARY pointed out that the comma should be deleted after the word "*demandes*" in the French text of article 22, since *demandes incidentes* did not form a third category in addition to *demandes additionnelles* and *demandes reconventionnelles*, but was a general term embracing the other two.

Article 17 was adopted on the understanding that the Drafting Committee would pay close attention to the questions referred to, including the necessity of bringing the English text into line with the French.

[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

ARTICLE 18

8. Mr. SCELLE, Special Rapporteur, introducing article 18, said that the last part of paragraph 2 meant that nothing which was not duly submitted to the tribunal could be taken into account by it in arriving at its award. It would be noted that paragraph 3, which gave the tribunal the power to set the *compromis* aside in order to arrive at a decision, was fully consistent with long-established practice.

9. Sir Gerald FITZMAURICE said the fact that certain Governments had suggested the inclusion of articles 15 to 19 was not in itself sufficient reason for including them, if the Commission had good grounds for not doing so. The Commission could simply state in the commentary that it had considered the arguments adduced in the General Assembly but still felt it was unnecessary to include provisions which related to what had become largely matters of common form and really went without saying. Moreover, much of the wording was taken from The Hague Convention of 1907 [2] and consequently had an old-fashioned ring and would look strangely out of place beside the remainder of the draft.

10. Mr. SANDSTRÖM said that Sir Gerald's last point could be clearly illustrated by comparing the wording used in article 18 with the text of Article 43 of the Statute of the International Court of Justice. He agreed that most of articles 15 to 19 might well be deleted but would be in favour of retaining paragraph 3 of article 18, thought it should be made clear that it did not apply to the time limit which the parties had fixed for the actual rendering of the award.

11. Mr. FRANÇOIS said he was inclined to favour the retention of articles 15 to 19 in order that the model draft might form a self-contained whole which States could use without having to refer to other instruments.

12. Mr. ZOUREK agreed that if the articles in question were deleted the draft would lose much of its value, since it would no longer fully meet the needs of the parties. There was, moreover, some force in the contention that a draft on arbitral procedure should not omit the accepted rules on procedural questions, even if they sometimes appeared self-evident. Provided that the Commission agreed on the substance, it could be left to the Drafting Committee to bring the language up to date, referring in that connexion to the corresponding provisions in the Statute and Rules of Court of the International Court of Justice.

13. Mr. BARTOS agreed that it would be sufficient if the Drafting Committee brought the language of articles 15 to 19 up to date.

14. With regard to the words "and, if necessary, of replies" in paragraph 2 of article 18, he inquired who was to be the judge of whether replies were necessary

[2] Convention for the Pacific Settlement of International Disputes, The Hague, 1907. See *The Reports to the Hague Conferences of 1899 and 1907*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), pp. 292-309.

or not; the point was one which had given rise to some difficulty in the past.

15. With regard to paragraph 3, he suggested that the words " on its own initiative or at the request of either party " be inserted after the words " the tribunal ".

16. Mr. SCELLE, Special Rapporteur, accepted that suggestion.

17. Referring to Mr. Bartos' question concerning paragraph 2, he said it was normal practice to permit the right of reply, but if the right was abused the tribunal should be able to insist that the oral proceedings commence without further delay.

18. Mr. AGO suggested that if the Commission wished to retain articles 15 to 19, as he thought it should, it should instruct the Drafting Committee not only to bring the language up to date but also to complete the text by ensuring that all the steps in the procedure were adequately covered, in order that States could use the draft as a whole, as Mr. François had suggested, without having to refer to other instruments.

19. Mr. MATINE-DAFTARY supported Mr. Ago's suggestion.

20. Mr. SCELLE, Special Rapporteur, thought that the Commission should at least take a decision regarding article 18, paragraph 3. In his view the tribunal should be free to refuse to extend the time limit for rendering the award, even if the parties agreed to extend it.

21. Mr. ZOUREK observed that that point was covered by article 28; as Mr. Sandström had pointed out, article 18, paragraph 3, referred only to the time limits fixed for the completion of the various stages in the procedure.

22. Mr. SCELLE, Special Rapporteur, thought that in that case paragraph 3 might perhaps be omitted altogether.

23. Sir Gerald FITZMAURICE disagreed, since the question of time limits in the various stages of the procedure gave rise to frequent difficulty and should be dealt with if the Commission was aiming at a complete set of rules.

24. Mr. AMADO, Mr. BARTOS and Mr. AGO agreed that article 18, paragraph 3, should be retained, the last-named adding that the text would have to be modified, however, since the time limit might be fixed not in the *compromis* but elsewhere.

The Commission decided to retain the substance of article 18, paragraph 3.

25. Mr. EL-ERIAN thought that, in addition to what Mr. AGO had previously suggested, the Drafting Committee might be authorized to omit such general provisions, for example article 18, paragraph 1, as in its opinion were not needed for the purposes of a complete code.

26. Mr. TUNKIN thought it would be sufficient to instruct the Drafting Committee to bring the text of articles 15 to 19 into line with current practice.

After further discussion, it was agreed to refer article 18 to the Drafting Committee for redrafting in the light of the discussion.

ARTICLE 19

27. Mr. SCELLE, Special Rapporteur, introducing article 19, said that the second sentence in paragraph 1 could equally well be put in another form: " It shall be public unless the tribunal, with the consent of the parties, decides otherwise ".

28. Mr. BARTOS suggested substituting the words " the secretary or secretaries " for the word " secretaries " in paragraph 2 of the article.

29. Mr. TUNKIN considered it unnecessary to retain paragraph 2 of the article. He suggested that the wording of the second sentence of paragraph 1 should be modelled on that of Article 46 of the Statute of the International Court of Justice.

30. Mr. SANDSTRÖM observed that, whereas it was in the interests of justice that court proceedings should be public, it was often advisable that the hearings of an arbitral tribunal should be held in private. Parties to a dispute often chose the course of arbitration precisely in order to avoid publicity.

Article 19 was adopted unanimously.

ARTICLE 20

31. Mr. BARTOS suggested that the Special Rapporteur and the Drafting Committee should consider inserting a provision based on article 48, paragraph 2, of the Rules of the International Court of Justice, which might read as follows: " The other party shall have an opportunity of commenting upon the new documents and of submitting documents in support of its comments ". It was not sufficient for the new documents simply to be " made known " to the other party.

32. Mr. AGO proposed that the word " written " be inserted before " pleadings " in the first line of the article.

It was so decided.

33. Mr. AMADO expressed approval of the article, which was closely modelled on articles 67 and 68 of The Hague Convention of 1907.

34. Sir Gerald FITZMAURICE said that it was most desirable that, save in quite exceptional circumstances, when the written proceedings were closed they should be finally closed. From his own experience it was most disconcerting if new material was produced just before the opening of the oral proceedings, leaving the other party scant time in which to check it and possibly produce counter-material.

35. It was not clear from the words " new papers and documents " whether the material was new simply because the party had not seen fit to produce it before or because it had only just come to light. The paragraph

should be more strictly worded so as to prohibit the production by a party after the pleadings had closed of material known to it before. On the other hand, if the material had just come to light, there might be a strong case for allowing it to be produced. He suggested adding the words " In exceptional circumstances " at the beginning of the second sentence in paragraph 1 and a proviso at the end of the paragraph stipulating that it must have been impossible for the parties to produce the documents before the closure of the pleadings.

36. Such provisions would place no real hardship on the party concerned since it would be perfectly at liberty to refer to the new material and even quote from the documents during the oral proceedings.

37. Mr. SCELLE, Special Rapporteur, suggested that the Drafting Committee should be asked to consider how the very delicate question raised by Sir Gerald Fitzmaurice could best be dealt with in the article. The adjective " new " could be replaced by the expression " not produced for the tribunal ".

38. Mr. AMADO thought that the proviso that the " new " documents must have been made known to the other party was an adequate safeguard.

39. The CHAIRMAN pointed out that it would be in conformity with the practice in the legal systems of many countries to limit the term " new papers and documents " to mean papers and documents not available for earlier production, as Sir Gerald Fitzmaurice had suggested. There would be difficulty, however, with regard to the use during oral proceedings of the contents of documents which had not been produced. Many systems prohibited such use.

40. Mr. MATINE-DAFTARY agreed with Sir Gerald Fitzmaurice. Parties must not be allowed to produce trump cards from their sleeves at the last moment.

41. Mr. AGO thought that the Drafting Committee should be asked to find a wording that would restrict the possibilities open to the parties in the matter of producing new material after the written proceedings were closed. Such occurrences were far too common.

42. He would also prefer a more precise expression than " new papers and documents " which would exclude, for example, legal or scientific opinions. To produce scientific opinions, which were often very lengthy, after the written proceedings were closed, and sometimes immediately before the opening of the oral proceedings, could only be described as an indirect means of unlawfully prolonging the written proceedings.

43. Mr. BARTOS, referring to article 48 of the Rules of the International Court of Justice, said that it was designed to avoid the danger of a party's applying for a revision of a judgement on the ground that it had been unable to produce relevant evidence. Under that article, if the other party did not object to the production of the new document it was held to have given its consent. If that party declined to consent, it was for the Court to decide, and that provided an opportunity of checking whether the material really could not have been produced before. However, in the three cases with which he had been recently connected, the other party had not objected.

44. He was generally in favour of article 20, always provided that the other party was given an opportunity of commenting on the new document and producing counter-material.

45. Sir Gerald FITZMAURICE said that the provision that the other party might object to the production of the new material was in practice no safeguard whatsoever. Such documents were deposited with the registrar, and the tribunal, which had the right to see every document connected with the case, was practically bound to see them. Once the members had seen them, however, it would be extremely difficult for them to shut out of their minds evidence of which they had knowledge but which had not been allowed. That was the chief reason why parties so rarely objected to the production of new material by the other party. However reluctant they might be to accept it, they realized that their opposition would make little practical difference and would only put them in a bad light.

46. That did not mean that the production of new material should therefore be permitted. Written proceedings lasted from several months to as much as two years and there was adequate time for either party to produce all the material that was relevant. The late submission of material, incidentally, was not always deliberate ; parties were sometimes rather remiss in sifting all the documentary evidence at their disposal.

47. He did not propose that paragraph 1 should be entirely redrafted but thought it should be reinforced on the lines he had previously suggested.

48. Mr. YOKOTA said that it was necessary to place some restriction on the submission of new documents. There was a certain similarity between that case and the one covered by article 39, dealing with an application for the revision of an award on the ground of the discovery of some new fact, although the provisions were naturally more strict in the latter case.

49. Mr. SCELLE, Special Rapporteur, said that there was no similarity between articles 20 and 39. Article 20 called for the production of all documents before the pleadings were declared closed and the award was rendered ; article 39 concerned the revision of an award.

50. Mr. EDMONDS said that the discussion related to a subject which had attracted the attention of lawyers throughout the world. In many countries, efforts were being made to simplify judicial procedure and to avoid an unnecessary accumulation of documents, sa that courts could reach their decisions more speedily.

51. The Special Rapporteur or the Drafting Committee could perhaps give expression in the draft to the

general principle that no new document should be produced at a late stage of the proceedings without sufficient reason for the delay and that if a document was presented in those circumstances by one of the parties, the other party should have the right to submit its answer.

52. The CHAIRMAN said that a problem of substance had arisen concerning the interpretation of the word " new " in the second sentence of article 20, paragraph 1. He put to the vote the interpretation according to which a new document was a document not available for production before the closure of the pleadings.

That interpretation was rejected by 8 votes to 7, with 3 abstentions.

53. The CHAIRMAN said that the term " new papers and documents " would therefore be construed to mean material not in fact produced, even though it could have been produced, before the close of the pleadings.

54. Sir Gerald FITZMAURICE said that, in view of the Commission's decision, the word " new " should be replaced by the word " further ".

55. The CHAIRMAN said that Sir Gerald's suggestion would be considered by the Drafting Committee.

56. Mr. AMADO said that the provisions of article 20 could be traced back to The Hague Convention of 1907 ; they had not given rise to any practical difficulties.

57. Mr. LIANG, Secretary to the Commission, said that, notwithstanding their origin, the provisions of article 20, paragraph 1, required careful consideration. The two sentences of that paragraph appeared inconsistent. The first sentence gave the tribunal the right to reject new papers and documents in certain circumstances. The second sentence gave the tribunal powers to take into consideration new papers and documents. The tribunal, however, would already appear to have those powers under the first sentence, which did not make it imperative for it to reject all new papers and documents.

58. Mr. AMADO said that the two sentences of article 20, paragraph 1, did not refer to the same case. The first sentence referred to the submission of new papers and documents by one of the parties without the consent of the other. The second sentence referred to new papers and documents which were brought to the notice of the tribunal by one of the parties and which had been made known to the other party.

59. Sir Gerald FITZMAURICE said that the objection was not so much to the actual production of new documents as to the time and the manner of their submission.

60. If the party which made the last written statement at that late stage produced new material, including perhaps consultations, the other party, which had to make the first oral statement, might well not have enough time to prepare an adequate reply to the new material in question. That situation frequently occurred in practice and it was desirable to prevent it.

61. Since it had not been possible to define the documents that could be produced by one of the parties at a late stage in the proceedings, he proposed that a provision should be inserted along the following lines : " In such cases, the other party shall have the right to require a further extension of the written pleadings so as to be able to give a reply in writing ". It was not sufficient to make the new material known to the other party. That party had to be given enough time to conduct the necessary research in order to prepare a written reply.

62. Mr. AGO said that Sir Gerald Fitzmaurice had drawn attention to the crux of the matter.

63. In practice, if one of the parties produced a new document, however late in the proceedings, the other party felt obliged to refrain from objecting, for fear of appearing to be uncertain of its case. It was therefore essential to give that party the necessary time to prepare an adequate reply to the new material, if the equality of the parties was to be preserved.

64. Mr. SCELLE, Special Rapporteur, said that the right expressed in Sir Gerald Fitzmaurice's proposal was self-evident. He would not, however, oppose the insertion of the proposed provision.

65. Mr. ZOUREK said that the introduction of the provision proposed by Sir Gerald Fitzmaurice would discourage the undesirable practice of producing new documents at a late stage of the proceedings.

66. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's proposal (para. 61 above), subject to drafting changes.

The proposal was adopted by 16 votes to none, with 2 abstentions.

Article 20, as a whole, as amended, was adopted by 17 votes to none, with 1 abstention, subject to drafting changes.

ARTICLE 21

67. Mr. SCELLE, Special Rapporteur, introduced article 21 of the model draft. In the French text of paragraph 1, the word " *maître* " would be replaced by the word " *juge* ", for the sake of concordance with the Commission's decision concerning article 10.

68. Mr. EDMONDS said that article 21, paragraph 4, appeared to make the decision to visit the scene of the case conditional on the request of one of the parties. He asked the Special Rapporteur whether there was any reason for not permitting the tribunal to do so of its own motion.

69. Mr. BARTOS said that he agreed with Mr. Edmonds. It was undesirable to limit the powers of the tribunal in that respect.

70. Mr. LIANG, Secretary to the Commission, said that article 15, paragraph 4, of the 1953 draft[3] made a visit to the scene conditional on the requesting party's offering to pay the resulting costs. It was therefore logical to specify that the visit would be ordered " at the request of either party ". In the present draft, the reference to costs having been dropped, there appeared to be no reason to require such a request.

71. Mr. SCELLE, Special Rapporteur, said that there appeared to be no objection to the deletion of the words " At the request of either party ".

72. Mr. MATINE-DAFTARY said that he could not vote in favour of article 21 in its present form.

73. Paragraph 1 provided that the tribunal would be the judge of the admissibility of the evidence presented to it. That provision gave excessive powers to the tribunal and should be deleted; it was sufficient to make the tribunal the judge of the weight of the evidence placed before it.

74. Paragraph 2 appeared to give the tribunal the unusual power to order the parties to produce evidence.

75. Lastly, he could not understand why a particular type of evidence was singled out for reference in paragraph 4. He wondered why the text did not deal also with the other types of evidence, or with evidence in general.

76. Mr. ZOUREK said that a special reference to the procedure envisaged in article 21, paragraph 4, was understandable in the 1953 draft because of the special problem of costs.

77. On the whole, the corresponding text of the 1953 draft was preferable to the present text of article 21, paragraph 4.

78. Mr. SCELLE, Special Rapporteur, said that the question of costs had to be decided ultimately by the tribunal in its award. It was undesirable, from the point of view of the equality of the parties, that a party requesting a specific measure for obtaining evidence should have to bear the costs which that measure involved.

79. In reply to Mr. Matine-Daftary, he said that the question of the admissibility of evidence could only be decided by the tribunal. The tribunal could state that a particular item of evidence was inadmissible or irrelevant to the case. As to article 21, paragraph 2, its provisions did not empower the tribunal to oblige parties to produce evidence; they simply stated that, if one of the parties failed to make evidence available, the tribunal would take note of that failure.

The meeting rose at 1.5 p.m.

[3] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

444th MEETING

Friday, 16 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

ARTICLE 21 (*continued*)

1. Mr. ZOUREK said that his doubts concerning the omission of a reference to the question of costs in paragraph 4 of article 21 had not been dispelled. He also still felt that it was necessary to maintain a reference to the decision of the tribunal being made at the request of either party. If, however, the Special Rapporteur did not agree to his suggestions, he would make no formal proposal.

2. Mr. TUNKIN said that, in accordance with article 2, the parties could lay down in the *compromis* rules concerning the admissibility of evidence. In order, therefore, to bring the provisions of paragraph 1 of article 21 into line with those of article 2, he suggested that, at the beginning of that paragraph, a phrase along the following lines should be inserted: " Unless otherwise agreed by the parties in the *compromis* . . ."

3. Article 21, paragraph 3, gave the tribunal the power to call for any type of evidence it might deem necessary. That provision was much too broad; he suggested that the language of Article 49 of the Statute of the International Court of Justice should be used instead. That article empowered the Court to call upon the parties " to produce any document or to supply any explanations ". Similar language was used in article 68 of The Hague Convention of 1907.[1]

4. He agreed with Mr. Zourek's remarks on paragraph 4.

5. Sir Gerald FITZMAURICE said that the reference in article 21, paragraph 1, to the admissibility of evidence was necessary. There was a clear distinction between the admissibility and the weight of the evidence submitted to a court and that distinction was well known both to international and to domestic procedure. There were circumstances in which it was desirable to rule out the submission of certain evidence altogether.

6. Paragraph 3 did not appear to add much to the provisions of paragraph 2, which covered both applications of the parties to submit evidence and measures ordered by the tribunal and connected with the production of evidence. The redundancy could

[1] Convention for the Pacific Settlement of International Disputes, The Hague, 1907. See *The Reports to the Hague Conference of 1899 and 1907*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 304.

perhaps be avoided by means of adequate redrafting, possibly by consolidating paragraphs 2 and 3 into a single paragraph.

7. With regard to paragraph 4, he said that the arbitral tribunal would clearly only order a visit to the scene connected with the case if it considered such a visit necessary; at that stage, the question of costs was irrelevant. It was clear, however, that the scene connected with the case could only be visited by the tribunal with the consent of the party on the territory of which the visit was to take place. If that party failed to co-operate with the tribunal in that regard, the tribunal should take note of that failure.

8. He therefore proposed the addition in paragraph 4 of a provision along the following lines: " The parties shall co-operate with the tribunal in the event of such a decision. If the party concerned does not consent to the visit, the tribunal shall take note of that fact."

9. Mr. SCELLE, Special Rapporteur, said that he could not agree to the deletion of the reference to the admissibility of evidence in article 21, paragraph 1.

10. The provisions of paragraph 2 on the failure of a party to co-operate in carrying out the measures ordered by the tribunal applied to the measure envisaged in paragraph 4. That fact could perhaps be made clearer, either by the addition of a provision along the lines proposed by Sir Gerald Fitzmaurice or by the insertion of a reference to the visit to the scene connected with the case, as well as a reference to the requesting of expert opinions, in the first sentence of paragraph 2. If the latter course was adopted, paragraph 4 would become unnecessary. The choice between those two courses could be left to the Drafting Committee.

11. Mr. AGO proposed the introduction in article 21, paragraph 2, of a reference to oral evidence and to the duty of the parties to facilitate the hearing of witnesses by the arbitral tribunal. The arbitral tribunal required the co-operation of the parties in order to take evidence from witnesses because it had neither the powers which municipal courts enjoyed in that regard nor the machinery which such courts could rely upon.

12. Mr. BARTOS agreed with Mr. Ago. As far as possible, the Commission had to give some indication of the standards which it considered internationally desirable in the matter of procedure. There were no generally accepted principles governing such questions as the rules of evidence, the onus of proof, and the manner in which witnesses should be examined and cross-examined. The rules in force on those subjects differed considerably from one legal system to another, and the Commission would be serving the cause of the peaceful settlement of disputes if it could agree on certain international standards.

13. It could not be stressed too often that there was no obligation upon States to accept the model draft in its entirety. States could decide to dispense with any provisions of the draft which they considered unsuitable for their purposes. Accordingly, the Commission should not hesitate to include in the draft any provisions which the majority of its members considered useful.

14. Mr. SCELLE, Special Rapporteur, said that a mere enumeration of the various means of evidence would not serve the purpose suggested by Mr. Bartos and any attempt to enter into detail would probably require a separate article concerning each type of evidence, with the consequence that the model draft would be extended unduly.

15. In reply to Mr. Tunkin, he said that the provisions of article 21, paragraph 1, did not in any way conflict with those of article 2. Article 2 did not refer to evidence. Of course, article 21, like all the articles of the draft, would only be applied in cases where the parties agreed to apply it to their dispute.

16. He could not therefore agree to the addition, at the beginning of article 21, paragraph 1, of the words proposed by Mr. Tunkin (para. 2 above). That addition was unnecessary.

17. Nor could he agree to Mr. Tunkin's suggestion that article 21, paragraph 3, should use the language of Article 49 of the Statute of the International Court of Justice. The latter article referred to the power of the Court to call upon the agents of the parties to produce any document or to supply any explanations even before the hearing began. Subsequent articles of the Statute, and in particular Article 52, covered all means of evidence.

18. Mr. TUNKIN said that article 2 of the model draft provided, in its second, or optional, paragraph, that " The *compromis* shall likewise include any other provisions deemed desirable by the parties ". Those provisions could, of course, include rules on the admissibility of evidence. For that reason, he had suggested that article 21 should commence with a proviso stipulating that it applied only in the absence of agreement of the parties on the question of evidence.

19. He did not, however, have any formal proposal to make, either on that point or on article 21, paragraph 3.

20. Mr. MATINE-DAFTARY proposed the deletion of the words " the admissibility and " in paragraph 1.

The proposal was rejected by 10 votes to 1, with 3 abstentions.

Paragraph 2 was adopted unanimously, subject to drafting changes.

Paragraph 3 was adopted by 12 votes to 1, with 2 abstentions, subject to drafting changes.

21. The CHAIRMAN said that the words " At the request of either party " in paragraph 4 had been deleted by the Special Rapporteur. In addition, the Special Rapporteur had accepted the substance of Sir Gerald Fitzmaurice's proposal (para. 8 above) relating to the same paragraph. He therefore put to the vote paragraph 4 as so amended, subject to the decision of the Drafting Committee concerning its redrafting or ilts amalgamation with paragraph 2.

Paragraph 4, as amended, was adopted in substance by 13 votes to none, with 3 abstentions.

Article 21 as a whole, as amended, was adopted by 12 votes to 1, with 1 abstention, subject to drafting changes.

22. Mr. SCELLE, Special Rapporteur, said that he had defended his text of article 21 because it reproduced the provisions adopted b the Commission in article 15 of its 1953 draft.[2]

23. The decision of the Commission was, as he understood it, to adopt the substance of the various provisions of article 21, leaving it to the Drafting Committee to redraft those provisions and to amalgamate, if necessary, certain of the paragraphs of the article in question. In a sense, therefore, the decision was of a provisional character.

24. The CHAIRMAN then put to the vote the proposal that the Drafting Committee should also be instructed to include a reference to expert evidence in article 21.

The proposal was adopted by 13 votes to 9, with 3 abstentions.

ARTICLE 22

25. Mr. SCELLE, Special Rapporteur, said that if the reference to additional claims and counter-claims gave rise to translation difficulties, as he understood it did from the discussion at the previous meeting on article 17, paragraph 4, he would be prepared to omit it. In any case he agreed with Mr. Matine-Daftary that in the French text the comma should be deleted after the word " *demandes* ".

26. Mr. BARTOS said there was no good reason for deleting the reference to additional claims and counter-claims ; the Commission should merely ask the Drafting Committee to bear in mind that there were two types of additional claims : accessory claims relating to the same events as those forming the subject of the main claim, and claims relating to new events connected with but subsequent to those which were the subject of the main claim.

27. Mr. ZOUREK said that article 22 dealt with a matter where practice was by no means uniform ; in several cases since the First World War additional claims or counter-claims had been explicitly excluded from the tribunal's competence. In any case, he shared the Indian Government's view[3] that, as drafted, article 22 (article 16 of the 1953 draft) left too much to the subjective judgement of the tribunal itself ; the words " arising directly out of " were far from precise, and in that connexion he drew attention to the Argentine Government's suggestion[4] that the application of the article should be restricted to counter-claims and that the words " arising directly out of the subject-matter of the dispute " be replaced by the words " relating to questions which necessarily arise out of the subject-matter of the dispute ".

28. Mr. AGO thought the words " arising directly out of " already provided an adequate safeguard against the risk of the tribunal's exceeding its competence.

29. He pointed out that in the International Court of Justice counter-claims at least could not be presented after a certain stage of the written proceedings had been reached. As the model draft laid down no time limits for the presentation of incidental or additional claims or counter-claims, he wondered whether it was in fact the Special Rapporteur's view that they should be presented at any stage.

30. Mr. SCELLE, Special Rapporteur, answered in the affirmative, but pointed out that the question had not been considered by the Commission at the time it prepared its 1953 draft. He doubted its practical importance.

31. Mr. AGO said that the question certainly was of importance as far as counter-claims were concerned. Counter-claims had very serious repercussions on the subsequent proceedings, since their effect was to make the claimant the respondent and the respondent the claimant. He doubted the advisability of permitting the presentation of counter-claims, for example, after the closure of the written proceedings.

32. Mr. LIANG, Secretary to the Commission, said that when the Secretariat had been engaged in preparing the commentary on the 1953 draft, the only clear precedent it had been able to find with regard to counter-claims was article 63 of the Rules of Procedure of the International Court of Justice ; it was clear, however, that that article only applied where proceedings had been instituted by means of an application, not where they were brought by special agreement, as would very frequently be the case in arbitral proceedings.[5]

33. Mr. AGO agreed that it was not really possible to envisage a counter-claim unless the proceedings were instituted by means of a unilateral application. Some additional provision to that effect in article 22 was clearly necessary.

34. Sir Gerald FITZMAURICE thought it was evident from the discussion that the article would have to be modified a good deal. In any case, the Commission should take some decisions on the principles involved. It was quite right that if there were incidental or additional claims or counter-claims, the tribunal should decide on them in order to dispose of all the issues arising directly out of the same subject-matter. However, the article did not indicate the circumstances in which such claims or counter-claims were admissible. In that

[2] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

[3] *Ibid., Tenth Session, Annexes,* agenda item 52, document A/2899 and Add. 1 and 2, p. 6.

[4] *Ibid.,* p. 2.

[5] See *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations publication, Sales No. : 1955.V.1), p. 69.

connexion he thought it necessary to distinguish clearly between incidental or additional claims, in other words those presented by the claimant, and counter-claims, in other words those presented by the respondent, not only because the distinction affected the time limit for submission but also because of the very important point raised by the Secretary.

35. Dealing with that point first, he agreed that counter-claims should only be admitted in the very rare case of the proceedings being instituted by unilateral application. For where two parties agreed to refer to arbitration a claim presented by one of them, the other would normally be aware, at the time they did so, of any counter-claim it wished to make arising out of the same subject-matter and should include such counter-claim in the agreement to arbitrate ; if it failed to do so, there was a very strong case for excluding the counter-claim. In the most unlikely event that the respondent did not discover the possible grounds for a counter-claim until subsequently, conclusion of a separate agreement should, he thought, be required.

36. In the case of additional or incidental claims, however, it was much more likely that the claimant might, for example, find he had suffered further damage after the proceedings had begun, even after the oral proceedings had begun ; in his view, therefore, no time limit should be fixed for incidental or additional claims, although provision should perhaps be made for some means whereby the written proceedings could be re-opened in respect of incidental or additional claims which were presented during the oral proceedings, in order that the respondent would not be deprived of the right to make a written reply.

37. Mr. TUNKIN said that, in view of the considerable discrepancies between the French and English texts of article 22, conclusions might differ according to the text under consideration. He fully agreed with Mr. Zourek that the article went too far. In the first place, it went even further than the corresponding provisions of the Rules of Court of the International Court of Justice and, since arbitral procedure differed materially from judicial procedure, that was neither advisable nor justified. The article also gave the tribunal a sort of supra-national character. Though, from the standpoint of *elegantia juris,* the article had some merit, it remained to be seen whether it would be of any practical value in the existing circumstances. He doubted whether it was expedient to take any decisions of principle at that stage and would prefer the text to be referred to the Drafting Committee for revision in the light of the discussion.

38. Mr. AGO said that if the article could be confined to claims (as distinct from counter-claims), it would present virtually no problem, except perhaps for the need to distinguish, even with regard to additional claims, between proceedings instituted by unilateral application and those instituted by joint reference of the two parties. In the case of the former, an additional claim was tantamount to a new application by the claimant. But in a case where the parties had agreed to submit their dispute to arbitration by joint reference, any new application would also have to be made jointly.

39. As to counter-claims, he thought that an express provision thereon in the draft could not be avoided. Though it was more frequent for disputes to be submitted to arbitration by agreement between the parties, submission by unilateral application could occur on the basis of an arbitration treaty or arbitration clause. Furthermore, in view of the provisions approved by the Commission for article 9, the likelihood of arbitration proceedings instituted by unilateral application, and hence also the possibility of counter-claims, had only increased. It must, however, be clearly stated that counter-claims were admissible only if the dispute had been referred to the tribunal by unilateral application and only if they were submitted within a certain time. He suggested that the closing date specified in the Rules of the Court for the submission of the counter-memorial might also apply to the presentation of counter-claims.

40. Since the two matters required separate treatment, he thought that article 22 should deal exclusively with the question of incidental and additional claims and that a separate article should deal with counter-claims.

41. Mr. SANDSTRÖM said that he shared Mr. Zourek's misgivings concerning the phrase " arising directly out of the subject matter " and its French equilavent. During the Commission's discussions of the draft convention on arbitral procedure at its fifth session, it had been explained that the connexion must be " necessary " or " inseparable ".[6] He doubted very much whether the word " directly " conveyed the idea of inseparability.

42. Mr. SCELLE, Special Rapporteur, agreed with Sir Gerald Fitzmaurice and Mr. Ago on the soundness of drawing a sharp distinction between additional claims and counter-claims, though the point had not been mentioned at the Commission's fifth session. He was afraid, however, that it would prove difficult to redraft the article on the lines suggested, because a variety of cases would have to be provided for. He thought that probably the problem was covered by the provision in article 36 that an award might be challenged on the ground that the tribunal had exceeded its powers.

43. He had no objection to an amendment stressing the inseparable connexion between an additional claim or a counter-claim and the principal claim, though he could hardly perceive any difference in meaning between such an amendment and the text he had drafted. In either case the clear intention was to describe a situation in which the dispute could not be decided without a decision on the additional claim or counter-claim. On balance, he considered that the article, though admittedly not perfect, should be left as it stood. It might be referred to the Drafting Committee, but he doubted if the latter could produce a better text for the article. In striving for a more perfect wording the Commission might forfeit the chance of working out a text commanding general agreement.

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[6] See A/CN.4/SR.188, paras. 44-75.

44. Mr. ZOUREK remarked that, as the Special Rapporteur himself appeared to recognize, there were serious objections to the article as it stood. There was, furthermore, a question of terminology. The term "*demandes incidentes*" had different meanings in different legislations. In French procedure, he understood it to include *demandes additionelles, demandes reconventionelles* and even *demandes en intervention.*

45. Since the article was to be offered as part of a model draft, he thought that the Special Rapporteur should be requested to produce a fresh text amended in the light of the discussion.

46. Mr. BARTOS said that the concepts of *indivisibilité* and of *connexité* were by no means identical. A case could be divided by limitation of the subjects even when they arose from one and the same cause. Many codes of civil procedure contained elaborate provisions concerning the concept of "indivisibility".

47. Nor did the expressions "incidental claim" and "additional claim" mean the same thing. In certain countries of central Europe an "incidental claim" was a subsidiary claim.

48. As for counter-claims, he said that if all reference to them was excluded from the article, the tribunal might be powerless to settle the dispute. Counter-claims formed an integral part of a dispute. Indeed, it sometimes happened that a counter-claim, by a reversal of the position of the parties, became the principal claim. If, for instance, a State, after tolerating an illicit situation for years, ceased to do so, the other State might claim that the situation originally tolerated had been consistent with international law. The tribunal on the other hand might decide that, on the contrary, the first State had a just claim against the other because of the illicit state of affairs which it had originally tolerated, and the counter-claim would thus become the principal claim.

49. Though he agreed that the tribunal must be given the means of settling the whole of the dispute, he had some misgivings regarding the powers given to the tribunal in the article. The parties might themselves agree to exclude all additional claims, if, for example, a State merely wished to obtain recognition of the justice of its attitude without claiming any reparation.

50. In view of the complex problems of terminology involved, he proposed that the Drafting Committee should be asked to produce a new text, in collaboration with the Special Rapporteur.

51. The CHAIRMAN said that, though it appeared to be generally agreed that an additional claim and a counter-claim were not on the same footing and that it might not be possible to deal with them in the same paragraph, he did not think it advisable to take any final decision at that stage.

52. He put to the vote the proposal that article 22 be referred to the Drafting Committee for redrafting in the light of the discussion.

The proposal was adopted by 15 votes to none, with 1 abstention.

ARTICLE 23

53. Mr. SCELLE, Special Rapporteur, introducing article 23, pointed out that it was modelled on Article 41, paragraph 1, of the Statute of the International Court of Justice.

54. Mr. VERDROSS said that the draft article represented a twofold advance on the corresponding provision of the Statute of the International Court. In the first place, it gave the president of the tribunal, subject to confirmation by the latter, the power to prescribe any necessary provisional measures. The second improvement was the use of the word "prescribe", instead of the vague term "indicate" used in the Statute.

55. Mr. EL-ERIAN inquired why the words "and if circumstances so require" appearing in the 1953 version of the article (article 17 of the 1953 draft) had been omitted.

56. Mr. YOKOTA observed that the words "at the request of one of the parties" did not figure in Article 41 of the Statute of the International Court. He proposed that the words should be deleted from article 23 as they had been, in similar circumstances, from article 21, paragraph 4, so that the tribunal would have the power to prescribe provisional measures on its own initiative as well as at the request of the parties.

57. Mr. SCELLE, Special Rapporteur, replying to Mr. El-Erian, said that the word "necessary" qualifying the words "provisional measures" served the same purpose as the phrase "if circumstances so require".

58. Replying to Mr. Yokota, he said that provisional measures taken in disputes between States might involve important political questions and it should therefore be for the parties to judge whether they were necessary. If neither party saw the need for provisional measures, no such safeguard would be required.

59. Mr. EL-ERIAN said that he thought the words "if circumstances so require" better emphasized the exceptional nature of provisional measures. If, however, the Commission found the word "necessary" adequate, he would not object to it. He was in favour of retaining the phrase "at the request of one of the parties".

60. Mr. ZOUREK thought that the article went too far. It was inadvisable to give the president sole power, subject to subsequent confirmation, to take a step of such gravity as the prescribing of provisional measures in disputes between States. In view of the rapidity of modern communications, there was really no justification for that provision, which might render the article unacceptable to many States. He proposed that the passage "or in case of urgency its president, subject to confirmation by the tribunal" should be deleted.

61. The CHAIRMAN put to the vote Mr. Yokota's proposal (para. 56 above) that the words " at the request of one of the parties " should be omitted from article 23.

The proposal was rejected by 12 votes to 1, with 2 abstentions.

62. The CHAIRMAN put to the vote Mr. Zourek's proposal (para. 60 above) that the words " or in case of urgency its president, subject to confirmation by the tribunal " should be deleted.

The proposal was rejected by 11 votes to 3, with 2 abstentions.

63. The CHAIRMAN put article 23 as a whole to the vote.

Article 23 was adopted by 12 votes to 3, with 2 abstentions.

The meeting rose at 1.5 p.m.

445th MEETING

Monday, 19 May 1958, at 3 p.m.

Chairman : Mr. Radhabinod PAL.

Arbitral procedure : General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

ARTICLE 24

1. The CHAIRMAN, in the absence of the Special Rapporteur, pointed out that there had been no comments on article 18 of the 1953 draft,[1] which corresponded to article 24, paragraph 1, of the model draft. Paragraph 2 was new, and related to the discovery of new evidence during the period after the proceedings had been closed but before the award had been rendered. An earlier article (article 20) dealt with the case of earlier discovery ; article 39 would deal with later discovery.

2. Mr. LIANG, Secretary to the Commission, referring to Sir Gerald Fitzmaurice's remarks (443rd meeting, para. 9) on the archaic nature of some of the wording taken over from The Hague Convention for the Pacific Settlement of International Disputes of 1907,[2] said he had certain doubts regarding the words " subject to the control of the tribunal " in paragraph 1 and feared they might give rise to misunderstanding. The purpose of those words was, he thought, to give the tribunal the power, if it so wished, not to declare the proceedings closed even if the agents and counsel had completed their presentation of the case ; but, in the English text at least, they failed to convey that meaning and all they seemed to mean was that the case should be presented in accordance with whatever directions were issued by the tribunal, which really went without saying.

3. Mr. FRANÇOIS thought the Commission's aim, in including the words in question, had been to prevent the agents or counsel from frustrating the proceedings by prolonging their presentation of the case unnecessarily. Some provision to that effect should be retained, even though it might be better expressed.

4. Mr. LIANG, Secretary to the Commission, agreed that some such provision might be desirable, but repeated that that was neither the apparent present meaning of paragraph 1 nor what he believed to be its real intention. The drafting committee might wish to consider whether the real intention would not be conveyed more clearly by adopting a wording similar to that used in article X, paragraph 6, of the rules of procedure of the United States-Mexican General Claims Commission, namely :

> " When a case has been heard in pursuance of the foregoing provisions, the proceedings before the Commission shall be deemed closed unless otherwise ordered by the Commission." [3]

5. Mr. AGO agreed with the Secretary in his criticism of paragraph 1. In connexion with what Mr. François had said, he felt that something more specific should be said about the oral proceedings than was said in article 18, paragraph 4. Normally the oral proceedings comprised a pleading, a counter-pleading, and possibly a reply and a counter-reply. If the Commission was silent on the matter, did that mean that in its view the parties could go on exchanging arguments indefinitely ?

6. The CHAIRMAN suggested that the Commission instruct the Drafting Committee to propose a wording to meet the point raised by Mr. François.

It was so agreed.

On that understanding, paragraph 1 was adopted, subject to any further drafting changes proposed by the Drafting Committee in the light of the discussion.

7. Mr. AGO (referring to the French text) said that in his view paragraph 2 gave a rather dangerous amount of latitude to the parties. It would be difficult in practice to prove that the new evidence it was desired to present had not been newly discovered or was not of such a nature as to have a decisive influence on the tribunal's decision.

8. In fact, only in extremely rare cases should the

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[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

[2] See *The Reports to The Hague Conferences of 1899 and 1907,* James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), pp. 292-309.

[3] Quoted in the *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations publication, Sales No. : 1955.V.1.), p. 75.

proceedings be allowed to be reopened once they had been formally declared closed.

9. Mr. TUNKIN pointed out that there was a discrepancy between the English and the French texts, the former referring simply to " new evidence " while the latter spoke of " newly discovered evidence ".

10. The CHAIRMAN suggested that the Drafting Committee be asked to work out a final text.

It was so agreed.

11. Mr. ZOUREK proposed that the scope of paragraph 2 be extended to cover the case where, after hearing all the evidence presented by the parties and declaring the proceedings closed, the tribunal wished to reopen them because it found, on closer examination, that it needed further evidence on particular points.

The proposal was adopted by 7 votes to 4, with 4 abstentions.

12. The CHAIRMAN called for a vote on paragraph 2, on the understanding that the Drafting Committee would make the changes required by the above-mentioned decisions.

On that understanding, paragraph 2 was adopted by 12 votes to 1, with 2 abstentions.

ARTICLE 25

13. The CHAIRMAN said that article 25 was identical with article 19 in the 1953 draft, except that in the English text the word " should " had been altered to " shall " in order to bring it into line with the French.

14. Mr. FRANÇOIS asked whether it was really the Commission's view that the tribunal should be prevented from sitting by the absence or illness of one of its members. Although the English text had been brought into line with the French, it would be noted that in its comments the Netherlands Government had proposed that the French be brought into line with the English by substituting the word " *devraient* " for the word " *doivent* " (A/CN.4/L.71, under article 17).

15. Mr. YOKOTA thought it was the duty of the arbitrators themselves to be present throughout the deliberations and of the president of the tribunal to ensure that the deliberations did not take place if any of them were absent. It would be going too far, however, to stipulate that the deliberations must not take place if any of the arbitrators were absent, for there would then be the danger — referred to in the commentary of the 1953 draft [4] — of one arbitrator absenting himself in bad faith, in order to wreck the proceedings ; various learned authors such as Mérignhac and Lord Phillimore had expressly stated that in such a case the tribunal should be able to proceed notwithstanding. Under the model draft, it would not be possible to replace an arbitrator who absented himself deliberately, since deliberate absence was not covered by the present wording of article 6, which referred only to death or incapacity.

16. Mr. MATINE-DAFTARY thought that the difficulty arose partly from the attempt to deal with two separate questions in the same sentence. He proposed that article 25 should state simply that the deliberations of the tribunal should remain secret ; the question of attendance should be dealt with in a separate article, the scope of which should be widened to cover also attendance at the earlier stages of the proceedings.

17. Mr. PADILLA NERVO said that in his view it was essential that all arbitrators should be present at least throughout the deliberations ; as was pointed out in the commentary on the 1953 draft,[4] failure to observe that rule might not only affect the weight of the award but also provoke a dissenting opinion which otherwise might not have occurred.

18. Mr. AGO agreed with Mr. Matine-Daftary that article 25 should deal exclusively with the secrecy of the tribunal's deliberations and suggested that it should be modelled on the terms of Article 54, paragraph 3, of the Statute of the International Court of Justice.

19. With regard to the question of attendance, he thought it essential to the whole structure of arbitration as the Commission conceived it that all the arbitrators should be present throughout the entire proceedings ; to allow the tribunal to function with one member absent would be contrary to all that had been said regarding the equality of the parties, the constitution of the tribunal, the manner of filling vacancies and so on. There was, of course, the danger to which Mr. Yokota had referred ; but that could be obviated by providing that in the event of prolonged and unwarranted absence, an arbitrator's post could be declared vacant and filled in the manner laid down in article 6.

20. The CHAIRMAN pointed out that under the second paragraph of article 2 the Commission had already agreed that the *compromis* could, if the parties so desired, include a provision fixing a quorum for the conduct of the proceedings. That implied that, if the parties so agreed, the proceedings could continue in the absence of one or even more arbitrators.

21. Mr. AGO agreed that if a quorum was provided for, the question was settled ; in that case, all that was required was the presence of a quorum. But where, as was more often the case, the arbitral tribunal was composed of three or five members, no quorum was provided for, and in such cases the attendance of all the arbitrators was required.

22. Sir Gerald FITZMAURICE agreed with Mr. Matine-Daftary that the two questions at present dealt with in article 25 should be dealt with separately. He also agreed that it was the duty of all members of the tribunal to be present throughout the deliberations at least. Whatever form of words was adopted should not be too rigid, however ; for the deliberations might last several weeks, and it seemed hardly practicable to insist that every arbitrator must be present at every

[4] *Ibid.*, p. 77.

meeting. Possibly the difficulty resided in the word " attended " ; in his view it would be sufficient to say something along the following lines : " All members of the tribunal shall participate in its deliberations and in the decision to be reached."

It was agreed to separate the two ideas dealt with in article 25.

23. The CHAIRMAN proposed that the first part of article 25 should read as follows : " The deliberations of the tribunal shall remain secret."

The proposal was adopted unanimously.

24. The CHAIRMAN, speaking as a member of the Commission, agreed with Sir Gerald Fitzmaurice that the draft should be reasonably flexible in the matter of attendance.

25. Mr. SANDSTRÖM said that, while occasional absences during the pleadings and hearings would hardly be objectionable, he did not think any absences could be permitted during the deliberations. Mr. Ago was correct in stressing the unity of the tribunal as a characteristic feature of the model draft ; but a no less characteristic feature of the draft was that it made it impossible for either party to frustrate the procedure in bad faith.

26. Mr. TUNKIN said that in his view it would probably be sufficient to provide that all the arbitrators must be present at the time the award was rendered.

27. Mr. AGO said that the *compromis* could contain, in accordance with article 2, paragraph 5, provisions concerning the quorum required for the proceedings of the arbitral tribunal. In the absence of such provisions, however, the tribunal should only sit if all its members were present. Moreover, in the case of the absence — even the temporary absence — of a member of an arbitral tribunal, the custom was to adjourn the meeting of the tribunal.

28. Provision would certainly have to be made to prevent one of the arbitrators from frustrating the arbitration by deliberate and prolonged absence. That was a very delicate question and the Commission had to consider it very carefully. Perhaps the best solution would be to permit that arbitrator to be replaced or, in certain cases, to enable the umpire to sit alone without both " national " arbitrators.

29. Mr. ZOUREK said that, failing a provision to the contrary in the *compromis,* the arbitral tribunal was not duly constituted unless all the members were present. Similarly, under the rules of procedure in force in many countries, an ordinary court could not function in the absence of one of the members of the bench.

30. He agreed with the views expressed by Mr. Ago and suggested that article 25 should provide that, in the absence of any provision in the *compromis* concerning a quorum, all the members of the arbitral tribunal should be present at its deliberations.

31. Mr. YOKOTA said that article 25 should lay down the duty of the members of the tribunal to attend its deliberations. It was, however, undesirable to provide that the proceedings would stop if one of the members was absent.

32. Sir Gerald FITZMAURICE said that article 25 should prescribe the duty of the members of the tribunal to attend its deliberations. It was, however, desirable that the article should not be too categorical on the subject of the consequences of non-attendance. If the proceedings were to be invalidated by the absence of one of the members of the arbitral tribunal, then it would be possible for one of the " national " arbitrators to obstruct the proceedings by deliberately absenting himself.

33. Mr. PADILLA NERVO said that, in the absence of any provision in the *compromis* regarding a quorum, it was to be presumed that the deliberations of the arbitral tribunal required the attendance of all its members.

34. The question of the deliberate absence of one of the arbitrators could perhaps be dealt with by treating such absence in the same manner as the incapacity of one of the members of the tribunal ; the resulting vacancy would be filled, as set out in article 6, in accordance with the procedure prescribed for the original appointments.

35. Sir Gerald FITZMAURICE said that he agreed in principle with Mr. Padilla Nervo's suggestion. It was desirable to include a provision to the effect that the persistent failure of one of the members of the tribunal to attend its deliberations would constitute grounds for his replacement.

36. If the matter of persistent failure to attend were thus kept separate, article 25 would only deal with the question of the duty to attend the deliberations of the arbitral tribunal. He suggested that the article in question should state that all the members of the tribunal were under a duty to attend its deliberations but that the occasional absence of a member, with the consent of the president of the tribunal, would not prevent the tribunal from continuing its deliberations, provided that all the members had participated in the deliberations leading to the decision.

37. Mr. GARCIA AMADOR said that the remedy proposed by Mr. Padilla Nervo was not likely to prove effective in practice. In most cases, the persistent failure of an arbitrator to attend the deliberations of the arbitral tribunal would be the result of pressure by that arbitrator's Government. It was not, therefore, practical to suggest that in that event the Government in question would be called upon to appoint a new arbitrator : the new arbitrator would be subject to the same influences as his predecessor.

38. Mr. SANDSTRÖM said that provision could perhaps be made for the new arbitrator to be appointed by the President of the International Court of Justice.

39. Mr. BARTOS said that in principle he agreed with Mr. Ago ; if one of the members of the arbitral tribunal was absent, the tribunal could not properly sit.

40. There were three separate questions before the Commission. Firstly, the duty of the members of the arbitral tribunal to attend its deliberations had to be laid down ; on that question, there had been no disagreement. Secondly, some provision would have to be made for the necessary quorum where the *compromis* contained no provisions concerning the quorum. Lastly, the Commission had to examine the delicate question of the repeated absence of an arbitrator which had the effect of delaying or obstructing the proceedings. That problem had actually arisen in practice. The Commission would have to decide whether the arbitral tribunal should be allowed to render an award notwithstanding the absence of the member who was endeavouring to obstruct the proceedings.

41. In view of the importance of the question and the absence of the Special Rapporteur, he proposed that the consideration of the question be adjourned.

It was so decided.

42. The CHAIRMAN said that the Commission would resume consideration of article 25 when it had before it more concrete proposals regarding the question whether the persistent absence of a member of an arbitral tribunal should constitute grounds for his replacement.

ARTICLE 26

43. The CHAIRMAN said that there had been no comments by Governments on article 26, which corresponded to article 21 of the 1953 draft.

44. Mr. VERDROSS said that if article 26 was intended to cover the case where the claimant ceased to continue to prosecute his case before the tribunal, then the text as drafted was satisfactory. If, however, it was meant to refer to the case where the claimant renounced his claim, then the position was quite different, for in that event there would be nothing left for the tribunal on which to adjudicate. A distinction should be made between the two situations.

45. Mr. BARTOS said that perhaps the drafting committee could introduce a distinction between the discontinuance of the proceedings and the renunciation of the right on which the claim was based.

46. Sir Gerald FITZMAURICE said that paragraph 1 of article 26 would appear to be unnecessary. The failure of the claimant party to prosecute its case could be covered by introducing the words " or to prosecute " after the words " failed to defend " in article 29, paragraph 1. If, however, the claimant party decided not to proceed and abandoned its claim altogether, then clearly the proceedings would necessarily have to come to an end.

47. Mr. SANDSTRÖM said that if the claimant party abandoned its claim, the respondent should have the right to require an authoritative decision from the tribunal bringing the dispute to an end.

48. Mr. LIANG, Secretary to the Commission, thought that there was a clear distinction between the discontinuance of proceedings by the claimant party and the failure of the claimant party to appear, which was covered by article 29, paragraph 1.

49. As pointed out in the commentary on the 1953 draft,[5] provisions corresponding to article 26 and stipulating that there must be consent by the other party to justify discontinuance were to be found in most national codes of civil procedure.

50. A case relevant to the question was that of the *Denunciation of the Treaty of 2 November, 1865, between China and Belgium*[6] where, after it had been settled out of court, the Permanent Court of Arbitration decided to remove the case from its list on the unilateral withdrawal of Belgium, in view of the fact that China had never taken any step in the proceeding before the Court.[7]

51. Mr. VERDROSS repeated that, if one party renounced its rights, the tribunal no longer had a dispute before it and could not continue to adjudicate. There was no need to continue the proceedings merely for the sake of apportioning costs ; they could be apportioned as provided in the *compromis*.

52. Mr. ZOUREK said that article 26 covered only one eventuality, that of *désistement d'instance*, or withdrawal of the complaint by the claimant party, which was a clearly defined concept in French procedure. In such a case, it was clearly necessary to protect the interests of the other party, for, quite apart from the question of the apportionment of costs, there was always the possibility that the claimant might reassert his rights. There might also be instances, however, of *désistement d'action*, by which the claimant renounced his rights. That form of withdrawal did not require the consent of the opposing party unless he had entered a counter-claim.

53. The CHAIRMAN, speaking as a member of the Commission, drew an analogy between the provisions of the article and " withdrawal with the leave of the court " and " withdrawal without the leave of the court " in Indian civil procedure. The first course was taken when the claimant wished to bring his suit on the same cause of action again later. In the second case, withdrawal anounted to dismissal of the suit. Costs were generally awarded to the defendant in such a case.

54. Mr. SANDSTRÖM, after expressing general agreement with Mr. Zourek, said that the dispute between Belgium and China cited by the Secretary showed to what extent the need for the respondent's consent to the discontinuance of proceedings varied according to

[5] See *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations publication, Sales No. : 1955.V.1), pp. 80-81.

[6] *Publications of the Permanent Court of International Justice, Collection of Judgments,* series A, No. 18, p. 5.

[7] *Ibid.,* p. 82.

the stage at which the move was made. If the claimant sought to withdraw before the respondent had replied, it was less necessary to have the latter's consent. Once, however, the respondent had defined his attitude, there was strong ground for the provision made in paragraph 1 of article 26.

55. Mr. AGO said that he did not think that the Special Rapporteur had had in mind, when drafting the article, the case of a claimant renouncing his basis claim, since it was highly improbable that in such an event the respondent party would wish the proceedings to continue. The article seemed rather to envisage cases where, because the proceedings were not going in his favour, the claimant merely wished to withdraw his complaint to aviod a decision by the tribunal. In those circumstances it would probably be precisely the object of the withdrawal of the complaint to forestall a decision at that point, so that the claimant might safeguard his basic claim and reassert it later. The article therefore served a useful purpose and should be retained.

56. Mr. VERDROSS agreed that there were two possible cases to be considered. If the claimant did not renounce his rights, the respondent clearly had the right to refuse to discontinue the proceedings. The solution might be to retain the article but to make clear in the commentary what was meant by discontinuance of proceedings.

57. Sir Gerald FITZMAURICE said that the same result could be obtained by making a drafting change in the article so as to except cases where the claimant recognized the soundness of the respondent's claim. He proposed inserting the words " unless accompanied by the recognition that the respondent's claim is well founded " at an appropriate point in paragraph 1 of the article.

58. Mr. TUNKIN pointed out that it might sometimes be more a matter of the claimant's renouncing his claim than of his recognizing that the claim of the other party was well founded.

59. The CHAIRMAN proposed that the article be adopted subject to drafting changes in the light of the remarks made by Sir Gerald Fitzmaurice and Mr. Tunkin.

It was so decided.

ARTICLE 27

60. The CHAIRMAN pointed out that the corresponding article in the Commission's 1953 draft (article 22) had been divided into two separate sentences and did not contain the words " if it thinks fit ", which had been inserted later in response to comments by certain Governments.

61. Mr. VERDROSS expressed grave doubts concerning the second part of article 27. Once a settlement was reached there was no longer any dispute and the tribunal could not judge, nor could it, therefore, render an award. In his opinion, the article should state simply that the tribunal might take note of the settlement reached by the parties.

62. Mr. ZOUREK agreed with Mr. Verdross. The second part of the article seemed to conflict with the provision in article 31 that " The award shall state the reasons on which it is based for every point on which it rules ". Settlements out of court were generally made *ex aequo et bono* and each party consulted its own interests without insisting on establishing its legal case. That being so, he could not see how the tribunal could possibly embody a settlement in a properly reasoned award.

63. Mr. BARTOS was in favour of omitting the words " if it thinks fit ", though a similar proviso admittedly figured in many codes of civil procedure. That was quite understandable, however, as it was customary for municipal courts to ratify settlements, thereby giving them the force of judgements. Judges were bound to refuse to countenance a settlement which was contrary to public policy or morality. In some matters, in fact, settlements out of court were explicitly forbidden. The position was entirely different in international arbitration where such a proviso might be said to conflict with the principle that the will of the parties must predominate.

64. He fully agreed with Mr. Zourek's criticism of the second part of the article.

65. Mr. TUNKIN agreed with the previous three speakers. An arbitral tribunal was not a supra-national institution but a body created by States to deal with a dispute or disputes. Once the case was settled by the parties, the tribunal could do no more than take note of the settlement. He was consequently in favour of retaining only the first clause of the article, subject to the omission of the words " if it thinks fit " which really related to the provision regarding the embodying of the settlement in an award.

66. Sir Gerald FITZMAURICE agreed that the words " if it thinks fit " should be omitted since the word " may " already showed that the tribunal enjoyed discretion.

67. The article as a whole, however, was a useful one and he did not think that the second provision in it could do any harm. There might well be cases where it would be useful for the settlement to be given additional status by being embodied in an award. Since such a step could only be taken " at the request of the parties ", he saw no objection to it, apart from that raised by Mr. Zourek, which could be easily overcome by inserting the words " Except in the cases envisaged by article 27 " at the beginning of article 31.

68. Mr. SANDSTRÖM fully agreed with Sir Gerald Fitzmaurice that the words " at the request of the parties " provided an adequate safeguard. In the Egyptian Mixed Courts on which he had served, it had been quite customary for settlements to be confirmed

by the court, and he did not see why a similar procedure should not be followed in international law.

69. Mr. EL-ERIAN proposed that in addition to omitting the words " if it thinks fit " the Commission should also change the verb " may " to " shall ". If a settlement were reached, there was no other course open to the tribunal but to take note of it. It enjoyed discretion only with regard to embodying the settlement in an award.

70. Mr. VERDROSS fully agreed with Mr. El-Erian.

71. Mr. LIANG, Secretary to the Commission, drew attention to paragraph 44 of the Commission's report covering the work of its fifth session [8] in which it stated its reasons for using the word " may " instead of " shall ".

72. Mr. EL-ERIAN observed that the reasons given appeared to refer to the question of embodying the settlement in an award and not to the tribunal's taking note of the settlement.

73. Mr. ZOUREK pointed out that confirmation of a settlement by a court was not equivalent to embodying it in a court judgement. A procedure could be provided in international law for the confirmation of settlements but it would probably prove of little practical value, for any settlement before an international tribunal would necessarily have to be embodied in an international agreement.

74. The reason quoted by the Secretary merely confirmed his doubts concerning the second part of the article. The tribunal must refuse to embody in an award a settlement which it considered to have been reached in an improper manner.

75. Mr. TUNKIN expressed approval of the amendments proposed by Sir Gerald Fitzmaurice and Mr. El-Erian.

76. Mr. BARTOS said that he was opposed to any confirmation of a settlement by an arbitral tribunal, for such a procedure, as followed in the Egyptian Mixed Courts, implied approval of the settlement and gave it executory force. He noted that the International Court of Justice, under article 68 of the Rules of Court, merely recorded the conclusion of a settlement without committing itself on the points of law covered by it. He was firmly convinced of the inadvisability of basing the article on an analogy with national civil procedure. It should end with the words " settlement reached by the parties ".

77. He agreed with Mr. El-Erian on the desirability of replacing the word " may " by " shall ". If the tribunal declined to take note of a settlement, the inference could be that it disapproved of the settlement, and it would be guilty of discourtesy to both parties.

78. Mr. YOKOTA, quoting the Special Rapporteur's own comment on his article (see A/CN.4/113, para. 21), said that it appeared to refer to the second part of the article and thus tended to support Mr. El-Erian's amendment. He suggested that the words " if it thinks fit " should be moved to the end of the article.

79. Mr. AGO said that it seemed to be generally agreed that it was the tribunal's duty to take note of a settlement and he, himself, was at one with Sir Gerald Fitzmaurice in considering that the second half of the article could do no harm.

80. He was also inclined to accept Mr. Yokota's suggestion but proposed that in any case the two different provisions in the article should be put in separate sentences. He suggested a text on the following lines :

> " If the parties reach a settlement, it shall be taken note of by the tribunal. At the request of the parties, the tribunal may, if it thinks fit, embody the settlement in an award."

81. The CHAIRMAN pointed out that " may, if it thinks fit ", meant no more than " may ".

82. He put to the vote Mr. Ago's proposal that the two provisions in the article should be expressed in separate sentences.

The proposal was adopted by 14 votes to none, with 1 abstention.

83. The CHAIRMAN put to the vote Mr. El-Erian's proposal (para. 69 above) that the word " may " in the first sentence should be replaced by " shall ".

The proposal was adopted by 14 votes to none, with 1 abstention.

84. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's proposal that the second sentence of the article be retained.

The proposal was adopted by 13 votes to 1, with 1 abstention.

85. The CHAIRMAN put article 27, as amended, to the vote.

Article 27, as amended, was adopted by 13 votes to none, with 2 abstentions.

Composition of the Drafting Committee

86. The CHAIRMAN proposed that, since Mr. Ago's collaboration was required in connexion with a number of articles, he should be appointed a member of the Drafting Committee.

It was so decided.

The meeting rose at 6 p.m.

[8] *Official Records of the General Assembly, Eighth Session, Supplement No. 9.*

446th MEETING

Tuesday, 20 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ARTICLE 28

1. Mr. TUNKIN thought that the inclusion of the word "normally" in the first part of the article tended to detract from the prestige of the *compromis*. Since the rest of the article made it clear that the principle was open to exceptions, there seemed no need for the word at all.

2. The CHAIRMAN pointed out that the word "normally" did not appear in the corresponding article (article 23) in the Commission's 1953 draft.[1]

3. Mr. SCELLE, Special Rapporteur, said that he had inserted the word "normally" precisely in order to emphasize that the general principle was that the award should be rendered within the period fixed by the *compromis* and that the rest of the provision was purely exceptional.

4. The CHAIRMAN put article 28 to the vote.

Article 28 was adopted by 16 votes to 1.

ARTICLE 29

5. Mr. SCELLE, Special Rapporteur, introducing article 29, said that he did not regard paragraph 3 as absolutely essential.

6. Mr. VERDROSS said that he was in favour of retaining paragraph 3, which very closely corresponded to Article 53, paragraph 2, of the Statute of the International Court of Justice.

7. Mr. YOKOTA expressed some doubts regarding the wording of paragraph 3. It seemed to imply that the tribunal had the power to render an award but was under no obligation to do so. If that construction was correct, the paragraph would conflict with the provision in paragraph 1 that the other party could call upon the tribunal to decide in favour of its claim. He would have thought that the tribunal, once requested by the other party to make an award, was bound to do so, provided that it had satisfied itself that the claim was well founded. He was, however, in favour of retaining the paragraph in a modified form.

8. Mr. SCELLE, Special Rapporteur, said that the word "*pourra*" in the French text should be taken in the sense of the English "can" rather than "may".

9. Mr. MATINE-DAFTARY inquired whether in paragraph 3 the Special Rapporteur had in mind an award by default or an award reached with both parties present. If it was the former, the fact should be stated, since such an award was challengeable.

10. Mr. SCELLE, Special Rapporteur, said that he would add the words "by default" after "award", since that was what he had had in mind.

11. Mr. SANDSTRÖM doubted whether the Commission had really envisaged the possibility of a challenge. He was opposed to introducing the idea, for the essence of arbitral procedure was that it should be rapid and that the award should be executed without delay. He did not consider it necessary to model the rules of arbitral procedure in all particulars on those of judicial procedure.

12. He would prefer "*rendra*" to "*pourra rendre*" in the French text of paragraph 3, for he had always interpreted the verb "*pourra*" in the context as equivalent to the English "may". He would also suggest using in paragraph 3 a similar formula to that in paragraph 1, namely, "decide in favour of the other party's claim", instead of "render an award".

13. Mr. SCELLE, Special Rapporteur, thought that the verb "*rendra*" would make the sentence too categorical. The tribunal must have time in which to reflect on the case. On the other hand, he saw no objection, apart from a stylistic one, to using the same formula in paragraph 3 as in paragraph 1.

14. Mr. AMADO suggested that the words "before rendering the award" should come at the beginning and not at the end of paragraph 2. He was not opposed to paragraph 3.

15. Mr. EL-ERIAN said that he agreed in principle with the article. Of the three points made in the article, the first two, namely, the tribunal's power to render an award by default and its power to grant the defaulting party a period of grace, should not be expressed in an imperative form. The third point, the duty of the tribunal to satisfy itself that it had jurisdiction and that the claim was well founded, should, however, be expressed in mandatory terms. He suggested wording paragraph 3 as follows: "On the expiry of this period of grace, the tribunal, before rendering an award, must satisfy itself..."

16. Mr. ZOUREK said that the article appeared to be based on the assumption that the award would always be made in favour of the non-defaulting party which called upon the tribunal to decide in favour of its claim. If, however, the tribunal found that its claim was not well founded, then, though bound to make an award, it must repect the party's application. The case was perhaps a rather hypothetical one, but in a model draft meant to cover all eventualities, it was impossible

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[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

to exclude such a possibility. He accordingly preferred the phrase " render an award " to that proposed by Mr. Sandström.

17. Mr. SANDSTRÖM said that paragraph 3 really covered two points : the obligation to render an award and the question of the content of that award. Although the tribunal must in all cases render an award if so requested, that award did not necessarily have to be favourable to the party requesting it.

18. Mr. SCELLE, Special Rapporteur, said that the discussion had convinced him of the desirability of keeping article 29 as it stood, subject to minor drafting changes.

19. Mr. BARTOS observed that the article, and Article 53 of the Statute of the International Court on which it was based, marked one step forward in the general progress to be observed in procedural matters. In effect, it abolished the old-fashioned judgement by default, which involved an automatic presumption of the formal justness of a suit for no other reason than the default of the defendant, a judgement which was not based on the conviction of the judges and which was liable to challenge. He agreed with the view just expressed by the Special Rapporteur.

20. Sir Gerald FITZMAURICE remarked that the case aptly mentioned by Mr. Zourek might well arise, especially in cases where neither party was strictly speaking claimant or respondent. The " other party " referred to in the article would not necessarily be the claimant. The whole cause of the confusion was the word " claim ", which was also used in Article 53 of the Statute of the International Court, though there the difficulty was less apparent. He suggested, for the consideration of the Drafting Committee, replacing it by " submission " or " case ".

21. Mr. SCELLE, Special Rapporteur, accepted Sir Gerald Fitzmaurice's suggestion.

22. The CHAIRMAN said that the Commission appeared to be agreed that the scope of the article was to give the tribunal the right not only to rule in favour of the party which appeared but also to dismiss that party's case if it was not well founded. The mere default of a party did not entitle the other party to a decision in its favour. Even *ex parte* evidence might not support the claim.

It was so decided.

Article 29, as modified, was adopted unanimously.

ARTICLE 30

23. The CHAIRMAN recalled the Commission's decision (442nd meeting) to deal with the provisions of article 13, paragraph 2, in connexion with the articles relating to the award. Article 13, paragraph 2, read : " All questions shall be decided by a majority of the tribunal."

24. Mr. SCELLE, Special Rapporteur, said that article 30 appeared to be the appropriate context for such a provision. Referring to the article itself, he said that it contained merely a description of the usual procedure.

25. Mr. AGO observed that paragraphs 1 and 2 of the article gave the impression that it would be the normal proedure for the expression of separate or dissenting opinions to be allowed, unless the *compromis* directed otherwise. Article 2, on the other hand, in listing the possible contents of the *compromis,* gave the impression that it was for the parties to stipulate whether or not dissenting opinions might be attached to the award. There thus appeared to be some contradiction between the two articles. Moreover, provision for the delivery of separate or dissenting opinions by judges was understandable enough in the case of so large a body as the International Court of Justice, but there was far less justification for it in a small arbitral tribunal. It should also be borne in mind that there was a risk that the authority of the award would be impaired if it were made a general rule — instead of a possibility — for arbitrators to express dissenting opinions. In any case, he would like paragraphs 1 and 2 of the article to be brought into line with the system adopted in article 2.

26. Mr. SCELLE, Special Rapporteur, while agreeing that the expression of dissenting opinion by members of a small tribunal might well weaken the force of the award, thought it preferable to leave the arbitrators free to attach their dissenting opinions to the award, unless otherwise provided in the *compromis.*

27. Sir Gerald FITZMAURICE fully agreed with the Special Rapporteur. Though, as he understood it, the delivery of dissenting opinions was not permitted in municipal courts under continental procedure, it was permitted in Anglo-Saxon law. He regarded it as of great importance to allow the attaching of dissenting opinions to the award, in the absence of any contrary stipulation in the *compromis.* Any dissenting opinion, in tribunals consisting of an arbitrator appointed by each party and an independent umpire, was usually held by an arbitrator appointed by one of the parties. The ideal was naturally for the tribunal to be unanimous, but if it were not, the expression of a dissenting opinion might be of psychological value through the assurance it gave to the losing party that its case had been thoroughly considered. A further consideration was that the dissenting opinion might contain statements of considerable value on points of law. He would, therefore, prefer to keep the article as it stood.

28. Mr. AGO agreed that there were arguments for and against giving arbitrators the opportunity of attaching dissenting opinions to an award. Whichever solution was adopted, however, it was necessary to decide definitely whether, in the absence of any relevant provision in the *compromis,* the arbitrators had or had not the right to attach dissenting opinions to the award. It might be inferred from article 2 that they had not the right, whereas article 30 seemed to suggest that they had.

29. Mr. VERDROSS agreed with Mr. Ago.

30. Mr. BARTOS said that, though an award undoubtedly carried more weight if no dissenting opinion were expressed, the arguments were stronger in favour of permitting the expression of dissenting opinions. Since such opinions were in the nature of a criticism of the award, the realization that they would be made public tended to give tribunals a greater sense of responsibility and to make them more careful in drawing up the award. He, too, was therefore in favour of the article as it stood, on the understanding that no dissenting opinions could be attached to awards in the case of adjudication *ex aequo et bono.*

31. A separate, though relevant, question which might be considered was whether, as was the practice in the International Court of Justice, judges voting for an award on different grounds from the rest of the tribunal could give a special explanation of their reasons.

32. He noted that the question of the safe keeping of the records of arbitral proceedings, a matter which followed on from article 30, had not been dealt with anywhere in the draft. Presidents of arbitral tribunals were generally regarded as bound to preserve the records of proceedings for some years. That, as was shown by the loss of the records of a Latin-American arbitration case with the private baggage of the president of the tribunal, was not a very satisfactory arrangement. The Commission might consider whether such records might, for instance, be deposited with the Registrar of the International Court of Justice, the International Bureau of the Permanent Court of Arbitration or the Secretary-General of the United Nations for safe keeping.

33. Mr. AMADO said that he remained faithful to the traditional principle that the purpose of arbitration was to put an end to disputes ; that purpose could best be served by discouraging the practice of separate or dissenting opinions. On the whole, the provisions of article 30 took into account the position of those jurists who, like himself, favoured the traditional system. If those provisions were retained, however, it would be necessary to redraft article 2, sub-paragraph 8.

34. Mr. LIANG, Secretary to the Commission, said that sub-paragraph 8 of article 2 was in the second, or optional, section of the article. It was not essential for the *compromis* to contain a clause concerning the right of members of the tribunal to attach dissenting opinions to the award.

35. Under the provisions of article 30, it was clear that, if the parties did not exercise the option contained in article 2, sub-paragraph 8, the members of the tribunal had the right to attach dissenting opinions to the award. In order to make the meaning clearer, it was desirable to use in article 30, paragraph 2, the same language as in the second sentence of article 30, paragraph 1. Paragraph 2 would then begin as follows : " Unless the *compromis* excludes the expression of separate or dissenting opinions, any member of the tribunal may attach . . ."

36. There was, however, a gap in the model draft to which the Drafting Committee could perhaps devote its attention. In accordance with article 9 as adopted by the Commission, the tribunal could render a decision in the absence of a *compromis,* on the unilateral application of one of the parties. It was desirable to state whether dissenting and separate opinions would be allowed in that event.

37. The CHAIRMAN said he saw no serious contradiction between the provisions of article 30 and those of article 2, sub-paragraph 8. Under article 2, sub-paragraph 8, it was optional for the parties to incorporate in the *compromis* a clause on the subject of dissenting or separate opinions. If they did not do so, then they would not be excluding separate or dissenting opinions and, in accordance with article 30, the expression of such opinions was permissible.

38. In a case where the arbitral tribunal adjudicated in the absence of a *compromis,* the position would be the same, since there was of course no provision on the subject of dissenting or separate opinions; the expression of such opinions was thus permissible.

39. Mr. EL-ERIAN said that he favoured the text of article 30 as proposed by the Special Rapporteur, which constituted a satisfactory compromise between the Anglo-Saxon and the Civil Law systems of procedure.

40. Separate opinions constituted a rich source of literature on international law and should not therefore be discouraged.

41. It was interesting to note that the " Civil Law " countries had subscribed to Article 57 of the Statute of the International Court of Justice, thus recognizing the necessity of permitting dissenting or separate opinions in international courts, although their own systems of judicial procedure did not allow the expression of such opinions.

42. Mr. FRANÇOIS said that the judicial procedure of his country did not permit judges to express separate or dissenting opinions ; he therefore preferred a formulation stating that separate or dissenting opinions could be expressed only if the parties, by the *compromis,* expressly permitted such opinions to be given.

43. If the expression of dissenting opinions was allowed, a " national " arbitrator would feel under an obligation to express such an opinion in every instance in which the award was adverse to his country, with the consequence that the authority of the award would suffer.

44. He wished to refer to the question raised by Mr. Bartos regarding the keeping of the records of the arbitral proceedings and the original of the award. As Secretary-General of the Permanent Court of Arbitration, he (Mr. François) had received a number of requests for the keeping of such records in the archives of that court. In particular, Mr. Max Huber had made such a request, fearing that the records of certain important cases in which he had acted as arbitrator might be lost after his death. It had also been suggested that the International Bureau of the Permanent Court of Arbitration might make it known that it was

prepared to receive in the future records of arbitration proceedings for purposes of safe keeping.

45. Although The Hague Convention of 1907 did not contain any provisions on the subject, he had acceded to some special requests, and he intended to propose to the Administrative Council of the Permanent Court of Arbitration that it should decide to accept all such deposits and make its decision known. If the International Law Commission expressed itself in favour of the idea of giving custody of the records of arbitral proceedings to the Permanent Court of Arbitration, the Administrative Council would be still more likely to give its consent to that proposal.

46. Mr. YOKOTA said that there was no real contradiction between article 30 and article 2, sub-paragraph 8. There might have been such a contradiction if article 2, sub-paragraph 8 had simply referred to the right to attach dissenting opinions to the award ; that provision, however, referred to " the right of the tribunal to attach or not to attach dissenting opinions to the award ".

47. There was, however, some slight discrepancy in the wording of the two provisions. Thus article 2, sub-paragraph 8 only referred to dissenting opinions, whereas article 30 also mentioned separate opinions. There were other discrepancies in the corresponding French texts. The attention of the Drafting Committee should be drawn to those matters.

48. Mr. ZOUREK said that article 25 of the 1953 draft, which stated that, subject to any contrary provision in the *compromis,* any member of the tribunal could attach to the award his separate or dissenting opinion, had not given rise to any comment by Governments.

49. He strongly favoured retaining the substance of that provision as incorporated in article 30.

50. Mr. AGO said that all the members of the Commission agreed that the expression of dissenting or separate opinions should not be prohibited. The question to be decided was whether such opinions should be expressed only if the *compromis* explicitly allowed them, or whether they could be expressed even if there was no reference to the subject in the *compromis.* He thought it was undesirable to encourage the practice of dissenting or separate opinions, which could lead to three different opinions being expressed by the three members of an arbitral tribunal and to a consequent weakening of the moral authority of the award. If the Commission preferred to adopt the criterion set forth in article 30, however, he would not object, provided that the contradiction between the text of the article and that of article 2, sub-paragraph 8 was eliminated.

51. The CHAIRMAN put to the vote the substance of the provision that, subject to any contrary provision in the *compromis,* any member of the tribunal could attach to the award a separate or dissenting opinion. Questions of drafting, including those concerning article 2, sub-paragraph 8 would be dealt with by the Drafting Committee.

The substance of the provision was adopted by 11 votes to none, with 5 abstentions, subject to drafting changes.

Article 30 as a whole was adopted unanimously, subject to drafting changes.

ARTICLE 31

52. The CHAIRMAN said that there had been no comments by Governments on article 31.

Article 31 was adopted unanimously.

53. Mr. BARTOS, in explanation of his vote, said that he had voted in favour of article 31 with the reservation that in cases where the parties empowered the tribunal to decide *ex aequo et bono,* it was not necessary that the award should state the reasons with respect to every point on which it had ruled.

ARTICLE 32

54. The CHAIRMAN said that there had been no comments by Governments on article 32.

Article 32 was adopted unanimously.

ARTICLE 33

55. Mr. SCELLE, Special Rapporteur, said that article 33 was the original work of the Commission and dealt with the question of the rectification of material errors. There had been no comments by Governments on that article.

Article 33 was adopted unanimously.

ARTICLE 34

56. Mr. SCELLE, Special Rapporteur, introduced article 34, which stated that the arbitral award should settle the dispute definitively and without appeal.

57. Mr. VERDROSS suggested the introduction of a proviso along the following lines at the commencement of the article : " Unless otherwise provided in the *compromis* . . ."

58. He was, in principle, in favour of the provision proposed by the Special Rapporteur, but it was clear that States could not be prevented from including in the *compromis* a clause making provision for appeal.

59. Mr. SCELLE, Special Rapporteur, said he could not accept the amendment suggested by Mr. Verdross. It was the basic purpose of arbitration to bring the dispute to an end once and for all.

60. Mr. AMADO said that the notion of appeal was contrary to the whole spirit of arbitration. Article 81 of The Hague Convention of 1907,[2] like article 54 of the 1899 Convention,[3] stated that the arbitral award settled the dispute definitively and without appeal.

[2] See *The Reports to The Hague Conference of 1899 and 1907,* James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), p. 306.

[3] *Ibid.,* p. 85.

Those provisions of the 1899 and 1907 Conventions set forth the basic philosophy of arbitration.

61. Sir Gerald FITZMAURICE said that all the provisions of the model draft were subject to the agreement of the parties. The point raised by Mr. Verdross was therefore already covered.

62. The Drafting Committee should consider whether the general principle that the model draft was subject to the agreement of the parties was in any way prejudiced by such specific references to their agreement as those contained in article 30.

63. Mr. BARTOS said that in principle he agreed with the Special Rapporteur and with Mr. Amado. In practice, however, cases could occur in which the parties concerned established a system of arbitration in two stages. That system had been adopted in particular for disputes of a technical character and for minor political disputes. The system of arbitration at the local level with the right to appeal to a central arbitral body had been incorporated, for example, in the frontier agreements between Yugoslavia and its neighbours.

64. It was necessary to make some reference to the international practice which had thus developed and which constituted an exception to the general rule that arbitral awards were final. A central arbitral body to which the parties could appeal, particularly in cases where a treaty provision had been infringed, had proved useful. The local arbitration boards had to deal with a considerable number of disputes, and the central arbitral body served to maintain a certain consistency in the decisions.

65. If the Special Rapporteur did not accept the amendment suggested by Mr. Verdross, he would have to abstain when article 34 was put to the vote.

66. Mr. MATINE-DAFTARY said that past experience with appeals in the matter of arbitral awards pointed to the undesirability of arbitration in two stages. He strongly supported the text proposed by the Special Rapporteur.

67. Mr. SCELLE, Special Rapporteur, said that the cases to which Mr. Bartos had referred were not really cases of appeal. What had happened was that treaties had sometimes made provision for a single process of arbitration which was, however, in several stages.

68. Mr. SANDSTRÖM said that, speaking from his own experience, he agreed with Sir Gerald Fitzmaurice that the parties to arbitral proceedings could on occasion provide for an appeals procedure. For the reasons already indicated, they would, however, be free to do so even if the present text of article 34 was retained. It would, in his view, be quite sufficient to indicate in the commentary that, notwithstanding the wording of article 34, it was open to the parties to institute an appeals procedure by agreement if they so desired.

69. If the Commission inserted some such words as " Unless the parties agree otherwise " in article 34, it would have to re-examine the whole draft in order to find out in what other articles the same words should also be inserted.

70. Mr. HSU agreed that as the Commission was laying down rules for sovereign States, it was unnecessary to insert any such proviso anywhere in the draft. The Commission had inserted the proviso in particular places because it had had a specific reason for doing so ; but in the present case, it was not its purpose to encourage the parties to provide for an appeals procedure, and hence no such proviso should be added.

71. The CHAIRMAN said he understood that Mr. Verdross did not wish to press his suggestion provided it was agreed that there was nothing to prevent the parties from providing for appeals by agreement if they so desired.

72. Mr. EL-ERIAN agreed that it would be sufficient to say in the commentary that article 34 laid down the general principle but that States were free to depart from it by agreement if they wished.

73. Mr. AGO said that it would in any case be desirable to delete the words " and without appeal ". The word " definitively " itself conveyed the meaning clearly. Moreover, the Commission could not be sure that it would not in fact become the normal practice to provide for an appeals procedure in international arbitration.

74. Mr. BARTOS supported Mr. Ago's suggestion.

75. Sir Gerald FITZMAURICE also supported the suggestion ; he suggested furthermore that the remainder of the article might be amended to read : " The arbitral award shall be final ", which was the wording normally employed in a *compromis*.

76. The CHAIRMAN put to the vote Mr. Ago's proposal (para. 73 above), on the understanding that the commentary would indicate that States were of course free to provide for appeals by agreement if they so desired.

On that understanding, the proposal was adopted unanimously.

Article 34, as amended, was adopted, subject to any further changes proposed by the Drafting Committee.

ARTICLE 35

77. The CHAIRMAN, introducing article 35 in place of the Special Rapporteur who had been obliged to retire from the meeting, said that it was virtually the same as article 28 of the 1953 draft.

78. Mr. FRANÇOIS pointed out that the second sentence of paragraph 1 applied to both paragraphs. He therefore proposed that it be made a separate paragraph, which would become paragraph 3.

79. Mr. BARTOS supported Mr. François' proposal, but suggested that the Drafting Committee should endeavour to make it clear that execution should be stayed only in respect of that part of the award regarding which an interpretation had been requested.

80. Mr. AGO agreed with Mr. Bartos that the text as it stood was very dangerous. Execution of the whole award would be stayed, under the article as drafted, if one party raised even a small point of interpretation concerning a minor part of the award. There would thus be a risk that requests for interpretation might become common, as a means of delaying the execution of the award. The question whether there should be a stay of execution should be decided by the tribunal to which the request for interpretation was referred, which might, if it saw fit, treat it as a question calling for an urgent decision.

81. Mr. MATINE-DAFTARY supported that suggestion, though it should be made clear that execution should in no case be stayed in respect of parts of the award which were not in dispute.

82. Mr. FRANÇOIS and Mr. ZOUREK pointed out that in very many cases the award was an indivisible whole and that disagreement on the interpretation of any part of it necessarily affected the whole. In their view, the only practical course in case of such disagreement would be to stay execution of the whole award.

83. The CHAIRMAN, speaking as a member of the Commission, said that in cases where the award could be divided into separate parts and the execution of one part did not depend on the interpretation of another, execution should, in his view, be stayed with regard to such parts only as were in dispute. In order to make that clear, however, he agreed that the present text would have to be modified.

84. Sir Gerald FITMAURICE thought a strong case could be made out for leaving the matter of stays of execution to the tribunal to which a request for interpretation was made. On the assumption that Mr. François' proposal would be adopted, he accordingly proposed that the new paragraph 3 should read:

> " In the event of a request for interpretation, it shall be for the tribunal or for the International Court of Justice, as the case may be, to decide whether and to what extent execution of the award shall be stayed pending a decision on the request."

85. The CHAIRMAN put to the vote Mr. François' proposal (para. 78 above) that the second sentence of paragraph 1 should be made a separate paragraph, which would become paragraph 3.

The proposal was adopted unanimously.

86. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's proposal (para. 84 above).

The proposal was adopted by 14 votes to none, with 2 abstentions.

87. Mr. ZOUREK said that he agreed with the comment by the Netherlands Government (A/CN.4/L.71, under article 28) that the time limits fixed in paragraphs 1 and 2 should be the same. In his view, the period of one month, as proposed in paragraph 1, was much too short. He therefore proposed that it be replaced by three months, as in paragraph 2.

The proposal was adopted unanimously.

88. Mr. TUNKIN requested that paragraphs 1 and 2 be put to the vote separately, since although he could vote for paragraph 1, which was consistent with normal arbitral procedure, he could not vote for paragraph 2, the effect of which would be to make the arbitral tribunal, as it were, a court of first instance to the International Court of Justice.

Paragraph 1, as amended, was adopted unanimously.

Paragraph 2 was adopted by 13 votes to 2, with 1 abstention.

Article 35 as a whole, as amended, was adopted by 14 votes to none, with 2 abstentions.

ARTICLE 36

89. The CHAIRMAN, introducing article 36, said that the text was virtually identical with that of article 30 in the 1953 draft.

90. Mr. FRANÇOIS pointed out that the Special Rapporteur had inserted the words " total or partial " under sub-paragraph (*c*). His reason for doing so was obvious, but it might be more accurate to amend the clause in question to read: " including failure to state the reasons for the award or any part thereof ".

91. Mr. LIANG, Secretary to the Commission, said he was somewhat doubtful as to whether failure to state the reasons for the award could be described as " a serious departure from a fundamental rule of procedure ". If the Commission agreed, it might wish to replace the word " including " by the word " or ".

92. Mr. MATINE-DAFTARY said he also had certain doubts regarding sub-paragraph (*c*). There was no clear indication anywhere in the draft what the fundamental rules of procedure were. In any event, departure from the rules of procedure should not, in his view, be regarded as sufficient ground for voiding the award unless the departure had been so material as to exert a direct influence on the award.

93. Sir Gerald FITZMAURICE agreed with Mr. Matine-Daftary. The fundamental rules of procedure in international arbitration were well known and the parties usually adhered to them. It was, in fact, difficult to see what was meant by " a serious departure from a fundamental rule of procedure ".

94. He also had some doubts regarding sub-paragraph (*a*). The tribunal was the judge of its own competence, and any questions that had arisen in that connexion would have arisen and been decided in the opening stages of the proceedings. The provision appeared, in effect, to give a party which for any reason felt aggrieved by the award the right of subsequent appeal against the tribunal's preliminary decision on the question of its competence, and that would surely be most undesirable.

95. Mr. VERDROSS agreed that it was for the tribunal to determine its own competence, but pointed out that it could do so only on the basis of the *compromis* and such other instruments as were applicable. If it acted in an arbitrary manner, for example, if it rendered a decision *ex eaquo et bono* when the *compromis* explicitly debarred it from doing so, it could, he thought, hardly be denied that it had thereby exceeded its powers.

96. Mr. FRANÇOIS agreed with Sir Gerald Fitzmaurice that there was a danger of the parties abusing the right to challenge the validity of an award on the ground that the tribunal had exceeded its powers. In the model draft, however, that danger was minimized by the fact that the challenge was referred to the International Court of Justice. Deletion of sub-pragraph (*a*) from article 36 would not be acceptable to the great majority of States.

97. Mr. AGO thought that in principle Mr. François was undoubtedly correct. The fact remained, however, that sub-paragraph (*a*) might give rise to serious difficulties, since the expression *excès de pouvoir* meant widely different things in different legal systems.

98. He also had certain doubts regarding the wording of sub-paragraph (*b*). For example, much surely depended on the time at which the corruption was discovered, and he thought it advisable to make the text more explicit.

99. He also agreed that the references in sub-paragraph (*c*) to "a serious departure" and "a fundamental rule" introduced two subjective criteria, which would be bound to give rise to difficulties and disputes.

100. As the Special Rapporteur attached great importance to articles 36 and 37, however, he suggested that further consideration of both articles be deferred until Mr. Scelle's return.

It was so agreed.

The meeting rose at 1 p.m.

447th MEETING

Wednesday, 21 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

[Agenda item 2]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

ARTICLE 38

1. The CHAIRMAN, in the continued absence of the Special Rapporteur, introduced article 38, which corresponded to and was almost identical with article 32 of the 1953 draft.[1]

Article 38 was adopted by 10 votes to 1, with 1 abstention.

ARTICLE 39

2. The CHAIRMAN introduced article 39, which corresponded to article 29 of the 1953 draft and followed it very closely except that two of the paragraphs had been broken up and the words "whenever possible" inserted in what had been the first sentence of paragraph 4 and a reference to the Permanent Court of Arbitration in what had been the second sentence.

3. Mr. YOKOTA noted that the time limits imposed in paragraph 2 were the same as those laid down in Article 61, paragraphs 4 and 5, of the Statute of the International Court of Justice. As was clear from the commentary on the 1958 draft,[2] in cases where an arbitral *compromis* had provided for revision, such as the *Pious Fund of the Californias* and the *North Atlantic Coast Fisheries* cases, the time limit for applications for revision had always been much shorter, in the cases cited eight days and five days respectively. The arbitral procedure which the Commission was engaged in formulating could not, of course, be compared to the procedure followed in such cases, but even in the case of arbitration based on an arbitration treaty such as the Pact of Bogotá[3] the time limit for applying for revision had been only one year. There was, in his view, good reason for the great discrepancy which existed in the matter as between the judicial procedure of the International Court of Justice, which was a permanent organ, even if its members changed, and arbitral procedure, where it would be exceedingly difficult to reconvene the tribunal after a lapse of years. Furthermore, arbitration depended essentially on the will of the parties and it was doubtful, to say the least, whether their will and their relations toward each other would remain unchanged for so long a period. In his view any question which arose as late as ten years after the rendering of the award should be regarded as a new dispute and should be submitted to a new tribunal. He therefore proposed that in paragraph 2 the words "within ten years" be replaced by, say, "within five years".

4. Sir Gerald FITZMAURICE drew attention to a discrepancy between the English text of article 39, paragraph 1, which referred to "some fact of such a nature as to have a decisive influence on the award" and the English text of Article 61, paragraph 1, of the Statute of the International Court of Justice, which

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[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9,* para. 57.

[2] *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations Publication, Sales No.: 1955.V.1), p. 101.

[3] American Treaty on Pacific Settlement (Pact of Bogotá), signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series,* vol. 30, 1949, No. 449, p. 55.

spoke of "some fact of such a nature as to be a decisive factor". In his view the wording used in the Court's Statute was preferable and should be employed in the model draft, since the question whether the fact was of a nature to have a decisive influence on the award was precisely the question which the tribunal would have to consider in the proceedings for revision.

5. He also felt that article 39 should contain some reference to the question of stay of execution; such a provision might well be along the same lines as that which the Commission had adopted in the case of article 35 (446th meeting, para. 84).

6. Finally, he agreed with Mr. Yokota that three years, or at most five, was an ample time limit for applications for revision.

7. Mr. MATINE-DAFTARY pointed out that a provision fixing a time limit of ten years meant only that applications for revision would be barred after the expiry of that period. To fix any shorter period was, in his view, unacceptable.

8. Mr. ZOUREK said that a particularly large number of Governments had criticized article 29 of the 1953 draft (see A/CN.4/L.71). Many of them had expressed the view that the article was inconsistent with the principle of the finality of the award. He remained nonetheless convinced that the Commission must not exclude all possibility of revising the award, although it might be desirable, as had been suggested by a number of Governments, to include a provision enabling the parties to agree in advance that the award should be final.

9. Many Governments had also criticized the proposed recourse to the International Court of Justice as contrary to the fundamental principles of international arbitration. In his view, the provision in question was undesirable for the further reason that it would only encourage the losing party to apply for revision. In his view, the discovery of any new fact of such a nature as to have a decisive influence on the award should be regarded as creating a new dispute, which should be settled by any of the means of peaceful settlement which the parties had at their disposal or by the application of the rules contained in the model draft which had been accepted by the parties in an express agreement.

10. Although he agreed with Mr. Yokota that the period within which applications for revision must be submitted should not be too long, it should not be too short either, since it was quite impossible to foresee all the circumstances which might lead to the discovery of the new fact.

11. Mr. AMADO said that if the Commission had been engaged in drafting a convention, he would have voted against article 39, as he had voted against article 29 in the 1953 draft, and for the same reasons. There was in Europe, largely under the influence of the mixed arbitral tribunals, a tendency to move away from the traditional view of arbitration as a speedy and effective procedure for the definitive settlement of international disputes, without any possibility of revision or appeal. In inserting in its model draft a provision concerning appeals and revision procedures, the Commission would be acting at direct variance with what all the authorities had said on the subject.

12. Mr. SANDSTRÖM said that he had the same doubts about article 39 as Mr. Amado. If the majority of the members of the Commission were in favour of retaining the article, he thought they should at least accept Mr. Zourek's suggestion (para. 8 above) that a provision be inserted enabling the parties to agree in advance that the tribunal's award should be final.

13. Sir Gerald FITZMAURICE said that he was largely in agreement with Mr. Amado's remarks but felt there could be little harm in retaining article 39 since the occasions on which it could be invoked would, in his opinion, be exceedingly rare. Before a dispute was ever referred to arbitration, there would be a fairly lengthy process of discussion between the parties on the facts of the case, and the arbitral proceedings themselves would take considerable time; it therefore seemed most unlikely that any crucial new fact would come to light after the award.

14. Mr. VERDROSS, referring to Mr. Zourek's suggestion, said that The Hague Conventions of 1899 and 1907[4] approached the question of revision from the opposite standpoint. The first paragraph of article 83 of the latter instrument read:

> "The parties can reserve in the *compromis* the right to demand the revision of the award."

15. Mr. LIANG, Secretary to the Commission, said that, particularly in view of the changed nature of the draft, he thought it would be inadvisable to insert anything which might suggest that the Commission was in favour of a revision procedure if, in fact, it was not; owing to the Commission's high standing and repute the draft would undoubtedly exert a great influence on the parties when they came to prepare the *compromis*, and it would be unfortunate if one party could point to a provision which appeared to sanction or even encourage a practice to which the majority of the Commission were, in fact, opposed. If the majority of the members of the Commission were in favour of a revision procedure, however, Mr. Zourek's suggestion might afford an acceptable solution.

16. M. YOKOTA thought it would be undesirable to insert at the beginning of article 39 any words such as "Unless the parties agree otherwise", for the reasons indicated during discussion of a similar point which had arisen in connexion with article 34 (446th meeting, paras. 56-76). He understood that it would in any case be stated explicitly in the preamble that the parties were at liberty to include in the *compromis* any other provisions they chose.

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[4] Convention for the Pacific Settlement of International Disputes, signed at The Hague on 29 July 1899, and Convention for the Pacific Settlement of International Disputes, signed at The Hague on 18 October 1907. See *Reports to the Hague Conferences of 1899 and 1907*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1917), pp. 32 ff. and 292 ff.

17. Sir Gerald FITZMAURICE agreed with Mr. Yokota that Mr. Zourek's suggestion should be taken into account not by means of a specific proviso in article 39, but by a general proviso applying to the whole draft.

18. As the Special Rapporteur apparently attached great importance to article 39, he thought it would be undesirable to adopt the alternative approach suggested by Mr. Verdross without hearing Mr. Scelle's views.

19. Mr. VERDROSS pointed out that he had made no suggestion, but had merely drawn attention to the provisions of The Hague conventions.

20. Mr. SANDSTRÖM said that one way of taking Mr. Zourek's suggestion into account would be to add a suitable passage in the second part of article 2.

21. The CHAIRMAN put to the vote the principle that the parties could by prior agreement stipulate that applications for the revision of the award would not be admissible.

The principle was adopted by 15 votes to none, with 1 abstention.

22. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's proposal (para. 4 above) that the words "to have a decisive influence on the award" should be replaced by the words "to be a decisive factor" used in Article 61, paragraph 1, of the Statute of the International Court of Justice.

The proposal was adopted by 14 votes to 1.

After some discussion in which it was pointed out that the French and English texts of Article 61, paragraph 1, of the Statute of the Court did not exactly correspond, it was agreed that the expression " exercer une influence décisive *" in the French text of article 39, paragraph 1, would remain unchanged.*

Paragraph 1 was adopted by 14 votes to none, with 1 abstention.

23. The CHAIRMAN put to the vote Mr. Yokota's proposal (para. 3 above) that the words "five years" should be substituted for "ten years" in paragraph 2 of the article.

The proposal was rejected by 7 votes to 5, with 3 abstentions.

Paragraph 3 was adopted by 14 votes to none, with 2 abstentions.

Paragraph 3 was adopted by 15 votes to none, with 1 abstention.

Paragraph 4 was adopted by 15 votes to none, with 1 abstention.

Paragraph 5 was adopted by 13 votes to none, with 2 abstentions.

24. Mr. AGO, referring to the words "that tribunal, as reconstituted," in paragraph 6, pointed out that the tribunal might be a permanent one, in which case it would not have to be reconstituted. He proposed that the Drafting Committee should consider replacing the phrase by the words "the tribunal which rendered the award", used in paragraph 5.

It was so decided.

25. Mr. VERDROSS, referring to paragraph 6, said that it was impossible for an application to be made by a single party to the Permanent Court of Arbitration at The Hague. The Permanent Court was merely a panel of judges from which an arbitral tribunal could be selected only by agreement between both parties. He suggested the deletion of the words "by either party".

26. Mr. ZOUREK observed that the clause was a model for possible inclusion in arbitration agreements. If the parties were agreed on its inclusion, then application to the Permanent Court of Arbitration could be made by one party.

27. The CHAIRMAN recalled that the Commission had deleted the reference to the Permanent Court of Arbitration from article 3.

28. Mr. EL-ERIAN, agreeing with Mr. Verdross, added that the words "by either party either, and preferably" were clumsy in English. He would prefer the wording of article 29, paragraph 4, of the Commission's 1953 draft.

29. Sir Gerald FITZMAURICE was also in favour of omitting all reference to the Permanent Court of Arbitration from the paragraph. It was to be noted that there was no reference to that court in article 35, paragraph 2, which dealt with a similar subject (disputes concerning the interpretation of the award).

30. He therefore proposed that the words "either, and preferably," and the words "or to the Permanent Court of Arbitration at The Hague" should be deleted from paragraph 6.

The proposal was adopted by 11 votes to 3, with 3 abstentions.

Paragraph 6, as amended, was adopted by 13 votes to 4.

31. Mr. BARTOS said that he had taken no part in the discussion on article 39 and, though he had no objection to many of the provisions on strictly technical grounds, had abstained from voting on various paragraphs on theoretical grounds and because he was as yet undecided whether the tendency to provide for the revision of arbitral awards was to be opposed.

32. The whole purpose of arbitration being to settle disputes, awards should be final and it was theoretically inconceivable that they could be reviewable. The possibility of their being challenged in the light of new facts as long as ten years after they had been rendered created uncertainty and was at variance with the true purpose of arbitration. If doubt was cast on the substantive truth of the facts on which an award was based, there would in effect be a new dispute and the parties should take steps to have that new dispute settled. The assimilation of arbitral procedure to national civil procedure and to the procedure of the International Court of Justice in the matter of revision of

judgements was conceivable only in the case of permanent arbitration machinery established under arbitration treaties or clauses, but not in the case of *ad hoc* arbitration.

33. He had voted against paragraph 6 because he could not see how an application for revision could be brought before a tribunal which had ceased to exist. And if it were made to a new jurisdiction, the decision of that jurisdiction, according to established legal doctrine, constituted a new award.

34. Mr. AMADO said that since article 39 was merely part of a model draft he would not oppose its adoption. There were, however, some very singular features in the article and particularly in paragraph 6. It was, for instance, by virtue of an arbitral award that large areas had been adjudged part of the territory of Brazil. Yet, according to the article, so momentous a decision would still be subject to revision as much as ten years after the award had been made. The idea, too, of making an application for revision to the same tribunal ten years later was particularly unrealistic; surely, the tribunal would have dispersed and some of its members might even be dead.

35. Mr. ZOUREK, explaining his vote on paragraph 6, said that the idea of preserving continuity between the jurisdiction making the award and the jurisdiction considering the application for its revision was entirely unrealistic. Even permanent tribunals changed their membership over the years. In any case the procedure of revision of an award was so exceptional that it seemed inappropriate to specify what institutions were to deal with the matter. Advance provision for a body competent to revise the arbitral award would make it easy for the losing party to have recourse — even if only in order to satisfy public opinion — to the procedure provided for. That would be contrary to the nature of arbitration, which should be final.

36. Sir Gerald FITZMAURICE said that the possibility of the award being revised raised automatically the question of stay of execution. He wished, therefore, to propose the addition to the article of a seventh paragraph worded on the lines of the provision adopted by the Commission as part of article 35 (446th meeting, para. 84): "It will be for the tribunal to decide whether, and if so to what extent, execution shall be stayed."

37. The CHAIRMAN drew attention to a similar proposal made in the comments of the Netherlands Government on article 29 of the 1953 draft (see A/CN.4/L.71).

38. Mr. SANDSTRÖM pointed out that a proviso would be necessary to cover the case where execution would already have taken place by the time the application for revision was made.

39. Mr. AMADO said that it was the essence of an arbitral award that it was binding on the parties and should be carried out forthwith. He failed to see how there could be any question of stay of execution ten years after the award had been rendered.

40. Mr. AGO did not think that there was any close analogy between the situations covered by article 35 and by article 39. In the first case, it might be quite logical to provide for a stay of execution of the award since there was some doubt concerning the meaning of the award. In the siutation envisaged in article 39, however, no such doubt existed, and as a rule the sentence should be executed so long as no revision had taken place. In exceptional cases it would always be open to the tribunal to prescribe a stay of execution as a provisional measure under article 23, if the circumstances so required.

41. Sir Gerald FITZMAURICE said that he did not think that his proposal raised any serious difficulty. Although those who had spoken against it generally assumed that the application for revision would not be made until ten years after the award had been rendered, in point of fact it was most likely that such application would be made very soon after the rendering of the award. In deference to Mr. Sandström's objection, the additional paragraph might begin with the words "Except in cases where the award has already been executed,". He did not, however, wish to press his proposal.

42. Mr. SANDSTRÖM pointed out that Article 61, paragraph 3, of the Statute of the International Court of Justice provided the exact opposite of Sir Gerald's proposal; it provided that the Court might require previous compliance with the terms of the judgement before admitting proceedings in revision. He thought if preferable not to include the paragraph proposed by Sir Gerald Fitzmaurice.

43. Mr. EL-ERIAN said that the Commission's text, being a model draft, should be as complete as possible. The possibility of the revision of an award undoubtedly raised the problem of stay of execution, and some provision for that eventuality should therefore be made in the draft.

44. The CHAIRMAN pointed out that, Sir Gerald Fitzmaurice having, in effect, withdrawn his proposal, the matter was no longer under discussion.

Article 39 as a whole, as amended, was adopted by 13 votes to 1, with 3 abstentions.

45. Mr. TUNKIN, explaining his vote on article 39, said that he was substantially in agreement with Mr. Amado and Mr. Zourek.

46. He had voted in favour of paragraphs 1 to 5 because those paragraphs contained some technical rules which in themselves were unobjectionable and which could be accepted by States if they chose to make some provision regarding revision. It was understood that the interested parties could decide that no revision was possible.

47. He had voted against paragraph 6 because that paragraph contained elements drawn from both arbitral and judicial procedure, which it was advisable to keep

separate. That paragraph had the additional defect of introducing indirectly the compulsory jurisdiction of the International Court of Justice. Lastly, like some other provisions of the model draft, the paragraph in question tended to make the International Court of Justice an appeal court to which the arbitral tribunal would be subordinated.

48. In view of his objections to paragraph 6, he had abstained when article 39 as a whole was put to the vote.

49. Mr. EL-ERIAN proposed that the Drafting Committee should be requested to consider the question of including in the draft a provision dealing with the stay of execution in cases of proceedings in revision.

50. Mr. YOKOTA said that he could see no reason why a provision similar to that adopted for article 35 should not be included in connexion with the parallel case of proceedings in revision. He supported Mr. El-Erian's proposal.

Mr. El-Erian's proposal was adopted by 9 votes to 5, with 2 abstentions.

51. Mr. MATINE-DAFTARY said that the decision could not simply be passed on to the Drafting Committee in that form, without any guidance. The provision to be drafted should, for instance, state that an application for revision would not *per se* operate to suspend execution; some action by the tribunal would be required for that purpose. To admit that execution could be stayed by a mere application for revision would be a grave blow to the authority of the *res judicata.*

52. The CHAIRMAN said that, Sir Gerald Fitzmaurice's proposal (paras. 37 and 42 above) having been withdrawn, he assumed, by implication, that the Drafting Committee would work on the basis of the proposal by the Netherlands Government.

53. Mr. AGO said that the content of the provision was still undecided; there had been no question of approving the Netherlands proposal.

54. Mr. EL-ERIAN said that his proposal had merely been that the Drafting Committee should discuss the question and report on how it thought it should best be dealt with. He had an open mind on the content of the text and on its place in the draft. A provision on the subject could, for instance, figure in the *compromis,* in which case the proper place for the text would be in article 2.

55. The CHAIRMAN said that any such provision could obviously refer only to stay of execution of the executable and unexecuted portion of the award. The Drafting Committee must, however, have something on which to work, since it only had the power to give more precise expression to ideas already accepted by the Commission.

56. Mr. AGO said that the Commission had decided in principle to include a provision concerning a stay of execution in cases where revision was applied for. It still had to consider, however, the content of that provision.

57. He thought the Commission would be treading on dangerous ground if it inserted a provision which enabled a party to obtain a stay of execution of the award by merely making an application for its revision.

58. Mr. AMADO said that, in admitting the concept of the revision of the award in its draft, the Commission had made a concession to certain modern trends and had departed from the traditional view of arbitration. According to that traditional view, arbitral awards were never executory; they were binding on the parties, but execution was a matter of good faith.

59. When two parties agreed to submit a dispute to arbitration, it had to be assumed that they wished to bring the dispute to an end in good faith.

60. Mr. YOKOTA agreed with Mr. Ago that the Commission had still to decide on the content of the provision regarding stay of execution in cases where the revision of an award was applied for.

61. The language suggested by the Netherlands Government was too broad: it would mean that execution would be stopped as soon as an application for revision was submitted. He preferred, for his part, a provision along the lines of Article 61, paragraph 3, of the Statute of the International Court of Justice.

62. Sir Gerald FITZMAURICE said that he did not favour the language of Article 61, paragraph 3, of the Statute of the International Court of Justice. It did not seem reasonable for a tribunal to require previous compliance with the terms of an award when that tribunal was about to admit proceedings in revision.

63. If, at the time of an application for revision, the award had already been executed, the question of a stay of execution did not, of course, arise. If, however, the award had not been executed, there appeared to be no objection to allowing the applicant to put the matter to the tribunal; it would then be for the tribunal to decide whether to grant a stay of execution or not.

64. He therefore suggested that the provision should be drafted along the following lines:

> "Unless the award has already been executed, it will be for the tribunal to decide whether, and if so to what extent, a stay of execution shall be granted."

65. Mr. AGO said that it would be better not to make any reference to the case of an award already executed. Such a reference would almost seem an invitation to a dissatisfied party not to execute the award, so that, by making an application for revision, it could obtain from the tribunal a stay of execution.

66. Mr. EL-ERIAN proposed that the provision under discussion should be drafted along the following lines:

> "The tribunal or the Court may, at the request of the interested party, grant a stay of execution pending the final decision on the application for revision if circumstances so require."

Mr. El-Erian's proposal was adopted by 13 votes to 1, with 3 abstentions, subject to drafting changes.

ADDITIONAL ARTICLE PROPOSED BY MR. BARTOS

67. Mr. BARTOS said that according to current practice all the documents relating to an arbitral tribunal's proceedings remained with the president of the tribunal. That practice could give rise to difficulties. In the first place, those documents might be required later for the purpose of an application for the annulment or for the revision of the award. In the second place, the records of the proceedings were of interest to the international community and to jurists.

68. He therefore proposed that an additional article be introduced relating to the deposit of the documents relating to the tribunal's proceedings. Subject to final drafting by the Drafting Committee, he proposed that the new article should be drafted along the following lines.

69. A first paragraph would state that if, after the expiry of the time-limit prescribed in article 35, paragraph 1, the arbitral tribunal had not received a request for interpretation, or, having received such a request, had given a decision thereon, the said tribunal would deposit all its documents with the Permanent Court of Arbitration, except where the parties had by agreement designated another depositary.

70. A second paragraph would state that the president of the tribunal would be responsible for carrying out the provisions of the previous paragraph.

71. Lastly, provision could also be made for the agreement of the parties concerning the disclosure or non-diclosure of the proceedings to third parties.

72. Sir Gerald FITZMAURICE said that the proposal made by Mr. Bartos was in principle an excellent one. It was also desirable that arbitration proceedings should be accessible to persons who might wish to inspect them for purposes of study. There might, however, be cases in which the parties wished to keep the proceedings private and it was therefore desirable to include some provision to cover that situation.

73. Mr. FRANÇOIS said that the fact that the documents relating to arbitral proceedings were deposited with the archives of the Permanent Court of Arbitration did not in any way imply that they would be made available to persons wishing to inspect them. In fact, whenever in his capacity as Secretary-General of that Court he received a request for the inspection of arbitral proceedings kept in those archives, he would transmit the request to the president of the arbitral tribunal concerned or to the parties.

74. The parties to a dispute were, of course, free to agree that the documents relating to the arbitration should remain secret after they had been deposited with the Permanent Court of Arbitration, and the Court would naturally respect the agreement of the parties in that regard.

75. Mr. LIANG, Secretary to the Commission, said that if the parties agreed to deposit the documents relating to the proceedings with the Permanent Court of Arbitration, it was desirable to make those documents available for publication. The publication of contemporary awards would help to enrich the contents of the *Reports of International Arbitral Awards,* the first six volumes of which had already been published by the United Nations. The seventh volume was being printed.

76. With regard to the additional article proposed by Mr. Bartos, he said it was perhaps desirable that it should be drafted in terms which did not suggest that there was any obligation to deposit the documents with the Permanent Court of Arbitration, or indeed with any third party. The parties to a case might feel that the documents relating to it were of an absolutely confidential character and hence might not wish to deposit them with a third party at all.

77. Mr. SANDSTRÖM said that the proper context for the article proposed by Mr. Bartos might be the second, or optional, part of article 2, where it could be stated that the parties could, if they so desired, include a provision in the *compromis* referring to the deposit of the documents relating to the proceedings and their publication or non-publication.

78. Mr. BARTOS said that he would submit at the next meeting a formal proposal taking into consideration the suggestions made by Sir Gerald Fitzmaurice and the Secretary to the Commission. His only purpose was to include a provision concerning the custody of the documents relating to arbitral proceedings.

The meeting rose at 1 p.m.

448th MEETING

Thursday, 22 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ADDITIONAL ARTICLE PROPOSED BY MR. BARTOS *(continued)*

1. Mr. BARTOS introduced the following draft of the additional article proposed by him (447th meeting, paras. 68-72):

> "If, after the expiry of the time limit prescribed in article 35, paragraph 1, the arbitral tribunal has not received a request for interpretation, or, having received such a request, has given a decision thereon, the said tribunal shall, with the consent of the parties, deposit all its documents with the registry of the Permanent Court of Arbitration, unless the parties have by agreement designated another depositary.

"The president of the tribunal shall be responsible for taking the necessary steps with a view to the deposit of the documents with the Permanent Court of Arbitration or with the depositary designated."

The additional article proposed by Mr. Bartos was adopted unanimously, subject to drafting changes.

2. The CHAIRMAN said that the Commission would resume consideration of articles 36 and 37 of the model draft on arbitral procedure when the Special Rapporteur was able to attend its meetings.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-5, A/CN.4/116 and Add.1, A/CN.4/L.72)

[Agenda item 3]

3. The CHAIRMAN invited the Commission to consider the subject of diplomatic intercourse and immunities.

4. Mr. SANDSTRÖM, Special Rapporteur, introduced his report containing a summary of observations received from Governments on the draft articles prepared by the Commission at its ninth session (A/3623, para. 16), together with his conclusions (A/CN.4/116). The observations by the Governments of Finland (A/CN.4/114/Add.2), Italy (A/CN.4/114/Add.3), China (A/CN.4/114/Add.4) and Yugoslavia (A/CN.4/114/Add.5) had been received too late to be taken into account in that summary.

5. The revised versions proposed by him for the draft articles were contained in document A/CN.4/116/Add.1.

6. Government comments had been generally favourable to the draft as a whole. Some Governments, including that of Chile, had conveyed their congratulations to the Commission. The Chilean Government had added that the draft embodied fundamentally the same principles as those stated in the Havana Convention[1] with modifications to adapt them to new conditions; that remark was particularly significant in view of the criticism expressed by certain Latin American delegations in the Sixth Committee of the General Assembly that the draft did not take sufficiently into account Latin American practice and in particular the Havana Convention. In fact, the only important Latin American practice not covered in the draft was that of the right of asylum in an embassy.

7. With regard to the form of the codification, the United States Government had, unlike other Governments, expressed opposition to the suggestion that the draft articles be submitted to the General Assembly in the form of a convention. In that connexion, he drew attention to the various objections to the draft formulated by the United States Government and to his reply to those objections (see A/CN.4/116).

[1] Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

8. He would be glad to hear the views of the other members of the Commission in the course of the general discussion.

9. Mr. TUNKIN said that there were a number of general questions suitable for discussion at that stage. The first question was whether the codification would take the form of a convention or some other form. Another was the question of the application of the articles in time of war, and a third was that of reprisals. Those questions had been raised by Governments in their observations, or had been left undecided by the Commission in its discussions at the ninth session.

10. He suggested that the Commission should discuss those general problems one by one and adopt decisions on each of them. In that way, the work of the Commission could be conducted speedily and fruitfully.

11. Mr. SANDSTRÖM, Special Rapporteur, said that he agreed with the views expressed by Mr. Tunkin.

12. The form which the codification would take was undoubtedly the first of the outstanding general questions to be discussed.

FINAL FORM OF THE DRAFT

13. The CHAIRMAN recalled that, at its ninth session, the Commission had prepared the draft on the provisional assumption that it would form the basis of a convention and had stated in its report that a final decision as to the form in which it would be submitted to the General Assembly would be taken in the light of the comments received from Governments (A/3623, para. 15).

14. The General Assembly, by its resolution 685 (VII) of 5 December 1952, had requested the Commission to undertake, as soon as it considered it possible, the codification of "diplomatic intercourse and immunities" and article 15 of the Commission's statute defined the expression "codification of international law" as meaning the more precise formulation and systematization of rules of international law in fields where there had already been extensive State practice, precedent and doctrine.

15. There had been considerable discussion during the ninth session as to whether the codification should be limited to the recording of existing rules. Some members of the Commission had taken a narrow view of the Commission's task, while others had considered that, in its task of codification, the Commission was not prevented from formulating certain new rules. The Commission had taken no definite decision on that point, which could be decided at the same time as the question of the form in which the draft would be presented.

16. Mr. GARCÍA AMADOR said that if the Commission were to take an early decision on the form of the codification, it might find it easier to draft the detailed provisions, since the form, and to some extent the content, of those provisions would necessarily depend on the type of instrument in which they would be embodied.

17. The experience of the recent United Nations Conference on the Law of the Sea had, however, shown that only after the final adoption of a set of articles was it possible to see more clearly in what type of instrument they could best be included.

18. Without prejudging the Commission's decisions concerning the planning of future work in the light of the proposals made by Mr. Zourek (A/CN.4/L.76), he wished to make some observations concerning the method of work to be followed in dealing with the subject of diplomatic intercourse and immunities.

19. At its ninth session, the Commission had reached an advanced stage of its work on the subject of diplomatic intercourse and immunities, so that it was now already in a position to consider the final draft which it would submit to the General Assembly in the light of the observations by Governments. Inasmuch as, in general, those observations were not likely to lead to any important changes in the draft, he suggested that the task of redrafting the articles on the basis of those observations should be entrusted to a committee composed of the Special Rapporteur and those members who, at the previous session of the Commission, had shown a special interest in the subject.

20. The method of work which he proposed would enable the Commission to devote a few meetings of the current session to the subject of the law of treaties, while the committee dealt with the subject of diplomatic intercourse and immunities.

21. Mr. AMADO said that the Commission should adopt methods of work which would enable it to transmit texts to the General Assembly as speedily as possible. On the whole, he agreed with Mr. García Amador's remarks.

22. It was important that the Commission should take an early decision on the type of instrument in which the draft on the subject of diplomatic intercourse and immunities would be embodied. For his part, he considered that that subject was particularly suited to regulation by international convention.

23. Mr. VERDROSS said that he agreed with Mr. Amado. In order to carry out its task, under article 1 of its statute, of promoting the progressive development of international law and its codification, the Commission should do everything in its power to promote the conclusion of a multilateral treaty on the subject of diplomatic intercourse and immunities.

24. When the Commission had submitted its draft to the General Assembly, it would be for the Assembly to decide whether it was necessary to convene an international conference of plenipotentiaries. Whereas the Commission's draft on arbitral procedure had taken the form of a model, he thought it particularly desirable that the draft on diplomatic intercourse and immunities should take the form of a draft convention.

25. Sir Gerald FITZMAURICE said that there were sometimes more effective methods of codifying international law than the negotiation of multilateral treaties. For his part, he considered that it would be regrettable if the General Assembly were to convene a diplomatic conference to deal with the subject of diplomatic intercourse and immunities. The method of convening a diplomatic conference was suitable for a subject like the law of the sea in which there were at least two important questions, those of conservation and the continental shelf, which were comparatively new to general international law. In the case of diplomatic intercourse and immunities the position was completely different; it was a subject with which Governments were eminently familiar and one in which there had been State practice for centuries.

26. The Commission could of course prepare its draft in the form of a convention, but it was undesirable that the draft should be submitted to an international conference. The General Assembly could simply recommend it to Member States for signature.

27. With regard to the method of work to be adopted by the Commission, he feared that the membership of the proposed committee would to some extent conflict with that of the Drafting Committee, since the latter was composed of no less than nine members of the Commission; that could lead to practical difficulties in the work of both committees.

28. The text of the articles on diplomatic intercourse and immunities was much shorter than the model draft on arbitral procedure. In addition, the points to be dealt with were less numerous and not so difficult. The Commission could itself deal with the articles on diplomatic intercourse and immunities on the basis of the excellent summary prepared by the Special Rapporteur (A/CN.4/116).

29. Mr. LIANG, Secretary to the Commission, suggested that there should be no detailed discussion of Mr. Zourek's proposals (A/CN.4/L.76) concerning the planning of the Commission's work until the document was available in all the working languages. In any case the proposals should, he thought, be discussed in their entirety and in the light of their full implications and not merely considered in connexion with the setting up of a committee to deal with the draft articles on diplomatic intercourse and immunity. The establishment of a committee was, of course, a possible solution. Mr. Zourek's idea, however, was that the system should come into effect at the eleventh session, with full interpretation and other services, which could not, for budgetary reasons, be provided at the current session.

30. The question whether the draft should take the form of a convention was one of primary importance which, as Mr. Amado had rightly said, should be settled at the outset. He was not quite clear what were the implications of the statement by the United States Government that it was opposed to the suggestion that the draft articles be submitted to the General Assembly in the form of a convention (A/CN.4/114). There was a difference between the submission of a text in the form of a convention and the submission of a text with a recommendation that the General Assembly take steps to convene a conference with a view to concluding a convention. It would be recalled that the methods and

manner of presentation of the work of the Harvard Law School (Harvard Research) had loomed large in the discussions of the Committee which had prepared the establishment of the Commission and had had no small influence on the drafting of parts of the statute of the commission. Now, the Harvard Research was a scientific institution and the drafts it prepared were not produced with a view to being laid before an international conference. Nevertheless, all its sets of draft articles were couched in the form of conventions, and, indeed, he could not see in what other form they could be put. Then again, it was clearly specified in article 20 of the Commission's statute that the Commission "shall prepare its drafts in the form of articles". And it might well be asked of what such articles should form part if not of a draft convention. The preparation of the draft in the form of a convention in no way implied that a convention would necessarily be concluded. The General Assembly might be content simply to adopt the draft, considering that it had sufficient scientific and moral authority as it stood.

31. It was really immaterial whether the term "draft convention" were applied or not to the draft articles the Commission prepared. The Commission could simply submit its work in the form of draft articles, leaving it to the General Assembly or to a conference convened by the General Assembly to decide whether a convention should be concluded on the basis of the draft articles. That course had been adopted on a number of occasions in the past. At its fifth session, for instance, the Commission had decided not to submit its articles on the continental shelf in the form of a convention, though it was to be noted that the United Nations Conference on the Law of the Sea, using the Commission's draft as a basis, had adopted a convention on the subject.

32. The CHAIRMAN pointed out that it was not necessary for the Commission to recommend that a conference be convened to conclude a convention on the subject. Both sub-paragraph (*c*) and sub-paragraph (*d*) of article 23, paragraph 1, of its statute implied that the text would be drafted in the form of a convention.

33. Mr. YOKOTA considered that the Commission should decide provisionally to prepare the draft articles in the form of a convention, though the ultimate decision as to form naturally lay with the General Assembly. According to the report of the Special Rapporteur (A/CN.4/116), many States had explicitly declared themselves in favour of a convention. In fact, the only Government that thought otherwise was that of the United States of America. None of the five reasons it gave was, in his opinion, sufficiently convincing to warrant the Commission's reversing its original decision. The reasons put forward, particularly the argument that a convention "would tend to freeze the *status quo*", applied equally well to other branches of international law, and could apply to the law of the sea.

34. The discussions of the Second Committee of the United Nations Conference on the Law of the Sea were of some relevance to the question under consideration. Various representatives on that Committee had suggested that, since the general régime of the high seas consisted mainly of generally accepted rules of law, the form of a declaration would be more appropriate than a convention, which could be reserved for the other, less well-established aspects of the law of the sea. Yet the Committee had finally decided to embody the results of its work in a convention, because a convention would bind States.

35. Mr. AGO also considered that a decision on the form of the draft should be taken at that stage, since experience had shown that the question whether a draft should take the form of a convention sometimes affected not only the form but even the substance of the articles themselves. Generally speaking, he did not consider that the Commission should invariably work with the conclusion of a convention in mind no matter what the subject under consideration might be. In the case of many of the topics on its list, other methods might better serve its fundamental purpose of consolidating and developing international law. In certain fields of international law which were going through a phase of development the conclusion of a convention might merely arrest that development; an enunciation of rules and principles carrying the full authority of the Commission, however, might influence not only the conduct of Governments but, what was more important, the decisions of arbitral tribunals and international judicial bodies in general and could thus have a far more favourable influence on the evolution of international law than the conclusion of a collective agreement—especially when one considered the hazards with regard to signature, ratification and reservations to which such agreements were subject. Furthermore, in view of the conservative trends that tended to emerge at diplomatic conferences, there was sometimes a danger that the conclusion of a convention might prove to be a step backwards rather than forwards, as far as the international law on the particular subject was concerned. In the case of so mature a subject as diplomatic intercourse and immunities, which had been thoroughly elaborated both in practice and theory, he was, however, in favour of working with the conclusion of a convention in view, though he would not consider it a setback for the Commission if the General Assembly decided not to adopt a convention on the subject.

36. Of the courses outlined in sub-paragraphs (*c*) and (*d*) of article 23, paragraph 1, of the Commission's statute, he preferred the former. While, in the case of the law of the sea in which many of the subjects were comparatively new, a diplomatic conference had been necessary, there was no need to hold a diplomatic conference on the question of diplomatic intercourse and immunities.

37. Commenting on the question of the planning of the Commission's work, he said that, though he appreciated the arguments in favour of establishing a committee to expedite the work of the Commission, the more he reflected on the idea the more he was opposed to it.

There were, first of all, the material difficulties; if no additional services could be provided, the committee could meet only at times when the Commission itself was not sitting. Secondly, almost half the Commission's members were members of the Drafting Committee, which had a heavy task before it, including the preparation of new texts merely on the basis of general instructions. Lastly, there was the disappointing experience with the committee on arbitral procedure at the ninth session. And the Commission should have no illusions on the idea of the representation of the principal legal systems in the committee. There were as many opinions as there were members of the Commission, and the discussion on arbitral procedure had shown that the divisions of opinion were rarely on a regional basis. In his opinion the delegation of work to a committee would simply lead to a duplication of discussion.

38. Mr. AMADO declared that Mr. Ago had convinced him of the unadvisability of establishing a committee.

39. Mr. BARTOS said that in the case of the draft on diplomatic intercourse and immunities, he was, for technical reasons, in favour of the course indicated in sub-paragraph (*c*) of article 23, paragraph 1, of the Commission's statute. It was the practice of the General Assembly to convene conferences of plenipotentiaries only for those conventions which required special technical preparation. The others, and they were many, were elaborated in the Sixth Committee and adopted by the General Assembly. Such a procedure, though taking up a considerable amount of the Sixth Committee's time, had been found more economical in the long run than diplomatic conferences at which political considerations tended to carry more weight than technical or scientific ones. The Convention on the Privileges and Immunities of the United Nations, which bore much similarity to the draft under discussion, had been prepared in the Sixth Committee.

40. On the question of establishing a committee, he entirely agreed with Mr. Ago. The idea of a "representative committee" was a pure play upon words. Though chosen with due regard to representation of the principal legal systems of the world, the members of the Commission were elected in an individual capacity as persons of recognized competence in international law. Accordingly, any question of substance must be discussed in the plenary Commission, and only questions of drafting could be entrusted to a committee. Serious account must, furthermore, be taken of the material difficulties referred to by the Secretary. The ideal was to keep the discussions as brief as possible. Though not in favour of limiting the time for speakers, he thought that much time could be saved if all exercised self-discipline and refrained from dwelling on the obvious. To delegate work to a committee would mean a discussion in three stages; preliminary debate in the Commission, detailed debate in the committee and a reopening of the discussion when the committee reported to the Commission.

41. Mr. SANDSTRÖM, agreeing with Mr. Ago, added that the question whether the draft on diplomatic intercourse and immunities should take the form of a convention depended largely on the content of the text. If the articles showed a liberal trend, he thought they should take the form of a convention, but if they showed the opposite trend the conclusion of a convention based on them would not be desirable.

42. He, too, was opposed to the idea of delegating work to a committee, in view of disappointing experience in the past. The establishment of a committee in addition to the Drafting Committee would place an intolerable strain on the members of the Commission and was, moreover, unnecessary. Many of the questions raised by Governments were minor points of drafting which could be rapidly reviewed by the Commission and referred to the Drafting Committee.

43. Mr. ZOUREK considered that the Commission should frame its drafts in the form of a convention, since international conventions had proved to be the only effective way of achieving progress in international law. No subject could be said to lend itself more to the conclusion of a convention than diplomatic — and, incidentally, consular — intercourse and immunities, for the rules of diplomatic intercourse were based on ancient practice. The prospects for the conclusion of a convention were very good. The provisional draft on the subject had, in general, met with a very favourable reception in the Sixth Committee and in the comments by Governments. The only Government opposed to a convention was so opposed for reasons which, like other speakers, he found unconvincing and in any case applicable to any codification.

44. The question whether to recommend the conclusion of a convention or the convening of a conference for that purpose was of secondary importance; whatever the Commission recommended, the ultimate decision lay with the General Assembly. He personally preferred the second course as being more rapid. For example, it had taken the Sixth Committee two months at the third session of the General Assembly in 1948 to prepare the comparatively short Convention on the Prevention and Punishment of the Crime of Genocide.

45. The discussion of the planning of the Commission's work was effected by two conflicting factors: personal preferences and the inescapable facts. Like other members, he, too, would like an opportunity of taking part in all the work of the Commission. But the fact remained that the General Assembly expected a final draft on diplomatic privileges and immunities to be submitted at its thirteenth session. After allowance was made for other matters, the Commission had only four weeks left in which to perfect the draft and to hold a general discussion on the law of treaties and, perhaps, on consular intercourse and immunities. And it had taken four weeks to complete the model draft on the already exhaustively discussed topic of arbitral procedure. He could not see how the work could be completed without recourse to a committee. After all, owing to the nature of the tasks referred to it, the existing Drafting Committee had become more a

committee of the type envisaged than a drafting committee proper.

46. Since the Drafting Committee had no technical services, the committee could use those of the Commission when the latter was not sitting. The objection that the Commission was too small to man the Drafting Committee and another committee at the same time merely strengthened the argument for a rational division of labour. If the committee did its work thoroughly, further consideration of the draft by the Drafting Committee would be practically unnecessary. Nor was there any greater force in the objection that the creation of a committee would necessitate a discussion in three stages, for that need not in any way delay the preparation of the draft. When the committee reported back to the full Commission, some changes in the texts prepared by the former would probably be prepared by the members of the Commission in certain cases, but the basic work completed by the committee would be maintained and only the finishing touches would remain to be added. Thus, even a three-stage debate might be more time-saving than discussion of minor drafting changes by a body of twenty-one members. If the Commission made a rapid review of the comments of Governments, taking decisions on major points and leaving the details to the committee, its output should rise without any increase in its work load.

47. Mr. EL-ERIAN agreed that the Commission should abide by the provisional decision it had taken at the previous session (A/3623, para. 15) that the draft articles on diplomatic intercourse and immunities should form the basis of a convention. As the Special Rapporteur had pointed out, that decision seemed to meet with the approval of most Governments, and he fully associated himself with what Mr. Sandström had said in his new report (A/CN.4/116) regarding the views expressed by the United States Government.

48. He shared the view expressed by the Egyptian and other delegations in the General Assembly that there was no reason why the Commission should not send the draft to the General Assembly for action without waiting to complete its work on *ad hoc* diplomacy and consular intercourse and immunities, though the position would have been otherwise if it had taken up consular intercourse and immunities first.

49. So far as the method of work was concerned, he thought it would be wise to deal with the general question of the planning of the Commission's work separately. In the case of the present draft, he was in favour of discussion in the Commission itself.

50. Mr. HSU said he thought all the members of the Commission would agree that when the Commission was engaged in codification pure and simple, it was sufficient for it to embody its work in a draft of which the General Assembly would merely take note, but that when its work came under the heading of the development of international law, it should be cast in the form of a convention, to which States would be free to accede or not. The views expressed by the United States Government were not, therefore, basically at variance with the Commission's own; for the reason why it was not in favour of a convention was that it considered that in the case in point the Commission should confine itself to formulating the rules and principles already accepted by the international community, in other words to codification pure and simple. He shared that point of view, and felt that the Commission should not be in too much of a hurry. For one thing, the prevailing political atmosphere was not conducive to innovations in international law. For another, many new States had recently come into being; once they had acquired more experience of diplomatic intercourse, it might become apparent that their needs in the matter were different, in respects which the Commission could not now foresee, from those experienced by older States.

51. With regard to the method of work, he said he was strongly in favour of examining the draft in the Commission itself, for the reasons already given and also because it would be difficult to arrange for two subordinate bodies to work concurrently.

52. Mr. FRANÇOIS said he shared the view that the work done by the Commission could be of great importance to international law even if it did not take the form of a convention. He was not even sure that a convention was necessarily the best form. Those who held the opposite view might point to the results achieved by the recent United Nations Conference on the Law of the Sea. It was true that the Conference had produced instruments which had been signed by a large number of States; but signatures were not ratifications, and even ratifications were often accompanied by reservations on important points of substance. The problem of reservations had not been settled by the Conference in a satisfactory manner.

53. However, in his view, it was not in the present case necessary for the Commission to decide what form the draft should finally take. A decision on that point would not vitally affect the text of the articles themselves, and might well be left to the General Assembly itself.

54. With regard to the method of work, he felt that recent experience in the Conference on the Law of the Sea had shown that it was inefficient to set up committees unless they were provided with facilities for simultaneous interpretation and summary records. He understood that it would not be possible to provide such facilities for a committee meeting during the current session, and he was therefore opposed to the appointment of a committee. Provided that the Commission did not allow itself to be held up by questions of translation and the like, and provided that all members exercised the utmost restraint in their statements, he was confident that the Commission could complete the drafts on arbitral procedure and diplomatic intercourse and immunities at its current session. As long as the General Assembly limited the length of the Commission's sessions to nine or ten weeks and made it impossible for the Secretariat to provide committees with the necessary facilities, it was impossible to expect more.

55. Mr. TUNKIN agreed with Mr. El-Erian that the

Commission should submit its draft on diplomatic intercourse and immunities to the General Assembly at its thirteenth session: there was no reason why its draft articles on consular intercourse and immunities and any articles it decided to submit on *ad hoc* diplomacy should not be in separate documents; in any case they could not be submitted for another two years at the earliest.

56. The Commission, having drafted the articles on diplomatic intercourse and immunities, was itself best qualified to decide what form they should finally take, and should therefore make a recommendation to the General Assembly in that respect. In his view, it should adhere to the provisional decision it had taken at the ninth session and recommend that they form the basis of a convention — and should take that decision without further delay, for the reasons indicated by the Special Rapporteur. In recent years international treaties had become the most important means of developing international law. He could not agree that conventions tended to "freeze the *status quo*" and so to hamper further progress in international law, for there was nothing to prevent the signatory States from agreeing on more liberal provisions. A treaty would have a binding force; by contrast, the preparation of a set of rules was of value in doctrine only. Whenever possible, therefore, the Commission should aim at the conclusion of conventions.

57. Mr. AMADO agreed with Mr. Tunkin. Until the Commission decided to recommend that the results of its work on any subject be embodied in a convention, he felt he did not really know where its efforts were tending. He realized that custom was the common law of international relations, but for him international law consisted essentially in written texts. Model rules and the like might prove useful to theorists and students of international law, but what mattered to States was the force of conventional obligations.

58. He fully agreed with what Mr. García Amador had said regarding procedure. Though he admitted the force of the arguments against the appointment of committees in general, he still felt, however, that it might be useful in the present case for a small committee to prepare an analysis of the Special Rapporteur's draft, showing which provisions merely reflected universal practice and which concerned matters that were still in doubt.

59. Mr. PADILLA NERVO said he did not think that the text of the draft articles would be greatly affected by whatever decision was taken on the final form of the draft; that decision could therefore be deferred until the articles themselves had been examined in the light of the comments submitted by Governments and such other comments as members of the Commission had to make. He agreed that such examination should take place in the Commission itself; it might be useful to have an analysis of the kind suggested by Mr. Amado, but that could well be prepared by the Secretariat.

60. Mr. EDMONDS said that he shared the view of those who thought the first question to be decided was that of the final form of the draft. He had been impressed by the argument that if there was any field of international law where the rules had been generally accepted and applied for generations, it was the field of diplomatic intercourse and immunities. But there were other, practical considerations which were also relevant. The Commission must be guided to some extent by the form of the request made to it by the General Assembly in resolution 685 (VII); he would not say that the form of that request precluded the presentation of the draft articles in the form of a convention, but it could not be denied that it spoke only of "codification". The Commission's aim should surely be to produce work that was not only of high academic value in itself but that would also bear fruit in practice; its drafts should therefore be in a form in which they were likely to be acceptable to as large a number of States as possible.

61. So far as the method of work was concerned, he agreed that practical considerations made the establishment of a committee inappropriate.

62. Sir Gerald FITZMAURICE said he was strongly in favour of postponing any decision on the final form of the draft; indeed, he agreed with Mr. François that it was not necessary for the Commission to make any recommendations to the General Assembly in that repect, save in exceptional circumstances.

63. If the Commission nevertheless took a vote on the question of the final form of the draft, he thought he would probably vote in favour of a convention, but that did not mean that he shared the view of those who considered that all its drafts should be in that form. In that connexion, he fully agreed with the remarks of Mr. Ago and Mr. François; there were many subjects on the Commission's programme which were quite unsuitable for treatment in the form of a convention and several of the drafts it had submitted earlier had not taken that form. The major part of international law did not consist of treaty law but of customary rules, and expressions of opinion by the International Law Commission as to what the customary law was carried their own authority. Though he considered that in the present case the conclusion of a convention would be appropriate, he agreed with much of the United States Government's criticism of conventions which merely embodied the customary law. For it might then be thought that States which did not accede to such conventions were not bound by the rules they contained, whereas in fact they were, since those conventions merely reflected customary law.

64. Mr. SANDSTRÖM, Special Rapporteur, proposed that the Commission should defer any decision on the final form of the draft until it had completed consideration of the articles themselves, but that it should proceed to such consideration on the assumption that the draft would take the form of a convention.

The proposal was adopted by 12 votes to 2, with 2 abstentions.

The meeting rose at 1.10 p.m.

449th MEETING

Friday, 23 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-5, A/CN.4/116 and Add.1, A/CN.4/L.72) *(continued)*

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1)

1. The CHAIRMAN invited the Commission to consider the draft articles and commentary it had provisionally adopted at its ninth session (A/3623, para. 16) in the light of the new proposals (A/CN.4/116/Add.1) which the Special Rapporteur had presented after considering the observations submitted by Governments (A/CN.4/114 and Add.1-5) and the views expressed in the Sixth Committee during the twelfth session of the General Assembly. He requested the Special Rapporteur also to draw attention, in connexion with each article, to the main points with regard to which he had found himself unable to accept the suggestions made by Governments in their written observations or in the Sixth Committee, in order that the members of the Commission might, if they wished, submit suitable proposals for the Commission's consideration.

2. The Commission had already disposed, for the moment, of the observations relating to the form of the codification, and he suggested that it now proceed to consider the articles themselves and that the other general observations summarized in the Special Rapporteur's new report (A/CN.4/116) be taken up in conjunction with the articles where the Special Rapporteur suggested that suitable changes might be made, if desired, in order to meet the views expressed.

It was so agreed.

DEFINITIONS CLAUSE

3. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his proposal for an introductory article worded in the manner suggested by the Netherlands Government (A/CN.4/116) but with the words "including military, naval and air attachés and other specialized attachés" added to sub-paragraph (*d*), partly in response to an observation by the United States Government.

4. The United States Government had also suggested that clear distinctions should be made between officer and subordinate personnel, but in point of fact the draft articles did not use either of those terms.

5. Mr. YOKOTA agreed that a definitions clause was essential, and said that in general the text proposed by the Special Rapporteur was acceptable. In his view, however, it was particularly important that a clear distinction should be made between officer and subordinate personnel, more especially in the matter of the privileges and immunities enjoyed by the two categories. The question of the privileges and immunities enjoyed by subordinate personnel was a source of disputes, and in that connexion he shared the view expressed by the Japanese Government that it would be necessary to go into greater detail with regard to the definition of "members of the diplomatic staff", "members of the administrative and technical staff" "members of the service staff" and "private servants", though it might be sufficient if that were done under sub-section C of section II, where personal privileges and immunities were dealt with.

6. Mr. TUNKIN said that he was not opposed in principle to an article on definitions. All definition was perilous, however, and he foresaw numerous practical difficulties in the text now proposed by the Special Rapporteur. For example, he asked what was meant in sub-paragraph (*d*) by "authorized by the sending State to engage in diplomatic activities proper". Likewise, the expression "administrative and technical service", in sub-paragraph (*f*), meant different things in different countries. It might be possible to overcome those difficulties and reach agreement on a satisfactory text, but only, he thought, after the other articles had been considered. He therefore proposed that further consideration of the proposed definitions clause be postponed until the Commission had completed its consideration of the other articles in the draft.

7. Mr. AGO and Mr. MATINE-DAFTARY supported Mr. Tunkin's proposal.

8. Mr. SANDSTRÖM, Special Rapporteur, said that he saw no objection to postponing consideration of the definitions clause.

Mr. Tunkin's proposal was adopted unanimously.

ARTICLE 1

9. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the Czechoslovak Government's proposal that the draft express the principle that all States enjoy the right of legation, and to his comments thereon (A/CN.4/116).

10. Mr. ZOUREK said it seemed illogical not to mention the fundamental right of States on which the rights laid down in the draft articles were based. The Czechoslovak Government's proposal would be consistent with the normal practice followed in manuals of international law as well as with the text of article 1 of the Havana Convention.[1]

11. He proposed that a provision reading as follows be added to the draft: "All sovereign States have the right of being represented by diplomatic agents". The provision could be inserted either as a new paragraph 1 in article 1 or as a separate article.

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[1] Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

12. The CHAIRMAN recalled that the Commission had discussed the question at length at its ninth session and had finally adopted unanimously a proposal omitting mention of the right of legation.[2] There was, he suggested, no need to reopen that discussion.

13. Mr. TUNKIN thought that what the Commission had agreed to do was to omit a particular form of words which had been suggested by the Special Rapporteur but had not been found entirely satisfactory. That did not really dispose of the problem, however, and he agreed that it would be desirable to insert a new paragraph in article 1, as suggested by Mr. Zourek. As a subject of international law, every State had the right of legation, even if it did not choose to assert it.

14. Sir Gerald FITZMAURICE said the proposal raised considerable difficulties. On analysis, the right of legation seemed to amount to the obligation which rested on other States to receive diplomatic representatives of the sending State; that at once raised the difficulty of defining the entities in respect of which such an obligation existed. It had been suggested that the Commission should refer to " all sovereign States ", but then it would be necessary to define " sovereign "; in any case, there were instances where non-sovereign States had enaged in diplomatic intercourse.

15. The proposal would also inevitably raise the whole very difficult problem of recognition.

16. It might be possible to overcome those difficulties, but to do so would require an elaborate formula and very lengthy discussion. That being so, he suggested that the wisest course would be to leave the matter on one side, for it had not given rise to any difficulties in practice.

17. Mr. ZOUREK pointed out that the right of legation did not automatically create an obligation on the part of other States. It was, in fact, stated explicitly in the present article 1 that the establishment of diplomatic relations between States took place by mutual consent.

18. Sir Gerald FITZMAURICE suggested that for that very reason it was clearly unnecessary to define the entities which possessed the right of legation.

19. Mr. GARCIA AMADOR thought that the right of legation was not a complete right but an imperfect right, for the exercise of which the fulfilment of some other condition was required. He thought the Commission should adopt a similar course to that followed by the recent United Nations Conference on the Law of the Sea in such cases, and speak of complete rights only.

20. Reference had been made to article 1 of the Havana Convention; however, that provision had not proved very satisfactory in practice.

21. Mr. ZOUREK said he could not agree with Mr. García Amador. In his view the active and passive right of legation, like the right to conclude treaties, was a general right, belonging to all States, though its exercise in specific cases depended on the agreement of the other States concerned.

22. Mr. EL-ERIAN said that, though in principle he agreed with Mr. Zourek, the proposal again raised the conflict between the theory of natural law and positivist theories and in particular the complex question of imperfect rights; he personally very much doubted whether there was such a thing as an imperfect right. In his view the so-called right of legation was really a capacity.

23. The discussion at the ninth session had also related to the question whether the Commission should attempt to define States.[2] It had, he thought, been agreed that in the draft articles the word " States " was used in the same sense as it was used in Articles 3 and 4 of the Charter of the United Nations and in the Draft Declaration on the Rights and Duties of States.[3]

24. The CHAIRMAN put to the vote the proposal that a provision regarding the right of legation should be added.

The proposal was rejected by 8 votes to 4, with 4 abstentions.

Article 1 was adopted unanimously.

ARTICLE 2

25. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his proposal that the words " the Government of " should be deleted in article 2, sub-paragraphs (*a*), (*c*) and (*d*), or at least in (*a*), as suggested by the Australian Government.

26. Mr. YOKOTA said he was in favour of deleting the words " the Government of " in sub-paragraph (*a*) but thought they should be retained in sub-paragraphs (*c*) and (*d*).

27. Mr. VERDROSS agreed with Mr. Yokota. He was also in favour of the addition of a new paragraph, as suggested by the Governments of Czechoslovakia and the United Kingdom, regarding the promotion of friendly relations and the development of cultural activities.

28. Mr. SANDSTRÖM, Special Rapporteur, said that the Government of Chile had suggested that the provisions of article 2, sub-paragraph (*b*), should operate only after the normal remedies had been exhausted (see A/CN.4/114/Add.1).[4] He did not consider an amendment along those lines advisable, since sub-paragraph (*b*) was couched in general terms and did not refer exclusively to cases where diplomatic protection was invoked following the exhaustion of local remedies.

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[2] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), pp. 9-12.

[3] See *Official Records of the General Assembly, Fourth Session, Supplement No. 10*, part II.

[4] See also *Official Records of the General Assembly, Twelfth Session, Sixth Committee*, 509th meeting, para. 9.

29. Mr. VERDROSS said that the observations of the Government of Chile, as well as those of the Governments of Colombia and Uruguay, proceeded from a misunderstanding. Those Governments obviously wished to prevent any formal diplomatic complaint from being made before local remedies had been exhausted, whereas the Commission, in drafting article 2 (*b*), had had in mind friendly *démarches* which could be undertaken in the absence of any judicial proceedings. The Commission's intention could be stated in the commentary.

30. Mr. GARCIA AMADOR said that the question of non-intervention raised by the Government of Colombia[5] did not require to be dealt with in the commentary. The principle of non-intervention was the subject of article 33 of the draft; there could therefore be no conflict between article 2 and that principle.

31. The remarks made by the Governments of Chile and Uruguay were applicable to diplomatic protection in the narrow sense. Article 2 (*b*), however, covered a much wider field; a diplomatic mission could protect the interests of its nationals by means of steps both formal and informal, which did not amount to diplomatic protection.

32. He proposed that a sentence be included in the commentary to the effect that the provisions of article 2 (*b*) were without prejudice to the principles of international law governing diplomatic protection.

33. Sir Gerald FITZMAURICE said that the inclusion in the commentary of a sentence along the lines proposed by Mr. Garcia Amador should give every satisfaction to the Governments of Chile and Uruguay. The question of the exhaustion of local remedies and that of denial of justice were connected with the subject of State responsibility rather than with that of diplomatic functions.

34. Article 2 (*b*) could only mean that a diplomatic mission could protect the interests of the nationals of the sending State to the extent that international law permitted.

35. Mr. PADILLA NERVO supported the proposal made by Mr. Garcia Amador. Article 2 (*b*) was concerned with the everyday assistance and general protection which a diplomatic mission afforded to its nationals, and not exclusively with matters which gave rise to litigation.

36. Mr. SANDSTRÖM, Special Repporteur, said that the Governments of Czechoslovakia (see A/CN.4/114/Add.1), the Philippines[6] and Yugoslavia (see A/CN.4/114/Add.5) had advanced a more detailed formulation of the functions of a diplomatic mission. In particular, it had been suggested that reference should be made to the promotion of friendly relations between the sending State and the receiving State as well as to cultural relations.

37. Since article 2 was not meant to give an exhaustive list of the functions of a diplomatic mission, he considered it unnecessary to make a specific reference to functions other than those which were set forth in sub-paragraphs (*a*), (*b*), (*c*) and (*d*) and which constituted the essential functions of a diplomatic mission. The United Kingdom Government in its observations had expressed a view similar to his own (see A/CN.4/114/Add.1).

38. Mr. ZOUREK proposed that a new sub-paragraph along the following lines should be inserted:

> "(*e*) Promoting friendly relations between the sending State and the receiving State, in particular by developing their economic, cultural and scientific relations."

39. In addition, he proposed that a provision should be included to the effect that the establishment of diplomatic relations implied the establishment of consular relations, since nowadays the diplomatic function included, as a general rule, the consular function. According to current practice, consular functions were exercised by a special section of the diplomatic mission and under the supervision of the chief of that mission, except where special arrangements for the establishment of a separate consulate were made by the two Governments concerned.

40. Mr. GARCIA AMADOR supported the first of the proposals made by Mr. Zourek. Since, however, that proposal was concerned with the duty to promote friendly relations among States. it should be placed in a separate paragraph, instead of in a sub-paragraph (*e*). Sub-paragraph (*a*) to (*d*) set forth rights rather than duties.

41. Mr. FRANÇOIS said that he saw no advantage in the adoption of the second proposal made by Mr. Zourek. It was true that in certain cases consular functions were exercised by a special section of the diplomatic mission, but that was not by any means a unversal practice. The important fact, however, was that the diplomatic and consular services were two distinct services, even if they were housed under the same roof.

42. A general statement to the effect that the diplomatic function included the consular function would be very misleading. Consular services were subject to special rules and should not be confused with diplomatic services.

43. Mr. VERDROSS said that he was in favour of the first proposal made by Mr. Zourek. The introduction of a reference to cultural relations would be a recognition of the progress made in international relations in that respect.

44. Sir Gerald FITZMAURICE said that he had no objection to the inclusion of a paragraph concerning economic, scientific and cultural relations, although he was inclined to share the view of the Special Rapporteur that it was not strictly necessary to add anything to the list of functions contained in article 2.

45. With regard to the second proposal made by

[5] See *Official Records of the General Assembly, Twelfth Session, Sixth Committee,* 509th meeting, para. 38.

[6] *Ibid.,* para. 43.

Mr. Zourek, he wished to emphasize that consular functions were quite distinct from diplomatic functions even if they were exercised by the same person. He questioned whether a diplomatic mission could assume, as of right, consular functions without the prior consent of the receiving State. Consular functions could be, and, indeed, often were exercised under the same roof as diplomatic functions, frequently by the same person, but the receiving State had in that case the right to require an *exequatur* to be obtained by any member of the diplomatic mission exercising consular functions.

46. Mr. TUNKIN expressed support for the first of Mr. Zourek's proposals, which was fully consistent with the principles of the Charter of the United Nations regarding relations between States.

47. With regard to Mr. Zourek's second proposal, he said that there was certainly some link between the establishment of diplomatic relations and that of consular relations. In practice, if diplomatic relations were established, no specific action was required to enable diplomatic missions to exercise consular functions through a special officer entrusted with consular duties.

48. He recognized, however, that there were some practical difficulties involved in the introduction of a provision along the lines proposed by Mr. Zourek.

49. Mr. AMADO said that he supported Mr. Zourek's first proposal and the suggestion of Mr. García Amador with regard to the form which the proposed provision should take.

50. He could not support Mr. Zourek's second proposal. In particular, he pointed out that if a diplomatic officer was entrusted with consular duties, the receiving State granted the *exequatur* to that officer personally and not to the chief of the diplomatic mission; in that way the distinction between diplomatic and consular functions was emphasized.

51. Mr. PADILLA NERVO said that he favoured Mr. Zourek's first proposal in so far as it referred to the promotion of friendly relations between the sending State and the receiving State. He did not think, however, that it was necessary to make any reference to the development of economic, cultural and scientific relations because those relations would undoubtedly be the subject of negotiations conducted by the competent attachés of the diplomatic mission as provided in article 2 (*c*).

52. Mr. HSU, while not in favour of extending a list that did not aspire to be exhaustive, thought that if any new item should be added it was a reference to the promotion of friendly relations among States and to the development of their economic, cultural and scientific relations.

53. Though he would not press for the inclusion of a reference to consular functions in article 2, he tended to agree with Mr. Zourek that the diplomatic function embraced the consular function. A number of other duties performed by diplomatic officers such as military attachés were not diplomatic *stricto sensu* although they went under that name. The distinction between diplomatic and consular functions was largely of historical origin.

54. Mr. ZOUREK, replying to Sir Gerald Fitzmaurice, said that many diplomatic missions established consular sections without applying for an *exequatur*; it was a general practice in his own country, for instance. The diplomatic function necessarily included the consular function, and there was no sharp division, though the services were generally distinct. There was, however, no need to settle the question at that stage of the debate; it could be discussed more fully in connexion with article 1 of his draft on consular intercourse and immunities (A/CN.4/108).

55. Sir Gerald FITZMAURICE fully agreed with Mr. Zourek that diplomatic and consular services were often amalgamated and that there was no reason why the diplomatic and the consular function should not be exercised by one and the same person in the same mission. The two functions were nevertheless distinct. If no *exequatur* was applied for by diplomatic missions with a consular section, it was merely because the local Government did not object. It would, however, always be within its rights in requiring an *exequatur* to be sought. He would, therefore, be firmly opposed to any suggestion in the draft that a diplomatic mission could automatically and as of right exercise the consular function. He agreed with Mr. Zourek that the matter would best be discussed in connexion with the draft on consular intercourse and immunities.

56. The CHAIRMAN said that he regarded Mr. Zourek's proposal concerning consular activities as having been withdrawn.

57. Replying to Mr. García Amador, he said that the question of the exact position of the proposed new item in article 2 could be left to the Drafting Committee.

58. He put to the vote Mr. Zourek's proposal (para. 38 above) that the words

> "Promoting friendly relations between the sending State and the receiving State, in particular by developing their economic, cultural and scientific relations"

should be added at an appropriate point in article 2.

The proposal was adopted by 14 votes to none, with 2 abstentions.

59. The CHAIRMAN put to the vote the proposal (see para. 25 above) that the words "the Government of" in sub-paragraph (*a*) should be deleted.

The proposal was adopted by 12 votes to none, with 3 abstentions.

It was decided that the words "the Government of" in sub-paragraphs (c) *and* (d) *would stand.*

Article 2 as a whole, as amended, was adopted unanimously, subject to drafting changes.

60. Mr. YOKOTA drew attention to the comment of the Netherlands Government (A/CN.4/114/Add.1) concerning the position of foreign trade missions. The

question was of considerable importance. During the negotiation of the recent Treaty of Commerce and Navigation between Japan and the Soviet Union, one of the most difficult questions had been whether the trade representatives of the Soviet Union in Japan were to be regarded as part of the diplomatic mission and to enjoy diplomatic privileges and immunities. Japan held that they should not, although it was prepared to accord some privileges and immunities by bilateral agreement. In his opinion, the principle was that trade missions did not form part of a diplomatic mission and that their staff was not automatically entitled to diplomatic privileges and immunities, though they might be accorded similar privileges and immunities by virtue of bilateral agreement. Since the Special Rapporteur stated in his conclusions (A/CN.4/116) that he had no objection to the Netherlands proposal, he (Mr. Yokota) urged that a statement on the subject be included in the commentary on the article.

61. Mr. SANDSTRÖM, Special Rapporteur, said that the question whether trade representatives formed part of a diplomatic mission or not was of sufficient interest to justify a reference in the commentary.

62. Mr. AMADO said that the Commission was not obliged to put in a commentary everything that a Government suggested. It must consider whether in the general arrangement of the draft a comment would add to the clarity of a provision.

63. Mr. MATINE-DAFTARY thought that the recently adopted reference to "economic relations" covered commercial relations. There was, however, a clear distinction between commercial attachés and the permanent trade representatives of countries where foreign trade was a State monopoly. Whereas the function of commercial attachés was to protect their countries' trade relations, trade representatives actively engaged in commercial transactions. They did not, therefore, come within the scope of a multilateral convention on diplomatic privileges and immunities and their position should be regulated by bilateral agreement.

64. Mr. LIANG, Secretary to the Commission, said that Mr. Amado's remarks raised an important point: whether matter which the Commission had not included in an article should appear in the commentary as supplementary material. The observation of the representative of China during the discussion of the Commission's report in the Sixth Committee at the twelfth session of the General Assembly[7] provided food for reflection on that point. After noting that the commentaries on some articles of the draft on diplomatic intercourse and immunities, such as paragraph 3 of the commentary on article 27 and the commentary on article 31, contained supplementary rules or exceptions to rules enunciated in the articles, the said representative had suggested that such material should be incorporated in the articles themselves.

[7] See *Official Records of the General Assembly, Twelfth Session, Sixth Committee,* 511th meeting, para. 20.

65. Although in most commentaries it had not been the Commission's intention that the remarks should constitute supplementary articles or rules, the impression might be conveyed that they did. The statute of the Commission contained certain criteria for determining the contents of commentaries but they had not always been followed. Since there appeared to be a certain amount of inconsistency in practice, the Commission might, at some appropriate time, take a decision on the exact nature of commentaries and whether or not they should contain supplementary rules or exceptions. Alternatively, it might be made clear that the commentaries did not contain rules but merely served to clarify the text.

66. Mr. AMADO said that he did not wish it to be thought that he was hostile to the observations of Governments. There was, however, a danger that some commentaries might weaken the force of rules enunciated in the article. Referring to the comments of the Netherlands Government, he said that the last part of the text, with its implication that some sending States acted dishonestly, would hardly tend to promote friendly relations between States. The Commission should beware of approving the addition of comments that might give rise to confusion.

67. Sir Gerald FITZMAURICE agreed with Mr. Yokota that the point raised by the Netherlands Government was an important one which should be dealt with under article 2, especially in view of the decision to include a reference to commercial functions in the article. It need not, however, be dealt with exactly on the lines indicated in the Netherlands comment. There was a clear distinction between members of diplomatic missions concerned with commercial questions, such as commercial and financial attachés, and trade representatives, though, as Mr. Matine-Daftary had pointed out, the latter might enjoy certain privileges and immunities on the basis of bilateral agreements. Perhaps the Special Rapporteur would find a better form of words.

68. Mr. SANDSTRÖM, Special Rapporteur, agreed with the Secretary that it was not desirable to include precise rules in the commentaries on articles. The Netherlands Government was, in fact, one of the staunchest supporters of that view. It had not been his intention, nor, he thought, that of the Netherlands Government, that the comment made by that Government should be inserted as it stood. He did, however, agree with the previous speakers on the importance of drawing attention to the problem.

69. Mr. TUNKIN said that he would not urge that a comment on the problem should be included in the report of the Commission. Indeed, it would probably be very difficult to frame such a comment in the absence of any reference to the question of trade missions in the article itself.

70. Under a practice established for decades, bilateral treaties of trade and commerce concluded by the Soviet Union with other countries included a more or less standard provision to the effect that its trade

representation formed part of its diplomatic mission. He knew of no such treaty that stipulated otherwise.

71. It was likewise the practice to regulate the question of the privileges and immunities enjoyed by trade representatives in the same bilateral treaties. He was not sure whether any great difficulty on that point had arisen during the negotiation of the treaty of commerce between the Soviet Union and Japan and did not think that the matter had presented any problem in recent years.

72. Mr. ZOUREK considered that the Commission should avoid conveying the impression that trade was entirely divorced from the diplomatic function. For decades quite the opposite had been true; economic and trade matters formed the very essence of the activities of diplomatic missions, as evidenced by the appointment of commercial attachés often assisted by a large number of officials. The question whether a State wished its trade officials to form part of its diplomatic mission was, he thought, a matter of the internal organization of the mission.

73. Mr. PADILLA NERVO said there appeared to be some confusion, for it was not clear what the Netherlands Government meant by "a trade representation". If the reference was to activities promoting trade relations performed by a member of the embassy staff or by the embassy itself, there was no difficulty. If the Netherlands Government had in mind *ad hoc* commercial missions, the matter would have to be treated under the heading of *ad hoc* diplomacy. If, on the other hand, it meant a permanent office set up for the purpose of engaging in trading activities, the status of that office and its staff should be regulated by prior agreement between the two States concerned.

74. Mr. BARTOS remarked that in many countries "trade representation" was a technical term describing an office through which a State in which foreign trade was a government monopoly conducted its trade operations in another State through agents who were permanently domiciled in the other State. Such agents thus combined the functions of commercial attaché and business man. In the United States of America most of the cases of that kind that had arisen had been regulated by special treaty in which the agents were accorded a mixture of diplomatic and non-diplomatic status. In the Treaty of Commerce and Navigation of 1940 between Yugoslavia and the Soviet Union, the head of the trade mission and his two deputies had been accorded diplomatic privileges and immunities but the office had been accorded no diplomatic protection and the premises and goods therein were not immune from attachment or execution. A trade mission was thus an institution *sui generis* not corresponding to the institution of commercial attaché.

75. Some countries tended to merge the functions of commercial attaché and trade representative, conducting trade operations through their commercial attaché, under the seal and title of the embassy. In Yugoslavia, however, all such transactions were void under commercial law in any case in which they were effected on behalf of foreign private firms. There was a clear and absolute distinction between commercial attachés who where the advisers to the diplomatic mission on commercial affairs and representatives engaging in trading operations on behalf of foreign private firms. The former enjoyed diplomatic status but trade representatives did not, although they were accorded some privileges and immunities by special treaty. The whole question was, however, rather vague and practice differed somewhat from State to State.

76. Mr. AMADO considered that the question of extending privileges and immunities to permanent trade missions should be dealt with in the draft in an appropriate article. Temporary trade missions should, however, be dealt with under the heading of *ad hoc* diplomacy.

77. The CHAIRMAN proposed that the Special Rapporteur should be asked to submit a text on the subject for consideration by the Commission.

It was so agreed.

The meeting rose at 1.5 p.m.

450th MEETING

Tuesday, 27 May 1958, at 3 p.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)* [1]

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) (*continued*)

ARTICLE 36

1. Mr. SCELLE, Special Rapporteur, introducing article 36, said that the problem of the annulment of awards was one of the most difficult in international law. The Commission had accordingly refrained at its previous sessions from going into detail on the matter, contending itself with listing three general grounds on which the validity of an award might be challenged. Experience in a recent case showed that the reference to corruption in sub-paragraph (*b*) was by no means superfluous. With regard to sub-paragraph (*c*), he said that failure to state the reasons for the award was but one example of a serious departure from a fundamental rule of procedure. He added that it might be better to reverse the order of grounds (*b*) and (*c*).

2. Mr. SANDSTRÖM said that he would prefer the existing order. He approved of the article, apart from what he considered the rather excessive emphasis placed on total or partial failure to state the reasons for the award. After all, in the United Kingdom it was

[1] Resumed from 448th meeting.

customary for arbitrators not to state the grounds for an award.

3. Mr. MATINE-DAFTARY, recalling his previous observations (446th meeting, para. 92), suggested that the epithets "serious" and "fundamental" were vague. A mere departure from rules of procedure was not generally considered ground for challenging the validity of an award. The departure must have been such as to exert a direct influence on the award, and he suggested that the Special Rapporteur might consider amending the clause on those lines.

4. He inquired whether, if a tribunal exceeded its powers in respect of only one of several points covered by its award, the entire award or only part of the award would be voidable.

5. Mr. ZOUREK said that he approved of the three grounds listed; he would, however, like another ground to be added which was almost invariably mentioned in academic writings, namely, the invalidity of the *compromis* in *ad hoc* arbitration or of the undertaking to have recourse to arbitration in the case of arbitration clauses (*clauses compromissoires*). Such cases were admittedly extremely rare in practice but the other cases covered by the article might also be quite rare.

6. Mr. SCELLE, Special Rapporteur, agreed with Mr. Zourek that the invalidity of the *compromis,* at least, could be a ground for the annulment of an award and he was not opposed to adding it as a further ground. It was, however, very unlikely that neither party would notice or invoke the invalidity of the *compromis* until after the award had been delivered. In the case of an undertaking to arbitrate, the validity or invalidity of the undertaking would become apparent at quite an early stage, at the time of the decision on the arbitrability of the particular dispute.

7. Replying to Mr. Matine-Daftary, he said that it should be left to the International Court of Justice, to which the application to declare the nullity of the award would be addressed, to decide whether a departure from a rule of procedure was "serious" and whether the rule itself was "fundamental", and also whether the tribunal's exceeding its powers in respect of one of the points covered by the award rendered the entire award or only part of the award voidable.

8. Replying to Mr. Sandström, he drew attention to the stipulation in article 31 of the draft that "The award shall state the reasons on which it is based for every point on which it rules". According to the draft, failure to state those reasons therefore constituted a defect and a ground for challenging the award. Though not all procedures were at one on the point, in French procedure such failure constituted a vital defect and he felt that there were very strong grounds for making it equally so in arbitration between sovereign States.

9. Sir Gerald FITZMAURICE recalled the doubt he had expressed on several points in the article (see 446th meeting, paras. 93-94). Referring to the question of the tribunal's exceeding its powers, he observed that it was generally agreed that every tribunal was the judge of its own competence. If a tribunal could be trusted to decide a case on its merits, it could surely be trusted to be judge of its own competence, too. Since the Commission had taken elaborate precautions to ensure that the arbitral tribunal would enjoy the confidence of the parties it seemed inconceivable that the tribunal would exercise its powers in a way which would support an application for the annulment of its award. Such a case would be so rare as hardly to justify including a provision which offered a very broad ground for challenging the validity of awards.

10. As far as ground (*c*) was concerned, he wondered whether the Special Rapporteur would quote some examples of serious departure from fundamental rules of procedure; to his knowledge such cases were so rare as to make it unnecessary to provide for them. Similarly, it was practically unknown in international arbitration for a tribunal to fail to give the reasons for its award and it seemed, therefore, equally unadvisable, merely for the sake of providing for so remote an eventuality, to leave the way wide open to a possible revival of the dispute by either party.

11. Referring to the question of the invalidity of the *compromis* or of the undertaking to arbitrate as a ground for the annulment of an award, he asked whether Mr. Zourek could give some examples of grounds for the invalidation of the *compromis* or undertaking. The validity of such agreement was, it was true, as much open to challenge as that of any treaty. But cases of annulment, even of general international treaties, were extremely rare, and he knew of no single case of an undertaking to arbitrate or a *compromis* having been declared invalid. He doubted, therefore, whether the inclusion of such a provision was worth while even from the theoretical standpoint.

12. Mr. LIANG, Secretary to the Commission, suggested that it was open to serious doubt whether the obligation to state the reasons for an award was generally accepted as a fundamental rule of procedure, though it was undoubtedly laid down in French law. The problem might perhaps be solved by making subparagraph (*c*) refer only to "a serious departure from a fundamental rule of procedure". The reference to "failure to state the reasons for the award" could then constitute a separate ground, if it was felt necessary to retain it in view of the stipulation in article 31.

13. Referring to the possibility of a serious departure being made from a fundamental rule of procedure, he drew attention to an instance quoted by Goldschmidt where "the tribunal has decided without giving the party any hearing whatever".[2] As Mr. Matine-Daftary had pointed out, however, the terms "serious departure" and "fundamental rule" should be more precisely defined. Though agreeing with Sir Gerald Fitzmaurice that such cases were extremely rare, he was not prepared to say that they did not occur at all.

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[2] Cited in the *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations publication, Sales No.: 1955.V.1), p. 110.

14. Mr. VERDROSS, recalling his previous remarks (446th meeting, para. 95), said that the question how a tribunal which was judge of its own competence could possibly exceed its powers raised a very important problem. He drew attention in that connexion to the part of an award of the Permanent Court of Arbitration in which that Court had stated that excessive exercise of power might consist not only in deciding a question not referred to the arbitrators but also in misinterpreting the express provisions of the *compromis* in respect of the way in which they were to reach their decisions, notably with regard to the legislation or the principles of law to be applied.[3] For an arbitral tribunal to reach its decision, not on the basis of the applicable law but by adjudicating *ex aequo et bono,* when not authorized to do so in the *compromis,* would be a flagrant case of *ultra vires.* Though the tribunal was undoubtedly the judge of its own competence, it was possible for it to exceed its powers; he was accordingly in favour of the Special Rapporteur's text.

15. Mr. SANDSTRÖM also thought that ground (*a*) should be retained. While it was true that the tribunal was the judge of its competence, the question was whether it was the intention of the parties that the tribunal should judge without appeal and that its decision should not be subject to review by a higher tribunal. He did not think that that necessarily followed at all. The tribunal was competent to judge only within the limits set by the parties.

16. He agreed with the Secretary's suggestion that sub-paragraph (*c*) should be divided into two distinct grounds for annulment.

17. Mr. BARTOS was in favour of retaining all the three grounds. If an arbitral tribunal was not competent to judge or went beyond its powers, the validity of its award must be determined by a judicial authority. A provision to that effect would be in keeping with the model draft's insistence on the judicial nature of arbitration and, since cases of excessive exercise of power occurred, provision should be made for them. The tribunal was bound to consider the question of its competence and was authorized to draw conclusions regarding it, but it was not the absolute master of its competence. It might, though not necessarily in bad faith, exceed its powers and he did not think that it diminished either the authority or the competence of the tribunal in any way to provide for annulment on the ground of excessive exercise of power.

18. It had been argued that the case contemplated in sub-paragraph (*c*) was extremely rare. However, the Secretary and Mr. Verdross had both quoted instances of a serious departure from a fundamental rule of procedure. Since it was the duty of the codifier to provide for all eventualities, especially those which had occurred in past experience, he felt it necessary to retain ground (*c*) too.

19. He agreed with Mr. Zourek that the invalidity of the *compromis* or undertaking to arbitrate was a possible ground for the annulment of an award but considered that eventuality to be covered by sub-paragraph (*a*). If the initial agreement was invalid, the tribunal in judging would be exceeding its powers, or, rather, exercising powers not really delegated to it at all. Whether the additional ground proposed by Mr. Zourek should be listed separately or regarded as covered by sub-paragraph (*a*) was merely a question of presentation.

20. Mr. EL-ERIAN said that he shared the Secretary's misgivings regarding the wording of sub-paragraph (*c*). The giving of reasons for an award was not strictly a question of procedure. He proposed that the sub-paragraph should be redrafted in the following terms, which would take account of Mr. François' remarks regarding the inclusion of the words "total or partial" (446th meeting, para. 90):

> "(*c*) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure".

21. Mr. YOKOTA said he would prefer the article to stand as drafted. Cases of annulment of an international award were admittedly very rare but so also were cases of revision of awards, yet the Commission had adopted article 39 for the sake of completeness.

22. Though it might be argued that *ex hypothesi* a tribunal was incapable of exceeding its powers, there was the practical question whether the draft should not provide for an appeal against an award in cases where the tribunal's decision concerning its competence was manifestly inconsistent with the provisions of the *compromis* or of the arbitral agreement. In his opinion the tribunal had the power to decide its competence only in the first instance, so to speak.

23. While agreeing with Mr. Matine-Daftary on the vague and general nature of the terms "serious" and "fundamental", he thought that to leave them out would be no solution and that it would be difficult to find any more precise expressions. It must be left to the International Court of Justice to decide whether a departure was serious or a rule of procedure fundamental.

24. Mr. AMADO said that he was in favour of article 36, although he was strongly opposed to the admission of any form of appeal from an arbitral award. The arbitral award was final, but if the award was to be unchallengeable the title on which it was based had to be valid.

25. The arbitral tribunal was the judge, and not the master, of its competence. Its powers were therefore not unlimited: it could only act within the limits prescribed by the parties in the *compromis.* Hence the parties had to be able to challenge the award if the tribunal exceeded its powers.

26. Mr. ZOUREK said that he could quote, as an instance of an invalid arbitral award, the Vienna Award of 2 November 1938 by the then Foreign Ministers of

[3] The Orinoco Steamship Company case between the United States of America and Venezuela, decided 25 October 1910. See *The Hague Court Reports,* James Brown Scott (ed.) (New York, Oxford University Press, 1916), p. 232.

Germany and Italy, Herr von Ribbentrop and Count Ciano, regarding the frontier between Hungary and Czechoslovakia, an award which had really been an act of aggression under the cloak of legality. It had been found necessary to include in the Treaty of Peace with Hungary of 1947 a provision declaring that so-called award null and void. That provision was contained in article 1, paragraph 4 (*a*) of that treaty; article 1, paragraph 2 contained a similar provision regarding the Vienna Award of 30 August 1940 concerning the frontier between Hungary and Romania.[4]

27. The case of the nullity of the *compromis* was not covered by the provision in article 36, sub-paragraph (*a*), of the model draft. That provision concerned the case where the tribunal had exceeded its powers under a valid *compromis*. It did not cover the case where the *compromis* itself was totally invalid.

28. It was not difficult to imagine examples of an arbitral tribunal exceeding its powers. An arbitral tribunal, called upon to render a decision on a specific sector of the frontier between two countries, might give a ruling on a greater length of the frontier than that specified in the *compromis*. An arbitral tribunal, called upon to give a decision on the existence of a claim but not on the amount due, might wrongfully award a specific amount instead of merely deciding the question of liability as such.

29. Mr. SCELLE, Special Rapporteur, said that the challenge of the validity of an award on the grounds that the tribunal had exceeded its powers was not a question of interpretation of the *compromis*. A tribunal could exceed its powers in one of two ways. Firstly, it might give a mistaken ruling on its own competence. Secondly, it might make use of its competence for a purpose other than that for which that competence had been given to it by the parties. The second case was analogous to the typical case of excès de pouvoir in French administrative law.

30. Since the articles were intended to constitute a model draft, the Commission would be leaving a serious gap in the model if it did not include a provision dealing with the cases in which the validity of an award could be challenged. The fact that such cases would perhaps occur only rarely was no argument for neglecting them.

31. He had no objection to the suggestions made by Mr. El-Erian, and by the Secretary of the Commission, regarding article 36, sub-paragraph (*c*). Those suggestions could be referred to the Drafting Committee.

32. He accepted Mr. Zourek's proposal for the insertion of a provision regarding the invalidity of the *compromis* itself, although he had some doubts with regard to that proposal.

33. Sir Gerald FITZMAURICE said that his doubts regarding article 36 had not been dispelled by the explanations given by the Special Rapporteur and other speakers. He would therefore abstain when the article was put to the vote.

34. It was important not to make it too easy for the parties to challenge the arbitral award. It had been suggested that article 36 was necessary because the arbitral tribunal might err with regard to its powers, but the arbitral tribunal could also err with regard to the merits of a case and yet no provision for appeal was made in the model draft. Both types of mistake on the part of the tribunal would raise questions of law and of interpretation and there appeared to be no reason for making it possible to challenge the validity of the award when no provision for appeal was made.

35. Mr. SANDSTRÖM said that the ground of invalidity of the *compromis* could only be regarded as included in the provision in sub-paragraph (*a*) if the wording was given an unduly broad interpretation. Normally, the words "that the tribunal has exceeded its powers" could only be understood by reference to the powers specified in the *compromis*. If the *compromis* itself was successfully challenged, the whole basis of the powers of the tribunal would disappear.

36. A provision along the lines proposed by Mr. Zourek was therefore necessary and he would vote in favour of Mr. Zourek's proposal.

37. Mr. SCELLE, Special Rapporteur, said that he agreed with Sir Gerald Fitzmaurice that the arbitral award should settle the dispute definitively and without appeal. The arbitral award should therefore not be challengeable save in exceptional cases, and it was precisely the purpose of article 36 to make provision for those exceptional cases.

38. Mr. MATINE-DAFTARY said that precisely because the model draft made no provision for appeal it was all the more necessary to maintain article 36 which dealt with the validity of the award. That article would alone make it possible to test the validity of an arbitral award.

39. Sir Gerald FITZMAURICE said that the remarks of Mr. Matine-Daftary illustrated the dangers underlying the provisions of article 36. Precisely because no appeal existed, the losing party, seeking some means of challenging the award, might be tempted to argue that the tribunal had exceeded its powers or had departed in a serious manner from a fundamental rule of procedure. Generally, it would not be too difficult for the losing party to make out a plausible case along those lines.

40. He would not vote against article 36, because the article had some theoretical justification, but he would abstain from voting in favour of it because he did not feel that that theoretical justification compensated for the disadvantage of offering the losing party a whole series of ways of challenging the award.

41. The CHAIRMAN put to the vote Mr. Zourek's proposal (para. 5 above) that a provision enabling the parties to challenge the validity of the award on the ground of the nullity of the *compromis* or of the under-

[4] See Treaty of Peace with Hungary, signed at Paris on 10 February 1947, in United Nations, *Treaty Series*, vol. 41, 1949, p. 170.

taking to arbitrate should be added in article 36, on the understanding that the drafting of the provision would be left to the Drafting Committee.

The proposal was adopted by 11 votes to none, with 2 abstentions.

42. The CHAIRMAN put to the vote Mr. El-Erian's proposal (para. 20 above) that sub-paragraph (*c*) be redrafted in the following terms:

"(*c*) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure".

The proposal was adopted by 12 votes to none, with 2 abstentions.

Article 36 as a whole, as amended, was adopted by 14 votes to none, with 1 abstention, subject to drafting changes.

43. Mr. EDMONDS, explaining his vote, said that he had voted in favour of article 36 because its provisions seemed desirable in principle, but he entertained serious doubts regarding the drafting. The provisions in question were very ambiguous and would prove difficult to apply. Almost any party defeated in an arbitration would appear to be able to take advantage of them.

44. He hoped that the Drafting Committee would clarify some of the uncertainties in the text.

ARTICLE 37

45. Mr. SCELLE, Special Rapporteur, introduced article 37; he pointed out that the reference in paragraph 2 to sub-paragraphs (*a*) and (*c*) of the preceding article would have to be modified in view of the addition made to article 36 on the proposal of Mr. Zourek (see para. 41 above).

46. Mr. YOKOTA pointed out that under paragraph 1 as drafted it would on occasion be possible for the losing party to evade execution of the award by challenging its validity and spinning out the discussions with the other party regarding the court which was to decide the question of nullity. As a precaution against such a contingency, a time limit should be fixed within which the parties must reach agreement on referring the question to another court, failing which it would be referred to the International Court of Justice. He therefore proposed the insertion of the words "within three months" after the words "if the parties have not".

47. Mr. MATINE-DAFTARY said that in his view there was some inconsistency between article 37, paragraph 3, and article 32, which laid down that the award should be carried out immediately. In municipal law a foreign arbitral award was not enforceable until declared enforceable by a municipal court. The model draft provided for no such procedure, and he wondered precisely what the Special Rapporteur thought would happen in practice.

48. Mr. SCELLE, Special Rapporteur, thought that Mr. Matine-Daftary had made a valid point. Theoretically there did appear to be some inconsistency between the two articles. In practice, however, the word "immediately" was always interpreted in a somewhat liberal fashion.

49. Mr. SANDSTRÖM agreed with the Special Rapporteur that the inconsistency between the two articles was only apparent. As a special provision, article 37 naturally prevailed over article 32, which laid down the general principle, though for clarity's sake a suitable proviso might perhaps be inserted in article 32.

50. An addition should also be made to article 37 to cover the point previously raised by Mr. Matine-Daftary (para. 4 above), in other words to make clear that if only part of the award was challenged on the ground that the tribunal had exceeded its powers, only that part could be declared null.

51. Mr. SCELLE, Special Rapporteur, thought it might be difficult to devise a form of words which would cover all such questions of detail, which could, in his view, be left to the discretion of the International Court of Justice or whatever other court the parties had agreed upon.

52. Mr. SANDSTRÖM proposed that, in order to cover the particular case, the words "in whole or in part" be added after the words "to declare the nullity of the award" in article 37, paragraph 1.

53. Mr. FRANÇOIS supported the observation of the Netherlands Government to the effect that the time limit for an application for annulment on grounds of corruption should operate in the same manner as the time limit for an application for revision.[5] He therefore proposed the addition of the following words at the end of paragraph 2: "of the discovery of the corruption and in any case within ten years of the rendering of the award."

54. Mr. ZOUREK supported Mr. François's proposal; a time limit of six months from the rendering of the award was much too short for challenges on the ground of corruption.

55. As was clear from the survey prepared by the Secretariat (A/CN.4/L.71), the article under discussion (article 31 of the 1953 draft) had been criticized by many Governments. In his view those criticisms were justified as the article tended to weaken the authority of the award as *res judicata*. To lay down in a model set of rules an elaborate procedure for dealing with challenges to the validity of the award as if such challenges were to be expected in the normal course of events would only encourage the losing party to invoke a provision which must find a place in the draft, since the right to challenge the validity of the award could not be excluded altogether, but which should only be invoked in quite exceptional circumstances.

56. Mr. AMADO said he entirely agreed with what Mr. Zourek had said. The same consideration applied no less in the case of applications for revision.

[5] *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 52, document A/2899 and Add.1 and 2, sect. 13.

57. The CHAIRMAN put to the vote Mr. Sandström's proposal (para. 52 above) that the words "in whole or in part" should be inserted after the words "to declare the nullity of the award" in paragraph 1.

The proposal was adopted by 11 votes to none, with 5 abstentions.

58. The CHAIRMAN put to the vote Mr. Yokota's proposal (para. 46 above) that the words "within three months" should be inserted after the words "if the parties have not" in paragraph 1.

The proposal was adopted by 12 votes to none, with 2 abstentions.

Paragraph 1, as amended, was adopted by 12 votes to 2, with 2 abstentions.

59. The CHAIRMAN put to the vote Mr. François' proposal (para. 53 above) that the words "of the discovery of the corruption and in any case within ten years of the rendering of the award" should be added at the end of paragraph 2.

The proposal was adopted by 14 votes to none, with 2 abstentions.

60. The CHAIRMAN proposed that, in paragraph 3, the words "Notwithstanding the provisions of article 32" should be added to meet the point raised by Mr. Matine-Daftary.

It was so decided.

Paragraph 3, as so amended, was adopted by 12 votes to 2, with 2 abstentions.

61. Mr. HSU said that although he had voted in favour of the articles relating to the annulment and revision of arbitral awards, he still had some doubts whether they should be retained as they seemed to have gone somewhat beyond the fundamental aim of the draft, which was to hold the parties to their undertaking to arbitrate and prevent them from frustrating the proceedings. Moreover, by providing for annulment and revision the Commission had been obliged to provide for recourse to the International Court of Justice in more cases than would otherwise have been necessary, and had thus laid the draft open to more criticism from States than it need otherwise have done. In his view the very rare cases where occasion for applications for annulment or revision arose should be treated as new disputes, and referred to arbitration as such.

62. The CHAIRMAN observed that the Commission had completed its consideration of the draft articles in the Special Rapporteur's model draft. Further consideration of item 2 of the Commission's agenda would therefore be deferred pending receipt of the Drafting Committee's report.

The meeting rose at 5.50 p.m.

451st MEETING

Wednesday, 28 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72) *(continued)* [1]

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 3

1. Mr. SANDSTRÖM, Special Rapporteur, said that he proposed no changes in article 3. He drew attention, however, to the view expressed by the Governments of Chile (A/CN.4/114/Add.1) and Finland (A/CN.4/114/Add.2) to the effect that the *agrément* was only required in the case of ambassadors and ministers. In his view the *agrément* should always be obtained for the head of a mission, even if he was only a *chargé d'affaires.*

2. He also drew attention to the fact that in the General Assembly the Philippine delegation had proposed the addition of a second paragraph stating that the receiving State could not refuse to give the *agrément* except on reasonable grounds (see A/CN.4/L.72); that point had, however, been debated at length at the ninth session of the Commission.

3. Sir Gerald FITZMAURICE said that while it was true that the *agrément* was not sought for a *chargé d'affaires ad interim,* the situation was otherwise with *chargés d'affaires ad hoc,* appointed, for example, pending the establishment of formal diplomatic relations between two States. It was, he thought, inconceivable that in such a case the *chargé d'affaires* would be sent to the receiving State unless his name had been submitted in advance and something at least very similar to the *agrément* procedure completed. He was therefore in favour of retaining article 3 as it stood, except that the word "accredit" might be replaced by the word "send", in order to cover the case of *chargés d'affaires.*

4. Mr. HSU, Mr. VERDROSS and Mr. ZOUREK agreed that article 3 should be retained as it stood.

Article 3 was adopted, subject to any changes proposed by the Drafting Committee.

ADDITIONAL ARTICLE (ARTICLE 3 A)

5. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his proposal (A/CN.4/116/Add.1) for a new article designed to meet a point raised by the United States Government in its observations on article 1 (A/CN.4/116).

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[1] Resumed from 449th meeting.

6. Mr. HSU thought that the proposal was not in keeping with existing practice and was unnecessary. He himself was his country's ambassador to two foreign States, but the first had not been asked to give its consent before he had been accredited to the second.

7. Mr. MATINE-DAFTARY agreed that the proposal was unnecessary. So far as he knew, only the Holy See had ever objected to multiple accreditation, because it was unwilling that an ambassador accredited to it should also be accredited as ambassador to Italy. For other States multiple accreditation was not desirable; nevertheless certain sending States were unable to avoid it.

8. Mr. BARTOS said that other similar cases had occurred. For example, up to 1929 the Netherlands Government had been unwilling to agree that one and the same person should be accredited as Serbian ambassador to both Belgium and the Netherlands. In his view, the Commission could not disregard existing practice, particularly when there were good reasons for it; the system of dual or multiple accreditation could give rise to difficulties in the case of tension between the States to which the ambassador in question was accredited.

9. Sir Gerald FITZMAURICE agreed that the receiving State to which an ambassador was accredited no doubt had a right to object to receiving him if he was accredited to one or more other States in addition. The Special Rapporteur's proposed text, however, gave the impression that its explicit consent to his being so accredited was required, which was not the case. He therefore proposed that the article be amended to read along the following lines:

> "Unless objection is offered by any of the receiving States concerned, the head of a mission to one State may be appointed head of a mission to one or more other States."

10. Mr. ALFARO said that, quite apart from the cases cited, many other countries had their own reasons for objecting to multiple accreditation. For the sake of illustration, he referred to the situation as between Spain and Portugal and as between Israel and the Arab States. The provision first proposed by the United States Government should therefore appear in the draft, though he agreed with Sir Garald Fitzmaurice that it should be worded in negative form.

11. Mr. EL-ERIAN agreed that it would be desirable to include some such provision. It would have been desirable to do so even if it had not been in accordance with current practice. For the Commission should endeavour to adopt rules which would help to reduce differences between States such as might well arise if the receiving States were not at liberty to object to multiple accreditation.

12. Mr. SANDSTRÖM, Special Rapporteur, accepted Sir Gerald Fitzmaurice's proposal.

13. Mr. HSU pointed out that all the cases which had been referred to were special cases. In the matter under discussion, as in all matters of diplomatic intercourse, he thought it was unnecessary to stress that the agreement of the States concerned was required.

14. The CHAIRMAN put to the vote the new article in the amended form proposed by Sir Gerald Fitzmaurice (para. 9 above).

The article was adopted by 14 votes to none, with 1 abstention.

ARTICLE 4

15. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his proposal (A/CN.4/116/Add.1) that the word "other" should be omitted from what had been the text of article 4 (A/3623, para. 16), in accordance with a suggestion made by the Netherlands Government (A/CN.4/116).

16. He also drew attention to the observations of the United States Government and his comments thereon (A/CN.4/116), and to the somewhat similar observation of the Yugoslav Government (A/CN.4/114/Add.5). As far as the alleged lack of clarity was concerned, he thought the proposed inclusion of a definitions clause would meet the point raised by the two Governments.

17. Mr. YOKOTA said he shared the Netherlands Government's view that a definitions clause would be desirable. Even if no such clause was included, however, he was in favour of omitting the word "other" in what had been the text of article 4, for it was clear from article 6, paragraph 1, that the head of the mission was not included among the members of the mission's staff.

18. Mr. LIANG, Secretary to the Commission, recalled that at the ninth session some doubts had been expressed regarding the precise meaning of the words "freely appoint". It had, he thought, been agreed that article 4 meant no more than that the *agrément* procedure was not required in respect of members of the mission staff other than the head of the mission. The observations of the United States Government showed that the wording adopted at the ninth session was open to misunderstanding, and it might therefore be advisable to make the scope of the article clear.

19. Mr. ZOUREK agreed. However, it should perhaps be made clear in the commentary that the fact that no *agrément* was required in the case of members of the mission staff other than the head of the mission did not mean that the receiving State was obliged to accept them, since it could always refuse an entry visa to a particular member or declare him *persona non grata* after his arrival.

20. After further discussion, Mr. AMADO suggested that the Drafting Committee might consider it possible to dispense with article 4 altogether since it was agreed that the article did no more than refer back, by implication, to article 3 and forward to articles 5, 6 and 7.

21. The CHAIRMAN put to the vote the text of paragraph 1, as proposed by the Special Rapporteur (A/CN.4/116/Add.1).

Paragraph 1 was adopted unanimously, subject to any changes proposed by the Drafting Committee.

22. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the text he proposed as article 4, paragraph 2, in accordance with a proposal by the Netherlands Government (A/CN.4/116). A somewhat similar proposal had been made by the Italian Government (A/CN.4/114/Add.3).

23. Mr. LIANG, Secretary to the Commission, pointed out that articles 3 to 5 dealt with the question of appointments. The question raised by the Netherlands and Italian Governments was somewhat different, and if the Commission wished to refer to it, it should perhaps do so at some later stage in the draft, possibly in connexion with article 8.

24. Sir Gerald FITZMAURICE said that, quite apart from sharing the Secretary's doubts as to the place of the provision in the draft, he was not at all sure that the provision itself was either necessary or desirable. The matter had been amply discussed at the ninth session and it had been established that it was the invariable practice of diplomatic missions to notify at least the initial arrival of their members to ensure that their names were placed on the diplomatic list. That they were certain to do in their own interest.

25. The new provision would nevertheless be acceptable provided that it were strictly confined to the initial arrival, or appointment, and the final departure of members of missions. As it stood, it could be interpreted as requiring every departure and arrival of a member of a mission, even on leave, for instance, to be notified, which was not the practice at all. Similarly, the second sentence might be taken to imply that private servants could not be engaged and discharged in the receiving State unless the Government of that State was notified. Although such notification was frequently made for the purpose of securing for the servants whatever privileges and immunities they were entitled to by law, the recruitment and discharge of private servants in the receiving State were not subject to the condition of notification.

26. The CHAIRMAN recalled that at the Commission's ninth session Mr. Khoman had suggested adding to the text submitted by Mr. Tunkin, which had subsequently become article 4, the words: "whose names shall be notified to the receiving State before they take up their duties". Mr. Khoman had not pressed the amendment and the matter had been dealt with in another context.[2]

27. Mr. FRANÇOIS said that he was sure that the Netherlands Government, when making the proposal now sponsored by the Special Rapporteur, had never intended to imply that notification of arrival and departure was necessary whenever a member of a mission returned from leave and went on leave. The purpose of the proposal was clearly to enable Governments to establish an accurate list of all persons entitled to diplomatic privileges and immunities. He could not agree with Sir Gerald Fitzmaurice that it was not necessary for missions to make any notification of the recruitment and discharge of private servants in the receiving State. Since such servants could claim special status it was most desirable the their engagement be notified and *a fortiori* that their discharge should be notified, in order to prevent their continuing to enjoy special status when no longer employed by a diplomatic mission.

28. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. François and drew attention to article 28, paragraph 4, and to paragraph 9 of the commentary on that article.

29. Mr. BARTOS said that he was in favour of including the new proposal but felt that it needed some clarification. For example, the text should also cover members of missions who did not leave the territory of the receiving State on terminating their appointment. Such cases were by no means rare and were of considerable legal, and even political, importance. Furthermore, whereas private servants engaged and discharged in the receiving State were mentioned in the second sentence, there was no corresponding mention of the arrival and departure of servants brought into the receiving State, although, according to article 28, such servants were not regarded as members of the mission. In that connexion, he felt bound to point out, with reference to Sir Gerald Fitzmaurice's remarks, that the practice of the United Kingdom Ministry of Labour of requiring domestic staff brought in by the Yugoslav mission to satisfy all the formalities applicable to ordinary foreign workers had caused considerable difficulty, and Yugoslavia had been obliged, as a counter-measure, to stipulate that the United Kingdom mission could not bring domestic staff into Yugoslavia without previous permission. It was a matter that required regulating one way or the other, and he was in favour of complete freedom for missions to bring in domestic staff.

30. Mr. LIANG, Secretary to the Commission, said that the new proposal would do no harm, especially as it had been made clear that it entailed no obligation to notify casual departures or arrivals. There was a danger, however, that it might be taken as somehow connected with the question of the duration of privileges and immunities, which was dealt with in article 31. Perhaps the Drafting Committee might be requested to find an innocuous place in the draft for the proposal, indicating its connexion with the question of the diplomatic list and the list of servants of diplomatic missions.

31. Sir Gerald FITZMAURICE said that he did not wish to press his objection to the proposal and was prepared to accept it subject to drafting changes and reconsideration of its context in the draft.

32. Referring to Mr. Bartos' remarks, he said that he (Sir Gerald Fitzmaurice) was speaking without know-

[2] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), 389th meeting, paras. 20 and 59.

ledge of the facts but that, on the face of it, the practice of the Ministry of Labour, if exactly as Mr. Bartos had described, would seem to go beyond what was permissible in international law. Servants brought in by diplomatic missions were of course subject to the ordinary laws governing the employment of aliens. This might mean that they could not accept any other employment while in the country. Perhaps it was something of the kind that accounted for the state of affairs mentioned by Mr. Bartos. Subject to the right of the receiving State to declare the persons concerned *non grata,* foreign diplomatic missions certainly had the right to employ servants who were not locally engaged. The Special Rapporteur's proposal, however, only referred specifically to locally recruited servants.

33. Mr. ZOUREK agreed with those speakers who were opposed to including the proposal in section I of the draft. The text had nothing to do with the substantive rules dealt with in the early articles and was perhaps more closely connected with article 28.

34. Mr. SANDSTRÖM, Special Rapporteur, agreed that the text might be referred to the Drafting Committee with the request that it should make certain drafting changes and reconsider the placing of the proposal in the draft.

On that understanding, paragraph 2, as proposed by the Special Rapporteur (A/CN.4/116/Add.1), was adopted unanimously.

ARTICLE 5

35. Mr. SANDSTRÖM, Special Rapporteur, referred to the new text proposed for article 5 (A/CN.4/116/Add.1).

36. The proviso at the end of the article, which was the only major change, had been introduced in view of the United Kingdom Government's observation that it was not its normal practice to grant such express consent (A/CN.4/114/Add.1). The United States Government, in its observations, had pointed out that it declined to recognize one of its own nationals as a diplomatic officer of an embassy or legation in Washington but ordinarily had no objection to the inclusion in the mission's staff of American citizens employed in other capacities (A/CN.4/114).

37. Mr. BARTOS, after recalling that he was opposed to the whole idea of appointing nationals of the receiving State as members of foreign diplomatic missions,[3] said that, in view of the Commission's decision on article 5 at its previous session, he was prepared to accept an article regulating the question, provided that it stipulated that the express consent of the Government of the receiving State was required in all cases. Furthermore, in view of the difficulties experienced by newly established States in staffing their missions, he was prepared to accept the principle that nationals of third States might be appointed to diplomatic missions, on the express understanding that the fact that the person concerned was not of the nationality of the sending State must be explicitly stated when the *agrément* was sought.

38. Mr. HSU said that he found the Special Rapporteur's addition acceptable since without it receiving States would be bound to go through the formality of giving express consent even when they considered it unnecessary.

39. Mr. EL-ERIAN said he had some difficulty in understanding the effect of the qualification added to article 5. How could a receiving State waive in advance its right to consent to what was in any case a rare practice, and what form would that waiver take? The waiver of a right could not be inferred from the mere failure to exercise it. Perhaps the intended purpose would be achieved by leaving out the last phrase and merely stating "... only with the express or tacit consent of that State".

40. Mr. SANDSTRÖM, Special Rapporteur, said that the qualification simply meant that when a receiving State did not insist on its consent being sought, it would not be necessary for sending States to apply for that consent in every case.

41. Mr. ZOUREK agreed that the fact that a receiving State raised no objection in certain cases could not be interpreted as a general waiver of its right. The amendment suggested by Mr. El-Erian would avoid the difficulty.

42. In his opinion, the text did not take sufficient account of the purely exceptional nature of cases of appointment of nationals of the receiving State to foreign diplomatic missions. Recalling that he had not supported the article at the previous session,[4] he added that such appointments might involve the person concerned in an embarrassing conflict of loyalties. Preferably, therefore, the article should open with the statement that diplomatic agents should, as a rule, be chosen from among the nationals of the sending State.

43. Mr. TUNKIN remarked that he could not see much reason for the new addition to the article. Such appointments were so rare that he did not think there could be any objection to a rule requiring the sending State to obtain the express consent of the receiving State to the appointment of one of the latter's nationals. The new formula proposed could only lead to some degree of uncertainty. He would prefer the original wording of article 5. Countries such as the United Kingdom, which did not insist on such consent being obtained, could always reply to that effect when their consent was sought.

44. Mr. YOKOTA said that the objections formulated by the Governments of the United Kingdom and the United States could be met by deleting the word "express", so as to cover the case of the implied consent of the receiving State.

[3] *Ibid.*, 403rd meeting, paras. 56-62.

[4] *Ibid.*, 389th meeting, para. 64.

45. Sir Gerald FITZMAURICE said that the Government of the United Kingdom had not formulated any objection to article 5; it had merely made a statement of individual practice.

46. He had no formal proposal to make, but suggested that the purpose of the Special Rapporteur in adding the words "unless it has waived that condition" could perhaps be better served by introducing a phrase along the following lines at the beginning of the sentence; "Except where a country does not insist on that condition..."

47. Mr. MATINE-DAFTARY said that he agreed with those members who opposed the insertion of the additional words proposed by the Special Rapporteur.

48. He asked the Special Rapporteur the reason for introducing the term "A diplomatic agent" in place of the words "Members of the diplomatic staff of the mission" which appeared in the draft adopted by the Commission at its previous session (A/3623, para. 16). For his part, he preferred the earlier text.

49. Mr. SANDSTRÖM, Special Rapporteur, withdrew his proposal for the insertion of the words "unless it had waived that condition".

50. The term "A diplomatic agent" had been introduced because it was the one appearing in the definitions clause proposed by him (A/CN.4/116/Add.1). When those definitions were adopted, the question whether that term should be retained in article 5 would be a matter of drafting.

51. Mr. ZOUREK said that since the Commission had no yet accepted the definitions clause proposed by the Special Rapporteur, it was better to vote on the original text.

52. Mr. SANDSTRÖM, Special Rapporteur, said that he had no objection to that procedure. The Commission could revert to the original text of article 5 (A/3623, para. 16) which he now proposed without amendment.

53. Mr. HSU drew attention to the case where the sending State wished to choose as a member of the diplomatic staff a person who was a national of both the receiving State and the sending State, a case to which reference was made in paragraph (6) of the commentary.

54. In cases of dual nationality, the consent of the receiving State should be required only if the dual national was a resident of the receiving State. It would be unfair to require such consent if the dual national was a resident of the sending State.

55. Mr. SANDSTRÖM, Special Rapporteur, said that the Government of China had made a proposal for an additional paragraph in article 5 stating that dual nationality should not constitute grounds for declaring a diplomatic agent *persona non grata* (A/CN.4/114/Add.4).

56. He did not propose a provision along those lines because he did not consider that the receiving State could be placed virtually under an obligation to observe foreign nationality laws.

57. He had also not considered it advisable to introduce a provision along the lines suggested by the Government of the United States of America (A/CN.4/116) because to do so would be to enter into excessive detail.

58. Sir Gerald FITZMAURICE said that there was a certain logic in the United States observation that, once it had issued a visa to a member of a diplomatic mission on a passport issued by the sending State, the receiving State was precluded from thereafter claiming that person as its national. The State issuing such a visa could be held thereby to have waived its special right, under the rule of "master nationality", to assert its own nationality in its relations with the dual national.

59. The CHAIRMAN put to the vote article 5 as drafted at the ninth session (A/3623, para. 16).

Article 5 was adopted by 16 votes to 1, with 1 abstention.

60. Mr. TUNKIN proposed the insertion of an additional paragraph in the following terms:

> "Such consent shall also be necessary for the appointment of nationals of the receiving State to administrative, technical and service staff posts where it is so required by the regulations in force or by the practice of the receiving State."

61. Article 5 dealt only with the appointment to diplomatic posts of nationals of the receiving State. Some provision had also to be made for the appointment of such nationals to non-diplomatic posts.

62. Mr. SANDSTRÖM, Special Rapporteur, said that he could not support Mr. Tunkin's proposal, which was not consistent with existing practice. As pointed out by the Swiss Government (A/CN.4/116), for the sake of the proper functioning of its mission a State had to be free to appoint nationals of the receiving State to the non-diplomatic staff of the mission without prior authorization. Any lack of co-operation in that respect by the receiving State would be contrary to the provision in article 19 that the receiving State should accord full facilities for the performance of the mission's functions.

63. Mr. MATINE-DAFTARY said that he was in general agreement with Mr. Tunkin's proposal. A national of the receiving State appointed to the staff of a diplomatic mission would enjoy certain privileges; it would be undesirable if those privileges were granted to him without the consent of the State to which he belonged.

64. Mr. PADILLA NERVO said that it was not the general practice of States to insist on their consent being obtained in the cases contemplated by Mr. Tunkin's proposal. If, however, the legislation of the receiving State stipulated that such consent was necessary, it would not be possible for a diplomatic mission to contravene that legislation. Article 33 of the draft specifically laid down the duty of all members of a diplomatic mission to respect the laws and regulations of the receiving State.

65. Sir Gerald FITZMAURICE said that the work of

a diplomatic mission would become more difficult, or might even be paralysed, if that mission was unable to engage such local personnel as interpreters, stenographers and messengers familiar with the local language and conditions. In accepting diplomatic representation, the receiving State agreed in principle that the mission could recruit such local staff.

66. The fact that express consent was not required prior to the appointment of such staff did not deprive the authorities of the receiving State of all control over such appointments. It was always open to the receiving State to declare *persona non grata* any member of the staff of a diplomatic mission, including a member of the local staff, thereby causing the termination of his functions with the mission in accordance with article 6, paragraph 1.

67. Mr. YOKOTA said that he could not support Mr. Tunkin's proposal which would make it impossible for a diplomatic mission to engage even a junior member of its staff without the consent of the receiving State.

68. Some States appeared to require such consent but their practice was contrary to a long-standing international usage regarding the recruitment of local staff. A diplomatic mission might, of course, be obliged to comply with local legislation which was at variance with general international practice, but the Commission should not by endorsing such departures from international law accept them as the expression of a valid general principle. On the contrary, in order to avoid any misunderstanding, a provision along the lines of the last paragraph of the comment by the Swiss Government (A/CN.4/116) should be inserted in the commentary.

69. Mr. VERDROSS said that he supported Mr. Tunkin's proposal. The receiving State was free to declare *persona non grata* a member of the local staff of a diplomatic mission; if, under its legislation, its nationals could not be employed as local staff without permission, it was clearly preferable that the mission should apply for the receiving State's consent before making any such appointment rather than run the risk of seeing the person concerned declared *persona non grata* and have to dismiss him.

70. Sir Gerald FITZMAURICE said that there was a very great difference between appointments to the diplomatic staff and appointments to the non-diplomatic staff of a mission. The refusal of the receiving State to permit the employment of one of its own nationals as a member of the diplomatic staff would not cause a serious impediment to the diplomatic mission because the sending State could always send one of its own nationals instead. The refusal, however, to allow the employment of local staff could well make it impossible for the diplomatic mission to carry on its work.

71. The receiving State could always declare a particular individual *persona non grata,* but it had no general right to prevent the employment of its own nationals. It had to accept the fact that some of its nationals would have to be employed in that capacity and could not object to the employment of a person by a diplomatic mission merely because of his nationality.

72. Mr. ZOUREK said that the practice of States was not uniform with regard to the appointment of nationals of the receiving State to non-diplomatic posts. The purpose of the provision proposed by Mr. Tunkin was to ensure the respect of the legislation of the receiving State where that State had enacted laws or regulations on the subject.

73. It was clear that the receiving State would not systematically withhold its consent to the employment of its nationals by a diplomatic mission in non-diplomatic posts. Such a systematic refusal would not be in its own interest, since it would hamper its relations with the sending State.

74. Mr. TUNKIN said that a realistic approach was necessary. If the legislation of the receiving State required that State's consent to the appointment, a diplomatic mission could not very well disregard that legislation.

75. The paragraph which the Commission had adopted as article 5 covered the case of the appointment of nationals of the receiving State to diplomatic posts. Silence on the subject of the appointment of such nationals to non-diplomatic posts would suggest that that consent might also be required for such an appointment. It was, however, preferable to include an explicit provision to that effect in order to avoid any misunderstanding.

76. Mr. MATINE-DAFTARY suggested to Mr. Tunkin a compromise formula which would recognize the right of the receiving State, on being notified of the appointment of one of its nationals to a non-diplomatic post by a foreign diplomatic mission, to object to such an appointment. A provision requiring prior consent would give rise to practical difficulties. The absence of objection would amount to consent.

The meeting rose at 1 p.m.

452nd MEETING

Thursday, 29 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 5 *(continued)*

1. Mr. HSU said that any decision on the proposal submitted by Mr. Tunkin at the previous meeting (451st meeting, para. 60) must be taken on the clear

understanding that it involved a new rule constituting a reversal of an existing and, in his own opinion, perfectly satisfactory practice. As the proposal stood, he found it very difficult to accept. If the need for diplomatic intercourse was accepted, diplomatic missions must be provided with the necessary facilities to perform their functions, and the missions of practically all nations depended to a great extent on auxiliary personnel drawn largely from local sources. It had been argued that the proposal should be adopted in the interests of convenience and logic. Yet the stipulation that the approval of the Government of the receiving State was necessary to every appointment, however minor, to the staff of a mission would prove most inconvenient and open to abuse. If carried to extremes, it might even render it impossible for a diplomatic mission to function at all.

2. So far as the logic of the proposal was concerned, he said the interests of one party, the receiving State, were adequately protected by the provision that that State must be notified of all appointments; and, so long as its approval was required for the appointment of diplomatic agents, it seemed unnecessary to extend the requirement to other personnel. The proposal therefore appeared to be protecting the interests of one party at the expense of those of the other, which could hardly be described as logical. Unless the proposal was amended on the lines suggested by Mr. Matine-Daftary at the previous meeting (451st meeting, para. 76), he would be obliged to vote against it.

3. Mr. GARCIA AMADOR remarked that due weight should be given both to the arguments in favour of the rights of the receiving State, which were mainly based on article 33 of the draft, and to those in favour of the right of the sending State to have its diplomatic mission accorded every facility required for the proper discharge of its functions. As far as the first group of arguments were concerned, he did not think that article 33 should be interpreted too literally. Though it laid down the duty of all persons enjoying diplomatic privileges and immunities to respect the laws and regulations of the receiving State, it prefaced that stipulation by the phrase "Without prejudice to their diplomatic privileges and immunities". The question raised in Mr. Tunkin's proposal should, he thought, be viewed in the light of the terms of article 19 and of the discussion on that article at the ninth session; the overriding consideration was that diplomatic missions should be provided with every facility to enable them to function. There could be no doubt that if the receiving State deliberately and systematically opposed the recruitment of local administrative and technical staff by a diplomatic mission, that mission would be unable to function. The whole object of the codification was to draft provisions reconciling the interests of the receiving and of the sending States, and accordingly he suggested that Mr. Tunkin's proposal should be amended to read:

> "In accordance with the regulations in force or with the practice of the receiving State, that State may oppose the appointment of specified persons having its nationality to the administrative, technical or service staff of a foreign diplomatic mission."

4. The suggested provision would give the receiving State the right to oppose the employment of certain specified individuals but not to oppose systematically or as a matter of principle the recruitment of its nationals for employment by foreign diplomatic missions.

5. Mr. SANDSTRÖM, Special Rapporteur, explained that he had included no proposal on the line of Mr. Tunkin's in his draft because he did not know of any country where such a rule was applied. Under the draft, the receiving State had other means of achieving the same end; it could, for example, declare any member of the staff of a mission to be *persona non grata* or not acceptable under article 6, or it could rely on the provisions of article 33. Accordingly, the proposal was superfluous and, indeed, undesirable, and for the same reason a compromise text, such as that suggested by Mr. García Amador, was equally unnecessary.

6. Mr. AMADO agreed with the Special Rapporteur. Countries such as his own whose nationals were forbidden by law to enter the service of a foreign power without official permission would have no difficulty in enforcing their internal legislation without the aid of any provision such as that proposed by Mr. Tunkin. He realized that some States might wish their consent to be sought to appointments of their nationals to the staff of missions but he could not see how a mission's duty to apply for permission to employ even a typist of local nationality could possibly be elevated to the level of a rule of international law.

7. Mr. TUNKIN thought that the amendment proposed by Mr. Matine-Daftary at the previous meeting went rather too far since it made the procedure advocated obligatory in all cases, even when not required by the regulations or practice of the receiving State.

8. Replying to Mr. Amado, he said the fact that Brazil required its nationals to obtain official permission before entering the service of a foreign State should, he thought, have been a reason for Mr. Amado's supporting the proposal.

9. He did not object in principle to the general lines of Mr. García Amador's suggestion and would agree to that text and his own proposal being referred to the Drafting Committee with a request to find a suitable form of words.

10. Mr. MATINE-DAFTARY explained that he had made his compromise proposal before seeing Mr. Tunkin's proposal in writing. Under his own proposal, the failure of the receiving State to object to the appointment of one of its nationals to the subordinate staff of a foreign diplomatic mission would be interpreted as tacit consent.

11. Iran had no special regulations requiring its nationals to obtain official permission before entering the service of a foreign Power. But experience had shown that certain persons sought employment with foreign missions in order to use their position for

improper purposes under the protection of the mission, and it was to enable the receiving State to take action against such persons that his proposal had been made. It would, however, be asking too much of diplomatic missions to require them to obtain the receiving State's previous consent to the employment of local persons on their staff.

12. Mr. ALFARO was in general agreement with those opposing Mr. Tunkin's proposal; the right of the receiving State to prohibit or restrict the appointment of its nationals to the auxiliary staff of diplomatic missions by requiring its previous consent to all such appointments should not be converted into a rule of international law. It was true that many American States had a clause in their constitutions forbidding their nationals to enter the service of a foreign Power without official permission, but that was a rule governing the relationship between a State and its national and hence could not form the basis of a rule of international law. If a national of such a State accepted employment with a foreign mission without applying for permission, the State would be perfectly within its rights in compelling him to apply for permission and, as a last resort, in declaring him *persona non grata* under article 6 of the draft. In a word, that article and the provision regarding notification adopted at the 451st meeting together offered a perfectly adequate solution to the problem, without the need for requiring the previous consent of the receiving State.

13. Mr. LIANG, Secretary to the Commission, drew attention to the recently published volume entitled *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*[1] which contained relevant source material. The contents of the volume tended to confirm the Special Rapporteur's view that the regulations in question were extremely rare. The laws and regulations relating to the employment of locally recruited staff were addressed principally to the nationals of the State or to the government departments responsible for enforcing the laws, though those laws had their repercussions on foreign diplomatic missions. There was no example of any law requiring such missions to obtain the consent of the receiving State before engaging nationals of the receiving State as members of their subordinate staff.

14. Many States, on the other hand, required their nationals to obtain permission before entering the service of a foreign State or to report such employment, but in all such cases, as Mr. Alfaro had pointed out, the regulations were concerned with the relationship between the State and its own nationals. Thus, while it was quite common for nationals of the receiving State to have to fulfil certain conditions before or upon entering the employment of a foreign mission, it was not the practice for foreign diplomatic missions to have to take active steps to obtain the consent of the receiving State. Perhaps Mr. Tunkin's proposal could be put in a form that would place the onus on the national of the receiving State to obtain clearance from his Government and that it was the duty of the mission, as his employer, to satisfy itself that the necessary formalities had been complied with.

15. Mr. BARTOS said that until 1950 the Yugoslav Government, though viewing with disfavour the appointment of its nationals to foreign diplomatic missions, had not insisted that its consent should be sought. Since 1950, however, new regulation absolutely prohibited the appointment of Yugoslav nationals to posts of a diplomatic character in foreign missions. But they could be appointed to the technical, administrative or service staff of such missions, provided that they informed the social security and tax authorities of the fact within seven days. Consequently, the onus was entirely on the Yugoslav national and there was no question of permission or consent. The reasons for Yugoslavia's change of attitude since 1950 were outlined in the statement of the Yugoslav representative to the Sixth Committee of the General Assembly in support of its proposal to give priority to the codification of the topic "Diplomatic intercourse and immunities".[2] Yugoslavia had found that certain countries were forbidding their nationals not only to accept employment with Yugoslav diplomatic missions but even to render casual services, such as giving medical attention to or even cutting the hair of members of the mission, a state of affairs which the Yugoslav Government considered to be in contravention of international law.

16. The employment of locally recruited subordinate staff by foreign diplomatic missions was perfectly lawful, though it could not be described as an ideal arrangement in view of the possibility that either the receiving or the sending State might induce such staff to render services of a rather doubtful character. There were, on the other hand, many practical considerations in favour of the system. Some services, particularly in countries whose languages were little known abroad, could be rendered only by nationals of the country. Furthermore, it would greatly increase the expenses of missions if they were not allowed to recruit auxiliary staff locally, and such increased expenditure would bear heavily on the budgets of small countries anxious to extend their diplomatic relations. The interests of the receiving State were adequately protected by its power to declare one of its nationals *persona non grata,* or to request his discharge or transfer to another type of employment within the mission. He was accordingly hesitant to support Mr. Tunkin's proposal on practical grounds and because of the absence of any guarantee that there would be no discrimination between foreign diplomatic missions in the withholding of consent. If the proposal were adopted it would mean, in practice, that missions either had to accept persons designated in advance by the authorities of the receiving State or had to dispense with auxiliary staff altogether. He would, however, be willing to consider the proposal if it applied only to certain types of employment in diplomatic missions.

[1] United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3).

[2] See *Official Records of the General Assembly, Seventh Session, Sixth Committee,* 313th meeting, para. 14.

17. Mr. PADILLA NERVO observed that some members of the Commission apparently overlooked the fact that the proposal was qualified by reference to the regulations in force or the practice of the receiving State. Though it was not desirable to establish a rule that the consent of the receiving State was indispensable to the appointment of its nationals to administrative, technical and service staff posts on foreign missions, it was necessary, particularly in view of the questions which would probably be asked on the point in the General Assembly, for the Commission to give some guidance to diplomatic missions accredited to a State whose nationals had to obtain official permission before entering the service of a foreign State. While agreeing with Mr. Alfaro and the Secretary that the obligation in such cases lay on the nationals themselves, he thought that, if only for reasons of international courtesy, missions in such countries should consider themselves bound to take local laws into account when making appointments; otherwise they might to some extent be encouraging or concealing a violation of the laws of the receiving State by its nationals. The obligation placed on the nationals of that State would have its counterpart in the moral duty of foreign diplomatic missions to satisfy themselves that the national in question had obtained permission before they took him into their employ. Such a precaution should not hamper the working of the mission and would be preferable to the national's being declared *persona non grata* after appointment. Some countries already took such precautions, where required. The heads of Mexican diplomatic missions, for instance, were bound, before recruiting such technical staff as interpreters, to ascertain whether there could be any objection under the laws and regulations of the receiving State to their employment, precisely in order to avoid the embarrassment of being subsequently informed that the employee in question was unacceptable because he had not obtained permission to be so employed. He suggested that the Commission should consider including a provision on the lines he had indicated either as an article or as part of the commentary.

18. Mr. EDMONDS recalled that the purpose of article 5 was to ensure that the nationals of the receiving State did not, without its consent, occupy a position in which they would be called upon to act in a diplomatic capacity on behalf of the sending State. The case of administrative, technical and service staff was quite different. There was no question of their acting in a diplomatic capacity as that term was usually understood, in other words of having to represent the purposes and policies of the sending State. He did not therefore believe that the receiving State's consent should be required before their appointment. In his view, the sending State could presume that, before taking up employment with its mission, they had complied with the relevant laws and regulations of the sending State, which were sometimes obscure or rested largely on practice.

19. He hoped that in voting on Mr. Tunkin's proposal the Commission would bear in mind the fundamental distinction between diplomatic and non-diplomatic staff. If it did so, he thought the logical course would be to reject it.

20. Mr. FRANÇOIS said that both Mr. Tunkin and Mr. Padilla Nervo apparently assumed that there were only two categories of States — those which allowed their nationals to serve on foreign diplomatic missions and those which did not. The question was more complex, however; the Netherlands, for example, did not forbid its nationals to enter the service of a foreign diplomatic mission, but if they did so without its consent they automatically lost Netherlands nationality. In his view the question raised in Mr. Tunkin's proposal was one which did not concern the sending State at all, but only the individual and the State of which he was a national, and could therefore be left aside in the Commission's draft.

21. Mr. MATINE-DAFTARY said that, after further consideration of Mr. Tunkin's proposal, he would withdraw his own compromise proposal. He agreed with the views expressed by Mr. François and thought the Commission should go no further than making an appropriate reference in the commentary, as suggested by Mr. Padilla Nervo.

22. Mr. TUNKIN said he had not been convinced by the arguments against his proposal. There appeared, however, to be general reluctance to insert it in article 5. He also noted that no member of the Commission had denied that, if the receiving State had enacted a regulation requiring its nationals to obtain its permission before entering the service of a foreign diplomatic mission, such regulation must be observed. Moreover, the receiving State would clearly be in a position to enforce compliance with such regulation by virtue of articles 4 and 6 of the draft.

For those reasons he would not insist on his proposal being put to the vote.

24. The CHAIRMAN stated that the amendment submitted by Mr. Tunkin could therefore be considered as having been withdrawn.

25. Before passing on to article 6, Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Australian Government and his comments thereon (A/CN.4/116). In the light of the observations just received from the Government of Pakistan (A/CN.4/114/Add.6), which raised much the same point, he would consider the matter further.

ARTICLE 6

26. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the drafting changes he proposed in article 6 (A/CN.4/116/Add.1). He also drew attention to the Swiss Government's suggestion that in addition to the reference in paragraph 4 of the commentary on articles 3 to 6, it might be desirable to include in article 6 itself an explicit provision to the effect that the receiving State was not obliged to give reasons for its decision not to accept a diplomat, and his comments

thereon (A/CN.4/116). The Italian Government had proposed adding to paragraph 2 the words "and may make an expulsion order against him" (A/CN.4/114/Add.3), but in his view the present wording was sufficient.

27. Mr. ALFARO said that if the expressions "*persona non grata*" and "not acceptable" were to be regarded as synonyms, one of them should be deleted in order to avoid possible misunderstanding. If, on the other hand, they referred to different periods, the latter to the period before the individual concerned took up his duties and the former to the period after he had done so, the distinction should perhaps be made clear in the text itself.

28. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the expression "*persona non grata*" was not normally used in connexion with subordinate staff; the expression "not acceptable" was more appropriate in references to such staff.

29. Mr. EL-ERIAN thought that it had been agreed at the ninth session that article 6 should cover the exceptional case of diplomatic agents who were nationals of the receiving State as well as the normal case of diplomatic agents who were nationals of the sending State. It was, indeed, for that reason that the words "or terminate his functions with the mission" had been added. He was therefore in favour of retaining the expression "not acceptable" not only for the reason given by the Special Rapporteur but also because the expression *persona non grata* seemed inappropriate in the case of nationals of the receiving State.

30. Mr. LIANG, Secretary to the Commission, said that if the two expressions were not to be regarded as synonymous, the words "or not acceptable" should be added to the heading of the article. If the two different expressions did not refer, as Mr. Alfaro had suggested, to different points in time but referred, rather, to different categories of mission staff, the words "not acceptable" seemed somewhat inappropriate in the case of a person who might have been working with the mission for a number of years. Unless some more appropriate term could be found, they might be replaced by "no longer acceptable".

31. Mr. TUNKIN recalled that at the ninth session article 6 had given rise to very lengthy discussion in the Drafting Committee, of which he had been a member. The Drafting Committee had been far from satisfied with the text of article 6, but had been unable to find any better alternative. So far as the period during which notification could be sent was concerned, he thought there was no possibility of misunderstanding arising out of the use of the words "not acceptable"; for even if, taken alone, those words might appear to relate only to the period before the person in question took up his duties, the context made it quite clear that that was not so, since the sentence began "The receiving State may at any time notify..." Of course, if the Drafting Committee could find some formula making it clear that the expression "*persona non grata*" applied to diplomatic agents proper and the expression "not acceptable" to the subordinate staff, that would be an improvement of the text.

32. Sir Gerald FITZMAURICE, agreeing with Mr. Tunkin, thought that the expression might with advantage be amended to read "not or no longer acceptable". He supported the Special Rapporteur's proposal to replace the words "according to circumstances" by the words "as the case may be" in the English text.

33. Mr. ZOUREK pointed out that, as article 6 covered different categories of diplomatic agents, different categories of mission staff and different periods of time during which the receiving State could object to their activities, it would be necessary to choose between expanding the text considerably to make it more explicit and leaving it as it stood, subject to the drafting changes proposed by the Special Rapporteur. He was in favour of leaving it as it stood, and was supported in that opinion by the fact that it had given rise to very few criticisms on the part of Governments.

34. Mr. YOKOTA agreed that two expressions were necessary, one applicable to diplomatic agents proper and the other applicable to subordinate staff. It could not be denied, however, that unless some explanation were given in the commentary the use of both expressions in the same clause could only confuse someone who had not followed the Commission's discussions.

35. Mr. ALFARO said that the use of the words "not acceptable" implied the non-acceptance of some proposal. The two expressions "not acceptable" and "*persona non grata*" were, he thought, distinguishable according to the period in which the notification was sent rather than according to the category to which the person in question belonged. For example, the Government of Panama had on one occasion wished to accredit a Panamanian citizen as ambassador to a European State but the European State had objected on the ground that the person in question was the son of one of its nationals and, since it was a *jus sanguinis* country, it regarded him as one of its nationals as well. It would not have been appropriate in such a case to use the expression "*persona non grata*" and the only appropriate expression was "not acceptable".

36. He suggested that the difficulties to which reference had been made might be overcome if the article were drafted somewhat along the following lines:

> "The State to which it is proposed to accredit a diplomatic mission may inform the sending State that the person proposed as diplomatic agent is not acceptable (*or*: is not *persona grata*). The State to which a mission has been accredited may furthermore inform the sending State at any time that the head of the mission or any member of the mission has ceased to be *persona grata*."

37. The CHAIRMAN invited the Commission to vote on article 6, subject to the drafting changes proposed

by the Special Rapporteur and any further changes proposed by the Drafting Committee in the light of the discussion.

Subject to such changes, article 6 was adopted unanimously.

38. Mr. SANDSTRÖM, Special Rapporteur, proposed the insertion of an additional paragraph in the commentary on articles 3 to 6, to deal with the subject of trade missions, in the following terms:

"The freedom enjoyed by the accrediting State in the choice of staff is, as stated in article 4, limited by the provisions of articles 5, 6 and 7 of the draft. There is another restriction, however, which is inherent in the purpose of such appointments — their purpose being to supply the mission with the staff to be employed in performing its functions. The accrediting State cannot appoint as a member of a mission a person unconnected with its functions and so secure for him the privileges attaching to the status of member of the mission. In practice, it is not always easy to recognize such cases. Doubts have arisen mainly because the foreign trade of certain countries is organized as a State monopoly and in consequence of the establishment of trade delegations in countries having a different economic structure. The exchange of goods between two countries is not in itself a diplomatic activity. On the other hand, the diplomatic mission does have the function of laying the groundwork for and promoting economic relations between the countries in a general way. An overlapping of functions may easily occur in the course of co-operation between the trade delegations and the diplomatic mission, which will make it difficult to determine whether the trade delegation or its members have been notified as belonging rightly to the mission. The problem is not one which can readily be solved by general provisions and it is usually dealt with in commercial treaties. This being so, the Commission did not consider that the question should be dealt with in the draft."

39. Mr. TUNKIN proposed that the commentary should not contain any provision on the subject of trade missions.

40. The paragraph proposed by the Special Rapporteur would not be acceptable to socialist countries, in which foreign trade was conducted by the State, and it was undesirable to include in the draft a provision to which some States would strongly object.

41. The proposed paragraph did not refer to any provision in the articles themselves, but dealt with an entirely new question which was not regulated at all in the draft.

42. Questions relating to trade missions were being settled in practice quite satisfactorily by means of bilateral agreements, and the introduction of a commentary on the subject would only serve to create controversies where at present there were none.

43. Mr. ZOUREK said that it was the consistent policy of the Commission not to refer in the commentary to questions not dealt with in the articles themselves. Since the question of trade representation was not yet ripe for codification in the body of the draft, it was undesirable to mention it in the commentary.

44. Sir Gerald FITZMAURICE said that article 2, as adopted by the Commission, included a reference to the commercial activities of a diplomatic mission. It was therefore desirable to state in the commentary that only those persons concerned with commercial questions who were members of the staff of the mission were entitled to diplomatic immunity. It was useful to make it clear that members of a trade mission did not *ipso facto* qualify for diplomatic immunity.

45. Mr. AMADO said that he agreed with the views expressed by Mr. Tunkin. It was the practice of his country, Brazil, to appoint ministers-counsellors for economic affairs at its principal embassies. Those ministers-counsellors were diplomatic agents and enjoyed full diplomatic privileges and immunities; they were concerned not only with the exchange of goods but also with the search for export markets for Brazil's products and with economic questions generally.

46. The CHAIRMAN, speaking as a member of the Commission, said that he was opposed to the insertion of a commentary on the subject of trade missions. The Commission should not attempt to regulate in the commentary subjects with which it had been unable to deal in the draft articles themselves.

47. In any event, the proposed paragraph was unnecessary. If a trade mission was part of the diplomatic mission, its members would automatically enjoy diplomatic status. If, on the other hand, the trade mission was a distinct body, its members would not automatically enjoy diplomatic status; their status could, of course, be regulated by bilateral agreement.

48. The only justification for any reference to the matter in the commentary might have been the possible apprehension caused by the exception from immunity stipulated in sub-paragraph (*c*) of article 24, paragraph 1. That sub-paragraph, however, stated that immunity from civil and administrative jurisdiction did not extend to such commercial activities exercised by a diplomatic agent in the receiving State as were outside his official functions. If, therefore, the commercial activities in question were part of his official functions, immunity would not be excluded.

49. Mr. YOKOTA said that he was in favour of including a statement along the lines proposed by the Special Rapporteur, although the text could be improved by being shortened and simplified.

50. The proposed commentary was related to article 2 and also to the provisions on privileges and immunities; it was therefore not outside the scope of the subjects dealt with in the articles.

51. The question of trade missions was very important; it had led to prolonged negotiations between his country, Japan, and the Soviet Union. As a result of those negotiations, diplomatic immunity had been granted only to the head of the Soviet trade mission and to his deputy.

52. Mr. VERDROSS proposed, as a compromise solution, that the additional paragraph should simply state that the question of trade missions had not been dealt with in the draft because it was normally regulated by bilateral treaties.

53. Mr. TUNKIN said that he could see no reason for including in the commentary any reference at all to trade missions.

54. The Soviet Union considered its trade missions as part of its diplomatic service in accordance with a Soviet law of 1933. There had been in practice no difficulties in relations with other countries; all the commercial treaties concluded by the Soviet Union with foreign countries included a provision to the effect that the Soviet Union trade representation was part of the USSR's diplomatic mission and that the chief of that mission and two of his alternates enjoyed diplomatic immunity.

55. Mr. BARTOS said that commercial attachés or economic counsellors were recognized by every State as forming part of the diplomatic personnel of an embassy or legation, but those attachés or counsellors did not engage in any commercial activities; their only function was to gather information and give advice with a view to developing economic and commercial relations between the States concerned. It was essential to draw a distinction between such commercial attachés or economic counsellors on the one hand and trade representatives on the other; trade representatives carried on commercial operations directly, and the Commission should include in its report a statement along the lines proposed by Mr. Verdross in order not to prejudge their status. The Soviet Union, which considered such trade representatives as diplomatic agents, had had to enter into special treaties with foreign countries regarding the status of those representatives. As a result, that status was not uniform; some countries treated them as diplomatic representatives, others granted them only some measure of immunity, whereas other countries placed them on the same footing as private persons.

56. In Yugoslavia, where foreign trade was controlled by the State, trade missions abroad formed special entities and were not part of the Yugoslav diplomatic missions.

57. A Yugoslav trade representative was debarred from pleading diplomatic immunity in connexion with the commercial activities carried on by him as part of his official functions. Yugoslavia thus drew a sharp distinction between the diplomatic functions of trade counsellors and the commercial activities of trade representatives.

58. The CHAIRMAN put to the vote Mr. Tunkin's proposal (para. 39 above) that there should be no commentary on the subject of trade missions.

The proposal was rejected by 9 votes to 5, with 4 abstentions.

59. The CHAIRMAN put to the vote the proposal made by Mr. Verdross (para. 52 above).

The proposal was adopted by 9 votes to 5, with 3 abstentions, subject to drafting changes.

60. Mr. AMADO said that he had voted against Mr. Verdross' proposal because he considered that it was superfluous to introduce a reference to trade missions in the commentary.

61. Sir Gerald FITZMAURICE said that, although he favoured the introduction in the commentary of a reference to the subject of trade relations, he had voted against Mr. Verdross' proposal because the wording was inadequate. It was necessary to make it clear that persons engaged in commercial activities as members of a trade mission did not enjoy diplomatic privileges and immunities in the absence of a special agreement.

62. Mr. PADILLA NERVO said that although he agreed with Sir Gerald, he had voted in favour of the proposal made by Mr. Verdross because he considered that some reference to trade missions was necessary.

ARTICLE 7

63. Mr. SANDSTRÖM, Special Rapporteur, introduced his revised text of article 7, paragraph 1 (A/CN.4/116/Add.1). The word "customary" had been replaced by the word "normal" in view of an observation by the Netherlands Government (A/CN.4/116).

64. He drew attention to the objections formulated by the Governments of the United States of America and Japan and to his comments thereon (A/CN.4/116).

Paragraph 1 as revised was adopted by 17 votes to none, with 1 abstention.

65. Mr. SANDSTRÖM, Special Rapporteur, introducing his revised text of paragraph 2 (A/CN.4/116/Add.1), said that he had taken into account the observations of the Governments of the Netherlands and Switzerland (A/CN.4/116).

66. The Government of the United States of America had formulated important objections to paragraph 2 (A/CN.4/116). In his report, he had stated his reasons for not making any changes in the paragraph other than those suggested by the Netherlands and Swiss Governments.

The meeting rose at 1 p.m.

453rd MEETING

Friday, 30 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) (*continued*)

ARTICLE 7 (*continued*)

1. Mr. SANDSTRÖM, Special Rapporteur, enlarging on his remarks at the end of the 452nd meeting, said that one of the United States Government's objections to article 7, paragraph 2, was that it failed to mention the principle of reciprocity (A/CN.4/116). He had prepared for the Commission's consideration a draft article on reciprocity (A/CN.4/116/Add.2) which would, of course, apply to the whole of the draft.

2. Mr. TUNKIN said that he doubted whether the deletion of the words "and on a non-discriminatory basis" from the first sentence of paragraph 2 would improve the text. One of two possible courses could be followed. One was to enunciate the principle of non-discrimination and the other to enunciate the positive principle of reciprocity. Yet the second course would lead in practice to discrimination as between missions accredited to the same State. In any case, as the Netherlands Government had pointed out (A/CN.4/116), the principle of non-discrimination should be implicit in every article of the draft. By contrast, the United States Government seemed to consider that the words in question should be deleted because the principle of non-discrimination did not apply in the case of paragraph 2.

3. With reference to the second sentence of paragraph 2, as revised by the Special Rapporteur, he suggested that the word "consent" would be more appropriate than "approval".

4. Sir Gerald FITZMAURICE said that, while the Netherlands Government was perfectly right in stating that the principle of non-discrimination was implicit in all articles of the draft, he was afraid that if the reference were omitted in paragraph 2, it might be read as implying that discriminatory practices were possible. In the case of paragraph 1, it was obviously impossible to have strict non-discrimination in the sense of imposing a uniform size on all missions regardless of circumstances. What was meant was that the guiding principles governing the determination of the size of missions must be the same, although the results might work out differently in different cases. By contrast, in paragraph 2 it would be desirable to mention the principle of non-discrimination for the purpose of stressing the difference between the situation contemplated in that paragraph and that contemplated in paragraph 1. The object of paragraph 2 was to provide that, so far as the exclusion of certain officials was concerned, all missions should be treated alike.

5. Mr. YOKOTA agreed with Mr. Tunkin and Sir Gerald Fitzmaurice. The United States Government's objection was based on the fear that the receiving State would have to treat all foreign missions alike "without regard to how the sending State treats representatives of the receiving State" (A/CN.4/116). Nevertheless, the fact that any State could retaliate against the mission of another State if the latter treated its mission unfavourably, thereby violating the rule, should suffice to allay the United States Government's apprehension.

6. Mr. FRANÇOIS agreed to some extent with Mr. Yokota. However, the reason for the proposal of the Netherlands Government was its fear that the enunciation of the principle of non-discrimination in one article only might convey the impression that less weight was attached to the principle in the other articles.

7. The CHAIRMAN pointed out that the particular objection of the United States Government and the objection of the Netherlands Government would be met by the adoption of a general article on reciprocity, as suggested by the Special Rapporteur.

8. Mr. SANDSTRÖM, Special Rapporteur, suggested keeping the reference to non-discrimination but pointing out in the commentary on the article that it was a principle that applied to the draft in general.

9. Mr. TUNKIN observed that it would not be sufficient to enunciate the principle of non-discrimination in the commentary on an article; it should be mentioned in a preamble to the draft or in a special article. He suggested voting on the retention of the principle enunciated in paragraph 2 and requesting the Drafting Committee to consider how best to make clear that the principle of non-discrimination applied to all articles.

10. Mr. SANDSTRÖM, Special Rapporteur, said that all the courses suggested were possible. A good solution would be to draft a special article enunciating the principles both of non-discrimination and of reciprocity.

11. The CHAIRMAN put to the vote the proposal that the principle of non-discrimination be enunciated in a substantive article.

The proposal was adopted by 12 votes to 1.

12. Mr. SANDSTRÖM, Special Rapporteur, withdrew his proposal (A/CN.4/116/Add.1) that the words "and on a non-discriminatory basis" should be deleted in article 7, paragraph 2.

13. The CHAIRMAN put to the vote the first sentence of paragraph 2, as contained in the draft adopted by the Commission at its ninth session (A/3623, para. 16).

The first sentence of paragraph 2 was adopted by 12 votes to none, with 1 abstention.

14. The CHAIRMAN put to the vote the second sentence of paragraph 2 as amended by the Special Rapporteur (A/CN.4/116/Add.1).

The second sentence of paragraph 2 was adopted by 12 votes to none, with 1 abstention.

Paragraph 2, as amended, was adopted unanimously.

15. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his tentative proposal for a new paragraph 3 to be added to article 7 (A/CN.4/116/Add.1) drafted on the basis of a comment by the Netherlands Government (A/CN.4/116). The proposal itself was self-explanatory.

16. Sir Gerald FITZMAURICE said that his only criticism of the proposed text related to a matter of drafting. As it stood it made no allowance for the custom of missions in hot countries of following the Government to a summer capital.

17. Mr. MATINE-DAFTARY inquired whether the word "places" meant towns or parts of a town. He agreed with the criticism expressed by Sir Gerald Fitzmaurice. In any case, he regarded the provision as unnecessary; there was no need to go into such detail in the draft.

18. Mr. FRANÇOIS said that "place" was to be construed to mean "town". In the circumstances mentioned by Sir Gerald Fitzmaurice, there could clearly be no objection to the mission's being established in two places. What the Netherlands Government objected to was a tendency to transfer parts of diplomatic missions to Amsterdam or Rotterdam, away from The Hague. The point raised was a practical and not a theoretical one.

19. Mr. TUNKIN pointed out a few problems raised by the text. For instance, the question where the mission should be established in the first place. The only answer to that could be: at the seat of the Government. Another doubtful point was the exact meaning of the word "offices" in the text. The proposition moreover seemed self-evident; since the sending State was not sovereign in the territory of the receiving State, it clearly could not establish branches of its mission without the consent of that State. Though he was in principle opposed to the inclusion of self-evident propositions in the draft, he had no strong objection to the proposed additional paragraph.

20. Mr. BARTOS said that his practical experience of the problem made him favour the Special Rapporteur's proposal. One mission in Yugoslavia had suddenly announced that the office of its military attaché would in future be at Split, while another had established its commercial attaché at Zagreb, because most of his commercial contacts were there. Ambassadors with little diplomatic business to transact in Yugoslavia had even been known to establish themselves in watering places, arguing that if they had been accredited to two countries, they might have had to operate from Rome or Vienna, so there could be no objection to their operating from a Yugoslav watering place. A practical objection to the establishment of a mission away from the receiving State's capital was that it would make it difficult for the receiving State to ensure full enjoyment of privileges and immunities by diplomatic missions. The question of missions in summer capitals was quite another matter, since the establishment of more than one office was necessitated by the arrangements of the Government of the receiving State itself.

21. The provision could be drafted either in the negative form chosen by the Special Rapporteur or as a positive statement that diplomatic missions should be established at the seat of the Government of the receiving State. As for its position in the draft, he said the additional paragraph might equally well form part of article 16, which dealt with mission premises.

22. Mr. LIANG, Secretary to the Commission, said that it was not clear to him in what circumstances a provision such as that proposed by the Special Rapporteur would be necessary. He presumed that, normally, whenever a mission considered it essential to establish an office outside the capital, it would seek the consent of the Ministry of Foreign Affairs of the receiving State, and in the vast majority of cases would receive it. Incidentally, the question of consent, which arose in connexion with other articles too, raised a point on which he was doubtful: whether the receiving State could simply withhold consent without giving valid reasons or allowing an opportunity for negotiation, or whether it was bound to justify its refusal.

23. He wondered whether there had ever been any case of a receiving State refusing to allow the establishment of a mission office outside the capital; he did not know of any case where the establishment of such an office had assumed such political or other importance as to prove a source of embarrassment to the receiving State. Cases such as those mentioned by Mr. Bartos, where the ambassador and the mission were established outside the capital and only a branch office was kept in the capital, were far more serious and by no means theoretical. In China, for instance, although the seat of the Government during the years 1927-1937 had been at Nanking, many very important diplomatic missions had been allowed to stay on in the quite distant city of Peking, because they had large establishments there and fewer facilities were available in Nanking.

24. The Special Rapporteur did not appear to regard his tentative proposal as really necessary but it might be useful to have a positive provision on the lines suggested by Mr. Bartos.

25. Mr. TUNKIN said that the discussion had shown the provision to be of practical value. He suggested that it should be referred to the Drafting Committee with a request that it take into consideration the various suggestions, including the question whether the provision should form the subject of a separate article.

26. Mr. EL-ERIAN said that he was in favour of the provision but agreed that it needed redrafting. Difficulties had arisen in Egypt when certain missions

had wished to establish information offices at Alexandria, where the municipal authorities had been unwilling to exempt them from local taxation, etc. Problems of that kind could easily be solved, if such branch offices were established with the consent of the Government of the receiving State.

27. Mr. SANDSTRÖM, Special Rapporteur, agreed that the proposal should be referred to the Drafting Committee for redrafting.

28. Mr. MATINE-DAFTARY proposed that the latter part of the text should read "... in towns other than the towns where the mission is established."

It was so decided.

29. The CHAIRMAN put to the vote the principle enunciated in the new paragraph 3 of article 7, on the understanding that the text would be redrafted by the Drafting Committee in the light of the discussion.

The principle was adopted by 13 votes to none, with 1 abstention.

Article 7 as a whole, as amended, was adopted unanimously, subject to drafting changes.

ARTICLE 8

30. Mr. SANDSTRÖM recalled that at the ninth session the Commission had decided to present alternative formulae for the purpose of determining the time at which the head of the mission was entitled to take up his functions. As he had indicated in his summary of the observations received from Governments (A/CN.4/116), the few Governments which had commented on the question were fairly evenly divided in their preference for one or other of the alternatives. In his revised draft of article 8 (A/CN.4/116/Add.1) he now proposed, in accordance with a suggestion made by the Netherlands Government (A/CN.4/116), that it be left to the receiving State to decide which of the two methods should be adopted. In accordance with a suggestion by the Swedish Government (A/CN.4/116), he also proposed that the words "and presented a true copy of his credentials to the Ministry for Foreign Affairs" should be replaced in the first alternative by the words "and a true copy of his credentials has been accepted by the Ministry for Foreign Affairs".

31. He further drew attention, in particular, to the observations of the Government of Chile (A/CN.4/116).

32. In the observations it had just presented (A/CN.4/114/Add.6), the Government of Pakistan reserved its position on article 8, principally, it seemed, because that Government followed a special practice in respect of high commissioners from other Commonwealth countries. The question of high commissioners from other Commonwealth countries was also referred to in the same Government's observations on articles 10 and 12. He suggested that the question be left aside for the moment and taken up in conjunction with article 10.

33. Mr. BARTOS said he was in favour of retaining both alternatives in the text of the article, as a large number of States had not yet indicated which they preferred. Either a choice between them could be made by the General Assembly after all Governments had expressed their views, or the whole question could be left to be settled as a matter of protocol, as some Governments suggested.

34. He supported the Swedish Government's suggestion. On the other hand, he agreed with the Special Rapporteur that the question of high commissioners of British Commonwealth countries went beyond the scope of article 8. In his view, their status should be laid down in a separate article, which might be inserted after article 14, since they were now recognized as members of the diplomatic corps and as the normal channel for diplomatic communications, in exactly the same way as other heads of missions.

35. Mr. YOKOTA said that he had asked several of his country's ambassadors and ministers about their experience in the matter dealt with in article 8. Their experience apparently was that heads of missions did not formally take up their functions until they had presented their letters of credence; until they had done so, all communications addressed to the receiving State were signed not by them but by the *chargé d'affaires ad interim*. Although that appeared to be the normal practice, however, it seemed that some Governments were in favour of the other alternative, even if they did not clearly indicate that such was the practice followed in their countries. In the circumstances, he supported the Special Rapporteur's new proposal, which should be acceptable to all countries.

36. Sir Gerald FITZMAURICE said that in view of the divergence of practice he supposed the Commission had no choice but to leave it to the receiving State to decide the matter, as the Special Rapporteur proposed. He still felt that the first alternative was greatly to be preferred, however, owing to the practical difficulties which might arise as a result of the delay in presenting letters of credence in case of the illness or absence of the sovereign or head of the State.

37. He hoped, moreover, that the Commission would not adopt the Swedish Government's suggestion, which would make an invidious distinction between the two alternatives. Presentation of letters of credence to the sovereign or head of the State, or of a true copy thereof to the Minister of Foreign Affairs, as the case might be, had always, he thought, been deemed sufficient.

38. In his view, it would be wise not to attempt to deal with the problem of high commissioners of the Commonwealth countries in the draft under consideration. For one thing, the Governments concerned had never been asked for their explicit comments on it. For another, there were, after all, only about ten countries in which the question arose, and in none of them, so far as he knew, had it yet given rise to difficulties in practice. Lastly, he was very doubtful whether high commissioners could be regarded as strictly equivalent to the heads of diplomatic missions; for example, the

fact that the countries concerned all had a common sovereign or head of State made the whole system of accreditation entirely different. In any case, as far as article 8 was concerned, the retention of both alternatives would largely meet the Government of Pakistan's point.

39. Mr. VERDROSS supported the Special Rapporteur's proposal, but suggested the addition of a sentence along the following lines: "The protocol of the receiving State shall determine which method shall be chosen."

40. Mr. TUNKIN agreed with Sir Gerald Fitzmaurice that the question of high commissioners of Commonwealth countries should not be dealt with in the draft.

41. Commenting on the Special Rapporteur's revised draft of article 8, he said it would have been desirable for the Commission to propose a uniform rule. Unfortunately the Commission had little more information to go upon concerning current practice than it had had a year previously. It seemed that most States, like the Soviet Union, did not consider the head of a mission to have formally taken up his functions until he had presented his letters of credence; it was not until he had done so, for example, that he exchanged formal notes with the heads of other missions in the same capital, expressing the hope that cordial relations would be maintained between them. And there was good reason for that practice, for the transmittal of letters of credence signed by the head of the sending State to the head of the receiving State was an act of some importance, and it was right that its importance should be reflected in the practice. It seemed, however, that other States preferred the alternative system. In the circumstances he agreed that the best course would be to leave the choice to the receiving State, as proposed by the Special Rapporteur.

42. The Drafting Committee should, however, endeavour to make sure that the text could not be interpreted as meaning that the receiving State would be free to decide the matter anew in each particular case; the proper interpretation presumably was that whatever system the receiving State applied should be applied to all heads of mission indifferently.

43. Mr. HSU drew attention to the Chinese Government's suggestion that, in the case of delay in the presentation of letters of credence, the head of a mission should be permitted to request the Minister of Foreign Affairs of the receiving State to arrange for an earlier commencement of his diplomatic activities if he so wished (A/CN.4/114/Add.4). For his own part, however, he would see no objection to the adoption of the Special Rapporteur's revised draft. What was important was that the heads of missions should know exactly where they stood; whatever system the receiving State applied, it must ensure that the sending State was aware of it.

44. He agreed that the Commission should leave aside the question of high commissioners. In his view that question should be settled in the first instance among the Commonwealth countries themselves, which could then submit any proposals they wished.

45. Mr. SANDSTRÖM, Special Rapporteur, said that, in suggesting that the question of high commissioners should be discussed in connexion with article 10, he had meant to say that he would at that time submit a proposal along the lines advocated by Sir Gerald Fitzmaurice, to the effect that the question should not be dealt with in the draft.

46. Mr. Tunkin's interpretation of the words "shall decide" was, of course, perfectly correct, and adoption of the amendment proposed by Mr. Verdross would preclude any other. Although he had incorporated the Swedish Government's suggestion in his new text, he was prepared, in the light of what had been said, to withdraw that part of his proposal since he thought the text adopted at the ninth session really met the Swedish Government's point. "Presented" meant "presented without any objections of form being raised".

47. Mr. BARTOS said that although the question of the status of high commissioners was, as between the Commonwealth countries themselves, governed only by the practice which had grown up between those countries, it had implications for other States as well, the scope and nature of which had to be settled on the basis of the principles governing diplomatic relations between sovereign States. It would therefore be an omission if no reference at all were made to that question in the Commission's draft.

48. Mr. ZOUREK said he was not very enthusiastic about the Special Rapporteur's new proposal, which would mean that the practice governing the commencement of the functions of the head of a mission would vary not only from one capital to another but also, in certain cases, as between the sending and the receiving State. The time at which the head of a mission took up his functions was material not only for the purposes of protocol but also for the purpose of answering such important questions of substance as from what point in time his official acts were to be regarded as the acts of the sending State. He therefore thought that it would be most desirable to provide for a uniform system. In his view, the decisive moment should be the time at which the head of the mission presented his letters of credence. That was a solemn and perfectly definite act. It did not seem too much to hope that those States which had in the past applied the other system would be willing to change to one recommended by the Commission.

49. Mr. SANDSTRÖM, Special Rapporteur, said that if the Commission had already decided that the draft should form the basis of a convention, he would have been inclined to agree that a uniform rule was necessary or at least desirable. In the circumstances, however, he did not see why the Commission should not leave it to the receiving State to adopt either of the two alternatives.

50. The CHAIRMAN put to the vote the new text of article 8 proposed by the Special Rapporteur (A/CN.4/

116/Add.1), subject to the restoration of the original wording in place of that suggested by the Swedish Government and on the understanding that the text did not mean that the receiving State was to decide the matter anew in each particular case, but that it should decide to apply the same system uniformly to all foreign missions.

On that understanding, and subject to any further changes proposed by the Drafting Committee, article 8 in the new form proposed by the Special Rapporteur was adopted, as amended, by 15 votes to none, with 1 abstention.

ARTICLE 9

51. Mr. SANDSTRÖM, Special Rapporteur, introduced his revised draft of article 9 (A/CN.4/116/Add.1).

52. In accordance with the observations of certain Governments, including the Government of Switzerland (A/CN.4/116), he proposed the addition at the end of paragraph 1 of a provision indicating that the name of the *chargé d'affaires ad interim* would be notified to the Government of the receiving State by the head of the mission before his departure or otherwise by the Government of the sending State.

53. Many Governments had objected to the provisions of paragraph 2. He therefore proposed its deletion.

54. Mr. YOKOTA said that the additional words proposed by the Special Rapporteur dealt with a minor procedural matter.

55. It was important that the name of the *chargé d'affaires ad interim* should be communicated to the Ministry of Foreign Affairs of the receiving State, but the question who would be responsible for that notification was immaterial. In fact, as suggested by the delegation of Chile in the Sixth Committee,[1] that notification could well be made by the *chargé d'affaires ad interim* himself, a possibility which did not appear to be covered by the provision suggested by the Special Rapporteur.

56. Sir Gerald FITZMAURICE agreed with Mr. Yokota that it was only necessary to state that the name of the *chargé d'affaires ad interim* must be notified to the receiving State. That notification could, for example, be made by the sending State to the ambassador of the receiving State accredited at its capital.

57. Mr. BARTOS observed that the United Kingdom practice was to regard the head of a foreign diplomatic mission as remaining in charge of his mission while he was within the confines of the United Kingdom (A/CN.4/116). For his part, he preferred the Yugoslav practice, which was more realistic; if the head of a diplomatic mission was present in the country but was unable to perform his duties as a result of accident or sickness, the appointment of a *chargé d'affaires, ad interim* was considered quite appropriate.

58. The case mentioned by the Government of Denmark (A/CN.4/116), in which no diplomatic member of the mission was present in the receiving State and a non-diplomatic member of the staff was officially designated *chargé d'affaires,* had occurred at the Yugoslav Legation at Lisbon. The Portuguese Government, however, had refused to allow the Legation to continue to function in those circumstances and it had been found necessary for the two Governments concerned to agree that their relations would be conducted through the channel of their respective ambassadors in Paris.

59. He could not support the proposal of the Chilean Government (A/CN.4/116) that the words "*ad interim*" should be omitted, for there was a great difference between a *chargé d'affaires* and a *chargé d'affaires ad interim.* A *chargé d'affaires* was a permanent head of mission; a *chargé d'affaires ad interim* was merely in charge of a diplomatic mission until the arrival of the titular head of that mission.

60. He regretted the proposal to delete paragraph 2, for that paragraph set forth the useful presumption that the member of the mission placed immediately after the head of the mission on the mission's diplomatic list would take charge in the absence of his chief. If the Government concerned wished to appoint someone else, it could always do so.

61. Mr. TUNKIN said that at Moscow, it was the current practice, when an ambassador left for a holiday in the Crimea or the Caucasus, to leave a *chargé d'affaires ad interim* in charge of the embassy. That situation appeared to be covered by the text of article 9, because an ambassador who was absent from the capital, though not from the country to which he was accredited, was in fact "unable to perform his functions".

62. The case mentioned by the Government of Denmark raised an important point. If a non-diplomatic member of the staff of a mission was appointed *chargé d'affaires ad interim,* his status changed in that he would henceforth enjoy diplomatic immunity. Such a change would clearly require the consent of the receiving State. He therefore suggested the insertion in article 9, after the words "*chargé d'affaires ad interim*", of the phrase "appointed from among the members of the diplomatic staff of the mission". The effect of such an amendment would be to leave outside the scope of the provisions of article 9 the case mentioned by the Government of Denmark; the status of the *chargé d'affaires ad interim* would in that case be a matter for bilateral agreement.

63. With regard to the question of the notification of the name of the *chargé d'affaires ad interim,* he shared the views expressed by Mr. Yokota and Sir Gerald Fitzmaurice.

64. Mr. SANDSTRÖM, Special Rapporteur, withdrew his proposal to add at the end of the paragraph the words "by the head of the mission before his departure or otherwise by the Government of the sending State" (A/CN.4/116/Add.1).

[1] *Official Records of the General Assembly, Twelfth Session, Sixth Committee,* 509th meeting, para. 13.

65. Sir Gerald FITZMAURICE said that the Government of Denmark had raised a very real issue. It was by no means uncommon for a diplomatic mission to consist of only one diplomatic officer and an archivist. If the head and sole diplomatic member of the mission was away, the mission had to be left in charge of a person who was a member of the administrative staff. That person would in fact deal with the local Government, although he might do so unofficially. It was undesirable to make the provision too rigid, as suggested by Mr. Tunkin, because there might not be any other member of the diplomatic staff to replace the head of mission.

66. Mr. TUNKIN said that he did not press his suggested amendment.

67. Mr. LIANG, Secretary to the Commission, said that it was not uncommon for the sending Government to transfer temporarily an officer from its mission in a neighbouring State in order to act in the place of the head of a mission who was unable to perform his duties. It would therefore not be advisable to introduce a provision to the effect that the *chargé d'affaires ad interim* must be a member of the diplomatic mission concerned. It would be sufficient to provide that he should be a member of the diplomatic service, if it was desired to avoid the difficulties which might ensue from the appointment of a member of the non-diplomatic staff.

68. If the provisions of paragraph 1 were left as drafted at the ninth session, the natural interpretation of the provision would be that the person appointed as *chargé d'affaires ad interim* must belong to the diplomatic staff. A special provision would be necessary in order to cover the recourse to a member of the non-diplomatic staff.

69. The CHAIRMAN said that he could not agree with the Secretary's interpretation. The text did not exclude the possibility of any person being appointed *chargé d'affaires ad interim* by the sending Government.

70. Mr. ZOUREK said that in the rare cases where a diplomatic mission consisted of a single diplomatic officer, and that officer was absent or incapacitated, it was the practice for the sending Government to send another diplomatic officer to replace him or to entrust a member of the non-diplomatic staff with the task of carrying on the current administrative affairs of the mission without actually appointing him *chargé d'affaires ad interim*. Such an appointment was hardly possible, except in the case of *chanceliers* in certain capitals where those officials appeared on the diplomatic list.

71. Mr. PADILLA NERVO said that he was in favour of the provisions of paragraph 1 but objected to those of paragraph 2.

72. He agreed with Sir Gerald Fitzmaurice and Mr. Yokota that the only important question was that of the notification to the receiving State of the name of the *chargé d'affaires ad interim*. The way in which the name was notified was a secondary matter.

73. With regard to the case mentioned by the Government of Denmark, he said that the practice was for the sending Government either to entrust a *chancelier* merely with the archives of the mission, or to inform the receiving State officially that a person previously not a member of the diplomatic staff had been appointed secretary with diplomatic rank.

74. Mr. VERDROSS said that the case mentioned by the Government of Denmark was by no means very rare. The Austrian diplomatic mission to Oslo consisted of only one diplomatic officer and one *chancelier*, and the same had been true up to a year ago of the mission in Warsaw. In the absence of the diplomatic officer, all communications had to be addressed to the *chancelier*.

75. Mr. BARTOS said that the French Ministry for Foreign Affairs had advised the Government of Serbia in 1915 — at a time when Serbia had been threatened with enemy occupation — to give diplomatic rank to its *chanceliers* in those legations where there was only one Serbian diplomatic officer. It had been feared that Serbian diplomatic representation might suffer if the single diplomatic officer in charge of a mission happened to die or become incapacitated.

76. Mr. HSU supported article 9, paragraph 1, as adopted by the Commission at its ninth session.

77. He thought the provisions of paragraph 2 were unnecessary. It was self-evident that the member of a mission placed immediately after the head of the mission on the mission's diplomatic list would be presumed to be in charge in the absence of his chief.

78. Mr. ZOUREK pointed out that the fact that certain functions were entrusted to a member of the non-diplomatic staff of a mission did not make that person a *chargé d'affaires ad interim*. He did not represent the sending State.

79. If it was considered necessary to draft a provision covering the case mentioned by the Government of Denmark, a special paragraph would have to be introduced.

80. He regretted the proposal to delete paragraph 2. The presumption in that paragraph was a very useful one in practice, during the period before the notification of the name of the *chargé d'affaires ad interim*. He would have preferred paragraph 2 to be retained, the application of its provisions being restricted to cases of extreme urgency.

81. The CHAIRMAN put to the vote article 9, paragraph 1, as adopted by the Commission at its ninth session (A/3623, para. 16).

Paragraph 1 was adopted unanimously, subject to drafting changes.

82. The CHAIRMAN put to the vote the proposal (A/CN.4/116/Add.1) that paragraph 2 be deleted.

The proposal was adopted by 9 votes to 5, with 1 abstention.

Article 9 as a whole was adopted by 15 votes to none, with 1 abstention, subject to drafting changes.

The meeting rose at 1.5 p.m.

454th MEETING

Monday, 2 June 1958, at 3 p.m.

Chairman: Mr. Radhabinod PAL.

Resignation of Mr. El-Erian

1. Mr. LIANG, Secretary of the Commission, read out a letter from Mr. El-Erian, in which, having regard to the provision in article 2, paragraph 2 of the Commission's Statute that no two members of the Commission should be nationals of the same State, he tendered his resignation with deepest regret.

2. The CHAIRMAN said that in view of the circumstances, the Commission had no choice but reluctantly to accept Mr. El-Erian's resignation.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 10

3. Mr. SANDSTRÖM, Special Rapporteur, introducing his revised draft of article 10 (A/CN.4/116/Add.1) pointed out that four Governments, those of Sweden (A/CN.4/114), Switzerland (A/CN.4/114), Finland (A/CN.4/116/Add.2) and Yugoslavia (A/CN.4/114/Add.5), had declared themselves in their comments to be in favour of dispensing with the second class of heads of missions accredited to heads of States, but had advanced few reasons not already considered by the Commission at its ninth session. The Government of Pakistan considered (A/CN.4/114/Add.6) that a fourth class of heads of mission should be recognized, namely, high commissioners, who normally carried letters of introduction to the Prime Minister.

4. The United States Government proposed that the article should begin with the words "For purposes of precedence and etiquette..." (A/CN.4/116). Although the idea was already expressed in article 14, he would have no objection to an explicit statement in article 10 for the sake of emphasis.

5. In sub-paragraph (*b*) the words "other persons", criticized by Switzerland as ambiguous, could, as proposed by Italy (A/CN.4/114/Add.3), be replaced by "internuncios", the only type of representative to which the words could conceivably refer.

6. Mr. VERDROSS, referring to sub-paragraph (*a*), pointed out that legates were not accredited to heads of State but were special envoys for particular affairs only. He proposed that the reference to legates should be omitted.

7. Mr. YOKOTA said that he was not in favour of the addition proposed by the United States Government. It was unnecessary to repeat the reference made at the beginning of article 14 and, moreover, the proposed classification of heads of mission had a certain significance for purposes other than precedence and etiquette, inasmuch as it reflected an evolution of ideas. He was in favour of substituting the word "internuncios" for the ambiguous term "other persons".

8. Mr. TUNKIN agreed with Mr. Yokota that the addition proposed by the United States was superfluous. The appointment of an ambassador rather than of a minister sometimes had political significance.

9. Mr. BARTOS said he had been consistently advocating the classification of heads of mission into two classes only: those accredited to heads of State and those accredited to Ministers of Foreign Affairs. Any differences, however minor, in the status of the two classess of heads of mission accredited to heads of State recognized in the article did violence to the principle of the equality of States established by the Charter of the United Nations.

10. Mr. PADILLA NERVO suggested that article 10 and article 14 be combined or that the principle of the equality of heads of missions be enunciated at the beginning of article 10 before the various classes were listed. Failing that, it would be better to adopt the addition proposed by the United States.

11. Since it was specified in article 14 that the equality of heads of mission was unaffected by the class to which they were assigned, it would be more logical to provide for only two classes, ambassadors and *chargés d'affaires*. Since, however, the question had been amply discussed at the ninth session, he would not press for the amendment of article 10 on those lines.

12. Mr. ZOUREK said that for drafting reasons he was opposed to the United States Government's addition for it constituted an unnecessary repetition and furthermore, although in law there was no distinction between classes (*a*) and (*b*), some political significance might attach to the choice of class. It was, for instance, the practice of countries wishing to emphasize the importance of diplomatic relations between them to raise their representation to embassy level. Though the "minister" class might disappear in time, it still formed part of existing practice.

13. He agreed with Mr. Verdross that legates came rather under the heading of "*ad hoc* diplomacy".

14. Sir Gerald FITZMAURICE suggested that the point raised by the United States Government could more satisfactorily be met by prefacing article 10 with the words "Subject to the provisions of article 14,"

He agreed to the substitution of "internuncios" for the words "other persons".

15. Mr. HSU and Mr. ALFARO both thought that Sir Gerald Fitzmaurice's suggestion would be a technically more acceptable solution to the problem.

16. Mr. SANDSTRÖM, Special Rapporteur, said that he had no objection to the suggestion but thought that article 14 might as well form paragraph 2 of article 10. The matter might simply be referred to the Drafting Committee. He considered Mr. Verdross' proposal to delete the word "legates" fully justified.

17. Sir Gerald FITZMAURICE withdrew his suggestion.

18. The CHAIRMAN put to the vote the proposal that article 14 should become paragraph 2 of article 10, in which event the United States Government's proposed addition would become unnecessary.

The proposal was adopted by 14 votes to none, with 2 abstentions.

19. The CHAIRMAN put to the vote Mr. Verdross' proposal to delete the word "legates".

The proposal was adopted by 15 votes to none, with 1 abstention.

20. The CHAIRMAN put to the vote the Special Rapporteur's proposal to substitute the word "internuncios" for "other persons".

The proposal was adopted by 8 votes to 1, with 6 abstentions.

Article 10 as a whole, as amended, was adopted by 15 votes to none, with 2 abstentions.

ARTICLE 11

21. Mr. SANDSTRÖM, Special Rapporteur, drew attention to a new wording of the article proposed by the United Kingdom Government (A/CN.4/116). The United States Government's observation (A/CN.4/116) that it was not essential that the receiving and sending States should be represented by heads of mission of the same rank could be inserted in the commentary.

22. Mr. FRANÇOIS, referring to the United Kingdom proposal, pointed out that diplomatic missions were not always at the capital of the receiving State. In the Netherlands, for instance, they were in a different city. The text would need to be amended accordingly.

23. Mr. TUNKIN pointed out that whereas the English text of the United Kingdom proposal referred to "the level of their diplomatic representations", in other words to the institution of diplomatic representation, the French text in document A/CN.4/116/Add.1 spoke of "*la classe à laquelle doivent appartenir les chefs de leurs missions*".

24. Sir Gerald FITZMAURICE observed that the change from the original draft article was largely a matter of drafting, the new proposal using the term "the level of their diplomatic representation", which was current in English diplomatic parlance. There appeared to be some difficulty in rendering the expression in French.

25. Mr. TUNKIN said that since the English text was the authentic one, he would support it as more in harmony with the spirit pervading the whole draft, namely, the replacement of the old concept of diplomatic privilege and immunity as attaching to the person of the ambassador by the new concept of diplomatic representation as an institution, of which ambassadors were merely the heads.

26. Mr. AMADO remarked that, as the term "class" was employed in article 10, he would prefer the same term to be used in article 11, unless there were strong reasons against its use. The reference to "each other's capitals" in the United Kingdom proposal introduced an unnecessary complication. Quite apart from the case of the Netherlands, he said that diplomatic missions in Brazil would for some years to come be housed not at the new federal capital but at Rio de Janeiro.

27. Mr. EDMONDS said that he was not sure that the United Kingdom proposal would allow for the possibility of the receiving and sending States being represented by heads of mission of different rank. A reference to that possibility should at least be inserted in the commentary on the article.

28. Mr. LIANG, Secretary to the Commission, suggested that in order to keep the group of articles 10 to 13 coherent, it might be advisable to retain the draft article as it stood, especially as there was no difference in meaning between it and the United Kingdom proposal.

29. Mr. SANDSTRÖM, Special Rapporteur, said that he had not endorsed the United Kingdom proposal but merely offered it as a variant. He had no strong preference for either text, but thought, nevertheless, that the idea stated in the United States Government's comment was conveyed by the words "representation at each other's capitals".

30. Mr. ALFARO said that if the wording proposed by the United Kingdom for article 11 were adopted, and the expression "the level of their diplomatic representation" introduced into the text, consequential changes would be necessary in the drafting of other articles, including article 10. In his opinion, it would be preferable to adhere to the text of article 11 as adopted at the ninth session, especially since the proposed alternative was open to certain objections; for example, the word "mutually" and the expression "at each other's capital" were redundant.

31. The CHAIRMAN said he saw no reason for departing from the terminology which had been decided upon at the Commission's ninth session, and he therefore thought that the word "class" should be used in both articles 10 and 11.

32. Mr. PADILLA NERVO said he did not see the need for article 11, which added nothing to the meaning of article 1.

33. Mr. MATINE-DAFTARY said he preferred the original text of article 11, which was quite clear and required no amendment. The proposed alternative text introduced points which, if they were dealt with at all, should be dealt with either in separate articles or in the commentary. He referred in particular to the question whether heads of missions should be stationed in the capital of the receiving country, and whether the heads of missions exchanged by any two States should be of the same class.

34. Sir Gerald FITZMAURICE said that, though the expression "level of diplomatic representation" was more in conformity with current usage than the term "class", he realized that in the context it raised more difficulties than it solved. He also realized that the reference to capital cities was open to objection. If the Special Rapporteur had no strong preference for the alternative wording, therefore, he would suggest that it might be withdrawn.

35. He did not agree with Mr. Padilla Nervo that article 11 was redundant. Article 1 referred in general terms to the establishment of diplomatic relations, which was not quite the same thing as deciding to what classes heads of missions should be assigned.

36. Mr. SANDSTRÖM, Special Rapporteur, said he was willing to withdraw the alternative wording for article 11.

37. Mr. TUNKIN said he would vote for the text of article 11 as drafted at the ninth session. Though the expression "level of diplomatic representation" conveyed the meaning better than the word "class", the original wording was preferable in the particular context.

Article 11 as drafted at the ninth session (A/3623, para. 16) was adopted by 16 votes to none, with 1 abstention.

38. Mr. EDMONDS said the commentary should contain some reference to the United States Government's observation (A/CN.4/116) that it did not regard the terms of article 11 as implying that the heads of missions exchanged between any two countries should necessarily belong to the same class.

39. Mr. SANDSTRÖM, Special Rapporteur, said it was his intention to include such a reference in the commentary.

ARTICLE 12

40. Mr. SANDSTRÖM, Special Rapporteur, drew attention to paragraph 7 of the commentary on articles 10 to 13 (A/3623, para. 16) in which it was pointed out that the text of article 12 gave States a choice of two dates by reference to which the precedence of heads of mission in their respective classes was to be decided. The two dates were the date of notification of their arrival and the date of presentation of their letters of credence. Of the Governments which had expressed a preference for one or other of those dates, only one — the Government of the United Kingdom — had opted for the date of notification of arrival (A/CN.4/116). The United States Government had expressed the view that the article dealt with a matter of practice and protocol in the receiving State and not with a principle of international law suitable for codification (A/CN.4/116).

41. He proposed (A/CN.4/116/Add.1) that the article as drafted at the previous session should be retained, subject to an amendment proposed by the Netherlands Government (A/CN.4/116).

The amendment proposed by the Government of the Netherlands was adopted.

42. Mr. ALFARO observed that the expression "The present regulations", in paragraph 3 was inaccurate, since what the Commission was producing was a draft convention or draft articles, not regulations.

43. Mr. SANDSTRÖM, Special Rapporteur, said he had no objection to the proposed correction, which might be referred to the Drafting Committee.

Article 12, as amended, was adopted by 16 votes to none, with 1 abstention, subject to drafting changes.

ADDITIONAL ARTICLE (ARTICLE 12 A)

44. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the additional article proposed by the Italian Government (A/CN.4/114/Add.3). Although the functions of the diplomatic corps might not be so important as they had been formerly, the institution existed and might therefore form the subject of an article for inclusion in the draft.

45. Mr. BARTOS said he objected to the first paragraph of the proposed new article 12 A because it implied a definition of the diplomatic corps which would exclude diplomatic agents other than heads of mission.

46. The second paragraph was open to objection because it suggested that the functions of the diplomatic corps were confined to those which it was recognized to possess by international usage. Not all the functions of the diplomatic corps, however, were established by international usage and, furthermore, practice differed from country to country. Some of the functions of the diplomatic corps, for example, were defined by treaties.

47. The third paragraph was objectionable because it sanctioned the perpetuation of an outdated privilege for which there was no justification in objective theory.

48. Sir Gerald FITZMAURICE said he did not see any great objection to the proposed new article, the aim of which was merely to state the existing practice.

49. Referring to Mr. Bartos' criticism of the first paragraph, he agreed that in a looser sense the expression "diplomatic corps" might be taken to include all the diplomatic staff of the various missions. He suggested that it might be left to the Drafting Committee, in collaboration with the Special Rapporteur, to settle the problem in the light of the definitions to be included at the beginning of the draft.

50. The reference to international usage was in his

opinion correct in the context, because the subject of the second paragraph was the functions performed by the diplomatic corps as a whole. Practice in that matter depended entirely on usage and was not defined by individual treaties between one State and another. Perhaps the text might be made clearer by inserting the words "as a whole", or "as such", after the words "The diplomatic corps".

51. So far as the selection of the doyen of the diplomatic corps was concerned, he thought it would be difficult to object to such a long-standing practice as that by which, in some countries, the Apostolic Nuncio was automatically recognized as the doyen.

52. Mr. FRANÇOIS said he also had some doubts concerning the proposed new article. Practice in the matter of issuing "CD" plates for motor vehicles, for example, showed that the term "diplomatic corps" was not generally understood to include only heads of mission.

53. He thought it was incorrect to say, as did the second paragraph, that the diplomatic corps was represented by its doyen "for all purposes".

54. In the third paragraph, the use of the expression "*le plus âgé*" in the French text was mistaken, since the doyen of the diplomatic corps was not necessarily the oldest head of mission in the country concerned.

55. Mr. VERDROSS associated himself with the criticisms which had been voiced concerning the proposed new article. In particular, he considered the last paragraph redundant, for the point it made was already covered by article 12, paragraph 3.

56. Mr. AMADO considered the proposed new article superfluous. Moreover, it contained errors such as the one pointed out by Mr. François, it attached an incorrect meaning to the term "diplomatic corps" and it did not sufficiently define the functions of the diplomatic corps.

57. Mr. ZOUREK said he doubted the usefulness of the proposed new article. The diplomatic corps was not a collective body with a specified legal competence. Moreover, the criticisms expressed were very pertinent, particularly those relating to the meaning of the term "diplomatic corps" and the reference to international usage. It would be particularly inadmissible for the article to speak of international usage, as that usage was the very thing which the Commission was attempting to codify. If the article had to be adopted, it would be necessary to define the function of the diplomatic corps in unequivocal language.

58. Mr. LIANG, Secretary to the Commission, pointed out that the expression used in the English text of the third paragraph — "senior head of mission" — was correct, though the French text, which was the original, used the incorrect phrase "*le plus âgé*".

59. In his country, the institution of the diplomatic corps had formerly been resented, for it had been used to exert collective pressure on the Chinese Government for the purpose of enforcing rights of exterritoriality. That, however, was a matter of past history. In modern times, the functions of the diplomatic corps were mainly ceremonial and more suitable for treatment in a guide to diplomatic practice such as Sir Ernest Satow's[1] than in a codification of international law. A reference to the functions of the diplomatic corps in the draft convention on which the Commission was working might be a source of misunderstanding.

60. Sir Gerald FITZMAURICE said that the arguments advanced by previous speakers had surprised him, as it seemed to him that in the whole practice of diplomacy the concept of a diplomatic corps and doyen was one of the best known; he considered that the concept should receive recognition in the draft. Admittedly, the draft dealt mainly with questions of law, but it also dealt with etiquette, usage and privileges, so that a reference to the diplomatic corps would not be out of place.

61. In modern times the diplomatic corps as such no longer attempted to exert pressure on the Government of the receiving State, but it still performed a useful function in that, through its spokesman, the doyen, it could bring to that Government's attention any events or circumstances which affected the diplomatic corps as a whole. Possibly, the Italian Government's proposed text needed more precise drafting, but the principle it stated was sound and confirmed by ancient usage.

62. He was not certain that article 12, paragraph 3, covered the proposition that the Apostolic Nuncio should be the doyen of the diplomatic corps in countries where that was the practice, but article 12 in general certainly did not deal with the functions in general of the diplomatic corps or its doyen.

63. Mr. TUNKIN shared the doubts of other speakers regarding the Italian proposal, which, in his view, referred to concepts which required definition and to an international usage which it did not seek to clarify. The Commission's task was to draft concrete rules on diplomatic intercourse and immunities, and the Italian proposal did not contribute anything of value to that end.

64. He could see no reason for including in the draft any reference to the functions of the diplomatic corps, as if that corps were an organized body requiring special definition and special rules. What functions the corps now had were very restricted, and very different from those it had exercised in the past in some countries. While he had no objection in principle to an article concerning the diplomatic corps, he doubted whether an acceptable article could be drafted; it would not be a great defect if the draft omitted all reference to the diplomatic corps.

65. Mr. BARTOS felt that if the Italian proposal was accepted it would be necessary to state who or what body would authorize the doyen to take action, which authority would give permission to the diplomatic corps

[1] Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th ed., Sir Nevile Bland (ed.) (London, Longmans, Green and Co., 1957).

to act collectively, and what were the possible subjects of collective action by the corps. The rules observed in dealings with the diplomatic corps varied from country to country. And in any case he considered that the concept of the diplomatic corps as a separate entity with the ability to interpret, and indeed to create, international usage should not be enshrined in the draft.

66. Nor was there any basis either in doctrine or in practice for regarding the Apostolic Nuncio as the doyen of the diplomatic corps. Such a person represented a spiritual authority, and to the lay person it seemed illogical to give him that eminence, which could only be viewed as discrimination in favour of religion, and of one religion at that. The question was not only a political one, for in his view the recognition of the Apostolic Nuncio's privileged position would be in direct conflict with the positive law of the United Nations.

67. Mr. HSU said that the diplomatic corps was much less important than it had been before international law had become highly developed. Nevertheless, since diplomats in a receiving State had interests in common, the diplomatic corps was still an important institution. While he would like to see the insertion of an article on the subject he felt that the text proposed by the Italian Government was badly drafted. He thought therefore it would be desirable that Mr. Ago should be given an opportunity to speak on it and perhaps amend it.

68. Mr. TUNKIN agreed in principle with Mr. Bartos that the Apostolic Nuncio should not be regarded as holding a pre-eminent position in the diplomatic corps. He had not objected to article 12, paragraph 3, but in that case too he felt that the special favour given to the Holy See was in contradiction with fundamental principles of international law, and was indeed a kind of relic of the past.

69. Mr. SANDSTRÖM, Special Rapporteur, felt that as the Commission had accepted paragraph 12 it could not really object to the precedence given to the Holy See in the Italian Government's proposal.

70. He could not accept the argument that all diplomats of whatever rank should be regarded as forming part of the diplomatic corps, for in any joint deliberations only the heads of missions took part. International usage was undoubtedly rather vague on the subject, but the diplomatic corps did form an entity which had common interests and common privileges.

71. The French term "*le plus âgé*" was undoubtedly not justified in the Italian proposal, and he himself would prefer some mention to be made of the class of the doyen. In view of the various criticisms that had been made, however, he agreed that it would be desirable to suspend debate on the Italian Government's proposal until Mr. Ago's return.

72. Mr. ALFARO felt that, in view of the statements made, it would be difficult, if not impossible, to reach agreement on the Italian Government's proposed new article. In his view the existing state of affairs should be taken into account: heads of mission actually did form a diplomatic corps with analogous functions and common interests and had to agree on social and other matters, exchange views and make any necessary representations or *démarches*.

73. Although members of the Commission did not represent Governments, it was natural to assume that the member from Italy could best explain the Italian Government's intentions. For that reason he agreed that the Commission might await the return of Mr. Ago.

74. Mr. MATINE-DAFTARY thought that little good would be done by awaiting the return of Mr. Ago to explain or defend the Italian Government's proposal. However, it would be sensible to defer a decision until the Commission had considered whether the draft should contain any reference to the diplomatic corps.

75. The CHAIRMAN, noting the general desire to postpone discussion until Mr. Ago's return, suggested that the discussion be deferred until then, and that the Special Rapporteur, in consultation with Mr. Ago, submit a redraft of the Italian Government's proposal.

It was so agreed.

ARTICLE 13

76. Mr. SANDSTRÖM, Special Rapporteur, said that the only observation on article 13 was that of the United States Government (A/CN.4/116); in his view the point of that observation was implicit in the article.

Article 13 was adopted unanimously.

ARTICLE 14

77. Mr. SANDSTRÖM, Special Rapporteur, referred to the Netherlands Government's observation concerning an ambassador's right of access to the head of the receiving State, and to his comments on that observation (A/CN.4/116).

78. Mr. ZOUREK said that he had looked into the question and had come to the conclusion that right of access to the head of a State no longer existed. All heads of mission were in the same position and could request to be received by the head of State, as a rule through the Ministry for Foreign Affairs. The exclusive preprogative of audience with the head of State which Powers had formerly claimed on behalf of their ambassadors, as representing the person of the sovereign, had disappeared together with absolute monarchies and diplomatic practice no longer drew any distinction in that respect between the various classes of diplomatic agents, all of whom represented the sending State to the same degree. It should therefore be made clear that article 14 did not confer that right only on ambassadors.

79. Mr. FRANÇOIS said he was by no means certain that Mr. Zourek was correct in his view. As the Netherlands Government had said, the opinion was very widely held that an ambassador had the right to seek audience with the head of a State; he did not think that article 14 abrogated that right.

80. Sir Gerald FITZMAURICE noted that according to article 10 both ambassadors and ministers were accredited to heads of State, so that clearly no distinction should be made between them conferring only upon ambassadors right of access to heads of State.

81. On the question whether such a right existed now, he could not speak with much certainty, but such a right had undoubtedly existed in the past; it had been based on the conception of the ambassador as the representative of his sovereign or the head of his State. Even then, it had clearly been exercised sparingly, but merely because a right was exercised sparingly and tactfully it did not mean that it did not exist. At present, in any grave issue, on instructions from his Government, the head of the mission might ask for an interview with the head of the State or Government, although normally he would ask to see the Minister of Foreign Affairs; and in such a case it would be difficult for the authorities of the receiving State to refuse it. Satow's *Guide* was not very categorical in the matter, merely saying that an ambassador dealt "as a rule" with the Minister of Foreign Affairs.[2] In the circumstances, he was inclined to agree with Mr. François that there was a right, even if it was little used.

82. If it was possible to draft a suitable text, he was prepared to agree with the Netherlands Government that reference to the matter should be included in the commentary.

The meeting rose at 6 p.m.

[2] Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th ed., Sir Nevile Bland (ed.) (London, Longmans, Green and Co., 1957), p. 167.

455th MEETING

Tuesday, 3 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

OBSERVATIONS OF THE CZECHOSLOVAK GOVERNMENT ON SECTION I

1. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the Czechoslovak Government's proposal (A/CN.4/114/Add.1) that section I of the draft should deal with the rank and precedence, not only of the heads of mission, as in article 10, but also of the other diplomatic staff of the mission.

2. For the reasons he had given in his report (A/CN.4/116), he was not in favour of the proposal.

3. Mr. ZOUREK observed that the diplomatic staff of a mission, other than the head, were ranked according to a well-established hierarchical order which was the same in all countries. Though he appreciated the force of the Special Rapporteur's arguments, he thought that perhaps the matter could be dealt with in an article of the draft; or, if the Special Rapporteur considered that such a solution would exceed the scope of the draft, some reference might be made to the subject in the commentary. Another solution might be to add to article 12, dealing with the precedence of heads of mission, a clause indicating how the precedence of other diplomatic staff of the mission was to be determined.

4. If the Special Rapporteur agreed, he was willing to prepare a suitable text.

It was decided to defer consideration of the proposal.

5. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the Czechoslovak Government's proposal that section I of the draft should also stipulate the right of individual diplomatic members of a mission to exercise diplomatic activities in accordance with the instructions of their Governments (A/CN.4/114/Add.1).

6. He was of the opinion that such a provision would be superfluous, especially if the proposal of the Netherlands Government regarding a definitions clause was adopted.

7. The CHAIRMAN, speaking as a member of the Commission, said he did not see the need for including in the draft a stipulation that individual diplomatic members of a mission should have the right to exercise diplomatic activities "in accordance with the instructions of their Governments". Whether a particular diplomatic activity was in accordance with the instructions of the Government of the sending State was a question strictly between that Government and the member of the mission concerned. Instead of being his right, it would rather be his duty to follow such instructions. But so long as his activity was within diplomatic bounds, nobody else would be entitled to question it or to withdraw the privileges and immunities from the agent on the ground of want of such instructions. For that reason he was opposed to the inclusion in the draft of a provision on the lines proposed by the Czechoslovak Government.

It was agreed not to proceed with the consideration of the proposal.

ADDITIONAL ARTICLE (ARTICLE 14 A)

8. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the Czechoslovak Government's proposal that the draft should provide for the right of a diplomatic mission, and of the head of a mission, to use the flag and emblem of the sending country (A/CN.4/114/Add.1).

9. He was of the opinion that that proposal might be considered for adoption, and he had therefore embodied it in a draft additional article (A/CN.4/116/Add.1, article 14 A).

10. Mr. AMADO observed that in the proposed aditional article it would be better to use the expression "motor vehicles" than "means of transport".

11. Mr. ZOUREK pointed out that the term "motor vehicles" would not cover boats and ships which the head of a mission might also have at his disposal. He suggested that the text drafted by the Special Rapporteur might be adopted in principle, subject to any changes which the Drafting Committee might make for purposes of clarification.

Article 14 A as proposed by the Special Rapporteur was adopted, subject to drafting changes, by 14 votes to none, with 1 abstention.

ARTICLE 14 (*continued*)

12. The CHAIRMAN recalled the main points of the discussion which had taken place at the 454th meeting concerning the suggestion of the Netherlands Government (A/CN.4/114/Add.1) that the commentary should clarify the question whether the term "etiquette" included the special privilege which ambassadors were supposed to possess of being allowed to apply directly to the head of the receiving State. The records of the ninth session seemed to indicate that the Commission had not then accepted any distinction in that respect between ambassadors and heads of mission in other classes. At the preceding meeting of the Commission, Mr. Zourek had suggested that a statement should be included in the commentary to the effect that no such privilege existed.

13. Mr. ZOUREK said that the point he wished to make was that heads of mission other than ambassadors also had the right of applying to the head of the receiving State. Whether they could do so directly or through the Ministry for Foreign Affairs would depend on the rules of protocol in the different States. To maintain that only ambassadors had that right would be at variance with the principle of equality which the Commission had already accepted in article 14 of the draft.

14. Mr. TUNKIN thought it would be improper to include in the commentary any statement implying that there was a difference between ambassadors and ministers in the matter of access to the head of State. The discussion at the previous meeting and the practice of States clearly showed that, whatever might be the position in some countries, the distinction between ambassadors and heads of mission of other classes was in that respect losing its force. Such a distinction would in fact conflict with the general idea underlying the draft that the trend should be towards the abolition of the diversity of classes of diplomatic agents and towards the evolution of a single class of diplomatic representative.

15. Article 14 as it stood was quite clear. It was in fact stated in the draft that the article required no commentary. It would therefore be wrong to include in the commentary a statement to the effect that ambassadors were especially privileged in the matter of access to the head of State, since it was only in matters of precedence and etiquette that there could be any differentiation between heads of mission by reason of their class.

16. Mr. AMADO also opposed the inclusion in the commentary of any statement implying that ambassadors were especially privileged in the matter of access to the head of State. Such a position would mean that heads of State would be unable to receive the diplomatic representatives of States whose missions were headed only by ministers, no matter how important the cultural and economic relations between the two States might be. At one time, Switzerland, for example, had been represented in Brazil by a minister, not by an ambassador. Furthermore, if heads of State could receive only ambassadors, there could be no contact between the head of State and a *chargé d'affaires* in an emergency if at the time the ambassador himself should happen to be absent.

17. Mr. FRANÇOIS said he agreed with Mr. Tunkin that the supposed privilege of ambassadors in the matter of access to the head of State could not be regarded as a question of etiquette. He considered, however, that in order to make the position clear some explanation should be provided. The reason why ambassadors had been given special privileges in the matter of access to the head of State was that in former times they alone had represented the sovereign of their country. At no time had it been held that the right of access to the head of State extended to ministers or *chargés d'affaires*. Consequently, the idea that in that respect there should be no differentiation between heads of mission by reason of their class was a complete innovation. In his opinion, an observation in the commentary would not be enough to make the position clear, and the draft should include a separate article on the subject.

18. Mr. YOKOTA said it was not in keeping with the modern development of diplomatic intercourse to give ambassadors special privileges. The modern tendency was to give equal treatment to ambassadors and ministers. In practice, ambassadors did not in fact enjoy any special right of access to the head of State. If there was such a right, the heads of State would be under an obligation to receive ambassadors desiring to exercise that right, but no such obligation existed. Even in matters of etiquette, it was doubtful whether ambassadors were treated more favourably than ministers in the matter of obtaining direct access to the head of State.

19. He reminded the Commission that at its ninth session it had not endorsed the article of the Vienna Regulation which stated that only ambassadors, legates or nuncios should possess the representative character (A/3623, para. 16, commentary on articles 10-13). Furthermore, the Special Rapporteur had quoted Sir Ernest Satow as saying that it was not the case that ambassadors could demand access to the person of the head of the State at any time, since the occasions on which an ambassador could speak with the head of the State were limited by the etiquette of the court or

Government to which he was accredited (see A/CN.4/116).

20. He was therefore opposed to the inclusion of any reference to the right of access to heads of State in the commentary, though he realized that it would be premature to conclude that the supposed privileges of ambassadors in that respect had been abolished.

21. Mr. BARTOS drew attention to the distinction which had been made in the Commission's discussions at its ninth session between the representative character of ambassadors, under the terms of the Vienna Regulation, and the functions of heads of mission as described in the Commission's draft. It had been generally agreed that from the point of view of representative character ambassadors no longer enjoyed unique status, and that in modern times ministers were also regarded as having representative character. The reason was that the head of a diplomatic mission no longer represented the monarch but the State.

22. In reality, the treatment accorded to ambassadors and ministers depended on the situation in individual countries. There was no uniform practice.

23. The Commission had not included a reference to the matter of right of access to the head of State in the draft articles or in the commentary prepared at the previous session, and he was still of the opinion that no such reference should be included in the text to be adopted at the current session. The records of the discussion would themselves provide a sufficient explanation.

24. Mr. MATINE-DAFTARY agreed with the view expressed by previous speakers that, especially since the Second World War, ambassadors no longer had the same pre-eminence of rank as formerly. Since the point had been raised by the Netherlands Government, the Commission should consider the exact meaning to be attached to the word "etiquette" as used in article 14. The question whether the word should be retained or defined should be settled.

25. Sir Gerald FITZMAURICE said he was inclined to agree that no reference to the right of access to the head of State should be made in the commentary, but the Commission should be clear as to the basis on which it reached its decision. Since the right of access was not a matter of etiquette, there was no reason why that word should be omitted from article 14. Actually, a matter of substance was involved, for the article implied that there should be no differentiation between heads of mission by reason of their class in the matter of securing interviews with the head of State or Government. It was going too far, however, to suggest that ambassadors no longer fulfilled any representative function. There was in fact a definite representative element in the functions, privileges and immunities of heads of mission. If there was a right of access to the head of the receiving State, that right was vested in the sending State. If the sending State desired, or considered it necessary, that representations should be made directly to the head of the receiving State or Government, and instructed its diplomatic representative in that sense, it would be extremely difficult for the receiving State to refuse to accede to that wish. Though there might be no absolute right, there was an established practice in the matter.

26. If the Commission decided not to include in the draft or commentary any reference to the question of access to the head of the receiving State, its silence would not mean that no such practice existed. The point was that for the purposes of such practice there should be no difference between ambassadors and ministers.

27. The CHAIRMAN, speaking as a member of the Commission, pointed out that, once the principle of the equality of States had been established, the question whether heads of mission were regarded as having a representative or functional character was no longer of any importance. At the ninth session, there had even been a proposal that distinctions in title should be abolished and that there should be only one designation for all heads of mission.

28. He also was of the opinion that no reference to the matter should be made in the commentary.

The Commission decided, by 15 votes to 1, with 2 abstentions, that no reference should be made in the commentary to the question of access by heads of mission to the head of the receiving State.

29. Mr. MATINE-DAFTARY asked for a clarification of the word "etiquette" in article 14.

30. Mr. PADILLA NERVO said that the term was used in the Havana Convention,[1] under which diplomatic officers had the same privileges except so far as precedence and etiquette were concerned. What was meant by "etiquette" depended largely on usage. In his opinion, the word should be retained.

31. Mr. ZOUREK thought that the commentary might state, in response to the Netherlands Government's question, (A/CN.4/114/Add.1) that the term "etiquette" did not mean preferential treatment for heads of mission in the sense that they had a right of access to heads of State.

32. Sir Gerald FITZMAURICE cited article 13 as a simple example of etiquette. It dealt with the ceremonial of reception, which was not a matter of precedence.

33. Mr. AMADO expressed the view that etiquette was to a large extent the survival of the traditions of an earlier age. It had been very creditable for the Commission to decide to omit any reference in the commentary to what in his view was the outmoded concept of an ambassador's right of access to the head of the receiving State. Etiquette in diplomacy was similarly becoming outmoded, but precisely because it had become of relatively minor importance it would do no harm to leave the reference to it in article 14.

[1] Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

34. Mr. BARTOS noted the differences between the mode of reception of ambassadors and of, say, *chargés d'affaires ad interim*. However, the title of article 14 laid stress on the essential equality of status of heads of mission, and in the circumstances he had no objection to the retention of the word "etiquette".

35. Mr. PADILLA NERVO observed that in diplomatic practice there were differences in the ceremonial character of the treatment of various classes of heads of mission. For example, in his country an ambassador was received in public audience on his arrival, whereas a minister was received privately. The question of etiquette was one of local significance and, one might say, of local psychology, and in the circumstances he advocated the retention of the term in article 14.

36. Mr. LIANG, Secretary to the Commission, cited other instances in diplomatic practice where the question of etiquette arose. For example, in some States an ambassador on his arrival or departure was attended by the chief of protocol, whereas a minister was attended by the assistant chief; an ambassador bore the title "His Excellency", which was not applicable to ministers; and in some countries a solemn ceremony was held on the arrival of an ambassador, but not of a minister.

37. Mr. TUNKIN said that in the modern world there was a general tendency in diplomatic practice to put ambassadors and ministers on the same footing, and in the Soviet Union the same etiquette was observed towards those classes of heads of mission, for example, on their presentation of their letters of credence. But if the reference to etiquette was omitted it might conceivably make it more difficult for some States to accept the draft articles. It had to be admitted, too, that the question of etiquette was of minor importance, and did not involve any inequality of status among heads of mission. He had therefore no objection to the retention of the word "etiquette" in article 14.

38. Mr. MATINE-DAFTARY explained that he had not proposed that the word be deleted, but had merely asked for a clarification. The clarification had been given, and he was now quite content to see the word retained in the text.

39. The CHAIRMAN put article 14 to the vote, reminding the Commission that, in conformity with the decision adopted at the previous meeting (454th meeting, para. 18), it would become paragraph 2 of article 10.

Article 14 was adopted.

ARTICLE 15

40. Mr. SANDSTRÖM, Special Rapporteur, said that articles 15, 16, 17 and 23 all dealt with mission premises.

41. He referred to the observation of the Governments of the United States of America, Sweden and Switzerland and to his comments on those observations (A/CN.4/116). He had taken those observations into account in his revised draft article 15 (A/CN.4/116/Add.1).

42. The Italian Government's proposed amendment of article 15 (A/CN.4/114/Add.3) went rather too far, he thought; article 19 gave general authority to the receiving State to do all that could be regarded as reasonable in helping a mission to find accommodation.

43. Mr. ALFARO thought that the Italian Government's amendment was judicious for it allowed for the not infrequent case of the sending State's not obtaining adequate accommodation. There was, however, a contradiction between the first and second sentence of the amendment, in that the permission granted in the first sentence by no means constituted a right. It would be better to amend the second sentence to read:

> "If the sending State is unable to acquire adequate premises, the receiving State shall be obliged to ensure adequate accommodation for the mission in some other way."

44. Mr. ZOUREK said that, while he had no objection to the Special Rapporteur's proposed addition to article 15, he did not consider it really essential. The article as drafted at the ninth session was satisfactory.

45. The CHAIRMAN, speaking as a member of the Commission, said that the purpose of the article was to facilitate adequate accommodation for the mission of the sending State, and as such it had been adopted by the Commission. The Italian Government's proposal, however, appeared to make it the duty of the receiving State to provide adequate accommodation, and in his view it went beyond what the Commission had intended.

46. He agreed that there was some ambiguity in the expression "premises necessary for its mission". It might be desirable to add an explanation somewhere stating that the expression covered also the needs of the staff of the mission.

47. Mr. TUNKIN felt that the term "premises necessary for its mission" did not include premises for the staff of the mission. Article 16 also mentioned the premises of the mission, but article 23 specifically differentiated the mission premises from the private residence of the diplomatic agent. If the Commission meant to provide that adequate accommodation should be ensured by the receiving State for members of the mission staff, it would be advisable to make an addition to that effect. He doubted, however, whether it was desirable to do so.

48. Mr. SANDSTRÖM, Special Rapporteur, said that he had understood the words "premises necessary for its mission" to mean the official premises of the mission, and in drafting his revised text he had some hesitation in extending the meaning to include accommodation for members of the mission staff. That hesitation had been increased by the Italian Government's proposal, which in his view was liable to provoke invidious comparisons among States.

49. Mr. BARTOS pointed out that article 19 provided that the receiving State should accord "full facilities" for the performance of the mission's function. It should therefore supply adequate accommodation for the staff of the mission, and he consequently favoured any amendment to that effect.

50. Sir Gerald FITZMAURICE said that to insist that the receiving State provide accommodation for the staff of the mission would impose an undue burden upon it. In actual practice no attempt was made by States to provide accommodation, but no obstacles as a rule were put in the way of the acquisition by the sending State itself of suitable accommodation. The vital thing was adequate accommodation for the official premises of the mission. The subject had been discussed at the ninth session, and the conclusion then reached was that article 15 provided a just balance, in that it did not oblige the receiving State to do more than permit the sending State to acquire the necessary premises; if it did not permit the sending State to acquire such premises, it was only right — as the article provided — that it should ensure adequate accommodation in some other way. The amendment proposed by the Swedish and Swiss Governments merely weakened the text by removing the obligations placed upon the receiving State.

51. In the circumstances, he preferred the Commission's text as adopted at the previous session, without amendment.

52. Mr. YOKOTA thought that, as far as the official premises of the mission were concerned, the existing text should be retained. In respect of accommodation for the staff of the mission, he considered it would be better either to add a second paragraph requiring the receiving State to facilitate as far as possible the acquisition of adequate accommodation or, alternatively, to add a remark to the same effect in the commentary.

53. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to withdraw his proposed addition to article 15. The idea which Mr. Yokota proposed to incorporate in a new paragraph might be regarded as covered by the stipulation in article 19 that the receiving State should accord " full facilities " for the performance of the mission's functions.

54. Mr. YOKOTA withdrew his proposal.

Article 15 as drafted at the ninth session (A/3623, para. 16) was adopted unanimously.

ARTICLE 16

55. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his proposal (A/CN.4/116/Add.1) to insert the word "official" before the word "premises" in paragraph 1 of article 16.

56. The indication "whether owned by or leased to the sending State", which he had thought of adding, might be relegated to the commentary, since the point was really already covered by article 15 as just adopted.

57. To meet the desire of the Japanese and United States Governments for a definition of mission premises (A/CN.4/116) he suggested explaining in a commentary what was meant by the premises of the mission and its appurtenances. Incidentally, the definition given in the United States comment struck him as far too broad, including, as it did, the residences for officials and employees of the mission.

58. With reference to paragraph 1 of the article, three Governments referred to the need to enter mission premises in extreme emergencies, that of Japan (A/CN.4/116), in particular, considering that a provision that the head of a mission was under an obligation to co-operate with the authorities in such cases should be included in the article. It would be recalled that after thorough discussion of the question at the ninth session, the general consensus of the Commission had been against including any exceptions to the rule of inviolability in the text.[2]

59. During the discussion of the Commission's draft in the Sixth Committee at the twelfth session of the General Assembly, the delegation of Colombia had urged that the question of the inviolability of the mission premises be studied in the light of the fact that the Latin American countries accepted the right of political asylum inside their embassies or legations (see A/CN.4/L.72). Again, it would be recalled that the Commission at its ninth session had decided that the question of asylum was a separate topic not to be dealt with in the draft.[3]

60. Mr. VERDROSS said that he appreciated the point made by the Japanese Government. Since the Commission had decided not to deal with the subject of conduct in emergencies in the article, it would, however, be necessary to make a general statement in a preamble that the draft was not meant to be exhaustive and that points not covered by it were governed by the general principles of international law.

61. Mr. YOKOTA said that, since some Governments were anxious that some reference should be made to the position with regard to inviolability in extreme emergencies, it might be advisable to refer in a commentary to the obligation on the head of a mission to co-operate with the authorities in such cases. Though not opposed to Mr. Verdross' suggestion, he preferred the former solution.

62. Mr. FRANÇOIS considered that Mr. Verdross' suggestion went too far. It would be most inadvisable to give the impression that the set of rules elaborated by the Commission left many points uncovered. Since there appeared to be general agreement on the desirability of making some reference to extreme emergencies, the best place for it would be in the commentary.

63. As for the Special Rapporteur's proposal to insert the word "official" before "premises", he was at a

[2] See *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), 394th meeting, paras. 31 ff., and 395th meeting, paras. 1-46.

[3] *Ibid.*, 394th meeting, para. 72.

loss to understand the purpose of it; he wondered what parts, if any, of a mission's premises were to be regarded as unofficial and hence not inviolable. The change was presumably not designed to distinguish between the mission premises and the private residences of the head and members of the mission, as that distinction was clear enough from article 23.

64. Mr. SANDSTRÖM, Special Rapporteur, said that as not strictly "official" premises he had had in mind dwellings specially provided by the mission for its staff.

65. Mr. TUNKIN remarked that the view that the rule of inviolability admitted of some exceptions in cases of extreme emergency had been advanced at the ninth session by some, but by no means all, members of the Commission. Others, and he among them, considered that the possible threat to property through failure to deal with an emergency promptly was far less formidable than the danger of embittering relations between States through failure to respect the inviolability of the premises of a diplomatic mission. Respect for such inviolability must take precedence over all other considerations.

66. Though he was firmly opposed to referring to any possible exceptions in the article, he regarded Mr. Yokota's suggestion as worthy of consideration, provided that it was not taken to mean that the authorities could enter the premises of a mission without the consent of the head of the mission.

67. Mr. Verdross' suggestion on the other hand was open to two objections. Apart from the one already pointed out by Mr. François, there was the consideration that opinions differed on what was meant by the general principles of law. It would hardly be much of an explanation to refer to something which already stood in need of explanation itself.

68. He agreed with Mr. François, too, in opposing the addition of the word "official"; it was clear enough from the text as it stood that the mission's premises were the premises used for the functions of the mission. The addition would merely lead to confusion and might be interpreted as implying that only the offices of the mission were to be regarded as official premises.

69. Sir Gerald FITZMAURICE considered it of the utmost importance to maintain the rule of the inviolability of mission premises without any qualification. He was prepared to support Mr. Yokota's suggestion but, for the reasons already stated, would prefer not to include any general reference to the principles of international law.

70. He agreed with previous speakers in opposing the addition of the word "official" and, indeed, was unable to follow the Special Rapporteur's explanation of his reason for doing so. A description of part of the premises of a mission as "unofficial" seemed to be a contradiction in terms. In any case the distinction appeared to be without purpose since, under article 23, the private residences of diplomatic agents enjoyed the same inviolability and protection as the premises of the mission.

71. The CHAIRMAN pointed out that the corresponding article in the original draft submitted by the Special Rapporteur to the Commission at its ninth session (A/CN.4/91, article 12) had contained a clause providing for an exception to the rule of inviolability in an extreme emergency. The clause had, however, been withdrawn by the Special Rapporteur in the course of the discussion.[4]

72. Mr. BARTOS agreed that the rule of inviolability should take precedence over any possible threat to life and property. When relations between the sending and the receiving State were normal, the head of the mission would in any case call in assistance in case of emergency. But when relations were not normal, there was a danger that an emergency might be used, or even created, as a pretext for entering the premises of the mission. He could recall a case where an incendiary bomb had been thrown, allegedly by an indignant crowd, into the premises of a Yugoslav mission manifestly in order to give the local authorities an excuse to enter the building.

73. As for Mr. Verdross' suggestion, he doubted whether there were enough points not covered in the articles to justify such a preamble. It would be better not to deal with the question of emergencies in the draft at all, but to leave it to the good sense of heads of mission and the local authorities.

74. The insertion of the word "official" before "premises" would only cause confusion. Everything under the roof of the premises occupied by the diplomatic mission must be covered by the rule of inviolability. Incidentally, the delegation of the Philippines had raised an important point in asking for clarification of the situation when a mission occupied only an apartment in a building (see A/CN.4/L.72).

75. Mr. ALFARO said that in addition to the excellent reasons already advanced against the insertion of the word "official" there was the consideration that any such insertion would make it necessary for the Commission to specify what parts of a mission's premises were unofficial. And that would give rise to far greater difficulties than if the term "mission premises" were left to be interpreted in the light of common sense. He would not oppose Mr. Yokota's suggestion if other members of the Commission were in favour of it.

76. Mr. SANDSTRÖM, Special Rapporteur, said that although the distinction between official and unofficial parts of the premises of a mission did not, as Sir Gerald Fitzmaurice had pointed out, affect the question of inviolability, it might be relevant to article 17, which dealt with the exemption of premises from taxation.

77. In view of the trend of the discussion, he preferred to withdraw his proposal for the insertion of the word "official".

78. Mr. ZOUREK, after recalling the Commission's previous decision to make no mention of any possible exception to the rule of inviolability in case of

[4] See *Yearbook of the International Law Commission*, 1957, vol. I, 395th meeting, para. 2.

emergency, expressed entire agreement with Mr. Tunkin, Sir Gerald Fitzmaurice and Mr. Bartos on the point. Once exceptions were admitted the principle would be completely undermined. He would prefer the text adopted at the ninth session to stand, with the possible addition of a reference to Mr. Yokota's point in the commentary.

Paragraph 1 was adopted unanimously.

Paragraph 2 was adopted unanimously.

The meeting rose at 1.5 p.m.

456th MEETING

Wednesday, 4 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 16 *(continued)*

1. Mr. YOKOTA, enlarging upon his proposal that the commentary to article 16 should contain a reference to the duty of heads of diplomatic missions to co-operate with the local authorities in case of fire or other extreme emergencies, said that such a comment would leave the principle of the absolute inviolability of the premises of the mission intact. Even if the head of a mission failed to co-operate with the authorities in an emergency, the latter were not at liberty to enter the mission without his consent. The only recourse then open to the authorities was to express regret at his attitude, or even lodge a formal protest.

2. Mr. FRANÇOIS said that, after hearing Mr. Yokota's interpretation of his proposal, he was resolutely opposed to it. It was not always possible to get in touch with a responsible member of a diplomatic mission at short notice, and it was inconceivable that in such a case buildings must be left to burn down, or, for example, a madman allowed to fire upon passers-by from a mission window without any intervention of the authorities. If the draft was to provide for no exception to the rule in such extreme cases of emergency, he would prefer to have no reference to such cases at all.

3. Mr. TUNKIN pointed out that the question had been thoroughly discussed at the Commission's ninth session and the views then put forward by Mr. François had not been accepted. What was proposed now was merely that a comment should be added concerning the obligation of heads of missions to co-operate with the authorities, which involved no departure from the rule of absolute inviolability.

4. The CHAIRMAN pointed out that in the original draft the corresponding provisions were in article 12. At the ninth session, the Special Rapporteur, after some discussion, had withdrawn the part of the article providing for exceptions in cases of emergency, suggesting that the scope of the exceptions could perhaps be explained in the commentary.[1] When considering the commentary, the Commission had not at first reached any decision. At its 395th meeting the Special Rapporteur had said that the Commission could hardly decide whether it was necessary to refer to exceptions to the principle of inviolability in the commentary until it had his draft of the commentary before it.[2] At its 425th meeting the Commission had adopted without protest a commentary on article 16 which contained no reference to the question of exceptions.[3] Accordingly, the Commission had in effect endorsed the view just expressed by Mr. François that it would be better to say nothing on the subject.

5. Mr. YOKOTA observed that, since several Governments had expressed some apprehension at the absence of any reference to the action to be taken in extreme emergencies, he felt strongly that the subject should be mentioned, and several members of the Commission had supported his proposal to insert an appropriate reference in the commentary. He drew a parallel with the case of the expropriation of the land on which the premises of a mission stood, where the Commission, while enunciating the principle that such land could be expropriated only with the consent of the sending State, had added, as a counterpoise, that it was the duty of the sending State to co-operate.

6. Sir Gerald FITZMAURICE supported Mr. Yokota's proposal. His impression was that the Commission had accepted the text of paragraphs 1 and 2 of article 16 on the tacit understanding that some reference on the lines proposed by Mr. Yokota would be added in the commentary. Perhaps the comment could take the form of a reference to article 33, paragraph 1, which enunciated the duty of diplomatic agents to respect the laws and regulations of the receiving State, without prejudice to their diplomatic privileges and immunities.

7. Mr. TUNKIN said that he was not particularly anxious that any such comment should be included but, on the other hand, would not object to its inclusion.

8. Mr. AMADO thought that it was impossible to make provision for every contingency in the draft. It was hardly conceivable that a head of mission would fail to co-operate with the authorities in an emergency and he was opposed to the idea of a body of international

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[1] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), 395th meeting, para. 2.

[2] *Ibid.*, para. 41.

[3] *Ibid.*, 425th meeting, paras. 60-65.

lawyers solemnly telling heads of missions what their elementary duties as human beings were.

9. Mr. FRANÇOIS said that the grounds for Mr. Yokota's proposal were logical enough but there was a grave danger that the comment, especially in the light in which Mr. Yokota had presented it, might be interpreted as implying that the authorities were in no case permitted to enter mission premises without the consent of the head of the mission.

10. Mr. SANDSTRÖM, Special Rapporteur, said that the Commission could either say nothing on the question or point out that cases of extreme emergency were very rare and that it was difficult to frame a rule to fit them. After all, only three Governments had referred to the matter, two of them taking it as axiomatic that in extreme cases entry could be made without consent, and only the Government of Japan had asked for an explicit provision on the question. He would prefer the subject not to be touched on in the draft.

11. Mr. BARTOS said that he adhered to the views he had expressed on the substance of paragraph 1 of the article at the previous meeting (455th meeting, paras. 71-73). In an analogous case of refusal of a diplomatic agent to co-operate with the authorities in a matter unconnected with entry into mission premises, the Yugoslav Government, after giving formal satisfaction to the mission concerned for the action taken by the police, had declared the agent *persona non grata* on the ground that he was lacking in human feeling. And the Foreign Office of the country concerned, though not the mission itself, had acknowledged the correctness of the Yugoslav action.

12. Mr. ZOUREK said that Mr. Yokota's proposal was perfectly consistent with international practice. The permission of the head of the mission or, in his absence, of a member of the mission must be sought by the authorities, even in an emergency, before they entered mission premises, and to admit of any exception to that rule would weaken it.

13. Faris Bey EL-KHOURI agreed that the inviolability of a mission's premises must take precedence over all other considerations and the consent of the head of the mission to an entry by the authorities was clearly necessary. On the other hand, it was generally in the sending State's own interest that the local authorities should be allowed to enter the building in emergencies. It would be better, however, to make no reference to the subject than to insert a comment which, by introducing such debatable concepts as *force majeure* or "extreme emergency", would be open to different interpretations.

14. The CHAIRMAN put to the vote the proposal that no reference be made to cases of extreme emergency either in the article or in the commentary.

The proposal was adopted by 8 votes to 6, with 2 abstentions.

15. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the comments of the United States Government on paragraph 3 of article 16 and to his own observations thereon (A/CN.4/116). The Government of Finland considered paragraph 3 to be somewhat superfluous and suggested reformulating article 16 in such a way that its paragraphs 1 and 3 were more closely connected (A/CN.4/114/Add.2). He was not in favour of the latter suggestion, since to place paragraph 3 immediately after paragraph 1 would reduce it to a mere gloss on the first paragraph. The substance of paragraph 3 had its own *raison d'être,* independently of paragraph 1.

16. The CHAIRMAN, after recalling the course of the discussion on article 16, paragraph 3, at the Commission's ninth session, said that, in effect, the Special Rapporteur was asking the Commission to adopt unchanged the paragraph as then drafted.

17. Mr. BARTOS said it was by no means uncommon for the head of the mission actually to request the intervention of the judicial authorities. In one case, for example, a head of mission had asked for a search to be made of the residence of a mission employee in connexion with an alleged theft; in another the local authorities had been asked to conduct the necessary inquiries in connexion with the suicide of a Yugoslav national on mission premises; and in a third, the authorities had been asked to evict a national of the sending State of the mission who, after renouncing allegiance to that State, had refused to vacate the premises he occupied. Perhaps the Drafting Committee could be requested to consider the insertion of some such proviso as "unless the head of the mission requests such action" in paragraph 3.

18. Mr. ALFARO said that, for the purpose of emphasizing the connexion between paragraphs 1 and 3, paragraph 3 should perhaps begin with the words: "In consequence of the foregoing provisions".

19. Mr. YOKOTA considered that some definition of the "premises of the mission" should be given, for the effect of the cross-references in articles 23 and 28 was to extend the inviolability of the premises of the mission to the private residences of the administrative and technical staff of the mission and of the members of their families forming part of their respective households.

20. The CHAIRMAN suggested that a more appropriate place for Mr. Yokota's point would be article 23. The point had no relevancy to the article under discussion.

21. Mr. SANDSTRÖM, Special Rapporteur, remarked that the amendments which he would be proposing to article 28 might well dispose of Mr. Yokota's point.

Paragraph 3 was adopted by 15 votes to none, with 1 abstention.

22. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observation of the United States Government on paragraph 2 of the commentary on article 16 and to his own comments on that observation (A/CN.4/116).

23. In his opinion the observation was based on a misunderstanding, since paragraph 2 was intended to deal only with writs to be served on diplomatic agents by a process server. For the reasons he had given in his own comments, he saw no objection to the procedure mentioned in the last sentence of paragraph 2 of the commentary. He would suggest that the Commission should merely take note of the United States Government's observation.

24. Sir Gerald FITZMAURICE thought there was some justification for the observation. The last sentence in paragraph 2 of the commentary was unnecessarily categorical in saying that all judicial notices of that nature must be served through the Ministry of Foreign Affairs of the receiving State. There was in fact no reason why judicial notices should not be sent through the post. They might have no effect, owing to the immunity from jurisdiction of the diplomatic agent to whom they were addressed, but to send them through the post would involve no infringement of diplomatic immunity. He suggested that the sentence might be reworded to read:

> "All judicial notices of this nature should be delivered in some other way, e.g., through the post, or, in the last resort, through the Ministry for Foreign Affairs of the receiving State."

25. Mr. SANDSTRÖM said it was his understanding that the cases to which paragraph 2 of the commentary related were those in which writs had to be served by a process server.

26. Mr. YOKOTA supported Sir Gerald Fitzmaurice's suggestion, which he recalled had also been made at the ninth session, when it had been understood that the possibility of sending writs through the post should not be excluded. As drafted, paragraph 2 would cause difficulty, since it did not allow for that possibility. In Japan, for example, in cases where civil actions were brought against diplomatic agents, the procedure was to notify diplomatic agents through the post, and his country would be in some difficulty if no allowance was made for that procedure. Furthermore, as stated in the summary records of the ninth session, it had been clearly understood that the serving of notices through the post would not infringe the inviolability of a mission's premises.

27. Mr. LIANG, Secretary to the Commission, agreed with the Special Rapporteur that the United States Government's observation was based on a misunderstanding, since paragraph 2 of the commentary related only to a specific kind of judicial notice. Such notices were valid only if served by a process server, and they could therefore not be sent through the post.

28. The possibility of serving notices at the home of the diplomatic agent, or at some other appropriate place, was a matter which should not be dealt with in connexion with article 16, since that article related only to the inviolability of mission premises.

29. He therefore felt that paragraph 2 of the commentary should be retained, as drafted.

30. Mr. MATINE-DAFTARY said that it was not clear from the wording of paragraph 2 whether the immunity to be protected was the immunity of the mission premises, or the immunity of the diplomatic agents themselves, or both. He agreed that in some countries writs could not lawfully be sent through the post, and in such cases the only way of serving a writ on a diplomatic agent was to have it delivered through the Ministry for Foreign Affairs of the receiving State.

31. The Drafting Committee should be asked to reconsider the wording of the paragraphs so as to remove the ambiguities.

32. The CHAIRMAN referred to the discussion on the same point at the previous session.[4]

33. Mr. EDMONDS said it was a general rule of judicial procedure that a writ must be served personally. Paragraph 2 of the commentary said that such writs should not be served on the premises of a mission, or even at the door. It was the last sentence of the paragraph, relating to the delivery of judicial notices through the Ministry for Foreign Affairs of the receiving State, which raised a difficulty. The United States Government had pointed out that if the person on whom the writ was to be served was subject to the jurisdiction of the receiving State, the writ should be served upon him personally away from the mission premises, and the Ministry of Foreign Affairs should not be involved unless diplomatic immunity was claimed. The best course would therefore be to delete the last sentence of paragraph 2 of the commentary, and he made a proposal to that effect.

34. Sir Gerald FITZMAURICE said that, though the explanation given by Mr. Liang was correct in substance, he still thought the paragraph was likely to lead to confusion.

35. Paragraph 2 of the commentary should begin with the words "A special application of this principle it that no writ requiring personal service shall be served on the premises of the mission..." for otherwise the expression subsequently used — "All judicial notices of this nature" — might cover even writs which could be sent through the post.

36. The last sentence of the paragraph was not strictly relevant. The real aim of the paragraph was negative — to state that certain types of writ could not be served on mission premises. A difficulty was involved, because in many countries the nature of a writ might change as far as service was concerned. In the United Kingdom, for example, it was the general rule for all writs to be served personally, but if such service was impossible, an order for substituted service might be obtained from the court, and the writ could then be sent through the post or inserted in a notice published in the press, or communicated in some other way. A Ministry for Foreign Affairs would be embarrassed if it had to deal with such matters, and would probably return the writ and refuse to serve it. The best solution would be to delete the last sentence of the paragraph.

[4] *Yearbook of the International Law Commission*, 1957, vol. I, 396th meeting, paras. 28-48.

37. Mr. ZOUREK said that he thought the answer to Mr. Matine-Daftary's question was that paragraph 2 related only to the inviolability of the mission premises. The Special Rapporteur had explained the scope of the text and had shown that the observation of the United States Government was based on a misunderstanding. The paragraph meant that only in cases where the writ would otherwise have to be served by a process server should it be delivered through the Ministry for Foreign Affairs. The last sentence, he felt, was useful, and should not be deleted, because it sometimes happened that a writ was sent to a diplomatic agent by mistake, and in such cases the Ministry for Foreign Affairs was best qualified to stop the writ from being served and to return it to the court. Perhaps the difficulty to which the sentence gave rise might be overcome by an amendment on the following lines:

> "All judicial notices which, under the legislation of the receiving State, must be served by a process server should be delivered through the Ministry for Foreign Affairs."

38. Mr. SANDSTRÖM, Special Rapporteur, observed that the procedure of the service of writs differed from country to country. In his own country, for example, writs could be served by affixing them to the door of the home or office of the person concerned. Such cases were covered by the second sentence of the paragraph. While not indispensable, the last sentence, he felt, was worth retaining. Perhaps the objections to it could be met by saying that in some countries notices of that nature were delivered through the Ministry for Foreign Affairs.

39. Mr. ALFARO supported the proposal that the last sentence should be deleted.

40. Paragraph 2 of the commentary related only to the inviolability of mission premises, but the last sentence would affect also the immunity of the diplomatic agents themselves from civil and penal jurisdiction. If considered indispensable, the sentence might perhaps be transferred to some other context.

41. Mr. BARTOS said that under some national legislations, as for example the Italian, a writ could be delivered by the postman if the process server was not allowed to enter the premises. In cases where writs were served on diplomatic agents, the immunity of the sending State, as well as of the diplomatic agent himself, was involved. He referred to a dispute between the Yugoslav and Italian Governments concerning the delivery to an embassy by post of documents which, under Yugoslav law, only the competent government department in Yugoslav was authorized to receive. The Yugoslav Government had requested the Italian Government to submit to international arbitration the question whether that procedure was irregular and the Italian Government had found means of annulling the notification in question.

42. The commentary on article 16 rightly stressed that all communications from State to State should be made through the diplomatic channel, and he was therefore in favour of the retention of the last sentence of paragraph 2.

43. Mr. MATINE-DAFTARY supported the proposal that the last sentence of paragraph 2 should be deleted, since it was a possible source of confusion inasmuch as both the immunity of diplomatic agents and the inviolability of mission premises were involved. He thought, however, that there should be some sentence in the draft or in the commentary dealing with the procedure to be observed in the service of writs not affecting the immunity of diplomatic agents.

44. Sir Gerald FITZMAURICE, referring to the reason given by Mr. Zourek for wishing the last sentence of paragraph 2 to stand, said he thought the scope of the sentence was much wider than would be required for dealing with cases in which writs were returned to the court by the Ministry for Foreign Affairs. The implication of the sentence was in fact that writs must be passed on by the Ministry for Foreign Affairs, and that was simply not correct. In most cases, a Ministry for Foreign Affairs would refuse to forward such writs.

45. He still thought it would be better to delete the sentence, but in deference to those members who desired it to stand he would be prepared to accept it if it were reworded on the following lines:

> "Any person wishing to serve a writ on a foreign mission should get into touch with the Ministry for Foreign Affairs of the receiving State."

46. The CHAIRMAN put to the vote the proposal that the last sentence of paragraph 2 of the commentary on article 16 should be deleted.

The proposal was adopted by 10 votes to 6, with 1 abstention.

47. Mr. SANDSTRÖM, Special Rapporteur, referred to the observations of the Governments of the United States of America, Luxembourg, Sweden and Switzerland on paragraph 4 of the commentary on article 16, and to his own comments on those observations (A/CN.4/116). He also referred to the discussion at the previous session, when Mr. François had submitted a proposal concerning expropriation of mission premises in the public interest.[5]

48. In the light of the observations of Governments he had prepared a draft provision which, if adopted, would become paragraph 4 of article 16 (A/CN.4/116/Add.1).

49. He was not, however, entirely satisfied with the draft he had proposed, and he suggested that the provision might more suitably read:

> "If a building of a mission, or a part of such building, is required for the purpose of the carrying out of public works, such as the widening of roads, it shall be the duty of the sending State, notwithstanding the inviolability of the premises, to co-operate."

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[5] *Yearbook of the International Law Commission*, 1957, vol. I, para. 49 ff., and 397th meeting, paras. 1-26.

50. Sir Gerald FITZMAURICE pointed out that at the ninth session the Commission had decided that the principle of the inviolability of mission premises was of such importance that no qualification should be permitted to appear in the text of the article concerning it. It had also been decided that ancillary matters, such as the serving of processess and the requirements of public works, should properly be dealt with in the commentary. Although there was no implication in the Special Rapporteur's proposal that the mission premises could be taken over by force, he still felt that the addition of such a paragraph to the article would introduce a qualification of the principle that he himself would regret. For that reason, he would prefer any reference to public works affecting mission premises not to be included in the article itself, but in the commentary, where it could be amplified, if necessary.

51. Mr. GARCIA AMADOR agreed with Sir Gerald Fitzmaurice. The case of public works constituted an exception and a limitation to the principle of inviolability, and if a paragraph concerning that case were inserted in the article the principle would be weakened. Furthermore, it would not be easy to define the extent of the compensation payable under the Special Rapporteur's proposed new paragraph (A/CN.4/116/Add.1). He would therefore prefer the question of expropriation of mission premises for the purpose of public works to be mentioned in the commentary.

52. Mr. VERDROSS agreed with Sir Gerald Fitzmaurice and Mr. García Amador.

53. Mr. FRANÇOIS pointed out that during the recent United Nations Conference on the Law of the Sea many observations made in the commentaries to the Commission's draft on the law of the sea had been transferred to the body of the articles, on the ground that they dealt with important principles. It seemed obvious the observations of the Governments which had commented on paragraph 4 of the commentary on article 16 that, if the draft on diplomatic intercourse and immunities were considered at a similar conference, many passages at present in the commentaries would similarly be transferred to the body of the articles. Accordingly, inasmuch as paragraph 4 dealt with an important question — the limitation of the principle of inviolability dictated by the needs of public works — he considered that the question should be dealt with in the article itself. For that reason he supported the Special Rapporteur's proposal.

54. Faris Bey EL-KHOURI said he preferred the original proposal of the Special Rapporteur, or, rather, the first sentence of his original proposal (A/CN.4/116/Add.1). The second sentence was unnecessary, as the premises of the mission would naturally be subject to the laws of the receiving State, and compensation would be paid according to those laws. To leave that sentence, therefore, would be tantamount to extending to missions privileges not accorded to other persons or bodies in the receiving State whose property was affected by the public works. If the second sentence was deleted, he would support the insertion in the article of the Special Rapporteur's proposed new paragraph.

55. Mr. YOKOTA agreed with the views of Mr. François. He had some doubts, however, about the draft proposed by the Special Rapporteur. At the ninth session it had been decided that Mr. François' original proposal conferred a unilateral right on the receiving State to expropriate the premises of the mission, and it was felt that the consent of the sending State was an essential preliminary to the expropriation. The wording of the paragraph adopted for the commentary accordingly stressed both the consent of the sending State and its duty to co-operate. The Special Rapporteur's proposal, however, appeared to lay greater stress on the duty of the sending State to co-operate than on the necessity of obtaining its consent. He considered, therefore, that it required redrafting; in particular, the last sentence of the Special Rapporteur's original draft (A/CN.4/116/Add.1) should be retained, in order to keep a just balance between the duty of the receiving State and that of the sending State.

56. Mr. TUNKIN doubted whether it was necessary or advisable to insert in the article the additional paragraph proposed by the Special Rapporteur. On the one hand, it referred to the duty of the sending State to co-operate; such a duty was universally recognized. On the other hand, the paragraph as drafted was liable to cause misinterpretations, and any ambiguity in a legal text was to be avoided.

57. Mr. EDMONDS said that all the members of the Commission had agreed at the ninth session on the importance of the principle of the inviolability of mission premises. The question now before the Commission was whether the limitation of inviolability for the purposes of public works should be mentioned in the commentary to the article or become the subject of a provision in the article itself. In his view, inviolability did not extend so far as to enable the sending State, by insistence on the absoluteness of the principle, to hinder the natural growth of a city. The limitation was important, and should therefore be mentioned in the text of the article. He preferred the Special Rapporteur's original text to that proposed orally in the meeting, but had no particular objection to the latter.

58. Mr. HSU said that no doubt the Special Rapporteur's proposed new paragraph would be acceptable to a majority of delegations in a conference of plenipotentiaries; the same was true of many passages which the Commission had decided to include in the commentaries to the various articles. That was not, however, a convincing reason for inserting the proposed paragraph in the text of the article. The principle of the inviolability of mission premises was so important that it should be subject to the smallest possible number of exceptions. Accordingly, he considered that it would be better to deal with the subject of public works affecting mission premises in the commentary than in the article itself.

59. Mr. ALFARO said that it was universally recognized that where expropriation of mission premises was necessary for the purpose of public works it was admissible. But the formulation of a rule such as that proposed by the Special Rapporteur gave rise to serious difficulty. For example, the proposed paragraph imposed upon sending States the duty to co-operate; such terminology was rather too vague for a rule of international law.

60. The Special Rapporteur's draft suffered from other faults. The example of public works given — the widening of roads — should not be mentioned, because it might give rise to difficulties of interpretation; indeed, he thought, no illustrative examples should be given. Nor should compensation be mentioned, for it was a rule in all municipal law that expropriation gave rise to a claim for compensation. In any case, he thought it would be very difficult to frame a rule limiting the inviolability of mission premises in clear and unmistakable terms. In the circumstances, therefore, he would prefer the substance of the limitation to be referred to in the commentary only.

61. Mr. AMADO said that if the Special Rapporteur's proposal was adopted, article 16 would have a paragraph which in effect merely gave advice to States. It was true that public works were of importance and had to be carried out, but the international community was based on the idea of co-operation, and it was surely sufficient to leave in the commentary suggestions that would be adopted by all countries in a co-operative spirit.

62. Mr. PADILLA NERVO said that questions involving public works affecting mission premises would automatically be the subject of negotiation and agreement between the sending State and the receiving State, and the adoption of the Special Rapporteur's proposal would not only not change the existing situation but would also break the general harmony of the draft articles. A similar question had arisen in connexion with the inviolability of the diplomatic bag, and the Commission had rightly decided to deal with it in the commentary to article 21 rather than in the article itself. He therefore opposed the Special Rapporteur's proposal.

63. Sir Gerald FITZMAURICE agreed with Mr. Hsu that there was no reason to insert the substance of paragraph 4 of the commentary in the text of the article merely because a conference of plenipotentiaries would do so. The Commission should adhere to the principle that only essentials — in other words, concrete obligations — should be dealt with in the articles.

64. He did not deny the obligation of the sending State to co-operate with the receiving State in the carrying out of public works, but he was anxious that it should not be so expressed as to appear as a qualification of the principle of the inviolability of mission premises. If the Commission decided that it was desirable to make such a provision in an article, it would be more appropriately made in article 33, which dealt with the conduct of the mission towards the receiving State, rather than in an article concerned with the inviolability of mission premises. But he did not think that it was necessary to insert any such provision in an article, for obviously a receiving State would not expropriate mission premises without preliminary negotiation and agreement with the head of the mission or with the sending State. No known case existed of an expropriation having taken place without agreement on both sides. In any case, the receiving State was not helpless in such a matter; if the sending State was unreasonable, the receiving State could in many ways make life uncomfortable for the mission. Accordingly, there was no good reason for accepting the Special Rapporteur's proposal.

65. The CHAIRMAN put to the vote the question whether a paragraph on public works affecting mission premises should be inserted in the text of the article.

It was decided, by 9 votes to 6, with 1 abstention, that a paragraph on public works affecting mission premises should not be inserted in the article.

Article 16 as a whole, as drafted at the ninth session (A/3623, para. 16) was adopted unanimously.

The meeting rose at 1 p.m.

457th MEETING

Thursday, 5 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES ON DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 17

1. Mr. SANDSTRÖM, Special Rapporteur, said that in his redraft of article 17 (A/CN.4/116/Add.1) he had taken into account observations made by the Governments of the United States of America, Belgium, Chile and Luxembourg (A/CN.4/114 and Add.1). The Italian Government had suggested an amendment (A/CN.4/114/Add.3) which omitted the important point that the mission premises would be exempt from tax by reason of the sending State's ownership or lease of the premises, and for that reason the Italian amendment was unsatisfactory. The United States Government's proposal seemed merely to complicate the text, and he felt that the proper context for the amplifications and definitions proposed by that Government was the commentary rather than the article itself. Some observations, such as that of the Luxembourg Government (that the term "specific services rendered" was

more suitable than the term "services actually rendered"), and that of the Belgian Government (concerning the use of the French word *locaux*), seemed well justified, but would entail only drafting changes.

2. On reconsideration of his proposed redraft of article 17, he had reached the conclusion that it was in no way superior to the text adopted by the Commission at its ninth session (A/3623, para. 16) and he accordingly withdrew the redraft. As he had suggested, a few drafting changes might be made.

3. Mr. YOKOTA noted that the Commission's version of article 17 did not specifically refer to "direct" dues or taxes. The Convention on the Privileges and Immunities of the United Nations, 1946, referred in its article II to "direct taxes", and accordingly he considered there was a case for adding the word "direct" to the text of the article or for making the matter clear in the commentary. The Special Rapporteur had in any case stated his opinion in his conclusions (A/CN.4/116) that the article related to direct dues and taxes only.

4. Mr. SANDSTRÖM, Special Rapporteur, thought that the provision in the Convention cited by Mr. Yokota was different in scope from the article the Commission was discussing. In any case, he would be glad to hear of any indirect taxes on premises.

5. Mr. YOKOTA said he would not insist that the word "direct" should be in the text of the article, but he still considered that it should be made clear in the commentary that article 17 related to direct taxes and dues only.

6. The CHAIRMAN thought that the question might be considered when drafting changes to the text came under discussion; on that understanding, he put to the vote article 17 as drafted at the ninth session, subject to drafting changes.

Article 17 was adopted unanimously.

ARTICLE 18

7. Mr. SANDSTRÖM, Special Rapporteur, noted that the United States Government suggested (A/CN.4/114) that the words "and documents" should be omitted, as being confusing and unnecessary; the same Government objected to the remark in the commentary that inviolability applied regardless of the premises in which the archives and documents might be. It seemed to him that the archives and documents were part of the property of the mission and therefore should everywhere be inviolable, as, for example, in the case of a sealed letter sent by ordinary post.

8. The Italian Government proposed (A/CN.4/114/Add.3) the addition of the words "wheresoever they may be" at the end of the sentence, but those words merely added to the text of the article words in the commentary that were explanatory of the text. As neither Government had introduced any fresh concept which added to the substance of article 18, he had suggested no change.

9. Mr. AMADO noted that the words "and documents", objected to by the United States Government, had been added at the suggestion of the Secretary.[1]

10. The archives and documents of the mission did not necessarily have to be on the premises of the mission, as the ambassador might well have them, or some of them, with him anywhere in the State to which he was accredited. The Harvard draft on diplomatic privileges and immunities,[2] in article 5, also said that the archives were inviolable "wherever such archives may be located within the territory of the receiving State". In the circumstances, he thought the Italian Government's proposed addition reasonable.

11. Mr. ALFARO thought that the term "archives" included documents. Article 18 did not, however, seem to deal with the correspondence of the mission, which might be in the hands of messengers or in the post. Article 21 dealt with the inviolability of the diplomatic bag, but not with correspondence that was not in the diplomatic bag. For the sake of completeness, therefore, he proposed that the unnecessary word "documents" be deleted and the word "correspondence" inserted.

12. Mr. LIANG, Secretary to the Commission, explaining why he had suggested the introduction of the words "and documents", said that archives appeared to him to consist of those documents the safe custody of which was of prime importance. But some documents, such as memoranda in process of being drafted by the counsellors of the embassy, were not necessarily, and might never become, part of the archives. Hence his suggestion, which had been intended to complete the text.

13. Sir Gerald FITZMAURICE said that article 21 had the effect that documents and correspondence would be inviolable when they were in the diplomatic bag, while article 16 had the effect that they would be inviolable when they were on the premises of the mission. They were, so to speak, covered by the inviolability of the bag and the mission premises respectively. There remained documents and correspondence other that those on the premises of the mission or in the diplomatic bag, and it was these in particular which would be covered by article 18.

14. The difficulty, however, was to decide at what point correspondence became the correspondence of the mission. In some cases letters were addressed to the embassy from official sources and were recognizable as such because they were officially sealed or franked, but in other cases letters were not of this kind and were from private persons and bodies.

15. None the less, he felt that the difficulty of deciding

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[1] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), 399th meeting, paras. 29 *et seq.*

[2] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 61.

should not deter the Commission from recognizing the general principle of the inviolability of all documents of the mission. He therefore supported the proposal that the text remain as adopted by the Commission at its ninth session, with the addition of the words "and correspondence".

16. Mr. ZOUREK agreed with the Secretary that the expression "archives", even if the words "and correspondence" were added, did not cover all the written matter of the mission and felt that it was therefore necessary to maintain the words "and documents". There were, in addition to archives, other types of documents, such as draft memoranda and preparatory texts used for negotiation, which were equally inviolable.

17. He had no objection to the mention of the correspondence of the mission in the draft articles, but felt that it ought to be made in subsection B, which concerned facilitation of the work of the mission, freedom of movement and communication, rather than in subsection A, which concerned the mission premises and archives. Article 21 might be a suitable context.

18. Mr. AMADO said that the characteristic of archives was that they were relatively immovable, and confined to one place. To add "and correspondence" in article 18 would be to introduce a reference to something of a very different nature; for that reason he could not approve of the addition.

19. Mr. BARTOS said that in Yugoslavia the inviolability of a mission's archives and of correspondence conducted by diplomatic pouch was guaranteed. But a mission's correspondence not carried by diplomatic pouch did not enjoy a similar guarantee. Furthermore, the rules governing freedom of communication varied from country to country. Accordingly, he could not agree to the insertion of the words "and correspondence" in article 18.

20. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Bartos that it would be undesirable to add the words "and correspondence"; for one thing, it would be difficult to define the meaning of "correspondence". It seemed to him, too, that the word "documents" included official letters, so that nothing would be gained by the suggested addition, which he therefore opposed.

21. Mr. ALFARO said that, in view of the criticisms expressed, he would withdraw his proposal that the words "and correspondence" be inserted in article 18; similarly, he would not press for the deletion of the words "and documents". He still felt that the question of correspondence should be considered somewhere in the draft articles, for example in article 21.

Article 18 as drafted at the ninth session was adopted unanimously.

ARTICLE 19

22. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the United States Government and to his own comments thereon (A/CN.4/116), and he called attention to his proposed additional paragraph 2 (A/CN.4/116/Add.1), which he had drafted in response to a general observation of the Netherlands Government concerning subsections A and B under the heading "proposed additional articles" (A/CN.4/116). He also referred to the opinion expressed by the Philippine delegation on the subject at the General Assembly.[3]

23. Mr. TUNKIN said that he could see no justification for the somewhat surprising addition proposed by the Special Rapporteur. Though it would be perfectly in order to lay down the principle of non-discrimination in the matter of rates of exchange, he could not see why diplomatic missions should necessarily enjoy the most favourable rate. Some such rates, for example rates for tourists, might be established for special reasons and diplomatic missions might not be eligible to enjoy them.

24. Mr. ZOUREK considered that the proposed new paragraph went far beyond the scope of the draft. All States regarded their own currency regulations as a matter strictly within their domestic competence, and to make such an innovation might well render the draft unacceptable to many countries. Differences in exchange facilities were dictated by the economic needs and interests of the countries concerned and diplomatic missions might not fulfil the conditions required for the enjoyment of the most favourable rate, if it were a tourist rate for instance.

25. Sir Gerald FITZMAURICE supported the Special Rapporteur's proposal with respect to paragraph 1; and though there was, theoretically speaking, a good deal of truth in what the two previous speakers had said he likewise supported his proposed paragraph 2 of the article. One feature of modern international life was the practice of some countries of maintaining artificial rates of exchange which did not correspond to the real international value of their currencies. The establishment of other more favourable rates was in itself evidence of the unreality of the official rate. From his own experience he knew that diplomatic missions, whose local expenses were very heavy, were most severely handicapped by the artificial rates of exchange applied. While admitting that States were acting within their rights in establishing whatever rate of exchange they thought appropriate, he considered it only equitable that, where more favourable rates existed, diplomatic missions should benefit from them. Were the principle accepted, the text could be so worded as to exclude such exceptional rates as those offered to tourists.

26. Mr. BARTOS said that his own country, Yugoslavia, had experienced some difficulties in the matter of exchange rates. In response to a general request, all missions accredited to Yugoslavia had been accorded the preferential tourist rate instead of the official rate.

[3] *Official Records of the General Assembly, Twelfth Session, Sixth Committee,* 509th meeting, para. 48.

Since then, however, some missions had pressed to be accorded the special premium rate offered to Yugoslav nationals who brought into the country funds which they had earned, saved or inherited abroad and which they were not legally bound to transfer to Yugoslavia. His Government was naturally unwilling to grant to missions a rate of exchange which was really a reward for patriotism and to which the missions were, accordingly, in no way entitled. He was afraid that the Special Rapporteur's proposal might encourage such excessive demands.

27. Mr. AMADO considered that the transition from a paragraph containing the original text of article 19, which one naturally associated with all the diplomatic and political functions of missions, the exercise of the sovereign rights of the sending State in its relations with the receiving State, and the whole machinery of diplomatic representation, to a paragraph dealing with a matter of detail such as exchange rates would be altogether too abrupt. If the Commission desired to introduce a provision on the lines of that proposed by the Special Rapporteur, which he was not yet prepared to oppose, but which, as Mr. Bartos had pointed out, might have serious consequences and lead to many complications, it would be more appropriate to insert it among the articles dealing with exemption from taxation and customs duty.

28. Mr. SANDSTRÖM, Special Rapporteur, said he had been in two minds whether or not to propose the additional paragraph. The proposal was in any case purely tentative and the provision in question might well be inserted among the articles relating to financial matters.

29. The proposal itself could be justified not only on the grounds cited by Sir Gerald Fitzmaurice but also by the consideration that it would not be placing diplomatic agents in a privileged position to remove the inequality in the treatment accorded to them as compared with that accorded to tourists.

30. Mr. TUNKIN wondered why, of all the questions connected with the facilities to be accorded to missions, the Commission should single out just one financial problem. The question of exchange regulations, apart from being considered by States as coming strictly within their domestic jurisdiction, was a very complicated one and already governed by many bilateral agreements. He thought it would be unwise to include a provision which might jeopardize the acceptance of the draft by States.

31. Faris Bey EL-KHOURI considered that the proposed new paragraph 2 would open the door to a great deal of abuse. Missions might tend to profit from favourable rates of exchange no matter for what purpose they had been established. He saw no reason for according missions special privileges in the matter and was opposed to the provision.

32. The CHAIRMAN put to the vote the principle enunciated in the Special Rapporteur's addendum to article 19 (A/CN.4/116/Add.1).

The principle was rejected by 9 votes to 6, with 2 abstentions.

33. The CHAIRMAN put to the vote the text of article 19 as drafted at the ninth session.

Article 19 was adopted unanimously.

ARTICLE 20

34. Mr. SANDSTRÖM, Special Rapporteur, referred to the observations of the Governments of Australia, the Netherlands, Switzerland and the United States of America and to his own comments thereon (A/CN.4/16). He had redrafted article 20 (A/CN.4/116/Add.1) in the light of the Netherlands Government's observations.

35. Mr. VERDROSS said that there was little to choose between the old text and the new, since the Netherlands proposal expressed the same ideas as the original article 20 in rather different words.

36. Mr. TUNKIN recalled that the question of freedom of movement had been thoroughly discussed by the Commission at its previous session and that the Drafting Committee had had some difficulty in framing a text acceptable to all members. The Netherlands proposal was in some ways reminiscent of the text originally proposed by Sir Gerald Fitzmaurice,[4] which had been subsequently amended and amplified. He noted that of all the Governments which had commented on the draft, only two had expressed any dissatisfaction with article 20.

37. Mr. AMADO said that, unless amendment was strictly necessary, he would prefer article 20 to stand as adopted at the previous session; because it enunciated the principles in a single sentence it was technically superior to the revised text.

38. Sir Gerald FITZMAURICE said that, although he would prefer the revised text advocated by the Special Rapporteur, he realized that the 1957 text of the article constituted to some extent a compromise between conflicting points of view. Accordingly, although the text was open to improvement, he thought it wisest to leave it as it stood.

39. Mr. YOKOTA thought that the new proposal might give the impression that the receiving State could enact laws and regulations prohibiting or regulating entry into certain areas which would apply specifically to members of missions. As he understood it, the Commission, when adopting the article at its previous session had had in mind only laws and regulations on the subject applying to the general public. The original article 20 gave unambiguous expression to the principles involved and he would prefer it to stand unchanged.

40. Mr. EDMONDS observed that the difference between the old text and the proposed new text was

[4] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, Vol. I), 400th meeting, para. 34.

one of emphasis. The 1957 text of article 20 put the accent rather on the rights of the receiving State to place certain restrictions on freedom of movement, whereas the new proposal enunciated first the principle of freedom of movement and then indicated the circumstances in which the receiving State might be justified in placing various restrictions on that freedom. Accordingly, he was in favour of the new proposal, since it was more in keeping with the spirit pervading the draft for the general rule to be enunciated first.

41. Mr. ZOUREK remarked that there was no great difference in the practical implications of the two texts. Since, however, article 20 had been thoroughly discussed at the previous session and constituted a kind of compromise, of which only two Governments had expressed any criticism, he preferred that text to stand unchanged.

42. Mr. HSU agreed with Mr. Edmonds that the new proposal was more in harmony with the spirit pervading the rest of the draft. Moreover, since two Governments had expressed quite strong criticism of the article, the Commission should try to meet their wishes as far as possible.

43. The CHAIRMAN put to the vote the proposal that article 20 as drafted by the Commission at its ninth session be kept unchanged.

The proposal was adopted by 11 votes to 5.

ARTICLE 21

Paragraph 1

44. Mr. SANDSTRÖM, Special Rapporteur, drew attention to a drafting change recommended by the Government of the Netherlands and to observations by the Governments of Switzerland, Japan and the United States of America and to his own comments thereon (A/CN.4/116). In paragraph 1 of his revised draft (A/CN.4/116/Add.1), he had attempted to take into account the point raised by the Government of Switzerland.

45. Mr. BARTOS said that for practical reasons he opposed the Swiss Government's proposal that the right of a mission to use diplomatic couriers should be restricted to communications with the Government of the sending State and with its consulates in the receiving State.

46. It had recently come to be established as general international and diplomatic practice that it was unnecessary for a courier to call at all points at which there were diplomatic missions. Instead, certain places were used as exchange centres. Paris, for example, was used as an exchange centre for communications between Yugoslavia and not only France but also the United Kingdom, Luxembourg, Belgium, the Netherlands and Denmark. On certain fixed days, couriers from the embassies of Yugoslavia in Paris and in the other countries he had named arrived in Paris to receive diplomatic bags sent from Belgrade and to deliver diplomatic bags addressed to Belgrade. Similarly, Belgrade was used by many Western countries as an exchange centre for communications coming from or addressed to their ministries in other Balkan countries. Washington, and points in Brazil and Argentina were also used as exchange centres. That was not a unilateral practice on the part of Yugoslavia, but was found to be generally convenient. Furthermore, sometimes an ambassador was accredited to more than one State. The several missions which that ambassador headed would be handicapped if they were unable to communicate with each other by diplomatic courier. The Swiss Government's proposal would represent a retrograde step which would prevent States from making the best use of modern communications.

47. Mr. ZOUREK said that the restrictive interpretation implied in the Swiss Government's proposal did not correspond to modern practice. Arrangements of the kind described by Mr. Bartos, or arrangements whereby a courier could serve several missions lying on his route, were much more economical, convenient and efficient. If the Swiss Government's proposal were adopted, diplomatic missions in South America, for example, would have to adopt the longer and more costly procedure of communicating with each other through the respective ministries of foreign affairs. He therefore proposed that the 1957 text of paragraph 1 of article 21 should be retained.

48. Sir Gerald FITZMAURICE expressed the view that the Swiss practice was unduly restrictive in modern times, though it might formerly have been current. Diplomatic bags were commonly sent by air, and the courier often had to pass through two or three diplomatic posts where other bags would be collected in order to transmit material between one diplomatic post and another. Consequently, it would be unrealistic to restrict the use of diplomatic couriers in the manner suggested by the Swiss Government.

49. Mr. SANDSTRÖM, Special Rapporteur, said that in view of the trend of the discussion, he would withdraw the revised text of paragraph 1.

50. The CHAIRMAN put to the vote the text of paragraph 1 of article 21 as drafted at the ninth session.

Paragraph 1 was adopted unanimously.

Paragraphs 2 and 3

51. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations made by the Governments of the Netherlands, Switzerland, Belgium, the United States of America (A/CN.4/116) and Italy (A/CN.4/114/Add.3). It was the expression " articles intended for official use ", in paragraph 3, which had given rise to the most difficulty. Paragraph 2 of the revised text he had presented (A/CN.4/116/Add.1), which was intended to replace paragraphs 2 and 3 of the 1957 text, attempted to take into account the points which had been raised in connexion with that expression and also the Italian Government's suggestion that the diplomatic bag should bear a seal or external identification marks. The Italian Government's point that the bags should invariably be addressed to the head

of the mission in person could, he thought, be dealt with in the commentary.

52. Sir Gerald FITZMAURICE said he was sorry the Special Rapporteur had amalgamated paragraphs 2 and 3 of the 1957 text. At its preceding session, the Commission had found great difficulty in establishing the proper relation between the inviolability of the diplomatic bag and the obligation not to include improper material in it. After prolonged discussion, the Commission had come to the conclusion that it would be better to express those two ideas in separate paragraphs, so as to give due emphasis to the principle that the diplomatic bag should not be opened or detained. He saw no reason for reversing that decision now, though he would not object to the addition to paragraph 3 of a phrase relating to seals or external identification marks.

53. He noted with satisfaction that the Special Rapporteur had not followed the Italian Government's suggestion that diplomatic bags should be addressed invariably to the head of the mission, for that was not the normal practice.

54. Mr. TUNKIN said he also had considerable doubts as to the advisability of redrafting paragraphs 2 and 3 in the manner proposed by the Special Rapporteur. In his opinion, the new text represented a step backwards towards the text which the Special Rapporteur had originally proposed (A/CN.4/91). That original text had provided for some exceptions to the principle of inviolability, and the proposed new paragraph 2 might also be interpreted as meaning that the inviolability of the bag depended on observance of the conditions expressed in the first sentence.

55. The whole subject had been very closely studied at the preceding session and, as Sir Gerald Fitzmaurice had recalled, there had been considerable difficulty in finding any suitable form whatever. It had been agreed that the principle of inviolability was absolute — some members of the Commission had even suggested that it should be placed on a par with the inviolability of the mission premises — and that in no case was it permissible to open or detain the bags. On the other hand, there was an obligation of the sending State so far as the contents of the bag were concerned, though it was very difficult to ascertain whether that obligation was being carried out.

56. He suggested that paragraphs 2 and 3, as set forth in the 1957 draft, should be retained, perhaps with the addition in paragraph 3 of a phrase concerning seals or external identification marks.

57. Mr. SANDSTRÖM, Special Rapporteur, said it had not been his intention to ignore the discussions which had taken place at the preceding session. His reason for proposing an amalgamated text was that it might be advisable to provide a definition of the diplomatic bag, and the definition should come first. He admitted, however, that the 1957 text had been arrived at with so much difficulty that it might be better not to change it. The definition of the diplomatic bag could be given in the commentary. He therefore withdrew his proposed draft paragraph 2.

58. Mr. ALFARO said he was very glad the proposed text had been withdrawn, for that text, which covered the principle of inviolability as well as obligation not to place improper material in the bag, violated the rule that each paragraph of an instrument should deal with only one main idea.

59. He would support the text of paragraphs 2 and 3 as drafted at the previous session.

60. Mr. ZOUREK and Mr. YOKOTA expressed the desire that the Drafting Committee should add in paragraph 3 a phrase dealing with seals and external identification marks.

61. The CHAIRMAN put to the vote paragraph 2 of article 21 as drafted at the ninth session.

Paragraph 2 was adopted unanimously.

62. The CHAIRMAN put to the vote paragraph 3 of article 21 as drafted at the ninth session, on the understanding that the requested drafting changes would be made by the Drafting Committee.

Paragraph 3 was adopted by 16 votes to none, with 1 abstention.

Paragraph 4

63. Mr. SANDSTRÖM drew attention to the observations of the Governments of Belgium, Switzerland, the United States of America, the Netherlands, Japan and Chile (A/CN.4/116).

64. In paragraph 3 of his proposed new text (A/CN.4/116/Add.1), he had adopted the Belgian proposal that the term "diplomatic courier" should be defined.

65. Mr. BARTOS drew attention to the difficulty which often arose in connexion with the courier's passport. While some States insisted that the passport should be vised by the embassy, the general practice was not to demand a visa, though States were within their rights in requiring a visa, as either a permanent or a temporary measure. It was important, however, that States should notify other States of any change in their practice.

66. Mr. AMADO doubted whether it was necessary to include a definition in the text. It might perhaps be sufficient to say "A diplomatic courier shall be furnished with a document testifying to his status."

67. He saw no reason, however, why the 1957 text of paragraph 4 should not be retained since, though its terms might be regarded by some States as going too far, an adequate, restrictive interpretation of them was given in the commentary.

The meeting rose at 1 p.m.

458th MEETING

Friday, 6 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES ON DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 21 *(continued)*

Paragraph 4 (continued)

1. Sir Gerald FITZMAURICE said the Special Rapporteur's proposed paragraph concerning diplomatic couriers (A/CN.4/116/Add.1) was open to a number of objections. While the first sentence was acceptable in principle, he wondered whether it was necessary to mention the courier's passport, as distinct from a document testifying to the status of the courier. In some countries, only couriers who were permanent members of the courier service were given courier's passports. Frequently, however, diplomatic bags were carried by other members of the foreign service, for example by diplomats proceeding to their posts or returning home on leave. It was customary to issue to such persons a document attesting that on that particular journey they were carrying an official bag. A similar document might sometimes be given to the captain of an aircraft when he acted as courier.

2. He was not sure whether the second sentence of the proposed new paragraph represented any improvement on the 1957 draft (A/3623). In the first place, it did not say that the diplomatic courier should be protected by the receiving State, a provision to which no Government had objected. Secondly, the phrase "during his journey" in the new text might be interpreted to mean that the courier should not enjoy personal inviolability and immunity from arrest or detention in the intervals between his journeys. Such intervals might be short or long, according to the remoteness of the post to which the courier was sent; but, unless he went on leave during the interval, his inviolability and immunity should not be interrupted. It would probably be a simple drafting matter to substitute some such phrase as "in transit" or "while carrying out his functions". He would have preferred the 1957 draft, which covered the situation adequately, but would be prepared to accept the Special Rapporteur's new text if the drafting changes to which he had referred were made.

3. Mr. SANDSTRÖM, Special Rapporteur, referring to Sir Gerald Fitzmaurice's first criticism, said the idea of protection was implicit in the expression "personal inviolability". The word "journey" meant both the outward and the return journey, and also the interval between them. The text could certainly be redrafted in satisfactory form by the Drafting Committee.

4. Mr. YOKOTA said that while he was not opposed to the inclusion of a definition of "diplomatic courier" in the draft, he thought the text proposed by the Special Rapporteur might be improved.

5. Some confusion was created by the last sentence of paragraph 4 of the commentary on article 21 of the 1957 text, for that sentence implied that when the captain of a commercial aircraft was entrusted with a diplomatic bag he was to be regarded as a diplomatic courier, provided that he was furnished with a document testifying to his status as such. Whereas, however, a diplomatic courier was a person travelling for the purpose of transmitting a diplomatic bag, the captain of a commercial aircraft belonging to a regular airline and engaged in ordinary service could hardly be said to be travelling for the purpose of delivering a diplomatic bag and hence could not be regarded as a diplomatic courier. While the bag itself was entitled to protection, the captain of an aircraft or a member of its crew hardly needed any special privilege of inviolability. The status of diplomatic courier should therefore be reserved for persons travelling for the purpose of transmitting a diplomatic bag.

6. Accordingly, he thought the Special Rapporteur's proposed definition should be amended to state that a diplomatic courier was a person who was travelling for the purpose of transmitting a diplomatic bag. The word "exclusively" should be deleted from the second sentence of the Special Rapporteur's proposed new paragraph because it would exclude persons who were travelling for some other purpose at the same time.

7. Mr. TUNKIN said he also would prefer the 1957 text, possibly with some small drafting changes. The Special Rapporteur's proposed new text raised a number of difficulties. Sir Gerald Fitzmaurice had already drawn attention to the excessively restrictive interpretation which might be placed upon the words "during his journey".

8. He would not object to the addition, in the 1957 text, of a phrase stipulating that the diplomatic courier should be furnished with a document testifying to his status, though not necessarily a courier's passport. The first sentence might perhaps be amended to read: "The diplomatic courier, who should have documents testifying to his status, shall be protected by the receiving State."

9. The extension of the courier's inviolability to the captains of commercial aircraft might cause difficulty. When a State admitted diplomatic couriers, it undertook the obligation to protect them and respect their inviolability, but the situation was different with the captain of a commercial aircraft.

10. The CHAIRMAN observed that the points being discussed had all been thoroughly dealt with at the Commission's preceding session. They were not points which had been overlooked at the time and which had now been raised by Governments.

11. Mr. BARTOS recalled that at its preceding session the Commission had taken no firm decision on the question whether the captains of commercial aircraft carrying diplomatic bags should be accorded the inviolability and immunity of diplomatic couriers. The Commission had decided that the point should be mentioned in the commentary and that no further action should be taken until the reactions of Governments were known. As there seemed to have been no decisive request from Governments that the matter should be brought under regulation, the text should be left as drafted at the previous session.

12. In his opinion, the final decision on the particular point should be taken by the body which would deal with the Commission's draft in the last resort, whether it was a diplomatic conference or the Sixth Committee of the General Assembly.

13. Mr. AMADO said he was not in favour of changing the 1957 text. As the Chairman had pointed out, all the difficulties had been discussed at length at the preceding session. The Commission should not allow itself to be prevented from adopting the most generally acceptable text by an exaggerated desire to achieve perfection.

14. Mr. SANDSTRÖM, Special Rapporteur, said that in view of the arguments in favour of retaining the 1957 draft, he withdrew the new text which he had proposed.

15. The CHAIRMAN put to the vote paragraph 4 of article 21 as drafted at the ninth session.

Paragraph 4 was adopted unanimously.

Paragraph (4) of the commentary

16. Mr. YOKOTA said that the Netherlands and Japanese Governments in their observations had expressed opposition to the grant of inviolability to the captain of a commercial aircraft carrying the diplomatic bag; the Chilean Government, on the other hand, favoured the grant of inviolability, and the Swiss Government, in saying that there should be a special provision confirming the custom of entrusting the diplomatic bag to captains of commercial aircraft, appeared also to favour it.[1] In view of the divergence of opinion among Governments, it seemed to him that the Commission should not draft paragraph (4) of the commentary in such categorical terms as it had done at the ninth session.

17. Mr. ZOUREK said he could not see any difficulty. Undoubtedly the custom existed in many countries of sending the diplomatic bag by air, even without a courier. If the captain of the aircraft had a courier's passport, he should be regarded as a courier; if he did not hold a courier's passport he should be regarded as a mere carrier, without the inviolability which international law recognizes in the person of a diplomatic courier. That had been the substance of the Commission's opinion at the ninth session, and he felt that the Commission should adhere to it and state it precisely in the commentary.

18. Mr. BARTOS said that the captain of a commercial aircraft, when carrying the diplomatic bag entrusted to him by a Government, was acting as a diplomatic courier; but as captain of the aircraft he was, or could be, held civilly or criminally responsible for actions connected with his navigating of the aircraft. In other words, in the absence of provisions safeguarding his status, there was the danger of a conflict between his responsibilities as a pilot and his status as a courier; he could, for example, be arrested for contravening some regulation, with the bag in his possession. For that reason he felt that inviolability should be granted to the captain of a commercial aircraft for so long as he had the diplomatic bag in his possession.

19. Mr. TUNKIN said that the captain of an aircraft was primarily responsible for the management of his aircraft, and in carrying the diplomatic bag he was fulfilling a subsidiary function. It was sufficient that the diplomatic bag should remain inviolable; there was no need to grant any special privileges to the captain.

20. Sir Gerald FITZMAURICE observed that if the captain carried a courier's passport or other equivalent document he would rank as a courier and have the inviolability of a courier; if he held no such passport or document he would not have that inviolability. Historically, the custom of using couriers had arisen from the greater dangers attending travel in past centuries, when it had been found desirable to send a person to safeguard diplomatic documents in transit. The situation had changed greatly, and if on any particular journey a courier was not employed, there seemed no good reason to grant inviolability to a mere carrier. Indeed, if it were decided to grant inviolability to the captain of an aircraft, there seemed no logical reason why it should not be granted to other drivers of public vehicles carrying the diplomatic bag, such as engine drivers or the captains of ocean liners. If the sending State wished to provide a courier, it could do so: if not, it could by private arrangement draw the captain's attention to the fact that the bag was on board the aircraft, but could hardly expect the captain to be accorded personal inviolability. He was therefore in favour of leaving paragraph (4) of the commentary as drafted at the previous session: it went far enough, if not indeed too far.

21. Mr. PADILLA NERVO considered that to give the captain of an aircraft the status of a diplomatic courier, which was not his principal function, might conflict with the conventions of the International Civil Aviation Organization. If a State wished to send a courier, it was at liberty to do so; if it did not consider a courier necessary, the carrier surely did not qualify for the status of courier. In the circumstances, he thought that the words "who is not provided with such a document" should be deleted from the last sentence of paragraph (4) of the commentary. If it was decided not to delete them, he would be in favour of deleting the whole paragraph.

[1] For the observations of the four Governments see A/CN.4/114 and Add.1.

22. Mr. BARTOS observed that there was no analogy between the carrying of diplomatic mail by normal postal services and the practice of entrusting diplomatic bags to commercial airline pilots. The first was governed by international convention. The diplomatic mail was entrusted to the good faith of the carrying State and, though there were provisions whereby that State could refuse to accept such mail, once it was accepted a formal legal relationship was established between the consigning State and the carrying State, or States. In the second case, the relationship between the consigning State and the captain of the aircraft was a purely personal one, devoid of any conventional safeguard. The practice was, however, steadily growing and most chanceries had a list of airline pilots to whom diplomatic bags of special importance could safely be entrusted.

23. Two embassies in Yugoslavia, those of the United Kingdom and the United States of America, had aircraft specially intended for the carriage of diplomatic mail, though sometimes diplomatic agents and persons on mission were carried on the aircraft as well. The other, more usual, practice was to entrust the diplomatic bag to the captain of an aircraft of the national airline of the country concerned. In such cases, the captain of the aircraft, once he had handed over the diplomatic bag at its destination, reverted to the status of ordinary commercial pilot under the jurisdiction of the local civil authorities.

24. He, too, doubted the advisability of retaining the last sentence in paragraph (4) of the commentary on article 21. It would be better to point out that the commercial airline pilots carrying diplomatic bags had a dual status and that the problems arising out of that duality of status had not yet been resolved either by international law or by international practice. The Commission was faced with something of a dilemma. If it declined to recognize the practice of entrusting diplomatic bags to commercial airline pilots, it would be refusing to recognize an institution which was fast gaining acceptance. If on the other hand, it approved of the practice it would run the risk of neglecting the other consideration that the captain of a commercial aircraft was not exclusively engaged in carrying diplomatic mail.

25. Sir Gerald FITZMAURICE pointed out that the case of special pilot couriers was totally different from that of captains of commercial aircraft to whom diplomatic bags were entrusted. A diplomatic courier who piloted a special plane, even though it might carry private non-paying passengers as well was as much a courier, and as such entitled to diplomatic protection and immunity, as if he chose to take the diplomatic bag by car and took non-paying passengers with him. The courier was duly furnished with the proper papers in both cases, and neither operation was in any manner of speaking a commercial venture.

26. He still failed to see why, when diplomatic bags were entrusted to the captain of a commercial aircraft by private arrangement between him and the sending State, he should be regarded as even temporarily enjoying diplomatic inviolability.

27. Mr. AMADO remarked that it was an undeniable fact that the diplomatic bag conveyed inviolability on the person who was carrying it. Thus, once a captain of a commercial aircraft was entrusted with the diplomatic bag and given the appropriate papers, he became inviolable, though his inviolability ceased as soon as he handed over the bag at its destination.

28. Mr. ZOUREK said that he, too, thought that it would be quite sufficient to delete the words "who is not provided with such a document".

29. The CHAIRMAN put to the vote Mr. Padilla Nervo's proposal to delete the words "who is not provided with such a document" in paragraph (4) of the commentary on article 21.

The proposal was adopted by 10 votes to 2, with 4 abstentions.

30. Sir Gerald FITZMAURICE pointed out that, since the last sentence of paragraph (4) had been framed precisely with the words just deleted in mind, the last part of the sentence would probably have to be redrafted.

31. The CHAIRMAN put to the vote paragraph (4), as amended, of the commentary on article 21, subject to drafting changes.

Paragraph 4, as amended, was adopted by 11 votes to 2, with 4 abstentions.

32. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the comments of the Governments of Belgium, Japan and Argentina on the use of wireless transmitters by diplomatic missions (A/CN.4/116). In response to the proposal of the Argentine Government and bearing in mind the desirability of formulating precise rules in the body of the article and not in the commentary, he had incorporated the last two sentences of paragraph (1) of the commentary as a new paragraph in his revised version of article 21 (A/CN.4/116/Add.1). Since, however, it was clearly the wish of the Commission to avoid amending texts which were in the nature of a compromise reached after thorough discussion at its previous session, he wished now to withdraw the proposal after having drawn attention to the reasons underlying it.

33. Sir Gerald FITZMAURICE said that, in view of the Special Rapporteur's decision, he would merely draw attention to the astonishing diversity of State practice in the matter of the use of wireless transmitters by diplomatic missions. In some countries, it was not allowed at all. The United Kingdom, on the other hand, as stated in its comments (A/CN.4/116), made no objection to the use of wireless apparatus by foreign diplomatic missions for the purpose of communicating with their respective Governments. It would be recalled that at the previous session it had been strongly emphasized that under existing international conventions on telecommunications, diplomatic missions were bound to apply to the receiving State for special permission to operate transmitters. It was, therefore, interesting to note that in the United Kingdom missions were not

required to seek any special permission or even to obtain a licence to operate such installations. He hoped that the United Kingdom's extremely liberal practice in the matter would come to be adopted by other countries.

34. Mr. ALFARO suggested that article 21 was incomplete as it stood. Much diplomatic correspondence was not sent in a diplomatic bag or carried by courier but conducted through the post. He, therefore, considered it essential to enunciate the inviolability of diplomatic correspondence in general, and for that purpose proposed adding to paragraph 2 of the article the words "The official correspondence of the mission is inviolable". The use of the word "official" should dispose of any objection to extending the inviolability to private correspondence directed to the mission. The phrase "official correspondence of the mission" meant correspondence from the mission, that sent to the mission by its chancellery or other authorities of the sending State, and correspondence between the mission and consulates situated in the receiving State.

35. Mr. SANDSTRÖM, Special Rapporteur, said that he had no objection to the proposal, on the understanding that "official correspondence" applied only to mail emanating from the mission.

Mr. Alfaro's proposal was adopted unanimously.

Article 21 as a whole, as amended, was adopted unanimously.

The meeting rose at 11.30 a.m.

459th MEETING

Monday, 9 June 1958, at 3 p.m.

Chairman: Mr. Radhabinod PAL.

Filling of casual vacancy in the Commission (article 11 of the Statute)

[Agenda item 1]

1. The CHAIRMAN announced that at a private meeting held on Friday, 6 June 1958, the Commission had considered the question of filling the casual vacancy which had occurred in consequence of the resignation of Mr. El-Erian; it had been decided that the election to fill the vacancy would be postponed until the Commission's eleventh session.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ADDITIONAL ARTICLE (ARTICLE 21 A)

2. Mr. SANDSTRÖM, Special Rapporteur, referred to the proposed additional article 21 B (A/CN.4/116/Add.1), drafted in response to an observation of the Netherlands Government (A/CN.4/114/Add.1). He thought that such an article should appear in subsection B of the draft article (A/3623, para. 16) rather than in subsection A, which dealt only with mission premises and archives.

3. Mr. LIANG, Secretary to the Commission, said that the word "recovered" in the English text should be replaced by "levied".

4. Furthermore, he considered that it would be appropriate to use the term "mission" instead of "sending State"; the former was more generally used throughout the draft articles.

5. Mr. SANDSTRÖM, Special Rapporteur, said he had no objection to the changes suggested.

6. Mr. BARTOS said that a mission was entitled to charge fees in respect of visas, for example, and obviously it would be exempt in the receiving State from taxes on such fees. There seemed to be little reason for inserting a new article covering what was self-evident.

7. Mr. ZOUREK agreed with Mr. Bartos that the article was unnecessary; he had never heard of any case where the receiving State taxed fees charged by a mission in the course of its official duties. He had no objection to the substance of the article, but it seemed to him that a reference in the commentary would suffice.

8. Mr. ALFARO considered that the new article, which dealt with exemptions from taxation, should either precede or follow article 26 which was mainly concerned with taxation. He was in favour of the new article, for the draft should above all be unambiguous, and the article dealt with a matter not covered elsewhere in the draft provisions.

9. Mr. TUNKIN did not object to the article, but doubted whether such a small matter required an article to itself. He agreed with Mr. Zourek that it would be more appropriate to mention it in the commentary.

10. The CHAIRMAN drew Mr. Liang's attention to the fact that article 17 referred to the exemption of the sending State from taxation in respect of mission premises. The term "mission" was not used in the draft articles to designate the beneficiary of exemptions and privileges. He suggested that the terminology of the new article, as also its context, should be left to be settled by the Drafting Committee.

11. The CHAIRMAN put to the vote the proposal that the substance of the Special Rapporteur's proposal should be embodied in an article.

By 8 votes to 6, with 4 abstentions, it was so decided.

12. The CHAIRMAN put to the vote article 21 A as proposed by the Special Rapporteur, subject to drafting changes.

Article 21 A was adopted by 10 votes to none, with 5 abstentions.

ARTICLE 22

13. Mr. SANDSTRÖM, Special Rapporteur, said that the Commission had decided to postpone consideration of definitions until a later stage; at that time, article 22, paragraph 2, would also come under consideration. Paragraph 2 had been the subject of observations on terminology by the Governments of Chile, the United Kingdom, and the Netherlands (A/CN.4/114/Add.1). The observations on paragraph 1 by the Swiss and United States Governments required no particular comment.

14. Mr. ZOUREK considered paragraph 2 an integral part of article 22; a vote could hardly be taken on the article unless it included paragraph 2. As the article on definitions had not yet been adopted, he thought that the Commission should at that stage take a decision on article 22 in its 1957 form, with the reservation that amendments might later be necessary if the article on definitions was adopted.

15. The CHAIRMAN thought that paragraph 2 was somewhat out of place in article 22 because the definition it contained applied not only to article 22 but to all the draft articles. For that reason he felt that the Commission should vote on the substantive article and leave the definition and the place of the article in the text to be considered by the Drafting Committee.

16. He suggested that the Commission should vote on article 22 as drafted, on the understanding that a decision concerning paragraph 2 would be taken later in the light of the Drafting Committee's deliberations.

It was so agreed.

On that understanding, article 22 as drafted at the ninth session was adopted unanimously.

ARTICLE 23

17. Mr. SANDSTRÖM, Special Rapporteur, said that he had proposed the insertion of the word "official" before the word "premises" in paragraph 1 (A/CN.4/116/Add.1). In view of the discussion on article 16 (455th and 456th meeting), however, he withdrew that proposal.

18. In the light of an observation of the Netherlands Government (A/CN.4/114/Add.1), he proposed a redraft of paragraph 2 (A/CN.4/116/Add.1).

19. He said he had commented on the observations of other Governments, and had nothing to add except that he was not quite clear as to the meaning of the Japanese Government's observation on paragraph 1.

20. Mr. VERDROSS said that if the term "diplomatic agent" was meant to include a national of the receiving State who did not enjoy immunity except in respect of official acts, the language of article 23, paragraph 1, was too sweeping. Accordingly, he proposed that after the words "diplomatic agent" the words "who enjoys diplomatic privileges and immunities" should be added.

21. Mr. YOKOTA observed that there was special provision in article 30 for diplomatic agents who were nationals of the receiving State, so that Mr. Verdross' proposal seemed to be unnecessary.

22. In article 23, paragraph 1, the term "premises of the mission" seemed to mean the official premises of the mission, including the dwelling place of the head of the mission. At least, that was the impression he had gathered from the discussion of article 16, and he took it that the remarks then made applied equally to article 23. "Residence" therefore meant the residences of the other members of the diplomatic staff. But the word "private" did not seem to be appropriate, for the sending State often provided houses for the diplomatic staff and in that case the residences were State property and therefore not private. In order that there should be no misunderstanding, it was desirable to delete the word "private"; in that way all members of the diplomatic staff would be protected.

23. The CHAIRMAN thought that Mr. Verdross' proposal should be dealt with when the Commission discussed article 30 concerning the status of members of the diplomatic staff who were nationals of the receiving State.

24. With regard to Mr. Yokota's observation, he said that the inviolability of a residence was the consequence of the inviolability of the diplomatic agent, so that any house, even if used for recreation, would become inviolable if a diplomatic agent was living in it.

25. Mr. VERDROSS pointed out that article 30 dealt only with immunity from jurisdiction in respect of official acts performed in the exercise of his functions by a diplomatic agent who was a national of the receiving State. He had no objection to the question of the inviolability of such an agent's residence being dealt with under some article other than article 23, but it seemed to him necessary that it should be treated at some point. On the understanding that the question would be considered in another context, he had no objection to article 23, as revised by the Special Rapporteur.

26. Mr. TUNKIN said that the word "private" was not used in article 23 to mean "privately owned" but to denote the place where the diplomatic agent happened to be living, whether a room in a hotel, a house or an apartment. If the word "private" were deleted, the article might be interpreted to refer only to an official residence. He was therefore opposed to Mr. Yokota's proposal.

27. Mr. AMADO, agreeing with Mr. Tunkin, pointed out that a sending State could in any case provide a private residence for its diplomatic agent. Merely because it had purchased or leased the residence, the residence did not thereby become State property that could not be used as a private dwelling.

28. Mr. YOKOTA said he would not insist on the deletion of the word "private", but thought that the point he had made should be made clear in the commentary. In some cases sending States bought residences and then insisted that they should be exempt from

taxation. All residences of diplomatic agents, no matter who had purchased or leased them, should be on the same footing, and there should be no ambiguity because of the word "private".

29. Mr. TUNKIN observed that the problem of taxation of mission premises was dealt with in article 17. Article 23 concerned the inviolability of the residence of the diplomatic agent, and nothing more.

30. The CHAIRMAN put to the vote paragraph 1 of article 23 as adopted at the ninth session and paragraph 2 as amended by the Special Rapporteur.

Paragraph 1 was adopted unanimously.

Paragraph 2 was adopted unanimously.

Article 23 as a whole, as amended, was adopted unanimously.

31. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the United Kingdom Government's observation on the reference, in the commentary on article 23, to the bank accounts of diplomatic agents and to his own comments on the subject (A/CN.4/116).

32. Mr. BARTOS said that the provision proposed by the United Kingdom raised complicated questions of banking technique. The funds in diplomatic accounts could come from a great variety of sources. The normal practice was for accounts in free currencies to be non-transferable in the receiving State but transferable internationally, so that payments made abroad by a diplomatic agent would not be subject to control. Mixed accounts were quite a different question.

33. Of the forty diplomatic missions in Yugoslavia, twenty-eight had never imported any funds through official financial channels, although their expenses in Yugoslavia were often very heavy and sometimes included the publishing of newspapers. Many of the dinars used were bought on the "free" market in Trieste and brought in in the diplomatic bag. To proclaim the complete freedom of diplomatic accounts from exchange control would merely make matters worse and would be at variance with the stipulation in article 33, paragraph 1, that it was the duty of all persons enjoying diplomatic privileges and immunities to respect the laws and regulations of the receiving State. The funds of the United Nations were admittedly exempt from all exchange control under article II of the Convention on the Privileges and Immunities of the United Nations.[1] But in the Member States concerned, the accounts of United Nations currency transactions were subject to outside audit, an arrangement which would of course be quite improper in the case of accounts of diplomatic missions. In view of what he had said he would abstain from voting for any provision or comment which implied that diplomatic accounts were entirely free of control.

34. Mr. ALFARO, referring to the United Kingdom Government's comment, said that article 16 did not seem to be the proper place for the provision under consideration. The funds in bank accounts would seem to be covered by the word "property" in article 23, paragraph 2, while the accounts themselves, as an element of accounting could either be regarded as covered by the word "papers" or could form the subject of an addendum to the paragraph. On the other hand, the Commission wished to enunciate the principle that the bank accounts of diplomatic agents were exempt from control, the best place for the provision would be in article 24 which dealt with immunity from jurisdiction. In his opinion, save in the exceptions provided for in that article, immunity from control and jurisdiction should be total.

35. Mr. TUNKIN said that it was his impression that the Commission had adopted article 23, paragraph 2, at its ninth session with the idea in mind that the property of a diplomatic agent must be inviolable but not that the agent should be free to make whatever financial transactions he wished, regardless of the laws of the receiving State. He would welcome further explanation by the Special Rapporteur of the exact scope of the proposed addition.

36. Mr. ZOUREK said that the special question under consideration was not connected with the principle of inviolability. Bank accounts could be inviolable and at the same time subject to exchange control measures. As Mr. Bartos had pointed out, diplomatic accounts might be in the currency of the receiving State as well as in foreign currencies.

37. The proposed provision would go too far and would be contrary to the stipulation in article 33, paragraph 1. From the little knowledge he had of the question, he was convinced that the proposal was far from reflecting existing practice, which was that diplomatic agents, though accorded by courtesy certain special facilities in the matter of banking and exchange transactions, were nonetheless subject to the laws and regulations of the receiving State.

38. Mr. SANDSTRÖM, Special Rapporteur, said that he had not expressed any definite view as to the context of the proposed provision. Article 16 had merely been mentioned because it established the principle of inviolability. In taking up the United Kingdom suggestion, he had been thinking in terms of private accounts in which diplomatic agents would deposit their salaries or remittances from abroad and not accounts in any way connected with commercial activities. Private accounts of the type he had just mentioned should, he had considered, naturally be exempt from exchange control. In view, however, of the complications referred to by Mr. Bartos in particular, it would be wisest to say nothing at all on the subject.

39. Mr. MATINE-DAFTARY considered that article 23 as just adopted already covered the point. The private accounts of diplomatic agents were undoubtedly free of control, but if the agent engaged in stock exchange transactions and the like, those transactions would come under exchange control.

[1] United Nations, *Treaty Series*, Vol. 1, 1946-1947, p. 15.

40. Sir Gerald FITZMAURICE agreed that the inviolability of banking accounts and their immunity from exchange control were quite distinct questions. However, it would, he thought, be generally agreed that within certain limits diplomatic agents ought to enjoy some freedom from exchange control, at least as far as the remittance of funds to their home countries was concerned. It was a matter that should be dealt with in a separate article or commentary. Exchange control had come to be of great importance in recent years and it might well be a handicap for missions not to enjoy certain facilities and immunities in the matter of currency regulations.

41. The CHAIRMAN observed that, since the Special Rapporteur had withdrawn his suggestion for the addition of a provision on the lines proposed, no decision by the Commission was required.

ARTICLE 24

Paragraph 1

42. Mr. SANDSTRÖM, Special Rapporteur, suggested that article 24 be dealt with paragraph by paragraph. He drew attention to the view expressed by the Luxembourg Government (A/CN.4/116) that the enumeration of the types of jurisdiction in the introductory sentences of paragraph 1 was superfluous, and even undesirable, since it did not include commercial courts, and labour and social security jurisdictions. As could be seen from his own observations, he proposed that that part of the text should remain unchanged.

43. Mr. VERDROSS entirely agreed with the Special Rapporteur. The text was quite clear as it stood. In any case, commercial courts were a specialized branch of civil jurisdiction, while labour courts and social security courts were branches of administrative jurisdiction.

44. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Japanese Government of paragraph 1 (*a*) and to those of the Netherlands Government, which proposed two drafting changes, one affecting the English text only (A/CN.4/116). He had no objection to the proposed new wording which would also meet the point raised by the Japanese Government.

45. The United States Government considered that the exceptions covered by sub-paragraphs (*b*) and (*c*) were not at present recognized under international law. The Special Rapporteur proposed no change in the text on those grounds, for the reasons indicated in his conclusions (A/CN.4/116). The criticism by Luxembourg of the drafting of sub-paragraph (*b*) was sound (*ibid.*) and he accordingly proposed inserting the words "arising in the receiving country" after the words "an action relating to a succession".

46. A reference in a commentary would seem to be sufficient to meet the desire of the Government of Australia that some definition of the expression "commercial activity" should be given in paragraph 1 (*c*). Both the Chilean Government in its comments (A/CN.4/116) and through its delegation at the twelfth session of the General Assembly[2] and the Colombian delegation at the same session[3] had expressed the view that it was very unusual and, in fact, inadmissible for diplomatic agents to engage in the professional or commercial activities envisaged in the sub-paragraph.

47. Mr. VERDROSS fully agreed with the Special Rapporteur. The intention of the Japanese Government's comment was not at all clear, since it appeared to say the same as what was stated in paragraph 1 (*a*). Though it was true, as the United States Government had pointed out, that the exception covered by paragraph 1 (*b*) was not yet recognized in international law, it should be borne in mind that it was the Commission's task to promote the progressive development of international law and not merely to codify it.

48. The point made by the Chilean and Colombian Governments was perfectly sound. It would, however, be recalled that the Commission, after ample discussion at its ninth session, had come to the conclusion that provision had to be made for a practice which existed and which was also the subject of provisions in earlier draft codifications.[4]

49. Mr. ALFARO said that in some countries the administrative jurisdiction was defined more restrictively than in others. Consequently, it was desirable that a precise meaning should be attached to the term, either by including a definition in the text or by inserting a note in the commentary. In his opinion, it was most convenient to regard the administrative jurisdiction as comprising the judicial powers exercised by all the executive authorities of the State. As thus defined, the administrative jurisdiction would include the jurisdiction exercised by such executive authorities as the fiscal authority, and the traffic and social security authorities. It would be an all-inclusive concept covering every jurisdiction other than that of the ordinary civil and criminal courts.

50. Mr. SANDSTRÖM, Special Rapporteur, said he would have no objection to the inclusion in the commentary of a definition of administrative jurisdiction on the lines proposed by Mr. Alfaro.

51. Mr. AMADO observed that all the points arising in connexion with paragraph 1 had been thoroughly discussed at the Commission's preceding session. If Mr. Alfaro's suggestion were accepted, the Commission could regard its consideration of the matter as concluded.

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[2] *Official Records of the General Assembly, Twelfth Session, Sixth Committee,* 509th meeting, para. 18.

[3] *Ibid.,* para. 39.

[4] *Yearbook of the International Law Commission, 1957,* vol. I (United Nations publication, Sales No.: 1957.V.5, Vol. I), 402nd meeting, paras. 70-81.

52. Sir Gerald FITZMAURICE supported Mr. Alfaro's point of view, but thought it would be enough to refer to the matter in the commentary. What the Commission was concerned with was the kind of jurisdiction which resulted in court proceedings. He could not imagine a proceeding which would not fall under one of the three jurisdictions — criminal, civil and administrative.

53. The CHAIRMAN observed that the changes which the Special Rapporteur had proposed in sub-paragraphs (*a*) and (*b*) were drafting changes which did not affect the substance. He put to the vote paragraph 1 of article 24 as revised by the Special Rapporteur (A/CN.4/116/Add.1), subject to drafting changes.

Paragraph 1 was adopted unanimously.

Paragraph 2

54. Mr. SANDSTRÖM, Special Rapporteur, referred to the observations of the Governments of Belgium and the Netherlands (A/CN.4/116).

55. With reference to the amendment proposed by the Italian Government (A/CN.4/114/Add.3), he had reached the conclusion that that Government's amendment was not satisfactory, for it was a half-measure. In his opinion the Commission should state unequivocally the rule of the diplomatic agent's immunity, subject to such exceptions as it considered admissible.

56. He proposed that paragraph 2 should be redrafted (A/CN.4/116/Add.1) to take into account the Netherlands Government's suggestion.

57. Mr. TUNKIN said he was not clear as to the implications of the Special Rapporteur's proposed redraft. For example, if a diplomatic agent was involved in a succession case of the kind referred to in sub-paragraph (*b*) of paragraph 1, would other diplomatic agents belonging to the mission be under an obligation to give evidence?

58. Mr. AGO observed that at its preceding session the Commission had adopted a rather strict attitude towards diplomatic agents with respect to the limitations by which their immunity from jurisdiction might be qualified. Their immunity from the obligation to give evidence had, on the other hand, been left absolute. He thought there was some inconsistency there, since a diplomatic agent's refusal to give evidence might hinder the settlement of a case, for example, just as much as a claim to immunity from jurisdiction. It was for that reason that the Italian Government had proposed that a diplomatic agent's immunity from the obligation to give evidence should be confined to cases involving the official business of the diplomatic agent, and that in other cases a special procedure should be applied to obtain evidence from the agent.

59. Sir Gerald FITZMAURICE said he differed from Mr. AGO on that point and considered that Mr. Tunkin had been right in raising the question whether, if one diplomatic agent was involved in litigation in a case of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, another diplomatic agent belonging to the same mission could, under the terms of the proposed new text, be compelled to give evidence.

60. Paragraph 2 had been designed to cover not that kind of situation, but situations in which a diplomatic agent was called upon to give evidence in a case in which he was himself involved. He did not think, however, that a diplomatic agent could be compelled to give evidence even in such cases. His personal immunity was involved, and consequently no measure of compulsion could be exercised against his person.

61. He therefore thought that paragraph 2 should stand as drafted at the previous session. While the Italian Government's proposal contained an interesting suggestion, he noted that that Government had not queried the idea that a diplomatic agent could not be compelled to give evidence. It had merely suggested that in certain cases a special procedure should be applied. In some countries, however, and particularly in the common law countries, that suggestion would not be feasible, for if evidence was given at all it must be given in court. A diplomatic agent was not obliged to appear in court, but if he did so he must, subject to his right to refuse to answer particular questions affecting the public intered of his State, give his evidence in accordance with the forms required by the local procedure.

62. Mr. FRANÇOIS said that though everyone agreed that a diplomatic agent could not be compelled to give evidence in court, it was not enough merely to say that he was not obliged to give evidence. In some cases, there might be an obligation to give evidence, even though there was no way of enforcing it if the diplomatic agent refused. In cases of the kind referred to in sub-paragraphs 1 (*a*), (*b*) and (*c*) of paragraph 1, a diplomatic agent was under an obligation to give evidence. As had been pointed out, evidence could not be accepted in writing in some countries, and in such cases the diplomatic agent was obliged to give evidence in court unless there was a valid reason for refusal. Refusal to accept that obligation might lead to action at the diplomatic level between the two countries concerned, as the practice showed.

63. Merely to insert in paragraph 2 the words "except in cases coming under sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1" might be confusing, because it would leave open the question whether in such cases a diplomatic agent belonging to a mission other than that of the diplomatic agent directly involved was also under obligation to give evidence, or whether he might be excused from doing so.

64. Mr. AMADO said that in paragraph 2 a sacred principle of international law was involved. He could not admit that a diplomatic agent should in any circumstances be under an obligation to give evidence in court. The principle should be maintained in the form in which it had been formulated at the preceding session.

65. Mr. EDMONDS supported the suggestion of the Netherlands Government that the exceptions provided for in paragraph 1 should also be incorporated in paragraph 2. Sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, all related to litigation in which a diplomatic agent was involved in his private, as distinct from his diplomatic, capacity. It would be very undesirable if in such cases the diplomatic agent was not under an obligation to give evidence.

66. Mr. SCELLE thought that paragraph 2 might with advantage be drafted in a different way. There were cases in which a diplomatic agent was under an obligation to give evidence, if not by virtue of a precise rule of law, at least morally. Since, however, diplomatic agents were not subject to the criminal jurisdiction and no compulsion could be exercised against them, paragraph 2 should provide that a diplomatic agent could refuse to give evidence. His refusal might be dictated by considerations involving his position *vis-à-vis* his own Government, or by other considerations, but provision for his right to refuse should be made in the text.

67. Sir Gerald FITZMAURICE admitted that the existing text might be confusing. He had always understood paragraph 2 to mean that a diplomatic agent could not be compelled to appear in court and give evidence, but he agreed that a diplomatic agent might, in fact, be under a certain obligation to do so. At the Commission's preceding session, attention had been directed rather to the question of compulsion, as opposed to an unenforceable obligation. He suggested that perhaps paragraph 2 might be amended to read: "A diplomatic agent cannot be compelled to give evidence". A terse statement on those lines would correctly express the rule; at the same time, it would leave it to be inferred that in certain cases (e.g., those mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1) the diplomatic agent, though never a compellable witness, ought to give evidence.

68. Mr. TUNKIN said there were cases in which a diplomatic agent was under a legal obligation to do, or to refrain from doing, certain things. For example, he was under an obligation not to interfere in the internal affairs of the receiving State. Though no judicial sanction could be applied against him, there was a legal obligation, and a diplomatic agent who did not observe that obligation might be declared *persona non grata*. Merely to say that no compulsion could be applied against him left the question of obligation open.

69. Under existing international law, it might be said that a diplomatic agent was under no juridical obligation to give evidence.

70. Mr. AGO was of the view that Mr. Scelle's remarks had done much to clarify the situation. If it was clear that a diplomatic agent could in no case be forced to give evidence, it was nonetheless true that there might still be cases in which he was under an obligation to do so. Mr. Tunkin was right in saying that such cases should be defined. The existing text was therefore unacceptable.

71. Mr. BARTOS said that two principles were involved: the principle of the diplomat's freedom to carry out his functions and the principle of establishing the truth before the court. The question was which of those two principles needed the stronger guarantee. In some cases the requirements of both could be met without difficulty, while in others an indirect form of compulsion had sometimes to be applied. It was very difficult, however, to maintain that a diplomatic agent was under any obligation to give evidence. He could give evidence with his Government's consent, but such evidence could not be demanded.

72. In many countries, the practice of requesting diplomatic agents to give evidence in writing was, he thought, derived from the canon law under which in former times bishops, for example, had been invited to present their evidence in writing before the court. With the establishment of the principle of the equality of all men before the law, the privileges of the clergy had been abolished, but it was still the practice in many countries for the Ministry of Foreign Affairs to inform a diplomatic mission that in some particular case the court would be interested to have the evidence of a member of the mission either in writing or in some other form.

73. If, however, a diplomatic agent were requested to give evidence on a matter falling within the sphere of his official functions, it should be remembered that he could give such evidence only with the consent of his Government, just as, in cases concerning matters falling within the sphere of a civil servant's official duties, any evidence which the civil servant gave must be given with the consent of his superiors in the service. It would be unreasonable to draft a rule of international law which required more of diplomatic agents than was required of civil servants under their national law.

74. In conclusion, he said that while the diplomatic agent could be requested to give evidence there could be no question of his being under obligation to do so, and in all cases he had an indefeasible right to refuse to give evidence.

75. Mr. AMADO said he was not convinced by the arguments which sought to establish that a diplomatic agent was under obligation to give evidence. The immunity of the sending State was involved, and that immunity must be respected unless it was waived in accordance with the provisions of article 25.

76. He was in favour of retaining the existing text.

The meeting rose at 6.5 p.m.

460th MEETING

Tuesday, 10 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2)

ARTICLE 24 (*continued*)

Paragraph 2 (continued)

1. Mr. EDMONDS observed that it was clear from paragraph 1 of article 24 that a diplomatic agent could, in addition to performing his official functions, also engage in private activities. All the exceptions to his immunity from jurisdiction mentioned in paragraph 1 related to cases in which he was acting in his private capacity. Paragraph 2 stated that a diplomatic agent was not obliged to give evidence. Surely, however, the immunity could not extend to cases in which the diplomatic agent had been acting in his private capacity. If a diplomatic agent could not be compelled to give evidence in such cases, he would be able to escape the consequences of any transaction into which he entered in his private capacity. That would be a most undesirable state of affairs, and for that reason the rule laid down in paragraph 2 should likewise be qualified by the exceptions provided for in paragraph 1.

2. Mr. HSU said that the discussion involved two main questions: should the exceptions provided for in paragraph 1 also be mentioned in paragraph 2, and should the rule stated in paragraph 2 be expressed in a modified form?

3. He was opposed to any attempt to modify the rule. It had been suggested, for example, that the paragraph should state that a diplomatic agent could decline a request to give evidence or that he could not be compelled to give evidence. Both those formulae would alter the rule and establish a moral obligation as distinct from a legal one. There was no need for any such change. Immunity from the obligation to give evidence was an important part of the diplomatic agent's immunity from jurisdiction generally and its effects were even more far-reaching than the effects of his immunity from criminal jurisdiction. If a sending State waived its right to a diplomatic agent's immunity from criminal jurisdiction, the position was clear and steps would be taken to replace the diplomatic agent in question, but if the immunity from the obligation to give evidence was waived the result would be to take the diplomatic agent away from his work and perhaps even prevent him from carrying out his functions as diplomat; and that would be true whether he was involved in the case in either his private or his official capacity. It would be better therefore not to attempt to modify the statement of the basic principle as contained in the provision drafted at the previous session. In actual practice, he added, there was hardly ever any difficulty and diplomatic agents usually consented to give evidence in writing when they could not appear in court. If a diplomatic agent was unreasonable in such a matter, it was always open to the Government of the receiving State to take suitable action, but there was no need to prescribe a specific procedure.

4. While he was not strongly opposed to the Special Rapporteur's revised draft of the provision (A/CN.4/116/Add.1), in which the exceptions provided for in paragraph 1 were mentioned in paragraph 2, he thought it would be better to avoid making the change, because its effect might be to hamper diplomatic agents in their activities. Had the question of giving evidence been more carefully considered at the Commission's preceding session, the exceptions might not even have been included in paragraph 1. If some change had to be made in paragraph 2, perhaps the best solution would be to provide that in cases of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, a diplomatic agent might be requested to give evidence, but could not be compelled, or might refuse, to do so.

5. Mr. LIANG, Secretary to the Commission, said that the paragraph raised interesting questions concerning the basis of diplomatic immunity and the application of theory. As stated in the commentary on section II of the draft (A/3623, para. 16), a theory which seemed to be gaining ground was the "functional necessity" theory. A diplomat's immunity from the obligation to give evidence was intimately connected with his functions in the sense that the giving of evidence would take up a great deal of his time.

6. The discussion had shown that all were agreed that, if there was an obligation to give evidence, it was not an enforceable one. It had nevertheless been urged that a legal, or at least a moral, obligation existed. In his opinion, the moral obligation was outside the scope of the Commission's work, and the legal obligation would be difficult to establish.

7. The theory that a diplomat was immune from process but not from the substantive law would be hard to apply. A citizen was obliged to give evidence because it was one of his duties as a citizen to do so, and a similar obligation rested upon foreigners by virtue of their qualified allegiance, but there was no doctrine to show that a diplomat was under any such obligation.

8. The attempt to establish a connexion between paragraphs 1 and 2 had not been altogether successful. It was an *a fortiori* argument to say that, in cases where a diplomat had consented to jurisdiction — which were in effect cases of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1 — he was under an obligation to give evidence. Those cases were in fact cases in which the diplomat was a party to the proceedings and not a witness proper. It was therefore in his interest in those cases to consent to jurisdiction, for whether he was a plaintiff or a defendant he would

lose his case by failing to appear in court. It was questionable, however, whether the statements he made in court as a plaintiff or defendant could be regarded as evidence, for the term "evidence" meant the statements of witnesses. Consequently, if it was necessary to establish a legal obligation for the diplomatic agent to give evidence, it must be established separately and not upon the basis of the exceptions mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1.

9. Mr. ALFARO said the discussion had shown that many members of the Commission were of the opinion that diplomatic agents had a moral or even a legal obligation to give evidence in cases of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1. It was the unanimous view, however, that diplomatic agents could not be compelled to fulfil that obligation. Similarly, no compulsion could be exercised against diplomatic agents to carry out the obligations mentioned in article 33.

10. Mr. François and Mr. Scelle had expressed the view that paragraph 2 should state explicitly that it was the obligation of diplomatic agents to give evidence in civil cases of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1. Mr. Bartos on the other hand had suggested that courts should be recognized as having the right to request diplomatic agents to give evidence in such cases in a form compatible with the dignity of their office. In order to safeguard the basic principle of the diplomatic agent's immunity, and to reconcile the two views to which he had referred, he would suggest that paragraph 2 should be revised to read:

> "A diplomatic agent may not be compelled to give evidence. Nevertheless, in the cases specified in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, the local courts may request him to make a statement as a witness, and if the diplomatic agent consents, he shall give his evidence either in writing or in some other form to be agreed upon with the court concerned."

11. If the diplomatic agent was prepared to give evidence, the only question to be settled would be the form in which the evidence should be given. To appear in court as a witness might in some circumstances be incompatible with the dignity and status of the diplomatic agent, who should therefore be able to give his evidence in writing or in some other convenient form.

12. Mr. VERDROSS observed that the term used in paragraph 2 was "obliged". The Commission should be clear as to the meaning of that term. If it was thinking of a legal obligation, the paragraph should state of what the obligation consisted. An obligation without any legal consequence was no juridical obligation at all. If, for example, a diplomatic agent failed to observe the obligations laid down in article 33, the sanction might be to declare him *persona non grata*. Such action could obviously not be taken, however, in the case of a refusal on the part of a diplomatic agent to give evidence. He therefore agreed with Mr. Amado that there was no such obligation.

13. Mr. AMADO said that the immunity of the sending State was involved. That immunity belonged to the sending State and not to the person of the diplomatic agent himself. The confusion in the current debate had arisen because of the exceptions provided for in paragraph 1. At the Commission's preceding session he had voted against those exceptions.

14. Mr. YOKOTA said the question was whether a diplomatic agent could be under legal obligation to give evidence, not whether such an obligation could be enforced.

15. If a diplomatic agent was involved in cases of the kind referred to in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1 he was under the civil jurisdiction of the receiving State and therefore under an obligation to comply with the receiving State's law of civil procedure. If therefore he was required to give evidence under that law, there was no good reason why he should not comply.

16. In reply to Mr. Verdross, he said he could not agree that the sole test of the existence of a legal obligation was whether it was backed by legal sanctions. For example, a diplomatic agent had a duty to respect the laws and regulations of the receiving State, but could not be forced to respect them; the receiving State's remedy in serious cases of failure to respect the laws and regulations was to declare the diplomatic agent concerned unacceptable, and in less serious cases to express regret or lodge a protest.

17. He was therefore in favour of the Special Rapporteur's proposed amendment to paragraph 2.

18. Faris Bey EL-KHOURI said under the Islamic law the giving of evidence was regarded as a sacred duty. A witness was never compelled to give evidence, and was never summoned to appear in court, but failure to give evidence was regarded as a mortal sin. Witnesses had to be produced by the party whose case their evidence was intended to support.

19. The reason for the inclusion of paragraph 2 in article 24 was presumably to protect the diplomatic agent's immunity. That immunity, however, was already protected by article 22, which was so clearly worded that it was obvious that no sanction of any kind could be applied against a diplomatic agent. Paragraph 2 was therefore unnecessary and should be deleted. Its retention would have the disadvantage of giving the idea that any moral or legal obligation to give evidence was annulled.

20. Mr. TUNKIN said that the discussion had shown that a very broad meaning was to be attached to the word "evidence" as used in the English text. It covered both the statements which the plaintiff or defendant might make on his own behalf and also the evidence of witnesses. In those circumstances, the Special Rapporteur's proposal might lead to a misunderstanding, for if the words "except in cases coming under sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1" were added, they might be construed to mean that a diplomatic agent was under an obligation to give

evidence not only in his own case, if it came under sub-paragraphs (*a*), (*b*) or (*c*), but also as a witness in cases which might concern other diplomatic agents. The difficulty might be overcome by amending paragraph 2 to read: "A diplomatic agent is not obliged to give evidence as a witness."

21. He agreed with Mr. Yokota that in those cases the laws of the receiving State should be applied, since the diplomatic agent was under the civil or administrative jurisdiction of that State. In most of those cases, however, there would be no need to bring pressure upon him to give evidence, because he would be involved either as plaintiff or as defendant, as his own interests would suffer if he failed to appear in court.

22. He therefore thought paragraph 2 should be modified in the manner he had suggested.

23. Sir Gerald FITZMAURICE said it had emerged clearly from the discussion that no reference should be made in paragraph 2 to the exceptions provided for in paragraph 1. As the Secretary had very pertinently observed, in most cases of the kinds referred to in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, a diplomatic agent would be either a plaintiff or a defendant, and his interests would suffer if he failed to appear. It was therefore neither necessary nor desirable, in order to cover these cases, to provide for any special exception to the general principle that a diplomatic agent should not have to appear as a witness.

24. There was, however, a wider and much more difficult problem, namely, whether a diplomatic agent was in certain circumstances under a legal obligation to give evidence. One could visualize cases other than those mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1; for example, if a crime was committed in the diplomat's house, or if his car was involved in an accident in which a person was killed, would not the diplomatic agent be at least under a strong moral obligation to give evidence? It could be argued that the general principle was that a diplomatic agent had a duty to respect the laws of the receiving State and was under an obligation to give evidence in cases where to do so would not be incompatible with the performance of his official duties.

25. Nevertheless, important though these considerations were, he thought that on balance the view expressed by Mr. Amado was the correct one. A State might have strong reasons for not wishing its diplomatic agent to give evidence. Mr. Tunkin's suggestion might be acceptable, but on the whole he thought it would be better to retain the wording of paragraph 2 as drafted at the previous session. It would certainly be inadvisable to qualify the paragraph by a reference to the exceptions provided for in paragraph 1, especially since such cases represented only a part, and that the least important part, of the whole problem.

26. Mr. ZOUREK said that it would be contrary to international law to oblige a diplomatic agent to give evidence. If it was desirable that he should give evidence, the receiving State and the sending State could reach an agreement enabling him to do so. The question of moral obligation, on the other hand, was one that went beyond the scope of the Commission's draft.

27. To oblige a diplomatic agent to give evidence would lead to great dangers; for he was not a simple private individual, but a representative of the sending State, and if he refused to give evidence he would be open to attack by the press and by public opinion in the receiving State. Indeed, a refusal might lead to his being declared *persona non grata*. The exceptions in paragraph 1 related to proceedings in which the diplomatic agent himself was an interested party, so that he would appear as a party and not as a witness. In other words, his position in those exceptional cases was different from that of a witness. In his opinion, it was the very essence of immunity from jurisdiction that a diplomatic agent, while under a strict duty to respect such laws of the receiving State as established substantive rules (material law), could not be made subject to that State's adjective laws, including rules on the giving of testimony in court or before the administrative authorities.

28. Mr. MATINE-DAFTARY agreed that a diplomatic agent enjoyed immunity not because of his person but because of his character as a representative. If the Commission admitted exceptions to his immunity from jurisdiction when he engaged in commercial activities in the receiving State, the assumption was that he did so not as a diplomatic agent but as a business man. If those exceptions were permitted, it did not seem unreasonable that the rigid rule that the diplomatic agent should not be obliged to give evidence should similarly have exceptions. In other words, the Commission must either admit exceptions or not, and if a diplomatic agent could be a party in proceedings, why should he not be a witness? As Mr. García Amador had said during the ninth session, incomplete rights existed, and if incomplete rights existed there seemed no good reason why incomplete obligations should not likewise exist. He was therefore in favour of a provision allowing the diplomatic agent to give evidence in certain circumstances.

29. Mr. AGO said that the problem raised by paragraph 2 had nothing to do with the special exceptions in paragraph 1, so that the text was in no way improved by a reference to those exceptions. The matters in which the problem of giving evidence might arise were much more important. It was right to hold that a diplomatic agent was, within certain limits, immune from jurisdiction. But the fact that he was thereby exempted, to some extent, from compliance with local procedural laws in no way meant that he could disregard the fundamental laws of the country. If he witnessed a crime, he was not relieved of his duty to testify by the mere fact that he could not be compelled to appear as a witness before a court.

30. Mr. FRANÇOIS held the view that the right of the diplomatic agent to refuse to give evidence was not unlimited. In some cases, naturally, the diplomatic agent might have cogent reasons for his refusal; but

if he had not, the receiving State would be free to complain to the sending State, and if it did not receive satisfaction it could even declare him *persona non grata*. He considered, therefore, that both the original and the amended paragraph 2 went too far; the provision should be drafted in less categorical terms.

31. Mr. TUNKIN said that if a diplomatic agent were compelled to give evidence, the distinction between an ordinary citizen and such an agent would disappear and the whole edifice of diplomatic immunities would crumble.

32. Mr. VERDROSS maintained that a diplomatic agent must necessarily respect the laws of the receiving State, for, if he did not, he could be declared *persona non grata* and would even be liable to punishment on return to the receiving State after the expiry of his term as diplomatic agent. By contrast, the refusal of a diplomatic agent to give evidence could not give rise to any sanction, inasmuch as his general immunity from jurisdiction in the receiving State extended to the giving of evidence. He considered the text as amended by the Special Rapporteur satisfactory.

33. Mr. LIANG, Secretary to the Commission, referred for purposes of illustration to the legislative provisions governing the testimony of diplomatic agents in force in Austria and Colombia.[1] In both countries, an elaborate procedure was prescribed in cases in which diplomatic agents were asked to testify. Neither of the two legislations in question, however, provided that the diplomatic agent was legally obliged to give evidence, and in that respect the legislation of other countries was analogous.

34. Sir Gerald FITZMAURICE said that from the illustrative examples cited by the Secretary it was clear that a diplomatic agent was not under a direct obligation to give evidence, or at least could not be required to give evidence in the same way as an ordinary private citizen of the receiving State. The implication was that he could refuse to give evidence.

35. At the ninth session there had been a long discussion on the provision which had become article 33, particularly regarding the subjection of the diplomatic agent to the laws of the receiving State. The Commission had held that he was not subject to all those laws but had the duty to respect in general the laws of the receiving State. In the same way, he could not be obliged to give evidence, which was, as had been pointed out, a matter of procedural law rather than of fundamental law, so that, in spite of what Mr. Ago had said, it would be difficult to say that he had a duty to give evidence. Nevertheless, the language of paragraph 2 might well be toned down, and he therefore suggested that it read either: "A diplomatic agent is not obliged to appear as a witness", or: "A diplomatic agent can decline to give evidence". He was against the suggestion that any basic obligation to do so be mentioned.

36. Mr. AMADO said that a diplomatic agent witnessing a murder could hardly refuse to give evidence. The vital point, however, was that he could not be compelled to give evidence.

37. Mr. SANDSTRÖM, Special Rapporteur, said that in view of the arguments advanced during the discussion, he withdrew his proposed amendment to paragraph 2 (A/CN.4/116/Add.1).

38. In his view paragraph 2 as drafted at the previous session meant that a diplomatic agent could not be compelled to give evidence. He should, however, use that privilege with caution, for the question was a delicate one and clearly involved co-operation between the diplomatic mission and the authorities of the receiving State. Obviously if a diplomatic agent witnessed a murder he would give evidence, but there was no need for him to appear in court for that purpose. Perhaps the text could be changed by the Drafting Committee in the light of the views expressed.

39. Mr. AGO agreed with Sir Gerald Fitzmaurice that the text might be revised in order to restrict its meaning. It might read: "A diplomatic agent shall be exempt from rules of procedure concerning evidence", or, as Sir Gerald had suggested: "A diplomatic agent is not obliged to appear as a witness". The wording could, however, be left to the Drafting Committee.

40. The CHAIRMAN said that, as the Special Rapporteur had withdrawn his amendment and as the paragraph had been fully discussed, he proposed that it be put to the vote, subject to any drafting improvements suggested by the Drafting Committee.

41. As there was no objection, the Chairman put to the vote paragraph 2 of article 24 as drafted at the ninth session, subject to drafting changes.

Paragraph 2 was adopted by 12 votes to none, with 4 abstentions.

42. Mr. ALFARO explained that in voting for paragraph 2 he understood the word "obliged" to mean "compelled" as the Special Rapporteur had interpreted it.

43. Mr. EDMONDS said that he had voted in favour of the retention of paragraph 2 on the assumption that the amendments proposed by the Drafting Committee would permit recognition of the exceptions made in paragraph 1.

44. Mr. BARTOS said he had voted in favour of paragraph 2 because he understood the paragraph to mean that the rules of immunity excluded evidence given without the consent of the diplomatic agent's Government.

Paragraph 3

45. In reply to a question by Mr. YOKOTA, Mr. SANDSTRÖM, Special Rapporteur, said that it was clear that the reference in paragraph 3 to execution

[1] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (United Nations publication, Sales No.: 58.V.3) pp. 14 and 15 (Austria) and pp. 64 and 65 (Colombia).

in the cases referred to in paragraph 1 covered both administrative and judicial execution.

46. The CHAIRMAN put to the vote paragraph 3 of article 24 as drafted at the ninth session.

Paragraph 3 was adopted unanimously.

Paragraph 4

47. Mr. SANDSTRÖM, Special Rapporteur, introducing his proposed amendment (A/CN.4/116/Add.1), said that it was based on an observation of the Netherlands Government (A/CN.4/114/Add.1). The proposal of the Luxembourg Government (*ibid.*) should be dealt with at a later stage, when the question of an additional paragraph was discussed. The Governments of Switzerland (*ibid.*), United States (*ibid*), Finland (A/CN.4/114/Add.2) and China (A/CN.4/114/Add.4) all proposed the deletion of the last sentence of the paragraph (the Government of China proposed the deletion of the entire paragraph). He had not himself proposed the deletion of the last sentence because, if the draft articles were embodied in a convention, it seemed to him that the provision was in harmony with the concept of co-operation between the sending and the receiving States.

48. Mr. EDMONDS said that only the first phrase of paragraph 4, ending with the words "sending State", came within the scope of international law. It was not for the Commission to lay down what the competent court in the sending State should be. He proposed, therefore, that the second phrase of the first sentence and the whole of the second sentence should be deleted.

49. Sir Gerald FITZMAURICE agreed with Mr. Edmonds. It could not be certain that the sending State would be willing to assume jurisdiction in all cases, for that was a matter to be decided by national law. One of its diplomats in the receiving State, for example, might be held by a court in the sending State to be domiciled or resident in the receiving State, and in such circumstances the sending State might not have jurisdiction.

50. If, as the Special Rapporteur had proposed, the last phrase of the first sentence was deleted, the implication of the resulting text would be that the sending State always had jurisdiction over the diplomatic agent. As that was not invariably the case, he agreed that only the first phrase of the first sentence should be maintained, the rest of the paragraph being omitted.

51. Mr. HSU agreed with the two previous speakers. It would be quite sufficient to retain the first three lines of paragraph 4 in order to remind diplomatic agents that they could not escape the consequences of improper conduct and to remind Governments that they must provide for the punishment of such conduct.

52. Mr. FRANÇOIS said he was in favour of keeping paragraph 4 as it stood, subject to drafting changes. The last clause in the first sentence should be retained because the question whether a diplomatic agent could be brought before the courts of his own country had to be determined "in accordance with the law of that [the sending] State". In adopting that provision at its previous session, the Commission's intention had been that diplomatic agents should be tried not for all offences but only for those recognized by the law of the sending State.

53. The provision in the second sentence, concerning the designation of the competent court, had been included to assist States, such as the Netherlands, whose constitutional law gave no indication as to the court competent *ratione loci* to judge diplomatic agents resident abroad. He could not agree with Mr. Edmonds that the Commission was not competent to deal with the question or that the provision had nothing to do with international law. A number of authors, including von Liszt, regarded the principle that the competent court should be that of the seat of the home Government as part of the existing international law. In any case, it was the Commission's task to promote the progressive development of international law as well as to codify it. It would be noted, too, that the provision was usefully qualified by the words "unless some other (court) is designated under the law of that State".

54. Mr. SANDSTRÖM, Special Rapporteur, pointed out that, having some misgivings regarding the second sentence in paragraph 4, he had suggested merely stating in a commentary that, should a convention be concluded on the subject, the parties should undertake, as sending States, to provide a court competent to judge diplomatic agents resident abroad.

55. Mr. TUNKIN recalled that in the course of a long discussion on the paragraph at the ninth session many doubts had been expressed regarding it.[2] Since a diplomatic agent was clearly not exempt from the jurisdiction of his own State, it would make not the slightest difference whether the first part of the first sentence were included in the draft or not. The rest of the paragraph was something of an innovation and he agreed with Mr. Edmonds and Sir Gerald Fitzmaurice in doubting whether the Commission should go so far. Some States might object to it because its acceptance would mean revising their national legislation.

56. The CHAIRMAN put to the vote the proposal that the second sentence in paragraph 4 be deleted.

The proposal was adopted by 10 votes to 3, with 4 abstentions.

57. Mr. SANDSTRÖM, Special Rapporteur, withdrew his proposed amendment deleting the last clause in the first sentence of paragraph 4.

58. The CHAIRMAN observed that Mr. Edmonds had also proposed the deletion of the clause.

59. Mr. ZOUREK wondered whether Mr. Edmonds would reconsider his position. Now that the second

[2] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, Vol. I), 404th meeting, paras. 29 *et seq*; 405th meeting, paras. 1-15; 408th meeting paras. 37-48.

sentence had been deleted, the second part of the first sentence might well be retained.

60. The CHAIRMAN, speaking as a member of the Commission, suggested that the first sentence as it stood was somewhat tautological; persons subject to the jurisdiction of a State were always subject to that jurisdiction in accordance with the law of that State.

61. Mr. EDMONDS agreed that the second part of the first sentence was redundant. He would prefer the paragraph to confine itself strictly to the question of immunity from jurisdiction.

62. Mr. TUNKIN recalled that the clause under discussion had originally been proposed by him[3] as a necessary qualification of the additional provision proposed by Mr. François[4] that "A diplomatic agent shall be justiciable in the courts of the sending State". Now that the provision was worded differently, the subsidiary clause added little to what had already been said.

63. The CHAIRMAN put to the vote the proposal that the words "to which he shall remain subject in accordance with the law of that State" should be deleted.

The proposal was adopted by 11 votes to 2, with 4 abstentions.

Paragraph 4, as amended, was adopted unanimously.

Article 24 as a whole, as amended, was adopted unanimously.

ARTICLE 25

64. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of Switzerland, the United States of America, Luxembourg, Sweden, the United Kingdom, the Union of Soviet Socialist Republics (A/CN.4/116), and Italy (A/CN.4/114/Add.3), and to his own conclusions (A/CN.4/116). Apart from the insertion in paragraphs 3 and 4 of the reference to administrative proceedings (A/CN.4/116/Add.1) in response to an observation of the Soviet Union Government, he proposed no change in the article as adopted at the Commission's ninth session.

65. Mr. AGO observed that the rule relating to waiver contained in article 25 drew a twofold distinction between criminal proceedings and civil proceedings. First, in criminal proceedings, the waiver of immunity always had to be express, whereas in civil proceedings it could be express or implied. The second, less clearly indicated distinction was that in criminal proceedings the waiver must always emanate from the Government of the sending State. As the text stood, however, it gave the impression that the actual decision to waive privilege must come directly from the Government of the sending State in all cases. While such a provision was logical enough when the immunity of the head of the mission was to be waived, it was superfluous in the case of the other members of the mission. He was accordingly in general agreement with the proposal made by the Italian Government (A/CN.4/114/Add.3), though he believed that the proposed addendum should appear in paragraph 2 rather than in paragraph 1.

66. Mr. VERDROSS agreed with Mr. AGO.

67. Mr. ALFARO also supported Mr. Ago. It was essential clearly to establish in what manner the sending State waived the immunity of its diplomatic agents. Paragraphs 1 and 2 seemed to state that such a waiver must always be the act of the foreign office of the sending State. But there was a difference between the cases involving the head of the mission and those involving the other members of the mission. Similarly, in the circumstances contemplated in paragraph 3, a distinction should be made between the position of the head of a mission and that of a member of his staff. In his opinion, the article should be amended so as to deal quite clearly with each of the cases that might arise. He accordingly supported Mr. Ago's proposal.

68. Sir Gerald FITZMAURICE, agreeing with previous speakers, suggested that the words "by the sending State" in paragraph 1 should be deleted. As so amended, the paragraph would then state the bare principle, while paragraphs 2 and 3 would deal with the methods of effecting the waiver. Paragraph 3 really presented no difficulty. After a long discussion at its previous session, the Commission had come to the conclusion that the problem could be dealt with only on those lines.[5] In the case of paragraph 2, however, some members, while not dissenting from the principle, had been dubious as to the wording. Mr. Ago's proposal would, however, meet that difficulty, since it must be presumed that, when the head of a mission waived the immunity of one of its members, he did so with the full authority of his Government. Thus, the proposal might also meet the objection of the United States Government.

69. Mr. AMADO said that, before hearing Sir Gerald Fitzmaurice's suggestion, he had been on the point of proposing a redrafting of the Italian Government's addendum. He did not like the phrase "The head of the mission may waive the immunity", since it might be interpreted to mean that the decision lay solely with the head of the mission. He would prefer the following wording: "Waiver of immunity from jurisdiction of members of the staff of a mission may emanate from the head of the mission."

70. Mr. TUNKIN could see no justification for deleting the words "by the sending State" in paragraph 1. If they were omitted, it would not be quite clear that the decision to waive immunity could be taken solely by the sending State. It would be recalled that the question of a waiver of immunity by the Government had been discussed at length at the previous session, particularly in the Drafting Committee, and the Commission had

[3] *Yearbook of the International Law Commission, 1957*, vol. I, 404th meeting, para. 40.

[4] *Ibid.*, para. 29.

[5] *Ibid.*, 405th meeting, paras. 21-55 *passim*; 420th meeting, para. 54.

reached the conclusion that it would be wiser not to specify through whom the communication was to be made, whether through the prime minister, the minister for foreign affairs, or the ambassador. One point which should be perfectly clear was that privileges and immunities did not vest in the diplomatic agent personally but were enjoyed by him simply in his capacity as member of a diplomatic mission. That being so, he agreed with Mr. Amado that the wording of the Italian proposal was unsuitable.

71. In paragraph 2 it should be made clear that the decision to waive immunity and the communication of the decision were always official acts of the Government, the question whether the Government delegated the power to its ambassador to decide in certain cases or not being a matter for the particular States. The question of the channel through which the communication was conveyed was immaterial. The paragraph, however, certainly did not mean that a head of mission was not qualified to convey his Government's decision to that of a receiving State. He would prefer article 25 to stand as drafted, subject to the drafting change proposed by the Special Rapporteur.

72. Mr. AGO agreed with Mr. Amado that the Italian Government's proposal also could be reworded. It could be left to the Drafting Committee to find the best form of words.

73. He could not agree with Mr. Tunkin that, according to the existing wording of paragraph 2, the decision of a Government to waive the immunity of an agent could be conveyed by the ambassador. The paragraph explicitly stated that the waiver must be effected by the Government of the sending State. The institution of ambassador was, however, a State institution; the ambassador was never part of the Government.

74. Mr. ALFARO said that Mr. Ago had clearly stated the point he had himself made previously, namely, that according to the text of article 25 waiver of immunity could not emanate from the head of the mission. The text accordingly should be amended.

75. Mr. YOKOTA recalled that, during the protracted discussion of the question at the previous session, some members had been of the same opinion as Mr. Tunkin, but others had doubted whether paragraph 2 really reflected the general practice of States. That practice appeared to be correctly stated in the observation of the Swedish Government (A/CN.4/116) and was supported by a number of judicial decisions. He was, therefore, in favour of amending the text on the lines proposed by the Italian Government.

76. Mr. BARTOS said that it clearly followed from an ambassador's letters of credence that, when he made a communication to the Government of the receiving State, he must be presumed to be speaking in the name of his Government. Though the decision to waive immunity lay with the Government of the sending State, it was perfectly in order for the decision to be communicated in a note from the heard of mission. Nothing to the contrary was indicated in the article, and he did not consider that the text detracted in any way from the authority of the head of a mission.

77. Mr. TUNKIN agreed with Mr. Bartos that it was customary to regard a note from an ambassador as expressing the will of his Government. Many problems were, however, dealt with at the mission level, without reference to the Government of the sending State, the ambassador stating in his communication that he agreed or did not agree on a certain point. Such a communication was not regarded as carrying the same weight as a communication between Governments.

78. It was completely erroneous to claim that paragraph 2 meant that the communication of the decision to waive immunity must emanate from the central office of the Government; it might emanate from any organ recognized under international law as competent to represent a State in its international relations.

79. Mr. AMADO said that the head of a diplomatic mission must always be presumed to be speaking in the name of his Government. If a note from a head of mission was sufficient to produce the severance of diplomatic relations between two countries or even more serious consequences, he could not understand why it should not be sufficient to waive the immunity of a third secretary, for example. It was difficult to conceive that a head of mission would not first have consulted his Government on a matter of such importance as a waiver of immunity, in which political issues out of all proportion to the person concerned might be involved. He did not regard paragraph 2 as implying that a special act of the Government of the sending State was required as distinct from the act of its head of mission. The text could be interpreted as admitting the use of the ordinary channels of diplomatic intercourse.

80. Mr. MATINE-DAFTARY agreed that an ambassador was always regarded as the spokesman of his Government. Since the trouble arose from the repetition of references to the sending State in paragraphs 1 and 2, the best solution would be to delete from paragraph 2 the words "by the Government of the sending State" which were open to misinterpretation and had given rise to much unnecessary discussion.

81. Mr. PADILLA NERVO said that the article had two objects: to state the principle that immunity could be waived and to indicate the various possible forms of the waiver, either express or implied. It was not essential that the article should refer to the procedure to be observed in communicating the decision to waive immunity; the communication should be made in the recognized form of diplomatic intercourse. The first three paragraphs of the article would be sufficiently clear if they were redrafted on the following lines with no reference to procedure: paragraph 1 to be retained in the passive form as in the English text; paragraph 2 to be worded: "In criminal proceedings, the waiver must always be express; in civil proceedings, waiver may be express or implied." The rest of existing paragraph 3 would then constitute a new paragraph 3.

82. The CHAIRMAN, speaking as a member of the Commission, said that Sir Gerald Fitzmaurice's suggestion (para. 68) would improve the drafting of the article. As it stood, the repetition in paragraph 2 of the words "by the Government of the sending State" after it had already been stated in paragraph 1 that immunity may be waived by the sending State, gave the impression that the Commission was indirectly including in paragraph 2 a rule of evidence, requiring proof that the waiver really emanated from the Government of the sending State. The deletion of the words "by the sending State" in paragraph 1 would dispose of that possible misunderstanding, and the resulting text would then make it clear that the Commission was simply laying emphasis on the authority which could effect a waiver. Mr. Yokota's suggestion, based on the Italian Government's proposal, could also be included in the text with appropriate drafting changes to make it clear that the authority of the head of the mission was to convey waiver in certain cases.

83. Sir Gerald FITZMAURICE said that after hearing the proposals of Mr. Matine-Daftary and Mr. Padilla Nervo, he though that either of them achieved more efficiently the same purpose as his own suggestion.

84. Mr. TUNKIN pointed out that much of the difficulty arose from a discrepancy between the English and the French text of paragraph 2.

The meeting rose at 1.10 p.m.

461st MEETING

Wednesday, 11 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 25 *(continued)*

1. The CHAIRMAN, after recalling the proposals made at the 460th meeting by Mr. Matine-Daftary (para. 81) and Mr. Padilla Nervo (para. 82), invited the Commission to vote on article 25 paragraph by paragraph, as drafted at the ninth session (A/3623, para. 16).

2. Mr. ALFARO thought it would be very difficult to vote on each paragraph separately without prior agreement on the article as a whole. The chief cause of confusion was the patent contradiction between paragraph 1, under which only the sending State could waive immunity, and paragraph 3, which referred to implied waivers. For the purpose of overcoming the difficulty, he would prefer the words "by the sending State" in paragraph 1 to be deleted and paragraph 2 to read simply "In criminal proceedings, waiver must always be express." Several members of the Commission had made it perfectly clear that when the head of a mission communicated a waiver of immunity it must be taken as emanating from his Government. Yet, although it was undoubtedly incorrect to state, as did the existing text of paragraph 2, that the communication of a decision to waive immunity must always come from the Government and never from the head of the mission, it was true that the words "effected expressly by the Government of the sending State" gave rise to some misunderstanding.

3. Mr. SANDSTRÖM, Special Rapporteur, said that he could accept Mr. Padilla Nervo's proposal which would have the effect of omitting from the article all reference to the procedure of waiving immunity. He was anxious to retain paragraph 1 in full, though whether its sense was expressed in the active form or, as Mr. Padilla Nervo preferred, in the passive form was of no great importance. The principle, to which many speakers had referred, that immunity from jurisdiction was a prerogative of the State which could be waived only by the State was of considerable theoretical significance and he would prefer it to be stated explicitly.

4. Mr. MATINE-DAFTARY pointed out that Mr. Padilla Nervo's proposal was substantially the same as his own, except that in paragraph 1 the latter had used the passive form, as in the English text, which would not be suitable in the French text.

5. The CHAIRMAN observed that the choice between the active and passive form could be left to the Drafting Committee. On that understanding, he put to the vote paragraph 1 of article 25 as drafted at the ninth session.

Paragraph 1 was adopted by 11 votes to 1, with 2 abstentions.

6. The CHAIRMAN put to the vote paragraph 2 as proposed by Mr. Padilla Nervo: "In criminal proceedings, waiver must always be express."

Paragraph 2 was adopted by 13 votes to none, with 1 abstention.

7. The CHAIRMAN put to the vote paragraphs 3 and 4 as drafted at the ninth session.

Paragraph 3 was adopted by 13 votes to none, with 1 abstention.

Paragraph 4 was adopted unanimously.

Article 25 as a whole, as amended, was adopted unanimously.

8. Mr. ALFARO explained that he had abstained from voting on paragraph 3 because he considered it to be in conflict with paragraph 1 as just adopted.

ARTICLE 26

9. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the general observations of the Swiss, United States and Belgian Governments on the article, to the observations of the Governments of Luxembourg, Japan, Belgium, the Netherlands, the United Kingdom and Chile on the various exceptions listed in sub-paragraphs (*a*) to (*e*), and to his own conclusions (A/CN.4/116). He proposed the following amendments to the text adopted by the Commission at its ninth session. The words "national or local" in the introductory clause should be amended to read "national, regional or local", in response to a proposal by the Belgian Government. Sub-paragraph (*a*) should be amended to read "indirect taxes incorporated in the price of goods", in response to an observation of the Government of Luxembourg. In response to observations by the Governments of Luxembourg and the Netherlands, the words "subject to the provisions of article 31 concerning estates left by members of the family of the diplomatic agent" should be added to sub-paragraph (*c*). The provisions referred to occurred in article 31, paragraph 3, of the revised text proposed by the Special Rapporteur (A/CN.4/116/Add.1).

10. Finally, in response to an observation of the Belgian Government he proposed the addition of a sub-paragraph (*f*) reading as follows: "Registration, court or record fees, mortgage dues and stamp duty". He decided not to propose the other amendments appearing in the revised text of article 26 (A/CN.4/116/Add.1).

11. Mr. YOKOTA suggested that since the Drafting Committee had been requested to consider replacing the words "and not on behalf of his Government for the purposes of the mission" in article 24, paragraph 1 (*a*), by the words "unless he holds it on behalf of his Government for the purposes of the mission", it should be asked to consider a similar change in article 26, sub-paragraph (*b*).

It was so decided.

12. Mr. YOKOTA, referring to sub-paragraph (*a*), observed that indirect taxes were incorporated in the charges for other things than goods. In Japan, for instance, railway fares included a travel tax, while the price of admission to places of public entertainment included an entertainment tax. He would therefore prefer the simple reference to "indirect taxes" in sub-paragraph (*a*) to stand.

13. Mr. ZOUREK remarked that Mr. Yokota's point could be met by simply adding the words "or services" after the words "in the price of goods".

14. The CHAIRMAN proposed that Mr. Zourek's suggestion be referred to the Drafting Committee.

It was so decided.

15. The CHAIRMAN observed that sub-paragraph (*c*) could not really be finally adopted by the Commission until it had taken a decision on article 31, paragraph 3.

16. Faris Bey EL-KHOURI considered that a number of matters were not covered by article 26 as it stood. To what extent, for instance, was the diplomat liable for taxes charged on hunting permits or dog licences? It would perhaps be advisable to add a provision either enunciating a general exemption from dues and taxes or else stating that diplomatic agents were not exempt from any dues and taxes other than those mentioned.

17. Mr. SANDSTRÖM, Special Rapporteur, explained that, unless the taxes mentioned by Faris Bey El-Khouri were regarded as charges levied for services rendered, diplomatic agents would enjoy exemption from them, since they were not mentioned in any of the six exceptions.

18. The CHAIRMAN put to the vote article 26 as amended by the Special Rapporteur (paras. 9 and 10 above), subject to drafting changes.

Article 26 was adopted by 14 votes to none, with 1 abstention.

ADDITIONAL ARTICLE (ARTICLE 26 A)

19. Mr. SANDSTRÖM, Special Rapporteur, proposed the adoption of the following additional article based on an observation of the Soviet Union Government (A/CN.4/116):

"The diplomatic agent shall be exempt from all personal contributions in money or in kind."

20. The services and contributions envisaged in the article were many and varied, ranging from compulsory military service to the obligation on the public in general under Swedish law, for instance, to help fight forest fires. The new article should, he thought, be placed in proximity to article 26, but it was for the Drafting Committee to decide on its exact position.

21. Mr. ZOUREK considered the article a very necessary one. Almost all countries had legislation making it compulsory for all able-bodied members of the community to lend a hand in the event of public disasters. Apart from the services mentioned by the Special Rapporteur, there were also such duties as jury service or lay judge service. Though it could not be claimed that such legislation was meant to apply to diplomatic agents, there might be cases in which that fact was not expressly stated in the relevant legislative measure, and in which difficulties might therefore arise if the proposed rule were not adopted.

22. Mr. VERDROSS also regarded the provision as absolutely essential.

23. Mr. EDMONDS said that the phrase "personal contributions" was inappropriate. The aim was presumably to exempt diplomatic agents from the obligation to perform certain emergency services. He did not see how the word "contributions" would serve that purpose.

24. Mr. SANDSTRÖM, Special Rapporteur, said it was a question of translation. The French text, which used the words "*toute prestation personnelle en nature ou en espèces*" was quite clear, since services were *prestations en nature*.

25. Sir Gerald FITZMAURICE agreed that it was a question of translation but was not sure whether even the French word *prestation* was correct. He would have thought the word "services" should certainly be used. Perhaps it would be better to say "all personal services and contributions in money or in kind".

26. Mr. ZOUREK also thought it was a matter of drafting. The difficulty might perhaps be overcome by saying "all personal contributions and all public services", or "all personal or public services".

27. Mr. SANDSTRÖM thought the word *prestation* covered the situation. The same word was used in Swedish.

28. The CHAIRMAN put to the vote article 26 A as proposed by the Special Rapporteur (A/CN.4/116/Add.1) subject to drafting changes.

Article 26 A was adopted unanimously.

ARTICLE 27

29. Mr. SANDSTRÖM, Special Rapporteur, said he had decided to withdraw the revised text he had prepared for article 27 and to revert to the 1957 text, except for the introductory passage of paragraph 1, which was based on an observation made by the Belgian Government and which, he proposed, should read: "The receiving State shall, in accordance with such regulations as it shall prescribed, grant exemption from customs duties on".

30. He drew attention to the observations made by the Government of Belgium (A/CN.4/116) and, on paragraph 1, by the Governments of Japan, Switzerland, the United States of America, the Netherlands, Chile (*Ibid.*) and Italy (A/CN.4/114/Add.5). The points raised by the Governments he had mentioned, and particularly in the Japanese Government's second observation and in the observations of the Governments of Switzerland, Chile and Italy were, he thought, adequately met by the amendment he had proposed to paragraph 1. The Swiss Government's observations reflected ideas expressed in paragraph 3 of the commentary to article 27. He was not sure what were the implications of the observation of the Government of the Netherlands.

31. He drew attention to the observations on paragraph 2 made by the Governments of Belgium, Japan, Switzerland, the United States of America and the Netherlands (A/CN.4/116).

32. He had at first thought of adopting the drafting changes embodied in the text proposed for paragraph 2 by the Government of Belgium, but had subsequently come to the conclusion that they would make the text ambiguous, especially in relation to the inspection of a diplomatic agent's personal baggage. In view of the Commission's discussions at its preceding session, he had thought it better not to introduce any change along the lines suggested by the Government of Japan.

33. Mr. MATINE-DAFTARY said that if paragraph 1 were adopted in the form proposed by the Special Rapporteur, the effect might be to destroy altogether the right of diplomatic agents to exemption from customs duties; the phrase "in accordance with such regulations as it shall prescribe" was much too broad in meaning. Furthermore, he questioned whether it was for the receiving State to "grant" exemption: the exemption was a right of diplomatic agents under international law.

34. Mr. SANDSTRÖM, Special Rapporteur, observed that the regulations differed greatly from country to country. The purpose of the proposed new text was to give Governments some discretion in the matter without jeopardizing the substance of the right. Such restrictions as were imposed would relate only to such matters as the quantity of goods which could be imported duty-free and the period within which they must be imported to qualify for exemption. The amended paragraph was in keeping with the terms of paragraph (3) of the commentary to the 1957 text.

35. Mr. MATINE-DAFTARY asked the Special Rapporteur whether it was his intention to suggest the deletion of paragraph (3) of the commentary.

36. Mr. SANDSTRÖM, Special Rapporteur, replied in the negative. His purpose had merely been to include provision for restrictions in the text itself.

37. Mr. AGO agreed with the Special Rapporteur that some clause to provide for the possibility of restrictions on the right to exemption from customs duties should be included. All States were aware of the manner in which the right of diplomatic agents to import goods free of duty could be abused and most of them had enacted restrictive legislation. The phrase suggested by the Special Rapporteur was therefore, he thought, the least that could be accepted, especially in view of the indication also given in the commentary that restrictions were allowable.

38. Mr. TUNKIN said that, though he had his doubts concerning the proposed new wording of the preamble, he had no specific objection to it.

39. Mr. MATINE-DAFTARY said he had not meant to disagree with the desire of the Special Rapporteur and Governments to prevent abuses. If, however, that was the purpose of the proposed new text, it should be stated more clearly, and the expression "in accordance with such regulations as it shall prescribe" should be qualified by the addition of some such phrase as "subject to reciprocity". In addition, it should be stated the regulations should be general in scope. As it stood the expression proposed by the Special Rapporteur was rather arbitrary and might lead to misunderstanding. Perhaps the best solution would be to express the idea in a separate paragraph.

40. Mr. AGO asked the Special Rapporteur whether, in view of Mr. Matine-Daftary's remarks, he wished to retain the words "in accordance with such regulations as it shall prescribe" in paragraph 1, or, as suggested by Mr. Matine-Daftary and also by the Italian Government, to express the idea in a separate clause. The

latter, he thought, would be the better course and would avoid all the ambiguities and misunderstandings to which the Special Rapporteur's text as it stood might give rise.

41. Mr. ZOUREK suggested that the Special Rapporteur should provide, at least in the commentary, a definition of customs duties as suggested by the Government of Belgium and as given in paragraph 3 of the text proposed by the Special Rapporteur (A/CN.4/116/Add.1).

42. Mr. SANDSTRÖM, Special Rapporteur, said the proper context for the definition would probably be the commentary.

43. He had no serious objection to Mr. Ago's suggestion that the provision authorizing restrictions on the right to import goods free of duty should be embodied in a separate clause. He would, however, be unable to accept without additions the wording suggested by the Italian Government, for it referred only to the number of articles and said nothing about the quantity or the time within which they would have to be imported in order to qualify for exemption.

44. Mr. TUNKIN said he thought Mr. Ago's suggestion was unnecessary and probably somewhat dangerous. It was unnecessary because the right to import goods free of duty was already limited by sub-paragraphs (*a*) and (*b*) of paragraph 1 to goods intended for the use of a diplomatic mission or for the personal use of a diplomatic agent or members of his family. Mr. Ago's suggestion was dangerous because, by drawing attention to the possibility of restrictions it might induce States to go further in that direction than they would have done otherwise.

45. Mr. ALFARO thought that Mr. Matine-Daftary's views were reasonable and well founded. It was desirable to specify that the regulations should have been duly enacted and should not be *ad hoc* enactments. He therefore proposed that the article begin with the words "The receiving State shall, in accordance with such regulations as are established by its legislation, grant exemption..." He felt that such an amendment would satisfy both Mr. Ago and Mr. Matine-Daftary.

46. Mr. SANDSTRÖM, Special Rapporteur, said that he had understood his own proposal to mean that the regulations would be enacted by the State legislature. He had no objection to Mr. Alfaro's amendment, but perhaps the Drafting Committee could settle the final wording.

47. Mr. YOKOTA agreed with Mr. Tunkin that the limitations set out in sub-paragraphs (*a*) and (*b*) of paragraph 1 were sufficient and that the additional clause proposed by the Italian Government was unnecessary. It was, on the whole, undesirable to place any restrictions on the number of articles imported.

48. The French text of the Special Rapporteur's proposal used the word *modalités,* which meant something different from the English word "regulations". Regulations were rules of substance which any State could enact to create restrictions, and altogether the word was too strong for the purpose and did not perhaps express the meaning of the French word adequately. Whatever the position, however, it should be stated in full detail in the commentary what the Commission had in mind.

49. Mr. EDMONDS recalled that at the ninth session the Commission had decided that diplomatic agents should be completely exempt from customs duties in respect of the articles mentioned in sub-paragraphs (*a*) and (*b*). If it was now decided that they should be exempt only in accordance with regulations prescribed by the receiving State, that would be a substantive departure from the previous decision, and it would become necessary to lay down limitations on the right of a receiving State to deprive diplomatic agents of the exemption. As far as he could see, the opening words of the Special Rapporteur's proposed new version would permit receiving States to abolish all exemptions of every kind. He proposed therefore that the Commission should adhere to the 1957 text, or else should so redraft the Special Rapporteur's proposal that the receiving State would not be given the power to take away all exemptions.

50. Mr. AGO said that any restriction on the right of exemption should be put in the article itself and not in the commentary, which was intended only to clarify the article and not to deal with matters of substance.

51. As for the addition suggested by the Special Rapporteur, there was, as Mr. Yokota had said, a perceptible difference between the English and French texts, and he preferred the English word "regulations", which implied the possibility of restrictions, to the French word *modalités,* which did not necessarily imply any. It seemed to him that, if the Special Rapporteur's suggestion were followed, a French word closer in meaning to the English should be used.

52. If, on the other hand, his suggestion were followed, a sub-paragraph could be added at the end of paragraph 1 reading: "The receiving State may nevertheless place reasonable restrictions on articles imported for the uses specified in (*a*) and (*b*)."

53. Sir Gerald FITZMAURICE agreed with those members of the Commission who held that sub-paragraphs (*a*) and (*b*) implied certain limitations on the right of a mission or a diplomatic agent to be exempt from customs duties. There had been, and still were, abuses of that right, but paragraph 2 provided a means of curbing them. The Special Rapporteur's new proposal could not achieve anything more than did the 1957 text in dealing with such abuses, which could not really be checked by limitations laid down by law. He therefore preferred the 1957 text.

54. Mr. AGO wondered if Sir Gerald Fitzmaurice had to some extent misunderstood the situation. The abuses which Mr. Ago meant to check did not concern the abusive import of certain articles in the baggage of a diplomatic agent, but the extra import of articles allegedly for personal use which in reality went well

beyond the requirements of such use. Sub-paragraphs (*a*) and (*b*) did indeed place restrictions on the diplomatic agent's right to exemption, but they did not cover the situation he had referred to, which could be dealt with only by restrictions placed by the receiving State on the import of certain articles.

55. Mr. HSU agreed that something should be done to prevent the import of articles to be disposed of on the black market, but he could not accept the sentence proposed by the Special Rapporteur, which could be interpreted to mean anything, and was open to abuse by the Government of the receiving State. On the other hand he had no objection to an article restricting the import by a diplomatic agent of a specific article or articles.

56. Mr. BARTOS said that the question was an extremely difficult one. By reason of a diplomatic agent's immunity whatever he imported could not be confiscated, and if he abused his right to exemption from customs duties and the receiving State decided to declare him *persona non grata,* a diplomatic incident might be precipitated. There was something to be said for a quota system whereby the quantity imported duty-free on any articles could be kept at a reasonable figure, and perhaps it should be stated in the commentary that the receiving State was not obliged to grant exemption to more than a reasonable quantity of any articles.

57. Mr. SANDSTRÖM, Special Rapporteur, observed that from the provisions cited in the publication *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*[4] it was clear that in many countries restrictions had been laid down in respect of the exemption from customs duties of diplomatic agents and in respect of the time within which they were entitled to claim exemption. A State was justified in imposing such restrictions, and he therefore preferred the text of his proposal, if no more appropriate form could be found. The Italian Governtment's proposal did not seem to be comprehensive enough.

58. He had no objection to the use of some word other than "*modalités*", for he had not contemplated a situation where junior customs officials could decide what exemptions should be made. It was a drafting question, however, and could be dealt with by the Drafting Committee.

59. Mr. AGO had no objection to the Special Rapporteur's proposal, provided that the English text, which was clearer, was taken as the basis of the vote.

60. In reply to Mr. Ago, the CHAIRMAN said that the Commission would vote on the English text of the Special Rapporteur's proposal.

61. He put to the vote Mr. Ago's proposed additional clause (para. 52 above) to be added at the end of paragraph 1.

62. The CHAIRMAN put to the vote the Special Rapporteur's proposal concerning paragraph 1 (para. 29, above), as amended by Mr. Alfaro's proposal (para. 45 above), subject to drafting changes.

The proposal thus amended was adopted by 8 votes to 7, with 1 abstention.

63. Mr. TUNKIN, referring to the first sentence of paragraph 2, said that at the Commission's preceding session it had been understood that the personal baggage to be exempt from inspection meant only such baggage as accompanied the diplomatic agent. The regulations on that point differed, however, from country to country, and diplomatic agents often had a great deal of unaccompanied baggage. He proposed therefore that the phrase "personal baggage" should be qualified by words indicating that only accompanied baggage was meant.

64. Mr. SANDSTRÖM, Special Rapporteur, said that to him "personal baggage" meant accompanied baggage, but he would have no objection to the addition of an explicit phrase to that effect.

65. Mr. ALFARO said it would be dangerous to restrict or qualify the meaning of the phrase "personal baggage". It often happened, especially when a diplomatic agent travelled by air, that a great deal of his baggage had to be sent separately by sea or land, and the whole purpose of the paragraph would be defeated if such unaccompanied baggage was not exempt from inspection. In this opinion the phrase "personal baggage" would include unaccompanied baggage.

66. Mr. HSU agreed with Mr. Alfaro. The exemption from inspection should be extended to baggage following by sea, for example, in cases where a diplomatic agent travelled by air. A large part of such unaccompanied baggage might consist of documents which the diplomatic agent could not possibly take with him.

67. There was not much danger of abuse, since if the authorities of the receiving State were suspicious the baggage could be inspected. It would be unwise to be too strict in the matter.

68. Mr. TUNKIN said that if the members of the Commission were of the opinion that the phrase "personal baggage" was sufficiently clear, he would not press his proposal.

69. The CHAIRMAN put to the vote article 27 as a whole, as amended.

Article 27, as amended, was adopted by 14 votes to none, with 2 abstentions.

ARTICLE 28

Paragraphs 1 and 2

70. Mr. SANDSTRÖM, Special Rapporteur, introducing his proposed new version of article 28 (A/CN.4/116/Add.1), said that in paragraph 1 he had dealt with the family of the diplomatic agent only; the provisions concerning technical and administrative staff had been transferred to paragraph 2. He was not sure that the

[4] United Nations publication, Sales No.: 1958.V.3.

proper context for the second sentence of paragraph 1 was not the commentary rather than the article.

71. Observations on the members of the family of the diplomatic agent had been made by the Swiss (A/CN.4/114), Belgian (*ibid.*), and Italian Governments (A/CN.4/114/Add.3), and he had nothing to add to his written comment (A/CN.4/116) on those observations.

72. Mr. VERDROSS said that paragraph 1 of both the original text and the Special Rapporteur's version went beyond international practice, which entitled only the diplomat's wife and minor children to privileges and immunities. Various Governments had objected to a formulation in such wide terms, and he felt that their objection was justified.

73. Sir Gerald FITZMAURICE said that the status of the members of the family had been fully discussed at the ninth session, and it had been decided that if only the wife and minor children were included the article would be too restrictive, as it would not cover, for example, the case of a sister keeping house for a bachelor or widowed diplomatic agent. The Special Rapporteur's version did not change the substance of the 1957 text, and he had no objection to it.

The meeting rose at 1 p.m.

462nd MEETING

Thursday, 12 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) (*continued*)

ARTICLE 28 (*continued*)

Paragraphs 1 and 2 (continued)

11. Mr. SANDSTRÖM, Special Rapporteur, said that observations had been received from the Governments of Belgium (A/CN.2/114) and Finland (A/CN.4/114/Add.2) on the subject of members of the family of a diplomatic agent who were nationals of the receiving State. In his view, although the matter was debatable, it was necessary to change the article, as the situation would be very difficult if a member of the diplomat's family was subject to the jurisdiction of the receiving State. That was the reason for his redraft of paragraph 1 (ACN.4/116/Add.1).

2. In reply to a question by Sir Gerald Fitzmaurice, he said that administrative and technical staff were the subject of paragraph 2 of his redraft. He referred to the observations of the Governments of Belgium, Switzerland, the United States of America, Argentina (A/CN.4/114), USSR (A/CN.4/114/Add.1), Italy (A/CN.4/114/Add.3) , China (A/CN.4/114/Add.4), Yugoslavia (A/CN.4/114/Add.5), Czechoslovakia (A/CN.4/114/Add.1), and Pakistan (A/CN.4/114/Add.6) and to their objections to article 28 as drafted at the previous session (A/3623, para. 16) which granted diplomatic privileges and immunities to a mission's administrative and technical staff. While he did not consider the reasons for those objections convincing, the opposition was so strong that the Commission's entire draft might be in danger if the objections were not taken into account.

3. Mr. VERDROSS recalled that one reason for the decision at the ninth session to grant privileges and immunities to the administrative and technical staff had been that small States frequently maintained small diplomatic missions with only one or two persons on the diplomatic staff and one or two on the administrative and technical staff, so that it was difficult to make a distinction between the two kinds of staff. The opposition of Governments to the 1957 text was great, however; perhaps with the addition of some such phrase as "on a reciprocal basis" the article might be generally acceptable.

4. He realized that, according to current practice, only the wife and minor children of a diplomatic agent were entitled to privileges and immunities. As the Commission, however, had established its rule in paragraph 1 in the knowledge that it was a step towards the progressive development of international law, he would be quite prepared to vote for that paragraph as drafted at the ninth session. But since the provisions of the paragraph as drafted in 1957 had encountered opposition, he suggested that in deference to the objections it might be revised to read: "Apart from the diplomatic agent, his wife and minor children forming part of his househould in all cases shall, and, subject to reciprocity, other members of his family may,..." The addition of the words "who are in the diplomatic list" after "members of the family" might also help to remove opposition.

5. Mr. TUNKIN said that the observations by Governments showed that it was not the rule in existing international law to grant privileges and immunities to persons who were not members of the diplomatic staff in the strict sense of the term. That had been recognized at the ninth session, but the Commission had intended to introduce an innovation which was manifestly not acceptable to Governments. It should therefore be abandoned. The first sentence of the Special Rapporteur's redraft of paragraph 1 was satisfactory in that respect.

6. As far as the administrative, technical and service staff was concerned, he said that diplomatic privileges and immunities could, naturally, be conferred on such personnel by virtue of bilateral or even multilateral

agreements. The Special Rapporteur's proposed redraft of paragraph 2 set out the existing situation, and was therefore acceptable.

7. With regard to members of the family of a diplomatic agent, he said the current practice in a great many States was to grant privileges and immunities to the wife and minor children only. The Special Rapporteur's proposed text would be more acceptable to Governments if it were altered to bring it into closer conformity with existing practice.

8. Finally, the second sentence of paragraph 1 of the Special Rapporteur's redraft of article 28 raised the complex question of dual nationality, which was closely linked with the internal legislation of countries. In practice problems of dual nationality were easily settled between States, but it would be difficult, and inadvisable, to establish a general rule. He thought therefore that it would be desirable not to deal with it in the draft articles, but to leave it to bilateral agreement between Governments.

9. Sir Gerald FITZMAURICE regretted that the Special Rapporteur had yielded to the views of Governments in the case of article 28, for that article had rightly sought to extend existing international law. The unfavourable comment it had elicited did not impress him, for it came from a minority of Governments, and in any case the practice set forth in article 28 of the 1957 draft was in fact the practice in many States. In some cases, indeed, the administrative and technical staff were put on the diplomatic list without any objection.

10. Most of the observations stated simply that the article did not reflect current practice or that it went beyond existing international law. That indeed had been the Commission's intention in paragraph (6) of the commentary. If the Commission thought that its proposals were right, it should maintain them against the opposition of some Governments. One very good reason for maintaining them was the difficulty in modern times of making a distinction between the diplomatic and the technical and administrative staff of a mission. The functions performed by technical and administrative staff had formerly been performed by the diplomatic staff and only because the latter was physically unable to cope with the workload had the assistance of the former become necessary. The function itself, however, still remained diplomatic. Furthermore, without the general immunity from arrest the administrative and technical staff would be unable to carry out its functions satisfactorily, and the inviolability of the mission's confidential material would be endangered. Much of the staff was making a more important and more essential contribution to the functioning of the mission than, say, some junior attaché. Lastly, unless the members of a diplomatic agent's family enjoyed immunity, pressure could be brought to bear on the diplomatic agent through his family. The same argument was equally applicable to the families of the technical and administrative staff, for such staff had access to the secrets of the mission. For all those reasons, he considered that article 28 as adopted at the ninth session should be retained and that it should be explained in the commentary why the Commission had retained the text in spite of the criticisms of some Governments.

11. The suggestion of Mr. Verdross that the words "subject to reciprocity" be inserted could not be regarded as adequate. It was not inconceivable that a Government, considering it unlikely that a foreign State to which one of its diplomatic missions was accredited would arrest any of the staff, might regard it as favourable to its own interests not to grant diplomatic privileges and immunities to the administrative and technical staff of that State's mission. Again, the requirement of reciprocity existed already. Accordingly, it was not necessary to mention reciprocity specifically.

12. Mr. YOKOTA said that the question of the privileges and immunities of the members of the family of a diplomatic agent had been fully discussed at the ninth session, and no good reason had been advanced to change the wording of article 28. The words "forming part of his household" and "forming part of their respective households" provided sufficient limitation to the concept of members of a family.

13. It was clear from the observations of many Governments that the article went beyond current practice in granting the same privileges and immunities to the administrative and technical staff as those granted to the diplomatic staff. On the other hand it was unreasonable, in his opinion, that such staff should be treated on the same footing as members of the service staff as suggested by the new proposal of the Special Rapporteur; they should, he thought, be treated as an intermediate group. Administrative and technical staff should not be accorded the privileges mentioned in articles 22 and 23, but should enjoy those referred to in article 24. He was rather more doubtful concerning the exemptions mentioned in articles 26 and 27, but thought that such staff should be eligible for the exemptions mentioned in article 26, at least. Such a solution might not correspond with the practice current in some States, but current practice was not uniform and no formulation could possibly cover its variations. His suggestion might, if the draft articles became a convention, prove acceptable to the majority of States.

14. With regard to the principle of reciprocity, he felt that there should be a provision granting at least a minimum of privileges and immunities to the administrative and technical staff. It would be open to States to agree among themselves to grant more extensive privileges and immunities, but if the Commission left everything to be settled by States on a reciprocal basis it would not be offering a solution at all. The Commission should seek a solution acceptable to at least a majority of States.

15. Mr. HSU emphazised that the articles, although inspired by a spirit of idealism and a desire to contribute to the development of international law, were yet tentative. There were many objections to article 28 from Governments, and their objections were perhaps well founded. For, from the standpoint of a receiving State, diplomatic privileges and immunities were a

necessary evil, and the receiving State's tendency was to restrict them as much as possible. The Commission should be guided by similar considerations, provided that its draft did not impair the efficiency of the mission.

16. Diplomatic missions grew in size year by year, and if there was no check on the grant of privileges and immunities there would be an inordinate number of persons possessing such privileges, a situation which would be, to say the least, most inconvenient to Governments. It was a sound principle therefore to limit privileges and immunities to the diplomatic staff only and to treat members of the administrative, technical and service staffs differently. That did not mean that they could not enjoy such privileges and immunities in certain circumstances, e.g., in the performance of their official duties. If their official functions were protected that would be a sufficient safeguard for the mission. Sir Gerald Fitzmaurice had said that some of the members of the auxiliary staff were entrusted with very confidential matters, but in his view the diplomatic staff alone should deal with such matters. His conclusion was that it was inadvisable to assimilate the technical and administrative staff to the diplomatic staff.

17. With regard to the definition of the members of the family of a diplomatic agent, he suggested that it might be said that the wife and minor children should enjoy the privileges and immunities set out in articles 22 to 27, whereas other members of the household could only enjoy them subject to agreement with the receiving State. In the case of a sister keeping house for a bachelor, the receiving State would probably be reasonable and put her on the footing of a member of the family enjoying privileges and immunities. In the same way, if a State was willing to extend the privileges and immunities to its own nationals who were members of the family of a diplomatic agent, a satisfactory arrangement could be made.

18. Mr. AGO agreed with Sir Gerald Fitzmaurice that the Commission should resist the temptation of always acquiescing in the views expressed by a few critical Governments. Not to grant privileges and immunities to the technical and administrative staff, who sometime performed very delicate functions, might have graver consequences than not to grant them to certain members of the minor diplomatic staff. The service staff, on the other hand, were in a different category, however, and he could not approve of the Special Rapporteur's grouping that staff with the technical and administrative staff in paragraph 2 of his redraft of article 28. The service staff could not be assimilated to the diplomatic staff, but the administrative and technical staff certainly could.

19. He had no specific proposal to make in respect of the provisions concerning members of the family of a diplomatic agent forming part of his household. The qualification that they should form part of his household was liable to be equivocal, however, and there was some substance in the objection to extending the diplomatic status beyond the diplomatic agent's wife and his children who were under the age of majority.

20. Mr. AMADO said that, as at the previous session, his approach to the question of diplomatic privileges and immunities was guided by the principle of functional necessity: the mission and its members had to be able to perform all acts associated with diplomatic intercourse, to carry out the instructions of its Government and to promote good relations between States. That being so, he could not agree with Mr. Yokota that members of the administrative and technical staff of a mission need not enjoy the immunities referred to in article 22 and 23, nor could he accept the redraft of article 28 proposed by the Special Rapporteur, Members of the administrative and technical staff might well be cognizant of all the secrets of the mission, including the secret intentions of the head of the mission himself, and it was quite inadmissible that such staff should be at the mercy of the police of the receiving State. Once a confidential clerk was in the hands of the police, the police could gain knowledge of the inmost thoughts of the head of the mission. That was why he fully agreed with Mr. Ago that, in the matter of immunities, administrative and technical staff should be treated on the same footing as the diplomatic members of the mission and as an entirely distinct category from service staff.

21. Referring to the meaning of "the family of a diplomatic agent" he said it was admittedly not always easy to determine what persons the expression comprised. But he thought the stipulation that the family had to form part of the diplomat's household could hardly be improved upon.

22. Article 28 had met with considerable criticism. But the criticism enmanated from a small number of Governments, and in his opinion it was the Commission's duty to frame whatever provisions it considered to be in the best interests of the international community. The considerations put forward by Mr. Hsu concerning the excessive number of persons enjoying diplomatic privileges and immunities were, he thought, purely incidental to the main question.

23. The CHAIRMAN, speaking as a member of the Commission with reference to the question of defining a diplomatic agent's family, referred to his remarks at the previous session.[1]

24. Mr. FRANÇOIS regretted that the Special Rapporteur had abandoned the text adopted at the previous session. It seemed that the Special Rapporteur had been greatly influenced by the observations of certain Governments. Speaking from his own experience as Special Rapporteur on the law of the sea, he said that such observations were of course valuable but they should not acquire too much prominence in the Commission's debate. The fact that a small number of Governments stated that their practice differed from that proposed by

[1] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), 410th meeting, para. 26.

the Commission was not *per se* a sufficient reason for the Commission to change its position. The observations and criticisms of Governments should be weighed strictly on their merits.

25. He entirely agreed with Sir Gerald Fitzmaurice, Mr. Ago and Mr. Amado that privileges and immunities should be extended to the administrative and technical staff of missions. And he could not accept the view that such privileges and immunities should be confined strictly to the diplomatic members of the mission, for the whole purpose of privileges and immunities might be frustrated if they were not extended to other members of the staff. In that connexion, he said that in recent years many new States had come into existence which did not have the same established traditions or developed law and therefore did not have, perhaps, the same safeguards for members of diplomatic missions as the older countries. Accordingly, it seemed hardly a propitious moment to begin restricting the enjoyment of privileges and immunities.

26. The steady increase in the number of privileged persons which alarmed Mr. Hsu was accounted for mainly by the grant of certain privileges and immunities to officials of the United Nations and other international organizations, and was an unavoidable necessity. The fact that it had been found necessary to accord such treatment to officials of international organizations was scarcely an argument in favour of restricting the privileges and immunities of missions at a time when they were even more in need of them than were international organizations.

27. The system of reciprocity advocated by Mr. Verdross would be of no avail, since some countries could refuse to accord certain privileges and immunities to the missions of certain other countries in the secure knowledge that the rights of their own representatives would be sufficiently safeguarded in those countries. He was accordingly in favour of keeping article 28 as it stood.

28. Mr. BARTOS noted that many of the objections of Governments were based on considerations similar to those he had expressed in dissent from the majority view at the Commission's previous session. The extension of diplomatic privileges and immunities to the members of a diplomatic agent's family raised some very difficult problems in practice. Even close relatives of the diplomatic agent living under the same roof with him might lead their own lives and engage in commercial, political or cultural activities which could bring them into conflict with the laws of the receiving State or at least cause them to incur a certain civil and even penal responsibility. The daughter of a head of mission, for instance, though an eminent doctor, had had to be refused permission to serve on the staff of a medical establishment, because it was inadmissible that she should be immune from the consequences of any mistakes or even offences that she might commit in the exercise of her profession. It had been argued that, in cases of abuse of privilege, a member of the family of a diplomatic agent could always be declared *persona non grata*. But that was not always so easy, as had been shown in the case of the wife of a diplomatic agent who, as a *prima donna,* had sung songs of a political nature which had given offence to the receiving State.

29. The administrative and technical staff of missions must certainly enjoy a measure of immunity. It was the usual practice, however, for such staff to enjoy the so-called *petite immunité,* namely, immunity in respect of acts performed in the course of their duties. Experience showed that, quite apart from their greater number, members of the subordinate staff of missions committed far more offences and caused far more incidents than the diplomatic agents themselves. One problem in such cases was that, unless such staff members could be interrogated by the authorities, it was very difficult to discover whether the offence had been committed in the course of their duties or in their private capacity. In any event, if they were to enjoy full immunity, there must be some safeguard such as the right to submit their case to the authorities of the sending State.

30. But though willing to extend privileges and immunities to members of the administrative and technical staff, he saw no justification for according them to the members of their families. Indeed it might be in the best interest of members of such staff not to do so, since, if such persons knew that their families enjoyed no immunity, they would exercise stricter control over their conduct.

31. In view of the foregoing considerations he wished to suggest that paragraph 1 of the article as far as the words "if they are not nationals" be amended to read:

> "Apart from diplomatic agents, the members of the family [or: the spouse and minor children] of a diplomatic agent forming part of his household, provided that they do not engage in professional or political activities on their own account in the territory of the receiving State, and likewise the members of the administrative and technical staff of a mission, shall..."

32. The CHAIRMAN said that, while the difficulties of the receiving State in dealing with aliens in a privileged position should not be ignored, they should also not be exaggerated; the overriding consideration was that of the needs of the mission, which had to be able to discharge its functions properly.

33. Mr. ALFARO said that he was decidedly in favour of keeping article 28 as it stood, for the reasons stated by Sir Gerald Fitzmaurice and amplified by Mr. Ago, Mr. Amado and Mr. François. On the specific question of the definition of the members of a diplomatic agent's family, he was in favour of the wise general rule laid down in the text that they are those who form part of his household. To confine the family to the spouse and minor children would create difficulties in the case of unmarried diplomatic agents for whom a female relative acted as hostess or " mistress of the house ".

34. In reply to Mr. Hsu, he said that in any particular case the question of the size of the mission could be dealt with effectively under article 7, paragraph 1.

35. Mr. GARCIA AMADOR said that, the question having been exhaustively discussed, he wished merely to state that he was in favour of retaining article 28 as it stood. A principle involved was that all members of a mission should enjoy the privileges and immunities necessary for the proper discharge of their functions.

36. Mr. MATINE-DAFTARY was also in favour of retaining the text of article 28 as drafted, after full discussion, at the Commission's previous session. The article was based on two main principles; first, diplomatic privileges and immunities belonged to the sending State and not to the members of its diplomatic mission personally; and secondly, they were necessary for the proper discharge of the mission's functions. Though the duties of the members of a mission fell into a variety of categories — purely diplomatic, consular, clerical and administrative, and technical — it was not for the receiving State to decide which of those duties could be regarded as serving the purpose of representation of the sending State.

37. Mr. ZOUREK recalled that at the preceding session it had been generally agreed that in extending to the administrative and technical staff of a mission the privileges and immunities granted to the diplomatic staff, the Commission had gone beyond the practice in existing international law. From the observations submitted by Governments, however, it was clear that a number of Governments regarded such an extension as unacceptable. Under general international law the administrative and technical staff of a mission did not enjoy the same diplomatic immunities as the diplomatic staff proper. No such extension was recognized, for example, by either the Havana Convention[2] or the Harvard draft.[2] The 1957 text should therefore be amended, and the Special Rapporteur had been well advised in dealing separately with the two categories of officials. The revised text proposed by the Special Rapporteur did not mean that the administrative and technical staff should not be given any immunity; on the contrary it provided that they would enjoy immunity in respect of acts performed in the course of their duties. Thus the minimum immunity was assured.

38. Some would go even further, but he did not think a further extension was justified merely on the grounds of the importance of the functions discharged by technical and administrative staff. After all, the service staff also performed important duties. The stipulation that administrative and technical staff should enjoy diplomatic privileges and immunities subject to reciprocity was, however, a reasonable one.

39. In its task of codifying and developing international law, the Commission could not go beyond the needs recognized by States. If States considered that the privileges and immunities granted to diplomatic agents should be extended to the administrative and technical staff of a mission, a rule to that effect would gradually be framed in the practice of States, though it could not, however, be binding on States which did not agree to the extension.

40. He could not support the view that a reciprocity clause would be of no use merely because States might refuse to apply it. States could also refuse to accept provisions of draft conventions which went beyond the framework of existing international law, and no such provision could be imposed on them against their will. He considered, therefore, that Mr. Verdross and others had made a good suggestion when they had proposed that the administrative and technical staff of a mission should enjoy diplomatic privileges and immunities in respect of all acts performed in the course of their duties, and complete diplomatic immunity on the basis of reciprocity.

41. At the Commission's preceding session, he had maintained that the circle of family members to whom the draft granted diplomatic privileges and immunities was too large. He thought that it was difficult to admit, for example, that adult children living in the household of the head of the mission should enjoy diplomatic immunities, and it was still more difficult to approve the extension of such immunities to more distant relatives.

42. The last sentence of paragraph 1 of the new text proposed by the Special Rapporteur should be deleted, because it introduced the very difficult question of dual nationality. A person might possess dual nationality, for example, through no choice of his own but merely because of a lacuna in national legislation. In such a case it was generally agreed that the nationality of the State where the person actually exercised his civil and political rights took precedence. In any case the problem was too complex to be adequately covered by a single sentence.

43. Mr. SANDSTRÖM, Special Rapporteur, said he would have no objection to withdrawing the proposal made in the last sentence of paragraph 1 of his revised text.

44. He explained that, so far as members of a diplomat's family were concerned, he had maintained the 1957 text largely because no change in the provisions in question had been proposed by Governments.

45. In reply to Mr. François' remarks concerning the treatment of the observations of Governments, he said that naturally objections concerning the substance of draft provisions should receive first attention. In addition, however, he thought the Commission should give due weight to such observations generally.

46. So far as the extension of diplomatic privileges and immunities to the administrative and technical staff of a mission was concerned, he agreed with Mr. Zourek that that was not a matter on which international law was firmly established. The Commission should go beyond the present stage of development of international law. In such cases it was advisable to see what

[2] Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty* Series, vol. CLV, 1934-1935, No. 3581.

[3] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 19-25.

was the attitude of Governments and ascertain the extent to which their observations could be taken into account. The Commission should also consider the chances of the draft's being accepted. The draft would be of little value unless it won the support of States. It was precisely in order to make the draft more generally acceptable that he had decided, although recognizing the excellence of the 1957 text, to redraft article 28 in the light of the observations of Governments. Accordingly, he maintained his proposed revised version of the article.

Paragraphs 1 and 2 of article 28 as drafted at the ninth session, subject to drafting changes, were adopted by 8 votes to 5, with 3 abstentions.

47. Mr. VERDROSS said that the question of service staff had not been discussed.

48. The CHAIRMAN observed that no proposal had been made regarding service staff.

49. Mr. ALFARO pointed out a discrepancy between the Spanish text and the English and French texts of paragraph 1. Whereas the latter referred only to members of families forming part of the household, the Spanish text added the words "*y dependan de el*" and "*y dependan de ellos*". He would be unable to accept the text unless the discrepancy was removed.

50. The CHAIRMAN said that the text would be rectified by the Drafting Committee.

51. Mr. AMADO said he was sorry the Commission had been so divided in its vote on such an important matter. While all recognized the need for extending to the administrative and technical staff of a mission the privileges and immunities referred to in the article, he thought that perhaps during the second reading of the draft, the phrase "together with the members of their families forming part of their respective households" might be deleted, as had been suggested by Mr. Bartos.

52. He also thought more consideration should have been given to the question of reciprocity of treatment, and to the question of the effect which the extension of privileges and immunities might have on the compilation of the diplomatic list, the value of which as presumptive evidence of entitlement to privileges and immunities was mentioned in paragraph (10) of the commentary.

53. Mr. ZOUREK said that he had voted against the retention of the 1957 text because in his opinion it went far beyond the scope of existing international law and because it was manifestly not acceptable to a large number of States.

54. Mr. AGO noted that many members of the Commission had cast their votes reluctantly. He agreed with Mr. Amado that while diplomatic privileges and immunities should obviously be extended to members of the administrative and technical staff of a mission, the need for extending them to their families was much less evident. Though the Commission had voted for the extension of privileges and immunities both to administrative and technical staff and to members of their families, the two classes of persons should really be kept quite distinct. The Drafting Committee should find an appropriate solution. Administrative and technical staff might perhaps more appropriately be brought within the definition of the term "diplomatic agent" given in article 22, paragraph 2, by the addition of some such phrase as "and also administrative and technical staff of a mission whose names were on the diplomatic list".

55. Sir Gerald FITZMAURICE thought the Drafting Committee might well take Mr. Ago's suggestions into account. One way of meeting the points raised by Mr. Amado might perhaps be to provide a full commentary on the paragraphs, explaining in detail why, despite the observations of certain Governments, the Commission had felt it desirable to retain the 1957 text, and the commentary might suggest modifications which might be made if Governments felt the text went too far.

56. The commentary might point out, for example, that what the Commission wished to insist upon was the extension to administrative and technical staff not only of privileges and immunities in respect of acts performed in the course of their duties but also of the general immunity from civil and criminal jurisdiction. The commentary might go on to say that it would not be inconsistent with that basic principle not to extend to administrative and technical staff certain privileges, such as some of those mentioned by Mr. Yokota. The commentary might also say that it would not be contrary to the basic principle if the situation were modified in respect of the members of their families. Those possibilities could be taken into account by Governments or by the General Assembly as a means of modifying the basic principle without seriously harming it, if there was a general feeling that it went too far. It should be made quite clear, however, that there was no intention of implying any derogation from the important principle that privileges and immunities should be extended to actual members of the administrative and technical staff.

57. Mr. HSU thought the vote should be interpreted as an expression of the Commission's desire that the 1957 draft should be adopted as a basis for discussion and not as a final text.

58. Faris Bey EL-KHOURI said he had abstained from voting because he thought the 1957 text went too far, and there was no acceptable alternative.

59. Mr. TUNKIN thought it would not be enough to deal with the matter in the commentary as suggested by Sir Gerald Fitzmaurice. Some changes were obviously desired by the great majority of the members of the Commission, and the best procedure would be to refer the text back to the Drafting Committee and discuss the changes it proposed later.

60. Mr. ALFARO thought a point of substance was involved which should not be left to the Drafting Committee, and that preferably the Commission itself should decide on the deletion of the phrase "together with the

members of their families forming part of their respective households."

61. The CHAIRMAN observed that since the paragraphs had been adopted by the Commission the text was now in the hands of the Drafting Committee.

Paragraphs 3 and 4

62. Mr. SANDSTRÖM, Special Rapporteur, introduced his revised draft paragraph 3, which was meant to replace paragraphs 3 and 4 of the 1957 text. Since it involved no change of substance, he suggested that the new text, which was based on a proposal by the Government of the Netherlands, be referred to the Drafting Committee.

63. The CHAIRMAN put to the vote paragraph 3 of article 28 of the Special Rapporteur's revised text (A/CN.4/116/Add.1), subject to drafting changes.

Paragraph 3 was adopted by 16 votes to none, with 1 abstention.

64. The CHAIRMAN put to the vote article 28, thus amended, subject to drafting changes.

Article 28, as amended, was adopted by 10 votes to 1, with 4 abstentions.

ARTICLE 29

65. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of the United States of America, the Netherlands, Belgium (A/CN.4/116) and Finland (A/CN.4/114/Add.2). He agreed with the Belgian Government that the exception relating to the child of a national of the receiving State should be deleted. He had also accepted the suggestion of the Netherlands Government that the idea of the article was brought out more clearly in the commentary than in the text itself. He had therefore proposed a wording in line with those suggestions (A/CN.4/116/Add.1).

66. Sir Gerald FITZMAURICE recalled that the article had given the Commission a good deal of difficulty at its preceding session, and he agreed that the text was capable of improvement. He would hesitate, however, to accept the redraft now proposed by the Special Rapporteur, even though it was based on the Commission's own commentary.

67. In the first place, it was very seldom that there was any question of a diplomatic agent himself acquiring the nationality of the receiving State. In most cases, it was the children of diplomatic agents born in the receiving State who might acquire the receiving State's nationality, and in relation to children the use of the phrase "against his will" was inappropriate. The article was, in fact, meant to express the principle that birth in a foreign country did not confer the nationality of that country on a diplomat's child.

68. His second objection was that, even if the acquisition of the nationality of the receiving State by a diplomatic agent himself was involved, it was not enough to use the expression "against his will". The sending State should also have some say in the matter and might well regard the acquisition of the receiving State's nationality by its diplomatic agent as undesirable, even though the diplomatic agent himself was willing to accept that nationality. The sending State could no doubt deal with such a situation by expelling the diplomatic agent from the service, but that was hardly a satisfactory solution. It would therefore be better to adhere to the principle of the 1957 text, even though the wording might be amended. The article should lay down a definite rule that persons enjoying privileges and immunities as members of a diplomatic mission should not be subject to the laws of the receiving State in respect of nationality. In other words, diplomatic immunity carried with it immunity from the nationality laws of the receiving State.

69. The CHAIRMAN referred to the discussion at the preceding session and to Mr. García Amador's proposal which had formed the basis of the article then drafted.[4]

70. Mr. TUNKIN agreed with the remarks made by Sir Gerald Fitzmaurice. There was also another point to be remembered. Article 29 of the 1957 text would require modification if the meaning of the expression "person enjoying diplomatic privileges and immunities" were changed in consequence of amendments to article 28. In other words, if the categories of persons qualifying for diplomatic privileges and immunities under article 28 were restricted by amendments to that article, it should be made clear that the provisions of article 29 applied to the children of all members of a diplomatic mission, whatever their category.

The meeting rose at 1.5 p.m.

[4] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, Vol. I), 411th meeting, para. 46.

463rd MEETING

Friday, 13 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 29 *(continued)*

1. The CHAIRMAN suggested that discussion of the article should be resumed after the Drafting Committee had considered the text.

It was so agreed.

ARTICLE 30

2. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of Cambodia, Switzerland, Luxembourg, the Netherlands, the United States of America (A/CN.4/116) and Italy (A/CN.4/114/Add.3).

3. In his revised draft of article 30 (A/CN.4/116/Add.1), paragraph 2 was new and was based on a proposal made by the Government of the Netherlands. The new paragraph dealt with the position of all members of the staff of a mission, other than diplomatic staff, who were nationals of the receiving State. Their position was also dealt with in the various paragraphs of article 28, but in that article no clear distinction was drawn between the treatment to be accorded to those who were and to those who were not nationals of the receiving State. The proposed new paragraph 2 related exclusively to those who were nationals of the receiving State. Their position had also been dealt with in paragraph (5) of the commentary to article 30 of the text drafted at the ninth session (A/3623, para.16). He suggested that the article be referred to the Drafting Committee.

4. With reference to the addition proposed by the Italian Government of the words " and any other privilege or immunity which is strictly related to the exercise of his functions ", he wondered if Mr. Ago might explain the implications of the Italian Government's proposal.

5. Mr. AGO thought the purpose of the addition was to fill a lacuna in the 1957 text. Immunity from jurisdiction alone was not enough to ensure the unimpeded performance of a diplomatic agent's duties, and provision should be made for the granting of other privileges and immunities which were undispensable for this purpose even when the diplomatic agents were nationals of the receiving State.

6. Mr. SANDSTRÖM, Special Rapporteur, said he would have no objection to the insertion of the addition proposed by the Italian Government.

7. Mr. YOKOTA said that in principle he was in favour of the Italian Government's proposal.

8. He drew attention to a serious lacuna in the 1957 text affecting the position of the administrative and technical staff of a mission. Article 28, paragraph 2, provided that members of the service staff of the mission should enjoy immunity in respect of acts performed in the course of their duties. That provision presumably applied to all members of the service staff, whether they were nationals of the receiving State or not. Paragraph 1 of the same article, however, provided that the administrative and technical staff of a mission should enjoy privileges and immunities only if they were not nationals of the receiving State. Nothing was said about the position of members of the administrative and technical staff who were nationals of the receiving State.

9. The CHAIRMAN pointed out that their position was dealt with in the Special Rapporteur's proposed new article 30, paragraph 2.

10. Mr. YOKOTA agreed, but said that that paragraph placed them on the same footing as the service staff and private servants of the head of a mission or a member of the mission. That was unjust, since administrative and technical staff had at least the same status as service staff and definitely a higher status than private servants. He thought the draft should expressly provide that members of the administrative and technical staff of a mission who were nationals of the receiving State should enjoy privileges and immunities in respect of acts performed in the exercise of their duties.

11. Mr. TUNKIN said that Mr. Yokota seemed to have overlooked the fact that article 30 dealt with nationals of the receiving State ; he personally did not see why, for example, a national of the receiving State, who was employed as driver by the head of a foreign mission and who had caused a fatal accident while driving the ambassador, should be immune from jurisdiction. Some members of the Commission were even hesitant to agree to provisions extending privileges and immunities to diplomatic agents who were nationals of the receiving State. Thus, the Italian Government's proposal broadened the scope of a provision which as it stood was felt by many to be too wide. Moreover, the expression " which is strictly related " was not satisfactory, for it might have wider implications than the language used in the 1957 text.

12. Mr. SANDSTRÖM, Special Rapporteur, said it was because the Italian Government's proposal went somewhat beyond the terms of the 1957 text of article 30 that he was inclined to give it his approval. The immunity from jurisdiction provided for in article 30 as drafted in 1957 might not in itself be enough to ensure the inviolability which a diplomatic agent required. The addition proposed by the Italian Government made good that defect of the 1957 text.

13. Mr. ZOUREK explained that the addition proposed by the Italian Government would also cover such matters as the right to use cipher and to fly a flag. If the receiving State authorized one of its nationals to be appointed to the staff of a foreign mission, it would be requested to grant him the privileges and immunities which he needed in the exercise of his functions. The irregular situation arising therefrom could only be avoided by abandoning completely the practice of appointing nationals of the receiving State as diplomatic agents of the sending State.

14. Mr. YOKOTA, replying to Mr. Tunkin, said it had not been the Commission's intention at its preceding session to accord full privileges and immunities to members of the service staff of a mission in respect of the acts performed in the exercise of their functions. Under article 30 as then drafted, even diplomatic agents who were nationals of the receiving State would be granted privileges and immunities only in respct of official acts performed in the exercise of their functions. Consequently, to make similar provision for service staff

would be going too far. The first sentence of article 28, paragraph 2, however, might be interpreted as granting such privileges and immunities to service staff who were nationals of the receiving State. If that sentence related only to service staff who were not nationals of a receiving State the text required amendment so as to make the position quite clear.

15. Mr. AGO pointed out that he was not at all in favour of the appointment of officials of the receiving State as diplomatic agents, but if the receiving State allowed such appointments it should be prepared to grant such agents privileges and immunities necessary for the performance of their functions.

16. Mr. SANDSTRÖM, Special Rapporteur, said he realized the force of Mr. Yokota's objection to the new paragraph 2. He suggested that the paragraph should be considered by the Drafting Committee in conjunction with article 28.

17. Mr. VERDROSS recalled that in considering article 23 the Commission had decided not to take any decision on the question whether inviolability of residence and property should be extended to the private residence of a diplomatic agent who was a national of the receiving State until it came to the discussion of article 30 (459th meeting, paras. 20 and 23). He wondered what recommendation the Special Rapporteur had to make on that point.

18. He thought that the idea intended to be conveyed by the Italian Government's proposal might be more appropriately expressed in a negative from, e.g., " A diplomatic agent who is a national of the receiving State shall not enjoy immunity from jurisdiction in respect of acts performed in his private capacity." The implication would be that the person in question might enjoy all other privileges and immunities usually granted to diplomatic agents.

19. Mr. SANDSTRÖM, Special Rapporteur, said he thought Mr. Verdross' point about the private residence of a diplomatic agent who was a national of the receiving State was adequately covered by the addition proposed by the Italian Government.

20. Sir Gerald FITZMAURICE agreed with Mr. Ago's interpretation and supported the Italian Government's proposal. A receiving State was not bound to consent to the appointment of its own nationals either as diplomatic agents acting for other States or as members of the administrative and technical staff of a foreign mission, but if it did so, or at any rate if it consented to the appointment of its own nationals as diplomatic agents, it should extend to them all the privileges and immunities necessary for the exercise of their functions. That was the purpose of the existing text of article 30, but the Italian Government was right in saying that that text did not go far enough.

21. Mr. TUNKIN supported the views expressed by Mr. Yokota in relation to article 28, paragraph 2. In all probability the first sentence of that paragraph was intended to apply only to service staff who were not nationals of the receiving State, but it could also be taken to apply to those who were. The Drafting Committee should make the necessary changes.

22. He was still not clear as to the exact meaning of the first sentence of the text proposed by the Italian Government, particularly the phrase " any other privilege or immunity which is strictly related to ". He preferred the 1957 text of article 30, which was quite unambiguous. It did not imply that in every case the privileges and immunities would apply only to official acts performed in the exercise of the diplomatic agent's functions, for the second sentence recognized the right of the receiving State to grant full privileges and immunities. That was a matter, however, which should be left to the discretion of the receiving State.

23. Mr. BARTOS said he opposed the appointment of nationals of the receiving State as diplomatic agents of another State ; but if the receiving State countenanced such appointments it should grant all the necessary privileges and immunities, for it was the immunity of the sending State itself which was involved and which must be respected. He agreed with Mr. Verdross that the privileges and immunities in question should include the inviolability of the diplomatic agent's private residence, for otherwise the diplomatic agent would be exposed to the risk of search. In the case of such diplomatic agents, their status as nationals of the receiving State was subsidiary to their status as diplomatic agents of the foreign State concerned.

24. Mr. SCELLE agreed with Mr. Bartos. In order to secure the diplomatic agent's freedom to express his views without fear of reprisal, the immunity from jurisdiction should subsist after the expiry of the diplomatic agent's employment in respect of acts performed in the exercise of his functions.

25. Mr. FRANÇOIS agreed with Mr. Tunkin's criticism of the expression " privilege or immunity which is strictly related to the exercise of his functions " in the Italian Government's proposal.

26. He also was of the view that, if the Government of the receiving State acquiesced in the appointment of one of its nationals as diplomatic agent of another State, it should grant all the necessary privileges and immunities.

27. Mr. MATINE-DAFTARY shared that opinion, though at the Commission's preceding session he had voted against the idea that nationals of the receiving State could be appointed diplomatic agents of another State and would do so again should another vote be taken. But since the majority of the Commission had endorsed that practice, these diplomatic agents who were nationals of the receiving State would have to be granted the privileges and immunities necessary for the efficient exercise of their official functions.

28. Mr. AMADO said that he found repugnant the idea of nationals of a receiving State acting as diplomatic agents for another State. There were exceptional cases in which persons did so act, but they were notable because they were exceptional. He would prefer the

whole article to be deleted, and made a proposal to that effect.

29. Mr. SCELLE said that if a national of the receiving State who was appointed diplomatic agent of a foreign State qualified for any privileges and immunities he should qualify for all. But the whole idea of the possible appointment of a national of the receiving State as representative of another State was objectionable and consequently he agreed with Mr. Amado that preferably the article should be omitted.

30. Mr. AGO considered that Mr. Scelle went too far in saying that if diplomatic agents who were nationals of the receiving State qualified for any privileges and immunities they should qualify for all ; obviously they should not in every case be granted exemption from customs duties and similar privileges, nor immunity from jurisdiction his respect of acts done in their private capacity.

31. On the other hand, the problem was a real one, and the Commission obviously should take cognizance of it. Frequently certain States and especially small States employed nationals of the receiving State as diplomatic agents because they had no alternative. The terms of the Italian Government's proposal were perhaps vague, but the idea behind it was sound, and it was desirable that the Commission should find a formulation that better met the situation. Such diplomatic agents should clearly enjoy only those privileges and immunities which were strictly necessary for their functions, but they should enjoy all of these.

32. Replying to a point raised by Mr. Scelle, he said that by " privileges and immunities necessary for their functions " he meant to include immunity from criminal jurisdiction after the expiry of their term as diplomatic agents.

33. Sir Gerald FITZMAURICE said he could not share Mr. Amado's antipathy for the idea of nationals of one State acting as diplomatic agents for another. In fairness to the respectable and even eminent men who had acted as such, the Commission should recognize that they had often rendered service not only to the sending State but also to the receiving State in the inception and maintenance of satisfactory diplomatic relations. Such men had usually been appointed with the full approval of the receiving State. Especially in the case of a young State beginning its career of independence the practice was very useful.

34. If the article was accepted, as he thought it should be, the diplomatic agent who was a national of the receiving State should enjoy the privileges and immunities necessary for the exercise of his functions. Article 30 merely granted him immunity from jurisdiction, and did not therefore go far enough. He should be given other privileges and immunities, but not the full range of privileges and immunities granted to a diplomatic agent who was not a national of the receiving State.

35. Mr. ALFARO pointed out that, while it was rare for the head of a mission to be a national of the receiving State, it was by no means rare in the case of the subordinate staff. He agreed therefore that there should be an article dealing with the problem. As Sir Gerald Fitzmaurice had said, article 30 did not go far enough ; diplomatic agents who were nationals of the receiving State should have all the privileges and immunities required for the efficient functioning of the mission.

36. Mr. HSU thought that it was too extreme a view to hold that nationals of the receiving State should never be diplomatic agents for another country ; it implied that States were at all times enemies of each other. Much loyal work had been done by agents of the receiving State's nationality. An article should therefore be inserted to deal with the problem raised by the existence of such agents. On the other hand, the terms of the Italian Government's proposal were vague. In his opinion it should be examined by the Drafting Committee.

37. Faris Bey EL-KHOURI said the last sentence of article 30 as drafted in 1957 appeared to allow the receiving State to limit the extent to which its nationals who acted as diplomatic agents for other countries would be entitled to privileges and immunities. That provision would not only enable the receiving State to establish discriminatory rules, but would destroy the uniformity and usefulness of the Commission's draft. In his view the last sentence should be deleted.

38. Mr. TUNKIN agreed with Mr. Scelle and Mr. Amado that article 30 should be deleted *in toto* ; cases of diplomatic agents who were nationals of the receiving State were so rare that no article concerning them should be inserted in a draft intended to be applicable generally.

39. If, however, the majority of the members of the Commission considered that an article to deal with so specific a situation was necessary, then he thought the Italian Government's proposal, as interpreted by Mr. Ago, went too far. Moreover, it was a possible source of difficulties. How, for example, would one define the privileges and immunities necessary for the exercise of a diplomatic agent's functions ? If any privileges and immunities were to be granted in the circumstances contemplated by article 30, they should be specified in precise language.

40. Mr. SANDSTRÖM, Special Rapporteur, said that the problem was a purely practical one, and an article to deal with the situation was required. Admittedly there was an element of vagueness in the Italian Government's proposal, but if the privileges and immunities to be granted to diplomatic agents who were nationals of the receiving state were specified, those persons would be given an exceptional status. It was strictly their personal inviolability which needed protection, and for the reasons he had stated he adhered to his view that the Italian Government's proposal was satisfactory.

41. Mr. AGO pointed out that the effect of the article was actually restrictive ; for if there were no article

to make a distinction, a diplomatic agent who was a national of the receiving State would be treated exactly as any other diplomatic agent and would consequently enjoy too extended privileges and immunities; for example, he could not be prosecuted for acts done in his private capacity. Accordingly, the position of diplomatic agents who were nationals of the receiving State should be regulated in a special article.

42. He had no particular preference for any formulation. Clearly a diplomatic agent who was a national of the receiving State could not have full privileges and immunities. He could enjoy all those and only those which were readly necessary to him in the exercise of his functions.

43. Mr. BARTOS said that in principle he was opposed to the employment of diplomatic agents who were nationals of the receiving State. If they were used, they could be granted the full range of privileges and immunities; or they could be excluded from certain specified privileges and immunities. It would raise great difficulties if the receiving State were competent to decide what privileges and immunities were to be granted to such an agent in respect of official acts performed in the exercise of his functions. The Commission should endeavour to avoid differences between the sending State and the receiving State, and for that reason he would support the grant of full privileges and immunities to diplomatic agents who were nationals of the receiving State during their term of office and thereafter in respect of acts performed in the course of their official duties.

44. Mr. SCELLE reiterated his opposition to the article. Unless some provision was added safeguarding the immunity from jurisdiction of the diplomatic agent both during and after his term of office the article would be open to serious objections.

45. Mr. ZOUREK recalled that at the ninth session he had opposed the use of nationals of the receiving State as diplomatic agents of a foreign State because of the conflict which would obviously arise between the duty of such a diplomatic agent to his own State and his duty to the sending State. He felt that the Commission should first decide if it wished to maintain the article, and, if so, should then consider its terms. The positive and negative versions proposed would be either insufficiently clear or else too far-reaching. Article 30 should specify what privileges and immunities should be accorded to a diplomatic agent who was a national of the receiving State. To say simply that such an agent would not enjoy privileges and immunities in respect of acts done in his private capacity would be to go beyond existing measures. It would mean that he would enjoy all diplomatic privileges and immunities in respect of acts done in his capacity as diplomatic official. If there was to be an article, it should be clear, not open to misinterpretation.

46. With regard to Mr. Scelle's argument concerning immunity from jurisdiction after the expiry of the diplomatic agent's term of office, he thought the question would be covered by article 31, paragraph 2. Alternatively, it could be dealt with either in the body of article 30 or in the commentary.

47. Mr. MATINE-DAFTARY said that he was opposed to the head of a mission being a national of the receiving State, but in the case of the subordinate staff he had no such objections. In all, or at least in many, missions the help of the nationals of the receiving State in subordinate capacities was a necessity and, indeed, contributed to good relations between States. He felt, therefore, that there should be an article dealing with the status of such persons.

48. Mr. AGO proposed the following text:

> "A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction only in respect of official acts performed in the exercise of his functions. Exemption from taxation and customs duties and inspection shall be granted to him only within the limits allowed by the receiving State."

49. The CHAIRMAN put to the vote the proposal that no article concerning diplomatic agents who were nationals of the receiving State should be included in the draft.

The proposal was rejected by 9 votes to 5, with 3 abstentions.

The text proposed by Mr. Ago was adopted by 9 votes to 2, with 4 abstentions, subject to drafting changes.

50. Mr. SCELLE said that he had voted against Mr. Ago's proposal because it was as ambiguous as the original draft article and left the receiving State the same opportunities for interference. For example, the receiving State would still have power to violate the secrecy of a diplomatic bag addressed to a head of mission who was a national of that State.

51. Faris Bey EL-KHOURI said that he had voted for Mr. Ago's proposal on the understanding that the Drafting Committee would so frame the final text that it would leave no freedom to the receiving State to enact regulations which departed from existing international law or to discriminate as between persons or mission.

52. Mr. ZOUREK said that he had voted against Mr. Ago's proposal because it still went too far, implying, for instance, that the private residence of a diplomatic agent who was a national of the receiving State must be inviolable. Such a provision was not strictly necessary, since all confidential material could be kept on the premises of the mission. He thought the provision would be unacceptable to many States. He reserved his final opinion until he had seen the text produced by the Drafting Committee.

53. Mr. AMADO, recalling Mr. Scelle's statement on the article, said that to prevent reprisals being taken against such a diplomatic agent by his State of nationality after he ceased to be a member of a foreign

mission it would be advisable to add to the text just adopted the last sentence of article 31, paragraph 2, as follows: " With respect to acts performed by him in the exercise of his functions as a member of the mission, immunity shall continue to subsist " (when his functions have come to an end).

54. Sir Gerald FITZMAURICE thought Mr. Scelle was mistaken in suggesting that the text just adopted would leave the receiving State the power to seize or interfere with a diplomatic bag addressed to a head of mission who was a national of that State. The inviolability of the diplomatic bag was a prerogative of the sending State, coming under sub-section B of the draft, and not a personal privilege, within the meaning of sub-section C of the draft, of the diplomatic agent to whom it was addressed.

55. Mr. SCELLE conceded Sir Gerald Fitzmaurice's point.

56. Mr. SANDSTRÖM, Special Rapporteur, said that his proposed new paragraph 2 (A/CN.4/116/Add.1) should be referred to the Drafting Committee and brought into line with the provisions of article 28.

Paragraph 2 of article 30 as proposed by the Special Rapporteur was adopted by 10 votes to none, with 7 abstentions, subject to drafting changes.

Article 30 as a whole, as amended, was adopted by 10 votes to none, with 7 abstentions.

ARTICLE 31

57. Mr. SANDSTRÖM, Special Rapporteur, said that he proposed the adoption of paragraph 1 of article 31 as drafted at the ninth session. He wished to withdraw the tentative proposal he had made (A/CN.4/116/Add.1), in response to an observation of the United States Government (A/CN.4/114), for the reason that the Commission had rejected — in connexion with article 4 — the idea that the formality of *agrément* was required for all diplomatic agents. For the same reason he did not recommend the adoption of the Italian Government's proposal (A/CN.4/114/Add.3).

58. In paragraph 2 he had drafted an amendment to make it clear that exemption from customs duty, unlike other privileges and immunities, should cease as from the time when the functions of a person enjoying privileges and immunities came to an end. But he had reached the conclusion that the amendment was unnecessary and accordingly wished to withdraw it.

59. As far as paragraph 3 was concerned, he proposed an additional sentence (A/CN.4/116/Add.1), in response to an observation of the Government of Luxembourg on sub-paragraph (*c*) of article 26 (A/CN.4/114).

60. Sir Gerald FITZMAURICE said that he found it difficult to agree with the proposed amendment to paragraph 2. As far as export duties were concerned, he considered that a diplomatic agent should be allowed a reasonable time from the termination of his appointment in which to pack and export his personal effects free of duty. Even in the case of import duties, he doubted whether it was right that exemption should cease abruptly as soon as the agent's appointment came to an end. He thought that at least duty-free admission should be accorded to any goods ordered by the diplomatic agent before the termination of his appointment, if they arrived in the receiving State between that date and the time of his departure.

61. Mr. TUNKIN said that he had been about to raise similar objections.

62. The CHAIRMAN put to the vote successively paragraphs 1 and 2 of article 31 as drafted at the ninth session.

Paragraph 1 was adopted unanimously.

Paragraph 2 was adopted unanimously.

63. The CHAIRMAN put to the vote paragraph 3 of article 31 as drafted at the ninth session, subject to the addendum proposed by the Special Rapporteur (A/CN.4/Add.1).

Paragraph 3, as amended, was adopted by 16 votes to none, with 1 abstention.

Article 31 as a whole, as amended, was adopted unanimously.

ARTICLE 32

64. Mr. SANDSTRÖM, Special Rapporteur, observed that, partly in response to an observation of the United States Government (A/CN.4/114), he proposed (A/CN.4/116/Add.1) an addendum to paragraph 1 of article 32 which would make it apply to members of missions other than diplomatic agents and to members of families enjoying privileges and immunities. He also proposed prefacing paragraph 2 by a text proposed by the Netherlands Government (A/CN.4/114/Add.1) to safeguard freedom of communication through third States.

65. Mr. ALFARO pointed out for the benefit of the Drafting Committee that the words " or return " at the end of paragraph 1 were superfluous, since the term " transit " applied equally to the outward and to the return journey.

66. Mr. YOKOTA observed that the addendum to paragraph 1 proposed by the Special Rapporteur appeared to conflict with article 28, paragraph 2, in that it would make members of the service staff of missions eligible to the same privileges and immunities as were enjoyed by a diplomatic agent passing through a third State, including the right of inviolability, which they were not recognized as possessing even in the receiving State. Some change in the drafting of the proposal was required.

67. Mr. SANDSTRÖM, Special Rapporteur, agreed that it would be excessive to accord inviolability to service staff passing through a third State. The words " some other member " in his proposed addendum might be changed to read " a member of the administrative or technical staff ".

68. Sir Gerald FITZMAURICE suggested that it would be simpler to retain the addendum as it stood but to revise the last part of paragraph 1 to read: " the third State shall accord him . . . such immunities as may be required to ensure his transit."

69. Mr. TUNKIN was under the impression that, even after long discussion in the Commission and in the Drafting Committee, the Commission had not regarded the text ultimately adopted at the previous session as entirely satisfactory. He himself was in two minds as to whether a provision limiting immunities to " such immunities as may be required " to ensure the diplomatic agent's transit was not rather too narrow.

70. Mr. Yokota's remark on the illogicality of according service personnel passing through third States greater privileges than they enjoyed in the receiving State was perfectly justified. But that was only one point; the main question was whether it was necessary to require third States to accord, even with certain qualifications, the same degree of immunity to non-diplomatic as to the diplomatic staff of a mission. Such a provision would be going far beyond existing practice. What, after all, was the foundation for according immunities to diplomatic agents in third States? Since they performed no functions there, the concept of functional necessity applied only in so far as it was obviously essential for a diplomatic agent to be allowed to reach the country in which he was to take up his post. The main consideration appeared to be the respect due from third States to the State he was to represent. And that consideration did not really apply to the non-diplomatic staff of a mission.

71. Mr. SANDSTRÖM, Special Rapporteur, said that as far as other members of the mission were concerned, his addendum had been motivated by the consideration that it was necessary, or at least desirable, for diplomatic missions to have administrative, technical, and even service staff of their own nationality, if they so wished. He was willing to delete the word " inviolability ".

72. Mr. TUNKIN pointed out that under existing practice, the subordinate staff of missions enjoyed no immunity in third States, but nonetheless passed through them without any difficulty.

73. Mr. ALFARO remarked that, apart from inviolability, which it was proposed not to mention in the article, there might be other privileges required to ensure transit. He therefore suggested amending the end of paragraph 1 to read " such immunities and privileges as may be required to ensure his transit ".

74. Mr. VERDROSS proposed that paragraph 1 should be left as it stood, with the reference to inviolability, and that a paragraph should be interpolated stating that third States should accord to the subordinate staff of missions free transit through their territories.

75. Mr. ZOUREK thought that it would be necessary to include a reference to the members of the family of a diplomatic agent in paragraph 1. The solution proposed by Mr. Verdross concerning non-diplomatic staff might be quite acceptable if the wording adopted was in accordance with the provisions of paragraph 1. He suggested that the text should provide that third States should accord " the necessary facilities " to other members of the mission if they passed through the territories of the third States or if they found themselves in the situation referred to in paragraph 1.

76. Sir Gerald FITZMAURICE said that Mr. Verdross' proposal impinged on a problem with which the Commission, as could be seen from paragraph 2 of the commentary on article 32, had deliberately refrained from dealing at its previous session. The question of the obligation to grant passage, which the Commission did not go into, was quite distinct from that of the obligation to accord certain immunities once that passage was granted. He would accordingly prefer not to use the exact form of words advocated by Mr. Verdross.

77. He thought that the proposal to include the families of members of missions on the same footing as the members of the missions themselves might be going too far. All members of the staff of a mission were presumably sent to their duty station because they were necessary for its proper functioning, and, on that ground, it was difficult to draw much distinction between the diplomatic and the non-diplomatic members of a mission. But, whereas it was desirable for third States, in the interests of the general process of diplomatic representation, to apply the same principles with respect to immunities to all working members of the staff of a mission, the need for them to do so in the case of the members' families might not be so apparent, since the immediate presence of the latter might not always be directly necessary for the functioning of the mission.

78. Mr. TUNKIN agreed with Sir Gerald Fitzmaurice on the undesirability of referring to freedom of transit in the article. He disagreed, however, with his implication that acceptance of the concept of functional necessity meant that every member participating in some way or other in the work of a mission was on the same level with regard to privileges and immunities. There was a very real difference between the function of diplomatic staff, which was a function of the State, and the function of, say, a chauffeur.

79. The families of diplomatic agents, on the other hand, should be granted the same immunities as the agent himself. If a diplomatic agent were travelling with his wife through a third State, it might greatly impede his transit if she were not accorded the same facilities.

80. Mr. LIANG, Secretary to the Commission, said that, while he agreed that inviolability should not be enjoyed by the administrative, technical or service staff of a mission, he thought it might be unwise to delete the term " inviolability " from paragraph 1 altogether. The question whether inviolability and immunity were synonymous was admittedly a matter of definition, but since the Commission had defined inviolability in article 22, he wondered whether the concept could now be regarded as included in that of " immunities ".

Though it was a controversial question whether third States were under the same obligations in the matter as the receiving State, he thought that it was the practice that diplomatic agents should at least enjoy freedom from arrest or detention when passing through third States. This freedom was included in the concept of inviolability as found in article 22.

81. Mr. SANDSTRÖM, Special Rapporteur, remarked that, in view of the provisions adopted in article 28, it would be inconsistent not to require third States to accord the same treatment to all members of the staff of missions who enjoyed full privileges and immunities. He quite agreed, on the other hand, that service staff were in a different category.

82. Mr. YOKOTA was in favour of retaining the reference to inviolability in paragraph 1 and of adding a text on the lines of that suggested by Mr. Zourek as a new sentence or paragraph.

83. Mr. ZOUREK pointed out that any such addendum would have to be closely modelled on the wording of paragraph 1, making it clear, in order to avoid raising the question of freedom of transit, that the facilities were to be accorded only in the specific circumstances outlined.

84. Sir Gerald FITZMAURICE suggested that, since the terms of article 32 had to correspond to those of article 28, it would be advisable to await the Drafting Committee's text for article 28 before taking any decision on the other article.

The meeting rose at 1.10 p.m.

464th MEETING

Monday, 16 June 1958, at 3 p.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 32 *(continued)*

1. The CHAIRMAN, after recalling the discussion on article 32 at the previous meeting, put to the vote the proposal to retain, subject to drafting changes, paragraph 1 of article 32 as adopted at the ninth session (A/3623, para. 16), and to extend the scope of the paragraph to cover members of families of diplomatic agents as well.

Paragraph 1 as amended was adopted unanimously.

2. The CHAIRMAN put to the vote the proposal that the Drafting Committee be requested to insert a new paragraph 2 stating that, in circumstances similar to those described in paragraph 1, third States should accord to members of the administrative, technical or service staff of missions the facilities required to ensure their transit.

The proposal was adopted by 11 votes to none, with 2 abstentions.

3. The CHAIRMAN put to the vote, as a new paragraph 3, paragraph 2 as adopted at the ninth session, prefaced by the addendum proposed by the Special Rapporteur (A/CN.4/116/Add.1).

The new paragraph 3 was adopted by 13 votes to none, with 1 abstention.

Article 32 as a whole, as amended, was adopted by 13 votes to none, with 2 abstentions.

Planning of future work of the Commission (A/CN.4/L.76)

[Agenda item 8]

4. Mr. ZOUREK, introducing his comments and proposals on the planning of the future work of the Commission (A/CN.4/L.76), said that his decision to submit the paper sprang directly from his participation, as Chairman of the Commission, in the debates, at the twelfth session of the General Assembly, on the Commission's report of its ninth session (A/3623).[1]

5. It would be recalled that the Commission had studied at its ninth session the problem set by the increase in its size and the question of ways and means of speeding up its work, and had included in its report on that session several paragraphs outlining the various considerations involved (A/3623, paras. 26 to 29).

6. From paragraphs 2 to 8 and 10 to 18 of his paper, it would be seen that the Sixth Committee had debated the working methods of the Commission at the eleventh and twelfth sessions of the General Assembly. On the latter occasion, a number of delegations had expressed, in one form or another, the desire that the methods of work of the Commission be improved. Four delegations had supported the suggestion of the representative of Sweden that in future the Commission should divide itself into two or even more sub-commissions working independently or along parallel lines on different topics. Two delegations, while approving that suggestion in principle, feared that it might have disadvantages, for example, a loss of unity of views. Several delegations, including those of Belgium and the Soviet Union, had opposed the Swedish suggestion, considering that the Commission should not press on too fast with the work of codification, which by its very nature required a considerable amount of time. However, the great majority of delegations seemed to agree that the Commission should be left to organize its work according to its needs and experience. He himself, in his reply as Chairman of the Commission, had

[1] See *Official Records of the General Assembly, Twelfth Session, Sixth Committee,* 509th to 513th meetings.

expressed the same view, and had undertaken to convey the views of the Assembly to the Commission.[2]

7. His paper was not only a fulfilment of that promise but was also inspired by his sense of the importance of reorganizing the Commission's method of work to ensure satisfactory progress. Some idea of the importance of the question could be obtained from the state of certain of the Commission's topics. On the law of treaties, which had been on the Commission's programme since the first session, no definite decisions, apart from the adoption of a few provisional articles, had been taken, or seemed likely to be taken at the current session, despite the production of three thorough and well-documented reports by the Special Rapporteur. Again the Commission's study of the immense subject of State responsibility — begun in 1955 following a decision taken by the General Assembly in 1954 — had not progressed beyond the stage of a preliminary general discussion and was also unlikely to make further headway at the current session. And the topic of consular intercourse and immunities, on which he had submitted a report and draft articles in 1957, had not as yet been seriously discussed, although several delegations to the General Assembly had expressed the wish that the draft be studied in the closest possible conjunction with the draft on diplomatic privileges and immunities. He realized, of course, that much of the slowness of the procedure was inherent in the nature of the Commission's work which called for a great deal of preparation, and considerable work on the part of the Special Rapporteur, the secretariat and all members of the Commission ; in addition, the Commission had to submit provisional drafts to Governments and to re-examine them in the light of their observations.

8. The considerable increase in its membership made it not only desirable but positively necessary that the Commission adopt a new method of work. The Commission had in fact quite a problem to solve : it had been asked to speed up its work, but, unless it changed its methods, the increase in membership must necessarily slow up its work. In his paper he drew attention (paras. 22-23) to three possible ways of expediting the work of the Commission and to the reasons for which they were unacceptable to the Commission or to most of its members.

9. In paragraph 22, sub-paragraph (*c*) and paragraphs 24 to 26 of his paper he outlined his own suggestion and set forth supporting arguments. It could be summarized as follows: any draft prepared by a Special Rapporteur should be the subject of a general discussion in plenary meeting, followed by a review of the articles of the draft and the amendments submitted by members, without any votes being taken at that stage unless absolutely necessary. After preliminary discussion, the draft would be referred to a sub-commission of not more than ten members, comprising the Special Rapporteur, representatives of all the world's principal legal systems, and those members most interested in the particular subject. The sub-commission, whose meetings would be conducted in the same way as plenary meetings, with simultaneous interpretation and summary records, would discuss fully the Special Rapporteur's proposals and the amendments thereto and prepare draft articles which would then be submitted to the full Commission for possible discussion and adoption. However, the Commission could also reserve a particularly important or urgent draft for discussion in plenary meeting only.

10. Such a procedure, while increasing the output of the Commission, would place no extra burden on the members of the Commission, since one sub-commission would meet in the morning and one in the afternoon at times when the full Commission was not sitting. The suggestion should also have the advantage of enabling the Commission to submit one draft regularly to the General Assembly every year, instead of no draft at all or two drafts at once as was sometimes the case. The regular submission of drafts was a very important consideration, for the Commission's draft was often the major item on the Sixth Committee's agenda.

11. A further suggestion was that drafts should be reviewed afresh in the light of observations of Governments not at the session immediately following their adoption but at the subsequent one. Such a procedure would give all concerned — Governments, the Special Rapporteur, the secretariat and the members of the Commission themselves — more time in which to play their respective parts in the process. Under the existing procedure, Governments were hardly in a position to begin to study drafts submitted to them until September, when the General Assembly began. Since the draft came up for reconsideration in the following April, there were only seven months in which to complete the whole process of study and transmission of comments by Governments, translation of the comments, study of the replies and preparation of his conclusions by the Special Rapporteur, translation and distribution of his memorandum and study of his memorandum by the individual members of the Commission. As a result, the number of replies from Governments was relatively small, and many were received so late that they could not be considered either by the Special Rapporteur or by the Commission during the session when the draft articles were examined in the light of the comments by Governments. Though his second suggestion would at first slightly retard the Commission's work, that disadvantage was of a fleeting nature and would be far outweighed by the fact that the Special Rapporteur would be able to take all replies of Governments into account, that the Secretariat would have more time in which to translate the documents and prepare any necessary studies, and that the members of the Commission would have time in which to formulate new proposals.

12. Mr. FRANÇOIS said that he could agree with most of the considerations put forward by Mr. Zourek and in particular with his statement that it would be impossible to have meetings of the full Commission twice a day. He had some doubts, however, concerning the advisability of the Commission's splitting up into two

[2] *Ibid.*, 513th meeting, paras. 36-38.

sub-commissions. When the Commission had consisted of only fifteen members, it was thought that it did not adequately represent the principal legal system of the world. Yet it was now argued that adequate representation of those systems could be obtained with a sub-commission of ten members. In that case, it was difficult to see why the membership of the Commission had been increased to twenty-one. As the sub-commissions — and on that point he fully agreed with Mr. Zourek — would have to be provided with full conference services, including simultaneous interpretation and summary records, and could meet only when those services were available, he failed to see how the proposed new system would really result in much saving of time or money. It would admittedly be useful and time-saving if questions of detail relating to matters already discussed by the Commission could be referred to a subsidiary body. But such a procedure was already being followed at the current session. Unlike the drafting committees of the United Nations Conference on the Law of the Sea, which had confined themselves strictly to questions of form, the Commission's Drafting Committee frequently had to consider points of substance as well. Thus, the existing Drafting Committee appeared to correspond already to what Mr. Zourek had in mind and there seemed to be no need to experiment with innovations. It would, however, be necessary to provide, in some cases, for simultaneous interpretation in these sub-committees.

13. He was not entirely convinced that an increase in the length of the Commission's sessions was entirely out of the question. After all, half the membership of the Commission had managed to attend both the Conference on the Law of the Sea and the current session, involving a total absence of five months from their other occupations.

14. One way of advancing more rapidly would be for the Commission to confine itself to limited subjects (e.g., diplomatic and consular privileges and immunities, and sections of the law of the sea) and not to broach such vast and almost inexhaustible subjects as the law of treaties or State responsibility, which could not be properly dealt with except by a virtually full-time body.

15. With Mr. Zourek's suggestion that there should be a longer interval between the first and second reading of the various drafts he was in entire agreement, as also with the considerations that Mr. Zourek had advanced in support of the suggestion. In particular it would relieve special rapporteurs of the need to study in detail, in the full meeting, all the observations of Governments — an unsatisfactory procedure which the Commission had been forced to adopt at the current session.

16. In short, he said he was not in favour of any drastic change in the methods of work of the Commission, which, to judge from the praise bestowed on it at the United Nations Conference on the Law of the Sea, had not been unsatisfactory. Undue weight should not be attached to the critical observations of the United Nations bodies concerned with administrative and budgetary matters which did not take account of the special character of the work of the Commission.

17. Sir Gerald FITZMAURICE said that his views were similar to those expressed by Mr. François.

18. Some of the observations made in the Sixth Committee at the eleventh session of the General Assembly might have created the impression that the Commission was working extraordinarily slowly and producing practically nothing. That was a mistaken impression. Mr. Zourek had suggested that the method he proposed would enable the Commission to produce one complete piece of work every session. The fact was, however, that the Commission's completed works on the rights and duties of States, the definition of aggression, reservations to treaties, codification of the Nürnberg principles, the draft code of offences against humanity, statelessness, the law of the sea, arbitral procedure, diplomatic immunities, and ways and means of making international law more generally known, represented an average of more than one completed work per session.

19. Much of the demand for speeding up the Commission's work had been based on a misconception. The impression that the Commission was not working fast enough was, he thought, partly due to the fact that the General Assembly itself was not always alble to take action on the drafts which the Commission produced. Even if the Commission did produce more work it was questionable whether Governments and the General Assembly would be able to keep pace.

20. The Commission's critics presumably had the idea that the Commission should provide texts which could be submitted to international conferences. The time available, however, imposed a limit on the number of such conferences which could be held, and the organization of international conferences to deal with any marked increase of output by the Commission would be a difficult matter.

21. Furthermore, the Commission could have made much quicker progress with its regular work on the subjects it had listed for codification at its first session if the General Assembly had not from time to time asked the Commission to report, in some cases to the Assembly's next session, on special problems. This was not intended as a criticism, but it was a fact. Mr. Zourek had mentioned, as examples of topics on which the Commission's progress was slow, the study of treaties and of State responsibility. It was particularly such time-consuming studies, however, which had had to be interrupted in order that the Commission could carry out the special tasks referred to it from time to time by the General Assembly.

22. It should not be thought that the Commission's work was necessarily wasted if a complete draft was not produced. The reports of the special rapporteurs, for example, were useful in themselves, and the Commission's discussions, even if, in a given session and on a given topic, they could only be short ones, were of great value.

23. International lawyers were naturally keenly interested in further material, but he was inclined to

think that some of them did not realize what a novel situation had been created by the establishment of the Commission and the amount of work actually being done. Previous efforts of codification had been private ventures by eminent lawyers or private bodies, such as the Institute of International Law. Never before had there been a body like the Commission, which was official in the sense that it had been set up by an intergovernmental institution. The impact of the quantity of real codification which the Commission was producing was now perhaps being felt for the first time. That was a matter for congratulation, and neither the General Assembly nor Governments should feel that the Commission's work was wasted.

24. As Mr. François had pointed out, the results desired in some quarters could be achieved only by a more or less permanent body. The establishment of such a body would, however, produce a plethora of texts and it would be impossible for Governments to spare time for comments and for the multitude of international conferences which would be necessary.

25. In his opinion, no fundamental change could or should be made in the Commission's method of work. He did not deny that some improvements might be introduced and, as United Kingdom representative in the Sixth Committee of the General Assembly, he had at one time been attracted by the idea of dividing the Commission into two sub-commissions. He had now come to doubt the wisdom of that proposal, for it might result in the Commission's losing the *esprit de corps* which by restraining prolixity and in other ways contributed so largely to the success of the work. Mr. Zourek had mentioned the success of the Drafting Committee in support of his thesis but the success of that Committee was largely due to the fact that before any matter was referred to the Committee it was thoroughly discussed in the full Commission. It was true that the Drafting Committee was sometimes asked to resolve difficulties for which the Commission itself had been unable to find a solution, but such requests were made only after full discussion in the Commission itself. If matters were referred to sub-commissions without such previous discussion, the likelihood of a repetition of the whole discussion when the matter was referred back to the full Commission would be much greater. That did not mean that reference of a matter to a sub-commission might not in some instances be useful, but that method should be used only on an *ad hoc* basis.

26. He agreed with Mr. François that one concrete measure which could be taken to improve the situation would be to institute a longer session, say twelve weeks instead of ten. In addition, more extra meetings could be held periodically in the afternoons, and the length of the main meetings could be extended by starting at 9.15 a.m. instead of 9.45 a.m. Slightly more use might perhaps be made of the method of referring particular subjects to sub-commissions. What really mattered, however, was the quality of the work, and the Commission should always remember that even if it produced more work the General Assembly might be unable to take action on it.

27. Mr. AMADO said that though he sympathized with Mr. Zourek's motives in submitting his proposals, he doubted whether the proposals would serve their purpose.

28. He questioned the statement in paragraph 20 of Mr. Zourek's paper that the 40 per cent increase in the Commission's membership would be bound to slow down the work if the Commission adhered to its previous methods.

29. He also thought that in Mr. Zourek's paper, too much importance was attached to the idea that the members of the Commission represented the world's principal legal systems. The fact was that each member spoke for himself without any intention of acting as spokesman of a particular system.

30. He doubted whether it would be feasible to establish sub-commissions to deal with limited aspects of the Commission's work. Even the Drafting Committee, whose work should presumably be fairly narrowly defined, found it impossible to confine itself to purely drafting questions, and it would be even more difficult for sub-commissions to limit the scope of their discussions.

31. It had been amply demonstrated that the Commission had no reason to be discouraged at the progress of its work, for in fact it had accomplished a great deal during the ten years of its existence.

32. The only way of increasing the Commission's output would be to extend the length of its sessions. A permanent body would not be desirable, for it would tend to be unenterprising, but the extension of the length of the Commission's session by another month would, he thought, be helpful. The Commission should state its opinion on that point quite frankly to the General Assembly.

33. Mr. LIANG, Secretary to the Commission, said that in accordance with practice he had to point out the financial implications of Mr. Zourek's proposal. He was informed by the Director of the European Office of the United Nations that if a sub-commission of the Commission met on half days when the Commission itself was not meeting, so that the same interpreters could be used for the meetings of both the sub-commission and the Commission, additional staff would be required for producing summary records and the total extra cost would be $21,356 for a ten-week session. The extra cost would of course be smaller if the sub-commission did not meet on the same day as the full Commission ; but on the other hand the extra cost would be greater if the proceedings of the sub-commissions were printed in the *Yearbook*.

34. With reference to the suggestion that the length of the Commission's session should be extended to twelve weeks, he pointed out that the additional two weeks would have to fall in March, since the General Assembly at its twelfth session had reaffirmed, in resolution 1202 (XII), its previous decision that there

should be no overlapping between the session of the Commission and that of the Economic and Social Council.

35. If the Commission considered that it really needed a twelve-week session, it should have no hesitation in making the appropriate suggestion to the General Assembly, though he thought such a suggestion would have a better chance of being accepted if the General Assembly had expressed, in either the preamble or the operative part of one of its resolutions, the desire that the Commission should work more quickly or increase its output. No such desire had, however, been expressed in any of the decisions of the General Assembly.

36. The criticisms of the Commission's work could, he thought, be traced to a number of misconceptions. First, there was the idea that the Commission was responsible for drafting a whole code of international law. To those who had that idea the Commission's progress must naturally seem slow if it produced only one complete text a year. That was a mistake because international law had developed so rapidly in practice and doctrine that it could only be codified, subject by subject and that had been the view of the Commission from its very inception. Secondly, it was a mistake to think of the Commission as comparable to a national codification commission, the members of which could be divided into various sections dealing with such well-defined branches of the law as civil law, criminal law, mercantile law, etc. That was again a mistake for the reason that in the case of a national codification commission the members would work on the basis of a common legal tradition and it would be easier to achieve agreement regarding particular problems. In addition they would usually be paid by the Government and work on a full-time basis. The difference between the codification of national law and that of international law escaped the attention of persons familiar with the codification of national law but not with the work of the League of Nations and the United Nations in the matter of codifying international law. The third misconception was that of regarding the Commission as a kind of juridical consultative organ of the General Assembly. It had often been suggested that legal questions arising out of the debates in the General Assembly could be referred to the Commission and that the Commission was a kind of legal adviser to the political organs. That was again an error, as the functions of the Commission clearly did not include that of giving legal advice. If the Commission had to deal with requests for *ad hoc* legal advice, its own work, which had been carefully planned by itself, would be necessarily delayed.

37. The criticisms of the Commission had not, however, found expression in decisions and resolutions. He thought that the General Assembly would be satisfied if the Commission reviewed from time to time its method of work, as it had done in 1957 and again at the current session. He further suggested that the Commission's report covering the work of its current session should contain a section showing that the Commission had carefully considered the statements made in the Sixth Committee during the twelfth session and Mr. Zourek's paper on the future work of the Commission.

38. Mr. AGO observed that in the opinion of the majority of the members of the Commission who had experience of other international bodies the Commission, all things considered, worked very satisfactorily and often more satisfactorily than many other bodies. It was noteworthy that opinions expressed to the Sixth Committee were by no means unanimous: on the one hand, for example, it had been said that the Commission should increase its output; on the other it had been authoritatively stated that it should be given all the time required for its work. It seemed obvious that some delegations in the Sixth Committee did not always realize how much time was spent on codification in general; obviously, the codification of international law took even longer than the codification of national law, for if it were hurried it would inevitably be badly done. The difficulties of the work entrusted to the Commission should be made clear in the Commission's report.

39. With regard to the means suggested for speeding up the work of the Commission, he subscribed to the views of Mr. Amado and Sir Gerald Fitzmaurice, who had advanced clear technical arguments against splitting the Commission. He had advanced those arguments himself during a previous discussion. The delicate and difficult task of codification involved the adjusting of old principles to the expanding community of nations and to the new international situation. In that undertaking, all the members of the Commission had to co-operate and there could be no question of dividing the Commission into two.

40. Again, the quality of the Commission's work was more important than its quantity. It had been said that its drafts were often — and quite rightly — examined word by word. In a few years' time it would not matter how long the Commission had spent on any one draft; but it would matter whether the draft was sound or not. It seemed to him, therefore, that the only practicable method of increasing the Commission's output — if that were really considered useful — would be to extend its session by two or three weeks.

41. Mr. SANDSTRÖM agreed that the Sixth Committee had misconceived the nature of the Commission's work. It was a fallacy to think that international law was something ready-made which could be brought to light by mere diligent research; the reality was that systems and practices differed through the world and authorities disagreed, so that the Commission's work had to take into account such variations, as well as to envisage in what way the development of international law could be furthered constructively.

42. Something could nevertheless be done to increase the Commission's output. The practice could be extended of leaving drafting problems to a sub-commission and reducing the discussions in the Commission, but such delegation had to be done with

care. In that respect, he agreed with Mr. Zourek that a membership of ten would be very suitable for a sub-commission. The Commission's sessions might also be extended to twelve weeks, although he recalled that on the one occasion on which a session had lasted for eleven weeks the general consensus of opinion had been that it had been extremely tiring. Other proposals that had been made were worth consideration, such as the lengthening of the time between the first and second readings. The work of preparation for the sessions and the projects could also be speeded up.

43. Mr. GARCIA AMADOR said that the idea that the Commission's sessions should be extended in length was eminently acceptable, but it was open to objection on technical grounds. Furthermore the General Assembly had decided that the Commission's sessions should not overlap those of the Economic and Social Council. Nor would it be easy to schedule the beginning of the Commission's sessions for an earlier date than was now customary, for then the session might conflict with the academic term.

44. The proposal that sub-commissions should be appointed had encountered the objection that the full Commission would be unable to go into each problem thoroughly. On the other hand it was almost universal practice for international bodies to appoint sub-committees, a practice which had not only had no adverse effect, but had indeed done a great deal towards clarifying problems and expediting work. The proposal seemed a most logical way of increasing the Commission's output of work.

45. Greater efforts should be made to plan and prepare the Commission's work in advance. Reports and memoranda could be produced earlier, and each subject taken up should be carefully surveyed, if necessary by a small group of members meeting before the beginning of the session, so that it could be examined in a planned and co-ordinated manner.

46. Mr. TUNKIN said that in the Sixth Committee only a few delegations had criticized the Commission ; the majority had spoken highly of its work. It was advisable that the Commission should from time to time review its methods of work, and he was therefore grateful to Mr. Zourek, whose proposals in general followed the practice of the Commission. The Commission's Drafting Committee was, as he had pointed out, practically a sub-committee, which considered substantive questions as well as mere drafting problems. Mr. Zourek had, however, gone a step further in proposing that the Drafting Committee should become a sub-commission provided with simultaneous interpretation and summary records. He (Mr. Tunkin) was unwilling to accept such a proposal, since nearly all questions of importance were discussed at the Commission's plenary meetings ; it seemed unnecessary to provide summary records for the Drafting Committee.

47. It was inadvisable to suggest that the Commission's session be extended by another two weeks, for owing to technical and financial difficulties the General Assembly was unlikely to agree to the suggestion. In the circumstances, it would be better to restrict the session to ten weeks.

48. One method of increasing the Commission's output of work would be to arrange for the Special Rapporteur's reports and the Secretariat memoranda to reach members about two months before the session opened, in order to give them time to study the documents and come to the session fully briefed.

49. He approved of the proposal for a longer interval between the first and second reading. The primary duty of the Commission was to produce work of high quality, and at present the second reading was done too hurriedly.

50. Mr. ZOUREK said that his comments and proposals had not been submitted purely on his personal initiative. He had drafted them because he felt that he should inform the Commission of what had happened at the Sixth Committee, where, he emphasized, no formal decisions had been taken. He also felt that the Commission should keep the initiative in its own hands and maintain its own prerogatives and rights where the organization of its work was concerned.

51. It was generally agreed that the Drafting Committee's work went beyond the mere task of drafting ; often, in fact, the Committee dealt with questions of substance. For that purpose the services at the Drafting Committee's disposal were inadequate ; he referred in particular to the lack of simultaneous interpretation. If the Commission did not propose that the Drafting Committee be provided with such services, obviously there would be no chance of any budgetary provision for them.

52. To simplify and to expedite the work of the Commission, a distinction should be made between the two kinds of questions with which it dealt : on the one hand, the important questions which would invariably be examined by the Commission as a whole ; on the other, the minor questions and the drafting questions which would be examined by a sub-commission. Obviously, any questions discussed by the sub-commission could be raised again later in the plenary session of the Commission.

53. The financial implications of his proposals should be considered not by the Commission but by the General Assembly. He added, incidentally, that the Secretary had, in speaking of the financial implications, envisaged the sub-commission as sitting at the same time as the Commission ; he (Mr. Zourek) had never intended, however, that the two bodies should sit at the same time, but rather that the sub-commission should meet only when the Commission was not sitting.

54. He thought that before the current session ended the Commission might agree in principle that the interval between two readings should be extended. There seemed also to be general agreement that the Drafting Committee could and should deal with questions of substance, but there was no unanimity on the question whether it should have full services or not. A decision on the question might therefore be postponed to a later session. On the other hand, he felt that the

Commission was in agreement that a passage should be inserted in the report stating that the Commission had discussed the criticisms made in the Sixth Committee, and ways and means of increasing its output of work; it should stress the special kind of work it did and set out any practical conclusions it had adopted on the basis of the memorandum submitted by Mr. Zourek (A/CN.4/L.76).

55. The CHAIRMAN considered that preferably the Commission should not take a formal decision. He suggested that an account of the discussion might be included in the report of the Commission.

It was so agreed.

56. Mr. LIANG, Secretary to the Commission, replying to points raised by Mr. Zourek, said that in the practice of United Nations bodies a drafting committee as a general rule was not provided with full technical services. His only reason for mentioning the financial implications of Mr. Zourek's proposals had been that he felt that the Commission should have all the facts before it. In any case, if the Drafting Committee did not meet at the same time as the Commission, the cost would be correspondingly reduced.

57. Mr. AMADO said that on reflexion he was not prepared to support the idea that the Drafting Committee should have full technical services, for if it was provided with such services the Committee would acquire a special status, which would be an undesirable precedent.

Representation at the thirteenth session of the General Assembly

58. Mr. LIANG, Secretary to the Commission, suggested that the Commission should, as in past years, depute its Chairman to represent it at the thirteenth session of the General Assembly.

It was so agreed.

Date and place of the eleventh session

[Agenda item 7]

59. Mr. LIANG, Secretary to the Commission, said the dates suggested for the opening and closing of the eleventh session at Geneva were 20 April and 26 June 1959.

60. After some discussion, the CHAIRMAN proposed that members should discuss the possible dates among themselves and reach agreement at the next meeting.

It was so agreed.

The meeting rose at 6.15 p.m.

465th MEETING

Tuesday, 17 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Date and place of the eleventh session *(continued)*

[Agenda item 7]

1. Mr. LIANG, Secretary to the Commission, explained that, as the Commission's eleventh session would be preceded by a conference of plenipotentiaries to draft an international convention for the elimination of statelessness and followed by a session of the Economic and Social Council the dates of which were in effect fixed by the Council's rules of procedure, any dates other than those he had mentioned at the previous meeting would involve a conflict with the other meetings. Accordingly, the Commission had no other choice but to hold its eleventh session from 20 April to 26 June 1959.

It was so decided.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 33

2. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of Belgium, Luxembourg, Switzerland (A/CN.4/114) and Italy (A/CN.4/114/Add.3) and to his own comments (A/CN.4/116). He was not proposing any amendment to the article. The Italian Government's proposal might be dealt with by the Drafting Committee.

3. Mr. AGO said that the Italian Government's proposal was, he believed, based on the idea that it was the duty of all diplomatic agents to respect local laws, whether or not they were entitled to privileges and immunities.

4. Mr. SANDSTRÖM, Special Rapporteur, said it was an implied term of article 33 that persons enjoying privileges and immunities were not subject to the jurisdiction of the receiving State. For that reason, it was desirable to leave its wording unchanged. The Italian Government's proposal was less comprehensive, and less concise.

5. Mr. BARTOS said that when diplomatic privileges and immunities were granted all those enjoying them should be, as a corollary, under the duty to respect the laws and regulations of the country which granted them. It was an obligation of the sending State to see that

they did so, and that State committed a breach of international law if it failed in that obligation. He agreed with the Special Rapporteur that the article was not improved by the Italian Government's proposed amendment.

6. Mr. AGO said that, in view of the remarks of the previous two speakers, he would be prepared to accept the existing text of article 33 as drafted at the ninth session (A/3623, para. 16).

7. The CHAIRMAN put to the vote article 33 as drafted at the ninth session.

Article 33 was adopted unanimously.

ARTICLE 34

8. Br. SANDSTRÖM, Special Rapporteur, referred to the observation of the United States Government (A/CN.4/114). He had no objection to article 34 being amended in accordance with that Government's observation, but perhaps the substance of the observation could be put in the commentary; alternatively, the words "to the diplomatic agent" might be omitted from sub-paragraph (*c*).

9. In reply to a question by Mr. Matine-Daftary, he said that the notification in sub-paragraph (*c*) was made when a person was declared *persona non grata* under article 6.

10. Mr. MATINE-DAFTARY thought that sub-paragraph (*c*) would be improved by the addition of the words "in accordance with article 6".

11. Mr. VERDROSS thought that the United States Government's observation was well founded, for diplomatic relations were between States, not between individuals, so that a State could not notify the diplomatic agent direct but must notify the Government of the sending State. He therefore suggested that the words "to the sending State" be substituted for the words "to the diplomatic agent" in sub-paragraph (*c*).

12. Mr. ALFARO supported Mr. Matine-Daftary.

13. Mr. AMADO said that sub-paragraph (*d*) was probably not necessary, as it was self-evident that the functions of a diplomatic agent came to an end on death. He proposed therefore that sub-paragraph (*d*) be deleted.

14. Mr. SANDSTRÖM, Special Rapporteur, accepted the proposals of Mr. Matine-Daftary and Mr. Verdross. With regard to Mr. Amado's proposal, he said that while death of course ended the functions of a diplomatic agent, it might be desirable to retain the sub-paragraph for the sake of completeness.

15. The CHAIRMAN said that the Drafting Committee would deal with the proposals made. He put to the vote article 34 as drafted at the ninth session, subject to drafting changes.

Article 34 was adopted unanimously.

ARTICLE 35

16. Mr. SANDSTRÖM, Special Rapporteur, referred to the additional paragraph suggested by the Government of Denmark (A/CN.4/116); in principle he had no objection to the new paragraph. In his own revised draft he proposed a new sentence (A/CN.4/116/Add.1), to remedy an apparent omission, but he was prepared to withdraw it if it were thought unnecessary.

17. Mr. ALFARO thought that the proposed new sentence was desirable. A provision which applied on the death of a diplomatic agent should apply also on his departure.

18. Sir Gerald FITZMAURICE also supported the Special Rapporteur's proposal, on the ground that it followed logically from article 31, paragraph 3.

19. The CHAIRMAN put to the vote article 35 as drafted at the ninth session, subject to drafting changes.

Article 35 was adopted unanimously.

20. Mr. VERDROSS noted that article 35 referred to the case of armed conflict, whereas there was no mention of that contingency in article 34. He considered that the omission was a lacuna in article 34.

21. Mr. ZOUREK thought that the Drafting Committee should consider Mr. Verdross' point. The difference which had just been pointed out arose from the fact that the draft contained an article concerning the end of the function of a diplomatic agent, but none concerning the end of diplomatic relations.

22. Mr. SANDSTRÖM, Special Rapporteur, pointed out that sub-paragraphs (*b*) and (*c*) of article 34 probably covered the cases of armed conflict, inasmuch as the functions of a diplomatic agent necessarily ended when diplomatic relations ceased.

23. Mr. AGO said that the problem existed not only in the case of armed conflict but also in the case of the severance of diplomatic relations.

24. Article 34 dealt only with the end of the functions of a diplomatic agent, but not with the severance of diplomatic relations. At the end of a war, for example, the same diplomatic agents might return to take up their functions, which would then have been merely interrupted, not terminated, by the intervening severance of relations. He agreed that a special provision should be inserted in article 34.

25. Mr. ALFARO and Mr. TUNKIN also considered that a new paragraph should be inserted, which should apply both to cases of armed conflict and to cases of simple severance of diplomatic relations.

26. Mr. LIANG, Secretary to the Commission, agreed. The draft as it stood contained a provision (article 1) concerning the establishment of diplomatic relations between States but none concerning the termination of such relations. No doubt the words "*inter alia*" in article 34 could be interpreted to cover cases of armed

conflict or severance of diplomatic relations, but the argument would be weak.

27. Mr. YOKOTA said that the question of the severance of diplomatic relations was extremely complicated. For example, it was not unprecedented that, despite the occurrence of hostilities between them, States maintained their diplomatic relations. Though the Drafting Committee might propose a new paragraph or article, the whole question should, he thought, be discussed in the Commission.

28. The CHAIRMAN said that the Drafting Committee would consider the question and put its proposals before the Commission.

ARTICLE 36

29. Mr. SANDSTRÖM, Special Rapporteur, referred to the amendment and additions proposed by the Netherlands Government (A/CN.4/116), which he had taken into account in his revised draft (A/CN.4/116/Add.1).

30. The Government of Finland considered that the words " acceptable to " in sub-paragraphs (*b*) and (*c*) should be replaced by " accepted by " (A/CN.4/114/Add.2) ; he made a proposal to that effect in his revised draft but would be prepared to withdraw it if it was controversial.

31. He had no objection to the Italian Government's proposal to delete the words " the good offices of " in sub-paragraph (c) (A/CN.4/114/Add.3).

32. Mr. ALFARO entirely agreed with the proposed deletion of the words " even in case of armed conflict " in sub-paragraph (*a*). The provisions of all three sub-paragraphs applied equally to the breaking off of diplomatic relations or an outbreak of armed conflict and that being so, it would be preferable to add a reference to the case of armed conflict in the opening words of the article. He made a proposal to that effect.

33. Mr. ZOUREK considered that it would be desirable to introduce the Finnish Government's proposed amendment under sub-paragraph (*c*) of article 36 ; in its observations that Government correctly described the current practice. The State which agreed to assume the protection of the interests of another State in the event of diplomatic relations being broken off, or in the event of the recall of the diplomatic mission, must first obtain the assent of the receiving State. That seemed also to be the almost general practice of States.

34. Mr. AGO said he was not in favour of Mr. Alfaro's proposed amendment to the opening words of the article. The article was concerned solely with the steps to be taken in the event of a cessation of diplomatic relations, regardless of the cause of the cessation. The case of a war is of interest only in so far as it involves a breaking off of diplomatic relations. The reference to armed conflict in sub-paragraph (*a*), on the other hand, was essential in order to emphasize the duty of the receiving State to respect and protect the premises and archives of the mission even in such an event.

35. The words " *ou interrompue* " in the French text of the opening clause did not strike him as particularly well-chosen. What was meant by the " interruption " of a mission? A more suitable wording would have to be found.

36. He was glad the Special Rapporteur had agreed to the deletion, in sub-paragraph (*c*), of the reference to " good offices ", which was inapposite in the context.

37. Mr. AMADO agreed with Mr. Ago. He added that the words " *accepté par* " would be stylistically preferable to " *acceptable pour* " in the French text.

38. Mr. TUNKIN agreed with Mr. Ago that there was no need to insert a reference to armed conflict in the opening words of the article. The text was already broad enough to cover all cases. A specific reference to armed conflict had been included in sub-paragraph (*a*) not in order to introduce any new idea but merely in order to stress a special case.

39. The reference to the withdrawal or discontinuance of missions had, he thought, been included in order to take into account the not infrequent cases where missions were temporarily or permanently withdrawn without diplomatic relations being broken off. He was in favour of keeping the article substantially as it stood, subject to drafting changes.

40. Sir Gerald FITZMAURICE suggested that the distinction between " acceptable to " and " accepted by " involved more than a mere drafting point, though Governments had possibly not appreciated that fact because the Commission had made no comment on the article. The proposed change involved the question whether the sending State must obtain the actual and previous consent of the receiving State to the choice of a third State as protecting Power. The conclusion reached at the previous session had been that the third State must be acceptable to the receiving State, in the sense that the receiving State was entitled to object to the sending State's choice. The Commission had deliberately refrained from implying that the sending State must first apply for the receiving State's consent to the third State it designated. He thought that the Commission should retain the text as it stood and explain its reasons for doing so in the commentary.

41. While he entirely agreed with Mr. Alfaro that the article covered any case of severance of diplomatic relations, whatever the cause, he shared Mr. Ago's view that it would be better to leave the opening words as they stood, since they were sufficiently general to cover any case. It was, however, desirable to specify that sub-paragraph (*a*) applied even in cases of armed conflict. That the provision could be misunderstood was evident from the Netherlands Government's proposal. The analogy drawn therein to article 31, paragraph 2, was quite false, since the latter text merely stipulated that the personal privileges and immunities of a diplomatic agent leaving the receiving State should subsist, even in case of armed conflict, until he left or for a reasonable

period in which to allow him to leave. In article 36, however, there could be no question of any limitation of the duration of protection. The principle continued to apply throughout the armed conflict or hostilities and until the settlement reached at the end thereof.

42. Mr. FRANÇOIS agreed with Mr. Tunkin, in particular, that there were cases where diplomatic missions were withdrawn without any breaking-off of diplomatic relations.

43. He was afraid that the Netherlands proposal had been misunderstood. Sub-paragraph (*a*) as it stood gave the impression that the receiving State was responsible for the protection of the premises and archives of the mission for the whole duration of an armed conflict. He was not sure, however, that such a duty really existed in international law. In the case of a prolonged conflict, the receiving State might well need to use the premises, though respecting the inviolability of its contents. In any case, that situation was governed by the law of war and the Commission's draft was concerned solely with the law in time of peace and in the transitional period between peace and war. It was precisely to establish that distinction that the Netherlands had proposed an additional article. It did not state that the duty enunciated in sub-paragraph (*a*) did not exist in case of war. It merely left the question open because the article did not purport to lay down a rule to be observed in time of war. He agreed, however, that the new article and commentary proposed by the Netherlands Government were a trifle heavy and thought that the Commission might simply delete the words " in case of armed conflict " and, as the Special Rapporteur had suggested, deal with the matter in the commentary.

44. He agreed with Sir Gerald Fitzmaurice that there was a very real distinction between the implications of the words " acceptable to " and " accepted by ". His own country, the Netherlands, had had considerable experience in acting as a protecting Power in the First World War and he was convinced that it was not the practice for the sending State to await the consent of the receiving State to the choice of the third State. It was, on the other hand, customary from the choice to be notified to the receiving State and should this State object to that choice, the sending State would then choose another State to protect its interests.

45. Mr. SCELLE said that, although agreeing with Sir Gerald Fitzmaurice that there was a clear distinction in the practical implications of the words " acceptable to " and " accepted by ", he did not regard the word " *acceptable* " in French as at all suitable since it immediately raised the question of what the conditions of acceptability might be. Since the receiving State had the right to refuse the choice, the phrase " accepted by " would be more appropriate. Perhaps the difficulty could be met by saying " provided that the receiving State does not reject its choice ".

46. Mr. LIANG, Secretary to the Commission, observed that, quite apart from the reasons put forward by Sir Gerald Fitzmaurice in favour of retaining the words " acceptable to ", there was the consideration that the use of the words " accepted by " could throw out of focus the whole process implied in sub-paragraph (*b*). That process was that the sending State should make representations to ascertain whether the third State it had in mind was acceptable to the receiving State, and once it had satisfied itself on that point the process was completed and the third State was accepted. As in the case of the appointment of a diplomatic agent to a mission, it would be inaccurate to say that the sending State might appoint as ambassador to the receiving State a person " accepted " by that State. The obligation on the sending State was to ascertain whether the condition of acceptability was fulfilled.

47. Mr. ALFARO, recalling his earlier proposal, pointed out that an outbreak of armed conflict was something quite distinct from the breaking-off of diplomatic relations and was not always covered by that concept. Armed conflict or frontier incidents might continue for quite a long time withou any formal severance of diplomatic relations. Since the Commission had adopted article 35, which contained a reference to cases of armed conflict, it seemed only logical that it should also include in article 36 a specific reference to armed conflict which applied to the whole article.

48. Mr. YOKOTA was in favour of keeping the rerference to cases of armed conflict in sub-paragraph (*a*) and of making the position quite clear in the commentary, in the light of the observations of the Netherlands Government. That Government appeared to regard armed conflict as divisible into two stages, the first stage being a reasonable period and the second stage beginning at the end of that reasonable period and extending up to the time when the conflict developed into a war in the technical sense of the term, at which point he law of war became applicable. However, the principle applied to both stages and not merely to the first stage.

49. Mr. AGO, referring to the statement that there were cases where armed conflict continued for some time without any breaking-off of diplomatic relations, said it was precisely because of that fact that no mention of armed conflict should be made in the opening clause of the article. Article 36 was concerned solely with cases involving an actual breaking-off of diplomatic relations. The duties laid down in the article were based on the assumption that diplomatic relations had been broken off.

50. He regretted that he could not agree with Mr. François. Though diplomatic privileges and immunities where part of what is called the law applicable in time of peace, it was by no means established that all the rules concerning them ceased to apply in time of war. For even in case of war, as long as diplomatic relations were not broken off, diplomatic privileges and immunities must continue to be enjoyed. Other duties, especially those provided for in article 36, were meant to safeguard certain articles in time of war, so that normal relations could be resumed when the

hostilities ceased. He could not therefore accept the idea that the duties outlined in sub-paragraph (*a*) were purely provisional. The Commission should state that they continued for the whole duration of the war.

51. After listening to the discussion on the relative merits of the words " acceptable to " and " accepted by ", he had become convinced that it would be better to use neither phrase. The phrase " accepted by " might be stylistically preferable, but it did not convey the Commission's meaning. " Acceptable to " on the other hand, as Mr. Scelle had rightly pointed out, was an expression whose juridical meaning was doubtful. Perhaps the Drafting Committee could consider replacing the words by some such phrase as " unless the receiving State refuses ".

52. Mr. AMADO, referring to the Netherlands proposed new article, said that the idea that the duties of the receiving State under sub-paragraph (*a*) should continue for " a reasonable period " only was quite unacceptable. The analogy with article 31, paragraph 2, was false, since in the case dealt with by that provision it was quite natural that the privileges and immunities of a diplomatic agent should subsist only for so long as he needed to leave the country. Moreover, how could one make the receiving State the judge of what was " a reasonable period of time " ? In an armed conflict or war the whole concept of " reasonableness " went by the board. He regretted too that he could not accept Mr. Alfaro's proposal.

53. He explained that his previous reference to the words " acceptable to " had been made on stylistic grounds only. The intention of the provision was quite clear. States engaged in armed conflict knew perfectly well that the only States elegible to serve as protecting powers were those which were neither materially nor morally involved in the conflict — neutral States, in fact.

54. Mr. BARTOS said that he was entirely opposed to the idea of elaborating the law applicable in time of war. Under the Charter of the United Nations, war was outlawed, except that defensive action might be justified pending action by the Security Council. On the other hand, it would be wise to emphasize in the article that the receiving State was bound to ensure protection of the premises and archives of a diplomatic mission even though an armed conflict had broken out between it and the sending State. He therefore preferred the reference to armed conflict to stand as drafted at the previous session.

55. Mr. SANDSTRÖM, Special Rapporteur, thought that on balance the wisest course would probably be to leave sub-paragraph (*a*) as it stood, for it was least open to misunderstanding. He was also in favour of keeping the words " acceptable to ", pending consideration of alternatives by the Drafting Committee.

56. He agreed with Mr. Ago's criticism concerning the words " *ou interrompue* ". He would have no objection to the passage in question being redrafted to read " or if a mission is permanently or temporarily recalled ". Otherwise he wished to keep the article as it stood.

57. The CHAIRMAN put to the vote Mr. Alfaro's proposal that a reference to cases of armed conflict be included in the opening words of the article and that the reference to them in sub-paragraph (*a*) be accordingly deleted.

Mr. Alfaro's proposal was rejected by 8 votes to 1, with 6 abstentions.

58. The CHAIRMAN put to the vote article 36 as drafted at the ninth session. subject to drafting changes.

Article 36 was adopted by 15 votes to none with 1 abstention.

ARTICLE 37

59. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of the United States of America, Switzerland and the USSR (A/CN.4/116). Mr. Tunkin had proposed an amendment on the lines of that proposed by the USSR Government, as follows :

> " Any dispute between States concerning the interpretation or application of this Convention that cannot be settled through diplomatic channels shall be referred to conciliation, submitted to the International Court of Justice in accordance with the Statute of the Court, or referred to arbitration in accordance with existing agreements."

60. Mr. TUNKIN said that the Commission's task was to codify existing international law and to promote the progressive development of international law. An article providing for the compulsory judicial settlement of disputes would not, he thought, further the Commission's purposes. Since only about thirty States had signified their acceptance of the compulsory jurisdiction of the International Court of Justice, it was obvious that the compulsory jurisdiction of the Court could not be regarded as a rule of existing international law. Nor could a clause providing for the Court's compulsory jurisdiction be said to promote the progressive development of international law, for unless such a clause had a reasonable prospect of acceptance by the majority of States, it would be nugatory. Furthermore, an article on the settlement of disputes was not indispensable in the draft under discussion, for the settlement of disputes had practically nothing to do with diplomatic intercourse and immunities. A draft containing such an article would probably not be acceptable to many States.

61. He would therefore prefer the draft not to touch on the subject of the settlement of disputes. If, however, the members of the Commission considered that an article on the subject was advisable. that article should be so drafted as to be acceptable not only to the thirty States which had accepted the Court's compulsory jurisdiction, but also to other States. The amendment he had proposed to article 37 was designed to meet that condition. His first proposal would be that article 37

should be deleted, but if that proposal did not find favour he would ask the Commission to consider his amendment.

62. Mr. GARCÍA AMADOR said he considered that Mr. Tunkin's whole argument was without foundation, since the text of article 37 contained no express provision for the compulsory jurisdiction of the International Court of Justice. He would compare article 37 in that respect with article 73 of the Commission's draft concerning the law of the sea (A/3159).[1] Article 73 provided that disputes should be submitted to the International Court of Justice at the request of any of the parties, unless they agreed on another method of peaceful settlement. Thus, by requesting submission of the dispute to the Court, any party to the dispute could compel the other parties to submit to the Court's jurisdiction. No such provision was to be found in article 37 of the present draft.

63. While it was true, as Mr. Tunkin had said, that the compulsory jurisdiction of the Court had been accepted by less than half the Members of the United Nations, it was also true that many States were in favour of compulsory arbitration and jurisdiction as a means of settling international disputes. It was particularly desirable that a body responsible for the codification and progressive development of international law should do its utmost to promote the ideal of compulsory judicial settlement. It would make a bad impression on public opinion if the Commission adopted a position which, though supported by a large number of States, was not in keeping with the progressive development of international law and with the trend towards increasing acceptance of the Court's compulsory jurisdiction.

64. The objections to compulsory judicial settlement were in fact more apparent than real. In that connexion it was interesting to note that many of the Governments which had in the General Assembly opposed the inclusion of a clause providing for the compulsory jurisdiction of the International Court of Justice in the draft articles on the law of the sea had voted in favour of the clause in question at the recent United Nations conference on the Law of the Sea.

65. He was not only opposed to both of Mr. Tunkin's proposals, therefore, but would actually be in favour of asking the Drafting Committee to bring the 1957 text of article 37 into line with article 73 of the Commission's draft articles on the law of the sea.

66. Mr. HSU said that Mr. Tunkin's proposals seemed to nullify a fundamental idea of the Commission's 1957 text — the idea that disputes should be compulsorily settled by certain methods. If there was any fundamental objection to the inclusion of the article, he thought the question should be decided by reference to the form which the Commission's draft was to assume — whether a set of draft articles, or a draft convention. In the latter case, he thought an article on the settlement of disputes should be included.

67. Mr. MATINE-DAFTARY was also of the opinion that the Commission's treatment of Mr. Tunkin's proposal should depend on whether the draft articles were to take the form of a declaration or of a convention. He was in favour of the latter alternative, and in that case he would support Mr. Tunkin's proposal for the amendment of article 37, just as, at the United Nations Conference on the Law of the Sea, he had supported the suggestion that the provisions concerning the settlement of disputes should be embodied in the additional protocol. Article 37 as drafted, with its provision for the compulsory jurisdiction of the International Court of Justice, would deter many States from acceding to the convention. He did not oppose the idea of compulsory jurisdiction as such; in fact, he regarded it as an ideal which it was to be hoped would one day be accepted by all States, but at the moment it was not acceptable, since only thirty States had made declarations recognizing the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute of the Court.

68. Mr. FRANÇOIS observed that a discussion of the advisability of providing for compulsory jurisdiction took place whenever a clause relating to the settlement of disputes was considered. In his opinion, it would be inadvisable to insert a compulsory jurisdiction clause in every draft which the Commission prepared. The task of the Commission was the codification of the law, not its implementation. The danger was that such a clause would come to be regarded as a "*clause de style*", and reservations to it would be so automatic that the clause would lose all its value. There were special cases, as had been seen during the United Nations Conference on the Law of the Sea, in which the inclusion of a jurisdiction clause was necessary; but if such a clause were inserted in a set of draft articles on diplomatic intercourse and immunities, he did not see on what grounds a similar clause could be excluded from any draft. He therefore agreed with Mr. Tunkin that article 37 should be deleted. He could not, however, accept Mr. Tunkin's amendment to article 37, which was too vague and did not allow, for example, for the submission of disputes to *ad hoc* arbitrators. The whole matter of the settlement of disputes should be governed by the general provisions relating to the subject.

69. Mr. SCELLE said he could not agree with Mr. François that the Commission's draft on diplomatic intercourse and immunities should not contain a clause providing for compulsory arbitration or jurisdiction. Diplomatic intercourse was in fact the sphere in which provision for compulsory jurisdiction was perhaps most necessary, since the maintenance of diplomatic intercourse was the touchstone of a State's membership in the international community. If a State refused, or held that it was free to maintain or not to maintain diplomatic intercourse, it automatically excluded itself from the community of nations.

70. Article 37 provided that disputes which could not

[1] *Yearbook of the International Law Commission, 1956*, vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I).

be settled through the diplomatic channel should be referred to conciliation or arbitration. It was wrong, however, to put arbitration on the same footing as conciliation, for arbitration implied the obligatory acceptance of the arbitral award, whereas no State was obliged to accept a solution proposed by way of conciliation. He proposed therefore that the text be amended to read:

> "Any dispute between States concerning the interpretation or application of this convention that cannot be settled through diplomatic channels or by conciliation shall be referred to arbitration or, failing that, shall be submitted to the International Court of Justice."

71. Mr. Tunkin's proposed amendment was even less satisfactory than the 1957 text. If, as he assumed, the phrase "in accordance with existing agreements" related only to arbitration and not to all the other means of settlement mentioned, Mr. Tunkin's proposal would be the very negation of the whole idea of the compulsory arbitration clause. He was therefore quite unable to support the proposal.

72. Mr. ALFARO observed that Mr. Tunkin had made two proposals: one, that article 37 should be deleted; and the other that, if the article were not deleted, it should be amended in the manner proposed by the USSR Government.

73. He disagreed with the first proposal, for he considered that all draft conventions prepared by the Commission should provide for the peaceful settlement of disputes by diplomacy, conciliation, arbitration and international jurisdiction. He was much attracted by Mr. Scelle's proposed redraft of the article, which made provision for compulsory arbitration. He agreed with Mr. Scelle's criticism of the expression "in accordance with existing agreements" in Mr. Tunkin's amendment, for arbitration should be possible even in cases in which the parties to a dispute had not entered into arbitration treaties with each other. He would support Mr. Scelle's proposed redraft.

74. Mr. YOKOTA said that he was unable to agree with the views expressed by Mr. François, for he was in favour of the principle that a clause providing for the compulsory settlement of disputes should be inserted in all international conventions.

75. It had been pointed out that there was a remarkable tendency among States, especially the newly established States, to refuse the idea of compulsory arbitration and judicial settlement. It had been disappointing, too, that the United Nations Conference on the Law of the Sea had not adopted a compulsory arbitration clause. The questions dealt with by that Conference, however, had had considerable political implications, implications from which the subject of diplomatic intercourse and immunities was free. In the case of diplomatic intercourse and immunities, therefore, there should be no such objection to the adoption of a clause providing for compulsory arbitration or judicial settlement. Consequently, he was in favour of retaining the 1957 text. Mr. Tunkin's proposed amendment of article 37 was in effect nothing but the expression of the wish that disputes should be settled by peaceful means. The obligation to settle international disputes by peaceful means was, however, embodied in the Charter of the United Nations, by which all Member States were bound. Accordingly, Mr. Tunkin's proposed amendment was a mere repetition of the principle of the Charter without any real obligation to resort to compulsory jurisdiction. If any such provision were inserted at all, it should provide for such an obligation.

76. Mr. BARTOS said that in each if its drafts the Commission should be at pains to encourage the recognition of the principle of the compulsory judicial settlement of international disputes. Far from agreeing that the recent United Nations Conference on the Law of the Sea had expressed hostility to that principle, he considered, on the contrary, that the principle had been affirmed by the support of the majority of the States, though he admitted that certain concessions had been made to the minority holding different views.

77. He would be in favour either of the 1957 text of article 37 or of some equivalent formula. If necessary, an additional protocol could be drafted, but care should be taken to avoid giving the impression that the Commission denied the trend towards the extension of a compulsory international jurisdiction. He did not wish to discuss Mr. Tunkin's proposal, because it made no provision for compulsory jurisdiction.

The meeting rose at 1.5 p.m.

466th MEETING

Wednesday, 18 June 1958, at 9.50 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 37 *(continued)*

1. Sir Gerald FITZMAURICE said he had voted for article 37 at the ninth session of the Commission and would not now vote against it if the majority of the members of the Commission were still in favour of it. On reflection, however, he had reached conclusions similar to those expressed by Mr. François at the preceding meeting. Though he agreed with Mr. Scelle's remarks concerning the obligation of States to submit their disputes on questions of international law to arbitration, he thought that much of what Mr. Scelle had said was more relevant to the question of accepting

the jurisdiction of the International Court of Justice in respect to disputes generally. Even though it might be admitted that States ought to accept the jurisdiction of the Court, it was questionable whether the Commission should insert a provision of that kind in a draft which did no more than codify the customary international law. In drafts which represented a progressive development of international law it might be necessary to include provision for arbitration because the subject matter was new and States might find it difficult to bind themselves in the absence of such provision. The arbitration clause might also be appropriate in multilateral conventions on technical or economic matters, in which some provision for the settlement of disputes must be made. When, however, the Commission was engaged in codifying the substance of the law, it did not normally enter into the question of how the law was to be enforced. But compulsory arbitration had to do with enforcement. There was no more reason why States should resort to arbitration in disputes relating to diplomatic intercourse and immunities than in disputes relating to any other matter on which customary international law was firmly established. While it might be generally desirable for States to resort to arbitration in such matters, it was not particularly desirable to do so in one case rather than in another. Consequently, he doubted whether a compulsory arbitration clause was a necessary part of the draft under discussion and he thought that in future drafts of that kind the Commission should think carefully before inserting a provision for compulsory arbitration.

2. He agreed with those who had criticized Mr. Tunkin's proposed amendment of article 37 on the ground that it was superfluous since it added nothing to what was contained in existing treaties or agreements between the parties. It would be better either to have no arbitration clause at all or to have a definite provision for compulsory arbitration.

3. Mr. VERDROSS said that while he thought the ideal solution would be the one proposed by Mr. Scelle, he realized that many States might not be prepared to accept a compulsory arbiration provision, and he therefore supported Mr. Matine-Daftary's proposal for a separate protocol providing for compulsory arbitration, so that States could accept the convention either with or without the protocol.

4. Mr. AMADO said he was in favour of the deletion of article 37, which was irrelevant to the Commission's task and altogether outside the scope of its work. The only merit of the article was that it was preferable to Mr. Tunkin's proposed amendment. The Commission had been entrusted by the General Assembly with the task, not of making suggestions as to how the rules relating to diplomatic intercourse and immunities should be applied but of ascertaining what those rules were and which of them had been accepted, or were capable of being accepted, in the practice of States.

5. Mr. ZOUREK agreed with Mr. François, Mr. Tunkin and Mr. Amado that the problem of the pacific settlement of disputes was a separate problem which concerned the *application* of the international conventions and should not therefore be linked to the codification and progressive development of international law. He said that the Commission's task was not in fact to lay down rules regarding the settlement of disputes concerning the interpretation of the rules of international law, including the rules relating to diplomatic intercourse and immunities. He recalled that he had always maintained that view in the Commission. Even if it were held that the Commission should deal with questions of enforcement, he doubted whether a compulsory arbitration or jurisdiction clause should be included in a draft on diplomatic intercourse and immunities. The choice of the means of peaceful settlement of disputes should be decided according to the nature of the disputes, and it was questionable whether disputes regarding diplomatic intercourse and immunities were of such a kind as to require submission to the International Court of Justice. Such disputes were often of a delicate nature and neither party would want to see them dealt with in the publicity which attended the proceedings of the Court or an arbitral tribunal. It was almost always in the interest of both parties to seek a friendly settlement and in the great majority of cases a solution was reached by conciliation if the matter could not be settled through the diplomatic channel.

6. He was therefore in favour of the deletion of the article. Those who were of a different view could raise the matter again when the final clauses of the convention were discussed, as among those final clauses there was often nowadays an article dealing with the settlement of disputes on the interpretation or application of the convention. It would not be right to discuss one final clause without the other.

7. Mr. AGO said that so long as it had not been finally decided what form the Commission's draft was to take the advisability of including a clause providing for compulsory arbitration or jurisdiction might have remained in doubt. Now that it was agreed, however, that the draft was to be submitted in the form of a convention, an article providing for the possibility of submitting disputes to peaceful settlement seemed an absolute necessity. The Commission had included such an article in its draft articles relating to the continental shelf. Those articles and the others relating to the law of the sea had been submitted to a diplomatic conference. So far as the draft on diplomatic intercourse and immunities was concerned the majority of the members of the Commission seemed to think that a diplomatic conference was unnecessary and that the General Assembly could itself adopt the draft in the form of a convention. The Commission was therefore under a duty to produce an ever more definitive text than in the case of the draft articles on the continental shelf. Consequently, a clause on the settlement of disputes could not be omitted. He agreed with Mr. Zourek that the Commission should not discuss only one final clause. Instead, however, of deleting that most important of final clauses, the Commission should consider completing the text with such other final clauses as might appear necessary.

8. In his opinion, a draft convention on diplomatic intercourse and immunities was typical of the kinds of convention in which a compulsory arbitration or jurisdiction clause should be included. A convention of that kind without an arbitration clause would be incomplete, and the Commission could not submit an incomplete draft to the General Assembly. Furthermore, the Commission was the body best qualified to work out a suitable text regarding the procedure for the peaceful settlement of disputes.

9. The text of article 37 as drafted at the ninth session (A/3623, para. 16) was not satisfactory. It had been adopted somewhat hastily, at a time when no decision had been taken as to the form which the draft articles would assume. The 1957 text contained no provision for unilateral recourse to the International Court of Justice, and in fact, as it stood, article 37 was little more than a *voeu*. He admitted that the text proposed by Mr. Tunkin was more logical in its wording, but unfortunately it had other grave defects. For example, it failed to make any provision for the case where the parties to the dispute did not recognize the jurisdiction of the Court. He was therefore unable to accept it. The draft should include a firm and definitive clause providing for the peaceful settlement of any dispute which might arise in the application of the convention. The 1957 text could be amended quite easily so as to become acceptable.

10. He did not agree with Mr. Scelle's suggestion that conciliation should be linked rather with settlement through the diplomatic channel than with arbitration. Conciliation was a practice more commonly associated with arbitration than with settlement through the diplomatic channel. In any case the essential point was that there should be an agreed procedure of arbitration and conciliation between the parties. Moreover, he wished to stress that article 37 would not be complete unless the final clause were modified by the addition of a phrase such as " at the request of one of the parties ", as in the corresponding article of the Convention on the Continental Shelf.

11. Mr. LIANG, Secretary of the Commission, recalled that during its work on the law of the sea, and particularly the law relating to the conservation of fisheries and to the continental shelf, the Commission had been concerned in many aspects of its work with the progressive development of international law, with what might be called " international legislation ". It had been thought that where no body of customary law existed, and new law had to be created, a system of arbitration must be developed so as to provide an impartial and judicial channel for securing the implementation of the new rules. That thesis could not be disputed. Members of the Commission, especially Mr. García Amador and Sir Gerald Fitzmaurice, had emphasized the importance of maintaining the arbitral machinery in connexion with the conservation of fisheries.

12. The United Nations Conference on the Law of the Sea had accepted the machinery for arbitral settlement in connexion with fisheries but the corresponding proposal relating to the continental shelf had not secured the necessary two-thirds majority and had been rejected. One of the explanations given was that since there was provision for arbitration in a separate protocol there was no need for an arbitration clause in the convention itself. That circumstance, however, could not provide a sufficient basis for the assertion that the Conference had repudiated the basic thesis for a clause relating to the settlement of disputes even in connexion with the continental shelf.

13. An arbitration clause was especially necessary in a draft which was largely concerned with legislation. So far as diplomatic intercourse and immunities were concerned, there were two principal contentions. According to the first, a clause providing for the settlement of disputes was necessary in every draft ; and according to the second, it was not necessary to insert such a clause in cases such as that under consideration, where the Commission was concerned only with the formulation of substantive rules. Both those theses were acceptable, but if the prevailing view was that there should be an arbitration clause, that principle should be uniformly applied in every draft.

14. Though he would not go so far as to say, as Mr. Ago had done, that article 37 was no more than a *voeu*, he agreed that it contained no element of compulsion. The article was in fact no more mandatory than Article 33 of the United Nations Charter providing for the choice of many methods of the pacific settlement of disputes. In other words, the obligation implied therein was so general as to preclude precise application. Draft article 37 provided that disputes " shall be referred to conciliation or arbitration ". So far, however, as arbitration was concerned, until the international community accepted the elaborate machinery recommended in Mr. Scelle's draft on arbitral procedure (A/CN.4/109), he could not see how the obligation could be implemented. The article went on to say that disputes " shall be submitted to the International Court of Justice ". In that connexion, he recalled that at the Dumbarton Oaks Conference in 1944 one of the proposals had been that all legal disputes should be referred to the International Court of Justice. That was a vague statement, and accordingly had subsequently been changed to the effect that disputes should be referred to the Court in accordance with the Statute of the Court. Article 37, he thought, must be interpreted in the sense that the submission must be " in accordance with the Statute of the Court ". In determining the legal effect of that article, the Court itself had to proceed on the assumption that a dispute had been submitted to it in accordance with the procedure laid down in its Statute. In other words, the dispute must be referred to the Court by the parties. It might be argued that the Commission's present draft, if it should be adopted as a convention, would be one of the conventions which invested the Court with jurisdiction ; but since it was not cecrtain that Article 36, paragraph 3, of the Statute itself had the force of a provision investing the Court with compulsory jurisdiction, he doubted that article 37

of the Commission's draft could be interpreted as having that effect. Consequently, article 37 was in no way different in legal effect from the amendment proposed by Mr. Tunkin. If provision was to be made in the draft for submitting disputes to the Court, the phrase " at the request of one of the parties " must be added as had been suggested. Otherwise, the article would contain no element of compulsion at all.

15. Faris Bey EL-KHOURI said it was desirable that all States should recognize the compulsory jurisdiction of the International Court of Justice. Disputes relating to the interpretation of bilateral or multilateral conventions were bound to occur, and usually such conventions contained a clause providing for arbitration or submission to the Court as a means of securing the peaceful settlement of such disputes. It had been proposed that the Commission should leave to the General Assembly the decision whether such a clause should be included in the present draft, but he was of the opinion that it would be better to leave to the General Assembly the decision whether or not to delete a clause which had already been included. The aim of the Commission should be to promote and encourage recognition of the Court's jurisdiction. The ideal was that disputes should be settled by friendly arrangement, but if that was not possible, there must be some way of securing a peaceful settlement. The Court offered the judicial machinery of settlement. Arbitration was also a judicial process, but it was not always acceptable. Under Islamic law, for example, arbitration was not permitted in cases involving public matters. He did not wish to imply that arbitration should be discarded as a means of securing the peaceful settlement of disputes, but the ultimate resort should be to the Court.

16. He would therefore vote for the article as adopted in 1957, but would propose a slight change in the wording. Instead of " shall be referred ", he would suggest that the phrase should read " may be referred ". That change would meet Mr. Liang's point that the Court could take cognizance only of cases which were submitted to it in accordance with its Statute.

17. Mr. ALFARO disagreed with Mr. Amado's view that a clause providing for arbitration and submission to the Court was quite out of place and irrelevant in a draft prepared by the Commission. The task of the Commission was not merely to compile rules of international law but to give effect to the universal desire for the establishment of a single system of international law. It was the Commission's duty not merely to codify international law but to promote its progressive development. The Commission's task must, as a general rule, be carried out through conventions which were to be signed by States and which would constitute a single body of international law. Such conventions should reflect the spirit of the United Nations. They should not merely be a compilation of existing laws, but should embody what, in the opinion of the Commission, the law should be in future. It was not right that such conventions should contain no arbitration clause.

18. It was not only natural, but appropriate and necessary, that each convention should include a clause providing for compulsory arbitration or submission to the Court. He was therefore in complete agreement with the view that article 37 should be included, either as drafted in 1957, if that form secured the consent of the majority, or as amended in the manner suggested by Mr. Scelle, Mr. Ago and others. He would vote for the version which seemed most acceptable to the majority.

19. Mr. MATINE-DAFTARY agreed with Mr. Ago that a convention without an arbitration clause was incomplete. The Commission should recognize, however, that an arbitration clause in the convention itself might not be acceptable to a great many States, for the policies and attitudes of States were not always what the Commission might desire or regard as ideal.

20. At the United Nations Conference on the Law of the Sea, a majority of States had been unwilling to accept an arbitration clause in the Convention on the Continental Shelf, but had wished the clause to be placed in an optional protocol. States were not likely to change their attitude in that respect in the immediate future, and consequently, if Mr. Tunkin agreed to withdraw his proposed amendment of article 37, he would like to repeat, in somewhat modified form, the proposal he had made at the preceding meeting, and propose that article 37 be separated from the text, and that a statement be made, either in the commentary or elsewhere, to the effect that the Commission was submitting an arbitration clause for the consideration of the General Assembly. The clause might be prepared by the Drafting Committee, and it could be left to the General Assembly to decide whether it should be embodied in a separate protocol or included in some other way.

21. Sir Gerald FITZMAURICE said that in the light of the discussion he wished to make it clear that he had hesitated with regard to article 37, not because he objected to the principle of compulsory arbitration, but because he doubted whether it was the Commission's task to lay down any provisions for enforcement when it was not creating new law but merely codifying existing law. The Commission had in the past rightly proposed means of enforcement when the substantive law and its methods of enforcement were closely interrelated, as in the articles on fishery conservation ; but in the case of the draft articles on diplomatic privileges and immunities there was no such interdependence. He would not oppose the majority if it thought otherwise, but if it was decided to insert the article it should be amended as Mr. Ago had suggested. He could not accept the Secretary's interpretation of the article, which would render it useless.

22. Mr. TUNKIN said he was second to none in making efforts to develop and strengthen international law in order better to serve the cause of peace, but, he observed, there were divergent views on how those objectives could be attained. Article 37 did not embody existing international law, and if it were inserted the other articles, which were of primary importance, might be rejected, with the consequence that the draft would

fail in its intended purpose. He agreed with Mr. Matine-Daftary that the problem of settling disputes was a separate problem. If, therefore, Mr. Matine-Daftary's proposal was accepted by the Commission, he would be prepared to withdraw his own proposal.

23. Mr. AMADO reiterated his view that article 37 was out of place in the draft. He found it difficult to believe that minor diplomatic disputes could ever be referred to the International Court of Justice as the result of an article framed by the Commission. Consequently, he strongly opposed the retention of article 37.

24. Mr. YOKOTA said that there was a great difference between an article in a convention and a provision in a protocol. A convention would be incomplete without provision for the settlement of disputes relating to the convention. Moreover, the effect of a provision in a convention was entirely different from the effect of one in a protocol. If it were presented as an optional clause in a protocol, only those States most eager to adopt it would sign the protocol, whereas if it were embodied in a convention, only those States which were strongly opposed to it would formulate reservations to the article in question. The majority of States, including those which were neither very enthusiastic for nor strongly opposed to the provision, would probably accept it in the convention without demur. As it was desirable that there should be provision for the judicial settlement of disputes, he was in favour of retaining the article.

25. Mr. EDMONDS said that law did not operate in a vacuum; where the principles of law had been embodied in rules there should also be rules of procedure as an accompaniment. It was the duty of the Commission to further the development of international law; therefore it should not be content with a mere eulogy of the International Court of Justice but should actively recommend that disputes be referred to it for settlement. Such action would extend and strengthen the jurisdiction of the International Court of Justice. He was therefore in favour of the retention of article 37.

26. Mr. SANDSTRÖM, Special Rapporteur, said that if in the draft under discussion the Commission's only intention was to record existing practice in international law there was no need for article 37; but if it intended that the draft should become a convention, article 37 was necessary. He therefore favoured the retention of the article, as amended by Mr. Ago. If an international conference was held to discuss the draft, it was possible, of course, that the provision for the settlement of disputes might be relegated to the final act.

27. Mr. AGO said he could not see the advantage of codifying customary law in a convention if there was to be no provision therein for the peaceful settlement of disputes. The Commission would fail in its task if its draft did not contain such a provision. As far as the clause itself was concerned, the essential point was to decide what body would in the last analysis deal with a dispute. At the ninth session, after much discussion, it had been decided to insert article 37; what was necessary now was not to delete all reference to the matter but to improve the text so as to establish a procedure for settlement to which recourse could be had at all times.

28. Mr. MATINE-DAFTARY could not agree with Mr. Yokota's argument. If article 37 was retained, a majority of States in a conference would oppose it, as they had opposed a similar article in the United Nations Conference on the Law of the Sea. If there was no conference, and the draft were offered to States for acceptance, a majority would make reservations in respect of article 37. Consequently, in order to avoid such a situation, the Commission should put the article in a separate protocol. There was no objection to its being amended by the Drafting Committee.

29. Mr. SCELLE said it was clear that article 37 was a necessary ingredient of a convention on diplomatic privileges and immunities. Some conventions did not need such an article, but in international and in national law there were certain fundamental principles, such as those with which the Commission was dealing, which had to be safeguarded by legal sanctions. To insert article 37 in a separate protocol rather than in the convention, therefore, would be an abandonment of the Commission's previous attitude, which was sound.

30. Secondly, Mr. Matine-Daftary's argument was open to question. If article 37 formed part of a convention it might be the subject of reservations by States, and if it was embodied in a special protocol States might not sign the protocol; but the effect in each case was the same. He was therefore in favour of its insertion as an article in the convention. If the majority of the Commission preferred the provision to appear in a separate protocol he would acquiesce, however unwillingly, while regarding such an action as a failure of the Commission to do its duty.

31. Mr. GARCÍA AMADOR said that the fate which had befallen the similar article in the United Nations Conference on the Law of the Sea did not support the view that there was a trend against compulsory jurisdiction by the International Court of Justice. In the Fourth Committee of that Conference a simple majority had supported the article, but the support of the two-thirds majority had not been obtained and hence the provision had had no chance of being accepted in the plenary Conference.

32. If the Commission desired to make the jurisdiction of the Court compulsory, as he hoped it would, the phrase "at the request of any of the parties" should be added in article 37 after the words "failing that,". He had already stated his preference for the compulsory jurisdiction of the Court (465th meeting).

33. The problem before the Commission was whether to retain article 37 in the draft or not. The Commission should remember, however, that the issue was less that of furthering the development of international law than that of the efficacy of the law. For that reason he was

in favour of the retention of the article, with the amendment he had suggested.

34. The CHAIRMAN observed that the discussion revealed two sides of the approach to the question. It was certainly logical to provide for reliefs in relation to rights and duties arising out of any legal relation and remedies in respect of such reliefs, whenever any codification was attempted concerning such a relation. But logic, though a good servant, was always a bad master. Even the Charter of the United Nations placed reliance on some residual good faith of States. The Charter did not make the Court's jurisdiction compulsory. On the other hand, too much emphasis should not be laid on the risk of the draft not getting universal acceptance. Even if not so accepted, it would serve a useful purpose as a model piece of codification. In his view good faith on the part of the States should not be ruled out altogether.

35. It seemed to him that the first proposal to be voted upon was that the substance of article 37 should be incorporated in the commentary.

36. Mr. MATINE-DAFTARY, replying to a question by Mr. García Amador, said that the commentary would contain the text of the article, subject to the drafting changes suggested by Mr. Ago and, perhaps, changes suggested by the Drafting Committee.

37. He agreed with Mr. Scelle that the article might be embodied in a separate protocol rather than in the commentary.

38. Mr. AGO thought that it might be placed in the commentary ; the General Assembly would then decide where to place it definitively. But it was essential that the Commission should be clear about the content of the article.

39. Mr. AMADO said that the article should not appear either in the body of the convention or in any commentary.

40. Mr. TUNKIN said that the Commission should first decide whether the article should be transferred to the commentary or not. If it decided in the affirmative, it would have to decide in what way the article should be amended.

41. Mr. LIANG, Secretary to the Commission, thought that it would create a somewhat peculiar situation if the Commission set out a number of alternatives in its report and left it to the General Assembly to choose between them. Experience showed that in such cases the General Assembly never chose between the alternative courses. It either decided to call a conference to prepare a convention on the subject or recommended the draft as a model for the guidance of States. He therefore thought it more advisable to include whatever text the Commission saw fit to adopt as a recommendation. Then, if a conference were convened, it would be for that body to choose.

42. After further discussion, the CHAIRMAN, on the suggestion of Mr. Edmonds, put to the vote first the proposal that the Commission should not adopt any provision on the lines of article 37.

The proposal was rejected by 11 votes to 5, with 2 abstentions.

43. The CHAIRMAN put to the vote Mr. Matine-Daftary's proposal that the article, as amended, be included in a special protocol.

Mr. Matine-Daftary's proposal was repected by 10 votes to 5, with 3 abstentions.

44. The CHAIRMAN then put to the vote article 37 as adopted at the ninth session, together with Mr. Ago's addendum " at the request of one of the parties " after the words " failing that ".

Article 37, as amended, was adopted by 13 votes to 3, with 2 abstentions.

ADDITIONAL ARTICLE 12 A (*continued*)[1]

45. Mr. SANDSTRÖM, Special Rapporteur, introduced the following text drafted by him in conjunction with Mr. Ago on the basis of a proposal by the Italian Government (A/CN.4/114/Add.3) and in the light of the Commission's discussion at its 454th meeting (paras. 43 to 74) :

" The diplomatic corps may bring to the notice of the Government of the receiving State any event or circumstance which affects the corps as a whole.

" When deliberating on such action the diplomatic corps shall be composed of the heads of mission. Its doyen shall act as its spokesman.

" The doyen of the diplomatic corps shall be the senior head of mission in the highest class or, in countries where this prerogative is held to vest in the Holy See, the Apostolic Nuncio."

46. Mr. BARTOS inquired, with reference to the second paragraph, how decisions were to be taken by the diplomatic corps : by an ordinary majority, a majority of two-thirds or by some other procedure ? Difficulties had frequently arisen in the past on that point, and representations made by the doyen of the corps were sometimes disavowed by certain heads of missions on the ground that, though they had taken part in the deliberations, no formal decision had been taken.

47. Mr. SANDSTRÖM, Special Rapporteur, said that he had assumed that decisions would be taken by an ordinary majority vote and that, if the voting was fairly evenly divided, the diplomatic corps would hesitate to make representations.

48. Mr. AGO thought it advisable to allow considerable flexibility on such points. He did not conceive of the diplomatic corps in terms of a properly constituted assembly and, indeed, to talk of the corps " deliberating " was hardly correct. The process of reaching a decision might take the form of bilateral consultations. Perhaps it would dispose of Mr. Bartos' difficulty, if the words " When deliberating on such action " were deleted.

[1] Resumed from 454th meeting.

49. Mr. AMADO considered the words " any event or circumstance " too vague. He would prefer a reference to " acts or circumstances ".

50. Sir Gerald FITZMAURICE, agreeing with Mr. Ago that some change was needed in the second paragraph, suggested replacing the words " When deliberating on such action " by the words " For the purposes of such action ". As had been said during the previous discussion, the term " diplomatic corps " was often used in a wider sense to include all diplomatic agents in a particular country.

51. Mr. ALFARO considered that the words " may bring to the notice of the Government " in the first paragraph were rather vague and did not reflect the practice in such matters. It would be more correct to say that the diplomatic corps might make representations or submit petitions to the Government.

52. Mr. MATINE-DAFTARY said that leaving aside the question whether the Apostolic Nuncio should automatically be the doyen in certain countries, he had no objection to the parts of the article defining the doyen and his role. The wording of the rest of the article, however, would give rise to confusion and might be described as positively dangerous. The phrase " any event or circumstance ", for instance, was far too general. In any case, what was meant by events or circumstances which affected the corps as a whole ? That was why he preferred that the Commission should avoid granting to the diplomatic corps such collective jurisdiction.

53. Mr. AGO said he could not see how an article on the diplomatic corps could constitute any great danger. It was very difficult to draft a suitable text. One speaker had found it too general, while another had found it too restrictive. The events or circumstances which the authors of the draft had in mind were matters which did not affect the interests of any particular country or group of countries but concerned the diplomatic corps as such. For example, in one case representations had been made by the diplomatic corps to the government of a country to point out that decisions in the case-law of their country to the effect that diplomatic agents did not enjoy immunity from jurisdiction in respect of acts performed in their personal capacity were contrary to international law.

54. Mr. AMADO said that, although Mr. Ago had made a good case, Mr. Matine-Daftary certainly had stressed a point which would be appreciated by the Latin-American countries, haunted, as they were, by the fear of collective diplomatic intervention.

55. Mr. BARTOS thanked the Special Rapporteur for his clarification. Though he could not but approve of the idea of including a provision on the composition and role of the diplomatic corps, he found it impossible to vote for the article as it stood.

56. In European countries at least, it was the practice for the diplomatic corps, quite apart from the role it played in matters of protocol and ceremonial, to bring to the notice of the Government of the receiving State, or even to protest concerning grave cases of violation of diplomatic privileges and immunities or circumstances which prevented the proper functioning of the system of diplomatic representation. It was, in fact, recognized as competent to watch over and safeguard the normal functioning of diplomatic missions.

57. The statement that the " deliberations " of the diplomatic corps might take the form of bilateral conversation showed how important was the question of the manner in which decisions were reached. It might be a serious political matter affecting good relations between States if the representations of a doyen were weakened by letters from individual ambassadors pointing out that no formal decision had been reached on the matter.

58. Though he recognized that the prerogative of the Holy See referred to in the third paragraph was of long standing and dated from before the Regulation of Vienna of 1815, he did not agree with the principle involved. He therefore requested a separate vote on the third paragraph, on which he would abstain.

59. Mr. TUNKIN observed that the debate seemed to confirm his remark during the previous discussion that, while he had no objection in principle to such an article, he doubted whether an acceptable article could be drafted. As at present worded, the text could hardly be accepted. The diplomatic corps could act only in cases in which the Governments which its members represented could act. It could not take action in " any event or circumstance ". A rapid rise in prices, for example, might well make the task of missions difficult and thus affect the diplomatic corps as a whole, but the latter would not be entitled to take any action, because the matter was an internal one for the receiving State. Unless it was qualified, therefore, the first paragraph of the article would be unacceptable.

60. The first sentence of the second paragraph was also so vague as to be hardly acceptable. Whether it was explicitly stated or merely implied that the diplomatic corps would deliberate on the action it should take, the question nevertheless arose how its decision would be reached. He did not think that it could be taken by a majority vote, for the diplomatic corps was not a supra-State organ. The Commission was in fact faced with a dilemma : either to say nothing at all on the question of the diplomatic corps or to attempt to frame an article which it would be difficult to draft in acceptable terms.

61. Mr. LIANG, Secretary to the Commission, said that, taken as a whole, the article gave the impression that the principal function of the diplomatic corps was to bring matters affecting it to the notice of the Government of the receiving State. But that was not, he thought, its normal day-to-day function. The diplomatic corps was normally concerned with matters of protocol and ceremonial, though that did not exclude the possibility of its acting as a body in grave circumstances, which were, however, of rare occurrence. Similarly, the institution of doyen was quite a normal one and he was not appointed, as the second paragraph might seem to

suggest, in order to take the action envisaged in the first paragraph. He would therefore suggest that the article might be redrafted so that the normal functions of the diplomatic corps be given precedence over its extraordinary ones. The third paragraph should, in his opinion, come first and the first and second paragraphs should be somewhat attenuated.

62. He could recall a pertinent case where many years before a Minister of Foreign Affairs of an oriental country had refused to receive the doyen acting on behalf of the accredited diplomatic representatives in a body in connexion with a protest over his country's denunciation of a treaty of extra-territoriality, on the ground that the treaties between his country and theirs made no provision for recognition of the diplomatic corps as an independent legal entity. Strictly speaking, that attitude might be justifiable, since the relations between the countries concerned were defined in bilateral treaties and not in a multilateral treaty.

63. Sir Gerald FITZMAURICE said that, although he did not altogether share the Secretary's views, he had been on the point of making a similar suggestion as to the redrafting. The interpretation placed on the article by some speakers seemed to him somewhat exaggerated. He agreed with the principle of the article. The institutions of the diplomatic corps and its doyen and the role they played in the matter of diplomatic privileges and immunities were, he thought, perfectly well known. There seemed, however, to be some confusion between a joint *démarche* by Governments and joint action by the diplomatic corps in matters affecting its status, privileges and immunities. The two had nothing in common. Whereas diplomatic representatives making a joint *démarche* required instructions from their Governments for the purpose, the diplomatic corps could make representations on matters of a protocolary character or affecting its status and privileges and immunities even in the absence of instructions from Governments.

64. Though the order of the paragraphs could be changed as the Secretary suggested, he regarded the precaution as somewhat exaggerated. The normal functions of the diplomatic corps were clearly defined in article 2 and there was no danger that article 12 A, which would come in a different section, would be misinterpreted. To meet the objections raised, he suggested replacing the words " any event or circumstance which affects the corps as a whole " by the words " any matter of an administrative, technical or protocolary character or affecting the status or privileges and immunities of the diplomatic corps ".

65. Mr. AMADO proposed the following abbreviated version of the article :

> " The doyen, acting on behalf of the diplomatic corps, may bring to the notice of the Government of the receiving State any fact or circumstance which concerns the diplomatic corps as a whole."

66. Mr. AGO welcomed Mr. Amado's proposal. He thought that the proposals submitted by Sir Gerald Fitzmaurice and Mr. Amado could be referred to the Drafting Committee.

67. Mr. ALFARO observed that Sir Gerald Fitzmaurice's remarks, in which he had succinctly defined the field of action of the diplomatic corps, were very much to the point and, in conjunction with Mr. Amado's proposal, should enable the Commission to draft an appropriate text. It was not enough, however, to state that the diplomatic corps should bring matters to the notice of the Government of the receiving State. It should also be able to make representations with a view to protecting the interests of the diplomatic corps as a whole.

The meeting rose at 1.5 p.m.

467th MEETING

Thursday, 19 June 1958, at 9.45 a.m.

Chairman : Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ADDITIONAL ARTICLE 12 A *(continued)*

1. The CHAIRMAN invited the Commission to take a decision on the additional article proposed at the preceding meeting.

2. Speaking as a member of the Commission, he said that there seemed to be no need to include in the draft a provision on the subject of the diplomatic corps. The question was hardly one between States.

3. Mr. ZOUREK agreed. Quite apart from the fact that the term " diplomatic corps " had two connotations, one broad (all the diplomatic staff of all the diplomatic missions accredited in a given State) and one restrictive (all the heads of missions), there was the important consideration that it represented a simple grouping of interests, a *de facto* grouping with no legal function, which exercised certain activities of a protocol nature and a *droit de regard* over the observance of diplomatic privileges and immunities by the receiving State. In that respect it bore a certain similarity to the consular corps. The proposed article tended, on the other hand, to transform the diplomatic corps into a legal institution with definite functions, and that he thought was neither necessary nor desirable. Such an article would even be harmful, as it would establish a legal basis for the unwarrantable intereference of the diplomatic corps into the affairs of the receiving State. Moreover, the

defence of the interests of the diplomatic corps belonged more to the political field than to the legal field.

4. The CHAIRMAN put to the vote the proposal that no provision on the subject of the diplomatic corps be included in the draft.

The proposal was adopted by 7 votes to 6.

5. Mr. SCELLE, explaining his vote, said that he was not opposed to the principle of the article. On the contrary, he considered some such provision necessary. It would be impossible for the Commission to include in the article the provisions which it really should contain. In his opinion the diplomatic corps should have a *droit de regard* over the general policy of the Government to which its members were accredited, but, because the concept of sovereignty was more dominant than ever throughout the world, a provision on such lines would stand no chance of acceptance. He had therefore preferred no article at all to one which merely touched on the truth.

ADDITIONAL ARTICLES ON RECIPROCITY AND NON-DISCRIMINATION

6. Mr. SANDSTRÖM, Special Rapporteur, proposed the following additional articles. The first, on the principle of reciprocity, would read as follows:

> " If a State applies restrictively a rule of this draft which is capable of being applied liberally or restrictively, then the other States shall not be bound, *vis-à-vis* that State, to apply it liberally."

The second, on non-discrimination, would read as follows:

> " In the regulations setting forth the conditions governing diplomatic missions accredited to it or the diplomatic privileges and immunities, the receiving State shall not discriminate as between States. A provision stipulating that the application of the regulations is subject to reciprocity shall not be deemed to be discriminatory."

7. Mr. MATINE-DAFTARY observed that the article on reciprocity was limited to one case only — the one in which a State applied a rule restrictively — and did not provide for cases where the State failed to apply the rule altogether.

8. Mr. YOKOTA said that, while appreciating the Special Rapporteur's efforts to frame a provision on reciprocity in response to the observations of Governments, he did not find the proposed article entirely satisfactory. Since it was, in fact, nothing more than an enunciation of a general rule of interpretation valid for any branch of law, he doubted whether it was either necessary or advisable to include it in a draft convention. If it were included, then logically every convention should have such a clause. It was perfectly true that some provisions in the draft were capable of being interpreted and applied with varying degrees of liberality or restrictiveness, owing to the deliberately general or even vague formulation adopted. But other draft conventions and draft articles elaborated by the Commission were equally open to different interpretations.

9. In his observations on the suggestion of the Netherlands Government concerning the principle of reciprocity, the Special Rapporteur had stated that reciprocity " may be conceived of as a condition governing the grant of advantages more extensive than the minimum laid down as obligatory " (A/CN.4/116). It was in that sense, and in that sense only, that a provision on the principle of reciprocity would be admissible in the draft. But not all States had understood reciprocity in that sense. The United States Government, in its observations on the draft articles (A/CN.4/114), for instance, considered that the principle of reciprocity should apply in article 7, paragraph 2, which dealt with the right of the receiving State to refuse to accept officials of a particular category on a non-discriminatory basis. The principle of reciprocity could not, however, apply in that case. The duty of non-discrimination was not optional but obligatory. If a State refused to accept officials of a particular category from a second State but not from other States, it was violating a rule of international law and the second State was then entitled to take similar action. In that case, however, it was not the principle of reciprocity which was involved but the right of reprisal.

10. He was therefore opposed to the proposal on the twofold ground that as a general rule of interpretation it was unnecessary and that the formulation it gave of the principle of reciprocity was inappropriate. He would, however, be in favour of including, either in a preamble to the draft or in a commentary, the Special Rapporteur's statement which he had just quoted.

11. Mr. SANDSTRÖM, Special Rapporteur, said that he had drafted the article in response to various observations by Governments and to suggestions by members of the Commission. He thought it would be an advantage to include a rule on those lines in the draft. Many national regulations on the subject of diplomatic privileges and immunities contained such a provision on reciprocity.

12. Replying to Mr. Matine-Daftary, he said he had refrained from referring to the non-application of rules, because it came under the heading of reprisals rather than of reciprocity. When drafting the article he had had in mind a liberal or restrictive interpretation of such texts as article 26 or 27, or article 7, which was drafted in general terms.

13. Mr. TUNKIN inquired what the relation was between the article on reciprocity and the reference to reciprocity in the second sentence of the article on non-discrimination.

14. Mr. SANDSTRÖM, Special Rapporteur, recalled that he had been requested by members of the Commission to draft an article on the principle of non-discrimination. In so doing, he had thought it wise to refer to the rule of reciprocity.

15. Mr. TUNKIN observed that there appeared to be a very close relation between the two articles but he was not quite sure what it was meant to be.

16. Sir Gerald FITZMAURICE considered that the Special Rapporteur had been quite right in drafting an article on what was rather a special case. When a Government provided for the grant of diplomatic privileges and immunities as part of international law and practice, its interpretation of its duties in that respect might be either liberal or restrictive and, if restrictive, might come very close to infringing international law without actually doing so. If the draft contained no clause on the principle of reciprocity, a country which applied the rules restrictively could claim that other countries were not entitled to do likewise in its regard.

17. Referring to Mr. Tunkin's inquiry, he said that there was neither relation nor conflict between the article on reciprocity and that on non-discrimination. They dealt with different subjects. The second article implied that if a State applied a rule of the draft restrictively, it must do so with respect to all States indiscriminately. The second sentence in the article was quite logical. It merely meant that if a State applied a rule restrictively to a second State, the action of the second State in according the other State like treatment would not be regarded as discriminatory but merely as an application of the principle of reciprocity.

18. Mr. LIANG, Secretary to the Commission, said that the principle of the second of the two articles was sound although he had some reservations as to its formulation. It envisaged the case where a State, in taking a restrictive view of the treatment to be accorded to diplomatic agents, did not violate any legal rule. According to the old text-books on international law, for example, those written at the beginning of the century, when a State acted in an unfriendly manner towards a second State without violating international law, the second State was entitled to have recourse to retortion. When, on the other hand, the first State violated international law, the second State could take reprisals. He was not sure, however, whether that terminology was still being used in contemporary international law.

19. In his view, the article was not concerned with the question of liberal or restrictive application of the rules so much as with that of according liberal or strict treatment within the framework of the rules. If a dispute on the subject were brought before an arbitral tribunal or the International Court of Justice, it would not be presented as a question of application. If the matter was governed by convention, it would be a question of liberal or restrictive interpretation of the provisions of that convention. He thought that it would be rather difficult to ascertain whether a rule was being applied liberally or restrictively. In view of those considerations he would suggest that the Drafting Committee consider the possibility of replacing the concept of " application " by the concept of according treatment in varying degrees within the framework of the rules.

20. Mr. BARTOS observed that the article dealt with the comparatively new concept of reciprocity in practice as opposed to the reciprocity implied in any treaty. He believed that it was Anglo-Saxon case-law which had first authorized courts to verify whether treaties were being effectively applied. In recent years there had been an increasing number of cases of non-application of treaties, due to differences in conditions and institutions in the various States, and these had had as a counterpart an increased demand on the part of States for the same rules to be observed by all States. The general view now was that if a State did not apply a rule when it was in a position to do so it was guilty of discrimination against those to whom it did not apply the rule.

21. He was convinced that, in the matter of diplomatic privileges and immunities, no State could expect better treatment than it accorded to other States. Since such privileges and immunities were accorded to ensure the proper working of diplomatic missions, it would be intolerable if some States hampered the proper working of missions while others did not. He accordingly considered it necessary to have a provision on reciprocity which would, so to speak, provide for a unilateral sanction, giving States a kind of right of self-defence or of reprisal.

22. The CHAIRMAN, speaking as a member of the Commission, said that Sir Gerald Fitzmaurice had effectively convinced him that there was no conflict between the two articles. The article on non-discrimination struck him, however, as the better draft and its second sentence gave a pointer to a more suitable wording of the other article.

23. The first article as drafted was concerned with the according of treatment under the rules in accordance with the treatment received under them. But the question was whether the restrictive application of a rule by a second State in response to like treatment by another State was a matter of reciprocity at all ; it was rather in the nature of reprisal. For him, the principle of reciprocity came into play when two States accepted the draft as governing their mutual relations, for then the implication was that at least legally both would accord like treatment to each other's missions. To indicate how a State was to behave when treated in a certain manner by another State, which was what the first of the two articles really did, would be going beyond the scope of the draft and providing, in effect, an article on reprisals. He therefore felt that the first article needed redrafting.

24. Mr. TUNKIN said that there was a close connexion between the two additional articles proposed by the Special Rapporteur. The first of the two articles concerned a specific case of the operation of the reciprocity principle which was expressed in general terms in the second. That relationship between the two articles should, he thought, be made clear.

25. It had always been understood that there were too kinds of reciprocity: first, reciprocity or non-discrimination in the sense that States gave each other

equal treatment on a non-discriminatory basis in relation to treatment accorded to other States ; and secondly, reciprocity in the sense that in its territory State A should give to State B exactly the same rights as State B gave to State A in its territory. The first of the two articles was concerned with reciprocity in the second sense.

26. Many rules could be interpreted liberally or restrictively. He agreed with Mr. Yokota that if such an article was included in the draft, there was no reason why a similar article should not be included in every draft which the Commission prepared. He therefore doubted whether a specific provision on the lines of that proposed should be included in the draft.

27. Mr. YOKOTA said that, despite Sir Gerald Fitzmaurice's observations, he still doubted the advisability of including in the draft so general a rule as was contained in the first of the two additional articles.

28. The second article contained an express reference to reciprocity. The Commission should have a clear idea of what was meant by reciprocity in that connexion. In the relationships which were the subject of the draft, the principle of reciprocity could properly operate only in cases where States were prepared to grant more than the minimum of privileges and immunities laid down in the draft. For example, under article 26 (*e*) the receiving State was not under a duty to exempt the diplomatic agent from charges levied for specific services rendered. The Japanese Government, however, exempted the premises of diplomatic missions from the payment of charges for electricity and gas, which came within the meaning of " services rendered ". That was a case in which the principle of reciprocity might operate. Article 20, on the other hand, stipulated that States should not restrict freedom of movement and travel by members of diplomatic missions. There, the principle of reciprocity could not be applied, for if in violation of article 20 a State restricted freedom of movement and travel such action might call for the application, not of the principle of reciprocity, but of reprisals.

29. He was not quite sure whether, in the second sentence of the second additional article, the word " reciprocity " was intended to bear the meaning he had attached to it. If therefore the article was adopted, the uncertainty on that point should be removed.

30. Sir Gerald FITZMAURICE said that the discussion had shown that provisions of the kind included in the two additional articles proposed by the Special Rapporteur were necessary and desirable, but also that those texts needed redrafting.

31. According to the distinction drawn by the Chairman and Mr. Yokota between reciprocity and reprisals, it was reprisals which might be resorted to in situations of the kind described in the first article, whereas the other additional article was more concerned with reciprocity. A further distinction between the two kinds of reciprocity had been drawn by Mr. Tunkin.

32. Mr. Tunkin's remarks had shown how necessary it was to make provision for both kinds of reciprocity. It would not be enough to provide that if State A did not in its territory discriminate against State B, then State B should not discriminate against State A in its territory. A situation might occur in which a receiving State, without discriminating against any particular sending State, might accord to all sending States less favourable treatment than was accorded to diplomatic missions by other States. Would, in that case, the States whose missions received the less favourable treatment be entitled, without being accused of discrimination, to treat the mission of the State in question less favourably than all the other missions accredited to them ? That was really the question at issue in the first of the two proposed additional articles.

33. Consequently, it could not be said that either of the two additional articles proposed by the Special Rapporteur was superfluous, for they dealt with different situations. The Drafting Committee might be asked to see whether the texts could be improved. For example, it should perhaps be made clear that the last sentence of the second article applied to cases in which States accorded more favourable treatment than they were bound to accord under international law.

34. Mr. ZOUREK said the Special Rapporteur's proposals regarding reciprocity were much too general and exceeded the scope of the Commission's draft. Diplomatic relations were of course based on reciprocity of treatment, but the Commission was preparing a draft convention, and by virtue of that convention reciprocity would be largely assured by the application of the rules of the convention. It would always be open to States which held that the terms of the convention were not being correctly applied to resort to the machinery of peaceful settlement provided for in the treaties to which they were parties.

35. Moreover, the principle of reciprocity could not be applied in an absolutely general way because there were some articles which were not based on reciprocity. For example, it would be difficult to apply the principle of reciprocity in the case of article 7, which referred to the particular conditions prevailing in individual receiving States.

36. Even if the application of the reciprocity principle should be confined only to the articles dealing with diplomatic privileges and immunities, serious difficulties might arise. For example, if a court in State A refused to grant to a diplomatic agent of State B immunity from jurisdiction in a specific case, it was doubtful whether, on the basis of the principle of reciprocity, the courts of State B would be entitled to refuse immunity from jurisdiction, in similar cases, to the diplomatic agents of State A.

37. The principle of reciprocity could most appropriately be applied in such matters as immunity from taxation and exemption from customs duties. Where the treatment given in those respects was more liberal than was strictly required under the rules of international law, it could properly be made subject to reciprocity, but the principle of reciprocity could not be regarded as applicable to the whole draft.

38. Mr. TUNKIN agreed with Mr. Zourek that the proposed article relating to non-discrimination and reciprocity was too general. Perhaps it should speak of non-discrimination and reciprocity in relation only to diplomatic privileges and immunities, but though that would be an improvement, he was not sure even then the text would be entirely satisfactory.

39. The Chairman and Mr. Yokota had rightly drawn attention to the distinction between reciprocity and reprisals. The Commission should be clear as to what it was dealing with. Reciprocity was the principle underlying the treatment to be accorded to each other by the parties to a specific bilateral or multilateral agreement ; but the Commission was codifying rules of general international law, and the provisions of the convention which it was preparing for acceptance by a mapority of States, if not by all, would be specific rules of general international law. How, then, was the second sentence of the proposed additional article on non-discrimination to be construed ? It might be interpreted to mean that if a State did not comply with a specific rule of general international law in its relations with another State, that other State might also be entitled not to comply with that rule. In that case, however, he agreed with Mr. Yokota that the action of the first State would be a contravention of international law and that the action taken by the second State would be a kind of reprisal.

40. Mr. ALFARO agreed with the Special Rapporteur and other members of the Commission as to the desirability of including the two proposed additional articles in the draft. It might perhaps be said that when, in cases of the kind referred to in the first of the two articles, State A applied a rule of the draft restrictively and State B retaliated by also applying that rule restrictively *vis-à-vis* State A, the action taken by State B was in the nature of a reprisal ; but that was a subsidiary aspect, and the article could certainly not be said to sanction a whole system of reprisals.

41. The second of the two proposed additional articles was concerned not so much with reciprocity as with non-discrimination ; and the reference to reciprocity in the second sentence was incidental, the main purpose of the sentence being to provide an example to illustrate what kind of action could not be deemed discriminatory.

42. It was imperative that in a draft relating to diplomatic intercourse and immunities situations of that kind should be regulated, for many of the articles related to immunities such as exemption from payment of customs duties on goods which the diplomatic agent imported for his own use or the use of his family. While some States applied that rule very liberally and allowed the diplomatic agent to import almost unlimited quantities of goods, other States applied it more restrictively. If State B adopted different policies in respect of such a rule towards States A and C on the grounds that State A applied the rule less restrictively, *vis-à-vis* State B, than did State C, the action of State B could not be regarded as discriminatory.

43. He was in favour of the two proposed additional articles, subject to such improvements and amendments as might meet with the ommission's approval.

44. Mr. SANDSTRÖM, Special Rapporteur, said that his intention in drafting the first of the two proposed additional articles had been to exclude the question of reprisals and to refer only to those rules in the application of which a certain latitude was possible. The draft referred specifically to a rule . . . which is capable of being applied liberally or restrictively ". That would include many of the rules in the draft, for example, the rule relating to inviolability. If there was any difficulty in connexion with the use of the word " applies ", the Drafting Committee might be asked to find a better term.

45. He regretted that the second article had been dealt with at the same time as the first, for it was concerned with a different subject. Perhaps the second sentence need not be retained, since what it said was self-evident.

46. Mr. HSU said he shared the misgivings expressed by Mr. Tunkin and others regarding the first of the two articles. He doubted whether it was adequate as a definition of reciprocity. He also doubted whether a definition of reciprocity was needed. The second article did not define discrimination and there was no reason why the first should include a definition of reciprocity. The article had presumably been proposed to meet the wishes of some Governments, but he suspected that what they wanted was not so much a definition by the Commission as its abstention from regulating questions which could best be left to the parties concerned to work out on the basis of reciprocity. Governments would not wish the Commission to attempt to define a word of which the meaning was self-evident.

47. Mr. LIANG, Secretary of the Commission, said that a State which went beyond the requirements of the rules and treated a foreign mission liberally could not insist that another State give the same liberal treatment to its diplomatic agents. If a State accorded treatment which fell short of what was required by the article, it failed to discharge its obligation and the question of reprisals might arise, but the subject of reprisal was beyond the scope of the rules under consideration. An additional article on reciprocity proposed by the Special Rapporteur covered only one aspect of that problem. He suggested, therefore, that the proposed article concerning liberal or restrictive application should be combined with the article on reciprocity ; the combined text would then read :

> " In carrying out the provisions of the rules governing diplomatic missions accredited to it or the diplomatic privileges and immunities, the receiving State shall not discriminate as between States. The granting of certain privileges and immunities subject to reciprocity shall not be deemed to be discriminatory."

It was unnecessary to refer to legislations or regulations ; indeed, many States had no written rules on the subject, but merely observed established practice.

The second sentence of his suggested amendment would cover all aspects of the subject.

48. Mr. AMADO said he was opposed to a reference to principles which were not clear-cut and intelligible. Reciprocity was a matter of practice, and in any case, was a concept that embraced a great divesity of things. The discussion had made it clear that there was no agreement on the subject, which was so unintelligible that he personally was unable to grasp the meaning of the second sentence of the French version of the Special Rapporteur's proposal on non-discrimination, which seemed more obscure than the English. As the subject was covered by diplomatic practice, there seemed to be no need to frame any rules.

49. Mr. VERDROSS said that, having followed attentively the Special Rapporteur's explanation of his proposal on reciprocity, he thought that the Drafting Committee, when it considered the wording of that proposal, should refer to principles rather than rules.

50. Faris Bey EL-KHOURI said that the second sentence of the proposed article on non-discrimination seemed to him to imply that if a State made a concession to another on a reciprocal basis it would be obliged to make the same concession to any other State claiming it. If that was the meaning, he would vote against the proposal.

51. The CHAIRMAN said that it was generally agreed that the two proposed articles were unsatisfactory in the form in which they were drafted. He suggested, therefore, that the Commission leave it to the Drafting Committee to consider them and attempt to frame a more acceptable text, avoiding provisions of the character of reprisals. A final decision on the articles could be taken when the Drafting Committee had submitted its revised version.

It was so agreed.

ADDITIONAL ARTICLE ON EXEMPTION FROM SOCIAL SECURITY LEGISLATION

52. Mr. SANDSTRÖM, Special Rapporteur, said that his proposed additional article (A/CN.4/116/Add.1) was based on a proposal by the Luxembourg Government (A/CN.4/114). The subject had been considered at the ninth session, and the Commission had decided that there should be no such article, but since then he had studied the legislations and come to the conclusion that it was advisable to include an article dealing with the subject.

53. The second paragraph of the article, however, dealt with what was in reality a private concern and its utility was questionable. In order to avoid discussion, therefore, he withdrew that paragraph.

54. Mr. TUNKIN said he had no specific objection to the proposal. On the other hand, social security was only one of many fields dealt with by national legislation, and if there was an article relating to social security, why should there not also be articles relating to other fields ?

55. Mr. SANDSTRÖM, Special Rapporteur, said that in framing his proposal he had had in mind contributions to old age pensions and accident insurance schemes, for example. He did not know what other fields of legislation Mr. Tunkin had in mind.

56. The CHAIRMAN put to the vote the draft additional article on exemption from social legislation (the first paragraph of the article as drafted by the Special Rapporteur).

The additional article was adopted by 16 votes to none, with 1 abstention.

57. Mr. MATINE-DAFTARY said that he had voted in favour of the article on the assumption that members of the mission and members of their families could contribute towards health insurance and sickness benefit if they so desired.

58. Mr. SANDSTRÖM pointed out that in many cases there was legislation permitting members of the mission to do so if they wished.

DEFINITIONS CLAUSE (*continued*) [1]

59. Mr. SANDSTRÖM, Special Rapporteur, said that the Netherlands Government had proposed (A/CN.4/114/Add.1) that the draft should contain a definitions clause. He thought the proposal reasonable, but considered the Netherlands Government's proposed text hardly comprehensive enough.

60. The CHAIRMAN said that the definitions would depend on the terms of the final version of the articles to be prepared by the Drafting Committee. He suggested, therefore, that the Commission should decide whether the draft should contain a definitions clause, and, if it agreed that it should, leave it to the Drafting Committee to work out the text.

61. Mr. YOKOTA said he had no objection in principle to the insertion of a definitions clause. The Netherlands Government's proposed definitions did not make it clear, however, what members of a mission make up the service staff and what ones the administrative and technical staff ; for example, it was not clear to which group a typist or an interpreter belonged. The definitions should therefore be clarified by examples in the commentary.

62. Mr. SANDSTRÖM, Special Rapporteur, said that examples could be given in the text of the clause. He had suggested (A/CN.4/116) adding " including military, naval and air attachés and other specialized attachés " at the end of sub-paragraph (*d*), and counsellors and secretaries might be added in the same category.

63. Mr. ZOUREK hoped that the meaning of the expression " members of the family " which had been discussed at length in connexion with article 28, would be defined.

[1] Resumed from 449th meeting.

64. Mr. BARTOS thought that in drafting the passage relating to domestic servants, the Drafting Committee should take into account the terminology used by the International Labour Organisation.

65. Mr. TUNKIN said that there was no shortage of terms which could be defined, such as " diplomatic intercourse ", " privileges ", " immunities ", etc. It was essential, however, that only those definitions should be set down which were really necessary for the understanding and application of the draft articles. He agreed that there should be an article containing definitions, but it should be closely scrutinized by the Drafting Committee.

65. The CHAIRMAN proposed that the draft articles should contain a definitions clause, the terms of which were to be worked out by the Drafting Committee.

It was so decided.

FINAL FORM OF THE DRAFT (*continued*) [2]

67. The CHAIRMAN said that the Special Rapporteur had proposed (448th meeting, para. 64) that consideration of the form to be given to the draft be deferred until the articles had been examined, and that proposal had been adopted. He requested the Commission to decide in what form the draft should be recommended to the General Assembly.

68. Mr. SANDSTRÖM, Special Rapporteur, proposed that the draft articles be submitted to the General Assembly in the form of a draft convention with a recommendation for action under either paragraph 1 (*c*) or paragraph 1 (*d*), of article 23 of the Commission's statute.

69. Mr. ALFARO agreed that the draft article should be submitted to the Assembly in the form of a convention, ready for signature. In his view, however, it was unnecessary to recommend, as one of the possible courses of action, that the General Assembly convoke a conference, as it might decide that the draft convention was suitable for immediate signature by States Members.

70. The CHAIRMAN expressed the view that a recommendation in conformity with article 23, paragraph 1 (*c*), of the Commission's statute would be the most suitable.

71. Mr. GARCIA AMADOR said that many conferences were held under the auspices of the United Nations. Some, such as the United Nations Conference on the Law of the Sea, had been very technical, but in the case of the draft articles before the Commission, no specialist knowledge was required. He therefore agreed with Mr. Alfaro ; because of the need to reduce the number of conferences to a minimum, and because the subject was straightforward, the General Assembly might well, after discussion, submit the draft convention to Members for signature.

72. Sir Gerald FITZMAURICE said that he would not vote against the submission of the draft articles as a convention, but he deprecated the idea that all the Commission's codifications of international law should be recommended to the General Assembly in the form of conventions. Some parts of international law did not readily lend themselves to presentation in such form. In others, as in the case of consular intercourse and immunities, there was not much customary international law, and in such a case, an international conference to agree upon a convention was desirable. In the case of diplomatic privileges and immunities, however, no new ground had been broken ; nor was there any obscurity such as had justified recommending the convocation of a conference on the law of the sea. He therefore thought that the Commission's recommendation should be made under article 23, paragraph 1 (*b*), of its statute, not 1 (*c*).

73. If the majority preferred to submit the text in the form of a convention, a recommendation should be made under article 23, paragraph 1 (*c*) rather than 1 (*d*). For if the General Assembly desired a conference, it would convoke one ; there was no reason why the Commission should recommend one.

74. Mr. ZOUREK agreed with Mr. Sandström that the draft articles should be recommended in the form of a convention. In framing the articles, the Commission had assumed throughout that they would form a convention, and there was no reason to suspect that the adoption of a convention would occasion much difficulty to States.

75. The question whether the recommendation should be made under paragraph 1 (*c*) or under paragraph 1 (*d*) of artilce 23 was of secondary importance. A conference to deal with diplomatic intercourse, if convoked, would not necessarily be as big as the United Nations Conference on the Law of the Sea ; if there were no conference, the draft convention would take up a lot of the General Assembly's time. Moreover, the draft articles dealt with general international law, and States outside the United Nations might wish to sign. A conference, then, appeared to be the most suitable place for consideration of the draft articles ; but the General Assembly would decide for itself.

76. Mr. LIANG, Secretary to the Commission, said that the General Assembly would undoubtedly call a conference if it so desired, whether the Commission made its recommendation under paragraph 1 (*c*) or under paragraph 1 (*d*) of article 23 of the Commission's statute. Except for the Convention on Genocide, he could recall no case in which the General Assembly had examined a draft convention in detail, article by article, and recommended it forthwith to States. He thought that it was unlikely that the General Assembly would itself examine the draft and commend it to Members for signature. The Assembly had a heavy agenda each year ; furthermore many of the delegations did not contain more than a small number of lawyers.

The meeting rose at 1.5 p.m.

[2] Resumed from 448th meeting.

468th MEETING

Friday, 20 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

FINAL FORM OF THE DRAFT *(continued)*

1. Mr. MATINE-DAFTARY said that the Commission's draft on diplomatic intercourse and immunities represented a significant accomplishment in international law; it would not only replace the Vienna Regulation and the Havana Convention but would incorporate all the developments which had occurred in the international law relating to diplomatic intercourse in the past 150 years. Because of the mportance of the draft articles, it seemed to him that they should be recommended to the General Assembly in the form of a draft convention as contemplated in article 23, paragraph 1 (*c*) of the Commission's statute. He did not, however, think that it was necessary to recommend the convocation of a special conference, for the draft convention, after approval by the General Assembly, could be opened forthwith to signature by Member States.

2. If it was decided to recommend the draft articles as a convention, the final clauses (concerning ratification, revision, entry into force, etc.) would have to be settled. The final clauses should, he thought, be drafted by the Commission rather than by the Sixth Committee of the General Assembly, and he proposed that the Drafting Committee prepare them for approval by the Commission.

3. The CHAIRMAN said that if the Commission decided to recommend the draft articles as a convention, the Drafting Committee would as a matter of course prepare the final clauses for its approval.

4. Mr. LIANG, Secretary to the Commission, was doubtful whether the Commission should concern itself with the final clauses. In the case of the United Nations Conference on the Law of the Sea, the method adopted had been that the Secretariat submitted memoranda containing alternative clauses on such subjects as ratification, reservations, etc., and the Conference had chosen those preferred by the majority. The drafting of final clauses was by no means a simple matter and, as the States participating in a conference might wish to be offered a choice, it seemed reasonable to follow the method used in the case of the draft articles on the law of the sea.

5. The CHAIRMAN put to the vote the proposal that the draft articles would form the subject of a recommendation to the General Assembly in conformity with article 23, paragraph 1 (*c*), of the Commission's statute.

The propored was adopted.

Planning of future work of the Commission

[Agenda item 8]

6. The CHAIRMAN said that he had discussed the organization of the work on the three remaining items of the agenda with the Special Rapporteurs concerned. They had agreed that the Commission should take up forthwith the subject of consular intercourse and immunities and devote the remainder of the session to it. At the eleventh session the first five weeks should be sufficient for completing the debate on consular intercourse and immunities, and the rest of that session would then be divided up between the law of treaties and international responsibility, one week being left for consideration of the report.

7. The law of treaties was so vast a subject that, if dealt with continuously, it would probably consume two full sessions. Accordingly, he proposed that the Special Rapporteur's drafts (A/CN.4/101, A/CN.4/107, A/CN.4/115) should be dealt with by chapters, and that each chapter, after discussion, would be referred to Governments for their observations.

8. He suggested that the Commission should agree to proceed in the manner he had outlined, on the understanding of course that the Commission would be free, in the light of circumstances, to modify the schedule he had described.

Is was so decided.

Co-operation with other bodies

9. The CHAIRMAN drew attention to a proposal submitted jointly by Mr. Alfaro, Mr. Amado and Mr. García Amador (A/CN.4/L.77). The object of the proposal was to request the Secretary-General to authorize the Secretary of the Commission to attend the Fourth Meeting of the Inter-American Council of Jurists as an observer.

10. Mr. LIANG, Secretary of the Commission, referring to the agenda item as a whole, said that on 8 May 1958 a communication had been received from the Asian African Legal Consultative Committee inviting the Commission to send a representative to the Committee's second session at Colombo, Ceylon, from 14 to 26 July 1958. That committee had been established in 1957, and had on its agenda items such as diplomatic immunities and the régime of the high seas which were also of interest to the Commission. It was impossible, because of the lateness of the invitation and the consequent difficulty in making arrangements, to send a representative of the Commission to the 1958 session, but he thought that the Commission should take note of the invitation, express its interest in the work of the

Committee and ask for reports of its activities, particularly those which were related to the Commission's work.

11. In reply to Mr. Sandström, he said that the Commission's letter would also say that the date of the session of the Asian-African Legal Consultative Committee was so close that it was not possible to consider fully the question of sending a representative to its session.

12. Mr. ALFARO, referring to the joint proposal, said that article 26, paragraph 4, of the Commission's draft mentioned expressly consultations with the Pan American Union.

13. The codification of international law had a long history in Latin America; at the Conference of American States held at Havana in 1928 no fewer than ten conventions had been adopted concerning such subjects as the law of treaties, neutrality, nationality, diplomatic and consular immunities, and private international law. The work of codification had since been carried on in Latin America, and he was convinced that consultation with inter-American bodies engaged on such work would tend to further the Commission's own endeavours.

14. The CHAIRMAN put to the vote the joint proposal (A/CN.4/L.77).

The proposal was adopted unanimously.

15. The CHAIRMAN proposed that the Commission invite its Secretary to send a letter to the Asian-African Legal Consultative Committee in the terms suggested by him.

It was so decided.

16. Mr. ZOUREK expressed the hope that the two regional organizations in question would continue to communicate to the Commission the results of any work which might be of interest to it.

17. Mr. LIANG, Secretary to the Commission, quoting from paragraph 24 of the Commission's report on its previous session (A/3623), pointed out that the Commission had requested the Asian-African Legal Consultative Committee to send any observations it might wish to make on questions under study by the Commission and had welcomed any information on the development of the Committee's programme.

Consular intercourse and immunities (A/CN.4/108)

[Agenda item 6]

General debate

18. Mr. ZOUREK, Special Rapporteur, introducing his report on consular intercourse and immunities (A/CN.4/108), said that the draft fell into two parts: the first dealt with the establishment, conduct and termination of consular relations, and the second with the privileges and immunities of the various classes of consular representatives. He did not think that there was any need for a lengthy discussion of the nature of consular representation. The vehement debate on the legal status of consular representatives, still being waged during the nineteenth century, had long been settled in theory and practice and every one now recognized, on the one hand, the public character of the consul officer as a State representative, and, on the other, the fact that he was not entitled to diplomatic privileges and immunities.

19. The various classes of consular representatives had never been determined in an international instrument, as the classes of diplomatic agents had been in the Vienna Regulation amended by the Protocol of Aix-la-Chapelle. An analysis of the practice of nations showed however that consular representatives could be grouped into four classes: consuls general, consuls, vice-consuls and consular agents. The question of consular privileges and immunities was complicated by the fact that there were several categories of consular representatives: career consuls, who were full-time government officials paid by the State; honorary consuls, mostly chosen among merchants or business men of the State in whose territory they were to exercise their functions and in most cases not having the nationality of the State appointing them; and finally, consular representatives who, although officers of the sending State, were authorized by their national laws to engage in some other gainful activity as well. Inasmuch as consuls in the last category were generally treated on the same footing as honorary consuls in the relevant national regulations, he had in his draft accorded them the same legal status as honorary consuls.

20. The situation was somewhat complicated so far as honorary consuls were concerned. Some States neither appointed nor accepted them, others accepted them though they did not themselves appoint them, while yet others both accepted and appointed them. As he had stated in his report (A/CN.4/108, para. 75), the Committee of Experts for the Progressive Codification of International Law, set up under the auspices of the League of Nations, had declared itself opposed to the institution of honorary consul. Nevertheless, despite the disadvantages described by the Committee of Experts, a large number of States still continued to make use of honorary consuls, and the institution was defended by various authors. Considering it impossible to ignore such a state of affairs, the Special Rapporteur had therefore felt bound to codify the legal status of honorary consuls. He had, however, concluded that if the different practice of States was to be taken into consideration the only way of ensuring agreement on a draft convention on consular intercourse and immunities was to deal with honorary consuls in a separate chapter and to include a provision in the final clauses (article 39) enabling those States which did not recognize the institution to exclude that chapter from the scope of their ratification or accession.

21. It was interesting to note that consular intercourse and immunities were not, as in the case of diplomatic intercourse, mainly based on customary rules. Consular activities and consular privileges and immunities were

chiefly governed in the international field by a very large number of bilateral conventions and a few multilateral conventions, the most outstanding multilateral instrument being the Convention regarding Consular Agents, signed at Havana on 20 February 1928.[1] Among the bilateral conventions, the consular conventions constituted an invaluable source of information on the law and practice of State on the subject. A great deal of interesting material was, however, to be obtained from more general treaties, such as treaties on commerce and navigation, treaties of friendship, business agreements, conventions on foreign workers, and extradition treaties. Municipal law was another rich source of material. The collection of regulations in force in the various countries governing the status and activities of consular representatives, recently published by the Secretariat[2] and containing an index which would be very useful, would undoubtedly be of great assistance both to the Commission and, at a later stage, to Governments when they commented on the draft.

22. Although the multilateral and bilateral conventions and the national regulations differed a great deal in their treatment of the subject, they did contain both a certain number of common principles and also a series of principles from which, though they were not identical from one text to another, a minimum capable of codification in a draft international convention could be abstracted. For a draft convention was, he considered, the only form in which the draft could be usefully prepared. That was a point which should be settled from the outset, since the form of the text would differ greatly according to whether it was simply to constitute a statement of principles already established in general law or whether rules accepted in international conventions were to be added in the form of an international convention. In the latter case, the draft would have to include a number of principles which, without being universally accepted, were common to a number of bilateral treaties and would promote the development of international law.

23. One general question on which he would welcome an early decision was that of the generic term to be used to cover all types of consuls. There was a great diversity of terminology and, though the point was not of major importance, he thought that some attempt should be made to standardize it in the interests of clarity and in order to remove a possible cause of disputes. The term " consul " was the most commonly used, but, as would be seen from article 3 of his draft, the term had the disadvantage of applying to only one of four different classes and could therefore be employed as a generic term only if there was no danger of misunderstanding. Other generic terms in use were " consular official ", " consular agent ", " consular authority " and " consular representative ". The term " consular agent " also had the disadvantage of being the designation of the fourth class of consul in his draft article 3 and of being used in some regulations to designate unpaid officials. There was also a danger of confusion with the term " agent of consular services ", which embraced not only the head of the office but all the members of the subordinate staff as well. Perhaps the most satisfactory generic term would be " consular representative ", which was easily translatable into other languages.

24. A further general question to be settled was that of the relationship between the new convention, should it be decided to adopt such an instrument, and existing bilateral treaties, where the treatment accorded to consular representatives was often more favourable than that provided for in the draft, which had, of necessity, to represent a common denominator of varying rules and practices. Since States could hardly be expected to denounce all their bilateral conventions on the subject, he had thought it wiser, with a view to facilitating wide acceptance of the text, to include a provision, article 38, specifying that the instrument in no way affected existing conventions and that the article applied solely to questions not covered by previous conventions. Another question was what repercussion the new convention would have on existing multilateral conventions. In practice that question should not prove very difficult to settle. If the provisions of the new convention were considered adequate, it should be possible for States to denounce the previous convention.

25. Partly because not all the material now available had been at his disposal at the end of 1956, his first report did not cover every aspect of the subject. He would, therefore, be shortly producing a second report dealing with the immunity of consuls from criminal jurisdiction (which was regulated by many bilateral treaties), the position of consuls in occupied territory, the most-favoured-nation clause in its relation to consular intercourse and immunities, and other matters.

26. He would appreciate the views of the Commission on the following more debatable points: the form the draft should take (whether it should be prepared as a draft convention); the internal structure of the draft, including the question whether honorary consuls should be treated in a special chapter; connexion between diplomatic and consular intercourse (article 1); the establishment, termination and breaking-off of consular relations and the withdrawal of the exequatur; and finally the question of consular missions to non-recognized governments. If he obtained at that stage the observations of the members of the Commission and their proposals for any additions, deletions or amendments, it should be possible to make rapid progress on the subject at the next session, since the articles dealing with many points on which, with some variations of detail, there existed a well-established general practice, could be referred to the Drafting Committee after a brief review. The fact that the draft on consular intercourse and immunities would be considered while the Commission had its decisions on parallel problems of

[1] League of Nations, *Treaty Series*, vol. CLV, 1934-35, No. 3582.

[2] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (United Nations publication, Sales No. 58.V.3).

diplomatic privileges and immunities fresh in its mind, should also facilitate rapid progress.

27. The CHAIRMAN suggested that, as in its discussion of the draft on diplomatic privileges and immunities, the Commission should proceed on the assumption that the text would take the form of a draft convention but defer its final decision as to the form of the draft, until the text had been completed.

28. Sir Gerald FITZMAURICE, referring to the problem of terminology, said that, while having no fundamental objection to the generic term " consular representative " advocated in paragraph 101 of Mr. Zourek's report, he considered it suffered from a number of disadvantages. A consular officer was undoubtedly a representative of his country, but, historically, that had not always been his primary function. Use of the term might tend to blur the distinction between diplomatic and consular representatives. Lastly, if the Commission referred to consuls as " consular representatives ", while referring to diplomats as " diplomatic agents ", it might almost seem to suggest that the consular officer possessed a more representative character than the diplomatic agent, whereas the reverse was the case. The term " consular officer " was the most familiar to him but he had no marked preference for any of the current designations.

29. The Special Rapporteur had prepared his draft on consular intercourse and immunities before even the first draft on diplomatic intercourse and immunities had been completed, and quite a large number of changes had been made in the latter draft since then. He considered that, as a guiding principle which must not be carried to extremes, the Commission should endeavour to treat any matter in consular intercourse and immunities which bore a real analogy to diplomatic intercourse and immunities in much the same manner in each draft. For example, after discussing whether States had the right to establish diplomatic relations and whether it was desirable to refer to that right, the Commission had finally contented itself with a statement on the lines of article 1, paragraph 3, in Mr. Zourek's draft on consular intercourse, namely, that diplomatic relations were established by mutual consent. Since it was undesirable to place the establishment of consular relations on a higher footing than that of diplomatic relations, he would prefer that article 1, paragraph 1, of Mr. Zourek's draft be deleted and the article drafted more on the lines of article 1 in the draft on diplomatic intercourse.

30. As for the form the draft should take, he thought that the arguments in favour of preparing it in the form of a draft convention were very much stronger than in the case of diplomatic intercourse and immunities. Though few of the matters dealt with in the draft could be described as very new, it was practically the first time that any attempt had been made to draw up a comprehensive code dealing with points on which no customary law at least existed.

31. He also fully agreed that it would be a very serious omission if the draft failed to deal with the institution of honorary consuls. That was a feature of consular intercourse whose importance, already considerable, might even be described as on the increase.

32. Mr. TUNKIN agreed that the problem of terminology was important. The terminology used in the draft articles on consular intercourse and immunities should concord with that used in the draft on diplomatic intercourse and immunities, since the two drafts contained many parallel ideas and provisions. He would suggest, however, that the Commission should not discuss questions of terminology at that stage, but should ask the Special Rapporteur to prepare a definitions article, which could then be discussed in detail.

33. Mr. FRANÇOIS said he disagreed with the views expressed by the Special Rapporteur on the subject of honorary consuls. The Special Rapporteur seemed to regard honorary consuls as representing an institution which belonged to the past and which was maintained by some States for purely pecuniary reasons. The Special Rapporteur admitted, however, that a number of countries still employed that type of consul.

34. In his opinion, the Special Rapporteur did not do justice to the institution of honorary consuls. For some countries, particularly small countries with large merchant fleets, it was absolutely necessary to appoint honorary consuls, because some authority was needed to perform consular duties in almost every port in the world. To appoint career consuls on such a large scale would not only be too expensive but also extremely wasteful, since in most cases there would not be enough work at particular ports to keep a career consul fully employed. It might be argued that it would be enough for maritime States to maintain consuls in the capital cities of the States at whose ports their ships called, but seamen could not be expected to travel to the capital on every occasion merely to get their papers signed.

35. The Special Rapporteur affirmed that a number of States refused to accept honorary consuls. He would be every interested to have from the Special Rapporteur a list of the countries concerned.

36. Mr. YOKOTA agreed that the draft articles should take the form of a convention.

37. The order of the articles and their terminology should correspond as closely as possible to the order and terminology of the articles on diplomatic intercourse and immunities. Article 1, for example, should be reconsidered from that point of view.

38. He agreed with Sir Gerald Fitzmaurice and Mr. François that honorary consuls represented an important group of consular officers. Japan probably had more honorary consuls now that it had had before the Second World War. Before the war it had had a career consul at Zurich, for example, but now it had only an honorary consul there. Obviously therefore the draft must contain provisions relating to honorary consuls, but since their status was quite different from that of career consuls, it was appropriate that they should be dealt with in a separate chapter.

39. He did not agree, however, with their separation from career consuls for the purposes of article 39 of the draft, which allowed the ratification either of all the articles, or of all the articles exept those dealing with honorary consuls. That approach was based on the assumption that a large number of States opposed the appointment of honorary consuls in principle. But that was not the case, and even if some States did not appoint or accept honorary consuls, that was not a sound reason for giving them separate treatment for the purposes of the ratification of the convention. The position of honorary consuls was somewhat similar, though not exactly parallel, to that of diplomatic agents who were nationals of the receiving State. Some members of the Commission had expressed categorical opposition to the appointment of such persons as diplomatic agents, and had maintained that the draft on diplomatic intercourse and immunities should contain no reference to them. It was always possible, however, for States which objected to the appointment either of diplomatic agents of the type he had mentioned or of honorary consuls to refuse to accept their appointment, and there was no need to provide for the possibility of partial ratification on that account. It was true that a similar procedure to that suggested by the Special Rapporteur for partial ratification had been adopted in the General Act for the Pacific Settlement of International Disputes of 1928, but that instrument had dealt with an entirely different matter, and he would therefore ask the Special Rapporteur to reconsider his draft article 39.

40. Mr. VERDROSS congratulated the Special Rapporteur on his report, which he thought should enable the Commission to dispose of the subject expeditiously at its next session. There were, however, two points of a general nature to which he would like to draw attention.

41. The Special Rapporteur had stated that the subject of consular intercourse and immunities was regulated only by treaties. While that was generally true, some of the principles involved belonged to general international law, and consequently the Commission's task should be not only to perform an exercise in the study of comparative law but also to ascertain what general principles affecting the subject existed.

42. He did not share the Special Rapporteur's view that diplomatic and consular relations were necessarily connected. Consular relations were conducted by agreement between the receiving and the sending States. Although it was true that diplomatic functions were broader than consular functions, it was also true that consular officers came much more closely into contact than did diplomatic agents with the insitutions of the country in which they discharged their duties. Whereas a diplomatic agent had to work through the Ministry of Foreign Affairs, a consular officer had direct access to the courts and the local administrative authorities. Although diplomatic and consular relations normally went together, there were cases where there was diplomatic, but not consular, intercourse ; and it would be wrong to assert that the two were necessarily associated.

43. Mr. ALFARO congratulated the Special Rapporteur on the excellent basis he had provided for discussion.

44. He agreed that the draft articles should take the form of a convention, for the subject with which they were concerned was particularly suited to such treatment.

45. On the question of terminology, he agreed with Sir Gerald Fitzmaurice that it would be inappropriate to use the term " consular representatives " as a general term for all consular officers, when members of diplomatic missions, who represented their State on a higher level, had merely been called " diplomatic agents ". He did not think, however, that the term " consular agents " should be used, though it was convenient and would have the advantage of bringing the two drafts into line. The term was open to criticism in that it might cause confusion because it generally applied to a category of consular officers immediately below that of vice-consuls. He would therefore suggest that the generic term should be " consular official ".

46. Mr. BARTOS said that in his opinion the Special Rapporteur's report should provide a solid basis for the Commission's work. There were nevertheless many provisions which needed redrafting.

47. On the question of honorary conculs, for example, he agreed with the views expressed by Mr. François, and he would add that countries of emigration also felt the need to employ honorary consuls in countries of immigration, where their nationals who had emigrated could not be left without consular protection. As in the case of honorary consuls employed by maritime countries at ports, however, the amount of work involved in protecting the interests of immigrants was not such as to justify the appointment of career consuls, either from the point of view of expense or from that of the economical use of manpower. The honorary consuls employed by the countries of emigration were very often emigrants who had become respected citizens of the countries to which they had migrated.

48. The Yugoslav Government, for example, had abandoned the policy of not employing honorary consuls which it had adopted immediately after the war, and had decided not only to revive but to develop the institution. Such honorary consuls performed the same duties, though they did not perhaps have the same privileges and immunities, as career consuls. The Special Rapporteur's provisions relating to honorary consuls should therefore be redrafted.

49. On the question of terminology, he agreed with Mr. Alfaro that the use of the expression " consular agent " as a general term to describe consular officers might be misleading, for in the current terminology consular agents had specific and well-defined responsibilities.

50. Another matter which deserved more detailed treatment in the draft was the amalgamation of diplomatic and consular functions. In Australia, New Zealand and the Union of South Africa, for example, the consular officers of some countries, though not empowered to perform diplomatic functions, and though not regarded as *chargés d'affaires,* acted as intermediaries between the Ministry of Foreign Affairs of the sending State and the Ministry of Foreign Affairs of the receiving State. Furthermore, as in the case of many Latin-American diplomatic missions accredited to London, it was not uncommon for diplomats to act as consuls without losing their diplomatic rank. In some cases they might possess both diplomatic credentials and consular commissions giving them the right of direct access to the local authorities in the receiving State. In cases of doubt, however, their status as diplomatic agents was always regarded as having priority over their status as consuls. Reference might also be made to the common practice whereby embassies had a consular section, some members of which, though performing consular duties and provided with consular commissions, were nevertheless included in the diplomatic list.

51. The Special Rapporteur had suggested that some countries would not allow the appointment of honorary consuls. In his (Mr. Bartos') experience that was true exclusively of certain eastern European countries.

The meeting rose at 1 p.m.

469th MEETING

Monday, 23 June 1958, at 3 p.m.

Chairman : Mr. Radhabinod PAL.

Consular intercourse and immunities (A/CN.4/108) (*continued*)

[Agenda item 6]

GENERAL DEBATE (*continued*)

1. Mr. HSU said that he would like to associate himself with those who had congratulated the Special Rapporteur on his excellent report (A/CN.4/108).

2. In paragraph 43, the report stated that despite repeated efforts China had only achieved the abrogation of consular jurisdiction during the Second World War. Why such jurisdiction in China was not abrogated earlier needed an explanation. By itself, such jurisdiction would have been abrogated long before, because in the first place the system was not based upon customary law but upon treaties and, secondly, is was to a large extent established voluntarily except in the cases of England after the Opium War and Japan after the Korean War. What delayed the abrogation was its complication by the existence of foreign settlements and concessions in certain towns and special navigation rights on certain rivers and canals. As the foreign merchants and some of their Governments were bent upon preserving this set of rights, it was necessary to wait until the Second World War before the abrogation of consular jurisdiction became a success, then it appeared to them that preserving that set of rights was no longer possible.

3. In the last sentence of paragraph 72, the report stated that the attributes of diplomatic representatives included consular functions. That statement had been challenged, and superficially there was something to be said for both points of view. Traditionally, the two sets of functions had been kept apart because they had developed independently, but in modern times they tended to merge. Closer consideration of the matter inclined him to agree with the Special Rapporteur. The development of consular functions had been influenced at every stage of their development by the requirements of international trade in the widest sense. In article 2 of its draft on diplomatic intercourse and immunities, however, the Commission had admitted that the functions of diplomatic missions included the protection of the interests of their nationals and the promotion of economic, cultural and scientific relations. It could, therefore, hardly be denied that diplomatic functions included consular functions.

4. At the present stage of development, diplomatic missions had in general taken over the policy side of the problem of meeting international trade requirements, leaving to the consular missions what were more or less only matters of administration. That, however, should be no obstacle to regarding the other consular functions as part of the functions taken over by the diplomatic missions. The functions of a consular mission were no less entitled to be regarded as diplomatic than the functions performed by the administrative, technical and service staff of a diplomatic mission, which were not themselves regarded as non-diplomatic.

5. Those who had objected to the Special Rapporteur's statement in paragraph 72 had presumably wished to restrict the meaning of the term " diplomatic " as applied to functions, but he did not think that there was any substantial disagreement between them and the Special Rapporteur. The question was not purely academic, since it had a bearing on the question of diplomatic privileges and immunities, and particularly on the provisions of article 28 of the Commission's draft on that subject. Since the functions of the members of the administrative and technical staff of a diplomatic mission differed little from those of the members of a consular mission, it would perhaps be inadvisable to grant them greater privileges and immunities than were granted to the members of consular missions.

6. Mr. EDMONDS said that to the practising lawyer and to the business community the subject of consular intercourse and immunities was perhaps more important than any other subject on the Commission's agenda, for

it involved international trade. The Special Rapporteur's report would be read with great interest.

7. To many people, diplomatic and consular intercourse meant much the same thing. The Commission should be careful to make a proper distinction between the two, and to see that terms which were used in the one case and which were not strictly applicable to the other should not be employed in a way which might lead to confusion. If the Commission could establish clear distinctions in matters relating to the two institutions, it would be performing a great service.

8. Mr. AGO said that, generally speaking, the work produced by the Special Rapporteur seemed admirable. He wondered, however, whether in part I of chapter III it might not have been possible to bring out more clearly a distinction which was often implicit in the Special Rapporteur's statements. While a diplomatic mission was an organ by means of which the State acted at the international level, dealing with relationships governed by international law, a consular mission was international only in the sense that it was established abroad. Its activity, therefore, although sanctioned and regulated by international law, was on the domestic level, confined to human relationships governed by the municipal laws of either the State which sent the consul or of that which received him. In substance, therefore, concular and diplomatic functions were wholly separate and not merely different in degree.

9. He was opposed to the suggestion made in paragraph 101 of the Special Rapporteur's report that the term " consular representative " should be used as a generic term applying to all the members of consular missions. It was doubtful whether even diplomatic agents could properly be called representatives in the full sense of the word, though they did represent their State in its relations with another. In the context of international relations *stricto sensu* he could accept the expression " consular officer " if the Commission preferred that to " consular agent ", though he did not think the objections to the latter were as serious as had been suggested.

10. Mr. ZOUREK, Special Rapporteur, replying to members of the Commission who had taken part in the general debate, said that the difficulties of terminology to which a number of members of the Commission had referred, were due largely to the great diversity of usage in the legislation, treaties and conventions on which the law of the subject was largely based. While he agreed that, where analogous problems were dealt with, the manner of treatment in the two drafts on diplomatic and consular intercourse and immunities should correspond, the Commission should beware of any temptation to carry the parallel too far. He would emphasize that it would not always be possible to keep the two drafts similar, especially in the matter of terminology. The term " diplomatic agent " had been used as a generic term for all diplomatic officials, and it could conveniently so be used because there was no category of diplomats to which that term was specifically applicable, but " consular agent " had the disadvantage that it might be taken to apply only to the fourth of the four classes he had listed in article 3 of his draft. Moreover, under several legislations, the term meant non-official staff who were not members of the consular corps. In some States consular agents were even regarded as private agents employed by consuls. Consequently he did not think that the term could be used generically, even if it were accompanied by a definition. Similarly, the word " consul " used by itself might be taken to refer only to a particular class of consular officials. The expression " consular representative " had been objected to, with some justification, on the grounds that it was rather grand by contrast with the simple " diplomatic agent ". The term " consular officer " was too comprehensive, since it might be taken to include members of the administrative and technical staff of consular missions.

11. One of the purposes of the draft, however, was to introduce some clarity into the question of terminology ; and for that purpose, an expression must be employed which would be interpreted uniformly in all countries. Since it was probably too late to change the terminology used in the draft relating to diplomatic intercourse, perhaps the draft on consular intercourse should contain a separate definitions article, as suggested by Mr. Tunkin. That was the more desirable since a similar article had already been included in the other draft. In that case, the Commission might agree to the use of the expression " consular officer ".

12. A number of observations had been made on the subject of honorary consuls. To avoid all misunderstanding, he wished to say that he had had no intention of discriminating against that class of consular officer. He had merely been obliged to take into account the different attitudes adopted by State towards that category of officer and the differences between the treatment accorded to honorary consuls and to career consuls by various States and legislations. There were States whose consular services included only career consuls, and which neither appointed nor accepted honorary consuls. The majority of States, on the other hand, used both types of consular officers. He had had to put the provisions of the draft in a form which would be generally acceptable. If no provision had been made for the possibility of separate ratification of these articles which related to consular officers other than honorary consuls, the States which did not recognize honorary consuls would have been compelled to enter reservations to the articles dealing with that category, and the final result would have been the same as would be produced by the procedure he had suggested for partial ratification.

13. Mr. Verdross had suggested that the report did not attach sufficient importance to customary law as a source of the rules relating to consular intercourse and immunities. He (Mr. Zourek) had not meant, however, to deny that customary law was a source of those rules, but merely to emphasize that the most important sources were treaties.

14. Mr. Bartos had suggested that not enough attention was given in the draft to the functions of consular agents. The reason why the subject was not dealt with more extensively was the diversity of treatment in national legislations and in consular conventions. Consular agents constituted the fourth of the four classes of consular officials listed in article 3. The draft left aside the question of their mode of appointment. He had been of the opinion that in view of the diversity of legislation on the subject it would be unwise to go too far ; but if the Commission so wished he would be willing to deal more fully with the legal status of the consular agent in an additional paragraph. In that connexion the question arose whether consular agents should be regarded as on exactly the same footing as other consular officials or whether they should be given legal status inferior to that of consuls-general, consuls and vice-consuls. Perhaps the whole subject could be more appropriately dealt with in connexion with article 3.

15. Mr. Bartos had also referred to the practice of some consular missions of maintaining consular correspondents in the receiving State. He did not think, however, that the practice was sufficiently general to afford a basis for codification in the draft.

16. He could not altogether agree with Mr. Ago's contention that not enough attention had been drawn to the distinction between the diplomatic mission as an organ of the State acting under international law and the consular mission as an institution acting under domestic law. While that distinction was to some extent valid in cases in which a country had both consular and diplomatic missions in a receiving State, it should be remembered that the duties of a consular mission included not only purely administrative matters and such functions as the notarization and translation of documents, but also the duty of ensuring the observance of commercial treaties between the two States concerned and of protecting the nationals of the sending State. The duties of a consular mission in that respect were confined to the consular district, but the Commission must remember that that district was sometimes coterminous with the whole territory of the receiving State. Thus it could not be said that a consular mission was concerned only with questions of domestic law. Perhaps the subject could most appropriately be discussed in relation to the article on the duties of consular missions.

17. With reference to the form of the instrument in which the draft articles on consular intercourse and immunities should be embodied, he thought that the only possible answer was a convention, since, for reasons already stated, the draft would largely constitute progressive development of international law. A further argument in favour of a convention was that it was in that form that the Commission had decided to present the draft articles on diplomatic intercourse and immunities.

18. He would reserve his replies to other comments, particularly those relating to article 1, until the draft was discussed article by article.

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II)

ARTICLE 1

19. Mr. ZOUREK, Special Rapporteur, introducing article 1, said that paragraph 1 reflected the well-known rule that the right to establish consular relations was derived from the sovereignty of States. The right could, of course, be limited by constitutional or international law and could not be exercised in any specific instance without the agreement of the States concerned. It was unfortunate that an analagous provision had not been maintained in the draft convention on diplomatic intercourse and immunities. He felt that the paragraph should stand.

20. Paragraph 2 raised a very important question. Since the nineteenth century, and in particular since the Second World War, diplomatic functions had changed greatly, because of the increasing importance of economic problems. The result had been an extension of diplomatic functions, and in many States the amalgamation of diplomatic and consular services and the creation of commercial attachés and counsellors as members of diplomatic missions. Few States had been unaffected by the change. Such extension of diplomatic functions, reflected in many international conventions and municipal statutes, did not mean that diplomatic missions had all the prerogatives of consuls, for, unless there was a special agreement with the receiving State, diplomatic agents could not deal directly with the local authorities. Hence, in some States, applications for an exequatur had been lodged by diplomatic agents, appointed to perform consular duties. He hoped that the observations of Governments on the draft under consideration would yield more information on the subject. In general, however, it could be said that paragraph 2 was in keeping with existing practice.

21. There was no need for comment upon paragraph 3. Where there were no diplomatic relations between States, the agreement of the receiving State was necessary for the establishment of consular relations, just as in the case of diplomatic relations. Between some States consular relations had been established by agreement and no diplomatic relations existed. The establishment of consular relations often foreshadowed diplomatic intercourse.

22. Mr. VERDROSS said that no rights should exist without corresponding obligations. Paragraph 1 provided for a right without an obligation and should therefore be deleted. It was desirable to say that consular relations were established, in the same way as diplomatic relations, by mutual consent between States.

23. With regard to paragraph 2, he said that admittedly many consular functions could be, and were, in fact, carried out by diplomatic agents, but essentially the function of consuls was to protect the interests of their nationals before the local authorities of the receiving State, and that presupposed an exequatur. Diplomatic agents, on the other hand, conducted their activities essentially through the Ministry of Foreign Affairs. In other words, the functions of a consul were different

from those of a diplomatic agent; and the consul was more concerned with the every-day life of the receiving State. With such a clear distinction between diplomatic and consular functions, it could not be said that the latter were included in the former. He therefore opposed paragraph 2.

24. Mr. ALFARO agreed that paragraph 1 conferred a right without a corresponding obligation. The paragraph was therefore unacceptable, particularly since paragraph 3 specifically provided for an agreement between States, thus introducing a limitation to the absolute right laid down in paragraph 1. Paragraph 1 should therefore be deleted.

25. The Special Rapporteur had given weighty reasons in favour of paragraph 2, and he was prepared to accept that paragraph as a desirable expression of *lex ferenda,* as opposed to *lex lata.* Paragraph 3 was equally acceptable without the first phrase, but he would prefer it to read simply: "The establishment of consular relations shall be effected by an agreement between the States concerned". That was the basic provision, from which the rest of the article should follow, and should therefore become paragraph 1.

26. It was desirable that there should be other paragraphs to express the Special Rapporteur's ideas. Paragraph 2 should lay down that every State had the right to propose the establishment of consular relations with other States. Paragraph 3 should be the original paragraph 2. Finally, as a corallary, there should be a paragraph 4, which could be taken from paragraph 10 of the Special Rapporteur's commentary on article 1 and would read: "In the absence of such diplomatic relations or previous agreement, no State shall be obliged to admit foreign consuls into its territory."

27. Mr. GARCÍA AMADOR said that there was no rule of international law to the effect that a State had the right to establish consular relations with another; for that reason he considered that article 1, paragraph 1, should be deleted.

28. Paragraph 2 was acceptable and indeed should, in his opinion, become paragraph 1; for upon the establishment of diplomatic relations the establishment of consuls could be said to become necessary. In fact, it was the establishment of diplomatic relations which gave rise to a right to appoint consuls and to the corresponding duty to admit them.

29. He had no objection to paragraph 3, except that he would prefer the first phrase to be deleted.

30. Mr. MATINE-DAFTARY asked that a special procedure be adopted during the rest of the session for the study of the draft articles concerning consular intercourse, since owing to the work connected with the United Nations Conference on the Law of the Sea and with the draft on diplomatic intercourse and immunities he, like other members, had not had the time to study the Special Rapporteur's report with the thoroughness it deserved. He suggested that each article should be discussed in general and in terms of the principles involved, but not voted upon. At the eleventh session, by which time members would have studied the report thoroughly, the articles could be put to the vote.

31. Paragraph 1 enshrined an incomplete right, inasmuch as it provided for no corresponding obligation. Moreover, it did not correspond to reality, for many States refused to permit the establishment of consular relations by specific States or the establishment of consular offices in places other than the capital. He doubted whether the paragraph should be retained.

32. There could be no general rule of the kind laid down in paragraph 2. Iran, for example, had established diplomatic relations with the Soviet Union, but the Soviet Union Government had refused to permit the Government of Iran to establish consulates. The Government of Iran could only offer a like refusal regarding the establishment of a Soviet consulate in its territory. It did not follow, therefore, that the establishment of diplomatic relations included the establishment of consular relations; accordingly, paragraph 2 should be deleted.

33. Subject to the omission of the first phrase, paragraph 3 was acceptable, though its drafting might be improved.

34. Mr. AGO also considered that paragraphs 1 and 2 should be deleted. As far as paragraph 1 was concerned, he said that no State had the right to establish consular relations under general international law, for the source of the law on the subject was an agreement with another State. Again, the establishment of diplomatic relations did not include the establishment of consular relations, for the latter could only be established *ipso jure* if the agreement between States so provided. He agreed with the Special Rapporteur that it was rare for the establishment of diplomatic relations not to lead to the establishment of consular relations, but the one did not follow automatically from the other.

35. He accepted paragraph 3 in substance. Dissatisfaction had been expressed with the drafting, but he was not sure that he would be fully satisfied with the suggestion that the paragraph be modelled on article 1 of the draft on diplomatic intercourse and immunities. Diplomatic and consular functions should not be identified too closely even in that respect, for whereas the establishment of a diplomatic mission in a State implied a corresponding establishment in another State, the same was not true of consular relations. A small State, for example, whose nationals emigrated in large numbers to another State, might need consulates, whereas the State to which the emigration took place might not. For that reason he would prefer a simple statement to the effect that a State, by agreement with another, might establish consulates in the territory of that other State.

36. Sir Gerald FITZMAURICE agreed with previous speakers that it would be quite sufficient if article 1 consisted simply of a somewhat redrafted version of its paragraph 3. He doubted whether the Special Rapporteur, in his extremely interesting commentary on the article, had successfully demoustrated the existence of a right to establish consular relations; and

from his description of a state of fact, namely, that the establishment of diplomatic and consular relations often went hand in hand, it did not necessarily follow that the establishment of the one implied the establishment of the other. In international practice, and indeed in the Havana Convention of 1928 cited by the Special Rapporteur in paragraph 4 of the commentary, a clear distinction was drawn between diplomatic and consular relations. It was to be noted, furthermore, that the Special Rapporteur in paragraphs 10 and 11 himself acknowledged that a State might refuse to establish consular relations even though it agreed to establish diplomatic ones. Again, the fact that the diplomatic and consular services were often merged did not mean either that the two functions were amalgamated or that the establishment of diplomatic and consular relations necessarily went together.

37. He did not believe that there was any " right " to establish consular relations and, in that connexion, found the considerations put forward in paragraph 12 of the commentary a trifle misconceived. It was not with the object of " achieving international co-operation in solving international problems of an economic, social, cultural or humanitarian character " that consular relations were established. The primary object of establishing consular relations was quite different ; it was to allow agents of each State to perform certain necessary functions in the territory of the other with respect to their own nationals in that State. Some of those functions might have a decided commercial aspect, but that was very different from stating that the purpose of the consular function was primarily economic.

38. Incidentally, he did not regard the word " intercourse " used in the English text of the titles of the drafts on consular and diplomatic intercourse as a particularly happy choice and in the case of the latter it was his intention to propose changing that part of the title to " diplomatic relations ". In consular matters the use of the term " relations " was not wholly appropriate. Representation was not the primary function of a consul and many of his activities contained no representative element, though he did not deny that the consular function involved some representative element. To avoid the misleading term " relations " it might be better to refer to " consular functions and immunities " in the title and throughout the draft.

39. Mr. BARTOS said that he found it difficult to reach a final opinion either for or against article 1. In the first place, he differed from the Special Rapporteur in the conception of the nature of consular relations. In the older textbooks a distinction was drawn between a diplomatic agent as a representative of his State conducting relations between the sending and the receiving State, and the consul, whose function it was to protect before the courts and the local authorities the nationals and the interests of the State which had appointed him and to perform certain duties in connexion with the nationals of that State but not to intervene in relations between that State and the State which had given him his exequatur. The concept of " consular representation " had gained a certain currency in recent years because the consular corps performed certain representative, or to be more precise, ceremonial functions. He was, however, not at all sure that he could accept the concept. Consequently, the term " consular relations " appeared to be inappropriate. The existence of so-called " consular relations " meant no more than permission to establish consulates and the obligation to facilitate their establishment. For example, so-called " consular relations " still continued between the Federal Republic of Germany and Yugoslavia although diplomatic relations had been broken off between them, but those " consular relations " merely involved the maintenance of consulates and the obligation to allow them to exist. There were no relations between the consular officers and the Governments of their States of residence, such relations being conducted by the respective protecting Powers.

40. With respect to paragraph 1, he said his position was very near to that of Mr. Alfaro ; he considered that every State enjoyed the capacity to establish consular relations, or in other words, to propose the establishment of consulates. To say that a State had the right to establish consular relations would mean that its decision was not dependent on the consent of the other State. He was accordingly in favour of the amendment proposed by Mr. Alfaro.

41. In connexion with paragraph 2 of the article, the question naturally arose how consular relations were to be conducted, whether through consulates or by the diplomatic mission. If consulates were to be opened, then surely according to article 2 of the draft, a further agreement was necessary. The establishment of consular relations did not follow automatically upon the establishment of diplomatic relations. What did follow perhaps was that certain officials of diplomatic missions could perform some consular functions. But that was not a universal custom and he knew of no countries which accorded to diplomats the same status as to a consul for the purpose of performing consular functions. Diplomatic agents, for instance, could not appear before courts as the representative and protector of one of their nationals resident in the receiving State ; they could perform such functions only through the Ministry of Foreign Affairs, and even then only in certain countries which tolerated the practice.

42. Accordingly, though he could accept many of the ideas contained in the article, if stated in another form, he could not accept paragraph 2 because it gave no indication how the consular relations were to be conducted. The Special Rapporteur had cited the Norwegian law of 7 July 1922 in support of his ideas. Yet, if Norway wished to open a consulate in Yogoslavia, the consul could exercise his functions only if he had been duly appointed and given his exequatur : there was no automatic admission. On the other hand, no objection was normally raised to the conduct of certain consular business in the so-called " consular sections " of diplomatic missions. Nevertheless, many States which were not prepared to allow consulates to be opened by another State in their territory were likewise not prepared to permit the diplomatic agents of that State

to take the necessary steps on the sport to protect one of its nationals.

43. Referring to paragraph 3 of the article, he observed that the provision was wrong in speaking of the "exchange" and the "admission of consular representatives" the agreement in question offered, rather, the possibility of exercising the capacity to open consulates.

44. Incidentally, one consequence of the existence of "consular relations", which was not brought out in the text or in the commentary, was that if a State permitted the establishment of the consulate of a second State in a particular locality, it could not, without becoming guilty of a grave act of discrimination, refuse to accord the same facility to all other States competent to exercise consular functions in its territory.

45. Mr. SCELLE said that, in contrast to most previous speakers, he found article 1 acceptable in principle, though formulated in too absolute terms. In his opinion, every State had the right to establish consular relations but only when it was socially necessary. Thus, whenever persons from one country were established in, traded with or even travelled through another country, the first country had the right to establish consular relations and the corresponding duty to establish them, while the second country was under the obligation to permit the establishment of consular relations. The question whether it was necessary in the particular circumstances to provide for consular protecion could be the subject of an agreement but the rule of law held good. The right in question was a veritable constitutional right and a rule of law as clear as the right to establish diplomatic relations. For rules of law invariably regulated relations between individuals, or between groups of individuals represented not by the State, which was for him a meaningless abstraction, but by their Governments.

46. What in that case was the purpose of the exequatur ? The answer was that the exequatur corresponded to the *agrément* in diplomatic relations. States were bound to permit consular relations but were under no obligation to accept a particular person as consul. Thus the exequatur was a guarantee offered by the appointing State of the competence of the consul and a recognition by the State of residence of his capacity to perform consular functions.

47. It had also been argued that certain States refused to accept consular relations. But should the Commission base its draft on a mentality that belonged to another age and to an early stage of social development ? Its task was surely to prepare the international law of tomorrow and no to codify the customs of the past. A State which refused consular relations was refusing international trade and denying the existence of international law and international society and was guilty of a fault as grave as that of a State which refused to honour an undertaking to arbitrate.

48. The question whether consular relations were conducted by a special class of official or by diplomatic agents was to him of minor importance, a matter which varied with the relations between particular States.

49. Paragraph 3 of the article might be more concisely redrafted to read: "The establishment of consular relations shall be effected by agreement between the States concerned, as in the case of diplomatic relations." In both cases no relations could be established without prior agreement.

The meeting rose at 6 p.m.

470th MEETING

Tuesday, 24 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consular intercourse and immunities (A/CN.4/108) *(continued)*

[Agenda item 6]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) *(continued)*

ARTICLE I *(continued)*

1. Mr. FRANÇOIS said that, though not agreeing that the concept of the State was a meaningless abstraction, he shared Mr. Scelle's views to some extent. He was not, however, in favour of article 1, paragraph 1, of the draft on consular intercourse (A/CN.4/108, para II). Since in many cases States did not wish to establish consular relations, he considered it inadvisable to establish a right without a corresponding obligation.

2. On the other hand he was in favour of maintaining paragraph 2. The institution of consul had been regarded from the outset as of great importance in promoting peaceful and economic relations between peoples. The establishment of consular relations followed directly from a State's desire to establish friendly relations with other States. If diplomatic relations existed between two States, those States must also accept consular relations. That did not, however, mean that one State could appoint consuls without the consent of the other State. Both must agree on the choice of consuls and of consular districts. He could conceive of cases in which States would not be prepared to receive consular officials and even of cases in which, in special circumstances, a State might refuse, temporarily perhaps, to accept consular relations. But the general principle still stood. Thus his position was that he was not entirely opposed to the views of Mr. Matine-Daftary and at the same time could not entirely agree with Mr. Scelle. Though the principle that States were obliged to accept consular relations was not part of existing international law, he thought that the Commission should include such a provision in its draft as a contribution to the progressive development of international law.

3. Mr. YOKOTA agreed with Mr. Verdross and other speakers that a right, in the strict sense, to establish consular relations did not really exist. The position was similar to that of the alleged right of legation, whose existence a few members of the Commission had affirmed at the previous session. It would be recalled,

however, that after lengthy discussion the Commission had finally adopted a statement that diplomatic relations were established by mutual agreement,[1] which meant implicitly that a State had no right in the strict sense of the term to establish diplomatic relations and could do so only on the basis of a mutual agreement. He was in favour of omitting paragraph 1.

4. As far as paragraph 2 was concerned, he agreed with Mr. Matine-Daftary and other speakers that the establishment of diplomatic relations did not always include the establishment of consular relations. For example, when diplomatic relations had been established between Japan and the Soviet Union in 1956 by mutual declaration, no exchange of consular officers had taken place, a question which had not been taken up until two years later in connexion wih the establishment of trade relations.

5. The Special Rapporteur, whose concept of consular relations was somewhat different from his own, seemed to consider that they existed when a section of a diplomatic mission performed acts normally performed by a consul. Though that view might be theoretically defendable, he thought it untenable from the practical standpoint and from the standpoint of codification of international law. Even when the protection of his nationals, development of commerce, or even notarial acts were entrusted to a diplomatic agent, it would not be proper to describe those functions as consular functions. Consular relations could be said to exist only when consuls had been exchanged or admitted by States, or at least when States were agreed to admit consuls and to permit them to perform their functions in their territories. He could not therefore accept paragraph 2, though he was anxious to keep the term " consular relations " or at least " consular intercourse " which was part of the very title of the subject. In his opinion " consular relations " was an appropriate term to describe those relations existing between States when they had either exchanged consuls or were prepared to admit them.

6. He proposed that the article should be redrafted concisely, on the lines of article 1 of the draft on diplomatic intercourse, to read: " The establishment of consular relations and the exchange or admission of consular representatives takes place by mutual agreement."

7. Although agreeing with Mr. Ago in principle that the analogy between consular and diplomatic intercourse should not be carried too far, he felt that where the situation as between consular and diplomatic intercourse was really similar, it was preferable to adopt a like formula. And on the question of the establishment of relations, the similarity was quite marked.

8. Mr. HSU, referring to Sir Gerald Fitzmaurice's remarks at the previous meeting, said that he had no objection to substituting the word " relations " for " intercourse ", since the two terms were practically synonymous. Substitution of the term " functions " was a different matter, though he would have no objection provided that the same term was used in both drafts. Such a change would then merely reflect a change in viewpoint. But to use the term in the title of the consular draft only would be illogical and misleading, since both drafts dealt with international relations.

9. He found article 1 acceptable, subject to some drafting changes. The principle enunciated in paragraph 1 was, admittedly, not to be found in text-books, yet it was no longer open to challenge. It was difficult to see how nations could develop friendly and trade relations, which was their duty under Article 1 of the Charter of the United Nations, if they did not possess the right to establish consular relations. It had been argued that a right which could not be enforced was no right at all. The right would, however, be enforceable, but for the abnormal international situation. In that sense, the right in question was no less enforceable than any other international right, with the possible, and rather doubtful, exception of the right to be immune from armed aggression.

10. Paragraph 2 was a sound provision also and he agreed with Mr. Scelle that the exequatur was no more than a consular *agrément,* the recognition of a country's consul by a foreign Government. Too much importance should not be attached to the exequatur. In some countries, a diplomatic mission wishing to set up a consulate section did not need to apply for an exequatur but simply notified the Government of the receiving State of the appointment of a member of the mission to exercise consular functions. And in some countries, an exequatur consisted merely of the letters patent of the consul with the word exequatur written over them.

11. Paragraph 3 seemed somewhat unclear and in conflict with the principles of the first two paragraphs. If the phrase " establishment of consular relations " in that context meant the establishment of consulates independent of the diplomatic mission, it would be advisable to redraft the paragraph to make that clear. The establishment of consulates was clearly subject to agreement, since such questions as the place and size of the consulates were involved.

12. Although he supported the principles in all three paragraphs of the proposed article, he thought that the Special Rapporteur could meet the criticism by reducing the three paragraphs to one, as follows :

> " The establishment of a consulate in the absence of diplomatic relations or independent of a diplomatic mission or in parts of the country other than the capital takes place by mutual consent."

Such a compromise text should be acceptable to those members of the Commission who took a more conservative view, and would cover all points except the right to establish consular relations. The question whether the establishment of consular relations was included in the establishment of diplomatic relations would then to some extent be covered by the reference to a diplomatic mission.

13. He was unable to agree with Mr. Yokota that the draft on diplomatic intercourse repudiated the idea that

[1] *Yearbook of the International Law Commission, 1957,* vol. I (United Nations publication, No.: 1957.V.5, Vol. I), 384th meeting, paras. 34 *et seq.* ; 385th meeting, paras. 1-31.

States had a right to establish diplomatic relations ; it merely left the question untouched. Nor could he agree that the example of the agreement between the Soviet Union and Japan showed that the establishment of diplomatic relations did not include the establishment of consular relations. It was merely an example of relations being established in two stages. After all, two years was not a very long time in international law.

14. Mr. TUNKIN said that he could not accept Mr. Ago's view of the nature of consular functions. While it was perfectly true that the consul had a far less representative character than the diplomatic agent, he could not be said to have no representative character at all. Mr. Ago had himself agreed that consular officers could appear before the local authorities of the sending State as well as to protect its nationals, and in such cases the officer was clearly appearing as the representative of the public authorities of the sending State.

15. In paragraph 1, the Special Rapporteur seemed to have in mind certain concepts current in theoretical literature, affirming the right of States to establish consular relations on the analogy of the right of legation. He himself largely agreed with Mr. Verdross and considered that the Commission should not go further in article 1 of the present draft than it had done in article 1 of the draft on diplomatic intercourse, which dealt with a similar question. If the Commission enunciated the right to establish consular relations, it would imply that any State must agree to any proposal to establish consular relations made by any other State, under pain of failing to honour its international obligations. That seemed to him to be incorrect in substance. It should, however, be quite easy to redraft article 1 on the lines of the corresponding provision in the draft on diplomatic intercourse.

16. Paragraph 2 seemed to him to be correct in substance, and in his opinion the objections to it were due to some misunderstanding. There was a distinction between the establishment of consular relations and the establishment of consular offices, parallel to the distinction drawn in article 1 of the draft on diplomatic intercourse between the establishment of diplomatic relations and the establishment of permanent diplomatic missions. Cases could arise where consular relations were established but no exchange of consular officers took place for quite a long time. For instance, the provisions of the consular treaty between the Soviet Union and the Federal Republic of Germany, signed in April 1958, applied both to consular activities conducted by consular departments of embassies and also to the activities of any consulates which might be established by the contracting parties in each other's territory. If either contracting party found it necessary to establish a consulate the parties would enter into negotiations with a view to reaching an agreement. Thus the treaty envisaged the possibility of consular functions being performed solely by the consular departments of embassies. When consulates were set up, the consular officers might, it was true, exercise wider functions than diplomatic agents performing consular duties but it was a recognized practice that a minimum of consular functions could be performed by diplomatic missions. Furthermore, he knew of no cases where, once it had been agreed to establish diplomatic relations, a further agreement on the establishment of consular relations had nevertheless been required. Any subsequent agreement would relate simply to the actual establishment of consular offices. Hence, if a distinction between consular relations and the establishment of consular offices was understood in paragraph 2, he would have no objection to it.

17. If paragraph 1 were redrafted on the lines of article 1 of the draft on diplomatic intercourse, and paragraph 2 retained as it stood, he thought that paragraph 3 could be dispensed with. Incidentally, he agreed with Mr. Matine-Daftary's suggestion that the Commission should take no vote on the articles at that stage.

18. Mr. EDMONDS observed that article 1, paragraph 1, appeared to be rather inconsistent both with the corresponding provision in the draft on diplomatic intercourse and with certain statements in the commentary on the article — paragraph 11, for example, which stated that a State might refuse to receive consuls. He had, however, been much impressed by Mr. Scelle's statement at the previous meeting (para. 45). If a State allowed the nationals of another State to lead normal lives in its territory and to engage in normal trade relations, it hardly became that State to refuse to enter into consular relations. Science and invention had brought States so close together that it was necessary to take a progressive view consistent with the realities of the age. Hence, he was in favour of retaining paragraph 1, especially if it could be modified along the lines suggested by Mr. Scelle.

19. The same considerations applied to paragraph 2. As the Special Rapporteur had shown in his commentary, it was the custom for diplomatic agents to perform certain consular duties and, if two States entered into diplomatic relations, that fact should imply a right to perform the usual consular functions as well.

20. As for paragraph 3, he failed to see how it could apply in view of the foregoing paragraphs. It should therefore be either reconsidered or omitted.

21. Faris Bey EL-KHOURI observed that the right referred to in paragraph 1 implied the existence of a corresponding obligation. The Commission would not be exceeding its powers if it drew attention to the existence of that obligation in cases where the establishment of consular relations was necessary and in the interests of relations between the States and the progressive development of international law. As Mr. Edmonds had observed — and the point might with advantage be referred to in the commentary — the establishment of consular relations could be regarded as necessary when there was commercial intercourse between the two States concerned and when the receiving State had authorized nationals of the sending State to reside in its territory. While a provision that was not recognized as compulsory could not be imposed

on the receiving State, the paragraph should be expressed in such a form as to show that the Commission favoured the promotion of the idea that consular relations were established by virtue of a right and its concomitant obligation.

22. He thought that the statement in paragraph 2 was correct, but that the text should be improved so as to show that it was only the establishment of a consular office in the capital, and not in other cities and ports, which was included in the establishment of diplomatic relations. The establishment of consular offices in other cities and ports was covered by paragraph 3, which indicated that in such cases separate agreements would be required.

23. All three paragraphs were, he thought, useful and should be acceptable to States if the Drafting Committee modified them so as to overcome the difficulties which had been mentioned during the discussion.

24. Mr. MATINE-DAFTARY said that since Mr. Hsu had described as excessively conservative the attitude of those members of the Commission who were opposed to article 1, he would like to make it clear that his position would depend on the form of the instrument in which the draft articles were to be embodied. If it was to be a convention, he would adhere to the position he had adopted at the preceding meeting, but if the draft articles were to constitute only a model or declaration, he would support the solution proposed by Mr. Scelle.

25. Mr. VERDROSS said there seemed to be some misunderstanding between the Special Rapporteur and some members of the Commission.

26. Relations between Governments, including commercial relations, came within the sphere of diplomatic intercourse, though a diplomatic mission might have a special department to deal with commercial matters. The main duties of a consul, however, were not concerned with the relations between Governments but with matters of internal law. The consul was a kind of advocate appointed by the sending State to act on behalf of its nationals residing in the territory of the receiving State. Under bilateral treaties a consul might have other functions, but under general international law he was there to protect the interests of the nationals of the sending State before the local authorities, including the tribunals, and the exercise of his functions, which depended on the issue of an exequatur by the receiving State, was not necessarily related to the conduct of diplomatic intercourse. If clarity was achieved on that point, it would be easy to find an acceptable formula, especially since the Special Rapporteur had recognized that a consul or a member of a diplomatic mission could not present himself before the local authorities unless he was in possession of an instrument, specifically the exequatur, authorizing him to do so.

27. Mr. SCELLE said he wished to supplement Mr. Verdross' remarks. The functions which a consular official performed in protecting the interests of the nationals of the sending State represented only one aspect of his position. There was another aspect: the consular officer was appointed by the sending State. When the organization of the international society was fully developed there would be representatives of all countries in all other countries and thus interpenetration would be complete. It was part of the Commission's task to define the essential functions of consular and diplomatic missions as institutions of the international community.

28. Mr. AGO said he had had no wish to deny that consular officers were appointed by the sending State and were in the official service of that State. They were in fact organs of the State, and their resemblance to diplomatic agents went even further, since their functions were provided for and regulated by international law. The essential difference between consular officers and diplomatic agents was that whereas the latter acted at the international level, dealing with relations between two subjects of international law, the former acted at the internal level, in matters governed by the municipal law of either the sending State or of the receiving State. For example, when he assisted in the settlement of successions or issued certificates or solemnized marriages, the consular officer acted as an organ of the legal system of the sending State; and when the consul took action to assist the nationals of his country resident in the receiving State in their relations with some local authorities, the action was taken in a domain governed by the law of the receiving State.

29. It would be somewhat illogical to use the word "representative" in relation to consular officers when that word had not even been adopted for diplomats in the Commission's draft concerning diplomatic intercourse, where it would have been more apt.

30. Mr. Tunkin and the Special Rapporteur had spoken, in relation to consular functions, of a right — a kind of counterpart in the consular field to the right of active and passive legation;[2] but Mr. Bartos had been correct, he thought, in affirming that the term was inexact, as the capacity enjoyed was strictly conditional. A State had a concrete right *vis-à-vis* another State to open consulates on the latter's territory if there was an agreement between the two. Without such an agreement, the right did not exist.

31. In connextion with paragraph 2, some members of the Commission had affirmed that when diplomatic relations had been established, the diplomatic mission was at any rate by implication empowered to engage in consular activities. He entirely disagreed. If the agreement between the two countries provided that the embassy should have a consular section, the affirmation would be correct, but it did not automatically follow from the institution of diplomatic relations that a consular section might be established.

32. He supported Mr. Matine-Daftary's suggestion that

[2] See commentary on article 1.

a vote on the draft articles concerning consular intercourse would be premature at that stage.

33. Mr. ZOUREK, Special Rapporteur, said he had not been convinced by the critics of paragraph 1. Though the wording might perhaps be modified, he did not think that every right was necessarily associated with a corresponding duty. That was an over-simple theory of the law, influenced by civil law notions. The employment of the word " right " was, however, consistent with accepted usage, and " right of legation " had been a current expression for centuries. It had been used in international conventions, including the Havana Convention of 1928.[3] Yet nobody contended that a State was legally bound to establish diplomatic relations with any other State that requested it. Furthermore, paragraph 3 was sufficiently clear to dispel all doubt on that point. Since, however, no reference had been made to a right in the Commission's draft on diplomatic intercourse, he would not object to, though he would regret, the deletion of the paragraph.

34. Most of the objections to paragraph 2 were, he thought, based on a misunderstanding. The paragraph certainly did not mean, as had been suggested, that when diplomatic intercourse was established the sending State had the right to set up consular offices in the receiving State. In that connexion he would refer to paragraph 2 of the commentary on article 2. A distinction should be drawn between the inception of consular intercourse and the establishment of consular offices. What article 1, paragraph 2, meant was that when diplomatic intercourse was established the establishment of consular relations was implied. But those relations could be conducted in such a case only by the diplomatic mission. That implication had been questioned, especially by Mr. Ago. Mr. Matine-Daftary and Mr. Yokota had cited cases in which diplomatic relations were said to exist without consular relations. But who performed the consular functions in such cases ? It could hardly be suggested that they were not performed at all, for their performance was essential to routine intercourse between States. In many cases, however, a sending State would find it too expensive to establish special consular offices in the receiving State, and consular duties were performed by the diplomatic mission. For those reasons he was therefore of the opinion that the idea expressed in paragraph 2 was in keeping with a general if not a universal practice.

35. Mr. Verdross had supported the view that the ability to approach the local authorities was a distinguishing feature of consular, as opposed to diplomatic, relations. He (Mr. Zourek) did not think, however, that that was an essential criterion. The relations between consular officers and the local authorities were regulated either by local usage or by the legislation of the receiving State, and the whole subject would be discussed when the Commission came to deal with article 24 of the draft. He would point out, however, that consular officers were sometimes empowered to approach the central authorities as, for example, in cases where it was claimed that the authorities of the receiving State had not given fair treatment to a national of the sending State ; and also that diplomatic agents were in some cases empowered to approach the local authorities, even though they were bound to do so through the Ministry of Foreign Affairs.

36. He could not agree with Mr. Ago that the functions of a consular officer must fall solely within the framework of the internal law either of the sending or of the receiving State. That might be the false impression in cases where a country maintained both a diplomatic mission and concular missions in the receiving State, but consular officers generally had to undertake duties in connexion with the observance of such international instruments as commercial and navigation treaties, and to ensure the protection of their nationals. That function assumed even greater significance where the consular district was coterminous with the territory of the receiving State. Moreover, under most national legislations, consular officers were empowered to deal with the central authorities, such as the Ministry of Commerce or the Ministry of Foreign Affairs, when the sending State was not represented in the receiving State by a diplomatic mission ; that was a practical necessity. In such cases the consular mission had to deal with matters affecting the relations between States.

37. It had been rightly pointed out that consular intercourse was not necessarily based on reciprocity, for sometimes a State might wish to maintain consular offices in a country which did not need to have consular offices in that State. He had provided for that possibility by the use of the phrase " the exchange or admission of consular representatives " in article 1, paragraph 3.

38. Objection had been raised to the expression " consular intercourse " but he thought the Commission would be obliged to retain it, for it was consecrated by usage and had been employed previously by the Commission itself and approved by the General Assembly.

39. Summing up, he said he would be prepared to sacrifice paragraph 1, but thought that paragraphs 2 and 3 should stand.

40. The CHAIRMAN observed that if paragraph 2 merely meant that diplomatic missions were also empowered to carry out consular functions, there was no need to say so in the present draft ; the performance of consular functions should have been included among the functions of a diplomatic mission enumerated in the draft on diplomatic intercourse and immunities.

41. He asked the Special Rapporteur whether one of the implications of paragraph 2 was that when diplomatic intercourse had been established there would be no need for another agreement for the purpose of establishing consular intercourse.

42. Mr. ZOUREK, Special Rapporteur, replied in the

[3] Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

affirmative. Special agreements would, however, be needed if the sending State wished to establish consular offices either in the capital of the receiving State or in other towns.

4. Mr. TUNKIN said that, like the Special Rapporteur, he was unable to accept the view that consular activities must necessarily be within the framework of internal law. The distinction between diplomatic and consular functions in this respect was in fact a distinction of degree rather than of principle. While the activities of consular officers were largely determined by the internal law of the sending and receiving States, that did not mean that consular officers could not also discharge functions which were regulated by international law, as, for example, functions connected with the observance of commercial agreements.

44. Nor could he accept Mr. Ago's assertion that diplomatic agents could carry out consular functions only with the express consent of the receiving State or by virtue of a specific agreement between the two States. Not only could the consular department of an embassy discharge consular functions in the territory of the receiving State, but it might also carry out such duties in respect of nationals of the sending State who resided in the territory of a third state in which the sending State maintained no consular departments or offices. Such persons might, for example, send their passports for renewal to consular offices in the receiving State. In respect of the consular functions discharged by a diplomatic mission, no separate agreement was needed.

45. Sir Gerald FITZMAURICE said that the question whether diplomatic functions included consular functions was a question less of theory than of fact, and the facts should be ascertained. The Special Rapporteur had pertinently asked by whom the consular functions were discharged in countries in which a sending State maintained a diplomatic, but no consular, mission. He doubted, however, whether a sending State had an absolute right to exercise consular functions merely by virtue of the establishment of diplomatic relations. If such a right existed, the performance of consular functions should have been mentioned among the functions of diplomatic agents enumerated in the Commission's draft on diplomatic intercourse and immunities.

46. The real question was whether, if a sending State opened a consular section in its embassy in a receiving State without being specifically authorized to do so, the receiving State would have the right to object. The position was often obscured by the existence of a kind of implied agreement. What often happened in practice was that the embassy of the sending State would inform the receiving State that certain personnel had been designated to exercise consular functions. No objection would be made by the receiving State, and consequently there was a tacit agreement that the sending State might arrange for the performance of consular functions through its diplomatic mission. In his opinion, however, the receiving State would in such circumstances be within its rights if it objected to the procedure. Under article 2 of the draft, the agreement concerning the exchange and admission of consular officers should specify the seat and district of the consular mission. How would the consular district be defined in cases where consular activities were carried out by the diplomatic mission in the absence of a special agreement for the purpose of establishing consular relations? The Special Rapporteur's answer would presumably be that the consular district comprised the whole territory of the receiving State, but the point should be clarified.

47. He did not agree that a diplomatic agent had an automatic right, for example, to appear before the courts of the receiving State for the purpose of carrying out — and because he said that he was carrying out — a consular function. That argument, in fact, showed the weakness of the theory that diplomatic functions included consular functions, for a diplomatic agent had to act through the Ministry of Foreign Affairs. He must be invested with consular as well as a diplomatic capacity before he could exercise consular rights; and consular functions were essentially distinct from the functions of diplomatic agents.

48. Mr. ALFARO disagreed with the view that consular functions were exercised only for the protection and defence of nationals of the sending State. Such a view of consular relations would have been correct in past centuries, but was no longer valid; for consuls not only rendered services to nationals of the sending State, but also to nationals of the State where they acted as consul, and even to those of other States. Thus, a consul stamping an invoice for goods to be shipped abroad helped the interests both of the importing country and of the exporting country, which was generally the receiving State.

49. In the same way, the principal function of a consul was no longer, as it had been under the capitulatory system, to appear before local authorities. In reality, he still did so in cases where the laws of the receiving State protected the interests of a national of the sending State, for example, in the case of an estate with no known heir to the deceased foreign person in the receiving State. In such a case a consul acted as representative of a national of the sending State. A consul might also assist nationals of a third State, as when he issued visas authorizing entry into the sending State. In other words, he had a wide variety of functions. It could not be said that those functions were concerned only with the protection of the nationals of the sending State, for they were commercial, civil and international in character.

50. Mr. YOKOTA said that Mr. Hsu had criticized his example of delay in the establishment of consular relations between the Soviet Union and Japan, on the ground that two years was an insignificant time in international relations. Such an objection might appeal to a philosopher or a political thinker, but not to a jurist,

who could not disregard two years so lightly. Surely, if a delay of two years could occur between the establishment of diplomatic relations and the establishment of consular relations, the latter could hardly be said to be implicit in the former. It had further been argued that the Soviet embassy had maintained a consular section before consular relations had been established with Japan. That might have been so, but it must have been purely an internal arrangement within the embassy; to the best of his knowledge, the existence of the section had never been notified to the Japanese Government, nor had it been officially recognized.

51. It was doubtful whether it was proper to speak of consular functions being performed by diplomatic agents. It had been said that one of the functions of consuls was to protect the nationals of the sending State and that that function was performed by diplomatic agents ; but in his opinion that was the proper function of the diplomatic mission and not of consuls, nor did diplomatic agents perform that function in their capacity as consuls. The fact that such protection had been a consular function in the past did not mean that it was still a consular function in modern times. In his view, therefore, the term consular relations should be reserved for those cases in which States had agreed to admit consuls into each other's territories ; for otherwise there would be confusion.

52. Mr. TUNKIN thought that, in the Soviet-Japanese declaration on the re-establishment of diplomatic relations, consular relations had also been mentioned. In that case, Mr. Yokota's example would be irrelevant. In any case, the Soviet Union had established diplomatic relations with many other countries without mention being made of consular relations ; and yet the embassies both in the Soviet Union and in the other countries had consular sections. One example was the Federal Republic of Germany.

53. Mr. ZOUREK, Special Rapporteur, replying to the points raised by Sir Gerald Fitzmaurice, said that in the absence of consuls the consular district of a diplomatic mission would comprise the entire territory of the receiving State. Again, a diplomatic agent's appearance before local authorities was not a characteristic of his functions. Without some special authority, such as an agreement between the States, a diplomatic agent could not appear before the local authorities, but neither could a consular agent. Legislations differed on the matter, and in some cases local usage permitted one or the other to appear.

54. The Commission would deal with the exact functions of a consul when it discussed article 13 of his draft. Those functions were defined in many conventions, even if some went beyond generally existing practice, and there was little danger of States not accepting them. If, however, the draft was to apply solely to cases where consular relations were conducted only by separate consular offices, as Mr. Yokota suggested, then the scope of the draft would be enormously reduced, and the Commission would then also have to consider how the draft could deal with the situation in the many countries without such offices. No such question had been raised in connexion with the draft on diplomatic intercourse and immunities, and he felt that if Mr. Yokota's limitation was accepted there would be a lacuna in that draft. Consular relations covered a host of international as well as intranational matters, and consular functions were exercised in all countries ; nor was it conceivable that they should not be exercised, even in the absence of an agreement for the establishment of consular relations. There was therefore no need for special recognition by States of the consular section of a diplomatic mission.

55. The CHAIRMAN said that if paragraph 2 was accepted without change it would raise no difficulties. If, however, it was so changed as only to extend diplomatic functions to cover consular functions the proper, and the only, place for such a provision was the draft on diplomatic intercourse and immunities.

56. Mr. ZOUREK said that he had raised that very point during the discussion of the draft on diplomatic intercourse and immunities, but it had not been pursued. Perhaps it would be desirable to mention it in both the draft conventions.

57. Mr. SCELLE said that the question was of great importance. It should certainly be mentioned in the draft on diplomatic intercourse and immunities, but above all it required mention in the draft on consular intercourse.

58. Mr. ZOUREK proposed that paragraph 2 should be retained, and that paragraph 3 should be merged with paragraph 2. The article would then consist of a single provision, general agreement being implied in the first sentence and special agreement provided for in the second.

59. Mr. SCELLE said in that case article 1 should be drafted rather differently, for, although diplomatic and consular functions were closely linked, they were nevertheless very different. He considered that there was an obligation on the part of States to admit consuls and to specify consular districts. The Commission would fail to codify the international law on the subject if it did not lay down both the right to send consuls and the obligation to receive them.

60. Mr. VERDROSS thought that the article would be generally acceptable if paragraph 2, as presented in the report, was prefaced by the words : " Without prejudice to the functions which are governed by the internal law of the State of residence,".

61. Mr. ZOUREK said he had no objection to the substance of Mr. Verdross' proposal. Its final form might need further consideration.

The meeting rose at 1 p.m.

471st MEETING

Wednesday, 25 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1)

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.78/Add.1)

1. Sir Gerald FITZMAURICE, Rapporteur of the Commission, introduced the chapter of the draft report relating to arbitral procedure (A/CN.4/L.78/Add.1). Paragraphs 1 to 4 of the draft report contained a sketch of the history of the draft articles, and were followed by an explanation of the basis on which the draft had been written and why he had felt it unnecessary to make a detailed commentary on the articles. In the text of the draft articles the main change was the reintroduction of headings to certain groups of articles; in addition, the order of some articles had been changed. In the light of comments made during the discussion in the General Assembly, the Special Rapporteur had added articles on procedure, and he had placed them under the heading: " Powers of the tribunal and the process of arbitration ". The commentary after the text was self-explanatory.

2. Mr. SCELLE, Special Rapporteur, said that the draft articles remained in substance much as they had been, but they had gained in sobriety of expression and clarity of layout. Much of the improvement had been due to the work of Sir Hersch Lauterpacht and of Sir Gerald Fitzmaurice.

I. Introduction

Paragraphs 1 to 5

No observations.

Paragraph 6

3. Mr. BARTOS said that the reasons given for dispensing with a detailed commentary on the articles had not convinced him. From the scientific point of view it was desirable that the final text should have such a commentary, and from the practical point of view it would be difficult for Governments and for delegations in the General Assembly to consult the successive reports in order to find an adequate commentary on each article. The draft articles would be a possible source of international law, he thought, and deserved better treatment. Because of the short time at the Commission's disposal, he had no practical suggestion to make, but he felt that the commentary on the articles should at least be closely examined and extended so as to bring out clearly the difference between the old and new versions.

4. Mr. SCELLE, Special Rapporteur, said that the previous reports were so voluminous that the Rapporteur of the Commission could not be expected to incorporate them in the draft, especially as members of delegations in the Sixth Committee and the General Assembly ought to have the earlier reports before them when discussing the present draft articles. Unless the General Assembly required a compilation, therefore, Mr. Bartos' criticism was unjustified.

5. Sir Gerald FITZMAURICE, Rapporteur, said that he had considered the question whether there should be a more detailed commentary, but had come to the conclusion that the earlier reports on arbitral procedure had been so full and masterly that they could not be improved upon. Accordingly he had preferred simply to summarize the salient points.

6. Mr. LIANG, Secretary to the Commission, suggested that the Secretariat's detailed *Commentary,*[1] prepared at the Commission's request, should be mentioned in paragraph 6.

7. Mr. SCELLE, Special Rapporteur, supported the Secretary's suggestion. The Secretariat's *Commentary* had been of great assistance, particularly on certain points where doctrine was not fixed and where precedents were required.

8. Sir Gerald FIZMAURICE, Rapporteur, agreed that the Secretariat's *Commentary* should be mentioned in paragraph 6.

9. Mr. HSU suggested that perhaps the Secretariat might revise its *Commentary* in the light of the new draft articles.

10. Mr. LIANG, Secretary to the Commission, said that the articles as now adopted by the Commission did not depart in any radical way from the 1953 text (A/2456,[2] para. 57) so that the Secretariat's *Commentary* was still of value. The *Commentary* could hardly be revised in time for the thirteenth session of the General Assembly, but thereafter, if there was any request for revision, it might be revised.

11. Mr. GARCIA AMADOR pointed out that some members of the delegations at the forthcoming session of the General Assembly and other persons outside the Assembly would be looking at the draft articles for the first time. For the sake of such persons, and because of the misinterpretations which had occurred and were liable to recur, he felt that it should be made clear in paragraph 6 that the object of the draft articles was to make arbitral procedure efficacious only when States had agreed to resort to arbitration. It must be absolutely clear that the articles did not make arbitration between States compulsory.

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[1] *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session* (United Nations publication, Sales No.: 1955.V.1).

[2] *Official Records of the General Assembly, Eighth Session, Supplement No. 9.*

12. Sir Gerald FITZMAURICE, agreeing with Mr. García Amador, suggested that the "General observations" (paragraphs 8 to 13), which were precisely designed to fulfil the purpose the latter had in mind, be placed before the draft articles to serve as an introduction.

It was so decided.

13. Mr. ZOUREK proposed that the words "*de style*" in the penultimate sentence of the French text of paragraph 6 should be deleted.

It was so agreed.

14. The CHAIRMAN pointed out that in view of the decision just taken, section III. A, "General observations" (paragraphs 8 to 13), would be considered before section II (paragraph 7) containing the text of the draft.

III. A. General observations

Paragraph 8

15. Sir Gerald FITZMAURICE suggested that, in view of the decision just taken by the Commission (para. 12 above), paragraph 8 should be redrafted.

It was so agreed.

Paragraph 9

16. Mr. GARCÍA AMADOR suggested that the fourth sentence in paragraph 9 should be so redrafted that it could not be misconstrued as implying that resolutions adopted by the General Assembly, or model drafts adopted in General Assembly resolutions, had no binding force.

17. Mr. ZOUREK saw no difficulty in the sentence referred to. It was already recognized that resolutions of the General Assembly, with the exception of those relating to internal administrative matters of the United Nations, had no binding force in law.

18. The CHAIRMAN, speaking as a member of the Commission, observed, with reference to the second sentence in paragraph 9, that in his view the adoption of a convention by the General Assembly did not involve an obligation on Member States to decide whether to sign and ratify it or not. It seemed unnecessary to raise such a debatable point in the paragraph and he suggested that the second half of the sentence should be replaced by the words "... convention for adoption by the General Assembly and for possible signature and ratification by States." The fourth sentence, referred to by Mr. García Amador, could be deleted as superfluous. It might be hardly proper to make so self-evident a statement as the fact that adoption of the report by resolution would not make the draft binding on States.

19. Mr. HSU supported the Chairman's suggestion that the fourth sentence of paragraph 9 should be deleted. The question whether a resolution of the General Assembly was binding or not depended more on the form in which it was drafted than on the fact that it was a resolution. In any case, he would welcome the deletion of the reference to article 23, paragraph 1 (*b*) of the Statute of the Commission, since recommendations under that clause ("To take note of or adopt the report by resolution") had come to be associated with drafts which embodied only customary law and which did not need to be couched in the form of a convention. It was obviously inadvisable to convey such an impression in the case of the model draft on arbitral procedure.

20. Mr. SCELLE, Special Rapporteur, proposed that at an appropriate point in paragraph 9 a statement should be added to the effect that the draft had nothing in common with a general draft on compulsory arbitration.

21. Sir Gerald FITZMAURICE, Rapporteur, agreed with the suggestions of Mr. García Amador and with that of the Chairman relating to the second sentence in the paragraph, but was reluctant to delete the fourth sentence or to adopt Mr. Hsu's suggestion. In view of the history of the draft, it was most desirable that the Commission should make a definite recommendation as to its fate. In its report on its fifth session (A/2456, para. 55) the Commission had made a specific reference to article 23, paragraph 1 (*c*) of its Statute, and he thought that a corresponding reference should be made to paragraph 1 (*b*) in its present report, in order to make it quite clear that the Commission was recommending a different course of action. He was in favour of retaining the sentence, subject to redrafting to meet Mr. García Amador's point. In his opinion, for the reasons stated by that speaker, it was advisable to stress that neither the adoption of the Commission's report nor the adoption of the draft articles in the form of a resolution would be in any way binding on States Members of the United Nations.

22. Faris Bey EL-KHOURI pointed out that paragraph 4 of the preamble to the model rules on arbitral procedure should make it perfectly clear that the procedures suggested in the rules would be compulsory only if the States concerned had agreed to have recourse thereto.

23. Mr. LIANG, Secretary to the Commission, agreed with Mr. García Amador and also with the Rapporteur on the desirability of retaining the reference to the Commission's Statute in order to explain the course of action advocated. He suggested redrafting the second part of the fourth sentence as from the words "now recommends" and merging it with the fifth sentence in the following manner:

> "the Assembly adopts the present report by resolution, the draft articles would become binding only in the following circumstances..."

It was so decided.

Paragraph 10

24. Mr. ZOUREK proposed that the word "*accord*" should replace the word "*consentement*" in the third

and fourth sentences of the French text of paragraph 10.

It was so agreed.

Paragraph 11

25. Mr. LIANG, Secretary to the Commission, thought that it might be advisable to explain what was meant by the phrase " if not in form " in the first sentence of paragraph 11. In his opinion, an agreement to arbitrate involved, even in form, an international obligation.

26. Sir Gerald FITZMAURICE, Rapporteur, said that the phrase in question was intended to refer to a treaty obligation. It had been argued that an undertaking to arbitrate was not equivalent in form to an obligation under an ordinary treaty. The phrase was not essential, however, and could be deleted, in keeping with the principle that observations which were not absolutely essential were best omitted if they might give rise to any misunderstanding.

27. Mr. SCELLE, Special Rapporteur, thought that the sentence was quite clear and very well rendered in French. He was in favour of retaining the phrase, since an undertaking to have recourse to arbitration might take a number of forms.

28. Mr. LIANG, Secretary to the Commission, remarked that Mr. Scelle's point was covered elsewhere, namely, in the draft articles themselves.

It was decided that the words " if not in form " should be deleted.

29. Mr. ZOUREK proposed that the words "*un engagement de recourir à l'arbitrage*" should replace the words "*une convention d'arbitrage*" in the first sentence of the French text.

It was so agreed.

30. Mr. YOKOTA proposed that the words " in law " should be inserted after the word " bound " in the second sentence of paragraph 11, to make it clear that a legal obligation was involved.

It was so agreed.

Paragraph 12

No observations.

Paragraph 13

31. Mr. GARCÍA AMADOR proposed that the word " sovereign " should be omitted before the word " States " in the first and fourth sentences of paragraph 13.

It was so agreed.

32. Mr. BARTOS urged that some reference be made to the fact that the Commission had discussed the question whether the draft should apply, *mutatis mutandis*, to disputes between States and international organizations and to disputes between international organizations and, though not opposed to the idea, had concluded that in view of frequent references in the draft to the International Court of Justice, whose Statute precluded it from adjudicating in disputes involving international organizations, it would be difficult to apply the draft to such disputes.

33. Mr. GARCÍA AMADOR suggested that reference should also be made to the fact that the Commission had discussed the advisability of extending the scope of the draft to cover disputes between States and individuals or bodies corporate concerning agreements or contracts containing an arbitration clause.

34. Mr. SCELLE, Special Rapporteur, suggested that it might be more appropriate to mention the points just raised in a footnote rather than in a paragraph of the text. The preamble referred to disputes between States, and consequently a reference to disputes between entities other than States, or between States and such other entities, was not strictly relevant.

35. Sir Gerald FITZMAURICE, Rapporteur, supported Mr. Scelle's suggestion. The footnote might say that the Commission had not felt it necessary to add provisions covering disputes involving bodies other than States.

36. Mr. ZOUREK said that, so far at least as disputes between international organizations were concerned, the substance of the matter had not been discussed. He suggested that a decision on the form which the reference should take in the report should be deferred until the text of a footnote had been prepared for the Commission's consideration.

37. Mr. HSU thought that perhaps there was no need to discuss the matters referred to, since the draft articles were to take the form, not of a convention, but of model rules. The position was that if a State was willing to enter into an arbitration agreement with an international organization or a body corporate, it would be quite free to do so.

38. The CHAIRMAN suggested that the Rapporteur be asked to prepare a footnote for the Commission's consideration.

It was so agreed.

II. Text of the draft *and* III. Commentary

Title and preamble

39. The CHAIRMAN, speaking as a member of the Commission, suggested that in the title it might be more appropriate to use, instead of " model rules ", the more neutral term " set of rules ".

40. Mr. EDMONDS said that the phrase " model rules " was frequently used in the United States to describe drafts of that kind.

41. Mr. YOKOTA said he was in favour of keeping the phrase " model rules ", since it was less likely to lead to misunderstanding than the expression " set of rules ".

42. Mr. SCELLE was also in favour of retaining the word " model ". A group of experts on international

law, like the Commission, was well qualified to produce a model of that kind.

43. Mr. ALFARO said he also preferred to retain the word " model ", partly because it was the term most suited to the aim of the draft, and partly because the expression " set of rules " would be difficult to translate into Spanish in such a way as to convey the purpose of the draft.

44. Mr. ZOUREK recalled that the expression " standard rules " (*règles types*) had also been suggested and might perhaps be adopted if there was strong objection to the use of the word " model ".

45. The CHAIRMAN, speaking as a member of the Commission, said that since a majority of the members seemed to be in favour of retaining the word " model ", he would withdraw his amendment.

The title and preamble were adopted unanimously.

46. Mr. BARTOS, explaining his vote, said he was aware that although the preamble stated that the rules should not be compulsory unless the States concerned had agreed to have recourse thereto, they would in fact become compulsory in the course of time, for that was the fate of all sets of rules or models which were generally accepted. He opposed the idea that the rules should be compulsory at the present time, but despite his awareness that they would become compulsory, he had not voted against the preamble, for he realized that by sponsoring those rules the Commission was making a contribution to the future international law on arbitration.

COMMENTS ON THE PREAMBLE (A/CN.4/L.78/Add.1, paras. 14 and 15)

47. Mr. LIANG, Secretary to the Commission, suggested the deletion of the words " under the present scheme " in the second sentence of paragraph 14, since the articles of the 1953 draft would have had no binding effect, either. The purpose of the paragraph was to draw attention to the fact that the articles had no binding effect, and consequently the phrase " under the present scheme " was misleading.

It was decided to delete the words " under the present scheme ".

48. Mr. ZOUREK pointed out that in the French text of paragraph 14 the words " have no binding effect " were rendered by " *n'ont pas force exécutoire* ", which he thought did not mean the same thing.

49. Sir Gerald FITZMAURICE, Rapporteur, suggested substituting " *n'ont pas d'effet obligatoire* ".

50. Mr. ZOUREK signified his approval of the suggestion.

The French text of paragraph 14 was amended accordingly.

51. Mr. GARCÍA AMADOR suggested that, to avoid misunderstanding, the word " international " should be inserted between the words " general " and " law " in the last sentence of paragraph 15.

It was so agreed.

ARTICLE 1

Article 1 was adopted by 12 votes to 1, with 1 abstention.

COMMENTS ON ARTICLE 1 (A/CN.4/L.78/Add.1, para. 16)

52. Mr. ZOUREK suggested that, in the commentary on article 1, the words " The majority of the members of " should be inserted at the beginning of the third sentence so as to avoid giving the impression that the Commission had been unanimously of the opinion that the criticisms were not well founded.

53. Mr. FRANÇOIS said he felt some difficulty in accepting Mr. Zourek's proposal. It was true that if the text was left unchanged, the impression might be conveyed that the Commission had been unanimously of the opinion that the criticisms were not well founded ; but on the other hand, if the phrase " the majority of the members of the Commission " were used, there might be some justification for claiming that it should be used on every occasion on which a decision had not been unanimous.

54. His practice as Rapporteur had been to use the phrase " the Commission " when reporting majority decisions, except in cases where important principles were involved, when he had used the phrase " the majority of the members of the Commission ". On the whole, he thought it was better to say only " the Commission ", but perhaps a general statement could be included in the report to indicate that the use of that phrase did not necessarily imply that the Commission had been unanimous on the point in question.

55. Mr. ALFARO observed that decisions were taken by majority vote in most deliberative bodies. In recording decisions of the International Court of Justice, for example, it was stated that " The Court decided . . .", even if there were dissenting opinions, and the same practice was universally followed in recording the decisions of courts with a plurality of judges. So far as the decisions of the Commission were concerned, dissenting opinions were normally mentioned in the records, and though reservations to votes were sometimes referred to in footnotes in the Commission's reports, it seemed natural to use the expression " The Commission decided . . ." for the purpose of recording majority decisions.

56. Sir Gerald FITZMAURICE, Rapporteur, agreed with Mr. François and Mr. Alfaro. The phrase " the Commission " had been used for a long time in reporting majority decisions, and he did not think there was any danger of its being interpreted as implying that the decision in question was necessarily unanimous. It was, however, reasonable that members who had opposed a decision should request that some indication

of their opposition should be given in the report; he would, therefore, suggest, as a solution which would avoid the use of the word "majority", that the words "Despite doubts expressed by certain of its members" should be inserted at the beginning of the sentence in question.

57. The CHAIRMAN, speaking as a member of the Commission, thought that, where important questions of principle were involved, it was right that some indication of the views of the minority should be given in the report. That had in fact been the Commission's practice. It should be remembered that the Commission's decisions were not final, but would have to be considered by the Sixth Committee of the General Assembly; consequently any indication of the real situation in the Commission, especially on important matters, would be of value to the Sixth Committee. He therefore supported Mr. Zourek's proposal and thought the suggestion made by the Rapporteur would provide an adequate solution.

58. Mr. ZOUREK recalled that under article 20 of its Statute the Commission was obliged to report the divergencies and disagreements which exist among its members, as well as the arguments invoked in favour of one or the other view. He would accept the Rapporteur's suggestion as a solution for the particular difficulty to which he had drawn attention.

59. Mr. YOKOTA said that though he was sympathetic in substance to the views expressed by Mr. Zourek and the Chairman, he would not be in favour of using the expression "the majority of the members of the Commission" because, unless that form were used whenever a decision had not been unanimous, the expression "the Commission" might imply a unanimous decision, and consequently there would be a danger of misunderstanding. He was, therefore, in favour of the Rapporteur's suggestion.

It was agreed that the words "Despite doubts expressed by certain of its members" should be inserted at the beginning of the third sentence in paragraph 16.

The meeting rose at 1.5 p.m.

472nd MEETING

Thursday, 26 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Limitation of documentation: General Assembly resolution 1203 (XII)

1. Mr. LIANG, Secretary to the Commission, drew attention to General Assembly resolution 1203 (XII). He suggested that the Commission should take note of the resolution and have its action in so doing placed on record.

It was so agreed.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1) *(continued)*

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.78/Add.1) *(continued)*

II. TEXT OF THE DRAFT *and* III. COMMENTARY *(continued)*

ARTICLE 2

2. Sir Gerald FITZMAURICE, Rapporteur of the Commission, observed that the only change made in article 2 was indicated in the comment on that article, in paragraph 17 of the draft report.

Article 2 was adopted unanimously.

ARTICLE 3

3. Sir Gerald FITZMAURICE, Rapporteur, said that no change of substance had been made in article 3, and that there was no separate comment on it in the draft report.

Article 3 was adopted by 10 votes to none, with 2 abstentions.

ARTICLE 4

4. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the separate commentary on article 4 in paragraph 18 of the draft report.

5. The 1953 text of the article (A/2456, para. 57) had been modified in accordance with the decisions adopted by the Commission earlier in the session. The Drafting Committee had introduced no change of substance into the text as then approved, but had thought it desirable to draw attention to the fact that the text as it stood said nothing about changing an arbitrator appointed by the arbitrators already appointed — in other words, the third or fifth arbitrator, who would be the umpire. The feeling had been that it should not be possible to change such arbitrators even by agreement between the parties, and he therefore proposed that the words "by agreement between the arbitrators already appointed or who are appointed" might be inserted after the words "Arbitrators appointed" in the second sentence of paragraph 3.

6. Mr. SCELLE, Special Rapporteur, said he entirely agreed with the Rapporteur's proposal. The case in question was of frequent occurrence and should be covered in the draft.

7. Mr. MATINE-DAFTARY asked for an explanation of the phrase "the first procedural order" in paragraph 4.

8. Mr. SCELLE, Special Rapporteur, said that no difficulty had been raised in connexion with that phrase since the 1953 text had first been presented. It was necessary to specify the point at which the proceedings were deemed to have begun, and the making of the first procedural order, as for example the order for

the written proceedings to be opened, seemed to provide the most suitable indication.

9. Mr. ZOUREK said that since he had not been present at the discussion on the article he would like to make his position clear. The second sentence of paragraph 3, he thought, went too far, for in exceptional circumstances, as for example when an arbitrator became unable to carry out his functions, it ought to be possible to replace him, no matter in what manner he had been appointed.

10. Sir Gerald FITZMAURICE, Rapporteur, thought the point raised by Mr. Zourek was covered by article 5, which provided for the filling of vacancies caused by death, incapacity or resignation. Article 4 was not intended to deal with the filling of vacancies.

11. Mr. ZOUREK said he was not entirely satisfied by the Rapporteur's explanation. Article 5 provided for the filling of vacancies, but specified that they should be filled in accordance with the procedure prescribed for the original appointments. That provision presumably implied that if the arbitrator had been appointed by the President of the International Court of Justice, the replacing arbitrator must be similarly appointed. The meaning should be made clear.

12. Mr. FRANÇOIS said it was essential that the arbitrators should have the confidence of the parties. If that confidence did not exist with respect to one of the arbitrators, the other arbitrators should not be prevented from appointing a substitute. That objection would also apply to the addition proposed by the Rapporteur.

13. He would be unable to vote for the second sentence of paragraph 3, or for the addition proposed by the Rapporteur. He would therefore request that article 4 be put to the vote paragraph by paragraph.

14. Sir Gerald FITZMAURICE, Rapporteur, observed that the first sentence of paragraph 3 did not prevent, but merely discouraged, the parties from changing an arbitrator who had been appointed by agreement between them. There were two other procedures for the appointment of arbitrators, and in both cases it was undesirable that, once appointed, the arbitrators should be changed. When, for example, under the terms of the *compromis,* the parties had entrusted their national arbitrators with the task of appointing a third arbitrator, the national arbitrators would certainly be in touch with their respective Governments on the subject and only in exceptional circumstances would they be likely to appoint an arbitrator who was not approved by their Governments. Lastly, in the case of appointments by the President of the International Court of Justice, it was most unlikely that the President of the Court would appoint an arbitrator without consulting the parties previously. It would be very unseemly if, after the parties had been unable to constitute a tribunal themselves, and the President of the Court had had to intervene, an arbitrator appointed by the President was changed and the parties attempted once more to constitute the tribunal themselves. Despite the objections voiced by Mr. François, he thought that paragraph 3, with the addition he had proposed, should stand.

15. Mr. YOKOTA observed that the Rapporteur's proposal placed arbitrators appointed by the arbitrators already appointed and arbitrators appointed by the President of the International Court of Justice on the same footing. There was, however, another possibility: to give the same treatment to arbitrators appointed by mutual agreement between the parties and to arbitrators appointed by arbitrators already appointed, and to provide that in either case the arbitrators could not be changed save in exceptional circumstances. He thought that while it should be possible for arbitrators already appointed to change the arbitrator they themselves had appointed, it would be damaging to the authority of the President of the International Court of Justice if arbitrators appointed by him were changed after the parties themselves had been unable to constitute the arbitral tribunal. If the majority of the members of the Commission preferred the Rapporteur's proposal to the alternative he (Mr. Yokota) had suggested, he would not vote against that proposal, but would merely abstain.

16. Sir Gerald FITZMAURICE, Rapporteur, said that subject to the agreement of the Special Rapporteur he would be prepared to insert the addition he had proposed in the first sentence of paragraph 3 instead of in the second. The first sentence would then read: "Arbitrators appointed by mutual agreement between the parties, or by agreement between the arbitrators already appointed, may not be changed after the proceedings have begun, save in exceptional circumstances."

17. Mr. SCELLE, Special Rapporteur, signified his assent.

18. The CHAIRMAN said that, in compliance with the request made by Mr. François, he would put article 4 to the vote paragraph by paragraph.

Paragraph 1 was adopted by 10 votes to none, with 2 abstentions.

Paragraph 2 was adopted by 10 votes to none, with 2 abstentions.

Paragraph 3, as amended by the Rapporteur, was adopted by 6 votes to 5, with 1 abstention.

Paragraph 4 was adopted by 11 votes to none, with 1 abstention.

Article 4 as a whole, as amended, was adopted by 7 votes to 2, with 3 abstentions.

ARTICLE 5

19. Sir Gerald FIZTMAURICE, Rapporteur, drew attention to the comment on article 5 in paragraph 19 of the draft report. The text had been thoroughly discussed by the Commission and had not been altered by the Drafting Committee.

Article 5 was adopted by 11 votes to none, with 2 abstentions.

ARTICLE 6

20. Sir Gerald FITZMAURICE, Rapporteur, observed that article 6 corresponded to article 8 of the 1953 text (A/2456, para. 57). Earlier in its current session, the Commission had amended paragraph 3 so as to provide that vacancies should be filled in accordance with the procedure prescribed for the original appointments instead of in the manner provided for in article 3, paragraph 2. The Drafting Committee had made no further change.

21. Mr. MATINE-DAFTARY said he agreed with the provisions of the article so far as they related to disqualification by reason of some fact arising subsequently to the constitution of the tribunal. He inquired, however, whether an arbitrator could be disqualified while the tribunal was being constituted, or, in other words, during the process of the appointment of the arbitrators.

22. Sir Gerald FITZMAURICE, Rapporteur, replying, said that the question of the disqualification of arbitrators hardly arose before the tribunal was constituted, since until that point it was open to any of the parties to refuse to accept or agree to a particular arbitrator. Either the parties were going to agree on the choice of arbitrators, in which case they would not accept a person who was disqualified, or they were unable to agree, in which case the appointments would be made by the President of the International Court of Justice. If the President informed the parties in advance of his choice, before the tribunal had been constituted, it would still be open to them to object ; but if, after the tribunal had been constituted, one of the parties, not having previously been informed whom the President of the Court had chosen, found that the arbitrator was subject to disqualification, the provisions of article 6 would apply.

Article 6 was adopted by 11 votes to none, with 2 abstentions.

ARTICLE 7

23. Sir Gerald FITZMAURICE, Rapporteur, observed that article 7 was new. He drew attention to the comment in paragraph 20 of the draft report.

24. Mr. EDMONDS said that in view of the fundamental importance of the principle involved in the second sentence, he would like to state his position in the matter.

25. During the discussion which had taken place earlier in the session, the view had been expressed that the parties should have some say in the matter of whether the oral proceedings should be recommenced if a new arbitrator was appointed. In his opinion, that view was correct. It was unfair to place the burden of the decision upon the newly appointed arbitrator, especially since, even though he had a transcript of the oral proceedings, he might not be in a position to say whether the proceedings should be recommenced, for a written transcript did not always represent the testimony of the witnesses. In the United States law, it was a principle that " he who decides must hear ". In his opinion, it was unfortunate that the words " or one of the parties ", which it had been proposed should be added after the words " The newly appointed arbitrator ", had been dropped (438th meeting, para. 85).

26. The CHAIRMAN, speaking as a member of the Commission, said that the procedure followed in ordinary courts did not strictly apply to arbitral tribunals, which functioned according to the quorum principle, not all the members being necessarily present at all the meetings. The difficulty to which Mr. Edmonds had alluded was, he thought, adequately met by the second sentence, for even though it was not explicitly stated that the oral proceedings could be recommenced at the request of one of the parties, the parties were quite free to make representations in that sense to the newly appointed arbitrator, who would then be in a position to judge whether or not it was desirable to recommence the oral proceedings.

27. Sir Gerald FITZMAURICE, Rapporteur, said that while he fully appreciated the force of Mr. Edmonds' reasoning, he felt there were certain differences between national and international courts of which account must be taken. In the first place, whereas oral evidence figured largely in the proceedings of national courts, it was comparatively infrequent in international courts, the great bulk of the testimony before which was normally presented in writing in the form of affidavits, etc. The second difference was that, while in national courts the action of the parties was strictly controlled by the provisions of the national law and the powers of the court, an effort had to be made, in laying down rules governing the procedure in international arbitral tribunals, to avoid creating a situation in which one of the parties would be able to take advantage of the appointment of a new arbitrator for the purpose of prolonging proceedings which were already sufficiently protracted. It was not generally desirable to recommence oral proceedings unless it was essential to do so.

28. As the Chairman had pointed out, the newly appointed arbitrator would have a transcript of the proceedings.

29. Mr. SCELLE, Special Rapporteur, said he entirely agreed with the views expressed by the Rapporteur. The new article was very important, and he thought it adequately covered all the questions likely to arise in connexion with the matters with which it dealt.

Article 7 was adopted by 10 votes to 1, with 3 abstentions.

30. Mr. BARTOS said he had abstained from voting on article 7 because he thought the oral proceedings should be recommenced on the appointment of a new arbitrator if the parties so requested and if the tribunal considered that the request was justified. He was of the same opinion on the subject as Mr. Edmonds.

ARTICLE 8

31. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 8 in paragraph 21 of the draft report.

32. The only change of substance made by the Drafting Committee was that in the second sentence of paragraph 1, the words " the essential elements of a *compromis* " had been substituted for the phrase " the essential elements of the case ", which had been used in the original text (A/CN.4/113, annex, article 9). The Drafting Committee had felt that the use of the words " of the case " was inappropriate since it was for the tribunal itself to decide what were the essential elements of the case.

33. Mr. BARTOS said he was still of the opinion that decisions as to which questions fell within the competence of the tribunal should be subject to review by the President of the International Court of Justice, if one of the parties applied for review ; for in the circumstances contemplated in article 8, as in those contemplated in article 9, the arbitral tribunal could conceivably exceed its powers even if the arbitrators were in good faith.

34. He did not, however, ask for any amendment of article 8.

Article 8 was adopted by 12 votes to none, with 3 abstentions.

35. Mr. MATINE-DAFTARY said he had abstained from voting on article 8 because he did not agree that the arbitral tribunal could ever dispense with a *compromis*. If there was no *compromis*, there could be no arbitration.

ARTICLE 9

36. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the replacement in article 9 of the word " widest ", used in the 1953 text (A/2456, para. 57, article 11), by the word " necessary ".

37. Mr. YOKOTA said that he had opposed the word " widest " because he felt that it went too far. He now opposed the word " necessary " because he felt that it was too restrictive. He proposed therefore that the word " necessary " be deleted.

38. Mr. EDMONDS supported Mr. Yokota, but for a different reason. The word " necessary " added nothing to the meaning, for he could not see any difference between " powers " and " necessary powers " in the context.

39. Mr. SCELLE, Special Rapporteur, thought that the tribunal should be given the widest possible powers to interpret the *compromis*. The expression " necessary powers " was too restrictive, while the word " powers " used by itself would weaken the text still more. He proposed that the word " widest " be restored to the text.

40. Mr. LIANG, Secretary to the Commission, pointed out that, as in the United States Constitution, the term " necessary powers " could be interpreted as stronger than the simple term " powers ", inasmuch as it meant powers of implementation to the fullest extent.

41. Mr. AGO demurred at that interpretation, which seemed to him to be the exact opposite of the true position ; the term " the necessary powers " was weaker than " the power ". The deletion of the word "necessary " and the change from the plural to the singular was all that was required.

42. Mr. ALFARO approved of the word " necessary ", for according to the canons of interpretation with which he was most familiar, " necessary powers " meant all the powers required, and hence the widest powers.

43. Sir Gerald FITZMAURICE, Rapporteur, replying to a question by Mr. YOKOTA, said that he saw no difference between " the power to interpret " and " the necessary powers to interpret ".

44. Mr. MATINE-DAFTARY suggested the term " full powers ".

The Commission decided, by 7 votes to 4, with 5 abstentions, to delete the word " necessary ".

The Committee decided, by 5 votes to 2, with 8 abstentions, not to insert the word " widest ".

45. Sir Gerald FITZMAURICE, Rapporteur, said that as a consequential change the word " powers " should be changed to " power ".

46. Mr. BARTOS said he had voted against the deletion of the word " necessary " by reason of the position he had adopted with respect to article 8.

Article 9, as amended, was adopted by 15 votes to none, with 1 abstention.

ARTICLE 10

47. Sir Gerald FITZMAURICE, Rapporteur, said that the drafting of the first sentence of article 10 had been left to the Drafting Committee, which had considered the various suggestions of the Commission and chosen the words " shall apply ".

48. The Commission had accepted in principle the inclusion of the sentence within brackets, but the Drafting Committee had reached no final decision because it had doubted whether, in view of the opening sentence of the article, the sentence was really necessary. He personally considered it necessary, because the opening sentence concerned only Article 38, paragraph 1, of the Statute of the International Court of Justice, whereas the reference to *ex aequo et bono* occurred in Article 38, paragraph 2.

49. Mr. FRANÇOIS noted that the commentary on article 10 (A/CN.4/L.78/Add.1, para. 23) merely recorded the decision of the Drafting Committee, without explaining why it had reached that decision. The commentary should be expanded to show whether

the change in the text was merely a drafting amendment or whether it was one of substance.

50. Mr. AGO doubted whether the word " apply " was suitable in the context of article 10. The tribunal would apply customary international law, but it would not " apply " a provision specially framed for another court. He suggested that the words " conform to " should be substituted for " apply ".

51. Sir Gerald FITZMAURICE said he had no objection to such an amendment, but thought that the effect was substantially the same whichever wording was used. He believed that the tribunal could be said to " apply " Article 38, paragraph 1, if it applied the various sources of law specified therein.

52. Mr. ALFARO agreed that the sentence within brackets should be left in the article and the brackets removed.

53. The term " apply " raised primarily a question of language, but undoubtedly its use immediately after the word " applied " was undesirable. He suggested that the words " proceed in conformity with " be used.

54. Mr. LIANG, Secretary to the Commission, pointed out that, technically, it would be incorrect to say " apply Article 38, paragraph 1, of the Statute ", since it was intended only that the tribunal should apply what was often termed " the sources of law " enumerated in that paragraph. The preambular part of that paragraph, naturally, was not susceptible of being applied. He thought that one solution might be the insertion of the words " the rules contained in " after the word " apply ".

55. Mr. ZOUREK supported the Secretary's suggestion, but added that he would prefer the insertion to read: " the rules and principles of law in ".

56. Sir Gerald FITZMAURICE, Rapporteur, pointed out that in Article 38, paragraph 1, of the Court's Statute only sub-paragraph (*c*) referred to rules and principles of law as such; the other sub-paragraphs referred to sources of law. He proposed that the article read: " . . . the tribunal shall act in conformity with the provisions of Article 38, paragraph 1, sub-paragraphs (*a*) to (*b*)."

57. After further discussion, Faris Bey EL-KHOURI proposed that article 10 should reproduce textually, without any reference to Article 38 of the Statute of the International Court, those provisions of Article 38, paragraph 1, which mentioned the rules intended to be applied by the arbitral tribunal in the absence of agreement between the parties.

58. Mr. ZOUREK supported the proposal.

59. Sir Gerald FITZMAURICE, Rapporteur, said that Faris Bey El-Khouri's proposal offered an acceptable solution. After the words " shall apply " the actual text of Article 38, paragraph 1, sub-paragraphs (*a*) to (*b*), would be inserted in article 10. The sentence in brackets would become a separate paragraph.

Faris Bey El-Khouri's proposal was adopted by 15 votes to none, with 1 abstention.

Article 10, as amended, was adopted.

III. A. General observations (*continued*) [1]

60. Sir Gerald FITZMAURICE, Rapporteur, after recalling the requests made by Mr. Bartos and Mr. García Amador at the previous meeting and the Commission's decision in that connexion (471st meeting, paras. 32-38), submitted the following draft footnote:

> " The present draft is of course intended to apply to arbitrations between States. The Commission considered how far the draft might also be applicable to other types of arbitration, such as arbitrations between international organizations, or between States and international organizations, or between States and foreign private corporations or organizations, or other juridical entities. The Commission decided not to proceed with these aspects of the matter. Nevertheless, now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, certain of its provisions might, with the necessary adaptations, also be capable of utilization for the purposes of other types of arbitration."

61. The first three sentences of the note were purely historical. The last sentence could be omitted, if the Commission saw fit, but he would prefer to retain it. Since the parties to a dispute were entirely free to decide whether to make use of the model draft at all, and, if so, of what articles and with what adaptations, the comment in the footnote could hardly do any harm.

62. Mr. AGO regretted that the passage concerning arbitration between international organizations or between States and international organizations was couched in such modest terms. It was his impression that the Commission, when discussing the model draft, had been generally agreed that, with very little adaptation, affecting in particular three of its articles, the model draft could apply to disputes between States and international organizations and to disputes between international organizations themselves. Such disputes tended to become increasingly frequent and the system of arbitration advocated in the draft might perhaps come to be more easily accepted in such cases than in disputes purely between States. He would, therefore, prefer disputes involving international organizations to be referred to in more definite terms.

63. On the other hand, the question of the applicability of the model draft to disputes between States and foreign private corporations or other juridical entities had been considered by the Commission, if he rightly recalled, as an entirely distinct matter. Whereas disputes between States and international organizations or between international organizations were disputes between subjects of international law in which the law

[1] Resumed from 471st meeting.

applicable was international law, in the case of disputes between States and foreign private corporations the substantive applicable law was essentially internal law. The latter type of dispute was consequently outside the scope of the model draft.

64. In a word, his objection to the text of the footnote was that it said too little on the first question and too much on the second.

65. Mr. BARTOS said that his objections to the text were almost the same as those of Mr. Ago. The Commission had refrained from further consideration of the applicability of the model draft to disputes between States and international organizations or between international organizations because some of the articles might involve recourse to the International Court of Justice, whose competence was confined to disputes between States. The Commission had not, however, been opposed to the idea in principle, and had recognized that the law applicable in such disputes would be public international law.

66. But only Mr. García Amador had regarded the model draft as capable of being applied to disputes between States and foreign private corporations. All the other members of the Commission had considered that the law applicable in such cases was not public international law, unless the State of nationality of the private corporation transformed the dispute into a dispute between States by espousing its national's cause. What he chiefly objected to in the draft footnote was that it placed two different types of disputes on the same footing. He could, however, accept a text dealing with disputes between States and foreign corporations in a separate paragraph, in which it would be pointed out that the Commission had not gone further into the subject. He would be obliged to vote against the text as it stood.

67. Mr. GARCIA AMADOR said he could not understand how anyone who had studied the more recent instruments making provision for arbitration between States and foreign private corporations or other juridical entities could continue to maintain that the procedure involved in such arbitrations was governed by internal law. However, he still recognized, as he had recognized when the question had first been discussed, that it was inexpedient for the Commission to consider so very complex a problem. All that the footnote was meant to do was to mention that the Commission had discussed how the model draft might be applied to such types of arbitration. It merely pointed out that fact and added that some provisions of the draft might, with appropriate adaptations, be applied to arbitrations of that kind. Since several of the provisions of the model draft were reproduced almost word for word in the instruments he had mentioned at the Commission's 433rd meeting (paragraph 60), he could see no objection to the statement, which contained no recommendation and in no way committed the Commission to consider the matter further. In his opinion the footnote could be adopted without any reservation.

68. Mr. TUNKIN recalled that at its previous meeting the Commission had been in favour of dealing with the subject in a footnote but had left the actual text to be drafted by the Rapporteur in the light of the discussion. The point raised by Mr. Ago and Mr. Bartos was a very important one, since the text appeared by implication to place arbitrations between States and international organizations or between international organizations and arbitrations between States and private entities on exactly the same footing. He supported Mr. Bartos' suggestion for the redrafting of the text. He also thought that even in the case of the first type of arbitration, it was too strong to say " The Commission considered ". It would be more appropriate to say " The Commission briefly discussed ".

69. Mr. SCELLE, Special Rapporteur, observed that the Commission was reopening a debate on matters of substance which had already been discussed at length. He found the text of the footnote quite satisfactory. The model draft was concerned solely with arbitration between States. The Commission could, if it wished, mention that it had considered other related but subsidiary questions out of curiosity, but there was no real need to inform the General Assembly of that fact.

70. Mr. LIANG, Secretary to the Commission, thought that no mention should be made in the text of arbitrations involving foreign private corporations or other juridical entities. Arbitration between States and foreign private corporations was an entirely different subject from the first point dealt with in the footnote and the applicability of the model draft to such types of arbitration was extremely doubtful.

71. On the other hand, there was no denying that the Commission had discussed, though briefly, the applicability of the model draft to arbitrations between States and international organizations or between international organizations. And it must be said that, in view of the large number of agreements between international organizations and their host States, there was ample scope for such a type or arbitration.

72. He suggested retaining the first sentence of the text, changing the word " considered " in the second sentence to " discussed briefly " and deleting both the end of the sentence, from the words " or between States and foreign private corporations ", and the following sentence. He did not think there could be any objection to the substance of the last sentence.

73. The CHAIRMAN, speaking as a member of the Commission, wondered whether the Commission was in a position to make the statements appearing in the last sentence of the text, since it had not considered the articles of the model draft in that light.

74. Mr. FRANÇOIS said that he could accept the text of the footnote, with some drafting changes, and could not agree with either Mr. Ago or Mr. Bartos. Disputes between States and large commercial concerns were becoming increasingly important, far more important than disputes between international organizations. Moreover, it could not be claimed that

the former type of dispute was governed merely by internal private law. Public law was also partly applicable and the Permanent Court of Arbitration had, in fact, declared its willingness to co-operate in the settlement of disputes between States and foreign private corporations. Such disputes were a new chapter in law which was largely governed by exactly the same principles as those enunciated in the draft. There would of course be some differences, but that fact was already recognized in the text under consideration.

75. Sir Gerald FITZMAURICE, Rapporteur, pointed out that he had originally regarded the two questions as too detailed to warrant including a reference to them in a very general commentary and he had only drafted the text under consideration in response to the requests of Mr. Bartos and Mr. García Amador. In doing so he had tried to keep to generalities without saying anything that was definitely incorrect. The word " considered " in the second sentence could be attenuated if necessary, but it was a matter of fact that both questions had been raised and discussed.

76. With regard to the last sentence, he said that, whatever might be the law applicable in such cases, many provisions of the model draft were undoubtedly quite normally included in arbitration agreements between States and foreign private corporations. Furthermore he could not entirely agree with those who claimed that the disputes in question were governed solely by internal law. For one thing, in such cases it was difficult to say which internal law applied. The position was more as Mr. François had described. If an arbitration agreement with a foreign private corporation was not carried out by the Government of the State which was party to it, the Government of the State of nationality of the corporation might well espouse the corporation's cause and bring a claim under the rules governing State responsibility. Thus it was impossible to say that international law and the principles of international law were wholly foreign to such disputes.

77. Mr. ZOUREK considered that all reference to arbitration between States and private entities should be omitted from the footnote. Firstly, the Commission, though it had touched on it, had not really discussed such arbitration. Secondly, the text as it stood conveyed the very false impression that the question remained on the programme of the Commission.

78. In disputes between States and foreign private corporations the law applied was not public international law but internal law and private international law. It was the Protocol on Arbitration Clauses of 1923 [2] and the Convention on the Execution of Foreign Arbitral Awards of 1927,[3] as recently revised at the conference of plenipotentiaries held in New York, which applied in the case of such disputes. That basic difference should be borne in mind. As the Secretary had pointed out, arbitrations between States and foreign corporations were entirely different from arbitrations between States and international organizations or between international organizations.

79. Finally, apart from some purely formal provisions, he considered that only very few of the articles in the model draft could be applied to disputes between States and foreign corporations.

80. Mr. YOKOTA, speaking on a point of order, said that, to his best recollection, the Commission had decided to include as a footnote a statement that the two questions had been raised and discussed to some extent but that the Commission had decided not to proceed any further with them. That much, he thought, had been agreed and was no longer open to discussion.

81. The last sentence in the text, however, was a new element and, since it had given rise to a reopening of the discussion on matters of substance, he proposed that the text be confined to the first three sentences.

82. Mr. ZOUREK recalled that he had proposed at the previous meeting (471st meeting, para. 36) that a decision be taken only when the Commission had a text before it. There had thus been no final decision.

83. Sir Gerald FITZMAURICE, Rapporteur, observed that the two instruments cited by Mr. Zourek (para. 78 above) were primarily applicable not to arbitrations between Governments and foreign private entities but to arbitrations between private entities in different countries. Disputes between Governments and foreign private corporations were always governed by the arbitration agreements previously concluded between them. Though it was difficult to say exactly what law applied in such cases, they were certainly not governed exclusively by internal law. Indeed there was sometimes an extremely close analogy between arbitration between States and arbitration between States and foreign private corporations.

84. Mr. AGO observed that certain provisions of the model draft could undoubtedly be applied to any form of arbitration, even to arbitration between two private juridical entities. But those provisions were purely formal ones, such as article 9 or article 38, and were not necessarily concerned with international arbitrations but with every form of arbitration in general. On the other hand, with some slight exceptions, every provision in the model draft was capable of being applied to arbitration between States and international organizations, which was an international arbitration. He could not therefore agree to putting both types of arbitration on the same footing. He proposed the deletion of the reference to arbitrations between States and foreign private corporations. On the contrary, for arbitrations with international organizations, the words " certain of its provisions " in the last sentence should be reduced simply to " its provisions ".

85. Mr. GARCÍA AMADOR remarked that after the protracted debate at that meeting it could hardly be

[2] Protocol on Arbitration Clauses, signed at Geneva on 24 September 1923. See League of Nations, *Treaty Series*, vol. XXVII, 1924, No. 678.

[3] Convention on the Execution of Foreign Arbitral Awards, signed at Geneva on 26 September 1927. See League of Nations, *Treaty Series*, vol. XCII, 1929-1930, No. 2096.

said that the Commission had not discussed the question of arbitration between States and foreign private corporations or other juridical entities. He felt it essential, especially in view of Mr. Zourek's remarks, to mention that the subject had been discussed.

86. Mr. MATINE-DAFTARY agreed with Mr. Zourek and Mr. Ago and urged that a decision be taken on the text.

87. The CHAIRMAN pointed out that the first three sentences of the text merely stated matters of fact. It could not be denied that the Commission had discussed, however briefly, both arbitrations involving international organizations and arbitrations between States and foreign companies, and had not proceeded further with the subject.

88. He put to the vote the question whether a footnote dealing with the subject should appear in the report.

The Commission decided by 10 votes to 2, with 1 abstention, that such a footnote should appear in the report.

The meeting rose at 1.5 p.m.

473rd MEETING

Friday, 27 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1) *(continued)*

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.78/Add.1) *(continued)*

III. A. GENERAL OBSERVATIONS *(continued)*

1. Sir Gerald FITZMAURICE, Rapporteur of the Commission, read out a revised version of the footnote discussed at the previous meeting (472nd meeting, para. 60), which he had drafted in conjunction with Mr. Ago. Except for the deletion of the words "of course" from the first sentence, the first three sentences remained unchanged. The remainder would read:

"Nevertheless, now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, its provisions would, with the necessary adaptations, also be capable of utilization for the purpose of arbitration between States and international organizations or between international organizations.

"Arbitrations between States and foreign private corporations or other juridical entities are, of course, governed by different legal considerations. However, some of the articles of the draft, if adapted, might also be capable of use for this purpose."

2. Mr. GARCÍA AMADOR suggested that, since the Commission had not discussed what legal considerations applied to arbitrations between States and foreign corporations, the words "are, of course, governed", in the first sentence of the second paragraph, were rather too categorical.

3. After discussion, Sir Gerald FITZMAURICE, Rapporteur, agreed to change the sentence in question to: "Different legal considerations arise in arbitrations between States and foreign private corporations or other juridical entities."

4. Mr. TUNKIN remarked that the new text did not take account of the discussion at the previous meeting. Furthermore, the term "legal considerations" was misleading. The point was that a different law applied. He could not vote for the text as it stood.

5. The CHAIRMAN put the new text of the footnote, as just amended by the Rapporteur, to the vote.

The text was adopted by 9 votes to 3, with 1 abstention.

6. Mr. ZOUREK said that he had voted against the text because there was not the slightest doubt that arbitrations between States and foreign corporations were governed by entirely different principles from those applicable to arbitrations between States and international organizations or between international organizations.

7. Replying to the Rapporteur's remarks at the previous meeting (472nd meeting, para. 83) concerning the Protocol of 1923 and the Convention of 1927, he said that the texts of those two instruments made it perfectly clear that the arbitration of disputes arising out of contracts between States and foreign corporations was governed by private international law and not by public international law. The Rapporteur's opinion on that matter was clearly wrong.

II. TEXT OF THE DRAFT *and* III. COMMENTARY *(continued)* [1]

ARTICLE 11

8. Sir Gerald FITZMAURICE, Rapporteur, said that the only change from the previous text of the corresponding article (A/CN.4/113, annex, article 12) was the substitution of the words "the law to be applied" for the words "international law or of the *compromis*".

Article 11 was adopted by 13 votes to none, with 2 abstentions.

Article 12 was adopted unanimously.

ARTICLES 13 TO 17

9. Sir Gerald FITZMAURICE, Rapporteur, pointed out that articles 13 to 17 were new but largely procedural. He read out the proposed commentary on them in paragraph 24 of the draft report.

Article 13 was adopted unanimously.

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[1] Resumed from 472nd meeting.

Article 14 was adopted unanimously.

Article 15 was adopted by 15 votes to 1.

10. Mr. MATINE-DAFTARY said that he had voted against article 15 because, although agreeing that the time fixed in the *compromis* might be extended by agreement between the parties, he could not accept the idea that the tribunal could do so at its own discretion.

Article 16 was adopted by 14 votes to none.

Article 17 was adopted by 14 votes to 1, with 1 abstention.

11. Mr. EDMONDS explained that he had voted against article 17 because he had understood that in the circumstances contemplated by the article a new document could not be introduced unless it could be shown that the evidence to which it related had not been known to the parties at the time of the written pleading.

The commentary on articles 13 to 17 was adopted.

ARTICLE 18

12. Sir Gerald FITZMAURICE, Rapporteur, observed that article 18 was a rearrangement of article 21 of the Special Rapporteur's draft (A/CN.4/113 annex). The only significant change was the introduction of a reference to experts as well as to witnesses.

13. Mr. MATINE-DAFTARY said that he was opposed to the principle enunciated in the article that the tribunal was judge of the admissibility of the evidence produced. Besides, it was not clear by what criteria the tribunal was to be guided.

Article 18 was adopted by 14 votes to 1, with 1 abstention.

ARTICLE 19

14. Sir Gerald FITZMAURICE, Rapporteur, recalled that the Commission had adopted the principle of article 19 subject to redrafting by the Drafting Committee of the part of the text dealing with additional claims and counterclaims. In view of the great difficulty of drawing a precise distinction between the two types of claim, the Drafting Committee had thought it wisest to use the general term " ancillary claims " — which he preferred, on second thoughts, to " incidental claims " — since the proviso that they must be " inseparable from the subject-matter of the dispute and necessary for its final settlement " was an adequate safeguard. He drew attention to the commentary on the article in paragraph 25 of the draft report.

Article 19 was adopted by 15 votes to none, with 1 abstention.

15. Mr. BARTOS said that he had abstained from voting on article 19 because the term " *indivisible* " in the French text had no clear meaning in law. The words " necessary for its final settlement " were also unsatisfactory. It should be stated that the claim must be " necessary for its final settlement on that occasion ". He preferred the article in its original form.

ARTICLE 20

Article 20 was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 21

16. Sir Gerald FITZMAURICE, Rapporteur, pointed out that the last part of article 21 had been added on the proposal of Mr. Zourek. He drew attention to the commentary on the article in paragraph 26 of the draft report.

17. Mr. YOKOTA expressed some misgivings concerning the addition to article 21. Since the proceedings should obviously not be reopened without very strong justification, the conditions under which they could be reopened must be specified in detail. The first part of paragraph 2 was quite satisfactory in that respect and he therefore proposed that the last few words in the article should be amended to read : " that there is a need for clarification on points of a similar nature " — namely, of such a nature as to have a decisive influence on the tribunal's decision.

The proposal was rejected by 3 votes to 2, with 11 abstentions.

Article 21 was adopted by 15 votes to none, with 1 abstention.

The commentary on article 21 was adopted.

ARTICLE 22

18. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the commentary on article 22 in paragraph 27 of the draft report.

19. Mr. ZOUREK said that, in his opinion, the words " Except where the claimant admits the soundness of the defendant's case ", which were an addition to the previous text, went too far. It would be more in keeping with the principles governing civil procedure to say " Except where the claimant renounces his claim ". For example, there might be a dispute concerning a territory to which three States laid claim. In such a case renunciation of a claim would in no way imply admission of the soundness of the defendant's case.

Article 22 was adopted by 14 votes to 1, with 1 abstention.

The commentary on article 22 was adopted.

ARTICLE 23

20. Sir Gerald FITZMAURICE, Rapporteur, recalled that the Commission, on the proposal of Mr. El-Erian, had decided to insert in article 23 the words " if it thinks fit ", in order to emphasize that the tribunal should not be bound to include in an award a settlement of which it did not approve.

Article 23 was adopted by 15 votes to 1.

ARTICLE 24

21. Sir Gerald FITZMAURICE, Rapporteur, explained that the words "with the consent of either party" which had appeared in the 1953 text (A/2456, para. 57, article 23) had been deleted; the new text of article 24 left it to the tribunal to decide whether the period should be extended or not, but that power was qualified by the proviso that the time could only be extended if the tribunal would otherwise be unable to render the award.

Article 24 was adopted by 13 votes to 1, with 2 abstentions.

ARTICLE 25

Article 25 and commentary (A/CN.4/L.78/Add.1, para. 28) were adopted unanimously.

ARTICLE 26

Article 26 was adopted unanimously.

ARTICLE 27

22. Mr. AGO proposed two drafting changes in paragraph 2 of article 27. Since it was not at all in the matter of arbitration to provide for a quorum, particularly in the case of a tribunal of three or five members only — as in such cases the presence of all the arbitrators was normally required — he proposed that the first phrase of the paragraph as far as the word "or" should be amended to read "Except in cases where the *compromis* provides for a quorum". Secondly, since the procedure to be followed in the event of the appointment of an arbitrator to a vacancy was laid down in article 7, it would be sufficient to replace the last sentence of the paragraph by the words "In the case of such replacement, the provisions of article 7 shall apply."

23. Sir Gerald FITZMAURICE, Rapporteur, accepted both drafting changes. He drew attention to the commentary on articles 26 and 27 in paragraph 29 of the draft report.

Article 27 as amended was adopted by 13 votes to none, with 2 abstentions.

The commentary on articles 26 and 27 was adopted.

ARTICLE 28

24. Sir Gerald FITZMAURICE, Rapporteur, read out the commentary on article 28, in paragraph 30 of the draft report.

25. Replying to an inquiry from Mr. MATINE-DAFTARY, he explained that a member of a tribunal might wish to attach a separate opinion if, while not dissenting from the award, he had supported it for reasons different from those of the majority.

26. On the suggestions of Mr. AGO and Mr. BARTOS, he agreed to add after the words "it shall be drawn up in writing" in paragraph 1, the words "and shall bear the date on which it was rendered".

Article 28, as amended, was adopted unanimously.

The commentary on article 28 was adopted.

ARTICLE 29

Article 29 was adopted by 15 votes to none, with 1 abstention.

27. Mr. BARTOS explained that he had abstained from voting because he considered that the text should be qualified by the words: "unless the parties have dispensed the tribunal from the need to state its reasons".

ARTICLE 30

Article 30 was adopted unanimously.

ARTICLE 31

28. Mr. BARTOS observed that in arbitral awards affecting the delimitation of State frontiers, mistakes were often made in geographical nomenclature. He wondered whether the questions to which such mistakes might give rise should be dealt with under article 31 or article 33.

29. Sir Gerald FITZMAURICE, Rapporteur, said the answer would depend on the circumstances of each case. If the mistakes were not such as to affect the substance of the award, article 31 would be applicable; but otherwise the applicable article would be article 33 or perhaps even article 38, dealing with revision of the award.

Article 31 was adopted unanimously.

ARTICLE 32

30. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 32 in paragraph 31 of the draft report.

Article 32 was adopted unanimously.

ARTICLE 33

31. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 33 in paragraph 32 of the draft report.

32. Faris Bey EL-KHOURI proposed that the phrase "within three months of the rendering of the award" in paragraph 1 of article 33 be amended to read "within three months of the communication of the award to the parties", since in some cases it might be weeks or even months before the award was communicated to the parties in writing. Even in civil actions under national law, it was the date of the communication of the judgement to the parties which marked the commencement of responsibilities under the term of the judgement.

33. Sir Gerald FITZMAURICE, Rapporteur, said that normally there was no difference between the time of

the rendering of the award and its communication to the parties. He cited the terms of article 28, paragraph 3.

34. Faris Bey EL-KHOURI objected that it might still take some time for the agents of the parties to communicate the award in writing to their Governments.

35. Sir Gerald FITZMAURICE, Rapporteur, pointed out that in any case the date of communication to the parties could not be taken as the point from which the three-month period referred to in article 33, paragraph 1, should run, because that point must be a fixed date, and the parties might receive written communication of the award on different dates.

36. The CHAIRMAN recalled that Mr. Zourek's proposal earlier in the session for extending the time limit in question to three months had been unanimously accepted. It was generally agreed that the parties must be represented before the tribunal and that the award would be communicated to their representatives at the same time as it was rendered.

Faris Bey El-Khouri's proposal (para. 32 above) was repected by 8 votes to 4, with 4 abstentions.

37. Sir Gerald FITZMAURICE, Rapporteur, observed that Faris Bey El-Khouri's proposal had drawn his attention to the need to amend, in paragraph 2, the words " if within a time limit of three months " to read : " if within the above-mentioned time limit ".

Article 33 was adopted by 12 votes to 1, with 3 abstentions.

ARTICLE 34

38. Sir Gerald FITZMAURICE, Rapporteur, drew attention to the comment on article 34 in paragraph 33 of the draft report.

Article 34 was adopted unanimously.

ARTICLE 35

39. Sir Gerald FITZMAURICE, Rapporteur, observed that the only new element in article 35 was sub-paragraph (*d*), and drew attention to the comment on the article in paragraph 34 of the draft report. In view of what had been said in the introduction to the 1953 text (A/2456, para. 39), the reintroduction of that sub-paragraph needed some explanation. It was difficult to deny that if the original undertaking to arbitrate was invalid the award must also be invalid. Yet it was a case that should very seldom arise, and which ought to be especially rare in the case of arbitration agreements. However, allowance should be made for the theoretical possibility.

40. The word " essential " should be inserted before " validity " in the last sentence of the comment.

41. Mr. MATINE-DAFTARY said he would be unable to vote for the article unless the words " or a serious departure from a fundamental rule of procedure " in sub-paragraph (*c*) were deleted. The Drafting Committee should either have deleted those words or made their meaning clear.

42. The CHAIRMAN recalled that sub-paragraph (*c*) had originated in a proposal by Mr. Liang which had been amended by Mr. El-Erian and accepted by the Commission in its present form by 12 votes to none, with 2 abstentions (450th meeting, para. 42).

43. Mr. VERDROSS proposed that sub-paragraph (*d*) should be placed first in the list of grounds on which the validity of an award might be challenged. That would be the most logical arrangement, since the undertaking to arbitrate, or the *compromis,* was the basis of the whole procedure.

44. Mr. SCELLE, Special Rapporteur, said that though Mr. Verdross' proposal was apparently logical he doubted its value, since it was inconceivable that the invalidity of the undertaking to arbitrate or of the *compromis* should not be discovered until after the conclusion of proceedings which might have lasted for months. He did not ask for the deletion of sub-paragraph (*d*), but he would not be in favour of placing it at the head of the list.

45. Sir Gerald FITZMAURICE, Rapporteur, agreed with the Special Rapporteur. Though Mr. Verdross' proposal seemed logical, the rearranged order would suggest that the invalidity of the undertaking to arbitrate or of the *compromis* was a frequent ground for challenging the validity of an award, whereas in fact the opposite was true. He had had considerable misgivings as to the advisability of including sub-paragraph (*d*) when Mr. Zourek had made the original proposal, especially in view of the reasons for not doing so given in the introduction to the 1953 text (A/2456, para. 39). Sub-paragraph (*d*) would obviously give any State acting in bad faith an excuse for alleging that an award rendered against it was invalid because the undertaking to arbitrate or the *compromis* had itself been invalid. While it could not be denied in principle that if the agreement to arbitrate was invalid the award must therefore be nullified, he thought the provision should not be given a conspicuous place in the draft.

46. Mr. AGO said he shared the Rapporteur's misgivings as to the wisdom of including sub-paragraph (*d*). Moreover, while he admitted that the invalidity of the undertaking to arbitrate would exclude the possibility of the tribunal's issuing a valid award, he would point out that, as a consequence of article 9, the validity of the *compromis* must necessarily have been examined by the arbitral tribunal itself before the award was given. He therefore suggested that, if sub-paragraph (*d*) was retained, at least the words " or the compromis " should be deleted.

47. Mr. ZOUREK said that cases were conceivable in which the *compromis* was subsequently found to be a nullity because concluded under duress. Though he agreed with the Rapporteur that cases in which the validity of the award could be challenged on the grounds mentioned in sub-paragraph (*d*) were very rare, he

thought that the provision should nevertheless be retained, especially if a similar provision was to be included in the draft on the law of treaties. Cases in which the validity of treaties could be challenged on the same grounds were also rare.

48. Mr. BARTOS said he was of the same opinion as Mr. Ago so far as the words "or the *compromis*" were concerned. If they were retained, some reference would have to be made to the powers of the tribunal under articles 8 and 9, but in his opinion it would be better if the phrase were deleted.

49. Faris Bey EL-KHOURI pointed out that a *compromis* could be a nullity if it had been signed by a person who was not qualified to represent the State in question.

50. Mr. SCELLE, Special Rapporteur, said that in his opinion sub-paragraph (*d*) was an encouragement to act in bad faith, for any party which was dissatisfied with an award would be able to say that the undertaking to arbitrate had been given under pressure, or that the *compromis* was invalid. He proposed that the Commission should reconsider its earlier decision and that sub-paragraph (*d*) should be deleted.

51. The CHAIRMAN observed that under the rules of procedure, a two-thirds majority would be required for the adoption of Mr. Scelle's proposal for reconsideration. He put the proposal to the vote.

The result of the vote was 9 in favour and 5 against, with 2 abstentions.

The proposal was not adopted, having failed to obtain the required two-thirds majority.

Article 35 was adopted by 7 votes to 3, with 4 abstentions.

ARTICLE 36

52. Sir Gerald FITZMAURICE, Rapporteur, said that the rest of the sentence made it clear that the claim of nullity referred to in paragraph 1 of article 36 did not mean a claim before the tribunal; in other words, the period of limitation was three months from the allegation of nullity by either party. In the French, however, the term "*demande en nullité*" could be taken to imply that the tribunal was seized of the claim. A more suitable word might be "*contestation*".

53. Paragraph 3 had been left substantially unchanged from the 1953 text. The language used was mandatory, although in article 33 and in paragraph 7 of article 38 the language dealing with the same point was much more qualified. There seemed to be good reason for using similarly permissive language in article 36, because it would be undesirable that the tribunal should automatically have to stay execution when, for example, the reasons for the claim of nullity were manifestly weak. He proposed therefore that paragraph 3 should be amended to read:

"The Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for annulment."

54. Mr. YOKOTA said that the same question of a stay of execution as that in paragraph 3 had arisen in respect of articles 33 and 38, and the Commission had unaccountably passed over article 36. He supported the proposed change.

55. Sir Gerald FITZMAURICE, Rapporteur, replying to Mr. AGO, said that the period of six months referred to in paragraph 2 obviously began with the claim of nullity. He had no objection to Mr. Ago's suggested use of the words "*la validité doit être contestée*" instead of "*la demande en nullité doit être formée*" in the French version. The English text did not require amendment.

Article 36, as amended, was adopted by 13 votes to none, with 2 abstentions.

ARTICLE 37

Article 37 was adopted by 12 votes to none, with 2 abstentions.

ARTICLE 38

56. Mr. SCELLE, Special Rapporteur, regretted that he had not been present at the 447th meeting, when article 38 (then article 39 of the model draft) had been adopted after the Commission had decided that paragraph 1 should begin with the clause "Unless the parties have in the *compromis* expressly excluded an application for the revision of the award" (447th meeting, para. 21). If some fact were discovered after the award "of such a nature as to constitute a decisive factor", then, as far as the tribunal was concerned, no real award could be said to have been rendered, for the tribunal's award would have been rendered without knowledge of essential facts. In other words, the tribunal would not have had all the evidence before it. He pointed out that under article 21 the tribunal had the power to reopen the proceedings after their closure on the ground of material new evidence. If by the retention of the words at the beginning of article 38, paragraph 1, a revision was excluded, the tribunal would be prevented from rendering a real award, and the award would be manifestly contrary to the law. He proposed therefore that the discussion on paragraph 1 be reopened and that the introductory phrase of that paragraph be deleted.

By 11 votes to none, with 4 abstentions, it was decided to reopen the discussion.

57. The CHAIRMAN put to the vote the proposal that the introductory phrase of paragraph 1 be deleted, which would result in the article reading: "An application for the revision of the award may be made by either party..."

The proposal was adopted by 12 votes to none, with 3 abstentions.

58. Sir Gerald FITZMAURICE, Rapporteur, in reply to Mr. MATINE-DAFTARY, said that paragraph 7 could not prevent the tribunal or the Court from staying the execution, even though the question of the admissibility of the application for revision had not yet been decided. He did not feel that there was any ground for not giving the widest latitude in that respect to the tribunal or the Court.

59. Mr. MATINE-DAFTARY said that the law should be absolutely clear. Until the tribunal or the Court had dealt with the admissibility of an application for revision it could not grant a stay of execution. If the paragraph was not amended to make that position clear, he would vote against it. He asked for a separate vote on paragraph 7.

60. The CHAIRMAN pointed out that in domestic law a court had the power to order an interim stay of proceedings even before it took up the question of the admissibility of an application; otherwise there was a possibility of irreparable damage being done to the applicant. He could not see anything faulty in the wording of paragraph 7.

Paragraphs 1 to 6, as amended, were adopted by 13 votes to none, with 2 abstentions.

Paragraph 7 was adopted by 12 votes to 1, with 2 abstentions.

Article 38 as a whole, as amended, was adopted by 12 votes to 1, with 2 abstentions.

61. Sir Gerald FITZMAURICE, Rapporteur, said that the commentary on article 38, in paragraph 35 of the draft report, would be deleted in view of the Commission's decision to delete the introductory words of paragraph 1.

Chapter II as a whole (A/CN.4/L.78/Add.1), as amended, was adopted by 11 votes to none, with 3 abstentions.

62. Mr. TUNKIN, explaining his abstention, said that arbitration was a specific means of settling international disputes, and the main principles of arbitral procedure were well known. The Commission had adopted a set of model rules which in substance denied those main principles, as was clear from the treatment of the rights of the parties regarding the constitution of a tribunal and also the rights which the parties might exercise in the course of the proceedings. In addition, they introduced, as it were by the back door, the compulsory jurisdiction of the International Court of Justice, with the consequence that the arbitral tribunal would be a jurisdiction subordinate to the International Court. The innovations might thus have the effect of undermining arbitration as a means of settling international disputes. Preferably, the Commission should have simply endeavoured to improve the rules currently in use and make them more acceptable to States.

63. He had abstained from voting, but he had not voted against the draft, as it was to be presented not as a draft convention but only as a set of rules from which States might choose such elements as could be of value to them.

64. Mr. ZOUREK said that the set of model rules was an improvement on the original draft convention of 1953. The new form in which the draft was presented also seemed preferable. Nevertheless, the Commission had not remedied all the defects which he had criticized at previous sessions and which had been adversely commented upon by many Governments. In particular, he thought that in certain respects the model rules tended to place undue restrictions on the will of the parties: thus in article 4 they forbade the replacement of a member of the tribunal, by a rule which was more rigorous than that applied in the International Court of Justice. Again, articles 33, 35 and 38 permitted the parties, after an award had been rendered, to apply to the International Court for interpretation, annulment or review of the arbitral award. He felt that those provisions, by giving advance authority for recourse to another body, would tend to encourage such recourse and destroy the definitive character of the award. Because of those faults, he had abstained from voting.

65. Mr. GARCÍA AMADOR said that he had voted in favour of the model rules because nothing, either in the new draft or in the 1953 draft, was in any way contrary to existing international law in the matter of arbitration. The model rules conformed to a modern trend which was particularly marked in America, where it had resulted in the Pact of Bogotá.[2] Traditional arbitration, even in those cases where States had bound themselves to submit their disputes to arbitration, was a system which suffered from basic defects, and the model rules would undoubtedly help bring about adequate solutions once States had assumed an obligation to arbitrate. He felt therefore that they provided an indispensable aid to arbitration of all kinds.

66. It was important, however, to realize that the model rules would not be of value in all kinds of disputes between States, and were by no means a magic formula for the solution of every difficulty. In that respect some of the remarks made in the General Assembly had been well founded. On the other hand, especially where the nature of the dispute was favourable, the model rules would be of great assistance in making the arbitral undertakings effective.

The meeting rose at 12.50 p.m.

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[2] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series*, vol. 30, 1949, No. 449.

474th MEETING

Monday, 30 June 1958, at 4.20 p.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) *(continued)*

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.78/ADD.2)

I. INTRODUCTION

1. Mr. SANDSTRÖM, Special Rapporteur, observed that the introduction to chapter III of the report made no reference either to *ad hoc* diplomacy or to diplomatic relations between States and international organizations or to the related question of the privileges and immunities of the organizations themselves. He had been asked to prepare a report on *ad hoc* diplomacy but, as he had stated earlier in the session, he had not had time to do so.

2. Mr. ZOUREK recalled that at its ninth session the Commission had decided not to deal with the question of the privileges and immunities of international organizations, and he was therefore of the opinion that there was no need to make a further reference to the subject in the report on the tenth session.

3. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Zourek, but thought that the subject of *ad hoc* diplomacy should be mentioned. He asked whether the Commission still desired him to prepare a report on that subject.

4. The CHAIRMAN asked the Commission whether it wished to renew its request to the Special Rapporteur to prepare a report on the subject of *ad hoc* diplomacy.

The Commission decided by 11 votes to none, with 1 abstention, to renew its request to the Special Rapporteur.

5. Sir Gerald FITZMAURICE observed that the Commission would not be able to take up the subject of *ad hoc* diplomacy at its next session and that the report to be prepared by the Special Rapporteur could not be considered by the Commission before the twelfth session.

6. Mr. YOKOTA suggested that the report on the current session might refer to the subjects mentioned by the Special Rapporteur (*ad hoc* diplomacy and relations of international organizations with States and *inter se*) by reproducing the text of paragraphs 13 and 14 of the Commission's report covering the work of its ninth session (A/3623).

7. Sir Gerald FITZMAURICE, Rapporteur of the Commission, supported the suggestion.

8. The CHAIRMAN suggested that the report should also indicate what action had been taken on the subjects at the current session.

The suggestions were agreed to.

There were no further observations on the introduction to chapter III.

II. TEXT OF THE DRAFT

ARTICLE 1

9. Sir Gerald FITZMAURICE, Rapporteur, said there had been some discussion in the Drafting Committee concerning the appropriateness of the word "authorized" in article 1 (*a*). The head of a mission was charged by the sending State with a duty, rather than authorized to act. Consequently, if the Committee had had more time, he felt sure that it would have decided to redraft the sub-paragraph to read:

> "(*a*) The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity."

He suggested that the definition should be so redrafted.

The drafting change suggested by the Rapporteur was adopted.

10. Mr. BARTOS proposed that the words "or a *chargé d'affaires ad interim* while acting in that capacity" should be added to the definition of "head of the mission" in sub-paragraph (*a*). Without that addition, there would be no provision in the draft to enable a *chargé d'affaires ad interim* to act as head of a mission and a Ministry for Foreign Affairs might claim, for example, that it was not acting in a discriminatory way if it failed to invite *chargés d'affaires ad interim* to attend meetings of heads of missions.

11. Mr. SANDSTRÖM, Special Rapporteur, said he doubted whether the expression "head of mission" was used in the draft in a sense which would include *chargés d'affaires ad interim*. In that connexion, he referred particularly to article 13. Article 16, too, he thought, made it clear that the category of heads of mission included only persons who had been accredited as such.

12. Sir Gerald FITZMAURICE, Rapporteur, thought that article 13 clearly showed that the term "head of mission" did not include *chargés d'affaires ad interim*.

13. Mr. MATINE-DAFTARY pointed out that the *agrément* of the receiving State was not needed even for permanent *chargés d'affaires*.

14. Mr. BARTOS suggested that article 13 might be amended so as to include *chargés d'affaires ad interim* in the category of heads of mission.

15. Sir Gerald FITZMAURICE, Rapporteur, observed that besides article 13 there were a number of articles in the draft in which the expression "head of mission" was used in contexts which would exclude *chargés d'affaires ad interim*.

16. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the definitions in article 1 were "for the purpose of the present draft articles" only, and that consequently the possibility of more comprehensive definitions was not excluded.

17. Mr. ALFARO agreed with Mr. Bartos that it was a defect of article 1 (*a*) that it did not include *chargés d'affaires* acting as heads of mission *ad interim*. It would be much simpler and more logical to say: "The 'head of the mission' is the person competent to represent the sending State."

18. Mr. LIANG, Secretary to the Commission, thought Mr. Alfaro's suggestion should be considered by the Commission. As it stood, article 1 (*a*) was not a definition at all.

19. The CHAIRMAN suggested that the Commission should vote on the text of article 1 as presented in the draft report, on the understanding that it might subsequently be amended in the light of the Commission's consideration of the rest of the draft.

On that understanding, article 1 was adopted by 12 votes to none, with 1 abstention.

ARTICLE 2

Article 2 was adopted unanimously.

COMMENTARY ON ARTICLE 2

20. Sir Gerald FITZMAURICE, Rapporteur, suggested that, in paragraph (1), it might be going too far to say that any State Member of the United Nations would be acting contrary to the spirit of the United Nations Charter if, in the absence of exceptional and temporary reasons (e.g., non-recognition), it refused to establish diplomatic relations at another State's request. In the first place, non-recognition often took place for reasons that could not be described as exceptional and temporary, whether those reasons were justified or not; and, in the second place, to describe refusal to establish diplomatic relations at another State's request as contrary to the spirit of the United Nations Charter was hardly consistent with the text of the article, which stated that the establishment of diplomatic relations took place by mutual consent.

21. He therefore suggested that the middle part of the paragraph be deleted. The text would then read:

"(1) There is frequent reference in doctrine to a 'right of legation' said to be enjoyed by every sovereign State. The interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, necessitate the establishment of diplomatic relations between them. However, this right cannot be exercised without agreement between the parties. The Commission did not consider that it should mention the right of legation in the text of the draft."

22. Mr. SANDSTRÖM, Special Rapporteur, agreed to the suggested redraft.

Paragraph (1) of the commentary, as amended by the Rapporteur, was adopted by 10 votes to none, with 2 abstentions.

Paragraphs (2), (3) and (4) were adopted unanimously.

ARTICLE 3

Article 3 was adopted unanimously.

COMMENTARY ON ARTICLE 3

23. Sir Gerald FITZMAURICE, Rapporteur, expressed doubt concerning the first sentence in paragraph (4) of the commentary. It was generally beyond the power of a diplomatic mission to prevent an infringement of treaties and of rules of international law. On the other hand, it might have to make representations in order to protect the interests of the sending State when neither a treaty nor a rule of international law had been infringed. He suggested that the first sentence, which was already covered by paragraph (3), should be omitted and that the words "The functions mentioned in sub-paragraph (*b*)" should replace the words "This activity" at the beginning of the second sentence.

24. With regard to paragraph (5), he suggested that the phrase "Obtaining information" should be replaced by a brief reference to article 3, sub-paragraph (*d*).

25. In paragraph (7), the expression "commercial representation" might be interpreted as covering commercial attachés, to which the paragraph clearly did not apply. He suggested that the expression should be replaced by "trade missions".

26. Mr. TUNKIN said that he had no objection to the change suggested by the Rapporteur in paragraph (4), though he could not entirely agree with the latter's arguments.

27. In paragraph (8), he suggested that the words "the receiving State is often willing that they should" should be replaced by the words "it is the usual practice for them to", which would be more in keeping with the existing situation.

28. Mr. SANDSTRÖM, Special Rapporteur, accepted the Rapporteur's suggestions with regard to paragraphs (4) and (7). At the beginning of paragraph (5) the words "Obtaining information covers" could be replaced by the phrase "The activities mentioned under paragraph (*d*) cover". As for paragraph (8), though he had no objection to Mr. Tunkin's suggestion, he thought that the whole paragraph could be deleted and the matter dealt with under article 39.

29. The CHAIRMAN put to the vote the commentary on article 3, together with the four above-mentioned amendments.

The commentary, as amended, was adopted by 11 votes to none, with 1 abstention.

ARTICLES 4 AND 5

Articles 4 and 5 were adopted unanimously.

ARTICLE 6

30. Mr. SCELLE objected on stylistic grounds to the words "*nomme à son choix*" in the French text of article 6.

31. Mr. SANDSTRÖM, Special Rapporteur, said that the words "may appoint " alone would not be enough to bring out the contrast between the procedure in the case of subordinate staff of the mission and that in the case of heads of mission, dealt with in article 4.

Article 6 was adopted by 13 votes to none, with 1 abstention.

ARTICLE 7

Article 7 was adopted by 12 votes to 1.

ARTICLE 8

Article 8 was adopted by 13 votes to none, with 1 abstention.

COMMENTARY ON ARTICLES 4 TO 8

32. Mr. LIANG, Secretary to the Commission, referring to paragraph (1) of the commentary, suggested that the passage concerning the concordance of the texts in the various languages was unnecessary.

33. With special reference to paragraph (2), he said that the commentary introduced some subsidiary rules which might make it difficult to ascertain the precise content of the articles themselves. The last sentence in the paragraph was an example. The Commission had been at some pains to draw a clear distinction between the position with regard to the appointment of subordinate staff and that with regard to the appointment of the head of the mission. The last sentence appeared, however, to apply to both. As far as heads of mission were concerned, it seemed to be an understatement; and as far as subordinate staff was concerned, it appeared to be somewhat in contradiction with article 6. He suggested deleting either the last sentence or the entire paragraph.

34. Sir Gerald FITZMAURICE, Rapporteur, said that article 5 was new. He proposed therefore that paragraph (1) of the commentary should read: "Article 5 is new, but the text of articles 4, 6, 7 and 8 as adopted..." The second sentence could well be omitted.

35. Mr. SANDSTRÖM, Special Rapporteur, agreed to both changes.

Paragraph (1) of the commentary, as amended, was adopted unanimously.

36. Sir Gerald FITZMAURICE, Rapporteur, said that paragraph (2) was very similar to paragraph (1) of the 1957 commentary (A/3623, para. 16, commentary on articles 3 to 6) and the last sentence of the paragraph was the same. But that sentence was undoubtedly not very clear, and he agreed that it might well be deleted. There was no reason, however, for deleting the rest of the paragraph, which stated as a general principle that both the sending and the receiving State should be satisfied as to the persons composing the mission.

37. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestion that the last sentence of paragraph (2) be deleted. The rest of the paragraph was a statement of the existing position, and deserved to be retained; but, instead of the passage "the several categories listed in article 1 (Definitions)", he would prefer an enumeration of the categories, as in paragraph (1) of the corresponding 1957 commentary. The second sentence of paragraph (2) would therefore read:

> "The mission comprises a head, and assistants subordinate to him, who are normally divided into several categories: diplomatic staff, who are engaged in diplomatic activities proper; administrative and technical staff, and service staff."

38. Mr. TUNKIN objected to the inclusion of the word "proper", which had been omitted from article 1.

39. Mr. SANDSTRÖM, Special Rapporteur, agreed to the deletion of the work.

Paragraph (2) of the commentary, as amended, was adopted unanimously.

40. Mr. YOKOTA said that as the last sentence of paragraph (2) had been deleted, paragraph (3) would be unintelligible without some explanation of the kind of procedure that was envisaged.

41. Sir Gerald FITZMAURICE, Rapporteur, said that the main objection to the last sentence of paragraph (2) was that it was by no means clear what it referred to. Its deletion made no difference to the intelligibility of paragraph (3).

42. Mr. SANDSTRÖM, Special Rapporteur, suggested that it would clarify the first sentence of paragraph (3) and satisfy Mr. Yokota's objection if at the beginning the words: "To achieve this result", were added.

The suggestion was agreed to.

Paragraph (3) of the commentary, as amended, was adopted unanimously.

43. Sir Gerald FITZMAURICE, Rapporteur, proposed that, for the sake of clarity, in the first sentence of paragraph (4) the words "that is to say, their names are not submitted in advance" should be added after "the sending State".

44. Mr. LIANG, Secretary to the Commission, suggested that the English text read "in principle" instead of "as a rule".

45. Mr. SANDSTRÖM, Special Rapporteur, accepted those two amendments.

Paragraph (4) of the commentary, as amended, was adopted unanimously.

46. Mr. ALFARO pointed out that the reference in paragraph (4) to "*persona non grata*" appeared to cover all members of the mission, whereas paragraph (5) limited the term *persona non grata* to diplomatic staff

only. The same wider use of the term occurred in article 8, paragraph 1. He felt that the inconsistencies should be eliminated.

47. Mr. TUNKIN said that article 8, paragraph 1, was perfectly clear. In any case, even if the term "not acceptable" were used in the case of the diplomatic staff or "*persona non grata*" in the case of the other staff, the effect would be the same.

48. The CHAIRMAN pointed out that the apparent inconsistency noted by Mr. Alfaro was in fact explained in the commentary.

49. Mr. ZOUREK proposed that the word "usually" be inserted before the word "employed" at the end of the second sentence of paragraph (5).

50. Mr. SANDSTRÖM, Special Rapporteur, accepted that amendment. It brought the text into closer conformity with existing practice.

Paragraph (5) of the commentary, as amended, was adopted by 14 votes to none, with 1 abstention.

The meeting rose at 6.5 p.m.

475th MEETING

Tuesday, 1 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) *(continued)*

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.78/Add.2) (*continued*)

II. TEXT OF THE DRAFT (*continued*)

COMMENTARY ON ARTICLES 4 TO 8 (*continued*)

Paragraph (6) of the commentary on articles 4 to 8 was adopted.

1. Mr. ZOUREK suggested that the opening words of the French text of paragraph (7) should be revised to read: "*La suite normale de ce qu'une personne a été déclarée* persona non grata *après qu'elle est entrée en fonction . . .*"

2. Mr. SANDSTRÖM, Special Rapporteur, agreed to the suggested amendment.

3. Mr. YOKOTA said that the last sentence of paragraph (7) seemed somewhat peremptory and made no provision for the continuance of diplomatic privileges and immunities during the interim period between the date of the declaration referred to in the preceding sentence and the date of the departure of the person declared *persona non grata*. He therefore suggested that the phrase "subject to article 37" (the article corresponding to article 31 of the 1957 text (A/3623, para. 16)) should be inserted in the sentence so as to avoid giving the impression that diplomatic privileges and immunities would cease immediately on the date of the declaration.

4. Mr. SANDSTRÖM, Special Rapporteur, said that the declaration mentioned in the penultimate sentence of paragraph (7) should take effect immediately.

5. Mr. TUNKIN said that the terms of the declaration would be decisive; it might provide for the continuance of privileges and immunities for a specified period additional to the "reasonable time" within which the sending State was to recall the diplomatic agent concerned or declare his functions terminated. He suggested that the last sentence of paragraph (7) might be deleted if the words "and that the person concerned no longer enjoys diplomatic privileges and immunities" were added at the end of the preceding sentence.

6. Mr. ZOUREK suggested that the possibility of the continuance of diplomatic privileges and immunities for a certain time after the date of the declaration might be provided for if the words "or will be terminated on a specified date" were added after the words "are terminated" in the penultimate sentence.

7. Sir Gerald FITZMAURICE, Rapporteur of the Commission, recognized the force of Mr. Yokota's objection to the last sentence of paragraph (7).

8. Mr. MATINE-DAFTARY also criticized the last sentence of paragraph (7). The declaration referred to in the penultimate sentence should provide for a specified period at the end of which diplomatic privileges and immunities would be discontinued. The person concerned would then become subject to the laws of the receiving State concerning aliens. He could either remain in the country on the same footing as other aliens, or, if the receiving State found his presence objectionable, he could be expelled; but it was wrong to emphasize the possibility of expulsion as did the last sentence of paragraph (7) as drafted.

9. Faris Bey EL-KHOURI observed that the phrase "and may even be expelled" was not necessary, since upon losing his diplomatic privileges and immunities the person concerned would be subject to the municipal law of the receiving State. The phrase should therefore be deleted.

10. The CHAIRMAN pointed out that a reasonable time for the recall of the person concerned or the termination of his functions was provided for in the second sentence of paragraph (7). Only after that reasonable time had expired would the declaration referred to in the third sentence be made.

11. Mr. SANDSTRÖM, Special Rapporteur, observed that the Commission might either adopt Mr. Yokota's suggestion or delete the last sentence, since it was not strictly necessary.

12. Mr. AGO observed that if a diplomatic agent should cease abruptly to enjoy privileges and immunities he would be liable not merely to expulsion but even

to arrest and trial — which seemed to him a hardly tolerable situation.

13. Mr. ZOUREK could not accept the view that the diplomatic privileges and immunities of a diplomatic agent declared *persona non grata* should subsist even if he refused to leave the country.

14. The CHAIRMAN said there seemed to be a general feeling that the last sentence should be deleted. He therefore put paragraph (7) to the vote with the last sentence deleted and the penultimate sentence amended in the manner suggested by Mr. Tunkin (para. 5 above).

Paragraph (7) of the commentary, as so amended, and with the drafting change to the French text suggested by Mr. Zourek, was adopted by 12 votes to none, with 1 abstention.

Paragraph (8) of the commentary was adopted.

15. Mr. AGO noted that paragraph (9) of the commentary, in discussing the appointment of nationals of the receiving State as diplomatic agents of other States, distinguished between two categories of such nationals. The first consisted of persons who were nationals of the receiving State alone, and the second of persons who were nationals of both the sending and the receiving States. He thought there were more persons in the second category than in the first, and consequently he found the third sentence of the paragraph unnecessary and undesirable. He suggested that it should be deleted.

16. Mr. YOKOTA said he found the sentence to which Mr. Ago had referred somewhat difficult to understand, since even if the receiving State gave its consent it would still be deprived of its jurisdiction so far as concerned the official acts performed by those of its nationals who were employed as diplomatic agents of other States. The point to be stressed was that it should not be so deprived of jurisdiction without consenting thereto, and he therefore suggested that the words "without its consent" should be inserted after the words "one of its nationals". Better still, the whole sentence might be deleted.

17. Sir Gerald FITZMAURICE, Rapporteur, wondered whether Mr. Yokota's interpretation was correct. The whole purpose of the sentence was to explain why the receiving State's consent was required. If it was not required, a person might secure employment with a foreign diplomatic mission for the sole purpose of claiming immunity from jurisdiction in his own country. He therefore thought the sentence should be retained.

18. Mr. AGO observed that the immunity from jurisdiction, so far as nationals of the receiving State were concerned, was accorded in respect only of official acts performed in the course of their duties as diplomatic agents attached to foreign missions. Though he did not dispute the accuracy of the idea on which the third sentence was based, he considered that the wording was unacceptable.

19. The CHAIRMAN suggested that it might not be necessary to give the reason why the consent of the receiving State should be required.

20. Mr. AGO said that the real reason for requesting the consent of the receiving State had nothing to do with the fact that that State would be deprived of its jurisdiction over a national but arose from the fact that that State would be faced with one of its nationals acting as the representative of a foreign State. The question of privileges and immunities was purely incidental.

21. Mr. BARTOS opposed Mr. Ago's suggestion that the third sentence of paragraph (9) should be deleted. The employment of nationals of the receiving State as diplomatic agents of foreign missions might lead to a conflict of obligations, and that was why privileges and immunities had to be granted. In his opinion the authors of the commentary had well expressed the intention which lay behind the provisions of the draft.

22. Mr. TUNKIN suggested that the words "for the appointment as a diplomatic agent of a national of a third State", in the fourth sentence of paragraph (9), should be deleted, since the problem had not been discussed by the Commission and such cases were comparatively infrequent.

23. Sir Gerald FITZMAURICE, Rapporteur, said he did not agree that cases of that kind were infrequent. In fact, they were quite common, especially, for example, in Italy, the Vatican City and the countries of the British Commonwealth. The reference in the commentary was, he thought, useful and should be retained.

24. He drew attention to two small drafting changes which should be made in paragraph (9). In the antepenultimate sentence, the word "however" should be inserted after "provision"; and in the last sentence the word "entirely" should be inserted after the word "opposed".

25. The CHAIRMAN put to the vote paragraph (9) as amended by the deletion of the third sentence.

Paragraph (9) of the commentary, as so amended, was adopted by 7 votes to 4, with 2 abstentions.

Paragraph (10) of the commentary was adopted.

26. Mr. TUNKIN suggested the deletion of the second sentence of paragraph (11) of the commentary because he did not think it was any longer the general practice that the prior consent of the receiving State was required in the case of multiple accreditation.

27. Sir Gerald FITZMAURICE, Rapporteur, suggested that it might be enough to delete the words "According to practice".

28. Mr. TUNKIN and Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestion.

Paragraph (11) of the commentary, as so amended, was adopted unanimously.

ARTICLE 9

Article 9 was adopted unanimously.

COMMENTARY ON ARTICLE 9

29. Sir Gerald FITZMAURICE, Rapporteur, said that it was not clear from the last sentence of the commentary that the persons there referred to as leaving their posts were leaving them finally. He suggested that the words "who leave their posts" be replaced by the words "who are finally leaving their posts".

30. Mr. SANDSTRÖM, Special Rapporteur, had no objection to the amendment.

The commentary on article 9, as amended, was adopted unanimously.

ARTICLE 10

31. Mr. TUNKIN said that the last sentence of paragraph 2 of article 10 was not concerned with the size of the staff. He suggested therefore that a more appropriate context would be article 6, which, like that sentence, dealt with the appointment of the staff.

32. In reply to Mr. BARTOS, he admitted that article 6 was a general rule, whereas the last sentence of article 10, paragraph 2, was a special rule. Both, however, dealt with the appointment of the staff, and should therefore be together.

33. Mr. SANDSTRÖM, Special Rapporteur, had no objection to the transfer of the last sentence to article 6. But for the fact that article 4 dealt with *agrément* in the case of the head of the mission only, the sentence might well be added to that article.

Mr. Tunkin's suggestion was agreed to.

Article 10, as amended, was adopted by 10 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLE 10

34. Mr. TUNKIN thought that the sentence in paragraph (3) of the commentary beginning with the words "Failing such agreement" should be drafted in language analogous to that used in article 10 itself: a right to limit the size of the staff was not the same as a refusal to accept a size exceeding what was reasonable and normal.

35. He added that the passage in paragraph (5) of the commentary beginning with the words "Only the States concerned" and ending with the words "to have recourse" appeared to be unrelated to the subject of the article and contained statements of doubtful validity. He proposed that the passage in question be omitted.

36. Mr. SANDSTRÖM, Special Rapporteur, said that if the passage in question were deleted the argument would not suffer; nevertheless, he considered that it was a useful explanatory comment and hence should stand.

37. Mr. YOKOTA said that many Governments followed the criteria laid down. The provisions of article 10 were very broad, and it was essential that States should understand the reasons why they had been drafted in that way. For that reason he thought that the passage under discussion should be retained.

38. He proposed that the word "vague" in the antepenultimate sentence of paragraph (5) should be replaced by the word "general".

39. Mr. MATINE-DAFTARY thought that paragraph (5) of the commentary complicated, rather than explained, the sense of article 10. In the circumstances it might be better to delete the entire paragraph.

40. Mr. AGO pointed out that the last sentence of paragraph (4) should be omitted, as it had just been decided that the last sentence of article 10, paragraph 2, would be transferred to article 6.

41. In paragraph (3) he disliked the term "absolute right". It had a specialized meaning in French, which was unsuitable in the context. In the same paragraph the last sentence was also extremely ambiguous.

42. Sir Gerald FITZMAURICE, Rapporteur, in reply to Mr. Ago, said that the fight was not absolute, but qualified, as it was limited by the provisions of the article. He could see no possible objection to the term, at least in English.

43. Mr. SANDSTRÖM, Special Rapporteur, agreed that there was no objection to the term "absolute right".

44. The last sentence of paragraph (3) of the commentary followed the language used in the commentary on article 7 of the 1957 text.

45. Mr. YOKOTA said that the last word of paragraph (3) should be "normal", to accord with the terminology used in the article.

46. Mr. LIANG, Secretary to the Commission, pointed out that the act of limiting the staff would be carried out by the sending State, but the request for limitation would be made by the receiving State. Consequently, the last sentence of paragraph (3) required some clarification.

47. After some discussion, Mr. SANDSTRÖM, Special Rapporteur, agreed to substitute for the words "the right, but not an absolute right, to limit the size of the staff" in paragraph (3) the words "the right within certain limits to refuse to accept an increase in the size of the staff". He also agreed to the insertion of the words "claim for" between "Any" and "limitation", and to the substitution of the word "normal" for the word "customary" in the last sentence of paragraph (3).

The commentary on article 10, as amended, was adopted by 11 votes to none, with 4 abstentions.

ARTICLE 11

48. Mr. SCELLE criticized the word "*bureaux*", in the French text of article 11, on the ground that it meant essentially a room or a piece of furniture. He preferred *annexes* or *dépendances*, which would bring

out the relationship between the offices and the mission headquarters.

Article 11 was adopted by 14 votes to none, with 1 abstention, on the understanding that the Secretariat would endeavour to find a more suitable French term corresponding to the English word "offices".

COMMENTARY ON ARTICLE 11

49. Mr. YOKOTA thought it undesirable and unnecessary to begin the commentary with the words "In consequence of an observation made by one Government". He suggested that they be omitted.

50. Mr. SANDSTRÖM, Special Rapporteur, agreed to the suggestion.

The commentary on article 11, as amended, was adopted unanimously.

ARTICLE 12

Article 12 was adopted by 10 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 12

51. Mr. SANDSTRÖM, Special Rapporteur, said that as the Commission had decided to delete the introductory words of the commentary to article 11, it should also omit the words "to adopt one Government's suggestion and" in paragraph (2) of the commentary on article 12.

It was so agreed.

The commentary on article 12, as amended, was adopted by 10 votes to none, with 1 abstention.

ARTICLE 13

52. Mr. TUNKIN observed that the draft in article 13 dealt with the *chargé d'affaires ad interim* before it dealt with the head of the mission. It would be preferable to put article 13 after article 17.

53. Mr. SANDSTRÖM, Special Rapporteur, agreed to the rearranged order.

Article 13 was adopted unanimously.

COMMENTARY ON ARTICLE 13

54. Sir Gerald FITZMAURICE, Rapporteur, said that in paragraph (2) of the commentary the emphasis was wrongly placed in the statement that the head of the mission in some countries was not replaced when he was in the country. The question was not that of replacement by the sending State, but whether the receiving State regarded him as able or as unable to perform his functions so long as he was in that country. The situation would be made clearer if the words "in some the head of the mission is not replaced when he is in the country" were replaced by the words "in some the head of the mission is not regarded as requiring to be replaced as long as he is in the country".

55. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendment.

The commentary on article 13, as amended, was adopted unanimously.

ARTICLES 14 AND 15

Articles 14 and 15 were adopted unanimously.

ARTICLE 16

Article 16 was adopted unanimously.

ARTICLE 17

Article 17 was adopted unanimously.

56. Mr. BARTOS said that he had voted for articles 16 and 17 subject to a reservation concerning religious authorities and their representatives.

COMMENTARY ON ARTICLES 14 TO 17

57. Mr. TUNKIN suggested that paragraph (3) of the commentary on articles 14 to 17 might well be omitted, since it gave no particulars of the nature of the observations of Governments on the point.

58. Sir Gerald FITZMAURICE, Rapporteur, considered paragraph (5) unnecessarily elaborate. Since the date according to which heads of mission took precedence was entirely dependent on article 16, paragraph 1, the paragraph could be confined to a statement of that fact.

59. Mr. SANDSTRÖM, Special Rapporteur, said that he had included paragraph (3) merely in order to point out that the question had been reconsidered. He accepted both suggestions.

60. He drew attention to the following addition to the commentary:

"(8) The Commission did not feel called upon to deal in the draft with the rank of the members of the mission's diplomatic staff. This staff comprises, apart from specialized officials such as military, naval, air, commercial or other attachés, the following classes:

Minister-Counsellors
Counsellors
First Secretaries
Second Secretaries
Third Secretaries
Attachés

Their rank is established on the same principles as the rank of heads of mission."

61. Mr. TUNKIN suggested the deletion of the last sentence in the additional paragraph, which had not been accepted by the Drafting Committee.

62. Mr. LIANG, Secretary to the Commission, suggested that the first item in the list should read "Ministers or Minister-Counsellors". "Minister" was a title given in some embassies to a diplomatic agent of a rank intermediate between that of the ambassador and that of the minister-counsellor.

63. After further discussion, Mr. SANDSTRÖM, Special Rapporteur, accepted both Mr. Tunkin's and the Secretary's suggestions.

64. Mr. ALFARO suggested that cultural attachés should be mentioned as well, since they were acquiring increasing importance.

65. Mr. BARTOS pointed out that it was quite a common practice for civil attachés to be given a rank in the diplomatic hierarchy and, for example, to be entitled first secretary for commercial affairs. To make their position *vis-à-vis* their purely diplomatic colleagues clear, he suggested adding a phrase such as "excepting, in the case of civil attachés, those to whom a diplomatic rank has been assigned".

66. Mr. ZOUREK said that Mr. Bartos' addition could be made but seemed hardly necessary, since it was clear that the phrase in the second sentence in the paragraph referred only to specialized attachés who had no diplomatic rank.

67. Mr. TUNKIN was in favour of adopting the paragraph as it stood. The Drafting Committee had discussed the position of attachés and had decided to set them apart, partly in view of the complicating factor of the different ranking of service attachés in the army, navy or air force.

68. Sir Gerald FITZMAURICE, Rapporteur, suggested that the reference to specialized officials in the second sentence in the paragraph should be omitted and a new paragraph added on the following lines:

> "There are also specialized officials such as military, naval, air, commercial, cultural or other attachés, who may be placed in one of the abovementioned classes."

69. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestions of Mr. Alfaro and Sir Gerald Fitzmaurice.

Paragraph (8), as amended, was adopted unanimously.

The commentary on articles 14 to 17 as a whole, as amended, was adopted unanimously.

ARTICLE 18

Article 18 was adopted unanimously.

COMMENTARY ON ARTICLE 18

70. Sir Gerald FITZMAURICE, Rapporteur, suggested and Mr. SANDSTRÖM, Special Rapoprteur, agreed that the words "This article" at the beginning of the commentary should be amended to read "The rule laid down in this article".

The commentary on article 18, as amended, was adopted unanimously.

ARTICLE 19

Article 19 was adopted unanimously.

COMMENTARY ON ARTICLE 19

71. Mr. TUNKIN observed that paragraph (3) of the commentary was both unclear and unnecessary. He suggested its deletion.

72. Mr. YOKOTA suggested that the words "the mission's staff" in paragraph (2) should be amended to read "the members of the staff of the mission" to bring the text into line with the wording of article 1.

73. Mr. SANDSTRÖM, Special Rapporteur, accepted both suggestions.

The commentary on article 19, as amended, was adopted by 13 votes to none, with 1 abstention.

ARTICLE 20

Article 20 was adopted unanimously.

COMMENTARY ON ARTICLE 20

74. Sir Gerald FITZMAURICE, Rapporteur, pointed out that the references to the observations of Governments in paragraph (6) and (7) of the commentary might have to be omitted in the light of the Commission's decision concerning similar references in commentaries to preceding articles.

On that understanding, the commentary on article 20 was adopted unanimously.

ARTICLE 21

Article 21 was adopted unanimously.

COMMENTARY ON ARTICLE 21

75. Mr. LIANG, Secretary to the Commission, suggested that the word "intention" in the first sentence of paragraph (1) of the commentary should be replaced by the word "substance".

76. Sir Gerald FITZMAURICE, Rapporteur, suggested that the second sentence in paragraph (1) of the commentary should be deleted, since the article itself referred to the sending State and to the head of the mission, and not to the mission. He also suggested that the last sentence in the same paragraph should be revised to read: "The Commission thought that a reference to specific services rendered was preferable to the phrase 'for services actually rendered'."

77. Mr. AGO, recalling the previous discussion on the subject, suggested that the phrase "which is a more comprehensive description" in the third sentence of paragraph (1) of the commentary should read "which in the Commission's interpretation covers all dues or taxes levied by any local authority".

78. Mr. SANDSTRÖM, Special Rapporteur, accepted all four suggestions.

The commentary on article 21, as amended, was adopted unanimously.

ARTICLE 22

Article 22 was adopted unanimously.

COMMENTARY ON ARTICLE 22

79. Mr. GARCÍA AMADOR observed that the opening words of the second sentence in paragraph (1) of the commentary might convey the impression that the 1957 commentary had been drafted independently of the Commission. He suggested that the words should be amended to read: "As the Commission pointed out at its ninth session".

80. Mr. LIANG, Secretary to the Commission, said that the words "One Government points out" at the beginning of paragraph (2) would leave the reader guessing what Government was meant. If reference to the particular observation was necessary, he would suggest either that the Government should be specified or that a reference to the document containing its observations should be inserted.

81. Mr. YOKOTA observed that the first two sentences of paragraph (2) might well be omitted.

82. Mr. SANDSTRÖM, Special Rapporteur, agreed that the first two sentences of paragraph (2) might be deleted. Paragraph (1) might also be deleted.

83. Mr. ZOUREK supported Mr. García Amador's suggestion as being preferable to the deletion of paragraph (1). Paragraph (2) could begin with the words "It was suggested that".

84. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestions of Mr. García Amador and Mr. Zourek.

The commentary on article 22, as amended, was adopted unanimously.

ARTICLE 23 AND COMMENTARY

Article 23 and commentary were adopted unanimously.

ARTICLE 24

Article 24 was adopted by 14 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 24

The commentary on article 24 was adopted unanimously.

The meeting rose at 1 p.m.

476th MEETING

Wednesday, 2 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) *(continued)*

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.78/Add.2) *(continued)*

II. TEXT OF THE DRAFT *(continued)*

ARTICLE 25

1. Sir Gerald FITZMAURICE, Rapporteur of the Commission, suggested that the words "liable to arrest or detention, whether administrative or judicial" in paragraph 5 of the article should be replaced by "liable to any form of arrest or detention", a form of words agreed upon by the Drafting Committee in connexion with article 27.

2. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendment.

Article 25, as amended, was adopted unanimously.

COMMENTARY ON ARTICLE 25

3. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to amend paragraph (3) of the commentary in certain respects. The words "One Government pointed out that" at the beginning of the first sentence should be replaced by the word "Formerly"; the words "this represents the practice obtaining in earlier times" at the beginning of the second sentence should be deleted, and the two sentences should be merged.

4. Mr. TUNKIN thought that the first statement in the third sentence of paragraph (3) was too categorical; the practice there described was not invariable.

5. Referring to the fourth sentence in paragraph (4), he pointed out that not all the incoming correspondence of the mission was "official"; only that emanating from official government organs could be so described.

6. Sir Gerald FITZMAURICE, Rapporteur, agreed with Mr. Tunkin on his first point and suggested that the word "always" be inserted between the words "no longer" and "pass" in the third sentence of paragraph (3).

7. With reference to Mr. Tunkin's second point he said that, even if the fourth sentence of paragraph (4) was redrafted, the difficulty of deciding what was official correspondence would still remain; and as the sentence now stood, incoming correspondence must be official, to. He would not, however, object to the deletion of the sentence.

8. Mr. YOKOTA said that, in keeping with the Commission's decision not to refer to observations of

particular Governments, the last sentence in paragraph (4) should be omitted.

9. Mr. SANDSTRÖM, Special Rapporteur, accepted Sir Gerald Fitzmaurice's suggestion with respect to the third sentence of paragraph (3).

10. So far as the fourth sentence in paragraph (4) was concerned, he said that Mr. Alfaro, who had proposed the text of article 25, paragraph 2 (458th meeting, para. 32), had seemed to envisage a rather broad definition of official correspondence. He (the Special Rapporteur) had accordingly included the sentence in the commentary in order to give the Commission an opportunity to express its opinion on the matter. He agreed to delete the fourth and last sentences in paragraph (4).

The commentary on article 25, as amended, was adopted by 10 votes to none, with 1 abstention.

ARTICLE 26

Article 26 was adopted unanimously.

COMMENTARY ON ARTICLE 26

11. Mr. ZOUREK pointed out that, as worded, the commentary might convey the impression that, in the absence of any convention on diplomatic immunities, the receiving State was entitled to tax the fees charged by a foreign mission in the course of its official duties. He suggested that the commentary should be replaced by the following: "This article states a rule which is universally accepted."

12. Mr. LIANG, Secretary of the Commission, supported Mr. Zourek's suggestion. In a number of cases, the commentaries seemed to imply that the object of certain articles was to prevent States from performing certain acts. He thought it undesirable to present articles in that light. Their object was to enunciate rules of law and not to forestall certain acts on the part of States.

13. Mr. SANDSTRÖM, Special Rapporteur, agreed with both speakers and accepted Mr. Zourek's amendment.

Mr. Zourek's suggested text of the commentary on article 26 was adopted unanimously.

SUBSECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

14. The CHAIRMAN observed that the term "persons" in the introduction to subsection C should be replaced by a more specific expression.

It was so decided.

ARTICLE 27

Article 27 was adopted unanimously.

COMMENTARY ON ARTICLE 27

15. Mr. SANDSTRÖM, Special Rapporteur, agreed, on the proposal of Mr. Tunkin, to delete the word "certain" before "measures" in the fourth sentence of paragraph (1) of the commentary.

16. Replying to an observation by Sir Gerald FITZMAURICE, Rapporteur, he suggested that the last sentence in paragraph (1) of the commentary should be left unchanged, since it had figured in the commentary on the 1957 draft (A/3623, para. 16, article 22).

The commentary on article 27, as amended, was adopted unanimously.

ARTICLE 28

Article 28 was adopted unanimously.

COMMENTARY ON ARTICLE 28

17. Sir Gerald FITZMAURICE, Rapporteur, remarked that the definition of "the private residence of a diplomatic agent" in paragraph (1) of the commentary was too wide; it would even include a club or a friend's house in which the diplomatic agent spent the night.

18. After further discussion, Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. TUNKIN's suggestion that the last part of paragraph (1) should be amended to read "includes even a temporary residence of the diplomatic agent".

19. Mr. TUNKIN remarked that the second sentence in paragraph (2) seemed to imply that a diplomatic agent's correspondence pertaining to a commercial venture in the receiving State was inviolable. He suggested that the sentence should be redrafted or else omitted altogether.

20. Mr. SANDSTRÖM, Special Rapporteur, explained that to allow the authorities of the receiving State to remove a diplomatic agent's correspondence pertaining to a commercial venture would, in effect, abolish the inviolability of his official correspondence, since it might be necessary to scrutinize all his correspondence for the purpose of determining what was official and what was commercial.

21. Mr. ZOUREK said that if the sentence was retained it would have to be clarified and the statement, which occurred in most consular conventions, would have to be added that such commercial correspondence must be kept separate from diplomatic correspondence. Since, however, the Commission considered that as a general rule it was not admissible for diplomats to engage in commerce, it would be better to omit a sentence which referred to purely exceptional circumstances.

22. Mr. SCELLE agreed with the Special Rapporteur.

23. Mr. YOKOTA said that, as the Commission had discussed the matter as some length, he would prefer some references to it to be made in the commentary.

24. The CHAIRMAN suggested that the last two sentences of paragraph (2) and the last two sentences

of paragraph (3) of the commentary should be deleted.

It was so agreed.

The commentary on article 28, as amended, was adopted unanimously.

ARTICLE 29

Article 29 was adopted unanimously.

COMMENTARY ON ARTICLE 29

25. Mr. TUNKIN suggested that the words "which is an intrinsic part of the national territory" in the second sentence of paragraph (5) should be omitted, for the statement was controversial.

26. Mr. ZOUREK considered the second sentence in paragraph (7) of the commentary too restrictive. He had understood that article 29, paragraph 1 (*c*), covered even isolated commercial transactions. He suggested that the sentence should be omitted.

27. Sir Gerald FITZMAURICE, Rapporteur, doubted the advisaibility of Mr. Zourek's suggestion. Paragraph 1 (*c*) of the article applied to cases where a diplomatic agent conducted a regular course of business "on the side". Such isolated transactions as, for instance, buying or selling a picture, were precisely typical of the transactions not subject to the civil jurisdiction of the receiving State. Annoying as it might be for the other parties to such transactions in the event of a dispute, it was essential not to except such transactions from the general rule for, once any breach was made in the principle, the door would be open to a gradual whittling away of the diplomatic agent's immunities from jurisdiction.

28. The CHAIRMAN pointed out that the article referred to "commercial activity". A single transaction would hardly constitute "commercial activity". Of course, even a single plunge in the waters of trade might suffice, but it must be in the waters of trade.

29. Mr. ZOUREK observed that it was the use of the words "professional" and "commerical" in the second sentence of paragraph (7) of the commentary that had caused him to raise his objection. The sale or purchase of articles by a diplomatic agent for his own or for his family's account, no matter how large the sum involved, did not constitute a commercial transaction within the meaning of most civil codes. A purchase was a commercial transaction only if made with a view to resale for purposes of gain. On the other hand, he did not think it necessary for a diplomatic agent to engage in continuous commercial activity in order to come under the provisions of paragraph 1 (*c*) of the article. If the agent engaged in a single large-scale commercial transaction which ended in disaster, he should not be immune from civil jurisdiction as far as it was concerned.

30. Sir Gerald FITZMAURICE suggested that the words "an isolated commercial transaction" should be replaced by "isolated transactions of a private character".

31. Mr. SCELLE agreed with Mr. Zourek's suggestion. According to French civil law, the expression "*actes de commerce*" meant habitual transactions carried on for purposes of gain.

32. The CHAIRMAN proposed that the Commission should adopt Mr. Zourek's suggestion to delete the sentence which, as he and Mr. Scelle had shown, was unnecessary, since an isolated transaction like the one contemplated in the discussion could by no stretch of the imagination be described as a commercial transaction.

33. Sir Gerald FITZMAURICE, Rapporteur, agreed, though pointing out that Mr. Scelle had, in effect, said exactly the opposite of Mr. Zourek. According to the latter, an isolated transaction could by a very little stretch of the imagination be presented as constituting commercial activity.

34. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Zourek's suggestion and the suggestion previously made by Mr. Tunkin (para. 25 above).

35. Mr. TUNKIN observed that paragraph (9) was somewhat confusing. It stated first that there was no obligation on a diplomatic agent to testify and later gave the impression that local courts might summon him to do so. He did not think local courts were entitled to take such action; at most, they could invite him, through the mission, to give testimony *ex gratia*.

36. Mr. LIANG, Secretary to the Commission, agreed with Mr. Tunkin. He knew of no article in any code of civil procedure under which a diplomatic agent could be required to give evidence. He suggested that the last sentence in paragraph (9) of the commentary should be deleted.

37. He also wondered whether the phrase "elucidating a crime" in the third sentence of the paragraph could be improved.

38. Sir Gerald FITZMAURICE, Rapporteur, agreed that the last sentence in paragraph (9) should be deleted and suggested that the penultimate sentence be amended to read "In certain countries there are special rules concerning the manner in which a diplomatic agent's testimony is to be taken when he consents to testify." He also suggested that the phrase "in elucidating a crime" should be replaced by "in the investigation of a crime".

39. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestions of the Secretary and Sir Gerald Fitzmaurice.

40. Sir Gerald FITZMAURICE, Rapporteur, referring to paragraph (10) of the commentary, proposed that in the third sentence the words "whether one can speak of 'evidence'" should be replaced by the words "whether the question of the obligation to give evidence is relevant", and that the second part of the same sentence, beginning with the word "furthermore" should be deleted.

41. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments to paragraph (10).

42. Mr. FRANÇOIS suggested that in the last sentence of paragraph (12) of the commentary it would be better to say "A partial solution" instead of "Another possible solution", since the procedure in question, though generally practised, did not represent a complete solution.

43. Mr. SANDSTRÖM, Special Rapporteur, said he would be prepared to agree to the deletion of the last sentence.

The commentary on article 29, as amended, was adopted unanimously.

ARTICLE 30

Article 30 was adopted unanimously.

COMMENTARY ON ARTICLE 30

44. Mr. AGO suggested that the word "alone" should be added at the end of the second sentence of paragraph (1) of the commentary, for otherwise the sentence would be pointless.

45. Mr. SANDSTRÖM, Special Rapporteur, agreed.

46. Mr. LIANG, Secretary to the Commission, suggested that the beginning of the third sentence of paragraph (1) should be amended to read: "It is for the benefit of the sending State that the immunity..."

47. Sir Gerald FITZMAURICE, Rapporteur, suggested that the passage in question should be amended to read: "The waiver of immunity must be on the part of the sending State because the object of the immunity is that the diplomatic agent..."

48. Mr. SANDSTRÖM, Special Rapporteur, accepted Sir Gerald Fitzmaurice's amendment.

49. Mr. AGO suggested that in the first sentence of paragraph (3) the word "expressed" should be replaced by the word "made", since the waiver could be either express or implied.

50. Mr. SANDSTRÖM, Special Rapporteur, suggested that the passage in question might be amended to read: "...there is no longer any doubt but that paragraphs 2 and 3 deal only with the form which the waiver should take..."

51. Mr. YOKOTA suggested that in the same sentence of paragraph (3) the phrase "in order to be taken into consideration" should be replaced by the phrase "in order to be effective".

52. Mr. SANDSTRÖM, Special Rapporteur, agreed to that change.

The commentary on article 30, as amended, was adopted unanimously.

ADDITIONAL ARTICLE ON EXEMPTION FROM SOCIAL SECURITY LEGISLATION

53. The CHAIRMAN said that the commentary on the new article would be examined later, since it was not yet available in both English and French.

The article was adopted unanimously.

ARTICLE 31

Article 31 was adopted unanimously.

COMMENTARY ON ARTICLE 31

54. Mr. FRANÇOIS doubted whether paragraph (1) of the commentary was really necessary. It asked the question whether the exemption from taxation was a right or a matter of courtesy, but the last sentence, without answering that question, stated that the exemption was a "fact".

55. Mr. SANDSTRÖM, Special Rapporteur, said that the words "*comme une règle de droit international*" had been inadvertently omitted from the French text. They should have come before the words "*que l'exemption existe*".

56. Mr. TUNKIN agreed with Mr. François. The paragraph should either be deleted or replaced by paragraph (1) of the commentary on the corresponding article in the 1957 text (A/3623, para. 16, article 26), which was much clearer.

57. Mr. YOKOTA said he also would be in favour of deleting the paragraph. It attempted to relate the grant of diplomatic privileges and immunities to the theory of "functional necessity", but diplomatic privileges and immunities had not been shown to be based exclusively on that theory.

58. Mr. SANDSTRÖM, Special Rapporteur, said he would be prepared to agree to the replacement of paragraph (1) by paragraph (1) of the commentary on the corresponding article in the 1957 text.

Subject to that amendment, the commentary on article 31 was adopted unanimously.

ARTICLE 32

Article 32 was adopted unanimously.

COMMENTARY ON ARTICLE 32

The commentary on article 32 was adopted unanimously.

ARTICLE 33

Article 33 was adopted unanimously.

COMMENTARY ON ARTICLE 33

59. Mr. SANDSTRÖM, Special Rapporteur, said that the second sentence in paragraph (3), and the words "to which attention has been drawn by several Governments" in the third sentence, should be deleted.

60. Mr. LIANG, Secretary to the Commission, said he found it difficult to understand exactly how the second half of paragraph (3) of the commentary was related

to the first half. It was unclear whether the word "legislation" in the second half of the paragraph was used in the normal sense or in a more restricted and technical sense. Many States had regulations governing the matter which were not, strictly speaking, legislation. He also wondered whether the regulations referred to meant regulations relating to the nature of the goods or regulations which would apply only in relations with certain States, for example, those which did not observe reciprocity. The phrase "*Ad hoc* regulation" in the last sentence also needed explanation.

61. Sir Gerald FITZMAURICE, Rapporteur, said he would like to ask the Special Rapporteur not to delete the second sentence of paragraph (3), but to amend it to read: "Such restrictions or conditions cannot be regarded as inconsistent with the rule that the receiving State must grant the exemption in question."

62. Unlike Mr. Liang, he had no difficulty in seeing how the second part of the paragraph was related to the first. The paragraph stated, first, the principle of exemption, then mentioned restrictions and then went on to say that such restrictions were not inconsistent with the obligation to grant exemption. The second part of the paragraph stated that to give effect to those restrictions the receiving State must act in accordance with the regulations established by its legislation, and in conclusion the paragraph affirmed that, in consequence, *ad hoc* regulation in each individual case was not permissible. In other words, the authorities must act in accordance with standing regulations and were not empowered to apply special rules to individual cases.

63. To meet the difficulty in connexion with the phrase "*Ad hoc* regulation", in the last sentence, he suggested that the word "established" in the preceding sentence should be placed between inverted commas.

64. Mr. LIANG, Secretary to the Commission, said he was not entirely convinced by Sir Gerald Fitzmaurice's argument. All the matters mentioned in the first part of the paragraph were covered by regulations but not usually by legislation. Most of the regulations reproduced in the Secretariat's publication *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*[1] were not "laws". Perhaps the Special Rapporteur or the Rapporteur of the Commission could explain whether "legislation" was used in paragraph (3) in a technical sense.

65. Mr. TUNKIN said he agreed with Sir Gerald Fitzmaurice, but still thought the last sentence of paragraph (3) confusing. It would seem to exclude the possibilit of a State's granting more liberal treatment than was stipulated by the regulations.

66. The CHAIRMAN suggested that in the last sentence of paragraph (3) the word "regulation" should be qualified by a phrase indicating that only restrictive regulation was meant.

[1] United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3).

67. Mr. SANDSTRÖM, Special Rapporteur, agreed to that suggestion.

68. Mr. ALFARO suggested that the meaning of the last sentence of paragraph (3) would be better conveyed if the initial phrase was replaced by the words "The disposal of each case by *ad hoc* regulations..."

69. The CHAIRMAN pointed out that if there was any ambiguity in the use of the words "regulations" and "legislation", that ambiguity existed in the text of the article itself, which referred to "the regulations established by its legislation".

70. He thought that if the last sentence of paragraph (3) was retained the word "therefore" should be replaced by the word "however".

71. Sir Gerald FITZMAURICE, Rapporteur, said that in English there would be no objection to the use of the word "legislation" in the context of paragraph (3). Legislation could be either ordinary or subordinate, and subordinate legislation included all the regulations which government departments were empowered to issue — for example, the regulations issued by the customs authorities.

72. He had no objection to the replacement of "therefore" by "however" in the last sentence. He would prefer the phrase "*Ad hoc* regulation in each case" to the phrase suggested by Mr. Alfaro.

The commentary on article 33, as amended, was adopted unanimously.

ARTICLE 34

Article 34 was adopted by 9 votes to 1.

COMMENTARY ON ARTICLE 34

73. Mr. ZOUREK said that he had voted against article 34 because in the drafting process its scope had become much wider than he thought desirable. The commentary reinforced his doubts about the article, for it dealt not only with the question of the nationality of children born to members of a mission but also with the question of marriage. Marriage was a voluntary act, and if the daughter of a diplomatic agent married a national of the receiving State there was no reason why such a case should not come under the legislation of the receiving State regarding nationality. Since the question of nationality on marriage was regulated by a special convention, the article should have stated simply that children, both of whose parents were nationals of the sending State and members of its diplomatic mission, did not automatically acquire the nationality of the receiving State by reason of having been born on its territory.

74. Another criticism of the commentary concerned the words "the only" used in the third sentence. They appeared to him to be inexact, as the condition referred to was not the only one governing the acquisition of nationality.

75. Mr. FRANÇOIS said that he had accepted article 34, but he could not accept the last two sentences

of the commentary, which appeared to him to be unnecessarily vague. It was not clear what "woman" was intended to be referred to in the penultimate sentence of the commentary. What, for example, was the position of the daughter of a diplomatic agent who married the national of a receiving State? Upon that marriage she ceased to be a member of the diplomatic agent's househould, and therefore, presumably, she could acquire the nationality of the receiving State. Some clarification of the commentary was needed.

76. He criticized the words "solely by the operation of the law of the receiving State" in the text of article 34 itself. Marriage was the voluntary act of an individual and hence it could not be said that the consequences of marriage on nationality were produced "solely by the operation of the law of the receiving State". Some additional explanation was required in the commentary.

77. Sir Gerald FITZMAURICE, Rapporteur, said that the penultimate sentence of the commentary should make it quite clear that the woman referred to was a member of the mission who continued as such after marriage. Clearly it did not cover the case of a member of a diplomatic agent's househould, for she ceased to be a member of the household when she married. Because of the possibility of such a case, he disagreed with Mr. Zourek, for the article could not be confined to the case of the birth of children, but must deal with the case of marriage as well.

78. The words in article 34 quoted by Mr. François were to a certain extent ambiguous, but it was the better view that, while the marriage itself was a voluntary act, the acquisition of nationality in consequence thereof was the direct effect of the operation of the law. The commentary should, however, be expanded to make the point clearer.

79. To meet Mr. Zourek's criticism of the third sentence, he proposed that the words "the only condition governing the acquisition of its nationality" be replaced by "an element conferring its nationality".

80. In the second sentence it would be preferable to substitute the word "parent" for "father".

81. Mr. TUNKIN suggested that the words "if the legislation of the receiving State provides for such an option" should be added to the sentence beginning "Such a child . . ."

82. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments suggested.

The commentary on article 34, as amended, was adopted by 12 votes to 1.

ARTICLE 35

83. Mr. TUNKIN asked for a separate vote on article 35, paragraph 1. While he accepted the provisions of the other two paragraphs, he considered it inadvisable to put the administrative and technical staff of the mission on the same footing as the diplomatic staff, as did paragraph 1.

Paragraph 1 was adopted by 11 votes to none, with 3 abstentions.

Paragraphs 2 and 3 were adopted unanimously.

Article 35 as a whole was adopted by 11 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLE 35

84. Mr. AGO suggested that the words "is a step towards the progressive development of international law" in paragraph (5) of the commentary on article 35 were couched in rather too ambitious language. He suggested that they be replaced by the words "represents progress in international law".

85. Mr. ZOUREK suggested that the word "large" in the penultimate sentence of paragraph (7) should be deleted.

86. Mr. FRANÇOIS said that it was perhaps a trifle extravagant to say, as did paragraph (8) of the commentary, that an ambassador's secretary or an archivist might know more State secrets than the diplomatic staff. He proposed that the words "some members of" be inserted before the words "the diplomatic staff" in that paragraph.

87. Mr. AGO observed that, whereas the second sentence of paragraph (11) stated that the Commission did not feel it desirable to lay down a criterion for determining who should be regarded as a member of the family, the very next sentence, read in conjunction with the first, in fact did lay down such a criterion.

88. Mr. SANDSTRÖM, Special Rapporteur, suggested that that criticism would be met if the words "go farther and" were inserted before "lay down a criterion" in the second sentence; the passage at the end of that sentence would be replaced by the words "nor did it desire to fix an age limit for children".

89. Mr. LIANG, Secretary to the Commission, suggested the insertion of the words "if they live in the same household" at the end of the penultimate sentence of paragraph (11).

90. Mr. YOKOTA thought that the words "and special circumstances" in the last sentence of paragraph (11) should be deleted, or, if retained, should be illustrated by examples. As it stood, the passage could only give rise to confusion.

91. Sir Gerald FITZMAURICE, Rapporteur, said that special circumstances existed, where, for example, a relative kept house for an ambassador. There might not be particularly close ties in such a case, but certainly there were special circumstances, which called for special exemptions. He agreed that examples might be given.

92. Mr. AGO suggested that the word "or" be used instead of "and" between "close ties" and "special circumstances".

93. Mr. YOKOTA pointed out that article 35, paragraph 3, exempted private servants from dues and

taxes on their emoluments. Paragraph (12) of the commentary was misleading, in that it implied that they did not enjoy those immunities as of right.

94. Mr. SANDSTRÖM, Special Rapporteur, said that that objection could be met if the words "However, it thought that except in the case of nationals of the receiving State, these persons should enjoy" were omitted from the second sentence and the first sentence were joined to the rest of the second sentence by the words "except for".

95. In response to an observation of Mr. AGO, Sir Gerald FITZMAURICE, Rapporteur, suggested that in the last sentence of paragraph (13) the words "just as absence from the list did not constitute conclusive proof that the person concerned was not so entitled" should be added.

96. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments suggested. He added that the reference to the 1957 draft in paragraph (1) could be dispensed with.

The commentary on article 35, as amended, was adopted by 12 votes to none, with 2 abstentions.

ARTICLE 36

Article 36 was adopted unanimously.

COMMENTARY ON ARTICLE 36

97. Mr. TUNKIN suggested that the words "at the time when it agrees to his appointment" be deleted from paragraph (4) of the commentary to article 36, for the *agrément* of the receiving State might be obtained later.

98. Sir Gerald FITZMAURICE, Rapporteur, said that article 36 did not specify any time limit, but it would be undesirable that the receiving State could grant privileges and immunities or take them away at any time. In other words, it should not be able, on the appointment of a diplomatic agent who was one of its nationals, to grant him certain privileges and immunities, only to curtail them or take them away a year or two later. He would not oppose Mr. Tunkin's proposal, but he thought that the position should be made quite clear.

99. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Tunkin's amendment.

100. Mr. AGO pointed out that neither article 36 nor the commentary appeared to safeguard the inviolability of a diplomatic agent who was a national of the receiving State.

101. Mr. TUNKIN said that the Drafting Committee had altered article 36 at Mr. Ago's suggestion.

102. Mr. BARTOS said that he opposed the appointment of nationals of the receiving State as foreign diplomatic agents, but if they were appointed as such they should be given all the privileges and immunities necessary for the performance of their functions. Accordingly, they should be granted inviolability.

The meeting rose at 1.10 p.m.

477th MEETING

Thursday, 3 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) *(continued)*

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.79/Add.2) *(continued)*

II. TEXT OF THE DRAFT *(continued)*

COMMENTARY ON ARTICLE 36 *(continued)*

1. Mr. AGO proposed that the words "inviolability and" should be inserted before the words "immunity from jurisdiction" both in article 36, paragraph 1, and in paragraph (3) of the commentary.

2. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Ago's proposal.

Mr. Ago's proposal was adopted unanimously.

The commentary on article 36, as amended, was adopted unanimously.

ARTICLE 37

Article 37 was adopted unanimously.

COMMENTARY ON ARTICLE 37

3. Mr. SANDSTRÖM, Special Rapporteur, said that the words "one Government raised the question" in paragraph (2) of the commentary and the words "In response to an observation received from one Government" in paragraph (3) should be omitted. The beginning of paragraph (2) would be redrafted.

4. Mr. TUNKIN pointed out that the Government referred to in paragraph (2), the Belgian Government, in its comments on article 31, paragraph 2, of the 1957 draft (see ACN.4/114), had suggested that exemption from import duties should cease on the termination of functions, whereas paragraph (2) of the commentary spoke of customs duties. The Commission had defined customs duties in paragraph (5) of the commentary on article 33 as covering both import and export duties: consequently an amendment was required.

5. Mr. YOKOTA expressed the view that paragraph (3) of the commentary should be deleted, on the ground that it merely repeated the text of article 37, paragraph 3.

6. Mr. SANDSTRÖM, Special Rapporteur, demurred; paragraph (3) was essential because it showed that an additional provision had been inserted.

7. He agreed to amend the text of paragraph (2) of the commentary in accordance with the Belgian Government's observation.

The commentary on article 37, as amended, was adopted unanimously.

ARTICLE 38

8. Mr. TUNKIN said that the Drafting Committee had drawn the Commission's attention to article 38, paragraph 2, about which it had doubts. States should not hinder the passage of ordinary citizens without good reason, and there did not appear to be sufficient justification for stipulating expressly that they should not hinder the passage of members of the subordinate staff of a mission. He himself adhered to the view that paragraph 2 was unnecessary and accordingly proposed its deletion.

9. In reply to the CHAIRMAN, he said that the phrase used in the discussion by the Commission ("the facilities required to ensure their transit") (464th meeting, para. 2) had been rejected by the Drafting Committee on the grounds that it could be interpreted to mean that third States would be obliged to take positive steps as, for example, by the provision of tickets, to facilitate the passage of the administrative and other staff of the mission.

10. Mr. YOKOTA thought that the Drafting Committee was in general right in its view. On the other hand, some reference to passage through third States should appear, and the provision proposed seemed appropriate. He was in favour of its retention.

11. Sir Gerald FITZMAURICE, Rapporteur of the Commission, also agreed that Mr. Tunkin's view was strictly correct. On the other hand, the provision did no harm, and it might conceivably be of value. He thought that it might be retained.

Mr. Tunkin's proposal was rejected by 4 votes to 1, with 3 abstentions.

Article 38 was adopted unanimously.

COMMENTARY ON ARTICLE 38

12. Mr. SANDSTRÖM, Special Rapporteur, said that he would delete paragraph (5) of the commentary on article 38, as it did not appear to be necessary.

13. Mr. AGO said he did not understand what problem was referred to in paragraph (2) of the commentary.

14. Mr. TUNKIN agreed that the last sentence of paragraph (2) was undesirable, for it was universally agreed that a State was entitled to regulate the admission of aliens. There was consequently no problem, and the last sentence was misleading. He thought that it should be deleted.

15. Sir Gerald FITZMAURICE, Rapporteur, said that the intention of paragraph (2) was not to deal with the problem whether third States were obliged to grant passage, but whether, if such passage was in fact granted, immunities should be given to the diplomatic agent. The paragraph did not deal with the question whether a third State would be justified in refusing admission to aliens in the case of foreign diplomatic agents and their staffs, although the problem existed, especially in cases where the only reasonable access to the State of destination was across that third State. The deletion of the last sentence of paragraph (2) might leave the implication that the Commission had in fact resolved that problem.

16. Mr. TUNKIN still felt that there was no problem to resolve. It was self-evident that a State could regulate the admission of aliens. To retain the last sentence of paragraph (2) would inevitably give a wrong impression to the reader.

17. Mr. AGO thought that some explanation, on the lines of Sir Gerald Fitzmaurice's remarks, should be added. In any case, the problem of passage across a third State was not rare, but common.

18. Sir Gerald FITZMAURICE suggested that the last sentence should read "The Commission did not think it necessary to go further into this matter."

19. Mr. ALFARO thought that no problem should be referred to in terms which could be misinterpreted. Perhaps the commentary might say simply that the Commission had resolved the problem of free passage along the lines of article 38.

20. Mr. YOKOTA contested Mr. Tunkin's view that a third State was entitled to regulate the admission of all foreigners to its territory. Some members of the Commission had maintained that diplomatic agents had a right of free passage. The Commission had not come to any decision on the problem, which was therefore not resolved; and to that extent the last sentence of paragraph (2) was correct. He was, however, prepared to accept Sir Gerald Fitzmaurice's amendment.

21. Mr. SANDSTRÖM, Special Rapporteur, and Mr. TUNKIN accepted Sir Gerald Fitzmaurice's amendment.

22. Mr. AGO also accepted that amendment, but still thought it might be advisable to give the Commission's reasons for not going further into the problem. One reason might be that the problem did not in practice give rise to difficulties.

23. Sir Gerald FITZMAURICE, Rapporteur, considered it better not to state any reasons in the context.

The commentary on article 38, as amended, was adopted unanimously.

ARTICLE 39

Article 39 was adopted unanimously.

COMMENTARY ON ARTICLE 39

24. Mr. GARCIA AMADOR said that the last sentence of paragraph (2) of the commentary on article 39 was open to misinterpretation. He proposed that the words "in accordance with international law" be inserted after the word "nationals".

25. Mr. TUNKIN pointed out that the treaties referred to in the last sentence of paragraph (4) must necessarily be observed; it was superfluous to make such an obvious comment. He suggested therefore that the sentence be deleted.

26. Sir Gerald FITZMAURICE, Rapporteur, suggested, in the light of Mr. Tunkin's remark, that the words "Such treaties must be observed" in paragraph (4) should be deleted and the previous sentence joined to the last sentence by the words "which are valid as between the parties".

27. Mr. LIANG, Secretary to the Commission, thought that perhaps the second sentence of paragraph (2) put undue emphasis on participation in political campaigns by persons enjoying diplomatic privileges and immunities. They might interfere in the internal affairs of a State in much more serious ways as, for example, in fomenting civil war. The words "In particular" therefore, if not the whole sentence, seemed to be out of place.

28. Sir Gerald FITZMAURICE, Rapporteur, suggested that the words "In particular" in paragraph (2) of the commentary be deleted, and the sentence be linked with the first sentence by the words "for example,".

29. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments suggested.

The commentary on article 39, as amended, was adopted unanimously.

ARTICLE 40

30. Mr. TUNKIN thought that the word "diplomatic" should be inserted before the word "mission" in article 40, sub-paragraph (*d*). Otherwise, the sub-paragraph might be interpreted to mean the termination of an *ad hoc* mission.

31. Mr. AGO noted that the Drafting Committee had made a radical change in sub-paragraph (*d*), as "the termination of the mission" had been substituted for "the death of the diplomatic agent". It seemed to him that the word "termination" was extremely ambiguous, in that it did not make it clear whether it was a temporary or a definitive termination.

32. Sir Gerald FITZMAURICE, Rapporteur, pointed out that relations between States could be broken off, and might or might not be resumed; but it could not be said in advance whether they would or would not be resumed. Few cases existed where States had agreed beforehand to interrupt diplomatic relations temporarily or for a specified period. In any case the word "termination" covered both what might eventually prove to be a mere interruption or else a final rupture.

33. Mr. ZOUREK thought that sub-paragraph (*d*) required clarification, for a mission could be recalled temporarily without a rupture of diplomatic relations necessarily taking place.

34. Mr. LIANG, Secretary to the Commission, said that the word "mission" was used in several senses, both concrete and abstract, in the draft. For example, the inviolability of the mission meant the inviolability of the mission premises. In sub-paragraph (*d*), on the other hand, the word was used in a purely abstract sense, and, moreover, appeared to be used in the sense of a particular mission instead of in the sense of diplomatic missions in general.

35. Mr. AGO suggested that sub-paragraph (*d*) should be deleted and replaced by the words: "In the case of rupture of diplomatic relations between the receiving State and the sending State".

36. Mr. ALFARO supported Mr. Ago's suggestion.

37. Mr. TUNKIN said he could not accept Mr. Ago's suggestion, for it did not correspond to reality. Diplomatic relations between States might be broken, and lead to termination of the mission, but a mission might also be recalled without a severance of diplomatic relations. He thought the word "recall" was preferable to the word "termination", since on the recall of the mission the function of the diplomatic agent ended.

38. Faris Bey EL-KHOURI pointed out that the title of article 40 was "Modes of termination", whereas sub-paragraph (*d*) listed the termination of the mission as one such mode. It was absurd that the termination of the mission should be a mode of termination.

39. Mr. ALFARO said he could not agree with Mr. Tunkin, as a mission could be terminated or suspended for reasons other than the rupture of diplomatic relations. There should, therefore, be a specific mention of rupture of diplomatic relations as well.

40. Mr. YOKOTA observed that the intention of the Commission had been to mention both the rupture of diplomatic relations and the termination of the diplomatic mission in article 40. That was clear from article 2, which differentiated between diplomatic relations and diplomatic missions. He proposed, therefore, that sub-paragraph (*d*) should read: "On the rupture of diplomatic relations or on the termination of the diplomatic mission".

41. Mr. EDMONDS expressed the view that all modes of termination were covered by sub-paragraphs (*a*) to (*c*).

42. Sir Gerald FITZMAURICE, Rapporteur, said that sub-paragraphs (*a*) to (*c*) dealt with occasions personal to the diplomatic agent, whereas sub-paragraph (*d*) dealt with the mission as a whole. On the other hand, the article was not meant to be exhaustive, as was clear from the words "*inter alia*". He recalled the Commission's decision to omit the provision stating that a diplomatic agent's function came to an end on his death,

because it stated a self-evident truth. In the same way, it was self-evident that his function would come to an end when the mission terminated. For those reasons the simplest course might be for sub-paragraph (*d*) to be deleted.

It was so agreed.

Article 40, as amended, was adopted by 12 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLE 40

The commentary on article 40 was adopted unanimously, subject to changes necessitated by the decision to omit article 40, sub-paragraph (d).

ARTICLE 41

Article 41 was adopted unanimously.

COMMENTARY ON ARTICLE 41

43. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to delete the first sentence of the commentary.

The commentary, as amended, was adopted unanimously.

ARTICLE 42 AND COMMENTARY

Article 42 and commentary were adopted unanimously.

ARTICLE 43

Article 43 was adopted by 13 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 43

44. Mr. SANDSTRÖM, Special Rapporteur, submitted the following text as the commentary on article 43:

"(1) It is stipulated in the draft that certain of its rules are to be applied without discrimination as between States (article 10, paragraph 2; article 16, paragraph 1) or uniformly (article 17). It should not be inferred that these are the only cases in which the rule of non-discrimination is applicable. On the contrary, this is a general rule which follows from the equality of States. Article 43, which is new, lays down the rule expressly.

"(2) In the article laying down the rule, the Commission was, however, at pains to refer to two cases in which, although an inequality of treatment is implied, no discrimination occurs, inasmuch as the treatment in question is justified by the rule of reciprocity which is very generally applicable in the matter of diplomatic relations.

"(3) The first of these cases is that in which the receiving State applies restrictively one of the rules of the draft because the rule is so applied to its own mission in the sending State. It is assumed that the restrictive application in the sending State concerned is in keeping with the strict terms of the rule in question, and within the limits allowed by the rule; otherwise, there is an infringement of the rule and the action of the receiving State becomes an act of reprisal.

"(4) The second case is that in which the receiving State grants, subject to reciprocity, privileges and immunities more extensive than those prescribed by the rules of the draft. It is only natural that the receiving State should be free, as regards the grant of benefits greater than those which it is obliged to grant, to make such grant conditional on receiving reciprocal treatment."

The commentary was adopted unanimously.

ARTICLE 44

Article 44 was adopted by 11 votes to 3.

COMMENTARY ON ARTICLE 44

45. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to delete the words "that the Commission's task was limited to codifying existing law and" in the third sentence of the commentary on article 44.

46. Mr. FRANÇOIS said that he would regret the deletion of the words in question, since some members, including himself, had in effect expressed the view that the Commission's task was mainly to codify international law and that it was not concerned with the question of implementation.

47. After a discussion in which Mr. GARCÍA AMADOR, Mr. TUNKIN, Sir Gerald FITZMAURICE and Mr. LIANG, Secretary of the Commission, took part, Mr. SANDSTRÖM, Special Rapporteur, accepted the following amended version of the third sentence:

"Some members considered that where, as in the present case, the Commission's task had consisted in codifying substantive rules of international law, it was unnecessary to deal with the question of implementation."

48. On the proposal of Mr. YOKOTA, he agreed to replace the words "Others, again," by the words "A majority of the Commission, however," in order more faithfully to reflect the course of the discussion.

49. On the proposal of Mr. LIANG, Secretary, and Sir Gerald FITZMAURICE, he agreed to delete the words "at the request of one of the parties" in the fifth sentence and to replace the words "has been modified in that sense" in the last sentence by the words "has been clarified by the addition of the stipulation that this can be done at the request of one of the parties".

The commentary, as amended, was adopted by 12 votes to none, with 2 abstentions.

ADDITIONAL ARTICLE ON EXEMPTION FROM SOCIAL SECURITY LEGISLATION (*continued*)

50. Sir Gerald FITZMAURICE, speaking on behalf of several members of the Commission, inquired whether it would be in order to reconsider the text of the new article on exemption from social security legislation

adopted at the previous meeting (476th meeting, para. 53), since it failed to deal with a point which was more likely to arise than any other.

51. The CHAIRMAN ruled that, in the absence of any objection, the text of the article might be reconsidered.

52. Sir Gerald FITZMAURICE observed that it was the general practice for diplomatic agents to pay the employer's contribution to social security schemes in respect of any of their servants or employees who were nationals of the receiving State. He accordingly proposed the following amended version of the new article:

"The members of the mission and the members of their families who form part of their households, not being nationals of the receiving State, shall be exempt from the social security legislation in force in the receiving State, except in respect of their servants and employees who are themselves nationals of the receiving State."

53. Mr. SANDSTRÖM, Special Rapporteur, said that he had not dealt with the point in the article because he regarded it as one which could be settled in the contract of employment between the diplomatic agent and his employee.

54. Mr. BARTOS suggested that provisions should also be made in the article for cases where diplomatic agents waived or renounced their exemption from the social security legislation of the receiving State and participated in social security schemes with the consent of that State. It would be sufficient to add the statement "This shall not exclude voluntary participation".

55. Mr. TUNKIN said that it should be made clear in the amendment proposed by Mr. Bartos that the receiving State was not bound to permit foreign diplomatic agents to participate in its social security schemes.

56. The CHAIRMAN observed that the whole article was based on the assumption that the social security legislation of the receiving State was comprehensive enough to include members of foreign diplomatic missions.

57. Sir Gerald FITZMAURICE suggested adding to Mr. Bartos' proposal the proviso "in so far as is permitted by local law".

58. Mr. SANDSTRÖM, Special Rapporteur, accepted Sir Gerald Fitzmaurice's proposal and Mr. Bartos' proposal as amended by Sir Gerald Fitzmaurice.

59. After further discussion, he said he would submit a revised text of the new article at the next meeting.

COMMENTARY ON THE ADDITIONAL ARTICLE

60. Mr. SANDSTRÖM, Special Rapporteur, submitted the following draft commentary on the new article concerning exemption from social security legislation:

"National social security legislation grants substantial benefits, often in the form of insurance, to persons living in the country, in consideration, however, of the payment of annual premiums by the beneficiary or his employer (old-age pensions, industrial accident and sickness insurance, unemployment insurance, etc.). Whereas members of a mission and members of their families who are nationals of the receiving State would naturally be subject to such legislation, the case of foreign nationals is different, for the latter may conceivably be entitled to similar benefits in their own country and in any case it is uncertain whether they will remain long enough in the receiving State to qualify for the benefit of that State's legislation. Under the present article, which is new, such persons are exempt from the receiving State's social security legislation."

61. Mr. TUNKIN remarked that the second reason given in the second sentence of the commentary for describing the case of foreign nationals as different was hardly cogent. A diplomatic agent might remain twenty years in the receiving State and still not qualify for the benefit of that State's legislation.

62. Mr. SANDSTRÖM, Special Rapporteur, thought that it was one reason which could be cited, but it was not necessary to include it.

63. Mr. AGO observed that the first reason given was not very convincing either. He proposed that the passage stating the two reasons should be omitted and that the words "the case of foreign nationals is different" should be amended to read "this is not necessarily the case when they have foreign nationality".

64. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Ago's two proposals.

The commentary on the additional article, as amended, was adopted unanimously.

CHAPTER IV: PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION (A/CN.4/L.78/ADD.3)

65. The CHAIRMAN put to the vote chapter IV of the draft report (A/CN.4/L.78/Add.3).

Chapter IV was adopted unanimously.

CHAPTER V: OTHER DECISIONS OF THE COMMISSION (A/CN.4/L.78/ADD.4)

66. Sir Gerald FITZMAURICE, Rapporteur, observed that the first part of chapter V of the draft report described the Commission's plans for the eleventh session and gave an account of the debate on Mr. Zourek's paper concerning methods of work (A/CN.4/L.76). Paragraphs 12 and 13, which were not specifically related to Mr. Zourek's paper or to the concrete proposals made therein, dealt with certain general points concerning the work of the Commission to which it had been felt desirable to draw attention.

67. Mr. TUNKIN said he thought chapter V gave a very full and accurate account of the discussion. He thought, however, that the part of the chapter dealing

with methods of work was so elaborate that it might give the mistaken impression that there was something wrong, or that a big problem of organization was involved. Some passages sounded almost like an attempt on the Commission's part to justify itself, or to prove a case. Such an impression would be unfortunate, because, although the Commission's work was not free from defects, there was nothing radically wrong with the way in which the Commission was discharging its task.

68. Mr. ZOUREK asked the Rapporteur whether he would be willing to amend the second and third sentences of paragraph 3 to read: "After examining in this paper the various methods by which the Commission's work might be accelerated, Mr. Zourek thought it possible to rely on only one of them as constituting a method that could be followed by the Commission.... This consisted in a reorganization..."

69. With reference to paragraph 7, he said that paragraph 26, sub-paragraph (*d*), of his paper (A/CN.4/L.76) had suggested that the facilities provided for sub-commissions should include simultaneous interpretation and summary records. Whilst he was prepared to admit that the observations in paragraph 7 might be justified so far as summary records were concerned, they should not apply to simultaneous interpretation, which in his opinion should be provided even for meetings of the Drafting Committee. Simultaneous interpretation had been provided for the Drafting Committee established by the United Nations Conference on the Law of the Sea, even though that Committee had been concerned with drafting matters alone, whereas the Commission's Drafting Committee often had to deal with questions of substance. It was true that in practice the members of the Drafting Committee were often able to dispense with simultaneous interpretation because they all had a sufficient knowledge of the language used, but that might not always be the case, and simultaneous interpretation should certainly be provided for sub-commissions. He therefore asked the Rapporteur whether he would be prepared to modify paragraph 7, and also the reference to paragraph 26, sub-paragraph (*d*), of his paper in paragraph 8, so as to allow for the provision of simultaneous interpretation.

70. He asked the Rapporteur if he would agree to the insertion of the word "approximately" before the words "40 per cent increase" in paragraph 10, since the words used in paragraph 22 (*b*) of his paper had been "in roughly the same proportion".

71. He wondered whether the footnote to the same sentence (footnote 7 *a*) was necessary or desirable. At the current session the circumstances of the Commission's work had been somewhat peculiar. For example, the Commission had spent much of its time on the reading of the draft on arbitral procedure, which had already been given two readings at earlier sessions, and consequently the Commission had been able to proceed much more expeditiously than would normally be the case. Furthermore, though the Commission's membership had been increased to twenty-one, he doubted whether the average attendance during the session had been more than eighteen.

72. Paragraphs 12 and 13 were, he thought, fully justifiable in view of the criticisms expressed concerning the Commission's work in the Sixth Committee of the General Assembly and also because in the report on its ninth session (A/3623, para. 29) the Commission had undertaken to deal with the subject. The paragraphs in question would show that the Commission had given the matter very serious consideration. They might, however, be shortened considerably.

73. Sir Gerald FITZMAURICE, Rapporteur, said he had no objection to the amendment to paragraph 3 requested by Mr. Zourek.

74. He also had no objection to the insertion of the word "approximately" in paragraph 10, though he felt that footnote 7 *a* should be retained, possibly in a modified form. He certainly had the impression that several members of the Commission had expressed the view that the increase in membership had not tended to lengthen debate appreciably. Since the presumed additional length of its discussions had been one of the main grounds on which it had been suggested that the Commission ought to alter its methods of work, it would be desirable to deal with the matter in the report.

75. He could not agree with Mr. Zourek's views concerning simultaneous interpretation in the Drafting Committee. If the Committee were provided with that service — a step which would naturally have budgetary implications — the atmosphere in which its work was conducted would be changed completely. A bigger room would be needed, debate would be more formal and it would no longer be possible to achieve the rapid solution of difficulties which a more colloquial approach did so much to facilitate. If on occasion members of the Drafting Committee were hampered by linguistic difficulties, the assistance of an interpreter could always be obtained.

76. Referring to Mr. Tunkin's remarks, he said that paragraphs 12 and 13 were not too much in the nature of an apologia, since in the General Assembly the Commission had been criticized for its supposedly low output. The paragraphs might be shortened, but in principle he thought the report should contain some passages along those lines.

77. Mr. LIANG, Secretary to the Commission, said that ever since the Drafting Committee had been established, it had been the custom to provide consecutive interpretation if required. If the Commission considered it necessary that simultaneous interpretation should be provided, the matter would have to be studied by the Secretariat in the light of United Nations practice as a whole. A sentence would have to be inserted in the report requesting the Secretariat to study the matter and provide whatever help it could to facilitate the Commission's work. Simultaneous interpretation was not usually provided for drafting committees.

78. In view of the criticisms which had been expressed in the Sixth Committee, and of the undertaking given by Mr. Zourek at the twelfth session of the General

Assembly, in his capacity as Chairman of the Commission, that he would bring those criticisms to the attention of the members of the Commission and study the question in detail, it was reasonable that the Commission's report should give adequate treatment to the subject. A detailed statement was called for, especially since the General Assembly expected the Commission to provide a survey of its working methods from time to time. In that connexion he recalled that at its sixth session the General Assembly had discussed the Commission's recommendation that its members should devote the whole of their time to its work, but had decided, in its resolution 600 (VI), not to take any action in the matter until it had acquired further experience of the functioning of the Commission.

79. It was desirable that the subject should be fully dealt with in the Commission's report, since the summary records, as printed in the *Yearbook,* were given only limited circulation, owing to the expense of producing the *Yearbook,* whereas the Commission's report was widely distributed as a General Assembly document. To most representatives at the General Assembly, the Commission's report was in fact the most easily accessible account of the Commission's work and it would therefore be a mistake to attempt to make it too concise.

80. Mr. ALFARO expressed the opinion that paragraphs 12 and 13 should not be abbreviated or deleted. They contained a judicious and exhaustive account of the Commission's activities. They also showed that the work was proceeding satisfactorily and that nothing would be gained by undue haste. In view of the unfair criticisms which had been voiced in the Sixth Committee and elsewhere, it was very desirable that the subject should be given full treatment in the Commission's report.

81. Mr. GARCÍA AMADOR said he was substantially in agreement with Mr. Alfaro. In reply to Mr. Tunkin, he pointed out that in printed form the report would look much shorter than in mimeographed form. It was necessary to give the Assembly an accurate account of the Commission's work, and the paragraphs in question served that purpose admirably. Paragraph 13, which expressed the Commission's awareness of the need for speed, and its determination to proceed as expeditiously as possible, was particularly important.

82. Mr. SANDSTRÖM said he was also of the opinion that paragraphs 12 and 13 should be retained in substance. There was, however, something in Mr. Tunkin's remark that they might be regarded as an attempt at self-justification. Accordingly, they might perhaps be dissociated from the context of the criticisms which had been levelled against the Commission and presented as an account of the Commission's accomplishment during the first ten years of its existence.

83. Mr. FRANÇOIS said he shared the opinion that paragraphs 12 and 13 would be useful, though he agreed with Mr. Tunkin that it would be wrong to present the account too much in the form of an apologia. Because, however, there was much misunderstanding concerning the Commission's work, not only in the Sixth Committee but also in other organs of the General Assembly, and because non-jurists should be given an idea of what the Commission was doing, he was inclined to think that chapter V of the draft report should be adopted in its entirety.

84. So far as the provision of technical services was concerned, he said a distinction should be made between sub-commissions and the Drafting Committee. He agreed with Sir Gerald Fitzmaurice that simultaneous interpretation was not necessary in the Drafting Committee, though even there linguistic difficulties occasionally made it difficult for some members to participate fully in the discussions; but in sub-commissions simultaneous interpretation would be a necessity, and if proposals for the establishment of sub-commissions were made in the General Assembly, the Assembly's attention should be drawn to the budgetary implications. He was not in favour of sub-commissions in general but realized that they might sometimes have to be established. The budgetary implications of such action might, he thought, be stressed even more strongly in the report.

85. Sir Gerald FITZMAURICE, Rapporteur, said that a paragraph covering the point raised by Mr. François could be added without difficulty.

86. He welcomed Mr. Sandström's suggestion to dissociate paragraphs 12 and 13 from the rest of the chapter, and he suggested that they be presented in the form of a survey of the Commission's work during the first ten years of its existence. The portion of the report under discussion would then fall into two sections, one being entitled "Planning of future work of the Commission" and the other "Review of the Commission's work during its first ten sessions". A number of consequential changes would be needed, especially in the introduction to paragraph 12.

87. Mr. AGO expressed approval of the suggested rearrangement.

88. He suggested that in paragraph 12 (*a*) greater emphasis should be placed on the Commission's opinion that slow progress in codification work was not necessarily bad in itself.

89. Mr. ZOUREK, reverting to the question of simultaneous interpretation in the Drafting Committee, emphasized that that committee was no longer concerned exclusively with drafting questions but often had to deal with questions of substance. If no request for simultaneous interpretation were made in advance, that service, even in cases where it was needed, could not be provided in time for the Committee's meetings.

90. He asked the Rapporteur whether he would be willing to include in the report a paragraph drawing attention to the fact that, as mentioned in paragraph 23 of his paper (A/CN.4/L.76), the splitting up of the Commission into two or more sub-commissions working on different subjects along parallel lines would not provide an adequate solution to the problem of expediting the Commission's work.

91. Sir Gerald FITZMAURICE, Rapporteur, said he would be prepared to insert such a paragraph.

92. So far as the Drafting Committee was concerned, he thought its status and functions were sufficiently indicated in paragraph 9 of the draft report (A/CN.4/L.78/Add.4) and that a reference to simultaneous interpretation was unnecessary, since it was generally agreed that the Committee would lose much of its utility if its proceedings were formalized. He could, however, include a paragraph stating that if the Commission began to use sub-commissions to a greater extent, or for different purposes, the question of simultaneous interpretation would arise and decisions by the Secretariat and the General Assembly would be required.

93. Mr. LIANG, Secretary to the Commission, said that the first two sentences of paragraph 14 should be corrected to read:

> "The Commission also had before it a communication received from the Asian-African Legal Consultative Committee informing the Commission of the holding of its second session at Colombo, Ceylon, from 14 to 26 July 1958, during which session the Committee proposed to consider certain items also of interest to the Commission. In view of the closeness of the date, the Commission was unable to consider the sending of an observer to this session."

94. The CHAIRMAN suggested that the Rapporteur should be empowered to introduce into the report the changes which had been agreed upon.

It was so decided.

Subject to those changes, chapter V (A/CN.4/L.78/Add.4) was adopted by 13 votes to none, with 1 abstention.

The meeting rose at 1.15 p.m.

478th MEETING

Friday, 4 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) *(continued)*

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.78/ADD.2) *(continued)*

1. Mr. SANDSTRÖM, Special Rapporteur, submitted a draft introductory commentary describing the historical background of diplomatic intercourse.

2. After several members of the Commission had suggested that an introductory commentary was superfluous, Mr. SANDSTRÖM withdrew the draft commentary.

3. Mr. SANDSTRÖM, Special Rapporteur, submitted a draft commentary describing the various theories which had been propounded by learned authors as the basis of diplomatic privileges and immunities.

4. The CHAIRMAN observed that the Commission had refrained from discussing the theoretical basis of diplomatic privileges and immunities, and that consequently no introductory commentary of that kind was required.

5. Sir Gerald FITZMAURICE pointed out that the theoretical basis of diplomatic privileges had been discussed at the Commission's ninth session and that some reference to the matter in the report might be appropriate.

6. Mr. GARCÍA AMADOR observed that the theories concerning the basis of diplomatic privileges were not settled and hence any commentary on those theories prepared by the Commission might be misleading. In particular, there was a danger of confusion between "functional necessity" and the "functional protection" which the International Court of Justice had decided should be extended to the staffs of international organizations.

7. Mr. YOKOTA said he would be prepared to accept the Special Rapporteur's draft commentary subject to some minor amendments.

8. Mr. TUNKIN and Mr. AGO expressed the view that the Commission should not concern itself with questions of theory when concerned with codifying international law.

9. Mr. SANDSTRÖM, Special Rapporteur, withdrew the introductory commentary.

10. Sir Gerald FITZMAURICE said he did not share the views expressed by Mr. Tunkin and Mr. Ago. It would be deplorable if the Commission were habitually to refrain from expressing any views as to the theoretical basis of its work. Even in the case of the draft on diplomatic privileges and immunities, although a familiar subject, the Commission might be open to some criticism if it failed to include in the commentary some paragraphs of the kind now proposed by the Special Rapporteur. The question what was the real basis of diplomatic privileges and immunities had arisen repeatedly, and the "functional necessity" theory, for instance, had proved of great value as a guide in overcoming difficulties of detail, interpretation and application.

11. The CHAIRMAN said that no member of the Commission would deny that the study of theory was useful. In codification work, however, any attempt to indicate the theoretical basis of the rules might impair their value.

12. Mr. LIANG, Secretary to the Commission, suggested that since the Special Rapporteur had withdrawn his draft commentary, the Commission should reintroduce the introductory commentary to section II which

it had included in its report covering the work of its ninth session (A/3623, para. 16, section II).

The suggestion was adopted unanimously.

ADDITIONAL ARTICLE ON EXEMPTION FROM SOCIAL SECURITY LEGISLATION (*continued*)

13. Sir Gerald FITZMAURICE, Rapporteur of the Commission, submitted the text of the new article as amended at the 477th meeting, in the following terms:

"The members of the mission and the members of their families who form part of their households, not being nationals of the receiving State, shall be exempt from the social security legislation in force in that State except in respect of their servants and employees who are themselves nationals of the receiving State. This shall not exclude voluntary participation in social security schemes in so far as this is permitted by the legislation of the receiving State."

14. Mr. EDMONDS pointed out that the phrase "not being nationals of the receiving State" was ambiguous; it might be taken to mean "because they are necessarily not nationals of the receiving State", which was clearly not the intended meaning. Perhaps the ambiguity might be removed if the words "not being" were replaced by the words "and who are not".

15. The CHAIRMAN said that, if the passage were amended in the way suggested by Mr. Edmonds, the relative clause would refer back only to the antecedent of the preceding clause, "the members of their families", whereas it should refer also to the members of the mission themselves.

16. Sir Gerald FITZMAURICE, Rapporteur, thought if the comma were retained after the word "households", the clause "and who are not nationals of the receiving State" would relate both to members of the mission and to members of their families.

17. Mr. SANDSTRÖM, Special Rapporteur, thought that the proposed text of the new article did not distinguish clearly enough between the two aspects of participation in social insurance: the payment of contributions and the enjoyment of benefits. Thus, while the exemption from the receiving State's legislation would cover both aspects so far as members of the mission and members of their families were concerned, it would, so far as servants and employees were concerned, cover only the payment of contributions.

18. In order to bring out the distinction more clearly, he proposed the following amended text:

"1. Members of the mission and the members of their families who form part of their households shall, so far as they personally are concerned, be exempt from the social security legislation in force in the receiving State, provided that they are not nationals of that State and unless by virtue of a Special agreement between the States or between the mission and the receiving State the said legislation is applicable to them.

"2. In any case where the members of the mission or their private employees or servants are subject to the legislation in question, the contributions payable in pursuance thereof shall, if the legislation so provides, be chargeable to the employer."

19. Sir Gerald FITZMAURICE, Rapporteur, said that he had no great objection to the Special Rapporteur's draft, although the last part of paragraph 2 was not absolutely clear to him. He could not, however, see any real difference in substance between the Special Rapporteur's text and his own.

20. Mr. SANDSTRÖM, Special Rapporteur, said that his draft dealt separately with the two aspects to which he had referred, and therefore appeared to him to be clearer. There was no difference in substance between the two drafts.

21. Mr. TUNKIN suggested that, for the sake of clarity, the words "of the receiving State" be added after the words "if the legislation" at the end of paragraph 2 of the Special Rapporteur's text.

22. He objected to the use of the word "employees" in the same paragraph. That word had not been defined in the definitions clause, nor had it been used previously in the draft convention. He suggested therefore that the word be deleted.

23. Mr. ZOUREK thought that the Special Rapporteur's new article bore the signs of hasty drafting, inasmuch as it used the word "employees", which had not been used in any other part of the draft convention. The end of paragraph 1 also appeared to him to be rather obscure in meaning, and he suggested therefore that the words "and unless by virtue of a special agreement..." to the end of the paragraph be omitted and the last sentence of Sir Gerald Fitzmaurice's text be inserted in their place.

24. Mr. AGO said that the Special Rapporteur's text should not refer to special agreements between States; nor should it state that the members of the mission might be subject to the legislation of the receiving State. He felt that the article should be redrafted in simpler and more appropriate language.

25. Sir Gerald FITZMAURICE, Rapporteur, thought that his text met Mr. Ago's objections.

26. With regard to the word "employees", he said that the new article was intended to cover such cases as the employment by the ambassador's wife of a secretary who was a national of the receiving State. Such a secretary was neither a member of the mission, nor a private servant, and he could think of no better term to describe the secretary than "employee", which was in no way ambiguous.

27. Mr. ZOUREK thought that the discussion disclosed the inadequacy of the term "private servant" in the definitions clause. A term of less restricted scope would be "private staff", which would cover the case mentioned by Sir Gerald Fitzmaurice.

28. Mr. YOKOTA said that if the word "employee" was used, the question would then arise what privileges and immunities such a person should enjoy. For that reason it was undesirable to use the word.

29. Mr. AGO said that there was no question, in the article, of granting an employee any diplomatic privileges and immunities. In the new article, the term was perfectly intelligible, and in the context the term "employee" could not possibly be construed to mean a person eligible for privileges and immunities.

30. Sir Gerald FITZMAURICE, Rapporteur, agreed with Mr. Ago. As far as privileges and immunities were concerned, all persons enjoying them were covered by the definitions clause. The new article had nothing to do with privileges and immunities, but merely defined certain forms of exemption from local legislation. The term "employee" was so well-known and so universally used that he could not see how difficulties could arise about its interpretation.

31. The CHAIRMAN thought that the best way of dealing with the situation was to call for a vote on each draft. He accordingly put Sir Gerald Fitzmaurice's text to the vote.

Sir Gerald Fitzmaurice's text of the additional article, as amended, was adopted by 8 votes to none, with 6 abstentions.

Chapter III (A/CN.4/L.78/Add.2) as as whole, as amended, was adopted unanimously.

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.78)

32. The CHAIRMAN put to the vote chapter I of the draft report (A/CN.4/L.78).

Chapter I was adopted unanimously.

33. Mr. ZOUREK recalled that at the 432nd meeting he had reported to the Commission that during the twelfth session of the General Assembly, which he had attended in his capacity as Chairman of the Commission, he had been approached by the Permanent Observer of Switzerland to the United Nations, who had communicated the Swiss Government's request for an opportunity to send observations on drafts prepared by the Commission (432nd meeting, para. 11). He had conveyed the Swiss Government's request to the Commission, and members would recall that Mr. Stavropoulos, the representative of the Secretary-General, had at the same meeting informed the Commission that the Secretary-General had received a similar request in writing from the Swiss Government (*ibid.*, para. 12). He had expected the Commission to consider the Swiss Government's request and he had understood that the matter would be referred to in a passage in the Commission's report on its tenth session.

34. In his opinion, the Swiss Government's request called for reply. It was so manifestly desirable that the request should receive favourable consideration that he hardly thought any prolonged discussion was necessary. He proposed accordingly that the Commission should accede to the Swiss Government's request in the sense that in future the Commission's drafts would be sent to that Government for observations. He proposed in addition that the report should contain a reference to the matter.

35. Mr. LIANG, Secretary to the Commission, referring to Mr. Zourek's remarks, said that the matter which the latter had raised had formed the subject of further consultations between the Secretariat and the Swiss authorities.

36. He added that any request from the Swiss Government for copies of drafts prepared by the Commission would receive the attention of the Secretariat of the United Nations, and such copies would be communicated officially to the Swiss Government, as had been done in the case of the draft on diplomatic privileges and immunities. The Commission had taken account, during its discussions at the current session, of the comments submitted on that draft by the Government of Switzerland (A/CN.4/114).

37. Sir Gerald FITZMAURICE doubted whether a reference to the matter raised by Mr. Zourek could appropriately be inserted in the report. The Commission had not officially considered the Swiss Government's request, and hence he would prefer no reference to it to appear in the report.

38. The CHAIRMAN thought that the matter referred to by Mr. Zourek was one with which the Commission should not concern itself; it was more properly a matter for the Secretary-General. Accordingly, he thought it was unnecessary to mention it in the report.

Closure of the session

39. Mr. EDMONDS, on behalf of members of the Commission, paid a tribute to the Chairman for his unfailing courtesy and for his efficient conduct of the proceedings throughout the session. Under Mr. Pal's capable chairmanship, and with the aid of the devoted efforts of the Vice-Chairman, Rapporteurs and Secretariat, the Commission had succeeded in doing a great deal of valuable work.

40. Mr. ALFARO, Mr. ZOUREK and Mr. MATINE-DAFTARY associated themselves with the tribute that had been paid.

41. The CHAIRMAN thanked the members for their kind remarks, and expressed his appreciation of the help he had received from the other officers, from the Rapporteurs and from all the members of the Secretariat.

42. He declared the tenth session of the International Law Commission closed.

The meeting rose at 11.45 a.m.

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[58E2]

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Printed in the Netherlands
18246—October 1958—2,350

Price: $(U.S.) 2.50; 18/- stg.; Sw. fr. 10.50
(or equivalent in other currencies)

United Nations publication
Sales No.: 58.V.1, Vol.1